

**COURT OF APPEAL FOR ONTARIO**

B E T W E E N

CONSTANTINE ENTERPRISES INC.

Applicant

– and –

MIZRAHI (128 HAZELTON) INC. and  
MIZRAHI 128 HAZELTON RETAIL INC.

Respondents

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**BOOK OF AUTHORITIES OF THE APPELLANT, DAVID BERRY**

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August 13, 2025

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**TAB 1**

COURT OF APPEAL FOR ONTARIO

CITATION: 1284225 Ontario Limited v. Don Valley Business Park Corporation,  
2024 ONCA 247

DATE: 20240404

DOCKET: COA-23-CV-1259

Roberts, George and Monahan JJ.A.

BETWEEN

1284225 Ontario Limited

Applicant  
(Respondent)

and

Don Valley Business Park Corporation, Amexon Realty Corporation and 200  
Ferrand Realty Limited

Respondents  
(Appellants)

Brian Radnoff and Vanessa Ford, for the appellants

Chris E. Reed, for the respondent

Heard: March 28, 2024

On appeal from the order of Justice M. Sharma of the Superior Court of Ontario,  
dated October 6, 2023.

REASONS FOR DECISION

[1] This appeal involves the application judge's interpretation of s. 4 of the parties' May 19, 1972, parking agreement ("Parking Agreement") and the



calculation of the new parking rate that the appellants should be required to pay to the respondent.

[2] Upon the conclusion of oral submissions, we advised the parties that the appeal was allowed, and the order below set aside, with reasons to follow. These are our reasons.

[3] Section 4 of the Parking Agreement provides as follows:<sup>1</sup>

[Appellants] agree[s] to pay parking rates to [respondent] with respect to the parking spaces which [respondent] shall be required to make available to [appellants] from time to time, in accordance with the provisions of this agreement. The rates to be paid by [appellants] to [respondent] for each such parking space, shall be the average of commercial, *bona fide*, arm's length parking rates being charged from time to time to the public using parking facilities located within one-half mile from the Project Lands and which parking facilities are serving office buildings.

[4] Absent error, the application judge's interpretation of the parties' Parking Agreement is owed considerable appellate deference and is reviewable on a standard of "palpable and overriding error": *Heritage Capital Corp. v. Equitable Trust Co.*, 2016 SCC 19, [2016] 1 S.C.R. 306, at para. 21. However a correctness standard applies if the appeal involves the incorrect application of a legal principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor: *Heritage Capital*, at para. 22.

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<sup>1</sup> Note that the current parties are successors in interest to the original parties to the Parking Agreement. We have therefore substituted "appellants" and "respondents" as appropriate in place of the names of the original parties.

[5] Respectfully, no deference is owed here. The application judge's analysis proceeded on the basis of the incorrect application of a relevant legal principle. In particular, the application judge found that s. 4 of the Parking Agreement was unambiguous even though fundamental terms material to the calculation of the new parking rate were undefined and unclear.

[6] The relevant terms included "commercial, *bona fide*, arm's length parking rates" being charged to "the public" using parking facilities "serving office buildings". A key ambiguity arising from these terms was whether the relevant "parking rates" should be based on hourly, daily, weekly, or monthly rates. It was also unclear from the terms of s. 4 whether parking facilities used by tenants of an office building could be included within the calculation of average rates or whether such parking facilities should be excluded, notwithstanding the fact that the appellants were themselves tenants of the office building being served by the respondent's parking lot.

[7] Moreover, notwithstanding his finding that s. 4 of the Parking Agreement was clear and unambiguous, the application judge proceeded to resolve the ambiguities identified above by relying on contested, hearsay evidence offered by the principal of the respondent, which the application judge had found to be inadmissible as expert evidence. The application judge appeared to take judicial notice of the fact that it was "commonly known" that landlords charge tenants a lower parking rate and thus such rates cannot be considered to be "commercial,

*bona fide*, arm's length" parking rates charged to members of "the public". In making this finding, the application judge incorrectly relied in part on the lay opinion of the respondent's affiant who was not independent and, as the application judge acknowledged, could not be treated as an expert. This caused the application judge to reject out of hand, erroneously in our view, the appellants' expert evidence that took into account rates charged by landlords to tenants, and to conclude that expert evidence on this issue was unnecessary and irrelevant. This also led him to ignore the fact that the parking rate to be charged to the appellants was a monthly rate, in accordance with the parties' historical practice. This formed part of the factual matrix that should have been taken into account.

[8] As a result of these analytical errors, the application judge's decision must be set aside and the interpretation of s. 4 of the Parking Agreement be considered afresh. We have a sufficient evidentiary record to allow us to make the following findings:

- a) The parking rates to be used for the calculation of average rates should be monthly rates for parking in the relevant area. This follows from the application judge's findings that the purpose of the agreement was to provide monthly parking for those who worked from Monday to Friday in the office buildings served by the parking facilities, and that persons who require monthly parking would opt for a more economical monthly rate, rather than a more expensive daily or hourly rate.

- b) Given the nature of the neighbourhood comparators implicated here, it may very well be that the only comparable commercial monthly rates within the relevant geographic area are those charged by landlords to tenants, whether tenants of the adjacent office buildings or tenants of the parking spaces alone. Section 4 does not exclude those comparators. In the context of the entirety of s. 4, “the public” may include tenants (who are members of the public) or other members of the public. “Public” cannot be viewed in isolation; it has to be construed in conjunction with the other modifiers in that sentence, in particular, “commercial, *bona fide*, arm’s length parking rates being charged from time to time to the public using parking facilities...serving office building.” In other words, the appropriate comparators are monthly rates charged to parties who are at “arm’s length” that are “commercial” and “*bona fide*”, using parking facilities serving office buildings. This could include tenants.
- c) The only admissible evidence regarding monthly rates was that provided by the appellants’ expert. The respondent’s evidence on comparable parking rates, on the other hand, consisted of inadmissible hearsay from an employee that focused primarily on daily or hourly rates rather than monthly rates.
- d) The appellants’ expert calculated the average monthly parking rate for comparable parking lots serving office buildings in the relevant geographic

area as \$57.22 per stall in December 2019 and \$71.36 per stall in April 2022. The appellants' obligation under s. 4 of the Parking Agreement is to pay the monthly parking rates being charged "from time to time" to users of parking lots in the relevant area. Accordingly, given that the average monthly rate in December 2019 was \$57.22 per stall, and the average monthly rate as of April 2022 was \$71.36 per stall, these are the rates that the appellants are obliged to pay pursuant to s. 4 of the Parking Agreement.

- e) Since the respondent first requested an updated parking rate on June 1, 2019, the appellants accept that the updated parking rate should apply from June 1, 2019, onward. This commencement date for the revised parking rate is not a *nunc pro tunc* order, as the appellants had argued in their factum. Rather it is merely giving effect to the appellants' existing legal obligations to pay the average monthly rate being charged "from time to time" by comparable parking lots, for the parking services the appellants received from the respondent from June 1, 2019, until the present.

[9] The appeal is therefore allowed, and the order below is set aside. We further find the monthly parking rate to be paid by the appellants pursuant to s. 4 of the Parking Agreement to be \$57.22 per stall from June 1, 2019, until April 30, 2022, and \$71.36 per stall from May 1, 2022, to the present.

[10] The appellants are entitled to their costs of the appeal in the agreed all-inclusive amount of \$25,000. They are also entitled to their costs of the application.

If the parties are unable to agree on the quantum of the latter, they may make brief written submissions of no more than three (3) pages, not including Bills of Costs, with the appellants' submissions to be served and filed within 10 days and the respondent's submissions to be served and filed within five (5) days thereafter.

"L.B. Roberts J.A."

"J. George J.A."

"P.J. Monahan J.A."

**TAB 2**

COURT FILE NO.: 07-CL-7309

DATE: 20090623

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** In the matter of the Receivership of 1565397 Ontario Inc., a company duly incorporated in Ontario with a head office in the Town of Maple, in the Province of Ontario

**BEFORE:** Mr. Justice H.J. Wilton-Siegel

**COUNSEL:** *Harvey G. Chaiton*, for A. Farber & Partners Inc., court-appointed Interim Receiver and Receiver and Manager of 1565397 Ontario Inc.

*Brandon Jaffe*, for John Robert Learmonth

*Michael W. Carlson*, for Marlucor Investments Inc.

**DATE HEARD:** March 25 and April 9, 2009

**ENDORSEMENT**

[1] The court-appointed receiver A. Farber & Partners Inc. (the “applicant” or the “receiver”) of 1565397 Ontario Inc. (“156” or the “debtor”) seeks the approval of the Court by way of advice and directions to disclaim an undertaking dated April 23, 2003 (the “Undertaking”) given on the closing of the purchase of a property by the debtor. For the following reasons, the relief is denied.

**Background**

***Circumstances of Delivery of the Undertaking***

[2] By an agreement of purchase and sale dated May 26, 2002 (the “Sale Agreement”), the respondent Marculor Investments Inc. (“Marculor”) agreed to sell a 107 acre parcel of land located in West Gwillimbury (the “Property”) to 2010149 Ontario Inc. (“201”).

[3] Schedule “A” to the Sale Agreement contained the following provisions:

2.(a) The aggregate purchase price for the Property, in the sum of One Million, Twenty-Five Thousand (\$1,025,000.00) Dollars, as set out in this Agreement shall be paid or satisfied as follows: [...]



(b) The parties acknowledge and agree that the purchase price has been determined on the basis of the Property comprising 26 lots according to Draft Plan of Subdivision 43T-93015 (which lays out a total of 28 lots, it being agreed that Lots 14 and 16 on the said plan are not included in this transaction). ...

7. The Vendor covenants and agrees to deliver to the Purchaser on or before closing, the following:

(a) A transfer of the 26 lots comprising the Property in registerable form whereby title thereto in fee simple, subject to the exceptions herein provided, is conveyed to the Purchaser. In the event that the plan of subdivision of the Property is not registered by the closing date, the Purchaser shall hold Lots 14 and 16 on the Draft Plan of Subdivision in trust following closing and shall transfer Lot 14 to the Vendor and/or the Vendor's assigns, and shall transfer Lot 16 to Mr. Learmonth as prescribed in the Draft Plan of Subdivision 43T-93015, on demand without cost upon registration of the plan of subdivision.

[4] At closing, the deed for the Property was delivered to 156 upon the direction of 201. Although it would appear that 201 and 156 were under common ownership, the parties have been unable to locate any formal assignment of the Sale Agreement to 156. Because Marculor did not register a plan of subdivision prior to the closing of the transaction, 156 delivered the Undertaking to the respondents at closing. I have proceeded on the basis that the rights of the respondents are derived from the Undertaking alone and that the respondents are not also alleging that the covenant in section 7(a) of the Sale Agreement is enforceable.

[5] The Undertaking reads as follows:

IN CONSIDERATION of and notwithstanding the closing of the above transaction, the undersigned hereby undertakes as follows:

1. [...]

2. To hold Lots 14 and 16 on the Draft Plan of Subdivision in trust following the closing of this transaction and upon registration of the Plan of Subdivision undertakes to transfer Lot 14 to the Vendor and/or the Vendor's assigns and transfer Lot 16 to Mr. Learmonth as prescribed on the Draft Plan of Subdivision 43T-9315, on demand without cost in accordance with the Agreement of Purchase and Sale dated May 26, 2002, save and except for any Land Transfer Tax or any of the direct costs of the transferees.

[6] Accordingly, pursuant to the Sale Agreement and the Undertaking, the respondent Marculor attempted to reserve Lot 14 for itself and Lot 16 for the respondent John Learmonth ("Learmonth"). Lot 14 is approximately 65 acres in area; Lot 16 is approximately 1.5 acres in area and includes Learmonth's residence.

### ***Subsequent History of the Property***

[7] Pursuant to a commitment letter dated May 12, 2006, CareVest Capital Inc. (“CareVest”) loaned approximately \$3.4 million to 156 secured by a mortgage against the Property. CareVest had knowledge of the Undertaking prior to advancing any of these funds to 156. This is reflected in, among other things, letters dated July 29, 2008 to each of the respondents from CareVest’s legal counsel in which the “prior interest” of the respondents in Lots 14 and 16 was recognized notwithstanding the fact that notices of the interests of the respondents pursuant to the Undertaking were not registered on title to the Property until 2008. For the reasons set out below, I think this statement should be understood to mean that the security constituted by the CareVest mortgage does not extend to the respondents’ interests in the Property.

[8] On December 7, 2007, the applicant was appointed by the Court as the receiver of 156 for the purpose of selling the Property by order of this Court (the “Receivership Order”). 156 had not registered a plan of subdivision by that date. The Receivership Order included powers in favour of the receiver to apply for registration of the draft plan of subdivision, to cease to perform any contracts of 156, and to apply for any vesting order necessary to convey the Property to a purchaser free and clear of any liens or encumbrances affecting the Property.

[9] The applicant has satisfied all conditions to registration of the plan of subdivision, apart from entering into an agreement with a telecommunications supplier. The form of this latter agreement has been settled. However, the applicant does not intend to sign the agreement until after the Court has addressed the issue on this application. The applicant does not otherwise foresee any other obstacle to registration of the plan of subdivision and intends to do so after this application is concluded.

### ***Prior History of the Property***

[10] In 1989, Learmonth sold the Property to a predecessor in title to Marculor, Charlesmark Investment Corporation (“Charlesmark”), pursuant to an agreement dated April 14, 1989 (the “Charlesmark Sale Agreement”). None of the parties can locate a copy of the Charlesmark Agreement. However, Learmonth’s solicitor registered notice of the Charlesmark Sale Agreement in the land registry office on April 27, 1989. This registration was removed from title, without notice to Learmonth, when the Property was put into the land titles system in 1999.

[11] Charlesmark and Learmonth also entered into an agreement dated April 14, 1989, which contained the following provision (the “Charlesmark Undertaking”):

Charlesmark Investment Corporation shall hereby undertake that upon the final approval of registration of the Plan of Subdivision for the proposed residential development of the Lands to convey to John Robert Learmonth, or his successors of [sic] assigns one (1) lot on the said plan of subdivision containing the existing one and one-half storey aluminium clad farm house and being approximately 1.5 acres in size at no cost to him.

I have proceeded on the basis that the Charlesmark Undertaking has been superceded by the Undertaking and therefore its continuing significance is limited to evidence of Marculor's knowledge of the interest of Learmonth in the Property.

[12] Learmonth and Charlesmark also entered into a lease dated April 14, 1989 by which Learmonth leased the home and 1.5 acre parcel described in the Charlesmark Undertaking on a month-to-month tenancy at a rent of one dollar per month (the "Charlesmark Lease"). The Charlesmark Lease was stated to terminate upon the conveyance of the lot contemplated by the deed pursuant to which Learmonth transferred the Property to Charlesmark.

[13] On October 1, 1993, Charlesmark transferred the Property to Marlucor. Marlucor does not deny knowledge of the Charlesmark Sale Agreement or the Charlesmark Lease.

### **Issues**

[14] The following issues are addressed on this motion:

1. does the Undertaking create a trust in favour of Marculor and Learmonth (collectively, the "respondents")?
2. does the Undertaking grant Marculor and Learmonth an interest in land?
3. does the applicant have the power to disclaim the Undertaking and/or sell the Property free of any interest of the respondents?
4. if the applicant has such power, do the equities favour granting approval to the applicant to disclaim the Undertaking and/or sell the Property free of any interest of the respondents?

### **Analysis and Conclusions**

#### ***Does the Undertaking Create a Trust?***

[15] The respondents argue that the Sale Agreement, as supplemented by the Undertaking, created a trust of Lots 14 and 16 in favour of the respondents as of the date of closing of the sale of the Property. On this basis, they argue that the interests of the respondents in the Property did not vest in the applicant pursuant to the Receivership Order. I am not satisfied, however, that the Undertaking constituted, or evidenced, the creation of a trust in favour of the respondents as of its date of execution, whether in Lots 14 and 16 or otherwise.

[16] Although courts will enforce a contract for the conveyance of future property by an order for specific performance, a trust of future property cannot be constituted. Lots 14 and 16 do not exist and will only come into existence, if ever, on the registration of the draft plan of subdivision. Accordingly, the Undertaking cannot constitute a trust of Lots 14 and 16 prior to registration of the draft plan of subdivision notwithstanding the language of the Undertaking

which purports to establish a trust of Lots 14 and 16 at the time of its delivery. Instead, I think the proper interpretation of the Undertaking is that 156, as the settlor, has executed a binding declaration of trust in respect of a trust that is only effective as of the date it is “fed” by the coming into existence of Lots 14 and 16.

[17] It is also questionable whether the inchoate property interests of the respondents described below are sufficiently certain as to subject matter to constitute a trust as of the date of execution of the Undertaking. In any event, however, the Undertaking does not evidence an intention to hold in trust an interest in the Property that is other than the fee in Lots 14 and 16.

[18] For the same reason, it is not possible to construe the subject matter of the trust at the present time to be the covenant contained in the Undertaking insofar as it constitutes a declaration of an intention to create a trust. That obligation is expressed in the Undertaking by reference to holding in trust Lots 14 and 16, which do not yet exist, rather than to holding such interests in the Property as arise prior to registration of the draft plan of subdivision and thereafter holding in trust Lots 14 and 16. Therefore, the covenant in the Undertaking does not establish a trust at the present time.

[19] Accordingly, I conclude that the Undertaking does not create a trust of the respondents’ interests in the Property prior to registration of the draft plan of subdivision.

***Does the Undertaking Create Interests in Land?***

[20] The following features of the Undertaking are relevant for this issue:

1. The Undertaking consists of a unilateral covenant on the part of 156 to hold Lots 14 and 16 in trust “following the closing of [the] transaction” together with a subsidiary covenant to convey the lots to the respondents upon their creation, which covenant would, in any event, be implied as a right of the beneficiaries of the trust;
2. While the Undertaking does not expressly say so, it is also clear that lots 14 and 16 are to be conveyed to the respondents free of any mortgage or lien incurred by 156;
3. The respondents are intended at all times to have interests only in respect of the portions of the Property that are to become Lots 14 and 16, rather than an undivided interest in the entire Property;
4. Insofar as the Undertaking can be construed as evidencing a contractual agreement between the parties respecting the transfer of Lots 14 and 16 to the respondents, the respondents have performed their obligations under such agreement by completing the sale of the Property; and

5. The Undertaking does not provide the respondents with any means of causing registration of the draft plan of subdivision. The conduct of the necessary work for such registration, and the timing of such registration, is left entirely in the discretion of 156.

*Analysis and Conclusions*

[21] I conclude that the Undertaking creates interests of the respondents in Lots 14 and 16 that are properly characterized as interests in land on the following reasoning.

[22] *Black's Law Dictionary*, 8th ed. (St. Paul, Minn: West Publishing Co., 2004) defines an inchoate interest as “a proprietary interest that has not yet vested.” This appears to capture the nature of the rights granted the respondents under the Undertaking. The Undertaking is an unconditional obligation to vest Lots 14 and 16 in trust upon the occurrence of a specified event. The fact that the lots have not yet been created does not prevent an interest in the Property arising prior to their creation as an “inchoate interest” in land. This conclusion is reinforced by the following considerations.

[23] When considered collectively, the elements of the Undertaking described above indicate an intention to grant rights in the Property effective as of the date of delivery of the Undertaking rather than at a future date. The Undertaking purports, to the extent possible as of its date of delivery, to grant the respondents interests in two particular lots to be excluded from the Property in the future on registration of the draft plan of subdivision. There is no issue regarding the enforceability of the Undertaking as at the date of its delivery. The subject-matter of the Undertaking are rights specifically described by reference to that draft plan of subdivision. The Undertaking has effect unconditionally. Furthermore, the respondents have satisfied their obligations in respect of their interests in Lots 14 and 16 by completing the sale of the Property to 156. There are no further actions on their part required to obtain Lots 14 and 16 when they are created. Similarly, 156 has done all that is necessary to grant an interest in the Property upon the registration of the plan of subdivision by agreeing that it will hold Lots 14 and 16 in trust upon their creation without further action or condition.

[24] The respondent's inchoate interests in the Property have a similarity to an interest in land created pursuant to a restrictive covenant. However, they differ from a restrictive covenant in that the interests exist in an inchoate form until such time as registration occurs at which time they mature to encompass the right to deal with Lots 14 and 16 as the beneficial owners thereof. However, the fact that the respondents do not have the full rights of beneficial owners as of the date of delivery of the Undertaking does not mean that the respondents did not acquire any interests in the Property when the Undertaking was delivered.

[25] I think this conclusion is consistent with the authorities cited to the Court on this motion to the extent they address the issue. The applicant relies principally on four decisions: *New Skeena Forest Products Inc. v. Kitwanga Lumber Co. Ltd.*, 2004 BCSC 1818, aff'd *New Skeena Forest Products Inc. v. Don Hill & Sons Contracting Ltd.*, 2005 BCCA 154; *Pope & Talbot Ltd. (Re)*, 2008 BCSC 1000, *CareVest Capital Inc. v. CB Development Ltd.*, 2007 BCSC 1146 and *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.*, 2008 BCSC 897. It

argues that the respondents do not have any interest in land because the Undertaking is an executory contract and/or is a contract for the sale of the land for which a court will not grant specific performance. They rely upon the fact that the respondents cannot compel the applicant to register the plan of subdivision because the undertaking does not contain a covenant to register the draft plan of subdivision and that, in any event, a court will not compel a receiver to undertake further work, or to obtain financing, to complete a contract for the sale of land.

[26] These are factually complicated decisions from which, in the case of the *bcIMC* and *CareVest* decisions, it is also difficult to extract the legal basis for the conclusions reached although in each case the practical result is compelling. However, I do not think these decisions are of any assistance in determining whether the respondents have an interest in the Property for four reasons: (1) the decisions do not actually address the issue in the terms suggested by the applicant; (2) there is no reason to conclude that specific performance – the unavailability of which was a significant factor in the decisions – is unavailable to the respondents in this case; (3) the issue of priority relative to secured lenders that is at the heart of the *CareVest* and *bcIMC* decisions does not arise in the present circumstances; and (4) the Undertaking differs from the applicable contracts in *CareVest* and *bcIMC* insofar as the latter are treated as executory. I will address each in turn.

[27] First, as I read these decisions, they do not actually stand for the proposition proposed by the applicant — that a party cannot obtain an interest in a lot in an unregistered plan of subdivision until it is created by registration of the plan because a court will not grant specific performance to require completion of the remaining work required to bring the lot into existence.

[28] In each of *New Skeena* and *Pope & Talbot*, Brenner C.J.S.C. held that the interests involved did not constitute an interest in land for reasons that are of no relevance to the issue in this proceeding. These decisions therefore do not address the issue in this proceeding.

[29] In *CareVest*, Pitfield J. refused to exclude the possibility that the purchasers might have an “unregistered equitable charge against the project” ranking ahead of the second mortgage. His refusal to award specific performance was, therefore, not determinative of the issue of whether the purchasers had an interest in land.

[30] In *bcIMC*, the court gave effect to the express contractual provisions in the purchase agreements that negated any interest in land arising thereunder. Such provisions are common in condominium purchase transactions and reflect at least a reasonable concern that a purchaser would have an interest in land absent such an agreement. In addition, apart from one sentence suggesting that the purchasers had no equitable interest in the projects because they were not yet registered, the court in *bcIMC* avoided the issue by holding, as the principal alternative conclusion, that if the purchasers had an equitable interest in the projects, the receiver had, or should be given, the power to disclaim the purchase contracts. This alternative conclusion was, in turn, based, not on the absence of any equitable interest in the projects, but rather on the absence of any equity in any interests in the property that the purchasers might have pursuant to the contracts. In the case of each of the disclaimed contracts, the purchasers were subordinated to the petitioner mortgagee and had no right of partial discharge of the petitioner’s mortgage. In

these circumstances, there was a basis for a “vesting out” order and no basis for an order for specific performance for the reasons expressed in *CareVest*. A vesting order in these circumstances is not inconsistent with the conclusion in this Endorsement for the reasons set out below.

[31] In summary, therefore, insofar as *CareVest* and *bcIMC* address the issue of the existence of an interest in land, they do not decide the issue by reference to the availability of specific performance. Both these decisions treat the lack of availability of specific performance as a basis for authorizing a receiver to sell the relevant property free of equitable interests asserted by the purchasers rather than as determinative of the validity of the purchasers’ claims. They do not proceed from a determination that specific performance is not available to a determination that the purchaser has no equitable interest. Instead, they proceed on the basis that the lack of availability of specific performance is a basis for ordering a sale of the relevant property free of a purchasers’ claims even if the purchaser may be found to have an equitable interest.

[32] Second, while it is axiomatic that a party can only have an equitable interest in land if a court is prepared to order equitable relief, I am not persuaded that the applicant is correct in its assertion that this principle can be applied to the present circumstances in the manner suggested by it.

[33] I accept that, as in *CareVest* and *bcIMC*, specific performance will not be ordered where it amounts to a mandatory order that requires the incurring of borrowing obligations against the subject property and the completion of construction in order to bring the property into existence. However, these circumstances are not present in this proceeding.

[34] The respondents are not bringing a motion for specific performance of the Undertaking as in *CareVest* and *bcIMC*. There is no need to do so. Instead, the receiver has, on its own volition, completed all the necessary work to register the draft plan of subdivision and intends to do so. It has undertaken this course of action based on its own assessment of the best means of maximizing the value of the Property, whether or not Lots 14 and 16 are included. In these circumstances, the issue of the availability of specific performance does not arise. The actions of the receiver in registering the draft plan of subdivision will trigger the Undertaking vesting Lots 14 and 16 in trust.

[35] As a related matter, the applicant’s decision to register the draft plan is a relevant consideration in assessing the equities relative to the receiver’s exercise of any right it might have to “vest out” the respondents’ rights. This is addressed below.

[36] The applicant says that the Court should disregard the fact that it has chosen to undertake this work and consider the issue of the respondents’ interests in the Property as of the date of the appointment of the applicant as the receiver of 156. I think this merely begs the question. The issue of whether the respondents had an interest in the Property would only have been presented at that time if the receiver had proposed selling the Property. This would have required the respondents to bring a motion for specific performance. If, however, it had proposed at that time to register the draft plan of subdivision, I do not see how the circumstances would have been any

different from those presented today. In short, as long as 156 or the applicant was, or is, proposing to register the draft plan of subdivision, the respondents do not need the Court's assistance by way of an order for specific performance to enforce their interests in the Property. Moreover, specific performance will be available upon registration of the draft plan of subdivision, whenever that occurs, to enforce the trust contemplated by the Undertaking. In these circumstances, I think it is unnecessary for the Court to consider the availability of specific performance in the determination of whether the respondents have interests in the Property.

[37] Third, the interests in the Property asserted by the respondents are fundamentally different from the interests in land addressed in *CareVest* and *bcIMC* upon which the applicant relies, except in one respect addressed below that contradicts the applicant's position.

[38] In each case, the court was prepared to consider the possibility that the purchasers had an equitable interest in the properties. However, it was also clear that, in each case, further construction activity was required in order to realize any value in the property which, in turn, required considerable additional financing secured against the entire project including the purchasers' units. The purchasers, therefore, had no equity in their proposed condominium units unless they ranked in priority to the existing mortgage financing on the projects. The court was prepared to consider that possibility in *CareVest*, resulting in an order for sale with a subsequent hearing on the priority issue. It did not consider that to be a possibility in *bcIMC*, resulting in an order for sale based on the absence of any equity of the purchasers in the property.

[39] In the present circumstances, however, the Undertaking provides that the interests of the respondents are carved out of the interest of 156 and are entirely separate. The Sale Agreement expressly provides that the transaction did not include Lots 14 and 16 and that Lots 14 and 16 are not part of the Property to be retained by 156. Accordingly, as mentioned, the Undertaking must be taken to provide that 156 was obligated to discharge any mortgage financing on the Property upon vesting of Lots 14 and 16 in trust. There is no suggestion in the record that either of the mortgagees (including *CareVest*) understood the Undertaking to operate differently vis-à-vis 156. There is, therefore, no priority issue to be determined regarding the respondents' interests in the Property. Nor is there any dispute that there is substantial equity in the respondents' interests in the Property.

[40] Fourth, while it is not express, I agree with the applicant that an important consideration in *bcIMC* and *CareVest* is the fact that the contracts are executory in the sense that each party had obligations that remained to be performed. I would add that it was also the case that, even if the purchasers had performed their obligations under their respective contracts to pay the remaining purchase price, their performance would have been insufficient to fund the construction necessary to bring the condominium units into existence.

[41] By contrast, in the present proceeding, the contract was not executory in that sense. Neither Marculor nor Learmonth was required to perform any further obligations to obtain their interests in Lots 14 and 16. This element is a relevant equitable consideration that is addressed below. However, I also think it distinguishes the cases relied upon by the applicant from the



present circumstances and reinforces the conclusion that the respondents acquired interests in the Property pursuant to the Undertaking.

[42] In summary, therefore, the principles in these decisions do not prevent the Undertaking from creating interests in land in favour of the respondents and, in certain respects, support that conclusion.

*Is the Interest in Land Void Under the Planning Act?*

[43] The applicant argues that, if the Undertaking creates interests in land, such interests are void under clause 50(3)(b) of the *Planning Act*, R.S.O. 1990, c. P.13 (the “Act”) and are not saved by subsection 50(21) of that Act. These provisions read as follows:

(3) No person shall convey land by way of a deed or transfer, or grant, assign or exercise a power of appointment with respect to land, or mortgage or charge land, or enter into an agreement of sale and purchase of land or enter into any agreement that has the effect of granting the use of or right in land directly or by entitlement to renewal for a period of twenty-one years or more unless,

...

(b) the grantor by deed or transfer, the person granting, assigning or exercising a power of appointment, the mortgagor or chargor, the vendor under an agreement of purchase and sale or the grantor of a use of or right in land, as the case may be, does not retain the fee or the equity of redemption in, or a power or right to grant, assign or exercise a power of appointment in respect of, any land abutting the land that is being conveyed or otherwise dealt with other than land that is the whole of one or more lots or blocks within one or more registered plans of subdivision; ...

(21) An agreement, conveyance, mortgage or charge made, or a power of appointment granted, assigned or exercised in contravention of this section or a predecessor thereof does not create or convey any interest in land, but this section does not affect an agreement entered into subject to the express condition contained therein that such agreement is to be effective only if the provisions of this section are complied with.

[44] Conversely, the respondents submit that the Undertaking does not violate the Act for two reasons: (1) the interests in land conferred thereby are not prohibited by paragraph 50(3)(b); and (2) in any event, any defect under section 50(3) is remedied by section 50(21). I will address each in turn.

*Application of Paragraph 50(3)(b)*

[45] The applicant says that the Undertaking constitutes an option to purchase land that violates the *Planning Act*. Given the nature of the respondents' interest in Lots 14 and 16, I do not think it is accurate to characterize their interest as an option to purchase. However, whatever the characterization, the case law makes it clear that the prohibition in clause 50(3)(b) does not affect the retention of an interest in land unless that interest confers a right of disposal of the land that is not dependent on the action or inaction of a third party: see *Re Redmond et al. and Rothschild*, [1971] 1 O.R. 436-441 (C.A.) at 441; *Pattison et al. v. Sceviour et al.* (1983), 43 O.R. (2d) 229 (H.C.J.); and *Ratnanather v. Kosalka et al.* (1995), 24 O.R. (3d) 326 (Gen. Div.).

[46] The applicant relies on the decision in *Morgan Trust Co. of Canada v. Falloncrest Financial Corp.* (2006), 218 O.A.C. 71 (C.A.) in which the Court of Appeal held that an option to purchase land violated section 50(3) of the Act. However, in that case, the option could be exercised on the earlier to occur of three events, one of which was the mere expiration of 20 years from the date of the option agreement. Such an option is in clear violation of the Act because the optionee retained an interest in land that could be conveyed, at the latest, at the end of the 20-year period.

[47] In the present circumstances, while the respondents do retain inchoate interests in the Property that are assignable, such interests do not constitute a "fee" in Lots 14 or 16. Until registration of the draft plan of subdivision, the "inchoate" interests of the respondents constitute a lesser interest in land for purposes of section 50(3). Nor do such interests constitute an interest in land abutting the Property. Such a relationship can only arise at the time of creation of Lots 14 and 16. Similarly, the respondents do not have the power to mortgage or dispose of Lots 14 and 16 prior to registration of the draft plan of subdivision. The Undertaking does not permit the respondents to convey Lots 14 and 16 at any time prior to registration. Until that time, the respondents can convey no more than the inchoate interests in such lots described above. Nor, as mentioned, is there a positive obligation on 156 to register the plan of subdivision or any right in favour of the respondents to cause such registration. Therefore, until registration occurs as a result of a decision by 156, which might never happen, the respondents also cannot be said to have retained a "power or right to grant, assign or exercise a power of appointment" in respect of Lots 14 and 16.

[48] The circumstances in the present proceeding are indistinguishable from those in *Marcrob Estates Ltd. v. Servedio* (1976), 1 R.P.R. 344 at 345 (H. Ct.), aff'd (1977), 1 R.P.R. 344 at 352 (C.A.), in which Cromarty J. concluded that the predecessor of subsection 50(3)(b) was not invoked on the following basis:

There is no evidence that Marcrob was the owner of any lands abutting those conveyed to Rosa and Vincenzo Crocitto. If it is the defendants' argument that by putting an option to purchase into the agreement of sale, he was attempting to retain the fee in the "back lands" it appears to me that it conveyed all of its lands subject only to the right to purchase a portion of them if and when the Planning Act was complied with in accordance with the terms of the agreement.

[49] A similar decision was reached in *Ratnanather v. Kosalka*, (1995), 24 O.R. (3d) 326 (Gen. Div.), which applied *Marcrob* and which addressed the application of the predecessor to subsection 50(3)(b) to a transfer of an entire parcel of land under a plan of subdivision for the value of part of the parcel coupled with an option to buy back the unpaid part of the parcel within a fixed period of time. In that case, Langdon J. concluded:

To retain an "interest" in part of the land is not necessarily to retain the fee or the power of disposition. ... *Miller v. Ameri-cana Motel Ltd.*, [1983] 1 S.C.R. 229, 143 D.L.R. (3d) 1, held that the granting of an option vests in the option-holder an equitable interest in the optioned lands. This means that the disposing power is no longer held by the grantor of the option. But does this mean that the opposite is true, i.e., that the power to dispose has been transferred to the option-holder to such an extent that he has the "fee"? The option-holder's interest is assignable. However, before he exercises the option and acquires full legal title he cannot dispose of or mortgage the optioned part. The option-holder has an equitable interest but cannot be said to have the power to dispose of the land. He can block disposal by the title-holder for the life of the option (or 21 years) but, absent approval under the Planning Act, cannot himself dispose of the property. With Planning Act approval, his power to dispose offends no policy.

The definition of "fee" for the purposes of the Planning Act has evolved with a view to a functional, rather than a technical approach, to the Act and to the regulation of specific land transfers: see Sidney Troister, *The Law of Subdivision Control in Ontario*, 2nd ed. (1994). A functional approach examines whether the purposes of the Act have been frustrated by the transaction.

While this transaction was structured to avoid the Planning Act restrictions on the retention of abutting land, it did so by compliance, i.e., by a transfer of the whole. The risk of getting back less than the whole was borne by the contracting party. The Act does not forbid risk-taking. The purpose of the Act is to prevent the subdivision of land without planning approval. No parcel of land was subdivided. The sellers retained an interest in part of the parcel but not one equal to a power to dispose. The option and its exercise would never create more than one parcel if approval were not forthcoming. I conclude that the seller did not retain the fee in abutting lands within the meaning of the Planning Act. This conclusion accords with the result of the decision of the Court of Appeal in *Marcrob*.

[50] I am of the opinion that these principles are equally applicable in the present circumstances.

#### Application of Section 50(21)

[51] Given the foregoing conclusion, it is unnecessary to consider the further issue of whether, if the Undertaking were characterized as an interest in land to which section 50(3) applied (whether as an option to purchase or otherwise), 50(21) operates to remedy any defect under

section 50(3) given the particular terms of the Undertaking. I am of the opinion, however, that it does so in the unique circumstances of this proceeding on the following reasoning.

[52] At all times, the parties expressly envisaged compliance with the Act in the form of registration of the draft plan of subdivision as a condition of 156's obligation to hold Lots 14 and 16 in trust of the respondents. The Undertaking therefore provides that Lots 14 and 16 will only vest in trust in favour of the respondents in circumstances in which the Act will necessarily have been complied with. Such an interest in land satisfies the objective of the Act of preventing subdivision of land without planning approval. Moreover, the terms of the Undertaking comply substantively with the provisions of section 50(21) if the provision is interpreted to require a conditionality to the arrangements that has the result that the Undertaking is only effective to vest Lots 14 and 16 in trust upon actions of 156 that include compliance with the Act. I am of the opinion that these circumstances are sufficient to satisfy the saving clause in section 50(21).

[53] Such an interpretation is consistent with other decisions on this issue. In particular, in *Ratnanather*, Langdon J. addressed a provision that apparently stated simply that the option to purchase was "subject to severance".

I find no merit whatever in the Kosalkas' argument that the wording of this second option was somehow insufficient to fulfil the requirements of s. 50(21) of the Planning Act in that it did not constitute "an express condition contained therein that such agreement is to be effective only if the provisions of this section are complied with". The purpose of s-s. (21) is to validate and facilitate agreements which otherwise would be made ineffective by the language of the infamous s. 50(3)(b). No precise formula of words is needed to invoke s-s. (21). The expression "severance" meaning a subdivision of a parcel of land authorized under the Planning Act is so common and pervasive in the real estate industry in Ontario as to need no further explanation. The requirements of s-s. (21) would be fulfilled if nothing more had appeared in the agreement than "subject to (a) severance".

[54] The applicant relies on the statement of LaForme J.A. in *Morgan Trust* at para. 20, which could be read to provide that, absent inclusion of explicit reference to compliance with s. 50 in the relevant agreement, no reservation of a right of disposition will be saved by section 50(21). However, as mentioned, the option to purchase in *Morgan Trust* could not be saved under section 50(21) as it did not, by its terms, restrict the exercise of the option to purchase to circumstances in which the Act would necessarily have been complied with. As such, it does not address the specific issue raised in this case. Nor did the relevant agreements in any of the other decisions relied upon by LaForme J.A. in reaching his conclusion: see *Dical Investments Ltd. v. Morrison* (1990), 75 O.R. (2d) 417 at 425 (C.A.); *Nepean Carleton Developments Ltd. v. Hope*, [1978] 1 S.C.R. 427; and *Murray Elias Ltd. v. Walsam Investments Ltd.* [1964] 2 O.R. 381 (H.C.J.), aff'd [1965] 2 O.R. 672 n (C.A.).

[55] The principle articulated in each of *Nepean*, *Dical Investments* and *Morgan Trust* is that an implied covenant to make an agreement for the sale of land effective on compliance with the

*Planning Act* does not satisfy the requirement in section 50(21) for an express condition. Accepting that this principle remains the law in Ontario, I do not think that it can properly be applied in the present circumstances for the reason that there is no such agreement, as such, to be complied with. Instead, there is a commitment to vest Lots 14 and 16 only upon the occurrence of an event – registration of the draft plan of subdivision – which constitutes compliance with the *Planning Act*. In the present circumstances, inclusion in the Undertaking of a term of the nature contemplated in *Nepean*, *Dical Investments* and *Morgan Trust* that the vesting in trust of Lots 14 and 16 is only to be effective upon compliance with the *Planning Act* would be unnecessary and any such term would clearly be redundant – the trust can only exist if there has been such compliance.

[56] Accordingly, if it were held that the respondents' interests in the Property were caught by section 50(3), I conclude that they remained enforceable interests in the Property by virtue of section 50(21).

#### *Conclusion*

[57] Based on the foregoing, I conclude that the respondents have enforceable interests in the Property pursuant to the Undertaking.

#### ***Authority of the Receiver to Disclaim and/or Obtain a Vesting Order in Respect of the Respondents' Interest in the Property***

[58] The applicant argues that, even if the respondents have a property interest in the Property pursuant to the Undertaking, the receiver may disclaim the Undertaking and sell the Property free and clear of the respondents' interests. I propose to discuss three elements of this position.

#### *Can the Receiver Disclaim the Undertaking?*

[59] The applicant says that it can disclaim the Undertaking even if it creates an interest in land. I understand disclaimer in this sense to be limited to repudiation of the Undertaking leaving the respondents with a right to claim damages for breach of contract against 156 for failure to perform the Undertaking.

[60] I do not think the applicant's position is correct. I know of no law that permits a court to authorize a receiver to terminate a proprietary interest in land in such manner. The effect of any such extinguishment of an interest in the Property would be the transfer of such interest to 156. Such action amounts to expropriation of the respondents' assets in favour of subordinate or unsecured creditors of 156.

[61] In addition, as a related matter, insofar as the Undertaking can be construed as an agreement for the sale of land as the applicant suggests, it has been fully performed by the respondents. Any breach, or more properly anticipatory breach by the applicant, at this time, cannot convert an interest in land into an unsecured claim.

[62] Moreover, the case law cited to the Court by the applicant does not support such a right. As mentioned above, the decisions in *New Skeena* and *Pope & Talbot* are not relevant as, in each case, the court held that the relevant parties did not hold an interest in land. In *CareVest*, Pitfield J. proceeded on the basis that it was possible that the strata contract purchasers had an equitable interest in the property and expressly dismissed the receiver's application for the power to disclaim the relevant contracts. In *bcIMC*, the court proceeded on the alternative grounds that (1) the purchasers had no interest in land; and (2) that, if the purchasers had an interest in land, it could be "vested out" based on the absence of any equity in such interest, rather than that the contract could be disclaimed.

*Can the Receiver “Vest Out” the Undertaking?*

[63] The applicant also argues that the receiver is entitled to “vest out” the interests of the respondents in the Property, by which it means selling the Property free of the interests of the respondents in the Property pursuant to the Undertaking. The applicant makes two alternative submissions regarding a receiver’s power to “vest out” a proprietary interest.

[64] The more aggressive position of the receiver is that the Court can authorize the receiver to sell free of the respondents’ interests in the Property leaving the respondents with an unsecured claim for damages against the Receiver. This is no different from the concept of disclaimer addressed above. For the reasons stated above, I do not accept that the Court or the receiver has such power in respect of an interest in land except perhaps in circumstances in which it is clear that there is no equity in the interest being “vested out”.

[65] The less aggressive position is that the Court has the authority to authorize the receiver to sell the Property free of the respondents’ interests with a subsequent hearing to be held to determine the value of the respondents’ interests. It finds support for such right in the *CareVest* and *bcIMC* decisions. The remainder of this section addresses the authority of the Court to authorize the receiver to “vest out” the respondents’ interests in the Property in this sense.

[66] I would note first that there is a significant difference between the present circumstances and the circumstances in the decisions upon which the applicant relies. The applicant is seeking authority to sell the interests in the Property of both the debtor, in this case 156, and the respondents. It contemplates a subsequent hearing to determine the allocation of the purchase price between the two interests, it being acknowledged that the interests of the respondents have real value. In *CareVest* and *bcIMC*, the receiver sought authority to sell a property free and clear of an equitable right in such property asserted by a third party. The purpose of the subsequent hearing ordered in *CareVest*, and considered in *bcIMC*, was to determine whether such equitable right existed rather than to determine the value of such right, which was either quantified or quantifiable on the sale of the property.

[67] Whether or not the Court has the authority alleged by the applicant generally, I do not think the Court has the authority to order a sale of the respondents’ interests in the Property on the basis proposed by the applicant for the following four reasons.

[68] First, it follows from the conclusion that the Undertaking created property interests in the Property in favour of the respondents, that 156 granted, and therefore no longer retained, such interests. Such interests in the Property reside in the respondents whose property is not subject to the receivership. In this respect, the present circumstances are similar to those in *Re Terastar Realty Corp.* (2005), 16 C.B.R. (5<sup>th</sup>) 111 (Ont. Sup. Ct.) and analagous to those in *2022177 Ontario Inc. v. Toronto Hanna Properties Limited* (2005), 203 O.A.C. 220 (C.A.) (in which, however, density rights were found not to be proprietary rights). As the receiver of 156, the applicant has taken possession of the property of the debtor only. It cannot have taken possession of, or otherwise have any interest in, the respondents’ interests in the Property, regardless of the terms of the Receivership Order because the Order extends only to the assets of

156. As such, the applicant has no authority under the Receivership Order to sell the interests of the respondents. Nor does the Court have the authority to grant such an order in the absence of the appointment of a receiver over the respondents' property and assets.

[69] Second, this is not a circumstance in which the receiver is seeking approval to sell a mortgagor's equity of redemption on the basis that either there is no equity in the property or that the mortgagor has no ability to service the mortgage. There is no suggestion that the respondents have any obligation to CareVest in respect of the CareVest mortgage. In addition, as mentioned, because the respondents' interests in the Property are separate from the interest of 156 and given the terms of the Undertaking, there is no question that there is value in the interests of the respondents.

[70] Third, as mentioned, the present circumstances differ from those in *bcIMC* and *CareVest* in that the issue is not a priorities dispute between creditors in respect of a quantified, or quantifiable, claim. In these decisions, the court treated the purchasers' interests in the relevant projects as derived from the equity of the project owners and therefore as subordinated to the interests of the mortgagees (subject to the priority issue raised in *CareVest* which is irrelevant for the present proceeding). In addition, the court treated the claims of the purchasers as an equitable charge that could be discharged on sale of the relevant property pursuant to an express or implied power of sale.

[71] It is not possible to treat the respondents' interests in the Property in this manner for four reasons. First, for the reasons stated above, the interests of the respondents exist as of the present time otherwise than by way of an equitable charge against the property of 156 derived from the equity of redemption of 156. Second, it is questionable whether the CareVest mortgage extends to such interests given the intention that Lots 14 and 16 are intended to be conveyed to the respondents upon their creation free of any mortgages or liens incurred by 156. Third, even if it does, CareVest has acknowledged that the respondents' interests in the Property rank in priority to its mortgage. Lastly, the value of the respondents' claims are neither quantified nor quantifiable upon a sale of the Property.

[72] Finally, as a related matter, the absence of any principle or basis for allocating the proceeds of sale of the Property between the interest of 156 and the interests of the respondents reflects the conceptual defect in the applicant's position. Even prior to registration of the draft plan of subdivision, the interests of the respondents in Lots 14 and 16 are entirely separate and distinct from the interest of 156 in the Property.

[73] In reaching the conclusion that the receiver does not have the power to "vest out" the respondents' interests in the Property, I have also concluded, for the reasons set out below, that the four decisions cited above do not support the applicant's position that the Court has the authority to order such a sale.

[74] As mentioned, the decisions of Brenner C.J.S.C. in *New Skeena* and *Pope & Talbot* proceed on the basis that there was no *in rem* or proprietary interest in land involved so the issue did not arise. In fact, the approach of Brenner C.J.S.C. in these decisions implies that he would



have reached a contrary result in each case if he had found that the applicants held an *in rem* or proprietary right, which reinforces the conclusion that a court does not have the authority to authorize a “vesting out” of an interest in land. I do not read the appellate decision in *New Skeena* as proceeding on a different basis because the British Columbia Court of Appeal upheld this determination of Brenner C.J.S.C. before concluding that the vesting order language in the receivership order was sufficient authority in favour of the receiver to allow it to disclaim the relevant contracts. I would add that I do not think that vesting language in a receivership order can, by itself, be determinative. It depends for its effectiveness upon the authority of the court to approve “vesting out” transactions in any particular circumstance.

[75] In *bcIMC*, the principal basis of the decision is that the strata contract purchasers did not have an interest in land by virtue of express contractual provisions. The alternative conclusion that the receiver should be given the power to sell the projects free of the purchasers’ equitable interests under their purchase contracts was based on the absence of any equity in such equitable interests because partial discharges of the relevant lots were not available. While the court also referred to other specific equitable considerations in considering each of the contracts individually, this is the common thread that runs through the decision in respect of each of the purchase contracts. While the Court has the authority to order such a “vesting out” of property interests having no residual equity in order to permit a sale of property subject to security (or, as in *CareVest*, a refinancing of such a property), as mentioned above, these circumstances are not present in this proceeding.

[76] Insofar as *CareVest* may suggest that the purchasers had an interest in land that could be “vested out”, it is clear that the Court did not address the contractual provisions in the strata purchase contracts and did not make an express finding that the purchasers had an interest in land. There are also two features of the property interest asserted by the purchasers in the *CareVest* decision that are not present in this proceeding that have been mentioned above. First, the court treated the purchasers’ potential interest as an equitable charge to secure the excess of the sale price over the contract price. Second, as a related matter, the court proceeded on the basis that a sale of the Property was warranted because there was no remaining equity in the project. In the present circumstances, the interests of the respondents in the Property are separate and distinct from the interest of 156, rather than derived from 156’s equity in the Property in the manner of the strata purchase contracts in *CareVest* and *bcIMC*, and have real value.

[77] For these reasons, I also do not find any of the decisions cited by the applicant to be of any assistance on the authority of the receiver to sell the Property free and clear of the interests of the respondents.

*Do the Equities Favour a Disclaiming of the Undertaking and/or Vesting Out of the Property Free of Claims Under the Undertaking?*

[78] If I have erred in concluding that the Court does not have the power to authorize the receiver to disclaim the Undertaking and “vest out” the respondents’ interests in the Property granted pursuant to the Undertaking, the receiver is nevertheless subject to the requirement that it

must exercise proper discretion in making a decision to do so. As an officer of the Court, it must have regard to equitable considerations.

[79] In my view, the equitable considerations in this case argue against permitting a receiver to sell the Property free of the respondents' interests in the Property pursuant to the Undertaking. Accordingly, to the extent that the issue in these proceedings turns on whether the Court should exercise its discretion, I would decline to make such an order having regard to the five equitable considerations set out below.

[80] First, the respondents have valuable interests in property, rather than a mere contractual interest that can be terminated in respect of future obligations. As mentioned, the effect of the requested relief would be to transfer the value of the respondents' interests in the Property to 156 for no compensation.

[81] Second, as a related matter and as mentioned above, the respondents have fully performed the obligations that were the pre-condition to the creation of their rights, and given consideration for the Undertaking, by closing the transaction contemplated by the Sale Agreement. This is not an instance of termination of an executory contract in the sense of a contract in which both parties have obligations under the contract that remain to be performed.

[82] Third, unlike the circumstances in *Morgan Trust*, there is no issue of notice of the Undertaking and, therefore, no issue of unjust enrichment. Each of 156 and CareVest has been aware of the Undertaking from the time of their initial involvement with the Property. In particular, CareVest had knowledge of the Undertaking when it made its loans to 156. It therefore knew that compliance with the Undertaking was a cost of any realization proceedings if it concluded that registration of the draft plan of subdivision prior to the sale of the Property would increase its recovery.

[83] Fourth, the fact that there is no goodwill of 156 to preserve is not, by itself, an equitable consideration in favour of "vesting out" the Undertaking given the nature of the respondents' interests in the Property. Similarly, the fact that the receiver will receive no proceeds of sale from Lots 14 and 16 is not a valid consideration given the intention of the parties as set out in the Undertaking and the absence of any further covenant to be performed by the respondents to obtain the benefit of the Undertaking.

[84] Fifth, as mentioned, the applicant intends to register the draft plan of subdivision. There is no question that the intention of the parties was that Lots 14 and 16 were not to be included in the Property ultimately retained by 156 after such registration. Similarly, there is no question that the intention of the parties was that 156 was to convey Lots 14 and 16 to the respondents free of any mortgage or lien securing any obligations of 156, including any financing required to fund the costs of registration of the draft plan of subdivision. There is no basis in the record for a conclusion that either of such features of the Undertaking were to terminate in the event of the insolvency of 156.

[85] More generally, the applicant is, in effect, seeking to have it both ways. It has chosen to complete the action triggering the Undertaking but claims an entitlement to disclaim its

obligation to do so. In the present circumstances, in which the receiver intends to register the plan of subdivision, the remedy of specific performance would, therefore, absent special circumstances, be available to the respondents if the receiver does not also honour the Undertaking. The receiver can only seek the power to disclaim the Undertaking in such circumstances if it can demonstrate that the respondents' interests in the Property have no value. It cannot do so.

### **Conclusion**

[86] Based on the foregoing, the applicant's requested declaration that it is entitled to disclaim the Undertaking and sell the Property free of the interests of the respondents therein pursuant to the Undertaking is denied.

[87] The parties are at liberty to schedule a hearing on the remainder of the application at a 9:30 a.m. conference to be scheduled by counsel.

### **Costs**

[88] The parties shall have 30 days from the date of these reasons to make written submissions with respect to the disposition of costs in this matter, and a further 15 days from the date of receipt of the other party's submission to provide the Court with any reply submission they may choose to make. Submissions seeking costs shall include the costs outline required by Rule 57.01(6) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended. To the extent not reflected in the costs outline, such submissions shall also identify all lawyers on the matter, their respective years of call, and rates actually charged to the client, with supporting documentation as to both time and disbursements.

**DATE:** June 23, 2009

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H.J. Wilton-Siegel J.

**TAB 3**

**CITATION:** 7326246 Canada Inc. and Kevin Gardiner v. Ajilon Consulting, 2014 ONSC 28  
**DIVISIONAL COURT FILE NO.:** 433/12  
**DATE:** 20140204

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**DIVISIONAL COURT**

|                                         |   |                                            |
|-----------------------------------------|---|--------------------------------------------|
| <b>BETWEEN:</b>                         | ) |                                            |
|                                         | ) |                                            |
| 7326246 Canada Inc. and Kevin Gardiner  | ) | Robert J. Drake, for the Plaintiffs        |
|                                         | ) | (Respondents)                              |
| Plaintiff (Respondent)                  | ) |                                            |
|                                         | ) |                                            |
| <b>– and –</b>                          | ) |                                            |
|                                         | ) |                                            |
| Ajilon Consulting, a division of Ajilon | ) | John-Paul Alexandrowicz, for the Defendant |
| Canada Inc.                             | ) | (Appellant)                                |
|                                         | ) |                                            |
| Defendant (Appellant)                   | ) |                                            |
|                                         | ) |                                            |
|                                         | ) |                                            |
|                                         | ) | <b>HEARD:</b> December 17, 2013            |

**HIMEL J.**

*Introduction*

[1] 7326246 Canada Inc. (“7326246”) and Kevin Gardiner sued Ajilon Consulting (“Ajilon”) for damages for negligent misrepresentation. The matter proceeded to trial before Deputy Judge M.O. Mungovan of the Small Claims Court. On April 20, 2012, the trial judge found in favour of the plaintiff in the amount of \$16,800 and costs in the amount of \$2,573.14. Ajilon appeals the judgment and asks that the appeal be allowed and that the decision be set aside and the action be dismissed with costs.

[2] The case was tried along with another claim against Ajilon by a plaintiff whose factual circumstances and legal issues were similar. In an order made by this court, this appeal and the appeal involving the other plaintiff were ordered to be heard together.

*Factual Background*

[3] Ajilon is a federally incorporated company which provides information technology ("IT") consulting services to a number of clients, one of which is Loblaw Companies Ltd. ("Loblaw"). Loblaw began using Ajilon's services in 2007, often on a project basis. The Business Analyst staffing group at Loblaw retained Ajilon in 2009 to provide consultants on a contract basis, as well as permanent staffing. Ajilon's practice was to locate consultants to provide the services, require them to incorporate, and have the consultant corporation sign an agreement as an independent contractor with Ajilon.

[4] In January 2010, Mark Healey was hired as a Business Development Manager at Ajilon and was assigned the Loblaw account. Late in January, Mr. Healey was contacted by Angela Walker, a senior manager at Loblaw, to locate five additional Senior Business Analysts ("BA") for her team. Mr. Healey's group made contact with potential consultants and arranged for them to meet with Jimmy Kahn, a senior manager at Loblaw.

[5] Kevin Gardiner ("Gardiner") is an officer and principal of the corporate plaintiff 7326246. He applied for a position to work at Loblaw as a Senior Business Analyst through Ajilon, interviewed successfully, and was offered the position through Ajilon. He signed an Incorporated Contractor Agreement with Ajilon (the "agreement") which provided for an initial term of six months commencing on February 10, 2010 and ending on August 13, 2010.

[6] Prior to receiving the offer from Loblaw, Mr. Gardiner had started a four month contract with a company called ESP. However, he believed that the Loblaw opportunity was a better one and notified ESP on February 3, 2010 that he was accepting another position but could still offer some services to ESP. Mr. Gardiner sent a copy of his incorporation certificate to Ajilon, signed Ajilon's standard independent contractor agreement and returned it to Ajilon. He arranged to meet with the Human Resources department at Loblaw to provide information for background checks.

[7] The agreement signed by Mr. Gardiner on behalf of 7326246 was to engage the consultant corporation as an independent contractor. It provided that background and security checks had to be completed. It stated that the company would only be paid for hours actually worked and approved according to proper invoices. It was silent on the amount of work that would be received, leaving this to the client's discretion. A termination clause provided for termination for any reason upon the provision of same day written notice. It also contained an entire agreement clause.

[8] On February 9, 2010, one day before the consultants were to start work, Mr. Healey received an email from Ms. Spadafora, an IT recruiter with the Human Resources department at Loblaw, advising that they were pushing Mr. Gardiner's start date back by one week to February 17. On February 16, Mr. Healey emailed Ms. Spadafora reminding her that the five consultants were starting in her group the next day and that her signature was still needed on the agreements. Later that day Mr. Healey received an email from Ms. Walker indicating that "due to some recent possible changes" within her group, they were still assessing the need for additional BAs and that Loblaw was postponing Mr. Gardiner's and the other consultants' start date again. This

time, no new date was given. Mr. Healey responded that he believed there were five exceptions to the moratorium on engagements, one being Mr. Gardiner, and he also noted that he and the other consultants were already signed up to contracts. However, Mr. Healey only received an email which reiterated that there was some uncertainty. The correspondence continued over the week.

[9] During this period, Mr. Gardiner had been in touch with Ajilon through Ms. Mehendiratta. On February 23, 2010, Mr. Healey emailed the consultants including Mr. Gardiner and advised that they should pursue other opportunities while he tried to get a firm commitment from Loblaw regarding start dates. On March 5, 2010, Ajilon sent letters to the consultants, including Mr. Gardiner, terminating their agreements. The reason given was that Loblaw no longer required his services. No services had ever been provided. 7326246 and Mr. Gardiner commenced an action against Ajilon for damages for negligent misrepresentation.

*Decision of the court below*

[10] Deputy Judge Mungovan heard the trial over two days. In his decision, he outlined the elements of the tort of negligent misrepresentation as set out in the leading authority of *Queen v. Cognos*, [1993] 1 S.C.R. 87. Having heard the evidence of Mr. Gardiner and read the emails sent back and forth between him and Ajilon, he found that Mr. Gardiner was relying on what the representatives of Ajilon had said to him “about a job in Loblaws.” He applied the test in *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, and found that the indicia of “reasonable reliance” had been proven: Ajilon had a direct financial interest in the transaction as it stood to gain from a successful placement of Mr. Gardiner in Loblaw; its employees possessed special skills, judgment or knowledge when dealing with Loblaw’s staffing needs; its advice on Loblaw’s offer was given to Mr. Gardiner in the course of Ajilon’s business, as it was done in the context of work; and the information was requested by Mr. Gardiner. Thus, he found that a duty of care existed between Ajilon and Mr. Gardiner’s corporation. The trial judge then held that Mr. Gardiner placed foreseeable reasonable and justifiable reliance on representations made by Ajilon. He also found that the duty extended to Mr. Gardiner’s corporation as Ajilon’s representative had dealt with both him and his corporation throughout.

[11] The trial judge found that the representation made to 7326246 was misleading as it portrayed to Mr. Gardiner that there was a “job” for him at Loblaw when there was no firm commitment from that company that they would “employ” Mr. Gardiner as a Senior Business Analyst. He noted that on February 16, 2010, Loblaw had communicated second thoughts about increasing its existing complement of business analysts.

[12] The trial judge went on to find that Ajilon, through Ms. Mehendiratta, acted negligently in making this representation. This conduct had to be considered against an objective standard with reference to a reasonable person. He held that Ajilon had breached the standard of care by representing to Mr. Gardiner that he had secured a place at Loblaw as a Senior Business Analyst “when in fact that was far from the case.” He held that Ms. Mehendiratta should have cautioned

him about the uncertainty of the position since there was no certainty until an official at Loblaw had “signed off on a candidate’s hire.”

[13] Deputy Judge Mungovan held that Mr. Gardiner relied upon the representations in advising Mr. Stern of ESP that he had been offered another position and was accepting it. He held that his reliance was “not rash but reasonable on his part” in that he had received an email from Ms. Mehendiratta on February 3, 2010, in which she congratulated him on having been offered the position and made it sound like it was a certainty.

[14] On the issue of damages, he found that Mr. Gardiner had left a four month contract at ESP for a warehouse manager position at \$4,200 per month with a possibility of full time employment. He calculated the damages at four months at \$4,200 per month, for a total of \$16,800. He also found that Ajilon terminated its agreement with Mr. Gardiner and his company effective March 5, 2010, and that Mr. Gardiner then tried to find work. On June 1, 2010, he found a job with Armtec-Brooklin Concrete. The trial judge found that he had made an effort to mitigate his company’s damages.

[15] Finally, on the question of whether the entire agreement clause in the agreement prevented Mr. Gardiner from bringing the action, the Deputy Judge found that the negligent misrepresentation was made by Ms. Mehendiratta, acting on behalf of Ajilon, in stating that there was a job for Mr. Gardiner as a Senior Business Analyst at Loblaw. The trial judge considered the “entire agreement” clause in the agreement and held that, while it did not specifically use the word “representation”, any representations would be covered by the word “understandings” which was mentioned in the clause. However, he went on to hold that the clause would only be enforceable where the parties to the contract are “sophisticated commercial parties” and that Mr. Gardiner was not a sophisticated commercial party and was not knowledgeable about technical legal aspects of contracts. Moreover, he held it was unenforceable because it was not specifically brought to Mr. Gardiner’s attention by Ajilon prior to signing the contract.

#### *Positions of the parties*

[16] The appellant argues that the trial judge erred by mischaracterizing the evidence and finding that Mr. Gardiner had a “job” – Ajilon did not have a firm commitment from Loblaw that they would “employ” Mr. Gardiner. In fact, Mr. Gardiner was offered a position through his company as an information technology consultant pursuant to an independent contractor agreement, not as an employee. By mischaracterizing the nature of the offer, the trial judge mischaracterized the representation that was made to Mr. Gardiner.

[17] Ajilon argues that the trial judge further erred by failing to consider the evidence presented by Ajilon regarding the representation that was made which showed, it submits, that it was not a negligent misrepresentation as at the time it was made, the offer made was true and accurate. In fact, Mr. Gardiner was asked to meet Ms. Spadafora on February 4, 2010, to provide the information for backgrounds checks. Even when the start date was pushed back, Loblaw still intended to proceed and the only pending step was a signature on the contracts. It was only on



February 16, 2010, after Mr. Healey contacted Ms. Walker, that Mr. Healey became aware that Loblaw was not sure that it was going ahead to hire the five consultants. While there was evidence regarding communications between representatives of Loblaw and Ajilon instructing Ajilon to make the offer to Mr. Gardiner, the relationship between Loblaw and Ajilon and the terms of the consulting arrangements were inherently uncertain in nature.

[18] The appellant also argues that the trial judge erred in law and made incorrect findings of fact in finding that the entire agreement clause in the agreement did not bar the action for negligent misrepresentation. It submits that the trial judge erred in law and made incorrect findings of fact in finding that Mr. Gardiner was not a “sophisticated commercial entity/party.”

[19] The appellant takes the position that, where the credibility of a witness was not in issue, it is open to an appellate court to review findings of fact by a trial judge if they were based on the failure to consider relevant evidence or a misapprehension of the evidence: see *Schreiber Brothers Ltd. v. Currie Products Ltd.*, [1980] 2 S.C.R. 78, at para. 10. Where the trier has made unreasonable findings of fact based on a misapprehension of the evidence and where the misapprehension is material to significant findings of fact, a new trial should be ordered: see *Apelowicz Management Inc. v. Griffiths*, 2010 ONSC 1410, at para. 23.

[20] Ajilon submits that the proposition that an appellate court should not lightly interfere with the findings of fact by a trial judge is subject to the trial judge correctly characterizing the evidence: see *Remo Valente Real Estate Ltd. v. Beauchamp*, [1996] O.J. No. 2040 (Sup. Ct.), at para. 1. In summary, on the evidentiary issues Ajilon takes the position that the trial judge failed to consider the evidence called by Ajilon that the representation did not constitute a negligent misrepresentation and erred in mischaracterizing Ajilon’s evidence concerning the nature of the opportunity that was offered to Mr. Gardiner.

[21] The respondent argues that the trial judge properly weighed the evidence and applied the law in concluding that the appellant had made a negligent misrepresentation about the nature and existence of the Senior Business Analyst position at Loblaw. It submits that Mr. Gardiner was congratulated about an offer from Loblaw but was never told that the offer was subject to a final approval or was conditional in any way. In fact, at the time of Ms. Mehandiratta’s email on February 3, 2010, the paperwork for final approval had not even been submitted to Loblaw. The agreement he signed with Ajilon set a start date of February 10, 2010. When that date arrived but the position had not materialized, he was told the start date was delayed one week to February 17. On February 16, he was told that he would not start the following day.

[22] The respondent was never cautioned that the position had not been approved and may not ever be approved. Mr. Gardiner takes the position that, on the contrary, Ajilon’s approach was to assure him that the work at Loblaw had been offered and the start date was imminent. That there were problems with Loblaw’s approval was not communicated to him until February 19, 2010, and even then, Mr. Healey said that matters still remained undecided at that point. No clear indication on the status of the work was given until he received a notice of termination. The

respondent takes the position that there never was a position ready for him and that Loblaw never had made an “offer” capable of acceptance.

### *The standard of review*

[23] The appellant submits that the applicable standard of review on questions of law is correctness. For questions of fact, the standard is palpable and overriding error. A palpable and overriding error is defined as “clear to the mind or plain to see”: see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 5, 8, 10, 26.

[24] The respondent submits that the standard of palpable and overriding error applies equally whether the disputed determination relates to credibility concerning “primary” facts, “inferred” facts or to global conclusions based on assessments of the evidence as a whole: see *L.(H.) v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401, at paras. 53-54. An appellate court will not interfere with the trial judge’s findings of fact unless the error can be identified and shown to have affected the result. The respondent further argues that it is for the trial judge to weigh the evidence and deference should be given. An appellate court should only intervene if the finding is “clearly wrong”, “unreasonable” or “unsupported by the evidence”.

[25] The trial judge’s application of the test of for negligent misrepresentation raises questions of mixed fact and law reviewable on the standard of palpable and overriding error. Whether the entire agreement clause precludes liability for negligent misrepresentation is a question of law reviewable on a standard of correctness.

### *The Test for Negligent Misrepresentation*

[26] The Supreme Court held in *Queen v. Cognos*, at p. 110, that for a claim to succeed based on the tort of negligent misrepresentation, five elements must be present. They are as follows:

- (1) there must be a duty of care based on a “special relationship” between the representor and the representee; (2) the representation in question must be untrue, inaccurate or misleading; (3) the representor must have acted negligently in making said representation; (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted.

### *Analysis*

#### *(1) Did Ajilon owe a duty of care to Mr. Gardiner and his company?*

[27] The appellant does not submit that the trial judge erred in finding a duty of care based on a special relationship between the appellant and the respondent. As the trial judge noted, the agreement was between Ajilon, the recruiting agency, and the consultant although the consultant was to provide the services for Loblaw and work at one of Loblaw’s premises. The trial judge noted that this requirement for negligent misrepresentation has become “a duty based generally

on ‘foreseeable reasonable reliance’.” Based on the evidence, the trial judge could easily have concluded that there was foreseeable reasonable reliance by the respondents on Ajilon’s representation. Ajilon’s representative, Mark Healey showed he understood this when he told Loblaw that “there may be issues because we already have [the consultants] signed up to contracts”, and that he did not want to lose them to other opportunities. Only later did he inform the consultants, including Mr. Gardiner, that they should pursue other opportunities.

*(2) Was the representation untrue, inaccurate or misleading?*

[28] This element of negligent misrepresentation requires that the representation be untrue, inaccurate or misleading at the time that it was made. The trial judge held that the representation by Ms. Mehendiratta was “misleading” because she did not have a firm commitment that they would “employ” Mr. Gardiner as a Senior Business Analyst. On February 3, 2010, Mr. Gardiner was congratulated via telephone about the Loblaw offer and later that day was told to contact Loblaw’s HR department for the criminal and job reference checks. These communications were based upon the email from Mr. Kahn of Loblaw to Mr. Healey of Ajilon, instructing Ajilon to extend an offer to Mr. Gardiner. What Mr. Gardiner was not told until much later was that the position was still waiting on a final approval from Loblaw. In an email dated February 16, Ms. Walker advised Mr. Healey that Loblaw was “having second thoughts about increasing its existing complement of business analysts” and yet Mr. Gardiner was not advised to pursue other opportunities until February 23.

[29] The appellant submits that the court must consider the inherently uncertain nature of consulting contracts and that the nature of the industry and the types of contracts used mean that an offer is never a certainty. Ajilon submits that there was no job, the opportunity was not secure and that there was no real representation as Ajilon was simply passing on the information that Loblaw had given it. The respondent argues that Ajilon was not led astray by Loblaw, as it knew sign-off was required and yet insisted on obtaining commitments from the potential analysts that drew them away from other opportunities without letting them know the true nature of the situation.

[30] The appellant makes much of the fact that Mr. Gardiner was an independent contractor, not a traditional employee, and consequently the trial judge misapprehended the position when he described it as a “job” or “employment” in his reasons. It submits that independent contractor arrangements are flexible, not secure and there are risks that the business opportunity may not materialize or that the opportunity may change. Ajilon argues that the trial judge mischaracterized the opportunity as a “job” or “employment” when, in fact, it was an independent contractor arrangement which had no certainty. The appellant submits that the trial judge erred in finding that the representation was misleading because Ajilon did not have a firm commitment from Loblaw that they would “employ” Mr. Gardiner at the time they made the offer – Loblaw was never to be Mr. Gardiner’s “employer”.

[31] Regardless of the nature of the industry and the potential risks inherent in this type of offer, Ajilon represented an offer of work to Mr. Gardiner and gave him all the details of it, save

for one—that the opportunity still required official approval. In the context of the communications between the appellant and the respondent, the trial judge found that the representations were untrue, inaccurate and misleading and I agree with this finding.

(3) *Did the representor act negligently in making the representation?*

[32] The failure to divulge relevant information is important in determining whether a misrepresentation was negligently made. Where the representor does not know or could not have known pertinent information when the misrepresentation was made, the misrepresentation would not be negligent: see *Lesage v. Canadian Forest Products Ltd.*, 2009 BCSC 1427, at paras. 87-89, *aff'd*, 2011 BCCA 259.

[33] Here, the trial judge found that Ms. Mehendiratta represented to Mr. Gardiner that he had secured a position as a Senior Business Analyst but failed to caution him that there was no certainty until Loblaw signed off. Ajilon argues that it is common in the context of the IT consulting industry for organizations to require flexibility and that needs are largely project-based, meaning that they can change or may fail to materialize altogether. The appellant argues that Mr. Gardiner should have been aware that the offer was not certain and, consequently, the appellant's failure to state this was not negligent. The appellant says that at the time the offer was made, Ajilon did not know that subsequent internal changes at Loblaw might impact any planned IT projects. Therefore, Ajilon did not act negligently in declining to warn Mr. Gardiner that the contract or statement of work had yet to be signed off on.

[34] Ajilon also submits that it is common to engage consultants without official paperwork and since the company had recently done this with eight consultants in the same group and no issues had resulted, it was reasonable to represent that Mr. Gardiner had been offered the position without expressly saying that the contract had not yet been signed.

[35] The respondents claim Ajilon should have known and did know that the contract still needed final approval, and that this meant the prospect of work for Mr. Gardiner was not yet certain. Ajilon's failure to disclose this made its misrepresentation regarding the certainty of the offer negligent.

[36] These submissions were all put to the trial judge. He concluded that, in making representations to the respondents, Ajilon breached the standard of care by representing that Mr. Gardiner had secured a position at Loblaw when Ajilon knew that was not the case. That conclusion was reasonable in the circumstances.

(4) *Did the representee rely in a reasonable manner on the negligent misrepresentation?*

[37] If it is doubtful that the misrepresentee would have acted any differently had the representation not been made, then this element will not be made out. The trial judge held that there was no doubt that Mr. Gardiner relied upon Ajilon's representation that there was a job for him at Loblaw as he left a position elsewhere. He found his reliance was reasonable. The trial

judge referred to the fact that Ajilon sent a number of emails to Mr. Gardiner confirming the position.

[38] The appellant argues that Mr. Gardiner preferred the position at Loblaw to the job at ESP and was willing to take the risk of that position not materializing. The appellant argues that he did not rely on Ajilon's alleged representation and that it was unreasonable for him to believe the position was a certainty. Rather, they argue Mr. Gardiner was aware of the nature of the independent contractor arrangement. Again, the appellant argues that the mischaracterization of the opportunity as a "job" caused the trial judge to fail to consider the opportunity in an appropriate context.

[39] Counsel for the respondent points to the direct evidence that, had Mr. Gardiner been informed that the opportunity was not certain and was not yet approved, he would have kept the other position.

[40] The trial judge found that Ajilon intended for Mr. Gardiner to rely on its representations and make himself exclusively available for the Loblaw position. It was negligent for Ajilon to make statements about the position and then not accept the responsibility for the intended effect of such statements. In my view, it was open to the trial judge to reach this determination on the evidence.

*(5) Was the reliance detrimental to the representee in the sense that damages resulted?*

[41] The trial judge found that Mr. Gardiner was entitled to damages for the loss of the position at ESP. Although he had not yet passed the background checks for the Loblaw position, these were formalities and no issue with those checks was raised by Loblaw. It was not reckless to leave the other position before completion.

[42] The evidence was that Mr. Gardiner left a contract where he was to be paid for four months at \$4,200 per month. When Ajilon terminated the agreement, Mr. Gardiner looked for work and found a job with Armtech-Brooklin Centre commencing on June 1, 2010.

[43] The trial judge held that he was satisfied with Mr. Gardiner's efforts to mitigate. He ordered damages for the amount of the contract that he rejected in order to take the Loblaw's position. The trial judge did not err in making his conclusions on damages.

*The entire agreement clause*

[44] Clause 30 of the agreement signed by Mr. Gardiner on behalf of himself and the plaintiff reads as follows:

This Agreement constitutes the entire agreement between the Parties pertaining to the consulting engagement set forth herein and supersedes all prior negotiations, understandings and agreements between the Parties, written or oral ....

[45] The appellant argues that the entire agreement clause specifically precludes reliance on representations and operates as a bar to negligent misrepresentation claims: see *Corfax Benefits Systems Ltd. v. Fiducie Desjardins Inc.* (1997), 37 O.R. (3d) 50 (Gen. Div.), at p. 6; *McNeely v. Herbal Magic Inc.*, 2011 ONSC 4237, at paras. 10 and 19; *No. 2002 Taurus Ventures Ltd. v. Intrawest Corp.*, 2007 BCCA 228, at para. 59.

[46] The trial judge referred to the entire agreement clause and found that, while the word “representation” does not appear in the clause, the word “understandings” does. He was satisfied that the representation relied upon probably did fall into the category of an understanding and, in any event, to conclude otherwise would “constitute a distinction without a difference.” In my view the trial judge did not err in this conclusion.

[47] He then relied on the authority of *McNeely* for the proposition that an entire agreement clause is enforceable to preclude liability for a negligent misrepresentation where the parties to such a contract are “sophisticated commercial parties.” He held that Mr. Gardiner was not a sophisticated commercial party in the sense of understanding a contractual clause such as this. He noted that “only a lawyer” would understand the importance of an entire agreement clause in this context, and therefore the clause could not be enforced to preclude Ajilon’s liability for the negligent misrepresentation.

[48] The appellant argues that *McNeely* does not stand for the proposition that the parties must be “sophisticated commercial parties” for an entire agreement provision to be enforced. Rather, it should be enforced unless it can be said that the clause is unconscionable or unfair, or unreasonable. The trial judge failed to establish the legal doctrine for striking the entire agreement clause down.

[49] The appellant thus argues that the trial judge applied the incorrect legal test by requiring that the parties be sophisticated commercial entities/parties and by narrowly defining a sophisticated commercial entity/party as a lawyer. The appellant argues that the trial judge erred in finding that Mr. Gardiner was not a “sophisticated commercial party” when he had previous experience in the IT industry as an independent contractor.

[50] The respondent argues that if the word representation is not in the clause, it cannot cover liability for misrepresentations. However, there is no suggestion that the trial judge made an error of law in finding otherwise. The respondent also submits that there are two situations in which a judge might not enforce an entire agreement clause: where a party was not a sophisticated commercial party and where the representation went to the heart of the contract. The respondent submits that both of these concepts apply in the case at bar.

[51] The problem of determining whether an entire agreement clause can preclude liability for a negligent misrepresentation is one that lies on the shifting sands between tort and contract. An entire agreement clause is similar to but distinct from a general exculpatory, or exclusionary, clause. In general, “both types of clauses have the effect of excluding liabilities of various kinds and are capable of producing unjust results”: see John D. McCamus, *The Law of Contracts*, 2nd

ed. (Toronto: Irwin Law Inc., 2012), at p. 372. More specifically, an exculpatory clause limits or excludes “liability for damages for breach of contract or for a tort connected to the contract”, while an entire agreement clause “seeks to exclude liability for statements other than those set out in the written contract and is sometimes referred to as an exclusion clause”: see *Shelanu Inc. v. Print Three Franchising Corp.* (2003), 64 O.R. (3d) 533 (C.A.), at para. 31. Where the issue is the effect of an entire agreement clause on a party’s liability in tort for a negligent misrepresentation, there appears to be little practical difference between its effect and that of an exculpatory clause.

[52] The precise relationship between the two types of clauses may seem an arcane point but it has ramifications given the Supreme Court of Canada’s new approach to the application of exclusionary clauses in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69. In *Tercon*, the province of British Columbia sought to preclude liability to a large construction contractor for a breach of a tendering contract by way of an exclusion clause found in that contract. Both parties were held to be “sophisticated” commercial parties: at paras. 73, 82. The court was unanimous that a new approach should be applied when a party “seeks to escape the effect of an exclusion clause or other contractual terms to which it had previously agreed”: at para. 121. Four members of the court dissented on the application of the new approach to the facts but the important aspect for this case is the approach itself.

[53] Under the former approach to exclusionary clauses, courts sometimes applied the doctrine of fundamental breach to hold an exclusionary clause unenforceable but this was undesirable as it often served to obscure the real grounds motivating judicial decision making. The new approach, described in *Tercon* at paras. 122-3, places the focus squarely on unconscionability and public policy:

The first issue, of course, is whether as a matter of interpretation the exclusion clause even applies to the circumstances established in evidence. This will depend on the Court’s assessment of the intention of the parties as expressed in the contract. If the exclusion clause does not apply, there is obviously no need to proceed further with this analysis. If the exclusion clause applies, the second issue is whether the exclusion clause was unconscionable at the time the contract was made, “as might arise from situations of unequal bargaining power between the parties” (*Hunter*, at p. 462). This second issue has to do with contract formation, not breach.

If the exclusion clause is held to be valid and applicable, the Court may undertake a third enquiry, namely whether the Court should nevertheless refuse to enforce the valid exclusion clause because of the existence of an overriding public policy, proof of which lies on the party seeking to avoid enforcement of the clause, that outweighs the very strong public interest in the enforcement of contracts.

[54] This new approach whereby a court may determine that a specific exculpatory term within an otherwise valid contract is unconscionable and, therefore, unenforceable has been

called the “unconscionable term” doctrine by John D. McCamus in *The Law of Contracts*, Ch. 11, Section D(6). Among the innovations to contract law potentially implied by the adoption of this doctrine is the ability of a court to strike an unconscionable term from a contract while upholding the remainder of the agreement as valid. As this is not a remedy at issue in this particular case, its availability need not be dealt with here. What is necessary, however, is to determine whether the *Tercon* approach applies to entire agreement clauses as well as exculpatory clauses, a point on which the decision itself is silent. The appellant argues that if the entire agreement clause is unconscionable, unfair or unreasonable, then the entire agreement clause will be unenforceable. The authority for this would have to come from an application of the *Tercon* approach to entire agreement clauses.

[55] The approach adopted by the Supreme Court in *Tercon* combines two previous approaches to the construction of exclusionary clauses laid out in *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426, where the court split on the doctrine to apply if not applying fundamental breach. In *Hunter*, Dickson C.J.C. preferred the doctrine of unconscionability because it would allow courts to focus on whether factors such as inequality of bargaining power meant an exclusionary clause should be held unenforceable. This notion seems to have become step two in the *Tercon* analysis. Justice Wilson, held that the courts must reserve some discretion to hold an exclusionary clause unfair and unreasonable in light of events subsequent to the formation of the contract, since unconscionability is only concerned with inequality of bargaining power and circumstances as they stood at the time the contract was made. This notion seems to have become step three in the *Tercon* analysis.

[56] In *Shelanu* the Ontario Court of Appeal held, at paras. 31-32, that entire agreement clauses should be construed using the principles of construction normally applied to exculpatory clauses. This decision came after *Hunter* but before *Tercon* and, accordingly, it described the framework for the construction of exclusionary clauses according to the *Hunter* approach. The question that remains is whether the *Tercon* approach, which seems to combine both elements of the framework from *Hunter*, applies to an entire agreement clause such as the one in this case absent direct authority.

[57] There are reasons to believe that it should. M.H. Ogilvie, writing prior to *Tercon*, argues that “entire agreement clauses pose the same policy issues as exclusion clauses” and for this reason “they are not at all mysterious”: see M.H. Ogilvie, “Entire Agreement Clauses: Neither Riddle nor Enigma” (2008) 87 Can. Bar Rev. 625, at p. 632. Where a misrepresentation induces the agreement containing the entire agreement clause, these issues can include the sophistication of the parties and the provision of notice to unsophisticated parties. Ogilvie argues, at p. 626, that “whether the contract in question is induced by negligent or fraudulent misrepresentation, the outcome for entire agreement clauses should be the same as in the case of exclusion clauses generally ...” where the clauses are generally enforced to preclude negligent misrepresentation in the context of negotiated contracts by sophisticated parties.

[58] Similarly, entire agreement clauses found in contracts induced by a negligent misrepresentation have generally been found to be unenforceable in the context of an



unsophisticated party unless notice of the clause, or even notice of the clause's intended effect, was brought home to the unsophisticated party during bargaining: see *Beer v. Townsgate 1 Ltd.* (1997), 152 D.L.R. (4th) 671 (Ont. C.A.), at para. 29; *Zippy Print Enterprises Ltd. v. Pawliuk* (1994), 100 B.C.L.R. (2d) 55, at para. 45; *Roberts v. Montex Development Corporation* (1979), 100 D.L.R. (3d) 660 (B.C.S.C.).

[59] McCamus speculates that the so called unconscionable term doctrine from *Tercon* may have application to clauses traditionally subjected to "special notice" requirements. Of these, entire agreement clauses are the most likely. He writes about such clauses at p. 444:

Of these provisions, perhaps the most likely candidate for subjection to the new doctrine is the "entire agreement" clause. Known to be a "trap for the unwary," entire agreement clauses have often been held to be enforceable only where Canadian courts are satisfied that the significance of the clause was brought home to the affected party ... It should be noted, however, that the "special notice" doctrine is applied only sparingly to signed agreements on the assumption that the signature constitutes a binding assent to all the written terms. It may be, then, that the new doctrine will play an important role in striking down unfair terms in signed agreements where there is no realistic expectation that the written terms have been either read or, if read, understood by the signing party. In other words, the doctrine of unconscionable term may provide a common law device, long awaited by some, that can ameliorate the harsh impact of unfair terms in boilerplate or "adhesion" contracts, offered particularly in the context of consumer transactions on a take-it-or-leave-it basis.

[60] This passage illuminates the importance of the trial judge's factual findings that Ajilon did not notify Mr. Gardiner of the entire agreement clause and that there could not have been any realistic expectation that he would have understood its importance without it being brought home to him. While the standard form contract as a whole was not strictly offered to Mr. Gardiner on a "take-it-or-leave-it basis", the enforcement of this particular clause would nevertheless impose a "harsh impact" on him.

[61] In my view, the *Tercon* analysis should be used to determine whether the entire agreement clause precludes Ajilon's liability for negligent misrepresentation. For this reason, I apply this approach.

[62] On step one, the trial judge concluded that the entire agreement clause did apply to negligent misrepresentations by use of the word "understandings" and I have already indicated I will not interfere with this finding.

[63] Step two of the question is focused on whether the clause is unconscionable. Unconscionability requires the combination of inequality of bargaining power and the use of that inequality by the stronger party to obtain an improvident bargain: see *Mundinger v. Mundinger* (1968), [1969] 1 O.R. 606 (Ont. C.A.), at p. 610. In *ABB Inc. v. Domtar Inc.*, 2007 SCC 50,

[2007] 3 S.C.R. 461, the Supreme Court wrote, at para. 82, that “[u]nder the doctrine of unconscionability, a limitation of liability clause will be unenforceable where one party to the contract has abused its negotiating power to take undue advantage of the other.” Here, I consider the standard form nature of the agreement, the importance of the clause in light of Ajilon’s knowledge that they were keeping Mr. Gardiner in abeyance without a final approval of the position from Loblaw, and the lack of any notice regarding the clause. While the appellant argues that Mr. Gardiner was not unsophisticated because of his experience as a contractor in the IT industry, the key points are that the clause took on outsized importance given the uncertainty of the Loblaw position and that his access to information regarding this uncertainty was controlled by Ajilon. I conclude that Ajilon used its stronger informational position in the circumstances to obtain Mr. Gardiner’s supposed consent to an improvident clause.

[64] Step three of the analysis need not be undertaken given my finding on step two but, in any event, it may well be that the clause is also unenforceable on the public policy ground that recruitment companies should be prevented from leading potential recruits to believe they have secured work when they have not. This would not lead to an unduly restrictive operating environment for recruitment companies. Ajilon could have acknowledged to Mr. Gardiner and the other consultants the uncertainty in the situation with Loblaw and still tried to sell them on the merits of the positions and their eventual placement which served Ajilon’s financial interests. The consultants may well have chosen to disregard other opportunities in favour of the potential but uncertain Loblaw positions.

[65] If I am wrong in applying the *Tercon* analysis to the entire agreement clause, the trial judge’s ruling on this issue must still be upheld under the traditional jurisprudence. As the foregoing discussion has shown, he did not err in determining that the sophistication of the parties and the lack of specific notice are relevant considerations in the case law on entire agreement clauses. While the trial judge went too far in stating that “only a lawyer” could have understood the importance of the clause – non-lawyers are certainly capable of understanding a clause like this if its significance is brought home to them – it is important to note that Ajilon gave no notice of the clause whatsoever. This cannot be sufficient notice given Ms. Langley’s unsophisticated nature with respect to the clause.

### *Result*

[66] In his reasons, the trial judge correctly set out the test for a claim founded in negligent misrepresentation. He reviewed the five factors and applied the law to the evidence before him. The entire agreement clause cannot preclude liability in these circumstances because it is unenforceable under the *Tercon* approach. Even if the *Tercon* approach does not apply, the trial judge did not err in determining the clause was unenforceable because Mr. Gardiner was an unsophisticated party and did not have notice of the clause. The trial judge made no reviewable error that would warrant intervention by this court. The appellant primarily asks this court to re-weigh the evidence and reconsider the matter, but that is not the function of this court.

[67] For these reasons, the appeal is dismissed. If the parties are unable to agree on costs, they may file written submissions according to the following timetable: the respondent by February 21, 2014 and the appellant by February 28, 2014.

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Himel J.

**Date:** February 4, 2014

**CITATION:** 7326246 Canada Inc. and Kevin Gardiner v. Ajilon Consulting, 2014 ONSC 28

**DIVISIONAL COURT FILE NO.:** 433/12

**DATE:** 20140204

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**DIVISIONAL COURT**

**BETWEEN:**

7326246 Canada Inc. and Kevin Gardiner

Plaintiff (Respondent)

**– and –**

Ajilon Consulting, a division of Ajilon Canada Inc.

Defendant (Appellant)

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**REASONS FOR JUDGMENT**

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**Himel J.**

**Released:** February 4, 2014

**TAB 4**

**CITATION:** AOD Corporation v. Miramare Investment Incorporated, 2021 ONSC 4280

**COURT FILE NO.:** 19-80545

**DATE:** 20210615

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

AOD CORPORATION

Applicant

– and –

MIRAMARE INVESTMENT  
INCORPORATED and ALAIN MERCIER

Respondents

)  
)  
) Jeffrey Langevin, for the Applicant  
)

)  
)  
) Pierre Champagne, for the Respondent,  
) Miramare Investment Incorporated  
)

) Alain Mercier, self-represented  
)  
)  
)

) **HEARD:** June 10, 2021

**REASONS FOR DECISION**

**ROGER J.**

**Background**

[1] This Application relates to the validity of a patent agreement dated January 30, 2012. The Applicant, AOD Corporation, (“AOD”) argues that the patent agreement is unenforceable because its president at the time, the Respondent, Mr. Alain Mercier (“Mercier”), did not have authority to bind the corporation to this agreement without the required majority of 67% of its shareholders. Following this agreement, a patent was obtained by the Respondent, Miramare Investment Incorporated (“Miramare”). The parties have since been unable to agree on the effect of the patent agreement, on how to monetize the patent, and, importantly, on how to share in its monetization (if any). As a result, despite the patent issuing in January 2018 and having a limited duration of up to 2025, the parties are at a standstill.

[2] AOD brought this Application seeking three declarations:

- that Mercier, had no authority to bind AOD and its shareholders to any agreement that would lien, transfer, or sell any asset belonging to AOD without the approval of two-third of the shareholders (in other words, that the patent agreement referenced above is unenforceable); and
- that it is the sole owner of the patent that is the subject of this litigation; and
- that it has the sole authority to control and monetize the patent.

[3] Miramare opposes the above and has brought a counter application seeking the dismissal of AOD's Application and orders that:

- AOD reinstitute Miramare's authority to instruct legal counsel while providing the necessary power of attorney for that counsel, as chosen by Miramare, to deal with the american patent office (USPO), so that Miramare, at its own expense, can ensure proper maintenance of and enhancement to the patent until it is sold; and
- Miramare may proceed to the sale of the patent through an arms-length international patent broker to an arms-length third party, the net proceeds of which, after marketing, brokerage and legal costs, will be held in escrow until any matters of financial warranty to a buyer, outstanding damages or liabilities between the parties or disputes as to the sales terms of the agreement are agreed upon or, in the alternative, adjudicated.

#### **AOD's Application and Arguments**

[4] AOD filed one affidavit in support of its application; an affidavit signed by its current director, Mr. Lino Mastromonaco ("Mastromonaco") on May 13, 2019.

[5] AOD says that it has one tangible asset, a US patent granted in January 2018 as patent number 9, 876, 731 (apparently aimed at controlling web platforms to support multi-user access to online software applications). The application for this patent was filed much earlier by AOD's predecessor, Wrapped Apps Corporation ("WAC"). WAC failed in about 2008 because of a lack of funding and its intellectual property was transferred to its secured creditors. The operating mind, director and shareholder of both WAC and AOD was Mercier. After WAC was wound up, Mercier acted as trustee for the secured creditors, who maintained an interest in the pending patent

applications. The secured creditors were given an option to expire in 2019 to convert their interest into shares of AOD; most apparently did.

[6] AOD alleges that in 2012, Mercier, without the authority of the shareholders of AOD and without any ability to bind AOD, entered into an agreement with Miramare to assist in the financing of the advocacy required to have any of the pending patents granted. AOD alleges that Miramare entered into this agreement with Mercier for a financing agreement. AOD also alleges that Mercier did not execute the agreement with Miramare on behalf of AOD, but rather, on behalf of the secured creditors of the intellectual property. AOD alleges that these are not one and the same as the shareholders of AOD and, in any case, that Mercier acted without any corporate authority from AOD. AOD alleges that Miramare went about financing the legal fees and disbursements needed to advance the patent pending applications and that, ultimately, Miramare was a financier for the advancement of the patent pending applications, one of which ultimately came to fruition.

[7] AOD argues that it is not bound by any agreement entered into by Mercier, without its consent and without a two-third majority of the shareholders of AOD. AOD also argues that regardless, Miramare did not fulfil the terms of its agreement with Mercier for the purpose of being permitted to further negotiate with AOD for payment of its expenses in advancing the pending patent applications. Notwithstanding, AOD takes the position that Miramare should be paid, as Miramar sets out in its pleading in the alternative, its entire fee for expenses in advance of patent pending applications. AOD argues that Miramar has no title to the patent, that it is solely owned by AOD, and that Miramare has no ability to negotiate the monetization of the patent.

[8] The parties have been unable to reach an agreement on how to market the patent. AOD seeks to pay Miramare for its out-of-pocket expenses and professional services and to go about marketing the patent as it sees fit. AOD seeks a declaration that the respondent, Mercier, had no authority to bind AOD and its shareholders to any agreement that would lien, transfer, or sell any assets belonging to it. AOD “relies on the principle of privity of contract and asserts that it has no duty of care to Miramare”.



[9] The parties are also involved in a legal action brought by Miramare, seeking damages of \$968,000 for the alleged breaches of contract against Mastromonaco, the current directing mind of AOD, Mercier and AOD.

### **Mercier's Arguments**

[10] Mercier filed three affidavits on this Application. Although he signed the patent agreement at issue, and although he is named as a respondent, it is apparent from his affidavits and from his presentation at the hearing of this Application that his interests are aligned with those of AOD.

[11] Mercier was a director and shareholder of WAC and is currently a shareholder of AOD. He started WAC with Mr. Johnson ("Johnson"), now a principal of Miramare, in 2001. In his affidavits, he states that a shareholders' agreement required a two-third majority of shareholders to sell or transfer assets of the corporation. In 2008, the intellectual property of WAC included six trademarks and nine patent applications (three in Canada, three in the US and three international). In 2008, the financing of WAC became more difficult and it became necessary to transfer to the secured creditors the intellectual property of WAC. Secured creditors were also given a 10-year option in the new corporation, AOD. In March 2009, WAC defaulted on its loans and the secured creditors of WAC became the owners of the intellectual property of WAC. The secured creditors chose Mercier as their trustee. The remaining assets of WAC were rolled into AOD and Mercier was the president of AOD until May 2019. Once a secured creditor of AOD exercised his or her option, he or she became a shareholder of AOD and was no longer represented by Mercier as trustee of the secured creditors.

[12] In his affidavit, Mercier states that as a trustee of the secured creditors, he had no authority to act in the name of the shareholders of AOD as it relates to the sale or transfer of the assets of AOD. He states, as well, that in March 2009, he recruited the services of Mastromonaco to assist with the financing and maintenance of the intellectual property of the secured creditors. He swears that, in the context of required financing to maintain the intellectual property of the secured creditors, on January 30, 2012, he signed, as trustee for the secured creditors, a financing agreement drafted by Johnson and his Miramare partners for the purpose of financing legal costs associated with the pending patent applications. He states that, in January 2018, a patent was issued

in the US and Miramare made an offer to the shareholders of AOD to commercialize that patent without paying the amount provided in the agreement. He states that the parties have since been unable to negotiate an agreement for the commercialization of the patent.

[13] He alleges that Johnson knew or ought to have known that a special resolution of 67% of the shareholders of AOD was required in order to transfer or sell an asset of AOD.

### **Miramare Counter Application and Arguments**

[14] Miramare argues that on July 13, 2011, following negotiations and joint drafting under the temporary designation “New Investors” (NI), Miramare signed a licensing contract with AOD, as well as with the WAC debenture holders who held options in AOD, entitled “Patent Agreement”.

[15] It states that this contract provided NI (which subsequently became Miramare) with the authority to take over the processing of AOD’s patent applications, assuming all attendant risks and costs, in return for: i) an exclusive license in perpetuity to exploit any AOD patent that Miramare was successful in having approved by the relevant patent authority, subject to not competing with AOD itself if it ever became operational, and paying to AOD 2.5% of its gross revenues therefrom, and ii) an option to buy any approved patent for up to \$107,000 and 2.5% of any subsequent sale of the patent to a third party, if that party was not interested in continuing payment of 2.5% of its revenues therefrom. Under the patent agreement, NI/Miramare would then undertake all of the risks and provide all of the professional expertise and financing needed to attempt to monetize the patents in exchange for this consideration. It argues that the agreement was clearly more than just a simple financing arrangement.

[16] Miramare decided that it would be the corporate vehicle to assume the 2011 contract with AOD and a revised patent agreement (the patent agreement) was executed on January 30, 2012, on the same terms as previously agreed to in 2011.

[17] Miramare states that, in late 2017, after six years of work, it appeared that Miramare was going to be successful in having one of the five remaining patent applications granted. Miramare informed AOD that it wished to exercise its option to sell the patent. Miramare states that AOD agreed and that Miramare paid for the requisite due diligence and legal drafting of a revised and

restated agreement. Miramare argues that this revision was needed to reflect the due diligence results of both AOD's inadequate title documentation and its lack of resources to provide the necessary financial warranties to a purchaser at sale, resulting in the need for the sales proceeds (net of brokerage and legal fees) to be held in escrow before distribution.

[18] Miramare states that the revised and restated patent agreement, which had been jointly drafted between AOD and Miramare, was ready for ratification in June 2018, at which point Miramare was informed that the Board of AOD, specifically Mastromonaco, had refused to put the agreement to AOD shareholders and that AOD was breaching the agreement by revoking Miramare's power of attorney authority over the patent. It says that AOD suddenly ceased to comply with the agreement, refused to recognize its validity, replaced its president, Mercier, and filed this application seeking a declaration that the agreement is invalid.

[19] Miramare disputes AOD's allegations that the patent agreement was never valid and that Miramare was just a financier. It disputes AOD's allegations that it had a unanimous shareholder agreement which required a special resolution of the shareholders prior to the sale, assignment, transfer or encumbrance of all or substantially all of the intellectual property of the company. It argues that AOD has failed to bring any evidence to show that there was indeed a unanimous shareholder agreement in place at the time the patent agreement was executed in 2011.

[20] In any event, Miramare argues that it is not responsible for the internal affairs of AOD, including an alleged unanimous shareholder agreement, by reason of the common law rule of indoor management and/or s. 18(1)(a) of the *Canada Business Corporations Act*, R.S.C., 1985, c. C-44 ("CBCA").

### **Issue**

[21] This Application concerns the validity of the patent agreement.

### **Analysis**

[22] I have concluded that the patent agreement is valid. Here are my reasons.

[23] Despite the many allegations of AOD, Mastromonaco, and Mercier to that effect, there is no unanimous shareholder agreement to be found in the evidence filed on this Application.

[24] This Application was started in 2019 and AOD, Mastromonaco and Mercier have to date been unable to locate and produce a unanimous shareholder agreement. Only one agreement referencing a 67% majority of shareholders was produced and it is signed by Mastromonaco on November 1, 2011. Mercier alleged during the argument of this Application that shareholders' agreements referencing a 67% majority had been signed by other shareholders of AOD but admitted that none other were in the evidence filed on this Application. He also admitted that there is no evidence before the Court whether such an agreement was adopted unanimously by the shareholders of AOD. There is a resolution of WAC in the evidence but that is not relevant to the disposition of this Application as WAC was not the owner of the patents and was no longer in existence in 2011 and 2012. On the other hand, a document found at Exhibit E of Miramare's Application Record from a Quebec governmental authority contradicts the allegations of AOD and of Mercier as it indicates that there is no unanimous shareholder agreement for AOD.

[25] During the hearing of this Application, I asked AOD and Mercier to identify in the evidence any valid and relevant unanimous shareholder agreement – they could not. As well, both were unable to convincingly articulate why Johnson, who executed the agreement on behalf of Miramare, or Miramare, allegedly knew or should have known that Mercier lacked authority to sign the patent agreement.

[26] As a director and president of AOD, Mercier had apparent authority to legally bind AOD to the patent agreement.

[27] Miramare by its principal, Johnson, has filed a number of affidavits on this Application. In his affidavits, Johnson swears that he had no prior knowledge of any limitation on Mercier's authority as president of AOD when it entered into the July 13, 2011 patent agreement and the January 30, 2012 patent agreement. Other than bare allegations, no evidence contradicts this and when asked during the hearing of this Application, Mercier could not explain how Johnson or Miramare could have known that Mercier lacked authority as Mercier and AOD could not point to any document or evidence that limited the authority of Mercier to sign those patent agreements.

[28] The common law rule of indoor management is applicable. Its object is to protect third parties transacting with a company in good faith, unaware of the complex internal management of the company. The principle was expressed in *McAteer v. Devencroft Developments Ltd.*, 2001 ABQB 917, 99 Alta. L.R.(3d) 6; aff'd on other grounds 2007 ABCA 137, 75 Alta. L.R. (4th) 129, as follows:

... The intent and operation of the “indoor management rule”, discussed *infra*, is, in the simplest of terms, that parties without knowledge of irregularity regarding the management of a corporation, need not make inquiries as to whether all necessary internal approvals within the corporation for a transaction are in place and in order: K.P. McGuinness, *The Law and Practice of Canadian Business Corporations* (Toronto: Butterworths, 1999) at 241-243, 257-258; *J.H. McKnight Construction Co. v. Vansickler* (1915), 24 D.L.R. 298 (SCC); *Bank of Nova Scotia v. Leblanc*, [1954] 2 D.L.R. 579 (NBSCA.D.); and *Gray v. Yellowknife Gold Mines Limited and Bear Exploration and Radium Limited (No.1)*, [1945] O.R. 688 (Ont. H.C.J.), varied [1947] O.R. 928 (C.A.).

[29] In *Canadian Western Bank v. Shieldings Inc.*, [1994] B.C.J. No. 2760 (S.C.), the Court states:

**166** Where an agent puts him or herself out as having the authority to bind the principal, and such is the natural inference from the conduct of the parties and the surrounding circumstances, a third party is generally entitled to transact with the agent on the terms of such agent's usual authority: if he does so, the company will be bound by what the agent has done. This is generally referred to as the “indoor management rule” otherwise known as the rule in *Turquand’s case*. [*Royal British Bank v. Turquand* (1856) 6 E & B 327.]

**167** The following definition of this rule was adopted by Mr. Justice Owen-Flood, in *Cavell Developments v. Royal Bank of Canada* (S.C.), aff'd (1991), 54 B.C.L.R. (2d) 1 (C.A.):

... if the articles of association give a power, persons dealing with the company, though they are deemed to have notice of the extent of the power, are not bound to inquire into what is called the “indoor management” of the company to see whether the power has been properly and regularly exercised with all the prescribed formalities, and if they find an officer of the company openly exercising an authority which the directors have power to confer upon him, they are relieved from the duty of further inquiry and are entitled to assume that the power has been regularly and duly conferred.

[30] Consequently, and in accordance with the common law rule of indoor management, Miramare never had any obligation or duty to investigate the internal affairs of AOD to ensure that Mercier had the actual authority to bind AOD. It was appropriate for Miramare to assume that Mercier, as director and president of AOD, had authority to bind the corporation.

[31] Section 18 of the *CBCA* is also applicable. It provides:

18(1) Authority of directors, officers and agents

No corporation and no guarantor of an obligation of a corporation may assert against a person dealing with the corporation or against a person who acquired rights from the corporation that

(a) the articles, by-laws and any unanimous shareholder agreement have not been complied with;

[...]

18(2) Exception

Subsection (1) does not apply in respect of a person who has, or ought to have, knowledge of a situation described in that subsection by virtue of their relationship to the corporation.

[32] Mercier was president of AOD at the time of the execution of the patent agreement, and s. 18 of the *CBCA* also applies to prevent AOD from avoiding the application of the patent agreement executed by Mercier, as a representative of AOD.

[33] Regarding AOD's and Mercier's allegations that there was a unanimous shareholder agreement which prevented AOD from being bound by the patent agreement, s. 18(1)(a) of the *CBCA* provides that a corporation may not assert against any person who has acquired rights against it that a unanimous shareholder agreement has not been complied with to remove itself from the application of an otherwise binding agreement. Moreover, and in any event, a valid and applicable unanimous shareholder agreement is not in the evidence and I conclude that none is applicable.

[34] Section 18(2) of the *CBCA* and the indoor management rule provide that this rule will not apply if Miramare had knowledge or should have known of the existence of a unanimous shareholder agreement for AOD or of other restrictions on its president. Here, despite the many bare allegations of AOD and Mercier, the evidence does not reveal any applicable restriction and does not support a finding that Miramare and/or Johnson had or ought to have had knowledge that such a document or any other restriction existed. As stated above, despite their allegations, AOD and Mercier have failed to bring forward any such evidence.

[35] The common law indoor management rule will not apply where circumstances surrounding the contract are suspicious. In this case, there was nothing suspicious about this arrangement in 2011 and 2012. The factual matrix indicates that, at that time, AOD had very little activity and almost no income. It had been unsuccessfully looking for additional financing for some time and had no means to prosecute (or push forward) its pending patent applications. In a November 2010 report to its stakeholders, which included Mastromonaco, Mercier reported that AOD could hardly continue. It made sense that AOD would be willing to license another company, who appeared prepared to raise the money required to develop and implement a new strategy for the approval of the patents, in order for AOD to obtain some form of revenue from the WAC patent applications, rather than abandoning those that had yet to lapse.

[36] To have Mercier contract this arrangement with Miramare is what one would expect in the circumstances. Indeed, Mercier reported positively about the patent agreement to the stakeholders of AOD in November 2011. In his November 30, 2011 report to AOD's stakeholders, Mercier reported that, to protect their intellectual property, AOD had concluded a licensing agreement in July 2011. All of the shareholders of AOD, including Mastromonaco should then have been aware of the July 2011 agreement concluded by Mercier, yet there is no evidence before this Court of any complaint about this made at the time or prior to 2018 after Miramare succeeded in obtaining a patent and wished to proceed as per the patent agreement.

[37] I find that there was nothing suspicious or anything that could raise a suspicion that something was not done properly within AOD in the circumstances, especially after Mercier signed in both his capacity of trustee and as president, and then publicly announced the initial arrangement to AOD shareholders and debenture holders and invited their enquiries.

[38] I have reviewed the evidence and find that a trial is not required to fairly dispose of this Application and Counter Application. Although the parties have made numerous allegations, and although some facts are in dispute, there are no material facts or any genuine issues in dispute that require a trial as the evidence presented allows me to fairly and justly decide the dispute and is a more timely, affordable and proportionate procedure.

[39] There has been no cross-examinations and I have not been made aware of any such requests being made and/or refused. The parties have filed numerous affidavits and documents and have had ample time to ensure that I be presented with a complete record. Indeed, I adjourned the application in March in part to allow Mercier time to file an additional affidavit, which he did. The evidence presented allows me to fairly conclude that there was no unanimous shareholder agreement or other restriction on Mercier when he signed either of the patent agreement, and that Miramare could not have been aware of any. Moreover, the evidence allows me to interpret the patent agreement and give required directions to the parties.

[40] The primary objective of contract interpretation is to give effect to the intention of the parties at the time of contract formation. The Court must read a contract as a whole, with the words used given their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of the contract - the factual matrix. The subjective intentions of the parties are not relevant. However, while the court considers the circumstances of a written contract, those circumstances cannot overwhelm the words of the agreement. The interpretation of a written contractual provision must always be grounded in the text and read considering the entire contract. If there is doubt or ambiguity about the meaning of a contractual provision, the principle of *contra proferentem* requires that it be interpreted against the party who drafted the agreement. As well, if a contract remains ambiguous after considering its text and its factual matrix, the court may consider the subsequent conduct of the parties. There is also a general organizing principle of good faith underlying many facets of contract law, and a general duty of honesty in contractual performance. Considerations of good faith inform the process of giving effect to the intention of the parties during contractual interpretation. (See: *Sattva Capital v. Creston Moly*, 2014 SCC 53, [2014] 2 S.C.R. 633, at p. 656 – 658; *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, at paras, 45, 63 – 65, 73, 93; *Shewchuk v. Blackmont Capital Inc.*, 2016 ONCA 912, 404 D.L.R. (4th)



512, at paras. 39 – 46; *RBC Dominion Securities Inc. v. Crew Gold Corporation*, 2017 ONCA 648, 73 B.L.R. (5th) 173, at para. 45; *Consolidated Bathurst v. Mutual Boiler*, [1980] 1 S.C.R. 888, at p. 899 – 900; and *Clarke v. Alaska Canopy Adventures LLC*, 2014 ONSC 6816, at paras. 34 – 37.)

[41] Here, as indicated above, the evidence and factual matrix contradict the allegations of AOD and of Mercier. As well, AOD’s affidavit significantly relies on hearsay, even on contentious issues, and despite being contradicted by Miramare and by some of the documentation (or absence of alleged documentation) was never corrected. An important example is paragraph 12 of the affidavit of Mastromonaco which is clearly contradicted by the obvious absence from the evidence of the alleged shareholder agreement. There is no evidence of relevant restrictions on Mercier’s ability to bind AOD and no evidence of how any restriction could have been known to Miramar. On the other hand, the evidence of Miramare is generally supported by the documentation. Indeed, considering the evidence and factual matrix, it made sense for the parties to enter into the patent agreement.

[42] Read as a whole, with the words used given their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time, I find it impossible to interpret the patent agreement as is argued by AOD and Mercier. For example, it would leave Miramare with no compensation for its successful prosecution of a patent as the compensation provided in the agreement flows towards AOD. By opposition, the interpretation suggested by Miramare accords with the language of the agreement read as a whole.

[43] The patent agreement, like the 2011 agreement, was signed by Mercier warranting that he was doing so as the nominee for the secured creditors as a director and as the Chief Executive Officer of AOD, with authority to bind these parties. It provides clearly that Miramare acquires an exclusive right to exploit the patent free and unfettered, except as provided by the patent agreement. That is the equivalent of a licensing right or licensing agreement in favour of Miramare. In return, the patent agreement provides that AOD is to receive, amongst others, a stipulated percentage of Miramare’s gross revenues generated from the patent. In addition, the patent agreement provides to Miramare an exclusive option to purchase the patent at any time by paying to AOD its legal fees then incurred in order to advance the patent, up to \$107,000. It is not a complicated agreement and its language is clear and unambiguous.

**Conclusion**

[44] The Application is therefore dismissed.

[45] The patent agreement of January 30, 2012 is valid and enforceable against AOD.

[46] The Counter Application is allowed, and the following is ordered:

- a) Miramare is the only entity that may deal with the patent, as per the patent agreement.
- b) As provided at paragraph one of the patent agreement, Miramare has the exclusive right to exploit the patent free and unfettered, except by the terms of the patent agreement, in return for the payments provided in the patent agreement.
- c) As provided at paragraph nine of the patent agreement, Miramare has the exclusive option to purchase the patent at any time by paying to AOD its legal fees, then incurred to advance the patent, up to \$107,000.
- d) Miramare has full authority to instruct legal counsel while providing the necessary power of attorney for that counsel, as chosen by Miramare, to deal with the United States Patent Office (USPO), so that Miramare, at its own expense, can ensure proper maintenance of and enhancement to the patent until it is sold or licensed.
- e) Miramare may proceed to the sale or licensing of the patent through an arms-length international patent broker to an arms-length third party, for its fair market value, the net proceeds of which, after marketing, brokerage and legal costs, will be held in escrow with Gowlings until any matters of financial warranty to a buyer, outstanding damages or liabilities between the parties or disputes as to the sales terms of the agreement are agreed upon or, in the alternative, adjudicated.
- f) Upon the sale or licensing of the patent, Miramare shall pay to AOD all amounts owing to AOD under the patent agreement.
- g) The parties may return before me for any issues relating to the finalization and implementation of this order, by contacting the trial coordinator.

[47] If the parties are unable to agree on the costs of this Application and Counter Application within the next 10 days, brief written submissions not exceeding five pages and five enclosures, together with a costs outline, shall be sent to my assistant by Miramare by 4:00 p.m. on July 5, 2021, by AOD and Mercier by 4:00 p.m. on July 12, 2021, and any brief reply by Miramare by 4:00 p.m. on July 16, 2021. I ask the parties to kindly advise me if they resolve the issue of costs but I will nonetheless assume that the issue of costs has been resolved if I do not receive any written submissions, or hear differently, by July 16, 2021.

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Mr. Justice P.E. Roger

**Released:** June 15, 2021

**CITATION:** AOD Corporation v. Miramare Investment Incorporated, 2021 ONSC 4280  
**COURT FILE NO.:** 19-80545  
**DATE:** 20210615

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

AOD CORPORATION

Applicant

**-and-**

MIRAMARE INVESTMENT INCORPORATED and  
ALAIN MERCIER

Respondents

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**REASONS FOR DECISION**

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Roger J.

**Released:** June 15, 2021

# TAB 5

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a e 2001-05-07

Heard: May 2, 2001

Judgment: May 7, 2001

Docket: 01-CL-4016

*R. English, for Trustee*

*R. Shour, for 1333203 Ontario Limited*

**rse e . Lax J.**

1 This motion is brought by Deloitte & Touche Inc. in its capacity as Construction Lien Trustee and in its capacity as Trustee in Bankruptcy. It raises the issue whether the Trustee should perform an agreement for the purchase and sale of land where the estate will receive no benefit from the transaction. The facts are unique.

2 700 King Street (1997) Ltd. was incorporated to convert 700 King Street West to mixed residential and commercial condominium use. Richard Crenian was its sole officer and director. He was also president and a 50% owner of Peregrine Hunter, a real estate developer and the project manager for 700 King. Armadale Properties Limited was a principal investor and 50% owner of the King Street project.

3 On February 9, 2001, Armadale obtained an order appointing Deloitte & Touche Inc. as Trustee and Receiver and Manager of 700 King and of 140085 Ontario Limited, a company which held title to the remaining real property assets of 700 King. On February 19, 2001, 700 King was assigned into bankruptcy and Deloitte & Touche Inc. was also appointed Trustee in Bankruptcy.

4 Yotam Goldschlager was directly or indirectly a purchaser of three residential units and one commercial unit at 700 King. The residential units were purchased for members of his family. The commercial unit, Unit 8, was purchased for his business. With respect to each of these purchases, Goldschlager dealt exclusively with Crenian, who had apparent and actual authority to enter into the agreements of purchase and sale on behalf of 700 King. This motion concerns the purchase of Unit 8.

5 On March 20, 1999, Goldschlager, through a numbered company as purchaser, entered into an Agreement of Purchase and Sale with Peregrine Homes Ltd. and 700 King as vendors. The purchase price provided in the Agreement of Purchase and Sale was \$185,000 and by Amending Agreement dated January 5, 2000 was increased to \$206,082. The uncontradicted evidence of Goldschlager is that initially, he was only prepared to pay \$185,000 for Unit 8 and Crenian was only willing to sell it to him at that price if he paid a deposit of \$100,000. Goldschlager agreed to this. Goldschlager's company provided cheques for \$100,000 in May 1999, \$22,557.74 in June 2000 (in accordance with the Amending Agreement) and \$85,000 (the balance of the purchase price) in December 2000, with the result that the entire purchase price was paid by way of deposit. At the request of Crenian, the cheques were made payable to Peregrine Homes Ltd. In July 2000, Goldschlager moved his business from its former premises to Unit 8 and spent about \$80,000 in improvements and moving costs.

6 The residential units closed on January 5, 2001. The transfer date for Unit 8 was scheduled for January 15, 2001 and postponed to February 7, 2001, but did not take place. The Receivership and Bankruptcy followed shortly after.

7 After its appointment, the Trustee proceeded to close sales of the residential and commercial units that had been sold. When it reviewed the files for Unit 8, it became apparent that all of the purchase monies for this unit had been paid by way of deposit to Peregrine Homes Limited, which was a personal company of Crenian, and had never been received by 700 King. There are no further funds to be delivered to the Construction Lien Trustee or to the Trustee in Bankruptcy upon the closing of the transaction. There is therefore no benefit to the creditors of the bankrupt in completing the transaction. The Trustee now applies for the advice and direction of the court.

8 The Trustee advances two arguments. First, it submits that the manner of payment is an essential term of a contract and that payment to one of two joint vendors in the absence of a written direction relieves the other contracting party from performing. Second, it submits that as the Trustee and the court must protect the assets of the estate for the benefit of the creditors, where the estate will receive no benefit, the court should direct the Trustee to disclaim the contract. In any event, as Trustee in Bankruptcy, it can only convey the bankrupt's interest, which is subject to mortgage and lien claims. Goldschlager would not

accept this title. Although its powers as Construction Lien Trustee permit it to convey clear title, it questions whether it would be appropriate for the Trustee to use its lien powers in this way.

9 In my opinion, these arguments are both answered in the circumstances of this case and the Trustee should be directed to use its lien powers to convey clear title to Goldschlager in accordance with the Agreement of Purchase and Sale and consistent with the Statement of Adjustments that was prepared in anticipation of the scheduled closing.

10 As to the Trustee's first argument, I was provided with no case that stands for this proposition, but assuming this is sound law, it cannot apply in this case. The Trustee concedes that Crenian had actual authority to enter into the Agreement of Purchase and Sale and to direct the manner in which the funds were to be paid. This is precisely what occurred. Crenian determined that the funds should be paid to Peregrine Homes Ltd. and Goldschlager complied with this direction. It makes no difference that there is no written direction for payment. Crenian did not pay the funds to 700 King, but this cannot affect the performance obligations of 700 King under the contract.

11 As to the second argument, the circumstances under which a trustee can disclaim a contract entered into by a bankrupt prior to its bankruptcy have long been the subject of uncertainty: *Re Triangle Lumber & Supply Co.* (1978), 21 O.R. (2d) 221 (Ont. H.C.); *Re Erin Features No. 1 Ltd.* (1991), 8 C.B.R. (3d) 205 (B.C. S.C. [In Chambers]). Assuming a trustee has this right, section 75 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B.3 prevents the Trustee from disclaiming this contract. As was noted by Saunders J. in *Re Triangle*, *supra*,:

A reading of s.53 [now, s.75] would appear to dispose of the problem. An agreement for sale in favour of a bona fide purchaser or mortgagee for valuable consideration is valid and effectual as if no receiving order had been made. It would therefore appear that the Trustee is bound by the agreement and may not disclaim it.

12 In the event that I am wrong and section 75 does not apply, I would not allow the Trustee to disclaim this contract. It is clear that a trustee can only succeed to the rights of a bankrupt and has no higher or greater interest. A trustee cannot terminate property rights that have passed under the contract prior to the bankruptcy: *Re Triangle*, *supra*; *Re Erin Features No. 1*, *supra*. The equitable interest under this contract passed prior to the bankruptcy and



Goldschlager could have enforced the transfer of title by way of specific performance. In my opinion, the property was validly conveyed and all that remained was the delivery of a deed.

13 I was referred to the decision in *Re Bakermaster Foods Ltd.* (1985), 56 C.B.R. (N.S.) 314 (Ont. S.C.) as contrary authority. In that case, if the Trustee had closed the transaction, there would have been a substantial deficit, which could only be made up from the funds in the estate to the prejudice of the unsecured creditors. The Trustee was directed not to close the transaction. In my view, these were exceptional circumstances, which have no application here.

14 The Trustee submitted that Goldschlager was the author of his own misfortune in providing the entire purchase monies as deposit and it is therefore he and not the creditors of 700 King who should bear this loss. In my view, if there is culpability, it does not rest with Goldschlager. He had no relationship with Crenian except as a purchaser of real estate. He has offered an explanation for providing the deposit he did. Although Peregrine Homes Ltd. had no beneficial interest in Unit 8, it was the bankrupt that gave Crenian apparent authority to act as he did. Prior to the bankruptcy, 700 King could not assert as against Goldschlager that Crenian lacked the authority to direct payment of the funds to Peregrine Homes Ltd. As the Trustee stands in the shoes of the bankrupt, it cannot now complain of the very loss to the estate that the bankrupt brought about.

15 Finally, the Trustee is an officer of the court and must act fairly to all parties with an interest in the estate. It would be dishonourable for the Trustee to disclaim this contract. I therefore find that the Trustee is bound by the contract in the same manner and to the same extent as the bankrupt was at the time of the bankruptcy and has no power to disclaim the contract. The Trustee is directed to complete the transaction in its capacity as Construction Lien Trustee. It may discharge the caution registered on title by 1333203 Ontario Limited. The Trustee and the numbered company should have their costs out of the estate. I fix the costs of the numbered company at \$2500.

*Order accordingly.*

**TAB 6**

Buchanan v. Oliver Plumbing & Heating Ltd.

[1959] O.R. 238-248

ONTARIO

[COURT OF APPEAL]

ROACH, SCHROEDER and MCGILLIVRAY, JJ.A.

18th MARCH 1959.

Sale of land -- Offer and acceptance -- Relationship pending completion -- Subsequent completion -- Trust -- Relation back.

A trust relationship between vendor and purchaser arises on the acceptance by the vendor of an offer to purchase by the purchaser which relates back to the time of the acceptance if the transaction is completed. So even if the contract stipulates that the property is not at the purchaser's risk pending completion and the property is damaged during that period but the purchaser elects to take it in its damaged condition, the vendor and the purchaser have a good cause of action against a tortfeasor liable for the damage done. In such a case the vendor is a trustee for the purchaser for any damages recovered by the vendor.

Torts -- Victim's contractual rights -- Immaterial.

A tortfeasor can derive no advantage from contractual rights accruing to his victim as a result of the injury under a contract between the victim and a stranger. Such rights are *res inter alios acta* and wholly irrelevant to the victim's cause of action against the tortfeasor.

Practice -- Two actions against same defendants -- Evidence in one action -- Right to resort to in other action.

Where two actions, the one brought by two plaintiffs and the

other by one only of those plaintiffs against the same defendants in each action, are tried together and the trial Judge directs proof of the claim in the second action before hearing the defence in either action, the Court may, and if necessary should under its discretionary power under Rule 232 permit the evidence for the plaintiff in the second action to be treated as evidence in the first action.

THIS was an appeal by the defendants from a judgment of Kelly, J., 30th May 1948 in two actions in favour of the plaintiff for damages and a reference to the master to ascertain the damages.

The plaintiffs in the first action were Buchanan as vendor and James as purchaser of certain property in Brantford. The plaintiff in the second action was Buchanan who sued for damages done to the contents of the property by the negligence of the defendants while in the first action the two plaintiffs claimed for the damages to the building. James made an offer to purchase the said property on 4th March 1957 and the plaintiff Buchanan accepted the offer 5th March 1957. The closing date in the contract was 1st May 1957 but the deal was not finally closed until 20th June 1957. April 12th, 1957 the defendant firm sent the second defendant, its employee, to effect certain repairs to the plumbing in the house. He brought with him a propane tank and while he was in the course of lighting the burner on the tank gas began to escape and it subsequently exploded doing extensive damage to the property and the contents. The trial Judge applied the rule of *res ipsa loquitur* and held that the cause of the damage was the negligence of the first defendant and its employee the second defendant. This finding was not challenged on the appeal. The defendants appealed on four grounds, first that the plaintiff Buchanan had no cause of action because she had divested herself of the property before the institution of the action and had received the full purchase price of the property from her co-plaintiff, secondly, that James had no cause of action because at the time of the explosion he was not the owner of the property nor had he any interest therein and he could under the contract have declined to accept the property in its damaged condition and any damages suffered by him flowed

directly from his own election to take the property in its damaged condition rather than from any tortious action on the part of the defendants. Thirdly, the plaintiff Buchanan had not assigned to James her chose in action against the defendants and, that chose in action being a cause of action in tort, it was not assignable. Fourthly, the plaintiffs had failed to prove that the second defendant was the servant of the first defendant.

H.A. Rice, for the appellants: Damages are a necessary ingredient in an action based on negligence; the plaintiffs must prove damages to sustain the action, and the onus of proof is on the plaintiffs: *Maple Leaf Lbr. Co. v. Caldbick* (1917), 40 O.L.R. 512. The trial proceeded on the basis that the offer to purchase was accepted on 5th March but this was accepted by the trial Judge on the strength of a statement by plaintiffs' counsel and no evidence was adduced to prove that a valid contract existed at the date of the explosion. If no contract between the plaintiffs James and Buchanan was in existence at the date of the explosion, James had no cause of action against the defendants neither had Buchanan, either as trustee for James or personally as she suffered no damage. Assuming that a contractual relationship existed between the plaintiffs, the cause of action follows the risk and the contract provided that the property was at the risk of the vendor, who suffered no damage and therefore had no cause of action; James had no legal right to the property to enable him to bring an action: *H.B. McGinniss Ltd. v. Dunford*, [1958] O.R. 404. James under a valid contract would have an equitable chose in action, a personal action against the vendor if she refused to carry out the contract, and not an equitable estate in land: *Re Flatt & Prescott & Russell* (1890), 18 A.R. 1, *Robinson v. Moffatt* (1916), 37 O.L.R. 52. It is an equitable doctrine that the vendor is a trustee for the purchaser and is only operative inter partes: *Montreal Trust v. Toronto*, [1944] O.R. 1, *DiGuilo v. Boland*, [1958] O.R. 384. The terms of the contract provided for termination on damage by fire and James made a new offer by his election to proceed with the purchase. James elected to assume these damages and can't complain of them against a tortfeasor; he has a duty to mitigate his damages; by

his election he bought a law suit, and cannot sue the tortfeasor. No evidence was adduced at the trial of a contractual relationship between the plaintiffs and the defendants, and a cause of action in tort cannot be assigned: *Royal Exchange Assce, v. Grimshaw Bros. Ltd.* (1928), 62 O.L.R. 25. When both parties are in Court damages to be assessed are those of the person who has a cause of action: *Rice Lake Fur Co. v. McAllister* (1925), 56 O.L.R. 440. Even if the cause of action were assignable, it must be by an absolute assignment, and by bringing a second action against the defendants. Buchanan indicates that there was no absolute assignment; even if there had been an absolute assignment, only Buchanan's damages could be assessed. The plaintiffs did not prove the existence of a master-servant relationship between the defendants or that the servant was acting in the scope of his employment: *Mongraw v. Paddock Tavern*, [1950] O.W.N. 463. The trial Judge erred in referring the matter of damages to the local master without any directions as this was a delegation of jurisdiction; there should have been a direction that the damages to be assessed were those of those of the plaintiff Buchanan.

W.B. Williston, Q.C., N.W. Allingham and R.J. Rolls for the respondents: Either or both plaintiffs were entitled to recover damages to the building, and in the circumstances of this case, if Buchanan recovers she must hold the money as trustee for James; either plaintiff may claim personal damages. Proof of repairs is the only evidence of damages and who paid for them is immaterial. A trustee relationship exists between the plaintiffs, and either the trustee or the cestui que trust may bring an action for damages. The purchaser has an interest in the land: *Lysaght v. Edwards* (1876), 2 Ch. D. 499, *Williams, Vendor & Purchaser*, 4th ed., 547, *Hanbury, Modern Equity*, 7th ed., 400, 14 Hals., 3rd ed., p. 558, para. 1040, *Rowe v. Fidelity-Phoenix F. Ins. Co.*, [1944] O.W.N. 387. The purchaser was the equitable owner and the vendor was a trustee, (with an interest) for him of the legal estate subject to the payment of the balance of the purchase price: *Hillingdon Estates v. Stonefield Estates*, [1952] 1 Ch. 627. A trustee relationship exists where the Court would have given specific performance: *Howard v. Miller*, [1915] A.C. 318. The position

of the parties to a contract is in a state of suspense until certainty as to its completion is established, then their relationship dates back to the date of the contract: *Rayner v. Preston* (1881), 18 Ch. D. 1. If there is any want of proof that the defendant Porteous was the employee of the defendant corporation, the respondent can now be granted leave as of right to adduce the necessary evidence: *Rbt. Simpson Co. v. Ruggles* (1929), 65 O.L.R. 186, Rule 232.

H.A. Rice, in reply.

E.J.K. Cur. adv. vult.

SCHROEDER, J.A. (after stating the facts summarized above):--  
In my respectful opinion, the first three grounds of appeal area based upon a misapprehension of the true relationship which exists between a vendor and purchaser of lands after they have entered into a valid contract for sale. That relationship was defined by Jessel, M.R., in *Lysaght v. Edwards* (1876), 2 Ch. D. 499, at p. 505-6 in these words:--

That being so, the next point I have to consider is, What is the effect of the contract? It appears to me that the effect of a contract for sale has been settled for more than two centuries; certainly it was completely settled before the time of Lord Hardwicke, who speaks of the settled doctrine of the Court as to it. What is that doctrine? It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession.

The relationship created by such a contract does not entail all the obligations of an ordinary trusteeship. The vendor is not a mere dormant trustee; he is a trustee having a personal

and substantial interest in the property, a right to protect, and an active right to assert that interest if anything is done in derogation of it. The relation, therefore, of trustee and cestui que trust subsists, but subject to the paramount right of the vendor to protect his own interests as vendor of the property: *Shaw v. Foster* (1872), L.R. 5 H.L. 321, per Lord Cairns, at p. 338.

In *Cornwall v. Henson*, [1899] 2 Ch. 710, at p. 714 Cozens-Hardy, J., pointed out that to state that the effect of a contract for the sale of land was to make the purchaser the owner of the land in equity from that moment, was to state the proposition too broadly. He expressed a qualification of that principle in these words:--

The doctrine is subject to one obvious qualification -- namely, that the contract is one of which the Court under the circumstances will decree specific performance. For instance, if the vendor is not in a position to obtain a decree for specific performance, whether by reason of some defect in title or by reason of some collateral misrepresentation, the purchaser never was, in the view of the Court, owner in equity of the property. So, too, if by reason of delay or other circumstances the Court declines to grant to the purchaser specific performance, the purchaser is not treated as being in equity owner of the property.

It should be stated that this judgment was reversed, [1900] 2 Ch. 298, but on another ground.

It is urged by counsel for the appellant that on the date of the explosion, 15th April 1957, whatever may have been the rule applicable to the interest of the vendor and purchaser of the property inter se, it could not be extended to enforce the purchaser's equities attaching to the property against a stranger to the contract and, indeed, that he could not enforce such equities until the contract was carried into effect; that his rights even as against the vendor were not enforceable unless the contract was one of which the Court would enforce specific performance, a thing which could never be pre-supposed. In the present case, however, it is not necessary



to speculate about this point. As has been stated, the offer to purchase was made 4th March 1957 and was accepted 5th March 1957, when a deposit of \$5,000 was paid. On 20th June 1957, the purchaser chose to accept the property in its damaged condition with the compensating benefits, paid the balance of the purchase price, and took a conveyance from the vendor which was duly registered. Thus the contract between the plaintiffs was completely carried into effect. In these circumstances, the principle enunciated by James, L.J., in *Rayner v. Preston* (1881), 18 Ch. D. 1, at p. 13, governs not only the rights of the immediate parties to the agreement, but also the rights of the purchaser against strangers to the contract. The passage in the opinion expressed by James, L.J., to which I allude, reads as follows:--

I am of opinion that the relation between the parties was truly and strictly that of trustee and cestui que trust. I agree that it is not accurate to call the relation between the vendor and purchaser of an estate under a contract while the contract is in fieri the relation of trustee and cestui que trust. But that is because it is uncertain whether the contract will or will not be performed, and the character in which the parties stand to one another remains in suspense as long as the contract is in fieri. But when the contract is performed by actual conveyance, or performed in everything but the mere formal act of sealing the engrossed deeds, then that completion relates back to the contract, and it is thereby ascertained that the relation was throughout that of trustee and cestui que trust. That is to say, it is ascertained that while the legal estate was in the vendor, the beneficial or equitable interest was wholly in the purchaser. And that, in my opinion, is the correct definition of a trust estate. Wherever that state of things occurs, whether by act of the parties or by act or operation of law, whether it is ascertained from the first or after a period of suspense and uncertainty, then there is a complete and perfect trust, the legal owner is and has been a trustee, and the beneficial owner is and has been a cestui que trust. (Emphasis added.)

This passage was quoted with approval by Duff, J. (as he then

was), in *The King v. Caledonian Ins. Co.*, [1924] S.C.R. 207, at p. 213, where he pointed out that what was stated by James, L.J., in the passage quoted was entirely consistent with the judgment of Lord Parker in *Howard v. Miller*, [1915] A.C. 318.

Applying that principle to the facts of this case, the completion of the contract on 20th June 1957 related back to the contract itself so that on the date of the explosion, 15th April 1957, there had been established a complete and perfect trust, and on that date and, indeed, on 5th March 1957, the plaintiff Buchanan was the trustee and the plaintiff James the beneficial owner of the property, the cestui que trust. When, therefore, the writ of summons was issued in this action on 26th June 1957, the parties were entitled to claim in those respective capacities, as well as in their individual capacities to the extent hereinafter indicated.

It is to be observed that in these cases the trusteeship is not from the beginning an absolute one, for it is recognized that the vendor has a personal and substantial interest in the property which he is bound to protect. His beneficial interest in the land consists first in his lien thereon for the price, and this involves his right to hold possession of the land until the whole purchase money is paid as well as the right to take for his own use the rents and profits up to the proper time for completion. The plaintiff Buchanan was, therefore, entitled to assert a claim for the physical damage done to the property by the explosion as trustee for the purchaser James, and she was also entitled to make a claim in her individual capacity for the damages consequent upon the disruption of her right to the use and enjoyment of the property until the date of closing of the transaction, when the purchaser became entitled to possession thereof. The damages which may be awarded to her as trustee she will hold, of course, in trust for the benefit of her co-plaintiff. The plaintiff James is also entitled to be compensated for the interference with his right to the use and enjoyment of the property from the date of the closing of the transaction to the time when the property could be restored to its former condition. These damages, too, should be awarded to the plaintiff Buchanan as trustee for James, to whom she will be accountable therefor.

Normally, under a contract for the sale of land, the property is from the date of the contract at the risk of the purchaser and he has no claim against the vendor for depreciation or deterioration which is not due to the vendor's neglect: *Robertson v. Skelton* (1849), 12 Beav. 260. Thus if a house is burned between the date of the contract and the date of completion the purchaser must bear the loss: *Paine v. Meller* (1801), 6 Ves. 349. Here, however, the parties have by a special stipulation set forth in the contract provided against such a contingency and, as has been observed, the plaintiff James elected, as was his right under the contract, to take a conveyance of the property notwithstanding its damaged condition.

What has been stated as to the relation between the plaintiffs as the vendor and purchaser of this property is sufficient to dispose of the contentions advanced by the appellants' counsel on the first three grounds of appeal. I wish to add, however, that the plaintiff Buchanan's recovery of the full purchase price was an advantage which accrued to her under a contract between herself and her co-plaintiff with which the wrong-doer had no concern and of which he can take no advantage. This may also be said of the appellants' contention that the plaintiff James had freely elected to take the property in its impaired state, although he was not obliged to do so. So far as the wrong-doers are concerned any benefits accruing to the plaintiffs under the contract, or any obligations to which they may be subjected thereunder, are completely irrelevant. The plaintiffs are prosecuting against the defendants a distinct cause of action and whatever contractual rights may be asserted by them inter se are completely immaterial so far as their respective claims for reparation against the defendants are concerned. This point was discussed in relation to insurance contracts in *Millard v. Toronto R. Co.* (1914), 31 O.L.R. 526 (C.A.) and *Morwick v. Provincial Contracting Co. Ltd.* (1923), 55 O.L.R. 71 and in the cases therein cited.

I come now to a consideration of the fourth ground of appeal, namely, that the plaintiffs have not established that there was

a master and servant relationship between the two defendants, nor that the defendant Porteous was acting in the course of his employment as a servant of the corporate defendant at the material time. It should be mentioned here that in addition to the action brought by the two plaintiff, the plaintiff Buchanan brought a separate action for recovery of the damage caused to the contents of the residence and which were wholly owned by her. On 9th May 1958, the assistant master made an order directing that both actions be set down consecutively on the list for trial at Brantford, and that the action of both plaintiffs be tried first, and that the other action in which Buchanan was the plaintiff be tried immediately thereafter, subject to the discretion and direction of the trial Judge.

At the conclusion of the trial of the first action, counsel for the defendants moved for a non-suit which was dismissed. At that time, however, the defendants did not declare their election not to call evidence. The record discloses the following colloquy between appellants' counsel and the learned trial Judge at the conclusion of the testimony in the first action:--

MR. RICE, My Lord, I understand that the plaintiffs Buchanan and James have completed their case in the first action?

HIS LORDSHIP: Yes, I want proof of the claim in the second action now, before the defence.

The learned Judge then heard the evidence of Buchanan, who had not testified in the first action. In the course of her testimony she stated that she had communicated by telephone with the first defendant requesting them to make certain plumbing repairs on her property and that, in compliance with her request, a plumber (presumably the defendant Porteous) was sent. This evidence, however, was not adduced as part of the evidence in the first action.

It was pleaded in the statement of claim that the defendant Porteous was at all material times acting in the course and within the scope of his employment as a servant of the first

defendant. This was not denied by the defendants either generally or specifically and the first defendant in fact pleaded:--

... that at all times any equipment supplied by it or used by any of its employees was in a good and workable condition free and clear from all defects and that all of its employees, including the defendant Kenneth Porteous, received full and adequate instructions with regard to the handling and use of the equipment.

The witness Rathbun, an inspector in the Brantford fire department, stated that he took charge of the alleged defective equipment and subsequently went to the premises of the first defendant where he saw one MacDonald. He referred to the latter as a representative of the plumbing company without further specifying the position or office which he occupied. A conversation ensued from which it may be inferred that MacDonald recognized Porteous as the company's employee and admitted that he was carrying out his duties as such employee on the premises in question. Later in the day this witness attended again at the office of the plumbing company and brought with him the tank in question. There he met L. Oliver and MacDonald as well as an insurance adjuster and a person who was said to be the solicitor for the defendant company. Rathbun also stated that sometime after the accident Mr. Oliver of the Oliver Co. called for the equipment in question and took it away from his office.

Plaintiffs' counsel read in to the record the answers made by Porteous on his examination for discovery, but it is well settled, of course, that these answers constitute evidence only as against the party examined and not as against his co-defendant.

Counsel for the respondents submits that there was sufficient evidence in the first action to establish that the defendant Porteous was, at the material time, acting as the servant of the first defendant and that the latter was the owner of the propane tank which caused the explosion and fire. Giving due weight to the portions of the evidence to which I have referred

and to the admission made by the corporate defendant in its statement of defence, I agree with this submission. It was not necessary to support the plaintiffs' case in the first action to resort to any other testimony. If this were not so, I would consider it proper for this Court to exercise its discretionary power in accordance with Rule 232 by permitting the plaintiffs to make the evidence of Buchanan, adduced in the second action, evidence for the plaintiffs in the first action. This evidence in addition to the evidence in the first action, establishes the point beyond question.

The learned trial Judge gave no specific directions as to the manner in which the damages of the plaintiffs were to be assessed by the referee. I have indicated in broad terms the heads of damage to be considered in addition to the physical damage to the property and this should provide a sufficient direction to him to ascertain the plaintiffs' damages under the terms of the reference. The appeal should be dismissed with costs.

Appeal dismissed.

Solicitor for the defendants, appellants: D.J. Walker,  
Toronto.

Solicitors for the plaintiffs: Pennell & Wyatt, Brantford.  
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**TAB 7**

**CITATION:** C & K Mortgage Services Inc. v. Camilla Court Homes Inc., 2020 ONSC 5071  
**COURT FILE NO.:** CV-20-00643021-00CL  
**DATE:** 20200827

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**IN THE MATTER OF SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED, SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990 C. C.43, AS AMENDED AND SECTION 68 OF THE *CONSTRUCTION ACT*, R.S.O. 1990, C. 30**

**RE:** C & K MORTGAGE SERVICES INC., Applicant

**AND:**

CAMILLA COURT HOMES INC. and ELITE HOMES INC., Respondents

**BEFORE:** Dietrich J.

**COUNSEL:** *Richard Macklin and Yolanda Song*, for the Moving Party Yong Yeow (Jeremy) Tan

*David P. Preger and David Z. Seifer*, for the Applicant

*Eric Golden*, for the Receiver, Rosen Goldberg Inc.

**HEARD:** August 21, 2020

**ENDORSEMENT**

[1] Yong Yeow (Jeremy) Tan and his wife Melissa, a Canadian citizen, live in Ho Chi Min City, Vietnam. When Mr. Tan retired from his employment in logistics, Melissa and he decided to use his savings and retirement bonus to purchase a residence in the City of Mississauga, Canada, where they would live. There, they would be closer to Melissa's family and Mr. Tan would work as a logistics consultant.

[2] On February 12, 2020, Mr. Tan entered into an agreement of purchase and sale (the "APS") with the Respondent Elite Homes Inc. ("Elite Homes") to purchase a residential unit within a condominium project, municipally known as 180 Mateo Place, Mississauga, Ontario (the "Mateo Property"). In accordance with the APS, Mr. Tan paid a deposit of \$500,000, \$100,000 of which he paid to the real estate broker, in trust, and \$400,000 of which he paid directly to Elite Homes.

[3] Prior to the parties entering into the APS, the applicant/responding party C & K Mortgage Services Inc. carrying on business as Rescom (the "Applicant"), had made a loan to the Respondents Elite Homes and Camilla Court Homes Inc. ("Camilla Court"). The loan was



secured by a first mortgage against the Mateo Property and other properties included in the condominium project, of which Camilla Court was the registered owner.

[4] When the Mateo Property was close to completion, on or about June 10, 2020, the principal of Elite Homes, Junaid Sudiq, advised the Applicant that the Respondents would be seeking a discharge of the Applicant's first charge on the Mateo Property to complete the sale to Mr. Tan. Mr. Sudiq also advised the Applicant that the proceeds from the sale of the Mateo Property would not be sufficient to obtain a discharge in accordance with the terms of the loan because the Respondents had used Mr. Tan's \$400,000 deposit to fund ongoing construction and development activity and they had no funds to it.

[5] The Applicant then applied to this court to have a receiver appointed. On July 2, 2020, Justice Conway appointed Rosen Goldberg Inc. (the "Receiver") as receiver over the Mateo Property and one other property in the condominium project. At that time, the Applicant's loan had been in financial arrears since May 15, 2020.

[6] Once the Receiver was appointed, Elite Homes could not close the sale pursuant to the APS. The Receiver decided to disclaim the APS.

[7] Mr. Tan brings this motion for an order directing the Receiver to refrain from disclaiming the APS and, instead, to complete it. Mr. Tan asks the court to find that he has an equitable or proprietary interest in the Mateo Property equal to the \$500,000 paid as a deposit.

[8] For the reasons that follow, I decline to grant the relief sought. In weighing the equities, I find that the Receiver has not breached its fiduciary duty in its decision to disclaim the APS.

### **Issue**

[9] The issue in this matter is whether Mr. Tan has an interest in the Mateo Property that should subordinate the interest of the Applicant first mortgagee.

### **Background Facts**

[10] Pursuant to a commitment letter dated October 6, 2018, the Applicant advanced a secured loan in the principal amount of \$4,550,000 to the Respondents. As security for the loan, the Applicant obtained a first charge against the Mateo Property and other properties in the condominium project. A second mortgage and a number of construction lien claims were subsequently registered on title to the Mateo Property.

[11] Pursuant to the secured loan agreement, the Applicant agreed to provide partial discharges of the loan for individual house sales provided that it received 100 percent of the net proceeds of sale, less the borrower's real estate commission, legal fees and HST, but not less than \$1,750,000 per house.

[12] Prior to executing the APS, Mr. Tan retained a lawyer, Stephen Poquiz, to review it.

[13] Paragraph 41 of Schedule “A” to the APS provides that the APS “shall be, and is hereby, subordinate to and postponed to any mortgage(s) arranged by the Vendor and any advances made thereunder from time to time or liabilities secured thereunder ...”

[14] The closing of Mr. Tan’s purchase was set to take place on April 30, 2020, when the balance of the purchase price of \$1,758,000 would be due. The closing date was extended to June 26, 2020.

[15] Because the Respondents had used Mr. Tan’s \$400,000 deposit to fund ongoing construction and development activity, the net sale proceeds of sale for the Mateo Property would be less than the amount required under the loan agreement. Prior to the scheduled closing date, the Applicant declined to grant a partial discharge of the mortgage and ceased to make any further advances on its loan to the Respondents.

[16] Mr. Poquiz represented Mr. Tan at both the June 18, 2020 hearing of the Applicant’s application for the appointment of the Receiver, which was adjourned at his request, and the July 2, 2020 hearing at which the Receiver was appointed. Mr. Tan did not apply to vary or appeal the Receivership Order.

[17] Following its appointment, the Receiver advised Mr. Tan of its intention to disclaim the APS. The Receiver confirmed that Mr. Tan could make an offer on the Mateo Property, and compete with any other purchaser, but that he would not receive any credit for his deposit.

[18] If the Receiver disclaims the APS, Mr. Tan would lose at least \$300,000 of his deposit. He will likely recoup \$100,000 through the Tarion Corporation; and he could likely recover an additional \$100,000 of the deposit if he releases all claims against the realtors and Elite Homes.

### **Positions of the Parties**

[19] Mr. Tan asserts that a court-appointed receiver, as an officer of the court, owes a fiduciary duty to act in the best interests of all stakeholders in the debtors’ estate and must not favour the interests of a secured creditor over others. Mr. Tan further submits that a court-appointed receiver does not have unlimited authority to disclaim contracts entered into by the debtor prior to the receivership, and that, in the case of Mr. Tan’s APS, a disclaimer would be a breach of the Receiver’s fiduciary duties.

[20] Mr. Tan also asserts that he has a proprietary or equitable interest in the Mateo Property to the extent of his \$500,000 deposit. Accordingly, he asserts that the Applicant should complete the APS by conveying the Mateo Property to Mr. Tan for the difference between the purchase price agreed to in the APS and the deposit he paid. He further asserts that the equities weigh in favour of completing the APS and that the Applicant’s legal priority is but one consideration in the decision to disclaim a contract.

[21] Mr. Tan submits that the Receiver should not be permitted to disclaim the APS because:  
a) it is grossly unfair and would cause significant financial hardship to Mr. Tan; and b)

completing the APS would not be onerous or commercially unreasonable, and it would not create a significant preference in favour of Mr. Tan.

[22] The Applicant asserts that if the Receiver is directed to complete the APS, its priority under the first mortgage will be subordinated to the APS, which is contrary to both the terms of the APS and the Receivership Order.

[23] The Applicant submits that such a direction would mean that no lender of funds for the construction of residential housing could rely on its registered priority pursuant to the *Land Titles Act* or protect itself from a buyer (with whom it would have no privity of contract) who signs an agreement of purchase and sale with the lender's mortgagor after the mortgage is registered.

[24] The Applicant also asserts that Mr. Tan's motion is a collateral attack on the Receivership Order, which Mr. Tan did not appeal.

[25] The Receiver submits that the \$400,000 paid by Mr. Tan to Elite Homes is not a deposit, but an unsecured loan to a builder.

[26] The Receiver further submits that Mr. Tan was advised by counsel regarding the APS, which makes specific reference to the possibility of a mortgage against the Mateo Property. The Receiver adds that there is no evidence that Mr. Tan was unaware of the Applicant's mortgage when he made the \$400,000 payment to Elite Homes, or that he was unaware of the risks or consequences of such action. The Receiver asserts that it was the Receiver that was unaware of Mr. Tan's \$400,000 payment to Elite Homes until the Respondents requested a partial discharge of the mortgage to permit a conveyance to Mr. Tan.

## Law

### ***Land Titles Act, R.S.O. 1990, c. L.5*** (the "*Land Titles Act*")

[27] Section 93 of the *Land Titles Act* provides as follows:

93 (1) A registered owner may in the prescribed manner charge the land with the payment at an appointed time of any principal sum of money either with or without interest or as security for any other purpose and with or without a power of sale.

Statement of principal

(2) A charge that secures the payment of money shall state the amount of the principal sum that it secures.

Effect of charge when registered

(3) The charge, when registered, confers upon the chargee a charge upon the interest of the chargor as appearing in the register subject to the

encumbrances and qualifications to which the chargor's interest is subject, but free from any unregistered interest in the land.

### **Receivership Order**

[28] The Receivership Order includes the following provisions:

Paragraph 3(c) provides as follows:

3. THIS COURT ORDERS that the Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:

...

(c) to manage, operate, and carry on the business of the Debtors, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, *or disclaim or cease to perform any contracts of the Debtors, including, without limitation, agreements of purchase and sale entered into by the Debtors with respect to the Property* [emphasis added];

Paragraph 34 provides as follows:

34. THIS COURT DECLARES that the Applicant's security over the Property ranks in priority to the interests, if any, of the purchasers under the agreement of purchase and sale between Elite Homes Inc. and Yong Yeow Tan, aka Jeremy (*sic*) Tan dated February 11, 2020, and the agreement of purchase and sale between Elite Homes Inc. and Sukhdeep Sandhu dated December 13, 2019.

### **Analysis**

#### **Mr. Tan's challenge to the Receivership Order**

[29] The Receivership Order, at paragraph 3(c), specifically authorizes the Receiver to "disclaim or cease to perform any contracts of the Debtors, including, without limitation, agreements of purchase and sale entered into by the Debtors with respect to the Property."

[30] Mr. Tan argues that the order permitting disclaimer was not appropriate on the application for the appointment of a receiver, and that the mortgagee did not seek this order on its application. I disagree. The record shows that Justice Conway, in making the Receiver Order, was well aware of Mr. Tan's concern and the real possibility that his APS would be disclaimed. Mr. Tan's counsel was present and made submissions at the hearing. Justice Conway's endorsement dated July 2, 2020 reflects Mr. Tan's concerns: "Overall, I consider it just and

convenient for a receiver to be appointed to take possession and control of the properties, finance the remaining construction as necessary and then market and sell the properties, all taking into account the interests of the various stakeholders. While I am sympathetic to the concerns of the purchasers, unfortunately they are caught in a situation created by the respondent who independently used the deposit money to fund the construction.” Mr. Tan did not take any steps to appeal the Receivership Order. Because Mr. Tan was represented at the hearing of the application, his ability to seek a variation of the order is limited: *Textron Financial Canada Limited v. Beta Limitée*, 2007 CanLII 30473 at para. 89.

### **Equitable Interest**

[31] Mr. Tan and the Applicant disagree on whether Mr. Tan has a proprietary or equitable interest in the Mateo Property. The Applicant asserts that he does not, and that the Applicant, as first mortgagee, has a legal priority to which any interest Mr. Tan may have in the Mateo Property is subordinate.

[32] Mr. Tan relies on the case of *Armada Properties Ltd. v. 700 King Street (1997) Ltd.*, 2001 Can LII 28461 (ON SC) in support of his claim for an equitable interest. In *Armada*, a construction lien trustee/trustee in bankruptcy sought guidance on whether it should perform an agreement of purchase and sale where the estate would receive no benefit. The purchaser, Mr. Goldschlager, had entered into an agreement of purchase and sale with the vendor/bankrupt 700 King Street (1997) Ltd. (“700 King”) to purchase a condominium unit. The purchaser paid the entire purchase price, in three instalments, by way of deposit, to a personal company of the sole officer and director of 700 King. Mr. Goldschlager then moved into the unit and made \$80,000 worth of improvements to the unit at his own expense. The transfer date for the unit was scheduled and postponed, but never took place. Receivership and bankruptcy followed. The trustee discovered that the entire purchase price for Mr. Goldschlager’s condominium unit had been paid to the officer/director’s personal company and 700 King had received none of these proceeds.

[33] In directing the trustee to use its construction lien powers to convey clear title to Mr. Goldschlager, Justice Lax held that the trustee could not disclaim the agreement of purchase and sale. A disclaimer was not appropriate because the trustee could only succeed to the rights of the bankrupt, and the trustee could not terminate property rights that had passed under an agreement of purchase and sale prior to the bankruptcy. Justice Lax found that the equitable interest in property under Mr. Goldschlager’s agreement of purchase and sale had indeed passed prior to the bankruptcy because Mr. Goldschlager had paid the full purchase price and could have enforced the transfer of title by way of specific performance. The property had been validly conveyed but for the delivery of a deed: see para. 12. It is also noteworthy that, unlike in the case of Mr. Tan’s APS, in *Armada*, there was no reference to a contractual provision negating Mr. Goldschlager’s interest in land or subordinating it to the mortgagee’s interest.

[34] At the outset of her reasons, Justice Lax acknowledges that the facts of the *Armada* case are “unique.” I agree and also find that they are distinguishable from the case at bar. Unlike Mr. Goldschlager, Mr. Tan did not pay the entire amount owing under the agreement of purchase and

sale, with the result that he could have, at any time prior to the receivership, enforced the transfer of title by way of specific performance. For Mr. Tan, there was no valid conveyance of the Mateo Property to him but for the delivery of a deed. In *Armada*, Mr. Goldschlager had an equitable interest in the whole of the property prior to the bankruptcy. The bankrupt had an obligation to convey title to Mr. Goldschlager prior to the bankruptcy. The trustee stood in the shoes of the bankrupt and took on the obligation to deliver the deed in recognition of Mr. Goldschlager's equitable interest in the whole of the property.

[35] Mr. Tan argues that notwithstanding that he does not have an equitable interest in the whole of the Mateo Property, the \$500,000 deposit payment creates an equitable interest that should be elevated above the secured interest of the Applicant based on the equities.

[36] Mr. Tan argues that according to the jurisprudence, disclaimer should only be permitted where: a) the mortgagee will face an onerous burden or greater financial hardship than the purchaser under the agreement of purchase and sale; or b) the purchaser paid less than fair market value; or c) the purchaser has been repaid his deposit. Mr. Tan asserts that none of these circumstances apply in this case.

[37] The Applicant submits that any equitable interest that Mr. Tan may have had is extinguished by clause 27 of Schedule "A" to the APS, which provides as follows:

**NO REGISTRATION**

27. The Purchaser acknowledges that this Purchase Agreement does not create an interest in the Real Property and that until a Transfer/Deed of Land is registered in favour of the Purchaser, he shall have no interest in the Real Property. The Purchaser further covenants and agrees that he will not register or cause or permit this Purchase Agreement to be registered on title to the Land and that no reference to it, or notice of it or any caution or any certificate of pending litigation, Purchaser's lien or any other notice or document of any type shall be registered on title whether or not the Vendor is in default hereunder. In the event that the Purchaser creates any encumbrance or makes any registration or causes or permits any encumbrance or registration to be made on title to the Land on or before Closing, any such action will constitute an event of default under this Purchase Agreement and the provision of Section 30 shall apply.

[38] Further, the Applicant submits that, at clause 41 of Schedule "A" to the APS, Mr. Tan agreed that the APS "shall be, and is hereby, subordinate to and postponed to any mortgage(s) arranged by the Vendor and any advances made thereunder from time to time or liabilities secured thereunder ..."

[39] Mr. Tan argues that the Applicant cannot rely on clauses 27 and 41 because the APS was terminated. In my view, Mr. Tan has not demonstrated that the APS was terminated. The record shows that in an email exchange with Mr. Sudiq relating to the closing of the Mateo Property, Mr. Sudiq stated that he was trying very hard to close the transaction. There is no evidence that

either the vendor or the purchaser took any step to terminate the APS. The receivership intervened and now the Receiver plans to disclaim the APS while Mr. Tan seeks to have it completed. Mr. Tan's position is supportive of the existence of the APS.

[40] Mr. Tan relies on *McGrath v. B.G. Schickedanz Homes Inc.*, [2000] O.J. No. 4161 in support of his position that a vendor, who unilaterally terminates an agreement, cannot rely on a clause in that agreement inserted for the protection of the vendor. However, in *McGrath*, it was clear that the vendor chose to treat the purchaser's alleged breaches of the Agreement as conduct constituting repudiation of the Agreement entitling the vendor to accept that repudiation and terminate the contract. Regarding the APS, there is no evidence of conduct constituting repudiation and no evidence that either party accepted the repudiation and terminated the APS. Further, in the case at bar, it is not the vendor but, rather, the Applicant who seeks to rely on the APS.

[41] The Applicant asserts that clauses 27 and 41 of Schedule "A", which remain in effect, are determinative of the Applicant's priority and that Mr. Tan was aware of these provisions at the time he entered into the APS. He had retained legal counsel to advise him on the APS before he signed it.

[42] In addition to confirmation of the Applicant's priority in the APS, paragraph 34 of the Receivership Order specifically provides that: "the Applicant's security over the Property ranks in priority to the interests, if any, of the purchasers under the agreement of purchase and sale between Elite Homes Inc. and Yong Yeow Tan, aka Jeremy (*sic*) Tan dated February 11, 2020, and the agreement of purchase and sale between Elite Homes and Sukhdeep Sandhu dated December 13, 2019." This declaration is consistent with s. 93(3) of the *Land Titles Act*.

[43] Mr. Tan further argues that Justice Conway's endorsement is clear that the Receiver is to take into account the interests of all the various stakeholders. He asserts that the Receiver did not. Instead, he alleges that it rushed into its decision to disclaim the APS without undertaking sufficient research into the Respondents' assets. I do not accept this allegation. The Receivership Order covered only the Mateo Property and one other property, thus limiting the scope of the Receiver's research into the Respondents' assets. Further, the Receiver was aware that even if there were sufficient assets to pay the Applicant in full (which is not the case), there was another secured creditor and a number of construction lien claimants who also had registered claims on title to the Mateo Property. Based on the record, there is little doubt that the Receiver's marketing and selling the Mateo Property would yield a higher recovery for the estate than would be the case if the APS were completed and Mr. Tan were given full credit for the \$500,000 deposit.

[44] Mr. Tan also asserts that a disclaimer of the APS is unfair because it benefits the Applicant only at Mr. Tan's expense. He further asserts that the loss to him on a disclaimer is disproportionate to the loss to the Applicant if the Receiver completes the APS. I disagree with this reasoning. If the Applicant does not disclaim, but completes, the APS, Mr. Tan alone would benefit, at the expense of the Applicant whose interest in the property is secured. Mr. Tan would enjoy a preference and the Applicant would be subordinated by the shortfall in the deposit plus

any incremental amount above the agreed upon purchase price that the Receiver might realize in the market. All of the equity in the Mateo Property is charged by the first mortgage. According to the First Report of the Receiver, dated August 17, 2020, filed in this motion, the Receiver has also incurred approximately \$40,000 in expenses for work required to market the Mateo Property for sale. Mr. Tan appears to be asking this court to resolve one inequity by creating another.

[45] I find that Mr. Tan has not met his burden to prove that the Receiver should prefer Mr. Tan over the secured creditor. The equities do not justify the subordination of the Applicant's legal priority. Such subordination is contrary to the terms of the APS and the Receivership Order.

[46] I accept that Mr. Tan is a victim of the improper use of the \$400,000 deposit he paid directly to Elite Homes in the belief that this payment would expedite the construction of the Mateo Property. However, the Applicant in no way participated in Mr. Tan's decision to make the improvident payment and was unaware that such payment had been made until Elite Homes requested a partial discharge of the mortgage to permit a conveyance of the Mateo Property to Mr. Tan. I find that there is no basis in equity or in law that would permit this court to visit the consequences of Mr. Tan's unfortunate decision on the Applicant secured lender.

[47] This conclusion is consistent with leading jurisprudence. See, for example, *Forjay Management Ltd. v. 0981478 B.C. Ltd.*, 2018 BCSC 527. In *Forjay*, Justice Fitzpatrick ordered the receiver to disclaim agreements of purchase and sale and to remarket the subject residential units free of the buyers' interests. Justice Fitzpatrick found that the mortgagee had legal priority over the position of the buyers by virtue of a contractual provision in each buyer's agreement, similar to the provision found in Mr. Tan's APS, negating any interest in land. Justice Fitzpatrick also found that the buyers' interests were grounded in contract and that no equitable interests arose in any of the units.

[48] In *Third Eye Capital Corporation v. Resources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, the Court of Appeal for Ontario held, at para. 109, that in considering whether an interest in land should be extinguished, a court should consider: (1) the nature of the interest in land; and (2) whether the interest holder has consented to the vesting out of their interest either in the insolvency process itself or in agreements reached prior to the insolvency. The Court of Appeal also held that if these factors prove to be ambiguous or inconclusive, the court may then engage in a consideration of the equities to determine if a vesting order is appropriate in the particular circumstances of the case.

[49] In *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.*, Justice Morawetz (as he then was) gave effect to a subordination clause in an agreement very similar to clause 41 of Schedule "A" to the APS. In that case, five buyers of condominium units paid the balance of the purchase price owing under their agreements directly to the debtor. The receiver moved for authorization to market and sell the condominium property and terminate the existing agreements. Justice Morawetz held that the mortgagee had legal priority over the interests of the buyers. His Honour then considered the equities and found that they did not justify overriding the first mortgagee's legal priority. His Honour observed that those purchasers whose deposits were



not held in trust may have some remedy against the debtors or its advisors. Regarding those purchasers who paid the balance of their purchase price, notwithstanding the subordination clauses of their agreements, and the fact that they would not be receiving title at that time, Justice Morawetz observed that these purchasers ran the risk of losing those payments but may have recourse against other parties: paras. 27 and 31-38.

[50] Mr. Tan too ran a risk when he paid \$400,000 directly to Elite Homes. It appears that he may have recourse against Tarion Corporation, and he may also have recourse against others as well.

[51] On the evidence, I am satisfied that the Receiver did not breach its fiduciary duty to take into account the interests of the various stakeholders in the Respondents' estate in its decision to disclaim the APS. In assessing whether a disclaimer of an agreement is appropriate, the priority of a secured interest registered under the *Land Titles Act*, while not determinative, weighs heavily.

### **Disposition**

[52] The moving party's motion is dismissed.

### **Costs**

[53] The Applicant submitted a Bill of Costs and asserts that costs should follow the cause on the outcome of the motion. Its costs, on a partial indemnity basis, are \$25,588.51, including HST and disbursements.

[54] The Applicant submits that it should be entitled to the costs it seeks because the motion was unnecessary and a collateral attack on the Receivership Order. It further submits that the principles at issue are of significant importance to the residential construction lending industry.

[55] Mr. Tan did not submit a Bill of Costs but submits that there should be no costs awarded on the motion. Alternatively, if costs are awarded against him, Mr. Tan submits that such costs should be nominal because he is already facing a potential loss of \$300,000 to \$400,000.

[56] Having heard the submissions and considered the principles relating to costs set out in rule 57.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, including the principle of indemnity, the amount of costs that Mr. Tan could reasonably expect to pay in relation to this motion, the complexity of the proceeding, and the importance of the issues, I fix the costs at \$20,000, inclusive of HST and disbursements. This award is fair and reasonable in the circumstances of this case.

\_\_\_\_\_  
*Dietrich J.*

**Dietrich J.**

**Date:** August 27, 2020

# TAB 8

## IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Campbell River Common Shopping Centre  
Ltd. v. Nuszdorfer,*  
2013 BCSC 141

Date: 20130131  
Docket: S9413  
Registry: Campbell River

Between:

**Campbell River Common Shopping Centre Ltd.**

Plaintiff

And

**Debbie Nuszdorfer and Christina Assu and  
Debbie Nuszdorfer and Christina Assu Operating as Kidlets**

Defendants

Before: The Honourable Mr. Justice Leask

### **Reasons for Judgment**

Counsel for the Plaintiff:

H.A. Henning

Counsel for the Defendants:

K. Simonett

Place and Date of Trial:

Campbell River, B.C.  
February 22 to 24,  
March 30, 2012

Place and Date of Judgment:

Campbell River, B.C.  
January 31, 2013

**Introduction**

[1] This case is a dispute about a commercial lease at a Campbell River Shopping Mall. The tenants were a mother and daughter who operated a children's clothing store called "Kidlets". The landlord was a corporate entity beneficially owned by Allan Edie, whose holding company owns other shopping malls in Edmonton, Calgary and Winnipeg. The plaintiff landlord is seeking judgment for:

- (a) non-payment of rent in the amount of \$28,937.26 as of August 1, 2010
- (b) future non- payment of rent for the unexpired term of the lease agreement in the amount of \$238,430.32;
- (c) damages in the amount of 3 months' rent or \$ 15,487.47;
- (d) interest of 5% above the Royal Bank of Canada Prime Rate;
- (e) solicitor client costs.

[2] The defendants base their defence and counterclaim on the proposition that they were induced to sign the lease by false representations made either negligently or fraudulently by representatives of the landlord. On this basis, their counterclaim is for:

- (a) rescission of the lease agreement;
- (b) general damages, special damages and aggravated damages;
- (c) interest;
- (d) solicitor client costs.

[3] The landlord called two witnesses, Mr. Edie and the company comptroller, Curtis Wade Whitfield. Both defendants testified and they called one additional witness, Denise Hollinger, who owned and operated a women's clothing store called Josan's and for a number of years chaired the Merchant's Committee in the mall. Credibility was a major issue in this trial.

**Facts**

[4] Mr. Edie purchased the Ironwood Mall in 2006 and renamed it “Campbell River Commons”. There were discussions between Ms. Assu and the landlord’s rental agents which lead to a number of meetings between Ms. Assu and Mr. Edie. The parties signed an offer to lease agreement on June 27, 2006. Kidlets occupied the premises from October 1, 2006 to August 23, 2010. The lease on which the landlord’s claims were based was signed on October 1, 2007. Ms. Assu believes the parties signed a lease earlier which different rental terms. She was unable to produce a copy of that lease. Mr. Edie denies that such a lease existed. The lease presented to the Court included the following terms:

- (a) the lease was for 8 years;
- (b) space was for 3,500 square feet;
- (c) rent was for \$10/per square foot in year 1 and \$11 per square foot in years 2-8 plus triple net;
- (d) the landlord would provide up to \$35,000.00 of leasehold improvements;
- (e) the landlord agreed to assume payment of the balance of the Defendant’s lease with T.A.T. Properties Ltd which was set to expire on February 1, 2009.

[5] There is no dispute between the parties that, prior to Mr. Edie’s purchase, the Ironwood Mall was a “retail dead zone” in Campbell River. Mr. Edie testified that there was only 50/60% occupancy of the mall at the time he took over. The parties also agree that Mr. Edie’s purchase, and his plans to upgrade and improve the mall caused a “buzz” that made the mall more interesting to tenants and customers. Mr. Edie testified that he spent approximately \$4 million in physical improvements to the mall including work on the roof and an upgrade of the facade including new

stucco, improvements to the heating and air conditioning and, in the interior, new drywall and painting.

**Factual Disputes**

**1. Representations**

[6] This is the most important factual dispute between the parties. The tenants say that Mr. Edie stated:

- (1) that the mall would be fully tenanted within two years;
- (2) that Winners would be a tenant in the mall once Wal-Mart “broke ground” to begin construction of their store in Campbell River; and,
- (3) that Sears and Thrifty’s, the major anchor tenants at the mall, would have new entrances permitting their customers to enter and leave through the interior of the mall.

[7] The landlord specifically denies making any such representations. Mr. Edie’s evidence concerning these specific points was:

- (1) It would be impossible for any landlord to provide any guarantee that its mall would have full occupancy within a given time period unless leases had already been signed and concluded.
- (2) The landlord did enter into negotiations with Winners but those negotiations were unsuccessful. Mr. Edie’s evidence was that the negotiations with Winners did not begin until after the tenants had signed their lease and therefore it was impossible that he could have made the representation about Winners at the time the tenants claimed that he did.
- (3) During Kidlets tenancy, Mr. Edie did succeed in having Sears open to the interior of the mall and requested Thrifty’s to do the same.

## **2. Rental Arrears**

[8] The landlord claims that the tenants' rent was \$28,937.26 in arrears on August 1, 2010. This is based on a "rental statement" introduced in evidence at the trial which was prepared using the landlord's accounting records. The tenants' position is that no arrears were owing at August 1, 2010. They argue that the landlord's record keeping is inaccurate and inconsistent. Ms. Assu said that she had paid her rental arrears by the end of 2009 according to an agreement she made with the landlord's comptroller, Mr. Whitfield. Ms. Assu provided a cheque dated December 26, 2009 in the amount of \$1,502.50 with "Back Rent for 2009 paid in full - re Kidlets - 1428 IRONWOOD" printed in the memo field. Although the landlord's records show that the cheque was received and cashed, both Mr. Whitfield and Mr. Edie deny the existence of any agreement regarding rental arrears.

## **3. Leasehold Improvements**

[9] The agreement to lease and the lease that is Exhibit 1 in these proceedings, provided that the landlord would provide \$35,000 worth of leasehold improvements. The agreement to lease specified a triple net rent of \$10 per square foot. The Exhibit 1 lease preserves the lease rate of \$10 per square foot for the first year of the tenancy but increases the lease rate to \$11 per square foot for years 2 to 8 of the lease. After the leasehold improvements were completed, Mr. Edie told Ms. Assu that she had exceeded her \$35,000 improvements allowance by approximately \$70,000. He asked her to reimburse the landlord for this extra spending. Ms. Assu's evidence is that she was taken completely by surprise by the demand.

[10] Mr. Edie told Ms. Assu that Howie Budinski was the go-to guy regarding the tenant improvements to Kidlets' tenancy. Ms. Assu was concerned that she did not have any money beyond the \$35,000.00 allowance made in the offer to lease and the lease with the Plaintiff. Ms. Assu was in constant contact with Mr. Budinski regarding the work and the budget. She was assured at all times that as long as she agreed with his suggestions, she would remain on budget. Ms. Assu agreed to substandard flooring and lighting on Mr. Budinski's advice. Ms. Assu further asserted



that Mr. Budinski stated that he would warn her if she was nearing the limit of her allowance. Ms. Assu states that at no time did Mr. Budinski tell her that she was either near or exceeding her allowance. There was no evidence adduced to rebut Ms. Assu's testimony.

[11] When told that Ms. Assu did not have the funds necessary to pay the landlord \$70,000, Mr. Edie proposed to increase her basic rent by \$2/square foot. When she protested that she could not afford such a rent increase, Mr. Edie agreed to "settle" for an increase of \$1/square foot. The tenants' position was that this increase was obtained by deceit and that they were entitled to a refund of \$10,208.10.

#### **4. Roof Collapse**

[12] During the tenancy, a roofer working on the mall roof caused Kidlets' roof to collapse scattering debris through the store. The resulting mess caused the closure of Kidlets' for approximately two weeks. Mr. Edie's local manager, Stacey Puff, told Ms. Assu that she would not have to pay one month's rent. Mr. Edie refused to honour this commitment. In addition, he refused to make a claim for repair of the damages on the mall's insurance policy. Kidlets claimed on their tenant's policy and had to pay the \$1,000 deductible.

#### **5. Signage**

[13] Schedule "D" to the lease at Exhibit 1 tab 1 at para. 8 states that signage shall be in the amount of \$125.00 per month. The Defendants were charged \$250.00 for each of the 35 months they were tenants at CRCSC.

[14] Mr. Edie's answer was that the landlord was providing two signs promoting the tenant's business and was therefore entitled to twice the amount specified in the lease.

#### **6. Additional Rent**

[15] Article 4.2 of the lease provides that the landlord shall submit to the tenant a detailed statement of the actual additional rent payable within 90 days of the end of the fiscal year. The landlord collected \$5 per square foot of estimated additional rent

from the tenants throughout their occupancy. Ms. Hollinger testified that the landlord's failure to provide calculations of the actual additional rent payable was a continuing source of grievance for the Merchant's Committee. Mr. Edie's response to this criticism was that the actual additional rent payable was always in excess of \$5 per square foot and that he agreed with Ms. Assu that he would only collect \$5.

**Law**

[16] The Landlord relies on Article 15.1 of the lease agreement:

It is hereby understood and agreed by and between the parties hereto that the terms and conditions set forth herein together with the terms and conditions set forth in the rules and regulations and any exhibits, schedules and/or plans annexed hereto embrace all of the terms and conditions of the Lease entered into by the Landlord and Tenant and supercede and take the place of any and all previous agreements or representations of any kind, written, oral or implied heretofore made by anyone in reference to the Leased Premises or in any way effecting the Development or equipment of which same forms a part and that the said rules and regulations and any exhibits, schedules and/or plans shall and do form a part of the Lease as fully as if the same were included in the main body hereof above the execution of the parties hereto...

[17] In support of its position, the landlord relies on several BC cases.

[18] *Quadra Pacific Properties Corp v. Qualicum Holdings Ltd.*, 2000 BCSC 1234, involved a lease of a unit in a strip mall in Nanaimo. The parties began negotiating in February 1997 and entered into a written lease on May 1, 1997. The tenant vacated the premises on February 26, 1999 while the lease was still in force. The principal dispute at the trial concerned an allegation by the tenant that his company had been induced to enter into the lease by a negligent misrepresentation by the landlord's real estate agent that a large anchor tenant, Cash Convertors, was about to lease the space next to the unit the tenant wanted to lease. The tenant testified "we would not have agreed to a lease if we'd known Cash Converters was not going in."

[19] In response, the landlord relied upon the "entire agreement" clause in the lease which said:

7.14 LEASE ENTIRE RELATIONSHIP The Tenant acknowledges that there are no covenants, representations, warranties, agreements or conditions

expressed or implied, collateral or otherwise forming part of or in any way affecting or relating to this Lease save as expressly set out in this Lease and that this Lease constitutes the entire agreement between the Landlord and the Tenant and may not be modified except as herein explicitly provided or except by subsequent agreement in writing of equal formality executed by the Landlord and the Tenant.

[20] Downs J. rejected the tenant's argument based on the following reason:

I am satisfied on the whole of the evidence before me and in the circumstances of this case that the defendant is bound by the "entire agreement" clause in the lease. Mr. Coates had negotiated two other commercial leases prior to the lease in question. The process of the negotiation of this lease demonstrates that Mr. Coates turned his mind to very specific provisions he wished to have included, or excluded, from the lease. Mr. Coates was neither unsophisticated nor naïve. The authorities to which I have been referred by counsel for the plaintiff mandate the application of an exclusion clause in such circumstances. Thus, even if Mr. Parker did make positive assurances of Cash Converters tenancy the plaintiff is not liable for them in either tort or contract.

[21] The plaintiff also relies upon *Kwan Bros. Investments Ltd. v. HFH Video Big Inc.*, B.C.S.C. Vancouver Registry No. C 905885, July 15, 1991. That case also involved a mall tenancy and allegations concerning the significance of the ongoing tenancy of a BC Government Liquor Store. Although the lease contained an "entire agreement" clause, the court's judgment was based on other factors:

From the fact that the defendant continued in occupation of the premises from August 1989, by which time it knew that the liquor store was going to be relocated, until May 1990, when it abruptly vacated, I have concluded that the immediate proximity of the liquor store was not of such "fundamental" importance as the defendant now protests. I am fortified in this view by the fact that in a letter to the plaintiff's solicitors dated June 27, 1990, the defendant's solicitors made no mention of a misrepresentation. That letter focused on an alleged "fundamental breach" which, it was said, "has led to our client's departure from the premises".

[22] The tenants rely on a number of cases for the proposition that the landlord cannot depend upon the "entire agreement clause" to justify ignoring the representations made to them to enter into the lease.

[23] In *B.G. Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12 La Forest and McLachlin J.J., writing for the majority, said:

In our view, the general rule emerging from the Court's decision in *Central Trust Co. v. Rafae*, [1986] 2 S.C.R. 147, is that where a given wrong prima facie supports an action in contract and in tort, the party may sue in either or both, except where the contract indicates that the parties intended to limit or negative the right to sue in tort. (p. 20)

...

We conclude that neither principle, the authorities nor the needs of contracting parties support the conclusion that dealing with a matter by an express contract term will, in itself, categorically exclude the right to sue in tort. The parties may by their contract limit the duty one owes to the other or waive the right to sue in tort. But subject to this, the right to sue concurrently in tort and contract remains. (p. 30)

[24] The measure of damages in contract and for the tort of negligent misrepresentation are:

Contract: the plaintiff is to be put in the position it would have been in had the contract been performed as agreed.

Tort: the plaintiff is to be put in the position it would have been in had the misrepresentation not been made (p. 31)

[25] The tenants also cite the well known case of *Queen v. Cognos, Inc.* [1993] 1 S.C.R. 87 for the elements of the tort of negligent misrepresentation:

- (1) there must be a duty of care based on a "special relationship" between the representor and the representee;
- (2) the representation must be untrue or inaccurate or misleading;
- (3) the representor must have acted negligently in making said representation;
- (4) the representee must have relied, in a reasonable manner, on said negligent representation; and

(5) the reliance must have been detrimental to the representee in the sense that damages resulted. (para. 39)

[26] Also in that case, at para. 55, Iacobucci J. said:

The applicable standard of care should be the one used in every negligence case, namely the universally accepted, albeit hypothetical, “reasonable person”. The standard of care required by a person making representations is an objective one. It is a duty to exercise such reasonable care as the circumstances require to ensure that representations made are accurate and not misleading...

[27] He further stated at paras. 62 to 63:

A duty of care with respect to representations made during pre-contractual negotiations is over and above a duty to be honest in making those representations. It requires not just that the representor be truthful and honest in his or her representations. It also requires that the representor exercise such reasonable care as the circumstances require to ensure that the representations made are accurate and not misleading.

Although the representor's subjective belief in the accuracy of the representations and his moral blameworthiness, or lack thereof, are highly relevant when considering whether or not a misrepresentation was fraudulently made, they serve little, if any, purpose in an inquiry into negligence. As noted above, the applicable standard of care is that of the objective reasonable person.

[28] The tenants rely upon the B.C. Court of Appeal decision in *Zippy Print Enterprises Ltd. v. Pawliuk*, 1994 BCCA 1756, in which Lambert, J.A., writing for a unanimous court said:

34. The usual rule in relation to clauses excluding liability is that if liability can be based on negligence or on some other ground, and if the clause does not specifically state that liability for negligence is excluded, then liability for negligence is not excluded. See *Alderslade v. Hendon Laundry Ltd.*, [1945] 1 All E.R. 244 (Eng. C.A.) and *Cavell Developments Ltd. v. Royal Bank of Canada* (1991), 78 D.L.R. (4th) 512 (B.C.C.A.).

...

37. In *Mendelssohn v. Normand Ltd.*, [1970] 1 Q.B. 177 (Eng.C.A.), Lord Denning said this:

There are many cases in the books when a man has made, by word of mouth, a promise or a representation of fact, on which the other party acts by entering into the contract. In all such cases the man is not allowed to repudiate his representation by reference to a printed condition, see *Couchman v. Hill* [1947] K.B. 554; *Curtis v. Chemical Cleaning and Dyeing Co.* [1951] 1 K.B. 805; and *Harling v. Eddy*

[1951] 2 K.B. 739; nor is he allowed to go back on his promise by reliance on a written clause, see *City and Westminster Properties (1934) Ltd. v. Mudd* [1959] Ch. 129, 145 by Harman J. The reason is because the oral promise or representation has a decisive influence on the transaction - it is the very thing which induces the other to contract - and it would be most unjust to allow the maker to go back on it. The printed condition is rejected because it is repugnant to the express oral promise or representation.

...

39. In Canada the point has been stated and approved by the Supreme Court of Canada in *Bauer v. Bank of Montreal* (1980), 110 D.L.R. (3d) 424, in the reasons of Mr. Justice McIntyre, for the Supreme Court of Canada, in this way at p.430:

Various authorities were cited for the proposition that a contract induced by misrepresentation or by an oral representation, inconsistent with the form of the written contract, would not stand and could not bind the party to whom the representation had been made.

...

45. I would apply the principle enunciated by this Court in *Betker v. Williams* to the circumstances of this case. A general exclusion clause will not override a specific representation on a point of substance which was intended to induce the making of the agreement unless the intended effect of the exclusion clause can be shown to have been brought home to the party to whom the representation was made by being specifically drawn to the attention of that party, or by being specifically acknowledged by that party, or in some other way.

[29] Lambert, J.A. also dealt with the relevance of delay:

50. Again, none of the cases to which we were referred applied a defence of acquiescence, waiver, election, estoppel or laches to a claim for damages for negligent misrepresentation. It is hard to see how laches can ever apply to such a claim, but the concept of "waiving the tort" is a familiar one and there is no reason in theory why a claim based in tort for negligent misrepresentation could not be waived. Such a waiver would require clear evidence. Merely allowing a relationship with the tort-feasor to continue and to modify itself while the claim is continuing would not amount to waiver of the claim. What would be required is some unequivocal act tantamount to a release of the claim. I do not consider that there is any such act in this case.

...

52. So the question is not whether the defendants acted promptly enough to claim to be restored to the position in which they were in before the agreement came into operation, either by rescission or damages. The question is whether they can be said to have conducted themselves in such a way that they must be regarded as having demonstrated unequivocally by their conduct that they abandoned their claim for damages for misrepresentation.

[30] The tenants also refer to *Taggart v. No. 236 Seabright Holdings Ltd.*, 2008 BCSC 1412, a decision in which Sinclair Prowse J., said respecting whether a claim for negligent misrepresentation can be maintained in the face of an “entire agreement” clause:

[95] The Defendants contend that the Plaintiffs are precluded from bringing this claim because of the provisions of the Contract of Purchase and Sale. Specifically, paragraph 23 of this Contract provides:

Entire Agreement

This agreement shall constitute the entire agreement between the Parties and no representations, warranties and previous statements made by any person or agent other than those in writing in this Agreement signed by the Parties shall be binding on the parties.

[96] There is no dispute that an action in tort for negligent misrepresentation may lie even though the relevant parties to the action are in a contractual relationship: *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87, 99 D.L.R. (4th) 626 and *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12, [1993] 2 W.W.R. 321 [BG Checo]. Such claims may lie even though the contract includes an Entire Agreement or general exclusion clause: *Zippy Print Enterprises Ltd. v. Pawliuk* (1994), 100 B.C.L.R. (2d) 55, [1995] 3 W.W.R. 324 (C.A.) [Zippy] and *BG Checo*. In other instances, Entire Agreement clauses were found to exclude total liability: *Intrawest Corp. v. No. 2002 Taurus Ventures Ltd.*, 2007 BCCA 288, 281 D.L.R. (4th) 420 and *Bow Valley Husky Bermuda Ltd. v. Saint John Shipping Ltd.*, [1997] 3 S.C.R. 1210, 153 D.L.R. (4th) 385.

[97] A review of these cases demonstrates that the determination of whether tort liability is excluded will depend on all of the circumstances of the case, including such circumstances as the sophistication of the parties. Of particular significance is whether the terms of the contract specifically address the matters that were the subject of the pre-contractual representations.

[98] The Court in *Zippy* at para. 45 described the underlying principle in the following manner:

A general exclusion clause will not override a specific representation on a point of substance which was intended to induce the making of the agreement unless the intended effect of the exclusion clause can be shown to have been brought home to the party to whom the representation was made by being specifically drawn to the attention of that party, or by being specifically acknowledged by that party, or in some other way.

[99] Applying these principles to the facts in this case, the Entire Agreement clause in the parties' Contract does not preclude the Plaintiffs from bringing this action.

[100] First, the Entire Agreement clause in this Contract is a general exclusion clause. That is, it does not specifically exclude claims for negligent

misrepresentations – there is, in fact, no reference to negligent misrepresentation.

[31] The tenants say that a case with significant factual similarities to the case at bar is *Punto e Pasta Manufacturing Inc. v. Henderson Development (Canada) Ltd.*, 2009 BCSC 37. This dispute involved a mixed residential and retail complex in Vancouver called International Village. The proprietor of Punto e Pasta, Mr. Papa, had operated a food catering business for many years. He also operated a small restaurant on Commercial Drive selling freshly prepared pasta dishes. His company signed a lease for premises at the International Village on February 25, 2000, and commenced doing business in May 2000. The tenant vacated the premises in November 2000. The tenant commenced a law suit alleging that the landlord misrepresented both the identity and nature of the commitments of some of the existing and prospective tenants of the International Village. He says that these representations were, at worst, fraudulent, and, at best, negligent. The landlord counterclaimed based on non-payment of rent. Slade J. did not find fraudulent misrepresentation; found that the “entire agreement” clauses in the lease did not exclude the landlord from liability for negligent misrepresentation; found the representation to constitute negligent misrepresentation; awarded damages; and dismissed the landlord’s claim for rent. In the course of his reasons, he discussed the Supreme Court of Canada decision in *Martel Building Ltd. v. Canada* [2000] 2 S.C.R. 360 and concluded:

[112] The decision of the Supreme Court in *Martel* does not, in my opinion, alter the law, as set out in *Cognos*, supra. *Martel* does not deprive a person who enters an agreement, in reliance on negligent misrepresentations, of a claim in tort for pure economic loss. Indeed, negligent misrepresentation is acknowledged, in para. 70, as a basis for recovery even where negotiation does not culminate in an agreement.

[32] As to statements of future intention he said:

[121] A statement of future intention is a statement of fact. If the statement is false, in the sense that it asserts a fact that is known not to exist, it is fraudulent. If merely inaccurate, in the sense of being incorrect, it may be actionable in negligence.

...



[125] In my view, a statement of intention cannot be accurate if made in the absence of a reasonable basis for a belief that that which is stated to be intended is achievable. If this were not so, the due diligence requirement (*Queen v. Cognos*, supra, at para. 44) would be meaningless.

...

[33] He also quoted the most famous English Judge, Bowen L.J. who said in *Edgington v. Fitzmaurice* (1885), 29 Ch.D. 459 at 483 (C.A.):

... the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else. A misrepresentation as to the state of a man's mind is, therefore, a misstatement of fact.

[34] As to the "entire agreement" clause, Slade J. said:

[163] Exemption clauses are construed narrowly and against the interest of the drafter (the contra proferentum rule):

Wilson J. stated in *Hunter Engineering* [[1989] 1 S.C.R. 426] that "an exclusion clause should be strictly construed against the party seeking to invoke it". In *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.* [[1997] 3 S.C.R. 1210], the Supreme Court of Canada unanimously adopted that statement. The Ontario Court of Appeal has stated: "Exclusion clauses are to be approached with the aid of the cardinal rules of contractual construction: they must be read contra proferentem and clear words are necessary for the exclusion clause to apply."

...

[168] I note the following passage from Prof. Hall's text (at 8.10.1):

To the extent that there is a consistent theme to the various concepts which seem to be at play, it appears to be that entire agreement clauses will only be enforced against a party who understood (or ought to have understood) the effect of the clause and whose attention was specifically drawn to the provision. Thus an entire agreement clause is much more apt to be enforced against a sophisticated party than against an unsophisticated one, and entire agreement clauses which are buried in fine print in standard form contracts are apt not to be enforced. In other words, entire agreement clauses tend only to be enforceable where contracting parties expressly turn their minds to them, or where they ought to have done so because of their sophistication and ability to obtain legal advice.

## Analysis

### 1. Representations

[35] Whether or not the landlord made the representations alleged by the tenants and whether or not they constitute negligent or fraudulent misrepresentation are the most significant disputes between the parties.

[36] I am satisfied that Mr. Edie made the representations alleged by the tenants. My principal reason for arriving at this conclusion flows from my assessment of the credibility of the parties. Both Ms. Assu and her mother presented as genuine truth-telling witnesses. They did not claim to remember every detail of what transpired. Their evidence had the rough texture of unrehearsed truth. On the issue of the proposed tenancy of Winners, Ms. Hollinger's evidence confirms the evidence of the tenants. She was given the same assurances a few months later, but, tellingly, before Mr. Edie testified that he'd even spoken with Winners.

[37] Mr. Edie's responses were unconvincing for a number of reasons. First, although the pleadings simply denied that the representations had been made, his evidence was less direct. As to the promise that the mall would be fully tenanted within two years, in evidence he said that it would be impossible for any landlord to guarantee such a thing. As to his alleged statement that Winners would be a tenant in the mall "once Walmart 'broke ground'", his answer was that he couldn't have made that promise because he didn't commence negotiating with Winners until much later in time. As to the anchor tenants having customer access to the interior of the mall, he said that Sears did and that he'd tried to get Thrifty's to create such an entrance, but they had declined. I understand that answer to be an admission, by implication, that he'd made the representation the tenants alleged.

[38] In addition, he was both vague and evasive in some of his answers. On the whole, I did not find Mr. Edie to be a credible witness.

[39] Like Slade J. in *Punto e Pasta*, I am not persuaded that the landlord's representations were fraudulent. The tenants' most forceful submission with respect

to fraud dealt with Mr. Edie's representation about Winners becoming a mall tenant. In his trial evidence Mr. Edie said that he did not engage in negotiations with Winners until 2 or 3 years after taking control of the mall. If this evidence is accepted as factual, then the representation he made to the tenants concerning Winners was false and he must have known of its falsity at the time he made the representations. I am not prepared to make this finding because I am not satisfied that his trial evidence concerning the timing of his discussions with Winners was truthful. Under the circumstances, I find that all three of the relevant representations made by Mr. Edie were made negligently.

[40] In terms of the elements of the tort of negligent misrepresentations set out in *Cognos*, I am satisfied that:

- (1) There was a duty of care based on a "special relationship" between Mr. Edie and Ms. Assu at the time he made the representations. Mr. Edie was a very experienced businessman, owner of a number of malls and knowledgeable concerning landlord/tenant issues in commercial malls. Ms. Assu was a Campbell River housewife who'd opened a small store. Her previous tenancies involved one retail complex in Campbell River with an understanding and cooperative landlord. I am satisfied that the disparity in knowledge and experience was sufficient to create the necessary "special relationship".
- (2) All three relevant representations were certainly misleading; the Winners representation was untrue; and the mall opening representation was inaccurate with respect to Thrifty's;
- (3) I have already explained why I am satisfied that the representations were made negligently by Mr. Edie;
- (4) In the circumstances of Mr. Edie making the representations to Ms. Assu and her mother for the purpose of persuading them to re-locate

their business to his newly acquired mall, I am satisfied it was reasonable for them to rely on his assurances;

(5) I am also satisfied that the tenant's reliance on Mr. Edie's representations to them was detrimental and damages resulted.

[41] Therefore I find that the tenants were induced to sign their lease by negligent misrepresentations made by the principal of the landlord.

[42] The tenants seek rescission of the lease agreement. In my view, too much time has passed and too many changes in circumstances have occurred to make rescission a practical remedy for me to grant. They also seek general damages and aggravated damages. I am not satisfied that the evidence in the case justifies an award of aggravated damages and therefore decline to make any such award. I am prepared to award the tenants \$10,000 in general damages.

## **2. Rental Arrears**

[43] I am satisfied that the landlord's claim for rental arrears must fail for a number of reasons. First, the landlord's comptroller, Mr. Whitfield, testified that the landlord's accounting records were unreliable. Second, I accept Ms. Assu's evidence (confirmed by the notation on her cheque) that she had an agreement with the landlord's agent (Mr. Whitfield) to bring her minor rental arrears up to date and she had carried out her obligations under the agreement by the end of 2009. In accepting her evidence, I reject both Mr. Edie and Mr. Whitfield's denial of the existence of that agreement. Third, my finding that the tenants were induced by the landlord's negligent misrepresentations to enter into the lease means that the landlord is unable to rely on its terms in this law suit. Last, if I have fallen into error in making the above findings of fact, I would be prepared to find that the damages owed to the tenants by the landlord for the tort of negligent misrepresentation should be augmented to include any amount of back rent actually owed by the tenants to the landlord.

### **3. Leasehold Improvements**

[44] On this topic I accept Ms. Assu's evidence concerning her dealings with the landlord's "go-to-guy", Mr. Howie Budinski. In particular I accept her evidence that she was assured that if she accepted Budinski's recommendations she would be "on budget". I did not accept Mr. Edie's evidence concerning the additional costs of tenant improvements in Kidlets space. In particular, the alleged drywall costs for their 3500 square feet seemed completely unrealistic. On the evidence before me, I am unable to determine if Mr. Edie was knowingly overcharging Ms. Assu, or whether he was the victim of overcharging by his tenant improvement contractor. In any case, I am satisfied that the "extra" \$1 per square foot which Ms. Assu was persuaded to agree to was not an appropriate charge. I award the tenant special damages of \$10,208.10 on this basis.

### **4. Roof Collapse**

[45] As to the roof collapse, the tenants have not provided adequate evidence to satisfy me concerning their allegations of the necessity for, and the duration of, any closure of their store caused by the roof collapse. I am satisfied that the landlord should be responsible for the \$1,000 deductible that the tenants were obliged to pay when claiming on their tenant's insurance policy as special damages.

### **5. Signage**

[46] I have reviewed Schedule "D" of the Lease Agreement which provides:

Signage: The tenant shall utilize a double sided 2'6" x 10' panel on a pylon sign located on the Lands at a cost of \$125 per month.

[47] No evidence was given concerning the dimensions of the sign or signs in issue.

[48] I accept the tenant's submissions and award \$4,375 in special damages under this heading.

## 6. Additional Rent

[49] I did not find that the evidence concerning this issue met the tenant's burden of proof. I dismiss their claim.

### Conclusion

[50] I dismiss all the landlord's claims against the tenants. I grant the tenants damages claims as previously noted:

|                 |             |
|-----------------|-------------|
| General Damages | \$10,000.00 |
|-----------------|-------------|

Special Damages

|                        |             |
|------------------------|-------------|
| Leasehold Improvements | \$10,208.10 |
|------------------------|-------------|

|               |            |
|---------------|------------|
| Roof Collapse | \$1,000.00 |
|---------------|------------|

|         |            |
|---------|------------|
| Signage | \$4,375.00 |
|---------|------------|

|           |             |
|-----------|-------------|
| Sub Total | \$15,583.10 |
|-----------|-------------|

|       |             |
|-------|-------------|
| Total | \$25,583.10 |
|-------|-------------|

[51] Both parties have sought solicitor/clients costs against the other. I award costs on Scale B to the defendants.

"Leask J."

**TAB 9**

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Ontario Reports

Court of Appeal for Ontario

Trotter, Zarnett and Jamal JJ.A.

July 8, 2020

151 . . 3 609 | 2020 ONCA 447

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2020 ONCA 447 (CanLII)

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rs — rs — r ppea — a r a resp s e r  
 ss — a a ps e s s e a a - epressa  
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 a a rer a era s e s ar e ar e e ar — e  
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 s , 2002, S. . 2002, . 24, S . , ss. 7 1 a , 7 2 .

In July 2003, the plaintiff was prescribed an anti-depressant manufactured by the defendant. By March 2004 he had stopped taking the drug. In July 2004, without consulting a physician, he started taking it again. A week later, he increased his daily dosage beyond the recommended amount. Within two weeks of increasing the dosage he began to have psychotic delusions that his 11-year-old son was terminally ill. The son had epilepsy but was otherwise healthy. Shortly thereafter he strangled his son to death. The plaintiff was charged with murder. At his trial he did not advance a defence based on the theory that the drug caused his psychosis. In September



2005 he was found to be not criminally responsible on account of mental disorder. In December 2009, after his fifth hearing before the Ontario Review Board, he was granted an absolute discharge with the board unanimously concluding that he no longer posed a significant threat to public safety. In the meantime, he had published a website about the dangers of the drug and asked the defendant to sponsor it. He also published a pamphlet about the drug, gave media interviews, retained a divorce lawyer, met with a lawyer in the United States to explore the possibility of suing the defendant, and in [page610] May 2007 was confirmed by a psychiatrist to be mentally competent and able to understand and sign legal documents in connection with the sale of his house. In October 2009, he received a DNA report indicating that he was an "extensive metaboliser" of medications and that the drug had caused his psychosis. In October 2011, believing that the report constituted discovery of a claim and that the limitation period was running out, he prepared and issued a statement of claim against the defendant. The pleading was amended after he retained counsel. The defendant filed a statement of defence denying liability, and subsequently moved for summary judgment to dismiss the action as statute-barred. The motion judge found that the plaintiff had discovered his claim long before October 2009, but that based on s. 7(1)(a) of the *Limitations Act, 2002* the two-year limitation period did not run during any time when the plaintiff had proved that he was incapable of commencing a proceeding because of his psychological condition. The judge found that the plaintiff lacked capacity until his absolute discharge by the Ontario Review Board in December 2009. The summary judgment motion was dismissed. The defendant appealed.

e , the appeal should be allowed.

The motion judge did not apply the wrong legal test under s. 7(1)(a). The judge had referred to "psychological strength" to undertake the initiation of a lawsuit. The expression was potentially confusing because it was apt to be misinterpreted as suggesting a subjective standard for capacity. The expression was also unhelpful because a finding of a lack of psychological strength was a conclusion, but not in itself a reason for finding incapacity. Thus, the expression was best avoided. However, the judge mentioned it only once and it was to make the uncontroversial point that a person may display many indicators of cognitive capacity, yet still lack the capacity to commence a proceeding in respect of the claim because of their psychological condition.

The motion judge did not reverse the onus for proving capacity under s. 7(2) of the *Limitations Act*. Section 7(2) provided for a presumption of capacity at all times unless the contrary is proved. The judge had cited a civil sexual assault case. The defendant argued that based on that case, the judge found that the plaintiff was incapable of commencing his claim until he obtained an absolute discharge from the Ontario Review Board and that the defendant was required to prove the contrary. However, the judge cited the case for the proposition that a plaintiff's discovery of a cause of action and the legal capacity to sue should not be conflated, and for the proposition that the capacity to start an action stands apart from the capacity to deal with other daily stressful circumstances. Citing the case did not constitute a reversal of the burden of proof.

The motion judge did materially misapprehend the evidence. He stated that he would have no

trouble in finding that the plaintiff, prior to his absolute discharge, would not have been able to understand the decisions he had to make or to appreciate the consequences of those choices. However, the judge did not refer to any specific evidence to support those findings. Nor were the findings supported by the expert evidence. The misapprehension was obvious and essential to the conclusion that the plaintiff was incapable of suing the defendant until after his absolute discharge, with the result that the decision was set aside.

It was an appropriate case for the Court of Appeal to exercise its fact-finding powers. The appeal did not raise questions of credibility, the record was complete for the purpose of deciding whether to grant summary judgment, the parties did not materially dispute the facts, neither party asked for redetermination by the [page611] Superior Court, and the matter had already been before the courts for almost a decade.

It was an appropriate case to grant summary judgment. Prior to his absolute discharge, the plaintiff had the ability to know or understand the minimum choices or the decisions required to pursue a claim. There was evidence that he understood the litigation process and that had the capacity to review and sign legal documents, to manage his financial and business affairs, and to reach out and to speak to others about mental illness. He had an appreciation of the consequences and effects of his choices or decisions in that he weighed the effects of litigation on himself and his family and he waited until he thought he had enough information on causation. The expert evidence established that he appreciated the nature of the proceedings. He showed an ability to choose and keep counsel, having been represented by counsel at his criminal trial and before the Ontario Review Board and retaining a divorce lawyer and consulting with an American lawyer. He had the ability to represent himself in drafting his own statement of claim, creating a website, and giving media interviews. He had an ability to distinguish between relevant and irrelevant issues. Although he was mistaken about the law of limitations, that mistake did not suggest that he was incapable of suing the defendant because of a psychological condition. There was no clear and unequivocal evidence that the plaintiff's doctors advised him not to sue until after his absolute discharge. Although being under the jurisdiction of the Ontario Review Board was stressful for the plaintiff and his family, the board's final ruling did not cause the immediate return of the plaintiff's psychological capacity to sue. There were many objective indications that the plaintiff had the capacity to sue the defendant long before the absolute discharge.

*Hengeveld v. Ontario (Minister of Transportation)*, [2017] O.J. No. 5596, 2017 ONSC 6300 (S.C.J.); *Huang v. Pan*, [2017] O.J. No. 2265, 2017 ONCA 268, 30 E.T.R. (4th) 19, 16 C.P.C. (8th) 59, 278 A.C.W.S. (3d) 13 (C.A.), quashing appeal, [2016] O.J. No. 5238, 2016 ONSC 6306, 24 E.T.R. (4th) 285, 272 A.C.W.S. (3d) 288, 100 C.P.C. (7th) 183 (S.C.J.) [Leave to appeal refused [2017] O.J. No. 3199, 2017 ONSC 3826 (S.C.J.)], **ap**

*Calvert (Litigation guardian of) v. Calvert* (1998), 37 O.R. (3d) 221, [1998] O.J. No. 505, 36 R.F.L. (4th) 169, 77 A.C.W.S. (3d) 582, 106 O.A.C. 299 (C.A.), affg (1997), 32 O.R. (3d) 281, [1997] O.J. No. 553, 26 O.T.C. 81, 27 R.F.L. (4th) 394, 69 A.C.W.S. (3d) 125 (Gen. Div.) [Leave to appeal to S.C.C. refused [1998] S.C.C.A. No. 161]; *C. (A.) v. Joyce*, [2017] O.J. No. 281,

2017 ONCA 49 (C.A.), *varg C. (A.) v. Joyce* (2016), 130 O.R. (3d) 114, [2016] O.J. No. 1627, 2016 ONSC 2164 (S.C.J.), **s**

*Hryniak v. Mauldin*, [2014] 1 S.C.R. 87, [2014] S.C.J. No. 7, 2014 SCC 7, 366 D.L.R. (4th) 641, 453 N.R. 51, J.E. 2014-162, 314 O.A.C. 1, 21 B.L.R. (5th) 248, 12 C.C.E.L. (4th) 1, 27 C.L.R. (4th) 1, 46 C.P.C. (7th) 217, 95 E.T.R. (3d) 1, 37 R.P.R. (5th) 1, EYB 2014-231951, 2014EXP-319,

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2212886 *Ontario Inc. v. Obsidian Group Inc.*, [2018] O.J. No. 3980, 2018 ONCA 670, 83 B.L.R. (5th) 186, 295 A.C.W.S. (3d) 287 (C.A.) [Leave to appeal to S.C.C. refused [2018] S.C.C.A. No. 391]; *Asagwara v. Money Mart*, [2014] O.J. No. 5805, 2014 ONSC 6974 (S.C.J.); *Bannon v. Thunder Bay (City)*, [2002] 1 S.C.R. 716, [2002] S.C.J. No. 18, 2002 SCC 20, 210 D.L.R. (4th) 62, 284 N.R. 190, J.E. 2002-466, 156 O.A.C. 307, 27 M.P.L.R. (3d) 31, 112 A.C.W.S. (3d) 360, revg on other grounds (2000), 48 O.R. (3d) 1, [2000] O.J. No. 1368, 185 D.L.R. (4th) 690, [page612] 131 O.A.C. 265, 9 M.P.L.R. (3d) 165, 96 A.C.W.S. (3d) 312 (C.A.); *Benhaim v. St-Germain*, [2016] 2 S.C.R. 352, [2016] S.C.J. No. 48, 2016 SCC 48, 2016EXP-3580, J.E. 2016-1957, EYB 2016-272525, 271 A.C.W.S. (3d) 664, 402 D.L.R. (4th) 579, 33 C.C.L.T. (4th) 1; *Bilek v. Constitution Insurance*, [1990] O.J. No. 3117, 49 C.P.C. (2d) 304, 22 A.C.W.S. (3d) 860 (Dist. Ct.); *Bisoukis v. Brampton (City)* (1999), 46 O.R. (3d) 417, [1999] O.J. No. 4598, 180 D.L.R. (4th) 577, 127 O.A.C. 107, 41 C.P.C. (4th) 33, 7 M.P.L.R. (3d) 1, 1 M.V.R. (4th) 42, 93 A.C.W.S. (3d) 389 [Leave to appeal to S.C.C. refused [1999] S.C.C.A. No. 52, 2000 CarswellOnt 3008]; *Broadgrain Commodities Inc. v. Continental Casualty Co. (c.o.b. CNA Canada)*, [2018] O.J. No. 2484, 2018 ONCA 438, 292 A.C.W.S. (3d) 394, 80 C.C.L.I. (5th) 23 (C.A.); *Bruno Appliance and Furniture, Inc. v. Hryniak*, [2014] 1 S.C.R. 126, [2014] S.C.J. No. 8, 2014 SCC 8, 366 D.L.R. (4th) 671, 453 N.R. 101, J.E. 2014-161, 314 O.A.C. 49, 21 B.L.R. (5th) 311, 12 C.C.E.L. (4th) 63, 27 C.L.R. (4th) 65, 47 C.P.C. (7th) 1, 37 R.P.R. (5th) 63, EYB 2014-231952, 2014EXP-318; *Bryars Estate v. Toronto General Hospital*, [1997] O.J. No. 3727, 152 D.L.R. (4th) 243, 103 O.A.C. 53, 73 A.C.W.S. (3d) 1054 (C.A.); *C. (C.) v. Children's Aid Society of Toronto*, [2007] O.J. No. 5613 (S.C.J.); *Canaccord Capital Corp. v. Roscoe* (2013), 115 O.R. (3d) 641, [2013] O.J. No. 2643, 2013 ONCA 378, 306 O.A.C. 382, 9 C.C.E.L. (4th) 26, 363 D.L.R. (4th) 182, 228 A.C.W.S. (3d) 252 (C.A.); *Canadian Imperial Bank of Commerce v. Green* (2015), 135 O.R. (3d) 334, [2015] 3 S.C.R. 801, [2015] S.C.J. No. 60, 2015 SCC 60, 391 D.L.R. (4th) 567, 478 N.R. 202, J.E. 2015-1921, 346 O.A.C. 204, 44 B.L.R. (5th) 1, 77 C.P.C. (7th) 1, EYB 2015-259361, 2015 SOACQ para. 10,054, 2016 CCSG para. 51,536, 2016 BCLG para. 79,099, 2016 OCLG para. 51,912, 2016 CCLR para. 201,256, 2015EXP-3510, 2016 CSLR para. 900-621, 2016 ACLG para. 79,675, 260 A.C.W.S. (3d) 25; *Cooper v. Comer*, [2017] O.J. No. 3539, 2017 ONSC 4142 (S.C.J.); *Costantino v. Costantino*, [2016] O.J. No. 5963, 2016 ONSC 7279 (S.C.J.); *Dawson v. Rexcraft Storage and Warehouse Inc.*, [1998] O.J. No. 3240, 164 D.L.R. (4th) 257, 111 O.A.C. 201, 26 C.P.C. (4th) 1, 20 R.P.R. (3d) 207, 81 A.C.W.S. (3d) 783 (C.A.); *Deck International Inc. v. Manufacturers Life Insurance Co.*, [2012] O.J. No. 2155, 2012 ONCA 309 (C.A.); *Evans v. Evans*, [2017] O.J. No. 3716, 2017 ONSC 4345, 281 A.C.W.S. (3d) 275, 96 R.F.L. (7th) 300 (S.C.J.); *Frohlick v. Pinkerton Canada Ltd.* (2008), 88 O.R. (3d) 401, [2008] O.J. No. 17, 2008 ONCA 3, 232 OAC 146, 62 C.C.E.L. (3d) 161, 49 C.P.C. (6th)

209, 163 A.C.W.S. (3d) 371, 289 D.L.R. (4th) 639; *Hussaini v. Freedman*, [2013] O.J. No. 912, 2013 ONSC 779 (S.C.J.); *Joseph v. Paramount Canada's Wonderland* (2008), 90 O.R. (3d) 401, [2008] O.J. No. 2339, 2008 ONCA 469, 294 D.L.R. (4th) 141, 56 C.P.C. (6th) 14, 166 A.C.W.S. (3d) 762, 241 O.A.C. 29 (C.A.); *Kassa (Re)*, [2019] O.J. No. 2007, 2019 ONCA 313 (C.A.); *Kim v. Manufacturers Life Insurance Co (c.o.b. Manulife Financial)*, [2014] O.J. No. 4481, 2014 ONCA 658, 244 A.C.W.S. (3d) 442, 40 C.C.L.I. (5th) 12 (C.A.), affg [2014] O.J. No. 853, 2014 ONSC 1205, 31 C.C.L.I. (5th) 252, 238 A.C.W.S. (3d) 468 (S.C.J.); *Kirby v. Leather*, [1965] 2 All E.R. 441, [1965] 2 Q.B. 367, [1965] 2 W.L.R. 1318 (C.A.); *Klimek v. Klos*, [2013] O.J. No. 3740 (S.C.J.); *Landrie v. Congregation of the Most Holy Redeemer* (2014), 120 O.R. (3d) 768, [2014] O.J. No. 3132, 2014 ONSC 4008 (S.C.J.); *Mazzei v. British Columbia (Director of Adult Forensic Psychiatric Services)*, [2006] 1 S.C.R. 326, [2006] S.C.J. No. 7, 2006 SCC 7, 264 D.L.R. (4th) 10, 346 N.R. 1, J.E. 2006-620, 222 B.C.A.C. 1, 46 Admin. L.R. (4th) 1, 206 C.C.C. (3d) 161, 36 C.R. (6th) 1, 68 W.C.B. (2d) 722, EYB 2006-102437, 2006 CCAN para. 10,018; *McAnuff (Re)* (2016), 130 O.R. (3d) 440, [2016] O.J. No. 2031, 2016 ONCA 280, 348 O.A.C. 20, 130 W.C.B. (2d) 59 (C.A.); *Mongeon v. Sammon* (2012), 108 O.R. (3d) 789, [2012] O.J. No. 255, 2012 ONSC 409 (S.C.J.); *Moore v. Apollo Health & Beauty Care*, [2017] O.J. No. 2381, 2017 ONCA 383, [2017] CLLC para. 210-048, 279 A.C.W.S. (3d) 90 (C.A.); *Murphy v. Welsh* (1993), 14 O.R. (3d) 799, [1993] 2 S.C.R. 1069, [1993] S.C.J. No. 83, 106 D.L.R. (4th) 404, 156 N.R. 263, 65 O.A.C. 103, 18 C.C.L.T. (2d) 101, 18 C.P.C. (3d) 137, 47 M.V.R. (2d) 1, 42 A.C.W.S. (3d) 509; [page613] *Novak v. Bond*, [1999] 1 S.C.R. 808, [1999] S.C.J. No. 26, 172 D.L.R. (4th) 385, 239 N.R. 134, [1999] 8 W.W.R. 499, J.E. 99-1095, 122 B.C.A.C. 161, 63 B.C.L.R. (3d) 41, 45 C.C.L.T. (2d) 1, 32 C.P.C. (4th) 197, 88 A.C.W.S. (3d) 670; *Ohenhen (Re)* (2018), 140 O.R. (3d) 616, [2018] O.J. No. 392, 2018 ONCA 65, 359 C.C.C. (3d) 154, 145 W.C.B. (2d) 506, 45 C.R. (7th) 73, 419 D.L.R. (4th) 76 (C.A.); *Panciera v. Rokovetsky*, [2009] M.J. No. 180, 2009 MBQB 129, 252 Man. R. (2d) 115 (Q.B.); *Pucci v. Wawanesa Mutual Insurance Co.*, [2020] O.J. No. 1758, 2020 ONCA 265, 2020 OABC para. A-1422 (C.A.); *R. v. Lamanna*, [2009] O.J. No. 3380, 2009 ONCA 612, 252 O.A.C. 280 (C.A.); *R. v. Morrissey* (1995), 22 O.R. (3d) 514, [1995] O.J. No. 639 (C.A.); *R. v. Penunsi*, [2019] S.C.J. No. 39, 2019 SCC 39, 378 C.C.C. (3d) 37, 435 D.L.R. (4th) 65, 55 C.R. (7th) 342; *Reid v. Crest Support Services (Meadowcrest) Inc.*, [2013] O.J. No. 4525, 2013 ONSC 6264, 233 A.C.W.S. (3d) 481, 93 E.T.R. (3d) 285 (S.C.J.); *Rizzo & Rizzo Shoes Ltd. (Re)* (1998), 36 O.R. (3d) 418, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, 154 D.L.R. (4th) 193, 221 N.R. 241, J.E. 98-201, 106 O.A.C. 1, 50 C.B.R. (3d) 163, 33 C.C.E.L. (2d) 173, 98 CLLC para. 210-006, 76 A.C.W.S. (3d) 894, D.T.E. 98T-154; *Tim Ludwig Professional Corp. v. BDO Canada LLP* (2017), 137 O.R. (3d) 570, [2017] O.J. No. 1865, 2017 ONCA 292, 277 A.C.W.S. (3d) 643, 413 D.L.R. (4th) 99, 70 B.L.R. (5th) 288 (C.A.); *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.*, [1997] O.J. No. 3754, 74 A.C.W.S. (3d) 207, 1997 CarswellOnt 3496 (C.A.), affg (1996), 28 O.R. (3d) 423, [1996] O.J. No. 1568, 2 O.T.C. 146, 62 A.C.W.S. (3d) 891 (Gen. Div.); *Waxman v. Waxman*, [2004] O.J. No. 1765, 186 O.A.C. 201, 44 B.L.R. (3d) 165, 132 A.C.W.S. (3d) 1046 (C.A.) [Leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 291]; *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625, [1999] S.C.J. No. 31, 175 D.L.R. (4th) 193, 241 N.R. 1, J.E. 99-1277, 124 B.C.A.C. 1, 135 C.C.C. (3d) 129, 25 C.R. (5th) 1, 63 C.R.R. (2d) 189, 42 W.C.B. (2d) 381, 1999 CCAN para. 10,036; *Winmill v. Woodstock (City) Police Services Board* (2017), 138 O.R. (3d) 641, [2017] O.J. No. 6406, 2017 ONCA 962, 16 C.P.C. (8th) 288, 46 C.C.L.T. (4th) 69, 286 A.C.W.S. (3d) 555 (C.A.), revg on other grounds [2017] O.J. No. 2013, 2017 ONSC 2528

(S.C.J.); *Winter v. Sherman Estate*, [2018] O.J. No. 2068, 2018 ONCA 379 (C.A.) [Leave to appeal to S.C.C. refused [2019] S.C.C.A. No. 438]

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*Courts of Justice Act*, R.S.O. 1990, c. C.43, ss. 134 [as am.], (1), (4)(a)

*Criminal Code*, R.S.C. 1985, c. C-46, ss. 672.52(1), 672.54 [as am.], (a), (b), (c), 672.81 [as am.]

*Limitations Act*, R.S.O. 1990, c. L.15 [rep.], s. 47

*Real Property Limitations Act*, R.S.O. 1990, c. L.15

*Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B, ss. 4, 7, (1)(a), (2), 10(3) [rep.]

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Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 20, 20.04(2), (a), (b), (2.1), (2.2)

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APPEAL by the defendant from the order of Lederer J., [2019] O.J. No. 2135, 2019 ONSC 2037 (S.C.J.) dismissing a motion for summary judgment.

*Randy Sutton, Kate Findlay and Justine Smith*, for appellant.

*Michael F. Smith and James Yap*, for respondent.

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The judgment of the court was delivered by

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A. Overview

[1] This appeal concerns the proper interpretation of s. 7(1) (a) of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B ("Act"). This provision provides that the basic two-year limitation period in s. 4 of the Act does not run during any time in which the person with the claim "is incapable of commencing a proceeding in respect of the claim because of his or her physical, mental or psychological condition". Section 7(2) adds that "[a] person shall be presumed to have been capable of commencing a proceeding in respect of a claim at all times unless the contrary is proved". What must a person with a claim show to prove that they were "incapable of commencing a proceeding in respect of the claim" because of their "psychological condition" under s. 7(1) (a), to rebut the presumption of capacity and stop the running of the limitation period? That is the central issue raised in this appeal.

[2] This is a tragic case. On July 31, 2004, the respondent, Mr. David Carmichael, strangled to death his 11-year-old son, Ian. At the time, Mr. Carmichael was suffering from mental illness and psychotic delusions. He was also taking the antidepressant drug, Paxil, manufactured by the appellant, GlaxoSmithKline Inc. ("GSK").

[3] Mr. Carmichael was charged with murder but was found to be not criminally responsible on account of mental disorder ("NCRMD"), and thus came under the jurisdiction of the Ontario Review Board ("Board"). He received in-patient treatment at a psychiatric hospital and in late 2007 started living in the community. He was granted an absolute discharge on December 2, 2009.

[4] Between July 31, 2004, when Mr. Carmichael killed his son, and December 2, 2009, when he received an absolute discharge, Mr. Carmichael worked with and instructed several lawyers, including his criminal defence counsel, his counsel before the Board and his divorce lawyer. He also travelled to Texas to meet with a U.S. lawyer with whom he discussed the possibility of suing GSK. He published a website and a booklet describing how he believed Paxil had caused his psychosis, gave media interviews to newspapers and a national [page615] television program and approached GSK about sponsoring or buying his website.

[5] On October 5, 2011, Mr. Carmichael sued GSK for damages. The action was commenced more than seven years after Mr. Carmichael killed his son and nearly two years after he received an absolute discharge.

[6] GSK moved for summary judgment to dismiss the action as statute-barred. The motion judge dismissed the motion, holding that that the two-year limitation period under s. 4 did not begin to run until Mr. Carmichael received an absolute discharge on December 2, 2009. In his view, Mr. Carmichael had proved that he was "incapable of commencing a proceeding in respect of the claim" because of his "psychological condition" under s. 7(1)(a), and had thus rebutted the presumption of capacity under s. 7(2).

[7] GSK now appeals.

[8] For the reasons that follow, I would allow the appeal. I would grant GSK's motion for summary judgment and dismiss the action as statute-barred.

#### B. *Relevant legislation*

[9] The key provisions in this appeal are ss. 4 and 7 of the Act.

[10] Section 4 establishes a basic two-year limitation period that begins to run once a claim is discovered:

4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.

[11] Section 7(1)(a) suspends the basic limitation period during any time in which the person with the claim is incapable of commencing a proceeding in respect of the claim because of his or her physical, mental, or psychological condition, while s. 7(2) provides that a person shall be presumed to have been capable of commencing a proceeding in respect of a claim at all times unless the contrary is proved. Section 7 provides:

7(1) The limitation period established by section 4 does not run during any time in which the person with the claim,

(a) is incapable of commencing a proceeding in respect of the claim because of his or her physical, mental or psychological condition; and

(b) is not represented by a litigation guardian in relation to the claim.

(2) A person shall be presumed to have been capable of commencing a proceeding in respect of a claim at all times unless the contrary is proved.

(3) If the running of a limitation period is postponed or suspended under this section and the period has less than six months to run when the postponement or suspension ends, the period is extended to include the day that is six months after the day on which the postponement or suspension ends. [page616]

### C. Background Facts

[12] The parties filed a joint chronology of major events from 2003 to 2011. While the parties do not materially disagree about the background facts, they do disagree about the legal significance of certain facts and whether these facts proved that, until December 2, 2009, Mr. Carmichael was incapable of commencing a proceeding in respect of his claim because of his psychological condition.

#### (a) *Mr. Carmichael starts and then stops taking Paxil*

[13] In July 2003, Mr. Carmichael was suffering from personal and financial stress and was given some Paxil tablets by his twin brother, who was taking Paxil for depression. Later that month, Mr. Carmichael was prescribed 40 mg of Paxil per day for depression by his physician.

[14] In early 2004, Mr. Carmichael began to wean himself off Paxil, and in March 2004, he stopped taking it. At that time, he did some Internet research and read articles suggesting that potential side-effects of Paxil included violence and the desire to commit suicide or kill someone. He also read about a U.S. lawsuit against GSK's predecessor company alleging that someone had killed himself and three others while taking Paxil.

#### (b) *GSK and Health Canada issue warnings about Paxil*

[15] In May 2004, GSK issued a warning to the medical community that some Paxil users reported "severe agitation-type adverse events coupled with self-harm or harm to others". GSK recommended "[r]igorous clinical monitoring" of patients for "agitation-type emotional and behavioural changes".

[16] In June 2004, Health Canada issued an advisory to Canadians stating that it had introduced stronger warnings on newer antidepressants, including Paxil. It warned that patients "may experience behavioural changes and/or emotional changes that may put them at increased risk of self-harm or harm to others".

*(c) Mr. Carmichael starts taking Paxil again and increases his dosage without medical advice*

[17] On July 8, 2004, without consulting a physician, Mr. Carmichael started taking 40 mg of Paxil again. About a week later -- again, without consulting a physician -- he increased his dosage to 60 mg daily, which was beyond the recommended dosage for depression. [page617]

*(d) During a psychotic episode, Mr. Carmichael kills his son*

[18] Within two weeks of increasing the dosage, Mr. Carmichael began having psychotic delusions that his 11-year-old son, Ian, had a malignant brain tumour and was terminally ill. In fact, although Ian had epilepsy, he was otherwise healthy. Mr. Carmichael also had delusions that Ian would kill Mr. Carmichael's daughter and cause his wife to have a nervous breakdown.

[19] Mr. Carmichael decided that the only way to end Ian's perceived suffering and to protect his wife and daughter was to kill him. He first planned to drown Ian and himself, but did not do so. Then, on July 30, 2004, he took Ian to a hotel in London, Ontario, on the pretext of taking him to a BMX bike-riding track. That night, Mr. Carmichael gave Ian an overdose of sleeping medication and strangled him.

[20] The next morning, Mr. Carmichael called the hotel's front desk and asked the operator to call the police. He told the 911 operator that he had killed his son and that he was taking Paxil. He was arrested and charged with first degree murder. When he was interviewed by the police, he raised the possibility that Paxil may have been involved in him killing his son.

*(e) At his criminal trial, Mr. Carmichael does not suggest that Paxil caused his psychosis*

[21] In August 2004, criminal defence counsel was retained to represent Mr. Carmichael. Mr. Carmichael and his counsel explored a defence based on the theory that Paxil caused his psychosis, and in February 2005, a psychiatrist told Mr. Carmichael that he supported this theory. Even so, Mr. Carmichael and his defence team decided not to advance this defence.

*(f) Mr. Carmichael is found not criminally responsible on account of mental disorder*

[22] On September 30, 2005, Mr. Carmichael was found to be NCRMD by Rady J. of the Ontario Superior Court of Justice. She found that, on the day Mr. Carmichael killed his son, he "was suffering from a severe depressive illness with associated delusional thinking that deprived him of the capacity to know that his actions were morally wrong". She found "no reasonable alternative explanation for this terrible event except the devastating effects of mental illness". She ordered him detained in custody at the Brockville Mental Health Centre ("Hospital") for up to 90 days under s. 672.54(c) of the *Criminal Code*, R.S.C. 1985, c. C-46, and transmitted a copy



of the record of the disposition hearing before her to the Board under s. 672.52(1) of the *Criminal Code*. [page618]

(g) *The Ontario Review Board*

[23] Because the Board's proceedings figure prominently in this case, it is worth saying a few words about its mandate.

[24] The Board's mandate is to determine whether an NCRMD accused poses a "significant threat to the safety of the public": s. 672.54(a). A "significant threat to the safety of the public" means "a real risk of physical or psychological harm to members of the public that is serious in the sense of going beyond the merely trivial or annoying" and "must be criminal in nature": *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625, [1999] S.C.J. No. 31, at para. 62. The Board must consider both the likelihood of a risk materializing and the seriousness of the harm that might occur: *Kassa (Re)*, [2019] O.J. No. 2007, 2019 ONCA 313 (C.A.), at para. 33.

[25] If the Board concludes that the NCRMD accused does not pose a significant threat to public safety, then he or she must be discharged absolutely: s. 672.54(a).

[26] But if the Board finds that the significant threat threshold is met, it must order the NCRMD accused to be either discharged or detained in custody in a hospital, in either case subject to conditions as it considers appropriate: ss. 672.54(b) and (c); *R. v. Lamanna*, [2009] O.J. No. 3380, 2009 ONCA 612, 252 O.A.C. 280 (C.A.), at para. 7. The Board must make a disposition that is "necessary and appropriate in the circumstances" (s. 672.54), which has been interpreted as meaning the "least onerous and least restrictive" disposition regarding the NCRMD accused's liberty interests that is consistent with public safety and their mental condition, other needs, and eventual reintegration into society: *Mazzei v. British Columbia (Director of Adult Forensic Psychiatric Services)*, [2006] 1 S.C.R. 326, [2006] S.C.J. No. 7, 2006 SCC 7, at para. 19; *McAnuff (Re)* (2016), 130 O.R. (3d) 440, [2016] O.J. No. 2031, 2016 ONCA 280 (C.A.), at para. 22.

[27] The Board must hold a hearing not later than 12 months after making a disposition and every 12 months thereafter as long as the disposition remains in force, to review any disposition that it has made for an NCRMD accused, other than an absolute discharge: s. 672.81.

(h) *Mr. Carmichael's first hearing before the Board*

[28] Following Mr. Carmichael's first hearing before the Board, held in November 2005, the Board accepted the Hospital's recommendation that while Mr. Carmichael was "not currently reporting or demonstrating any active symptoms of mental illness", he might suffer another psychotic episode, and therefore posed a [page619] significant threat to public safety. The Board ordered him detained at the Hospital, subject to conditions permitting him to enter the community once a month under approved supervision.

- (i) *Mr. Carmichael publishes a website, gives media interviews and asks GSK to sponsor his website*

[29] In June 2006, Mr. Carmichael published a website detailing how he believed that Paxil triggered his psychosis.

[30] That summer, Mr. Carmichael gave media interviews about his offence to *The London Free Press*, the *Ottawa Sun* and the *Ottawa Citizen*, contrary to the advice of his treating psychiatrists.

[31] In August 2006, Mr. Carmichael left a voicemail for GSK about "a potential opportunity to collaborate in a public education initiative". GSK did not respond. A few days later, he left another voicemail for GSK, which he later described as follows:

I proposed that GlaxoSmithKline become the exclusive sponsor of a website that I was developing for people suffering from depression (depressionsufferers.com). I also indicated that *if they become the exclusive sponsor that I would work with them on the messaging on my website (davidcarmichael.com) and that my wife, daughter and I would not explore the possibility of pursuing any legal action against GlaxoSmithKline.*

(Emphasis added)

[32] In late August 2006, GSK advised the Hospital that Mr. Carmichael had left a threatening voicemail trying to extort money and wrote to Mr. Carmichael to reject his proposal. In early September 2006, Mr. Carmichael responded to GSK in writing and again proposed that it sponsor his website. He followed up a couple of weeks later by leaving a voicemail for GSK and asked for a meeting. GSK did not respond.

[33] When Mr. Carmichael's psychiatrists heard that Mr. Carmichael had left a voicemail for GSK, they told him that such a voicemail could easily be construed as an attempt to extort money. They warned him not to act in this way in the future but rather to work through his lawyers.

(j) *Mr. Carmichael's second hearing before the Board*

[34] Following Mr. Carmichael's second hearing before the Board, held in November 2006, the Board confirmed that Mr. Carmichael continued to pose a significant risk to public safety, though he was now permitted to reside in the community in accommodation approved by the Hospital.

[35] The Board noted that the opinion of Mr. Carmichael's psychiatrist was that "[t]here are currently no signs of any symptoms of his mental illness", but his condition "could still deteriorate if he were subject to too much stress", and this "could [page620] lead to further suicidal ideas and could cause a relapse". It also noted that while Mr. Carmichael had reconciled with his wife, from whom he had separated after their son's death, dealing with his marriage would be a source of stress.

[36] The Board also noted that Mr. Carmichael and his wife had

considered the possibility of taking legal action against the manufacturers of one the medications, which they felt had caused a worsening of his depression and had eventually resulted in the death of their son. This plan now appears to have been put aside.

(k) *Mr. Carmichael retains a divorce lawyer*

[37] In February 2007, Mr. Carmichael advised the Hospital that he had retained a lawyer to help him divorce from his wife. His psychiatrist noted that Mr. Carmichael was handling these stressful events reasonably well: "he is not showing any florid delusions or hallucinations, he is not manic, he is not depressed and he seems to be dealing reasonably well with the stress of going through his divorce".

[38] By late March 2007, Mr. Carmichael and his wife had reconciled. His psychiatrist noted that "he has abandoned the idea of divorcing from his wife on the advice of his lawyer . . . and his wife and himself and daughter have actually met and have got into some reconciliation meetings".

*(l) Mr. Carmichael participates in a CTV W5 episode*

[39] In April 2007, CTV's investigative journalism show *W5* aired a segment entitled "Over the Edge", in which Mr. Carmichael was interviewed about the events leading to his psychosis, how he killed his son and his criminal trial. It also contained brief interviews of two psychiatrists, one of whom, Dr. Bradford, had prepared an expert report for Mr. Carmichael's trial on which Rady J. had relied in finding him NCRMD. One psychiatrist believed that Mr. Carmichael's psychosis was "directly related" to Paxil, while Dr. Bradford was not convinced of this and highlighted that drugs like Paxil had helped millions of people. A CTV journalist noted that Mr. Carmichael "has thought about joining the thousands of others who are suing the big drug companies", but for now was driven to gain greater freedom and to be a father again to his daughter.

*(m) Mr. Carmichael is confirmed to be mentally competent*

[40] In late May 2007, in connection with the sale of Mr. Carmichael's house, his psychiatrist confirmed that "David Carmichael, a patient in the Forensic Ward at Brockville Mental Health [page621] Centre, is mentally competent and able to understand and sign legal documents".

*(n) Mr. Carmichael's third hearing before the Board*

[41] Following Mr. Carmichael's third hearing before the Board, held in November 2007, the Board concluded that although Mr. Carmichael continued to present a significant risk to public safety, it was now appropriate to grant him a conditional discharge. The Board imposed as a condition that he continue to live in Brockville and report to the Hospital at least once a month.

[42] The Board noted that Mr. Carmichael's wife, daughter and mother had recently moved to Brockville and he was living with them. The Hospital's evidence was that his family reintegration was "proceeding cautiously", and that although he was compliant with his medication, "the risk of relapse is real". The Board found that Mr. Carmichael would continue to face stress in re-establishing his business as a fitness consultant, finding employment, and reconciling with his family.

*(o) Mr. Carmichael travels to Texas to meet with a U.S. lawyer about suing GSK*

[43] In March 2008, Mr. Carmichael travelled to Texas to meet with a U.S. lawyer, Mr. Andy Vickery, about potentially suing GSK. Mr. Vickery had successfully sued GSK regarding Paxil in the lawsuit that Mr. Carmichael had read about in March 2004 when he was researching Paxil.

[44] Mr. Carmichael explained during his examination for discovery that Mr. Vickery "was looking at an international class action at that point". Among other things, they discussed the statute of limitations and the need for an expert report to prove a causal link between Paxil and Mr. Carmichael's psychosis.

[45] On Mr. Carmichael's return to Canada, he did not consult with a Canadian lawyer or immediately try to sue. Mr. Carmichael explained in his examination for discovery: "I didn't think I had the merit for a lawsuit. I didn't have any evidence. And in dealing with GlaxoSmithKline, they adamantly denied there was any causal link. You know, so that's . . . at that point it [sic] time it would be impossible."

(p) *Mr. Carmichael's fourth hearing before the Board*

[46] At Mr. Carmichael's fourth hearing before the Board, held in November 2008, the Hospital now recommended an absolute discharge. Even so, the Board, by a majority, maintained a conditional discharge. [page622]

[47] The Hospital's evidence was that Mr. Carmichael's mental state was stable and that he no longer posed a significant threat to public safety. He had been living in the community with his wife and daughter since October 2007. He was working as a fitness consultant. He showed no symptoms of any anxiety disorder or mood issues and his family reunification was going well. But the Hospital also highlighted that Mr. Carmichael could still relapse into depression while being medication compliant and that the incidence of relapse and of suicide was higher because of Mr. Carmichael's family history of depression.

[48] The majority found that there was insufficient history and evidence to predict Mr. Carmichael's conduct if he were to decompensate. It was also concerned that no evidence showed that his wife and daughter were more knowledgeable about the signs of decompensation and willing to engage with mental health professionals if it occurred.

[49] One Board member, however, concluded that an absolute discharge was now appropriate. He noted that Mr. Carmichael had a supportive family and had reintegrated successfully into the Brockville community, that according to the Hospital his depression was "in complete remission", and that he showed no evidence of depression or any other mental disorder during his testimony, despite having had a long and stressful hearing before the Board. The minority member was satisfied that because of the catastrophic effect of the index offence and Mr. Carmichael's expressed remorse, all concerned would react differently than had been the case before the index offence and the development of psychotic symptoms would be avoided.

(q) *Mr. Carmichael publishes "Killer Side Effects"*

[50] In March 2009, Mr. Carmichael published a 36-page booklet entitled "Killer Side Effects: What GlaxoSmithKline Does Not Seem to Want Anyone to Know About Paxil". The booklet described why Mr. Carmichael believed that Paxil triggered his psychosis and led him to kill his son; included media articles on Paxil and the dangers of certain antidepressant drugs; described Mr. Carmichael's website in which he sought to educate the public on Paxil and depression; and included his communications with GSK, in which in 2006 he had asked GSK to sponsor his website and in 2008 had offered to sell it to them.

*(r) Mr. Carmichael receives a DNA report*

[51] In 2009, Dr. Yolande Lucire, a forensic psychiatrist in Australia, contacted Mr. Carmichael and asked him to participate in a research project dealing with antidepressants and genetics. Mr. [page623] Carmichael agreed and provided a sample of his DNA. The results, which he received in October 2009, noted that Mr. Carmichael is an "extensive metaboliser" of medications. Mr. Carmichael's evidence was that Dr. Lucire told him that Paxil had caused his psychosis. Mr. Carmichael concluded that his genetic make-up made him particularly susceptible to the alleged side-effects of Paxil. Mr. Carmichael testified on cross-examination: "I discovered my claim with the DNA test from Dr. Lucire. That's when I felt I discovered my claim."

*(s) Mr. Carmichael's fifth and final hearing before the Board*

[52] Following Mr. Carmichael's fifth and final hearing before the Board, held on December 2, 2009, the Board unanimously concluded that he no longer posed a significant threat to public safety and granted him an absolute discharge. The Board found that Mr. Carmichael "presented as a stable individual whose mental illness has remained in remission for a considerable period of time". The Hospital's evidence, summarized in its report dated September 28, 2009, was that Mr. Carmichael was in "full remission from his diagnosed illness of major depressive disorder", that there was a "low probability of reoffence" and that there appeared to be "no deterioration in Mr. Carmichael's mental status, arising from the stressors of day to day living". The Board noted that the Hospital was satisfied that Mr. Carmichael would continue to take his medication, that he would seek help as required on an ongoing basis, and that he was supported by his wife and daughter.

*(t) Mr. Carmichael sues GSK*

[53] On October 5, 2011, Mr. Carmichael, unaided by counsel, issued a statement of claim against GSK. He later amended it after retaining counsel, and claimed over \$11 million in general damages, \$1 million in aggravated damages, and \$10 million in punitive or exemplary damages. The claim alleged that Paxil induced the psychosis that caused Mr. Carmichael to kill his son. Among other things, it claimed that GSK was negligent in the manufacturing and marketing of Paxil and that it failed to adequately warn Mr. Carmichael and other consumers of the drug's dangers.

[54] Mr. Carmichael explained on cross-examination that he prepared the claim himself "within literally less than three days" in October 2011. He did so then because he believed that the limitation period had begun to run when he received Dr. Lucire's report: [page624]

And that's, to me, when I felt the statute of limitations period was running out. It was two years from one of the dates on that report that I got, the actual pharmacogenetic DNA results and I filed it within that two-year window. I knew I had no choice. I couldn't delay it any further.

*(u) GSK defends the action and moves for summary judgment*

[55] In April 2012, GSK filed a statement of defence. It denied liability.

[56] After discoveries, GSK moved for summary judgment because the action was statute-barred. GSK's position was that Mr. Carmichael commenced the proceeding more than two years after the day on which he discovered his claim against GSK. Cross-examinations were held on affidavits filed on the motion, including from Mr. Carmichael, his wife, daughter and two experts.

[57] In his affidavit, Mr. Carmichael stated that "[d]uring the entire period of my pre-trial detention I was psychologically overwhelmed and incapacitated by depression, my guilt and grief and the trauma of what I had done". He stated that he continued to experience "incapacitating psychological problems" until his absolute discharge on December 2, 2009.

#### *D. The Expert Evidence on the Summary Judgment Motion*

[58] Mr. Carmichael and GSK each filed contending expert reports about whether Mr. Carmichael was incapable of commencing his claim against GSK until December 2, 2009, because of his psychological condition.

##### *(a) Dr. Stephen Fleming*

[59] Mr. Carmichael's expert, Dr. Stephen Fleming, is a certified psychologist licensed to practise in Ontario, and has a clinical psychology practice with offices in Brampton and Mississauga. Since 2014, he has been Emeritus Professor of Psychology at the Faculty of Health at York University. He has co-authored a book on parenting after the death of a child and has published extensively in peer-reviewed journals on grief and trauma following death. He was provided with Mr. Carmichael's medical and other records and met with him for 8.5 hours over three meetings in March 2018.

[60] Dr. Fleming summarized his opinion as follows:

In my opinion David was incapable of commencing a proceeding in respect of his claim because of his psychological condition. A number of factors contributed to David's inability to initiate the process of launching a civil suit against GSK until his absolute discharge in December 2009. To fully appreciate his psychological state during this time, one must consider the complexity of David's response to the death of his son (depression, complicated grief, and trauma), the profound impact of Ian's death on the Carmichaels individually [page625] and collectively, the failure to receive on-going psychotherapy, and his feelings of vulnerability until he received an absolute discharge.

[61] Dr. Fleming saw "no evidence that anyone considered the possibility that Ian's gruesome murder might have had a traumatic impact upon David". In his view, Mr. Carmichael "exhibited symptoms of [Post-Traumatic Stress Disorder] that went undetected and untreated". He also concluded that Mr. Carmichael showed a tendency to avoid reminders of his son's death, which in turn interfered with his grieving.

[62] Dr. Fleming believed that a "significant contributing factor to David's not pursuing legal action until December 2009 was that it was against medical advice". He noted that Mr. Carmichael's medical team repeatedly cautioned him "about the disastrous consequence that might befall him should he begin to feel overwhelmed".

[63] Dr. Fleming concluded that Mr. Carmichael faced a considerable psychological risk of a relapse if he began legal proceedings before he received an absolute discharge:

[T]he launching of legal proceedings prior to December 2009 would have placed David at considerable psychological risk. The trauma of Ian's death resulted in the forced surrendering of David's comforting illusions and assumptions that [*sic*] his sense of self (i.e., organizing principles and values that maintain self-esteem and shape the data of experience). His assumptive world, that set of assumptions or beliefs that secure and ground individuals and provide a sense of reality, purpose, and meaning, was sorely challenged if not destroyed by David killing his son. The fracturing of David's assumptive world resulted in substantial psychological upheaval and left him feeling fearful, insecure, and vulnerable. Launching legal proceedings prematurely would threaten the process of re-building shattered assumptions, finding meaning after Ian's death, and precipitate a relapse.

(b) *Dr. Anthony Rothschild*

[64] GSK's expert, Dr. Anthony J. Rothschild, is a professor of psychiatry at the University of Massachusetts Medical School and a former professor of psychiatry at Harvard Medical School. He has published extensively in peer-reviewed journals in the field of psychiatry and conducted research on psychiatric illness, including depression, psychotic depression, bipolar disorder, anxiety disorders and schizophrenia. Although he did not meet with Mr. Carmichael, he was given his medical records and other materials filed on the summary judgment motion.

[65] Dr. Rothschild summarized his opinion as follows:

[T]he contemporaneous medical records, Mr. Carmichael's discovery testimony and Mr. Carmichael's behaviours and actions clearly and consistently indicate that he was competent and capable of filing a claim in a legal matter [for] a number of years prior to October 5, 2009. [page626]

The health care professionals who evaluated Mr. Carmichael came to the conclusion in October 2005, well before October 5, 2009, that Mr. Carmichael was competent to handle his business affairs, medical treatment, and legal affairs. The opinion of Mr. Carmichael's multiple health care professionals did not change and was consistently documented in the contemporaneous medical records describing Mr. Carmichael's ongoing treatment between October 2005 and October 2009.

In addition, for several years prior to October 5, 2009, Mr. Carmichael conducted business and contractual matters such as selling his home, consulting and retaining a divorce lawyer, applying for jobs, purchasing a car, purchasing a boat, and pursuing and meeting with potential business contacts.

It is my opinion, based on my review of the medical records, the actions of Mr. Carmichael in his personal and professional life, and given the opinions of Mr. Carmichael's health care professionals between October 2005 and October 2009, that he did not suffer from a physical, mental or psychological condition that would have rendered him incapable so as to prevent him from commencing a claim in a legal matter.

I find no basis for the assertion made by Dr. Fleming, that Mr. Carmichael was incapable of filing an action over that period of time due to a physical, mental or psychological condition.

[66] Dr. Rothschild disagreed with Dr. Fleming's opinion that it was too traumatic for Mr. Carmichael to file a claim until December 2, 2009, because of the strong memories of his son's death:

I disagree with Dr. Fleming's opinion that Mr. Carmichael avoided filing a legal claim because the memories and emotions associated with trauma are so painful that people avoid stimuli associated with the traumatic event (pg. 12). There is an abundance of evidence (discussed above) that Mr. Carmichael did not exhibit any avoidance behaviour related to his son's death. He met with attorneys, had discussions with his healthcare professionals, created websites, met with one or more lawyers, gave interviews to the press, wrote a blog, and contacted GlaxoSmithKline -- repeatedly voicing and discussing both his belief that Paxil played a role in the homicide and possible legal actions against GSK.

[67] Dr. Rothschild also disagreed with Dr. Fleming's opinion that Mr. Carmichael received medical advice not to sue GSK:

Mr. Carmichael was encouraged to work with his lawyers and to learn more about Paxil by the staff at Brockville Psychiatric Hospital regarding his concerns that Paxil played a role in causing him to take his son's life.... Contrary to Dr. Fleming's opinion, while the staff at Brockville Psychiatric Hospital told Mr. Carmichael to be careful as his phone call to GSK could have been interpreted as an extortion attempt, they did not discourage him from contacting GSK but urged him to work through his lawyer regarding any communications with GSK instead.

#### *E. The Motion Judge's Decision*

[68] The motion judge dismissed GSK's motion for summary judgment: at para. 46. He concluded that Mr. Carmichael was [page627] incapable of commencing his claim against GSK because of his psychological condition before the Board granted him an absolute discharge on December 2, 2009: at para. 42.

[69] The motion judge found that Mr. Carmichael discovered his claim against GSK about Paxil's potential role in causing his psychosis "long before October 5, 2009 which was two years before the action began": at para. 17. The motion judge referred to Mr. Carmichael's discussions with the police when he was arrested, his discussions with his lawyers in preparing for trial, his comments about Paxil during his treatment, his Internet searches, personal writings and interviews, and his discussions with the U.S. lawyer: at para. 17. This finding is not challenged on appeal.

[70] The motion judge next considered whether the two-year limitation period in s. 4 did not run under ss. 7(1)(a) and (2) during any time when Mr. Carmichael had proved that he was incapable of commencing a proceeding in respect of his claim because of his psychological condition. He held, at para. 40, that the relevant factors for determining whether a person is capable of commencing an action were set out in *Huang v. Pan*, [2016] O.J. No. 5238, 2016 ONSC 6306, 100 C.P.C. (7th) 183 (S.C.J.), at para. 19, appeal quashed [2017] O.J. No. 2265,



2017 ONCA 268, 16 C.P.C. (8th) 59 (C.A.), leave to appeal refused [2017] O.J. No. 3199, 2017 ONSC 3826 (S.C.J.), and *Hengeveld v. Ontario (Minister of Transportation)*, [2017] O.J. No. 5596, 2017 ONSC 6300 (S.C.J.), at para. 21 ("*Huang/Hengeveld* indicators of capacity"):

- (a) A person's ability to know or understand the minimum choices or decisions required to make them;
- (b) An appreciation of the consequences and effects of his or her choices or decisions;
- (c) An appreciation of the nature of the proceeding;
- (d) A person's ability to choose and keep counsel;
- (e) A person's ability to represent himself or herself;
- (f) A person's ability to distinguish between relevant and irrelevant issues; and
- (g) A person's mistaken beliefs regarding the law or court procedures.

[71] The motion judge rejected GSK's position that Mr. Carmichael met each of these indicators of capacity no later than 2005. In his view, GSK's position failed "to recognize the fundamental distinction between the cognitive ability to commence an action and the psychological strength required to actually undertake the initiation of a lawsuit": at para. 42. The motion judge found, at para. 42, that Mr. Carmichael had proved that he lacked each of [page628] the *Huang/ Hengeveld* indicators of capacity until his absolute discharge on December 2, 2009:

Understood from the perspective of the psychological burden being carried by David Carmichael, taking into account the evolution of his coming to terms with his role in the death of his son, particularly as interpreted by the treating professionals along the way, as assessed thereafter by Dr. Stephen Fleming, accounted for in the decisions of the Ontario Review Board and confirmed by his wife and daughter I am unable to take each of these factors as having been met prior to his absolute discharge. By way of example, I have no trouble in finding that David Carmichael would not have been able to understand the minimum choices or the decisions he would have been required to make, to appreciate the consequences of those choices, to fully understand the nature of the proceedings, to choose and keep counsel and to represent himself or distinguish between relevant and irrelevant issues.

#### F. *The Grounds of Appeal*

[72] GSK advances three main grounds of appeal.

[73] First, GSK submits that the motion judge erred in law by applying the wrong legal test under s. 7(1)(a) of the Act. While GSK accepts that the motion judge correctly identified the *Huang/Hengeveld* indicators of capacity, it contends that the motion judge erred by assessing those factors "through the lens of 'psychological strength'". GSK asserts that "psychological strength" is not mentioned in the Act and is too subjective as a yardstick for capacity. It claims that to permit a litigant to defer commencing a claim until they have the subjective psychological

strength to do so could extend the limitation period indefinitely and would effectively reverse the onus of proving incapacity.

[74] Second, GSK submits that the motion judge erred in law by reversing the onus of proving incapacity. It asserts that the motion judge required GSK to prove Mr. Carmichael's capacity, even though s. 7(2) presumes capacity "unless the contrary is proved".

[75] Third, GSK submits that the motion judge misapprehended the evidence regarding capacity and that this misapprehension led to a palpable and overriding error in applying ss. 7(1)(a) and (2) of the Act to the evidence.

### G. Analysis

[76] In what follows, I first address the proper interpretation of s. 7(1)(a) of the Act and then consider GSK's three grounds of appeal. As I will explain, I do not accept GSK's first two grounds of appeal but accept the third. I reach five conclusions:

- (1) The motion judge did not apply the wrong legal test under s. 7(1)(a) of the Act; [page629]
- (2) The motion judge did not reverse the onus for proving incapacity contrary to s. 7(2);
- (3) The motion judge materially misapprehended the evidence of incapacity, which led him to make a palpable and overriding error in applying s. 7(1)(a) to the evidence;
- (4) This is an appropriate case for the court to make a fresh assessment of the evidence and to substitute the decision that should have been made; and
- (5) Mr. Carmichael did not prove that he was incapable of commencing his action against GSK until December 2, 2009 because of his psychological condition.

#### (a) *The interpretation of s. 7(1)(a) of the Limitations Act, 2002*

##### (i) *Introduction*

[77] Section 7(1)(a) of the Act prevents the basic limitation period in s. 4 from running during any time in which the person with the claim is incapable of commencing a proceeding in respect of the claim because of his or her physical, mental, or psychological condition. This provision requires proof of two elements: (i) the person with the claim is "incapable of commencing a proceeding in respect of the claim"; and (ii) the reason that the person is incapable is "because of his or her physical, mental or psychological condition".

[78] Section 7(2) states that a person shall be presumed to have been capable of commencing a proceeding in respect of a claim at all times unless the contrary is proved. This provision establishes a presumption of the person's capacity to commence a proceeding in respect of a claim and places the onus on the person claiming incapacity to prove the contrary. The burden of proof to rebut this presumption of capacity is on the civil standard of the balance of probabilities.

##### (ii) *Purposive interpretation of limitation periods*

[79] The interpretation of s. 7(1)(a) is guided by the modern rule of statutory interpretation, that "the words of an Act are to be read in their entire context and in their grammatical and

ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd. (Re)* (1998), 36 O.R. (3d) 418, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, at para. 21, citing Elmer A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983), at p. 87; and *R. v. [page630] Penunsi*, [2019] S.C.J. No. 39, 2019 SCC 39, 435 D.L.R. (4th) 65, at para. 36.

[80] Traditionally, limitation periods were seen as having three purposes, known as the certainty, evidentiary and diligence rationales: *Novak v. Bond*, [1999] 1 S.C.R. 808, [1999] S.C.J. No. 26, at paras. 64-67; *Canadian Imperial Bank of Commerce v. Green* (2015), 135 O.R. (3d) 334, [2015] 3 S.C.R. 801, [2015] S.C.J. No. 60, 2015 SCC 60, at para. 57; and *Frohlick v. Pinkerton Canada Ltd.* (2008), 88 O.R. (3d) 401, [2008] O.J. No. 17, 2008 ONCA 3 (C.A.), at para. 18. The certainty rationale seeks "to promote accuracy and certainty in the adjudication of claims"; the evidentiary rationale seeks "to provide fairness to persons who might be required to defend against claims based on stale evidence"; and the diligence rationale seeks "to prompt persons who might wish to commence claims to be diligent in pursuing them in a timely fashion": *Green*, at para. 57, citing Paul M. Perell and John W. Morden, *The Law of Civil Procedure in Ontario*, 2nd ed. (Markham: LexisNexis, 2014), at p. 123.

[81] In *Novak*, McLachlin J. (as she then was) observed that the three traditional rationales for limitation periods generally reflect the interests of potential defendants, based on the idea that they should not have to respond to stale claims brought by persons who have not asserted their rights diligently: at para. 64. But as legislatures have modernized their limitations statutes, they have increasingly focussed on the need to treat plaintiffs fairly and to account for their interests as well: at paras. 65-66. Today, therefore, a limitations statute "must attempt to balance the interests of both sides": *Murphy v. Welsh* (1993), 14 O.R. (3d) 799, [1993] 2 S.C.R. 1069, [1993] S.C.J. No. 83, at p. 1080 S.C.R.; see also *Frohlick*, at para. 19; *Joseph v. Paramount Canada's Wonderland* (2008), 90 O.R. (3d) 401, [2008] O.J. No. 2339, 2008 ONCA 469 (C.A.), at para. 8.

[82] Ontario's comprehensive legislative reform of the law of limitations, which was passed in 2002 but only came into force in 2004, similarly sought to achieve a balance between the interests of defendants and plaintiffs. It is "aimed at creating a clear and cohesive scheme for addressing limitation issues, one that balances the plaintiff's right to sue with the defendant's need for certainty and finality": *Canaccord Capital Corp. v. Roscoe* (2013), 115 O.R. (3d) 641, [2013] O.J. No. 2643, 2013 ONCA 378 (C.A.), at para. 17.

[83] I turn now to consider the specific wording of s. 7(1) (a).

(iii) "Incapable"

[84] Although s. 7(1)(a) does not define "incapable", a person is generally said to be "incapable" if they lack physical or mental capabilities: *Black's Law Dictionary*, Bryan A. Garner, ed., 10th [page631] ed. (St. Paul, Minn.: Thomson Reuters, 2014) ("incapacity"). As noted by Tulloch J.A. for a five-judge panel of this court in *Ohenhen (Re)*, [2018] O.J. No. 392, 2018 ONCA 65 (C.A.), at para. 81:

Generally, Ontario law provides that a person has the capacity to make a decision if they are able to understand the information that is relevant to making that decision and able to appreciate the reasonably foreseeable consequences of that decision or lack of decision:

see e.g. *Substitute Decisions Act*, 1992, S.O. 1992, c. 30, ss. 6 (property decisions) and 45 (personal care decisions); *Health Care Consent Act*, [1996, S.O. 1996, c. 2, Sched. A] s. 4(1) (medical treatment); [*R. v. Conception*, 2014 SCC 60, [2014] 3 S.C.R. 82], at para. 22 (medical treatment).

[85] Capacity is linked to personal autonomy and a person's self-determination and ability to make important life choices. Because of the importance of these values, courts generally set a low threshold for determining capacity: *Calvert (Litigation Guardian of) v. Calvert* (1997), 32 O.R. (3d) 281, [1997] O.J. No. 553 (Gen. Div.), at p. 294 O.R., *per* Benotto J. (as she then was), *affd* (1998), 37 O.R. (3d) 221, [1998] O.J. No. 505 (C.A.), leave to appeal to S.C.C. refused [1998] S.C.C.A. 161; *Ohenhen (Re)*, at para. 83.

[86] But the law also recognizes that a person's capacity can vary with the decision at issue. Thus, "[a] person can be capable of making a basic decision and not capable of making a complex decision": *Calvert*, at p. 293 O.R. As Tulloch J.A. stated in *Ohenhen (Re)*, at para. 80: "a person may be capable of managing personal care, but not his or her finances. Or, a person may have the capacity to make a will for a simple estate, but not for a more complicated one."

[87] In this regard, I agree with the observation of Benotto J. (as she then was) in *Calvert*, that the capacity to instruct counsel is at the higher end of the competency hierarchy, at p. 294 O.R.:

There is a distinction between the decisions a person makes regarding personal matters such as where or with whom to live and decisions regarding financial matters. Financial matters require a higher level of understanding. *The capacity to instruct counsel involves the ability to understand financial and legal issues. This puts it significantly higher on the competency hierarchy.* It has been said that the highest level of capacity is that required to make a will[.]

(Emphasis added)

(iv) . . . "of commencing a proceeding in respect of the claim"

[88] Because s. 7(1)(a) asks only about the person's capacity to commence a proceeding in respect of the claim at issue, the provision implicitly recognizes that capacity can vary for different decisions. This contrasts with s. 47 of the former *Limitations Act*, R.S.O. 1990, c. L.15 (as it appeared on December 31, 2003),<sup>1</sup> which required the person to prove a state of general incapacity, by showing that they were "a minor, mental defective, mental incompetent or of unsound mind". Section s. 7(1)(a) of the current Act is therefore more liberal and generous than s. 47 of the former [page632] *Limitations Act* on the nature and scope of the incapacity that will stop the running of a limitation period: see *Landrie v. Congregation of the Most Holy Redeemer* (2014), 120 O.R. (3d) 768, [2014] O.J. No. 3132, 2014 ONSC 4008 (S.C.J.), at para. 29; Graeme Mew, *The Law of Limitations*, 3rd ed. (Toronto: LexisNexis, 2016), at p. 206, at §6.19.

[89] By focussing only on the person's incapacity to pursue the particular claim at issue, s. 7(1)(a) seeks to promote fairness by reflecting a concern for the plaintiff's own circumstances, thereby respecting individual differences and providing individual justice: see *Recommendations for a New Limitations Act: Report of the Limitations Act Consultation Group* (Toronto: Ministry of the Attorney General, March 1991), at p. 29.

[90] What, then, must a person show to prove that they were incapable of commencing a proceeding in respect of the claim?

[91] It is useful to begin by considering some of the decisions a potential litigant must make before commencing a lawsuit. Often, they must obtain professional advice about whether they have a claim, the costs of proceeding, the potential for recovery and the potential exposure for costs if they lose. They must then make an informed judgment about whether the costs of proceeding, both personal and monetary, outweigh the benefits. These are complex decisions: see, e.g., *Bisoukis v. Brampton (City)* (1999), 46 O.R. (3d) 417, [1999] O.J. No. 4598 (C.A.), at para. 49, *per* Borins J.A., leave to appeal to S.C.C. refused [2000] S.C.C.A. No. 52, 2000 CarswellOnt 3008 (discussing the test for capacity under s. 47 of the former *Limitations Act*).

[92] As a result, capacity must be assessed by considering the complex decisions involved in commencing a lawsuit. The court must ask whether a plaintiff had the capacity to make those decisions.

[93] This court listed some of the indicators for such capacity in *Bannon v. Thunder Bay (City)* (2000), 48 O.R. (3d) 1, [2000] O.J. No. 1368 (C.A.), [page633] at paras. 35-36, *revd* on other grounds [2002] 1 S.C.R. 716, [2002] S.C.J. No. 18, 2002 SCC 20, in the context of s. 47 of the former *Limitations Act*. There, Doherty J.A. included factors such as whether the person was capable of: (i) considering what steps should be taken to protect any claim they might have; (ii) making, or directing others to make, the appropriate inquiries to determine what steps, if any, to protect those interests; (iii) understanding any advice that might be received as a result of those inquiries; and (iv) effectively directing that procedural steps be taken following receipt of that advice. Doherty J.A. stated that a person would need to show they lacked one or more of these capacities to establish that they were of "unsound mind" under s. 47: at paras. 35-36. The Supreme Court allowed the appeal in *Bannon* because it concluded that this court was wrong to reverse the trial judge's factual findings, but did not address these indicators of capacity: (S.C.C.), *supra*. In brief reasons, Iacobucci J. noted that "'unsound mind' as provided for in s. 47 means in context lack of mental capacity from whatever source to perform the requisite steps" required by statute: at para. 1. He also observed that "the act of writing a letter may by itself be a simple one, but in this context it requires a consideration of many factors and a mental capacity to address and assess those": at para. 3.

[94] More recently, in *Hengeveld*, at para. 21, Hebner J. drew on *Huang* and other case law addressing when a person is under disability and requires a litigation guardian, and listed the following potential indicators of the capacity to commence a proceeding under s. 7(1)(a) of the Act:

- (a) a person's ability to know or understand the minimum choices or decisions required to make them;
- (b) an appreciation of the consequences and effects of his or her choices or decisions;
- (c) an appreciation of the nature of the proceedings;
- (d) a person's ability to choose and keep counsel;
- (e) a person's ability to represent him or herself;

- (f) a person's ability to distinguish between the relevant and irrelevant issues; and,
- (g) a person's mistaken beliefs regarding the law or court procedures.

See *Huang*, at para. 19, citing *C. (C.) v. Children's Aid Society of Toronto*, [2007] O.J. No. 5613 (S.C.J.), at paras. 29-32; *Calvert* (Gen. Div.), at p. 298 O.R.; *Kirby v. Leather*, [1965] 2 All E.R. 441, [page634] [1965] 2 Q.B. 367 (C.A.), at p. 444 All E.R.; and *Bilek v. Constitution Insurance*, [1990] O.J. No. 3117, 49 C.P.C. (2d) 304 (Dis. Ct.).

[95] Before this court, GSK submitted that the *Huang/ Hengeveld* indicators are appropriate *indicia* of capacity under s. 7(1)(a). Mr. Carmichael does not contest this, as long as the indicators are applied in a way that distinguishes between the capacity to perform routine cognitive tasks and the capacity to commence a legal proceeding concerning a psychologically traumatizing incident. Mr. Carmichael says that the motion judge did so.

[96] I agree that the factors listed in *Huang/ Hengeveld*, while not exhaustive, provide helpful indicators of capacity under s. 7(1)(a). They provide concrete and objectively verifiable indicators of a potential litigant's capacity to commence an action: if absent, this tends to support a finding that the person was incapable of commencing a proceeding in respect of the claim; if present, this tends to weigh against a finding that the person was incapable of commencing a proceeding in respect of the claim. These factors are neither necessary nor sufficient in themselves to establish incapacity; they are *indicia* that guide a holistic weighing of all the evidence on capacity in the context of the case. Depending on the circumstances, it may also be relevant for a court to consider other factors.

(v) . . . "*because of his or her physical, mental or psychological condition*"

[97] Lastly, the person's incapacity must be "because of his or her physical, mental or psychological condition". None of these terms is defined in the Act.

[98] A "physical condition" is a condition arising in or relating to a person's body. A "mental condition" is a condition affecting or arising in a person's mind, and includes mental disability, mental incompetency, or mental illness. And a "psychological condition" is a condition relating to the mental or emotional state of a person. See *The Oxford English Dictionary Online* ("physical", "mental", "psychological").

[99] As is evident from these definitions, in many cases there may be no clear demarcation between a psychological condition and a mental condition. Indeed, it could be said that a psychological condition is a particular type of mental condition, in that both conditions affect or arise in a person's mind. It would appear that the reason for listing the three separate conditions in s. 7(1)(a) was to allow for a liberal and generous interpretation of the types of conditions that would satisfy the plaintiff's burden to prove [page635] incapacity and stop the running of the limitation period, in order to treat the plaintiff fairly and account for their interests.

[100] It is also evident that a person could have incapacitating physical, mental, and psychological conditions simultaneously. For example, a person could be incapacitated by physical and mental conditions, such as bodily paralysis coupled with a traumatic brain injury; or by mental and psychological conditions, such as schizophrenia coupled with severe depression; or all three conditions could operate together.

[101] The physical, mental, or psychological condition must be the cause for the incapacity relied on under s. 7(1) (a). The incapacity cannot arise from other sources, such as lack of sophistication, education, or cultural differences: see *Huang*, at para. 18; *Costantino v. Costantino*, [2016] O.J. No. 5963, 2016 ONSC 7279 (S.C.J.), at para. 41; and *Children's Aid Society of Toronto*, at para. 25.

[102] Lastly, I agree with the submission in Mr. Carmichael's factum, that a plaintiff may be incapable because of a psychological condition where the evidence "is clear that initiating the lawsuit would pose an unacceptable risk to the plaintiff's psychological integrity".

(vi) ". . . during any time . . ."

[103] Section 7(1) suspends the running of the limitation period in s. 4 only "during any time" in which the person is incapable, and thus begins to run again once the incapacity ceases: see, e.g., *Mongeon v. Sammon* (2012), 108 O.R. (3d) 789, [2012] O.J. No. 255, 2012 ONSC 409 (S.C.J.), at para. 31.

(vii) *Evidence*

[104] A potential litigant will usually require persuasive medical or psychological evidence to prove that they lacked the capacity to commence the proceeding in respect of the claim: see, e.g., *Deck International Inc. v. Manufacturers Life Insurance Co.*, [2012] O.J. No. 2155, 2012 ONCA 309 (C.A.), at para. 6; *Winter v. Sherman Estate*, [2018] O.J. No. 2068, 2018 ONCA 379 (C.A.), at para. 14, leave to appeal to S.C.C. refused [2019] S.C.C.A. No. 438; *Reid v. Crest Support Services (Meadowcrest) Inc.*, [2013] O.J. No. 4525, 2013 ONSC 6264 (S.C.J.), at para. 17; *Klimek v. Klos*, [2013] O.J. No. 3740 (S.C.J.), at para. 25; *Hussaini v. Freedman*, [2013] O.J. No. 912, 2013 ONSC 779 (S.C.J.), at para. 51; and *Landrie*, at para. 35.

[105] Other evidence may also be relevant, such as:

-- evidence from persons who know the plaintiff well, the appearance and demeanour of the plaintiff, testimony of [page636] the plaintiff, or the opinion of the plaintiff's own counsel: see, e.g., *Costantino v. Costantino*, *supra*, at para. 58; *Huang*, at para. 20; and *Children's Aid Society of Toronto*, at para. 34;

-- the plaintiff's ability to commence other civil proceedings (see, e.g., *Asagwara v. Money Mart*, [2014] O.J. No. 5805, 2014 ONSC 6974 (S.C.J.), at para. 72; *Kim v. Manufacturers Life Insurance Co. (c.o.b. Manulife Financial)*, [2014] O.J. No. 853, 2014 ONSC 1205 (S.C.J.), at para. 55) or to defend criminal proceedings (see, e.g., *Winmill v. Woodstock (City) Police Services Board*, [2017] O.J. No. 2013, 2017 ONSC 2528 (S.C.J.), at para. 32, *revd on other grounds* (2017), 138 O.R. (3d) 641, [2017] O.J. No. 6406, 2017 ONCA 962 (C.A.); *Cooper v. Comer*, [2017] O.J. No. 3539, 2017 ONSC 4142 (S.C.J.), at para. 57); and

-- other indicators of capacity, such as the potential litigant's ability to travel, instruct counsel, swear affidavits and make decisions affecting legal rights, if they bear on the capacity to commence a proceeding in respect of the claim: see, e.g., *Reid*, at para. 17; *Klimek*, at paras. 24-25.

[106] Finally, just because a person can function on a day-to-day basis and make the decisions required in daily life does not necessarily mean they have the capacity to start an

action in respect of a claim: see *Bisoukis*, at para. 48. On the other hand, just because a person has a mental illness does not necessarily mean that they are incapable of instructing a lawyer or commencing a proceeding: see *Mew*, at p. 205, at §6.17, citing *Pancieria v. Rokovetsky*, [2009] M.J. No. 180, 2009 MBQB 129, 252 Man. R. (2d) 115 (Q.B.), at para. 20; *Evans v. Evans*, [2017] O.J. No. 3716, 2017 ONSC 4345, 96 R.F.L. (7th) 300 (S.C.J.), at paras. 51-53; and *Kim v. Manufacturers Life Insurance Co. (c.o.b. Manulife Financial)*, (S.C.J.), *supra*, at paras. 54-60, *affd* [2014] O.J. No. 4481, 2014 ONCA 658, 40 C.C.L.I. (5th) 12 (C.A.).

[107] I now turn to consider GSK's three grounds of appeal and the application of ss. 7(1)(a) and (2) to the evidence in this case.

(b) *Application to this appeal*

(1) *Did the motion judge err in law by considering  
"psychological strength" under s. 7(1)(a)?*

[108] GSK's first ground of appeal asserts that the motion judge erred in law by viewing the indicators for capacity through the subjective lens of "psychological strength", a factor not mentioned in the Act and one that would effectively extend limitation [page637] periods indefinitely. GSK argues that this approach would reverse the onus of proving incapacity that s. 7(2) imposes on the claimant. GSK appears to argue that because "psychological strength" is subjective, it would be open for anyone to claim that they lack the psychological strength to commence an action. The result would be that the onus imposed by s. 7(2) would be easily met in every case. In essence, GSK submits, an easily met onus is no onus.

[109] I do not accept GSK's submission. The motion judge referred to "psychological strength" only once in his reasons, when observing that GSK's position conflated the cognitive capacity to commence an action with the psychological capacity to do so. He noted, at paras. 41-42:

The factum filed on behalf of GlaxoSmithKline asserts that in this case each of these factors [for capacity from *Huang* and *Hengeveld*] was established no later than 2005. The presumption appears to be:

-- that because David Carmichael was able to participate in the determination of the defence to be put forward at his criminal trial he had capacity to commence this action;

-- that he accepted the risk of speaking publicly through newspapers and television and website postings and other writings in spite of his expressed fear that he was concerned that bringing an action might pose a risk to his being discharged from the Brockville Mental Health Centre; and

-- that he thought about and talked about commencing litigation, in particular his discussions with [the U.S. lawyer] Andy Vickery,

he satisfied the seven factors.

*To my mind, the application of those factors, in this way, continues the same mistake. It fails to recognize the fundamental distinction between the cognitive ability to commence an action and the psychological strength required to actually undertake the initiation of a lawsuit.*



(Emphasis added)

[110] I do not read these comments as suggesting that the *Huang/Hengeveld* indicators of capacity must be viewed through the lens of subjective psychological strength. I read the motion judge as simply making the uncontroversial point that a person may display many indicators of cognitive capacity, yet still lack the capacity to commence a proceeding in respect of the claim because of their psychological condition.

[111] On the other hand, if the motion judge was suggesting that indicators of cognitive capacity should not be considered in evaluating a plaintiff's capacity to commence an action, I respectfully disagree. As noted above, it is relevant to consider evidence of a plaintiff's capacity to do other things, because such evidence [page638] may provide objectively verifiable indicators of capacity to commence an action.

[112] I have also concluded, however, that referring to "psychological strength" under ss. 7(1)(a) and (2) is potentially confusing and unhelpful. The expression is potentially confusing because it is apt to be misinterpreted as suggesting a subjective standard, one that simply requires a claimant to assert that they lack the personal fortitude to proceed with a claim. As I have explained, that is not the correct approach under ss. 7(1)(a) and (2). The expression is also unhelpful because a finding of a lack of psychological strength is a conclusion, but not in itself a reason for finding incapacity under s. 7(1)(a). Instead, the reasons for such a conclusion must be found in objectively verifiable indicators of incapacity, such as the *Huang/Hengeveld* indicators. And, as a conclusion, insufficient psychological strength is just a restatement of the statutory threshold of incapacity because of a psychological condition.

[113] As a result, although I conclude that the term "psychological strength" is best avoided under ss. 7(1) (a) and (2), based on how I interpret the motion judge to have used this expression, I would not accept this ground of appeal.

(2) *Did the motion judge err in law by reversing the onus for proving incapacity contrary to s. 7(2)?*

[114] GSK's second ground of appeal asserts that the motion judge erred in law by presuming that Mr. Carmichael was incapable unless GSK proved the contrary. GSK asserts that the motion judge's approach reversed the onus for proving incapacity, contrary to s. 7(2) of the Act.

[115] GSK claims that the motion judge reversed the onus at paras. 24-28 of his reasons by relying on the decision of Perell J. in *C. (A.) v. Joyce*, (2016), 130 O.R. (3d) 114, [2016] O.J. No. 1627, 2016 ONSC 2164 (S.C.J.), rev'd on other grounds *C. (A.) v. Joyce*, [2017] O.J. No. 281, 2017 ONCA 49 (C.A.) ["C. (A.)"]. This case involved a civil sexual assault claim and was decided at a time when the statutory limitation period for claims based on sexual assault provided that "[u]nless the contrary is proved, a person with a claim based on a sexual assault shall be presumed to have been incapable of commencing the proceeding earlier than it was commenced" (Act, s. 10(3), since repealed by S.O. 2016, c. 2, Sch. 2, s. 2). GSK asserts that the motion judge effectively took the same approach by finding that Mr. Carmichael was incapable of commencing his claim until he obtained an absolute discharge from the Board and by requiring GSK to prove the contrary. [page639]

[116] I see no merit in this submission. The motion judge cited *C. (A.) v. Joyce* for the proposition that a plaintiff's discovery of a cause of action and their legal capacity to sue "should not be conflated": at para. 28, citing *C. (A.) v. Joyce*, at para. 180. The motion judge also cited the case for the proposition that "the capacity to start an action stands apart from the capacity to deal with other stressful circumstances that can be part of our daily lives": at para. 27. The motion judge then noted that the case before him required the court to apply these same distinctions, at para. 29:

In the context of the case I am asked to decide, it may well be that David Carmichael was capable of dealing with the death, the contracts, the sale as well as the other changes to his family's circumstances and, yet, remained unable to contemplate, that is remained incapable, of beginning this action.

[117] As noted above, the law recognizes that capacity is not an all-or-nothing affair. A person may have the capacity to deal with many complex matters, yet still lack the capacity to commence a particular action or indeed any action.

[118] I therefore see no error in the motion judge citing *C. (A.) v. Joyce*. He did not reverse the burden of proof or erroneously apply a now-repealed limitation provision applicable to sexual assault claims.

(3) *Did the motion judge materially misapprehend the evidence?*

[119] GSK's third ground of appeal asserts that the motion judge materially misapprehended the evidence of incapacity, leading to a palpable and overriding error in applying s. 7(1) (a).

[120] GSK asserts that the motion judge erred by finding, at para. 42, that Mr. Carmichael had proved that he lacked capacity under several of the *Huang/Hengeveld* indicators of capacity. GSK asserts that the motion judge "fails to particularize any evidence supporting his conclusion in paragraph 42", and that his conclusion conflicts with "the extensive evidence demonstrating that [Mr.] Carmichael was able to understand and appreciate his choices, notably those concerning issues relating to the litigation".

[121] For convenience, the relevant part of para. 42 is set out again below:

Understood from the perspective of the psychological burden being carried by David Carmichael, taking into account the evolution of his coming to terms with his role in the death of his son, particularly as interpreted by the treating professionals along the way, as assessed thereafter by Dr. Stephen Fleming, accounted for in the decisions of the Ontario Review Board and confirmed by his wife and daughter I am unable to take each of these factors as having been met prior to his absolute discharge. *By way of example, I have [page640] no trouble in finding that David Carmichael would not have been able to understand the minimum choices or the decisions he would have been required to make, to appreciate the consequences of those choices, to fully understand the nature of the proceedings, to choose and keep counsel and to represent himself or distinguish between relevant and irrelevant issues.*

(Emphasis added)

[122] The motion judge did not refer to any specific evidence from the record to support his findings in the underlined portion of para. 42. Mr. Carmichael's factum before this court did not do so either. When Mr. Carmichael's counsel, Mr. Smith, was asked during the oral argument of the appeal what evidence supported these findings, he referred to Dr. Fleming's report and conceded that the report did not say that Mr. Carmichael was unable "to make the minimum choices or decisions he would have been required to make" to commence an action.

[123] In my view, Dr. Fleming's evidence does not support the motion judge's findings. Dr. Fleming acknowledged on cross-examination that capacity assessments were not part of his practice and that he had never prepared one before. Still, in his report he concluded that Mr. Carmichael "was incapable of commencing a proceeding in respect of his claim because of his psychological condition". He reached this conclusion because, in his view, "the launching of legal proceedings prior to December 2009 would have placed David [Carmichael] at considerable psychological risk". But nowhere in Dr. Fleming's report or cross-examination did he suggest that Mr. Carmichael lacked any of the *Huang/Hengeveld* indicators of capacity until December 2, 2009. To the contrary, as I will explain below, on several of these indicators Dr. Fleming's evidence supported the opposite conclusion.

[124] In my view, therefore, the motion judge's finding that he had "no trouble" concluding that several of the *Huang/Hengeveld* indicators of capacity were not met reflects a misapprehension of the evidence. A misapprehension of the evidence "may refer to a failure to consider evidence relevant to a material issue, a mistake as to the substance of the evidence, or a failure to give proper effect to the evidence": *Moore v. Apollo Health & Beauty Care*, [2017] O.J. No. 2381, 2017 ONCA 383 (C.A.), at para. 37, citing *R. v. Morrissey* (1995), 22 O.R. (3d) 514, [1995] O.J. No. 639 (C.A.), at p. 538 O.R. Here, the motion judge made a mistake about the substance of the evidence and failed to give proper effect to the evidence, by finding that the evidence showed that several of the *Huang/Hengeveld* indicators of capacity were absent, when that was not so.

[125] A misapprehension of evidence justifies appellate intervention where it is palpable and overriding, that is, where the [page641] misapprehension is obvious and goes to the very core of the outcome of the case: see *Moore*, at para. 40; *Benhaim v. St-Germain*, [2016] 2 S.C.R. 352, [2016] S.C.J. No. 48, 2016 SCC 48, at para. 38; and *Waxman v. Waxman*, [2004] O.J. No. 1765, 186 O.A.C. 201, 44 B.L.R. (3d) 165 (C.A.), at paras. 296-297, leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 291. That is so here, because the motion judge's misapprehension is obvious and was essential to his conclusion that Mr. Carmichael was incapable of suing GSK until December 2, 2009, because of his psychological condition.

[126] As a result, the motion judge's decision should be set aside.

(4) *Should this court make a fresh assessment of the evidence and substitute the decision that should have been made?*

[127] The question then arises: what relief should be ordered?

[128] GSK asks this court to exercise remedial fact-finding powers on appeal. It says the court should make a fresh assessment of the evidence; it should find that Mr. Carmichael did not prove that he was incapable of commencing his claim against GSK because of his psychological

condition before the Board granted him an absolute discharge; and it should grant summary judgment dismissing the action as statute-barred.

[129] This court has the statutory jurisdiction to grant this relief. Once a reviewable error has been found, the court has the power to make a fresh assessment of the evidence and to make any order or decision that ought to or could have been made from the court appealed from, to order a new trial, or to make any other order or decision that this court considers just: see *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 134(1). This court may also draw inferences of fact from the evidence, where such an inference would not be inconsistent with a finding that has not been set aside: s. 134(4) (a).

[130] Despite having such authority, appellate courts are cautious about exercising fact-finding powers. Appellate courts will not make findings of fact if this requires the court to assess credibility or if the evidentiary basis needed to draw the necessary inferences is inadequately developed in the record at first instance: see *Pucci v. Wawanesa Mutual Insurance Co.*, [2020] O.J. No. 1758, 2020 ONCA 265 (C.A.), at para. 61; *C. (A.)*, at paras. 79-80, 82.

[131] At the same time, the Supreme Court of Canada's decision in *Hryniak v. Mauldin*, [2014] 1 S.C.R. 87, [2014] S.C.J. No. 7, 2014 SCC 7, at para. 2, *per* Karakatsanis J., called for a "culture shift" in courts deciding summary judgment motions "in order to create an environment promoting timely and affordable access to the civil justice system". Moreover, as Brown J.A. has noted, because "the [page642] court's comments [at para. 2 of *Hryniak*] apply equally to civil appellate courts", this court's exercise of its powers under s. 134 must also strive to promote "timely and affordable access to the civil justice system": *C. (A.)*, at para. 78.

[132] Thus, when an appellate court can find no genuine issue requiring a trial and can reach a fair and just determination of the merits of a motion for summary judgment through an appropriate exercise of its fact-finding powers under s. 134, it should do so. As the Supreme Court stated in *Hryniak*, when speaking of courts of first instance, "[t]his will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result": at para. 49. These comments apply equally to the exercise of fact-finding powers by a reviewing appellate court: see *C. (A.)*, at para. 81.

[133] Moreover, in appropriate cases, appellate fact-finding can promote important values of the civil justice system. As Doherty J.A. stated in *Pucci*, at para. 62:

Appellate fact-finding can . . . promote finality and efficiency in the civil justice process. In civil proceedings, appellate courts should avoid ordering a new trial if, in light of the nature of the factual issues, and the state of the trial record, the appellate court can confidently make the necessary factual findings without working any unfairness to either party: [*C. (A.)*], at para[s]. 78-80.

[134] Based on all the circumstances, I have concluded that this is an appropriate case for this court to exercise its fact-finding powers under s. 134.

[135] I reach this conclusion for five reasons:

- (1) The appeal does not raise questions of credibility, but rather depends crucially on the court's appreciation of the expert evidence: see *Bryars Estate v. Toronto General Hospital*, [1997] O.J. No. 3727, 152 D.L.R. (4th) 243 (C.A.), at para. 41;
- (2) The record is complete for the purpose of deciding whether to grant summary judgment. The record includes affidavits, transcripts of cross-examinations and examinations for discovery, medical reports and other information that was before the Board;
- (3) The parties do not materially dispute the facts; they dispute the legal significance of the facts, arising from a documentary record. This court is therefore as well placed as the motion judge to decide the issues;
- (4) Neither party asked this court to remand the matter to the Superior Court for redetermination if it set aside the motion judge's order; and [page643]
- (5) The tragic events of this case occurred almost 16 years ago and have now been before the courts for almost a decade. This gives particular poignancy to *Hryniak's* admonition, that the "[p]rompt judicial resolution of legal disputes allows individuals to get on with their lives": at para. 25.

[136] I now turn to make a fresh assessment of the evidence and to consider the order that the court below should have made.

(5) *Did Mr. Carmichael prove that he was incapable of commencing this action against GSK until December 2, 2009 because of his psychological condition?*

[137] I will first summarize the two-step process for a summary judgment motion under Rule 20 [of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194] mandated by *Hryniak*. I will then apply that approach to the evidence in this case.

(a) *Hryniak's two-step process for a summary judgment motion*

[138] Rule 20.04(2) of the *Rules of Civil Procedure*, provides:

20.04(2) The court shall grant summary judgment if,

- (a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or
- (b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.

(2.1) In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.
2. Evaluating the credibility of a deponent.

3. Drawing any reasonable inference from the evidence.

(2.2) A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.

[139] It is unclear from the motion judge's reasons and the record before this court whether, in ordering that Mr. Carmichael's action is not barred by the Act, the motion judge proceeded under rule 20.04(2)(a) or (b). While I will assess the issue under rule 20.04(2)(a), in accordance with the approach in *Hryniak*, even if I [page644] were to proceed under rule 20.04(2)(b), I would still be satisfied that it is appropriate to grant summary judgment.

[140] *Hryniak* and the companion case of *Bruno Appliance and Furniture, Inc. v. Hryniak*, [2014] 1 S.C.R. 126, [2014] S.C.J. No. 8, 2014 SCC 8, established a two-step process on a summary judgment motion:

-- First, the motion judge asks whether there is a genuine issue requiring a trial, based only on the evidence before the court, and without using the new fact-finding powers under rules 20.04(2.1) and (2.2), to weigh the evidence, evaluate the credibility of a deponent and draw any reasonable inference from the evidence. There will be no genuine issue requiring a trial when the evidence on the motion allows the judge to make the necessary findings of fact and to apply the law to the facts, and where granting summary judgment is a proportionate, more expeditious and less expensive means to achieve a just result: *Hryniak*, at para. 66; *Bruno*, at para. 22.

-- Second, if there is a genuine issue requiring a trial, the motion judge should then ask whether a trial can be avoided by using the new fact-finding powers to weigh the evidence, evaluate the credibility of a deponent and draw any reasonable inference from the evidence. The motion judge has a discretion to use these powers where it would lead to a fair and just result and would serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole: *Hryniak*, at para. 66; *Bruno*, at para. 22.

[141] *Hryniak* did not change the established evidentiary obligation on a motion for summary judgment for each party "to put its best foot forward": see *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423, [1996] O.J. No. 1658 (Gen. Div.), at p. 434 O.R., affd [1997] O.J. No. 3754, 1997 CarswellOnt 3496 (C.A.); 2212886 *Ontario Inc. v. Obsidian Group Inc.*, [2018] O.J. No. 3980, 2018 ONCA 670, 83 B.L.R. (5th) 186 (C.A.), at para. 49, leave to appeal to S.C.C. refused [2018] S.C.C.A. No. 391. The summary judgment judge is entitled to assume that the evidentiary record is complete and that no more evidence would be available at trial: see *Dawson v. Rexcraft Storage & Warehouse Inc.*, [1998] O.J. No. 3240, 164 D.L.R. (4th) 257 (C.A.), at para. 17; *Tim Ludwig Professional Corp. v. BDO Canada LLP* (2017), 137 O.R. (3d) 570, [2017] O.J. No. 1865, 2017 ONCA 292 (C.A.), at para. 54; and *Broadgrain Commodities Inc. v. Continental Casualty Co. (c.o.b. CNA Canada)*, [2018] O.J. No. 2484, 2018 ONCA 438, 80 C.C.L.I. (5th) 23 (C.A.), at para. 7. [page645]

(b) *Application of Hryniak's two-step process to this case*

[142] It is apparent that the motion judge weighed the evidence and drew inferences from it. There was conflicting expert evidence about Mr. Carmichael's capacity to sue GSK because of

his psychological condition before his absolute discharge, and the motion judge made findings on this issue.

[143] For the reasons I have already given, I agree with the motion judge's implicit conclusion that this was an appropriate case to grant summary judgment: it would lead to a fair and just result and would serve the goals of timeliness, affordability, and proportionality in light of the litigation as a whole: see above, at para. 135. Thus, I would find this to be an appropriate case to exercise the fact-finding powers under rules 20.04(2), (2.1), to weigh the evidence and draw reasonable inferences from it.

[144] I will now apply those powers to consider what the evidence shows on each of the *Huang/Hengeveld* indicators of capacity. I will also consider two other relevant considerations in the context of this case: whether Mr. Carmichael's doctors recommended that he not sue GSK before he received an absolute discharge, and the significance of the absolute discharge itself. As I will explain, when I weigh all the relevant considerations, I conclude that Mr. Carmichael did not prove that he was incapable of commencing his suit against GSK because of his psychological condition until December 2, 2009.

[145] I will first address the *Huang/Hengeveld* indicators of capacity.

(i) *Did Mr. Carmichael have the ability to know or understand the minimum choices or the decisions required to make them?*

[146] From 2005 to 2009, Mr. Carmichael understood the minimum choices or decisions required for him to pursue a claim against GSK:

-- Dr. Fleming agreed that Mr. Carmichael "understood the litigation process and . . . what it would involve", and that "[h]e understood the challenges and the purposes of cross-examination, all of that". Dr. Fleming also agreed that Mr. Carmichael was, in many respects, "a functioning individual": he had the capacity to review and sign legal documents, to manage his financial affairs, to consent to treatment, to set up his business and to reach out to speak to others about mental illness and the stigma around mental illness. [page646]

-- While Dr. Fleming's opinion was that Mr. Carmichael was psychologically incapable of commencing his lawsuit until December 2, 2009, he agreed that Mr. Carmichael was "overstating his medical condition in his affidavit" by alleging that he was "psychologically overwhelmed and incapacitated by depression, guilt and grief". He also disagreed with Mr. Carmichael's statement in his affidavit that he had incapacitating psychological problems until his absolute discharge.

-- Mr. Carmichael knew that he would likely need an expert report to prove that Paxil caused his psychosis. He was told this by the U.S. lawyer he visited in Texas in 2008 to discuss suing GSK. The evidence shows that this was a critical factor in Mr. Carmichael's decision not to sue until he did.

(ii) *Did Mr. Carmichael have an appreciation of the consequences and effects of his choices or decisions?*

[147] Mr. Carmichael appreciated at least some of the consequences and effects of his choices or decisions not to sue GSK before his absolute discharge on December 2, 2009:

-- On cross-examination, Dr. Fleming explained that Mr. Carmichael decided not to sue until his absolute discharge because of his concerns about the impact on himself, his wife and his family. Dr. Fleming's view was that a lawsuit would have been "too much" for Mr. Carmichael and his wife, but he agreed that it was Mr. Carmichael's "ultimate decision" not to sue GSK because he was "not prepared to take that step", and that this was "his choice". Dr. Fleming stated that Mr. Carmichael's focus was his family, not the lawsuit, and he therefore decided to "park" the lawsuit. As Dr. Fleming stated, Mr. Carmichael knew that he would "[n]eed more data".

-- On cross-examination, Mr. Carmichael explained that he "intellectually" made the decision not to sue GSK sooner because he believed that he did not have "enough information on causation". He also described how he feared "repercussions" from the Hospital because, in his view, the Hospital's chair of the mood disorder unit was "an advisor to several pharmaceutical companies", because "50 percent of [the Hospital's] funding . . . comes from the pharmaceutical industry", and because he believed that the Hospital would see a lawsuit as him failing to take responsibility for his actions. He did, however, also describe the "incredible grief of having to meet with civil litigators". [page647]

(iii) *Did Mr. Carmichael have an appreciation of the nature of the proceedings?*

[148] Mr. Carmichael appreciated the nature of the potential litigation proceedings against GSK before his absolute discharge on December 2, 2009:

-- As already noted, Dr. Fleming acknowledged that, well before his absolute discharge, Mr. Carmichael understood the litigation process and the challenge and purposes of cross-examination. Dr. Fleming also agreed that "at points between the period 2004 and 2009, Mr. Carmichael clearly appreciated the nature of the lawsuit and the requirements to put forward evidence to support his theory".

-- Mr. Carmichael's evidence was that he understood that he would need an expert to prove causation. He understood how limitation periods work and discussed this issue with a U.S. lawyer in 2008.

(iv) *Did Mr. Carmichael have an ability to choose and keep counsel?*

[149] Mr. Carmichael was able to choose and keep counsel for a potential claim against GSK long before his absolute discharge on December 2, 2009:

-- From August 2004 to September 2005, Mr. Carmichael was represented by criminal defence counsel, worked with him in defending the criminal charges against him, and discussed with him his theory that Paxil caused his psychosis.

-- From November 2005 to December 2009, Mr. Carmichael was represented by counsel at each of his five annual hearings before the Board.

-- In 2006, when Mr. Carmichael contacted GSK about sponsoring his website, his doctors were concerned that this might be misconstrued as an attempt to extort money and recommended that he "work through his lawyers".

-- In 2007, Mr. Carmichael retained a divorce lawyer. Dr. Fleming agreed on cross-examination that Mr. Carmichael had been "following the advice" of that lawyer, and at that



time Mr. Carmichael was "relieved by the fact that he's going through this and having the support of the [divorce] lawyer". [page648]

-- In 2008, Mr. Carmichael travelled to Texas to meet with a U.S. lawyer and received advice on what he would need to bring his lawsuit against GSK.

(v) *Did Mr. Carmichael have an ability to represent himself?*

[150] Mr. Carmichael likely had the ability to represent himself before his absolute discharge, at least to prepare and file a statement of claim:

-- When Mr. Carmichael ultimately did prepare and file his statement of claim, in October 2011, he did so himself, unaided by counsel.

-- During the period 2005 to 2009, Mr. Carmichael researched the potential links between Paxil and his psychosis (2005 onwards), created a website on this topic (2006), gave media interviews on this issue (2006), including on national television (2007) and wrote and published a booklet on his theory (2009).

(vi) *Did Mr. Carmichael have an ability to distinguish between relevant and irrelevant issues?*

[151] Mr. Carmichael could distinguish between the relevant and irrelevant issues concerning his claim against GSK well before his absolute discharge on December 2, 2009:

-- As already noted, Dr. Fleming agreed that, throughout 2004 to 2009, Mr. Carmichael "articulated in a variety of different forums his theory that Paxil had caused his psychosis".

-- Mr. Carmichael understood the relevance of an expert report to prove causation and of limitation periods. He discussed both issues with U.S. counsel.

-- Both Dr. Fleming and Mr. Carmichael acknowledged that one of the reasons Mr. Carmichael chose to "park" his lawsuit was that he lacked scientific evidence showing a causal link and he needed more data.

(vii) *Did Mr. Carmichael have mistaken beliefs regarding the law or court procedures?*

[152] Mr. Carmichael was mistaken about the law of limitations, but his mistake does not suggest that he was incapable of suing GSK because of a psychological condition before December 2, 2009:

-- Mr. Carmichael issued his statement of claim on October 5, 2011 because he believed that the two-year limitation period [page649] was "running out". Mr. Carmichael had received a DNA report in early October 2009 that in his view showed that his genetic makeup made him particularly susceptible to Paxil's alleged side-effects. Mr. Carmichael believed that the two-year limitation period for his claim ran from this date. He testified on cross-examination: "I had to file . . . I knew I had no choice. I couldn't delay it any further." He therefore put together his statement of claim in "less than three days" and had it issued. This evidence strongly suggests that Mr. Carmichael could have issued his claim before October 5, 2011 (though in itself it does not prove that he could have done so before December 2, 2009).

(viii) *Did Mr. Carmichael's doctors recommend that he not sue GSK before he received an absolute discharge?*

[153] If there were clear and unequivocal evidence that Mr. Carmichael's doctors advised him not to sue GSK until his absolute discharge because he did not have the psychological capacity to commence a lawsuit and risked a relapse of his mental illness, that would be an important factor to weigh in the balance. That was certainly the conclusion of Dr. Fleming (see above, at para. 62). But that is not what the evidence shows:

-- In 2006, when Mr. Carmichael's doctors learned that he had contacted GSK about funding his website, they told him to "work through his lawyers". They did not advise him against suing or contacting GSK through a lawyer.

-- In 2008, when Mr. Carmichael returned from meeting a U.S. lawyer in Texas, he told one of his psychiatrists, Dr. Ahmed. There is no evidence that Dr. Ahmed advised him not to sue GSK because of his psychological condition or that he risked a relapse if he commenced a suit.

-- On cross-examination on his affidavit, Mr. Carmichael was asked whether "any mental health professional [told] you that pursuing litigation against GSK with a lawyer would jeopardize your mental health". He responded: "They told me it would be stressful and that was the extent of it."

(ix) *What was the significance of Mr. Carmichael's absolute discharge?*

[154] I now come to the motion judge's ultimate conclusion that Mr. Carmichael's absolute discharge by the Board on December 2, 2009 was the trigger for him immediately regaining [page650] psychological capacity to sue GSK. This conclusion was supported by the opinion of Dr. Fleming, whose view was that Mr. Carmichael faced a considerable psychological risk of a relapse if he sued GSK before he received an absolute discharge (see above, at para. 63).

[155] I respectfully disagree with this conclusion. While I have no doubt that being under the Board's jurisdiction was very stressful for Mr. Carmichael and his family, I cannot accept that the Board's final ruling itself caused the immediate return of Mr. Carmichael's psychological capacity to sue GSK.

[156] Nothing in the proceedings before the Board suggested that Mr. Carmichael lacked any form of capacity until December 2, 2009, or at least not for a long time before then. To the contrary, the medical evidence before the Board consistently confirmed Mr. Carmichael's capacity. While I recognize that Mr. Carmichael's psychological capacity to sue GSK was never squarely before the Board, both the Hospital and the Board knew that Mr. Carmichael had discussed the possibility of pursuing a lawsuit against GSK, yet they never expressed any concern about his capacity to sue or whether this was in any way relevant to their decisions to recommend or grant him an absolute discharge. Instead, the message was to work through his lawyers.

[157] In particular, I note that the Hospital's final report before the Board was dated September 28, 2009. This date is significant because it means this Report provides contemporaneous evidence about Mr. Carmichael at a time that he now says he lacked capacity to sue GSK because of his psychological condition. For Mr. Carmichael's position on this appeal to succeed, then, the court must accept that, when this Hospital report was prepared, Mr. Carmichael was incapable of suing GSK because of his psychological condition. But the

Hospital report supports the opposite conclusion. The report noted:

*Mr. Carmichael attended his Pre-Review Board Case Conference on September 21, 2009. During this meeting he reports that he had no concerns and felt that the year had progressed very well. He also informed the treatment team that there has been no significant negative backlash from his visible involvement in Brockville Sports activities [Mr. Carmichael's sports consulting business] and that he is more active in various sporting activities across the province. Mr. Carmichael reports that he is fully aware of the community's response and feels grateful that he has been well accepted. He denies any significant financial stress in spite of the "significant financial risk involved in Brockville Sports." He went through his financial status and his hope for the future. He also reiterated that his family is looking into other avenues for income. He states that his wife and daughter have been very supportive. He also indicates that his wife appears to be coming to terms with the death of their son and that she is "grieving in her own way." He denies any detrimental effect of [page651] this grieving process on the relationship between him and his wife. He also states that his mother remains supportive. The relationship between him and his twin brother also appears to be improving.*

*On direct questioning Mr. Carmichael denies any features suggestive of mood disorder or psychosis.*

*Mental state examination was assessed as satisfactory. He displayed adequate insight into his mental disorder.*

(Emphasis added)

[158] And if Mr. Carmichael had the psychological capacity to sue GSK on December 2, 2009, when he received an absolute discharge, it follows that he likely also had this capacity on September 28, 2009, when this Hospital report was prepared recommending an absolute discharge. But if that is so, Mr. Carmichael's claim was statute-barred two years later -- that is, even before this action was commenced on October 5, 2011.

[159] It follows that I would reject Dr. Fleming's opinion that Mr. Carmichael faced a substantial risk of a relapse if he sued before he received an absolute discharge on December 2, 2009. Dr. Fleming's explanation for the return of Mr. Carmichael's capacity when he obtained an absolute discharge was essentially this: "[w]ith the Ontario Review Board granting an absolute discharge, and the treatment team's endorsement of his resilience and stress management strategies, [Mr. Carmichael] felt he could proceed with the litigation". But as already noted, Mr. Carmichael's treatment team had endorsed his resilience and stress management strategies in its report of September 28, 2009, and indeed had done so much earlier, including at the fourth Board hearing in November 2008, when the Hospital had also recommended an absolute discharge. In my view, this contemporaneous evidence of Mr. Carmichael's psychological condition undercuts the basis for Dr. Fleming's opinion that Mr. Carmichael's absolute discharge triggered the immediate return of his capacity to sue GSK.

(x) *Weighing all the considerations*

[160] Thus, when I weigh all the relevant considerations, I conclude that the *Huang/Hengeveld* indicators of capacity suggest that Mr. Carmichael had the capacity to sue GSK even before his absolute discharge on December 2, 2009. This conclusion is supported by the opinion of Dr. Fleming on several points, and is strongly supported by the opinion of Dr. Rothschild.

[161] On the other hand, Dr. Fleming -- whose practice does not include providing capacity assessments and who had never prepared a capacity assessment before -- contended that Mr. Carmichael was psychologically incapable of commencing his action until he received his absolute discharge and that doing so [page652] earlier risked Mr. Carmichael's psychological health and his relationship with his wife and daughter.

[162] I have already explained why I have concluded that the absolute discharge as a trigger for the immediate return of Mr. Carmichael's capacity to sue GSK is not plausible and not supported by the contemporaneous Hospital report, and why I would reject Dr. Fleming's opinion. I would also reject Dr. Fleming's conclusion that Mr. Carmichael was advised by his medical team not to sue before his absolute discharge, because that is not what the evidence shows.

[163] The evidence before the court that I do accept does not meet Mr. Carmichael's burden under s. 7(2) of the Act to prove that he was incapable of suing GSK before December 2, 2009 because of his psychological condition. The evidence shows that Mr. Carmichael had several reasons for not suing GSK before December 2, 2009: he did not believe he had the necessary expert evidence until he received the genetic test from Dr. Lucire in October 2009; he was worried about repercussions if the Hospital decided that he was not taking responsibility for his actions; and he was concerned for his own and his family's well-being. These are understandable reasons for not commencing a lawsuit. But in my view, none of these reasons, alone or together, prove that Mr. Carmichael was incapable of suing GSK until December 2, 2009 because of his psychological condition.

[164] To the contrary, well before December 2, 2009, there were many objective indications that Mr. Carmichael had the capacity to sue GSK: he showed that he could instruct and work with lawyers and take their counsel, including his criminal defence lawyer, his lawyer before the Board, his divorce lawyer and also briefly a U.S. lawyer with whom he consulted; he managed to speak and write publicly about the horrific circumstances of his son's death, including on his website, in his "Killer Side Effects" publication, in newspaper interviews, and in a national television interview; and he could engage with GSK directly, until it was recommended that he not do so.

[165] Thus, based on the complete record before the court and the legal principles and summary judgment test that must be applied, I conclude that Mr. Carmichael did not prove that he was incapable of suing GSK because of a psychological condition until December 2, 2009. I would therefore grant summary judgment and order that the action is statute-barred.

#### H. Disposition

[166] I would allow the appeal and grant summary judgment dismissing the action. I would order costs payable to the appellant [page653] in the agreed amount of \$30,000, inclusive of taxes and disbursements.

*Appeal allowed.*

## Notes

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- 1** On January 1, 2004, the Limitations Act was renamed the Real Property Limitations Act, R.S.O. 1990, c. L.15; Parts II and III, which did not relate to real property, were repealed; and the Limitations Act, 2002 came into force.

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End of Document

# **TAB 10**

**CITATION:** *Centurion Mortgage Capital Corp. et al. v. Brightstar Newcastle Corp et al.*,  
2022 ONSC 1059

**COURT FILE NO.:** CV-20-00650557-00CL

**DATE:** 2022-02-25

**SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)**

**RE:** Centurion Mortgage Capital Corporation, Applicant

**AND:**

Brightstar Newcastle Corporation, Brightstar Seniors Living Corporation, The  
Estate of Alan Chapple, John Blackburn, James Buckler and Lawson Gay,  
Respondents

**BEFORE:** Penny J.

**COUNSEL:** Gerald Rasmussen on his own behalf

Adrian Visheau and Adrienne Ho as *Amicus Curiae* on behalf of Gerald  
Rasmussen

Mani Kakkar for the Guarantee Company of North America

George Benchetrit for BDO Canada Limited in its capacity as Court-Appointed  
Receiver

Richard Mazar for Brightstar Newcastle Corporation, Brightstar Senior Living  
Corporation, The Estate of Alan Chapple, John Blackburn, James Buckler,  
Lawson Gay and 2153491 Ontario Inc.

**HEARD:** February 15, 2022

**ENDORSEMENT**

**Overview**

- [1] This is a motion for directions brought by the Receiver of Unit 417 in a condominium project. The unit is owned by Gerald Rasmussen. Mr. Rasmussen was prevailed upon by the principals of the condominium developer to prepay the final balance of his purchase price to the developer directly. This payment was not deposited into the deposit trust account established by the developer for that purpose.
- [2] After investigation, the Receiver initially advised interested parties that Mr. Rasmussen appeared to be a *bona fide* purchaser for value of Unit 417 and that the Receiver proposed that Mr. Rasmussen should receive clear title to that unit. This outcome was opposed by

the Guarantee Company of North America which is the remaining secured creditor with an interest in the condominium project. GCNA maintains that Mr. Rasmussen's payment was not *bona fide* and that its mortgage security should prevail over Mr. Rasmussen's interest. In the face of this dispute, the Receiver brought this motion for directions.

- [3] For the reasons that follow, I find Mr. Rasmussen is a *bona fide* purchaser for value and that, subject to the payment of all ordinary course closing adjustments, he is entitled to an order vesting clear title to Unit 417 in his name.

## **Background**

### ***The Project and the Receivership***

- [4] Brightstar developed a 78-unit condominium building known as "Brookhouse Gate" in Newcastle, Ontario. Centurion loaned Brightstar \$5.965 million to finance the project, secured by a mortgage on the project. Brightstar failed to repay the loan on maturity and committed other defaults. As a result, Centurion commenced these proceedings.
- [5] GCNA issued performance bonds on the project to cover deposit insurance and new home warranty claims. Its bond was also secured by a mortgage on the project. A dispute arose between Centurion and GCNA over which mortgage had priority. Pending resolution of that dispute, all parties agreed that Brightstar would continue to sell and to close sales of condominium units, with proceeds held under an escrow agreement.
- [6] Centurion, in addition, challenged the entitlements of two purchasers of units in the project: 1) in relation to Unit 101; and, 2) in relation to Unit 417. The Receiver was appointed by order of this Court on November 25, 2021 to deal with these two units. At the time of the Receiver's appointment, the other 76 units had all been sold. The dispute over Unit 101 is no longer in issue. This motion concerns Unit 417, owned by Mr. Rasmussen.
- [7] The priority dispute between Centurion and GCNA was resolved in Centurion's favour by a decision of Cavanaugh J. released on July 23, 2021 (2021 ONSC 5181). Centurion has since been paid out and no longer has an interest in these proceedings.
- [8] Thus, the dispute before the court in this matter is over Unit 417 and involves the interests of Mr. Rasmussen, the purchaser, Brightstar, the vendor, and GCNA, as mortgagee.

### ***Mr. Rasmussen's Purchase of Unit 417***

- [9] Mr. Rasmussen entered into the Unit 417 agreement of purchase and sale (APS) with Brightstar on October 30, 2014, for the price of \$337,900. There is no dispute that Mr. Rasmussen has advanced the full value of the purchase price. Deposits and payments totaling \$67,580 were paid into the trust account of the deposit trustee, Schneider Ruggiero LLP (SR Law). And, the Receiver has confirmed that Mr. Rasmussen paid \$270,320 (the balance of the purchase price under the APS) into Brightstar's bank account, in accordance with a Loan and Amendment Agreement of May 29, 2018 (the L&A Agreement).



- [10] The dispute between Mr. Rasmussen and GCNA arises because the balance of the purchase price (\$270,320) was paid, not to the deposit trustee, SR Law, but to Brightstar directly.
- [11] The evidence is that Brightstar, in particular, Mr. Blackburn, an officer and director of Brightstar, pressured Mr. Rasmussen to prepay the balance of his purchase price to help the development through a “rough stretch”. Mr. Rasmussen has deposed that Brightstar informed him that it needed money to complete construction of the project and that the balance of his purchase price could not be used for construction purposes unless it was paid in the form of a loan specifying it was the final balance of the purchase price.
- [12] Mr. Rasmussen initially refused but, he says, Brightstar continued to pressure him. Ultimately, Mr. Rasmussen agreed. He testified that he was in a weakened and vulnerable state because his wife had recently died, he had been diagnosed with cancer and he was in therapy for depression associated with these disturbing events.
- [13] Brightstar has not responded to the specific allegations of pressure raised by Rasmussen. Neither Brightstar nor GCNA has cross examined Mr. Rasmussen on his affidavit. Brightstar, in its affidavit materials, supports title to Unit 417 being transferred to Mr. Rasmussen on the basis that the purchase price was paid in full and that he acted in good faith.
- [14] As noted above, the prepayment on the final balance of the purchase price was structured as a loan and amending agreement between Brightstar and Mr. Rasmussen. The L&A Agreement states, amongst other things, that:
- (a) Clause 2: The Principal Sum of \$270,320 “represents the balance due and payable upon occupancy, registration of the condominium and closing of [Unit 417] pursuant to the APS”;
- (b) Clause 4: The Principal Sum is to be interest-free, but if closing does not occur within six months from the date of agreement, interest will accrue from the seventh month of the agreement until closing or repayment; and
- (c) Clause 8: Brightstar is to provide an amendment to Unit 417 APS, “acknowledging that the Principal Sum advanced will be applied to the purchase price of [Unit 417] on Closing by way of a credit to the Lender. At the time of closing no other purchase funds shall be required save for adjustments provided for in the APS and there shall be no charge for any upgrades or changes”.<sup>1</sup>
- [15] In addition, the bank transfer slip issued by Mr. Rasmussen’s bank, CIBC, to Brightstar and accepted by Brightstar and deposited at the time, specifically indicated that this payment of \$270,320 was the final balance of the purchase price for Mr. Rasmussen’s unit.

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<sup>1</sup> No such amendment to the APS was ever delivered.

- [16] Mr. Rasmussen moved into and took occupancy of Unit 417 in October 2018. He has since incurred additional expenses to significantly upgrade and renovate the unit. The condominium project was registered in November 2019. Mr. Rasmussen says that when he attended for the final closing with his lawyer on November 18, 2019, he was unable to close and receive clear title. This was because Centurion took the position that his unit was subject to a significant “unapproved credit or discount” that would not generate sufficient sales proceeds to Centurion.
- [17] Mr. Rasmussen takes the position he has paid in full for Unit 417 and is entitled to receive clear title to his unit.

### ***GCNA’s Claims Under Its Mortgage***

- [18] GCNA maintains an objection similar to that originally raised by Centurion on Unit 417’s closing. GCNA takes the position, among other things, that its deposit trust is \$270,320 short because of the diversion of the final purchase price for Unit 417 to Brightstar directly. GCNA says the shortfall matters in this case because it is owed at least \$85,905 of unpaid premiums and \$202,787.29 for legal fees; as well, it says it faces potential liabilities in the form of future new home warranty claims from purchasers of units in the project. Brightstar disputes these claims advanced by GNCA. The amount remaining in the deposit trust account is insufficient to cover all these potential liabilities.
- [19] To understand better GCNA’s position, it is necessary to consider GCNA’s agreements with Brightstar and how they fit into the scheme of condominium project construction and regulation in general.
- [20] GCNA’s involvement with the project arises from two credit instruments issued to Brightstar. GCNA’s first commitment letter issued to Brightstar (and to named principals of Brightstar) provides a bond in favour of Tarion regarding new home warranty claims as well as required deposit insurance. Each of these commitments provides credit to the project secured by GCNA’s mortgage. Later, when construction financing was confirmed and the project was underway, GCNA issued an amended commitment letter, containing further details regarding these two fundamental commitments.
- [21] GCNA emphasizes that the *Condominium Act, 1998*, S.O. 1998, c. 19, requires all deposits paid by purchasers of condominiums to be held in trust by an authorized trustee unless prescribed security is provided to the trustee, in which case the trustee may release secured deposit funds to the developer to finance the development of the new condominium units. Brightstar appointed its solicitor for the project, SR Law, to hold all deposits paid on the purchase price of condominium units in the project in accordance with the requirements of the Act.
- [22] In particular, GCNA relies upon an “extended” definition of deposit in its deposit trust agreement with Brightstar. Under GCNA’s March 31, 2014 deposit trust agreement, Brightstar granted GCNA security in respect of all deposit monies received in the project, which were required to be held in the escrow account maintained by SR Law. In section

1.1. of the agreement, “Deposit” and “Deposits” were defined to “have the meaning ascribed to that term in Part I(1) of Regulation 892 to the *Ontario New Home Warranty Program Act* [R.S.O. 1990, c. O.31].” Regulation 892 to the *ONHWPA* defines “Deposits” to include all money received on account of the purchase price:

“deposits” means, in respect of a home, all money received before the date of possession by or on behalf of the vendor from a purchaser on account of the purchase price payable under a purchase agreement, and, in the case of a condominium dwelling unit, includes money received by or on behalf of the vendor after the date of possession and prior to the date of transfer but does not include money,  
 (a) paid under the purchase agreement as rent or as an occupancy charge and not part of the purchase price, or  
 (b) specified in the purchase agreement as money paid under subsection 80 (4) of the *Condominium Act, 1998*.

- [23] Thus, GCNA’s essential position is that under the terms of its agreement with Brightstar, all funds for the purchase of Unit 417 had to be paid into the deposit trust account held by SR Law. Because this was not done, Mr. Rasmussen’s “loan” to Brightstar cannot qualify as a final payment on Unit 417. GCNA says Mr. Rasmussen must either repay the \$270,320 or provide GCNA with a mortgage in that amount (or some lesser negotiated amount).

### ***The Receiver’s Motion for Directions***

- [24] To bring this issue to a head, following its investigation the Receiver gave notice of its preliminary view that Mr. Rasmussen was a *bona fide* purchaser for value and should, subject to payment of standard adjustments on closing, receive clear title to Unit 417.
- [25] GCNA notified the Receiver that it opposed this outcome on the basis that Mr. Rasmussen was not a *bona fide* purchaser for value because he had, effectively, assisted Brightstar in doing an end run around Brightstar’s obligations under the commitment letters and the deposit trust agreement. This, GCNA says, had the effect of depriving it of the benefit of payment of the balance of Mr. Rasmussen’s purchase price.
- [26] Faced with this opposition, the Receiver brought the present motion for directions from the court.

### **The Issue**

- [27] The issue for determination on this motion is whether Mr. Rasmussen’s prepayment of the final balance of the purchase price for his unit satisfies all his obligations under the APS such that, subject to payment of standard closing adjustments, he is entitled to clear title free and clear of the GCNA mortgage.

## The Parties' Arguments

- [28] Mr. Rasmussen's position is that he has paid in full the entire purchase price for Unit 417 required under his APS. He was asked for advance payment and consented to do so in the form of the L&A Agreement. He says that the L&A Agreement and the terms of payment at the time were absolutely clear: the \$270,320 advanced, although it took the form of a loan, was never intended to be repaid unless the project for some reason could not be completed. The advance was, explicitly and in substance, payment (albeit in advance) of the final balance of the purchase price for Unit 417 under the APS. Upon closing, the "loan" would cease to exist. Mr. Rasmussen says he was not a party to and had no knowledge of Brightstar's contractual obligations to GCNA or to any other third party. Nor did he assist or conspire with Brightstar to breach its obligations to GCNA or anyone else.
- [29] GCNA advances, essentially six arguments for why Mr. Rasmussen is not entitled to the transfer of his unit free and clear of GCNA's mortgage:
- First, it says that Mr. Rasmussen's advance of \$270,320 to Brightstar was, on its face, a loan and not a payment at all.
  - Second, the payment did not comply with the terms of the APS. It says Mr. Rasmussen must re-tender the amount of \$270,320 (or give GCNA a mortgage) if he wishes to take clear title to Unit 417.
  - Third, GCNA claims that its mortgage has priority over any interest Mr. Rasmussen is found to have in Unit 417.
  - Fourth, it says that Mr. Rasmussen is estopped from requesting a vesting order against GCNA by virtue of clause 72 of the APS, which bars the purchaser from initiating proceedings against third party entities in respect of the APS.
  - Fifth, it says that the final payment cannot be set-off against the amounts due under its charge from Brightstar because GCNA does not owe Brightstar any money.
  - Finally, even though Mr. Rasmussen advanced value to Brightstar, he cannot be considered a *bona fide* purchaser without notice of GCNA's claims because, among other things: i) he knew the payment was out of the ordinary course and, by his own admission, agreed to it against his better judgment; ii) he had a lawyer acting for him in connection with the L&A Agreement and should be presumed to know and understand the law of condominium project financing, including Brightstar's obligations to GCNA and others; and iii) he was given explicit notice in the L&A Agreement of GCNA's prior mortgage.

## Analysis

### *Loan or Final Payment?*

- [30] GCNA argues that, on its face, the advance by Mr. Rasmussen of \$270,320 was a loan, not a final payment on account of the purchase of his unit. GCNA argues that the L&A Agreement says the payment was a loan, the funds were not paid into the deposit trust account, and the transaction appears to be an attempt to conceal payment to Brightstar. I am unable to accept this argument.
- [31] The L&A Agreement expressly provides that the principal sum of \$270,320 “represents the balance due and payable upon occupancy, registration of the condominium and closing of [Unit 417] pursuant to the APS”. The L&A Agreement also provides there shall be an amendment to the APS, “acknowledging that the Principal Sum advanced will be applied to the purchase price of [Unit 417] on Closing by way of a credit to the Lender. At the time of closing no other purchase funds shall be required...”
- [32] The L&A Agreement was structured as a loan in the sense that, if the project could not be completed, Mr. Rasmussen would be repaid his final payment. But once the condominium was registered, on closing the advance was to be taken as the final payment, in full, under the APS.
- [33] Although no amendment to the APS setting this out was ever provided, I find that it does not matter in the circumstances. This is a case for the application of the maxim that equity “looks on that as done which ought to be done”: *Grant Forest Products Inc. (Re)*, 2010 ONCA 355, 101 O.R. (3d) 383, at paras. 13-18. In applying this maxim, the court must consider whether:
- (a) the contract imposes a contractual obligation on a contracting party to do something it has not done;
  - (b) the contract is one that can be specifically enforced; and
  - (c) the party seeking relief is not a stranger but a party who would be entitled to specifically enforce the contract.
- Equity permits the court to recognize the obligation from the time it should have been performed, even if the time for performance has passed.
- [34] The Unit 417 APS imposes an obligation on Brightstar to deliver title and to undertake to discharge any mortgages, which are not to be assumed by Mr. Rasmussen as purchaser. The L&A Agreement is consistent with this obligation in stipulating that the advance of \$270,320 represents the balance of the purchase price due on closing and that no further purchase funds shall be required. Brightstar, however, failed to fulfill its obligation to provide clear title and to obtain the discharge of any project mortgages on closing.

- [35] The APS (as amended by the L&A Agreement) is a contract for which the remedy of specific performance is available. The only material steps remaining are for title to be conveyed to Mr. Rasmussen and any project mortgages discharged.
- [36] In some receivership cases courts have declined to grant specific performance of purchase agreements if doing so would amount to “a mandatory order that requires the incurring of borrowing obligations against the subject property and completion of construction ordered to bring the property into existence”: *1565397 Ontario Inc. (Re)* (2009), 54 C.B.R. (5th) 262 (Ont. S.C.), at para. 33. Such concerns are not present here. The project is complete and all units are sold and fully occupied.
- [37] Finally, Mr. Rasmussen is unambiguously a party to the APS and the L&A Agreement.
- [38] The Ontario Court of Appeal has recognized that:
- (a) once a unit purchaser enters into an agreement of purchase of sale, he becomes an equitable owner of the unit even though the agreement cannot be closed until the condominium is registered;
  - (b) the owner is in a fiduciary relationship with unit purchasers and actually holds the property in trust for them; and
  - (c) the owner has a duty to protect the interests of the unit owners and cannot put its own interests in conflict with theirs: *York Condominium Corp. No. 167 et al. v. Newrey Holdings Ltd. et al.* (1981), 32 O.R. (2d) 458 (C.A.), leave to appeal to SCC denied.
- [39] In light of these obligations it would be inequitable for Brightstar to be permitted to take advantage of its breach of the APS and retain title in Unit 417, which it holds in trust, notwithstanding its conflicting obligations to GCNA.
- [40] I find that Brightstar was short of money and was struggling to keep the project going. It structured this prepayment as a loan as a strategy to do an end run around its obligations to its lenders to hold all purchaser payments in trust unless release of these funds was specifically authorized. Brightstar was the recipient of the final payment for Unit 417. If this was contrary to its obligations under the GCNA commitments and mortgage, that is not Mr. Rasmussen’s problem. If GCNA must be made whole, that is Brightstar’s responsibility, not Mr. Rasmussen’s.
- [41] For all these reasons, I find that, under the L&A Agreement, properly interpreted in the context of the APS and the surrounding circumstances, Mr. Rasmussen’s advance of \$270,320 to Brightstar was the final payment for the purchase of Unit 417 under the APS.

***Did the APS Prohibit Payment to Brightstar Directly?***

- [42] I am also unable to agree that Mr. Rasmussen was under any contractual obligation to make his final payment of \$270,320 to SR Law. The APS quite specifically limits the payments required to be made to SR Law to two initial deposits which had to accompany the APS: i)

an initial \$5,000 deposit; and, ii) an initial down payment of \$62,580.00 (20% of the purchase price less \$5,000). By contrast, under the APS the *balance* of the purchase price was required to be paid *to the vendor* (or as the vendor might direct).

[43] Paragraph 1(b) of the APS states:

The following amounts comprising part of the Purchase Price shall be payable to Schneider Ruggiero LLP, in Trust, as deposits pending completion or termination of this Agreement and to be credited on account of the Purchase Price on the Closing Date and/or Unit Transfer Date (as such terms are hereinafter defined):  
 (1) the sum of \$5,000.00 by cheque or bank draft submitted with this Agreement;  
 (2) the sum of \$62,580.00 being 20% less \$5000.00 of the Purchase Price, submitted with this Agreement, by a cheque post-dated one (1) month following the execution of this Agreement by the Purchaser...

[44] Paragraph 1(c) of the APS states:

The balance of the Purchased Price to the Vendor (or as it may further direct) by certified cheque, bank draft, or wire transfer (using Large Value Transfer protocols) on the Unit Transfer Date (as hereinafter defined), subject to the adjustments hereinafter set forth...

[45] I also note that the APS addresses, in para. 20, how existing project mortgages are to be discharged on closing. Although the purchaser acknowledges project mortgages might exist, the APS stipulates that such mortgages are not intended to be assumed by the purchaser. In effect, the vendor undertakes to obtain partial discharges of project mortgages and to direct the necessary funds to the mortgagee from the purchase price to do so.

[46] Thus, the APS does not impose any obligation on Mr. Rasmussen to pay the balance of the purchase price to SR Law. Rather, the APS provides that Mr. Rasmussen shall direct this payment to Brightstar and that Brightstar may direct how such funds are to be paid. Mr. Rasmussen was entitled to take Brightstar's direction: *Armada Properties Ltd. v. 700 King Street (1997) Ltd.*, 2001 CanLII 28461 (Ont. S.C.).

[47] Furthermore, the APS contemplates that while project mortgages would still exist on the unit transfer date, the vendor would undertake to register a subsequent discharge. The obligations to deal with the funds tendered by Mr. Rasmussen in final payment for Unit 417 appropriately, and to attend to the discharge of any project mortgages, fell on Brightstar, not Mr. Rasmussen.

[48] It appears to be true that under the deposit trust agreement with GCNA, Brightstar was obligated to direct all amounts received for the purchase of a unit into the deposit trust account; but that was an obligation of Brightstar's, not Mr. Rasmussen's. Further, there is no evidence that Mr. Rasmussen was even aware of, let alone that he was involved in trying to thwart, Brightstar's obligations in this regard.

- [49] As noted earlier, Brightstar ran out of money. It was scrambling to keep the project going and, to generate some cash, did an end run around its contractual obligations to GCNA by prevailing on Mr. Rasmussen to prepay his final payment. Mr. Rasmussen advanced the full amount in good faith. That these funds were misdirected to pay project expenses instead of going into the deposit trust account is on Brightstar, not Mr. Rasmussen. It was Brightstar and its principals, not Mr. Rasmussen, who breached their obligations to GCNA. Mr. Rasmussen had no contractual obligations to GCNA. Under the term of its commitment letters, GCNA has indemnities from Brightstar and its principals to cover precisely this kind of thing; the responsibility for making GCNA whole is on them, not Mr. Rasmussen.
- [50] Mr. Rasmussen breached no obligations under the APS by advancing his final payment to Brightstar.

***Does GCNA’s Mortgage Take Priority Over Mr. Rasmussen’s “Loan” To Brightstar?***

- [51] GCNA maintains that its security has priority over any interests Mr. Rasmussen may have. Mr. Rasmussen had specific knowledge of GCNA’s mortgage when he advanced final payment to Brightstar. Therefore, GCNA’s interest should prevail. I do not agree.
- [52] Under the terms of the receivership order, the Receiver can obtain a vesting order to convey Unit 417 to a purchaser free and clear of any liens or encumbrances. Whether and in what circumstances a vesting order may be granted where third party rights could be extinguished has been addressed by the Ontario Court of Appeal in *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416, at paras. 109-110.
- [53] Before granting a vesting order that could extinguish rights, the court should conduct a “rigorous cascade analysis”. This begins with an assessment of the nature and strength of the interest that is proposed to be extinguished (which may be the determinative factor), and whether the interest holder had consented to vesting out during the insolvency proceedings or in other agreements reached prior to insolvency. If these factors are inconclusive, the court will consider the equities of the case. A consideration of the equities would include the question of prejudice, whether the party whose interest is being extinguished can otherwise be adequately compensated and whether the parties have acted in good faith.
- [54] GCNA has objected to the closing of the transaction of Unit 417 without provision of additional security. It states the funds currently held in escrow, along with the closing proceeds of Unit 417, are required for:
- (a) indemnity with respect to unpaid premiums owed by Brightstar to GCNA under the credit facility;
  - (b) indemnity with respect to legal expenses incurred by GCNA in the priority dispute with Centurion and the receivership of Brightstar;
  - (c) continuing collateral for GCNA’s future premiums that may be owed by Brightstar; and



(d) continuing security for GCNA's exposure to future loss and expense under the GCNA facility (which includes deposit insurance and future new home warranty claims).

- [55] Under the first component of the *Third Eye Capital* analysis, it is clear that GCNA's interest is purely financial, whereas Mr. Rasmussen's interest is both proprietary in nature (this is his home) and financial.
- [56] Under the second component, GCNA did agree to the discharge of its mortgage in agreements prior to the receivership proceedings. Under the terms of its commitment letter, GCNA agreed that it "will discharge its collateral mortgage upon the final closing of each unit and the discharge will be provided at no charge to the Principal, other than legal fees" and that GCNA "shall require evidence of transfer of title from the Principal/Declarant to purchasers as a condition of discharge."
- [57] There is no factual dispute that Mr. Rasmussen paid for his unit in full, thereby fulfilling his financial obligations under the APS to pay for his unit. The problem in this case is that Brightstar diverted Mr. Rasmussen's final payment of funds away from the deposit trust account and to itself, which it then used, presumably, for ongoing project expenses. This was, as discussed above, in breach of its obligations to GCNA.
- [58] On the basis of the two principal *Third Eye Capital* factors, I find that a vesting order giving Mr. Rasmussen clear title to Unit 417 is appropriate. Even if the two primary factors resulted in some ambiguity, I have no hesitation in concluding, on the evidence, that equitable considerations are entirely in favour of Mr. Rasmussen in any event.
- [59] On the question of prejudice, GCNA's position is that Mr. Rasmussen must advance a further \$270,320 into the deposit trust account in order to receive clear title (or, alternatively, take on a mortgage in GCNA's favour in this amount). Mr. Rasmussen does not have the means to make the final payment for his unit twice. The alternative proposed, a mortgage, would negate his equity in his unit in the same amount.
- [60] GCNA claims to need these funds to protect itself against unpaid premiums owed or potentially owed by Brightstar, its legal expenses arising out of its unsuccessful priority dispute with Centurion, and potential future claims under its bond.
- [61] The question of unpaid premiums and GCNA's legal fees is a matter of ongoing dispute with Brightstar. In any event, no legal basis has been established by GCNA to justify making Mr. Rasmussen responsible for these claims.
- [62] The question of GCNA's potential liability on the bond involves deposit insurance and new home warranty claims. Most of the unit sales in this project closed in early 2019. There is no evidence of any deposit insurance claims whatsoever.
- [63] The new home warranty program lasts for seven years. It is now three years since most units closed. Again, GCNA has advanced no evidence of any claims. Thus, what remains is an entirely contingent liability. Again, it is unclear what legal basis GCNA has for making Mr. Rasmussen responsible for these potential claims. The very purpose of the

Tarion regime is to protect individuals like Mr. Rasmussen and to ensure buyers of newly built homes receive protection against defects, which includes resolving claims where the developer has failed to do so. It strikes me as somewhat contrary to the purposes of the new home warranty program that Mr. Rasmussen would be, in effect, called upon and required to *pay* for such warranties before the developer and GCNA.

- [64] In any event, GCNA has indemnity claims available against Brightstar, its affiliates and its principals. Under its credit facility documents, GCNA obtained an unlimited joint and several indemnity from Brightstar, as well as guarantees from Brightstar Seniors Living Corp., L.R.G. Corp., Lawson Gay, John Blackburn, Jim Buckler and Alan Chapple. There is no evidence that any of these entities and individuals are unable to make good on any liabilities they may have under their indemnities and guarantees.
- [65] GCNA says Mr. Rasmussen has a claim for repayment of his loan to Brightstar and that he should repay the final payment into the deposit trust account for the benefit of GCNA and sue Brightstar for his money back on the loan. I am unable to give any credence whatsoever to this argument. GCNA is in the business of offering bonds and taking on, and managing, the risks of doing so (by, for example, obtaining indemnities and guarantees from a wide base of involved parties on the developer side). Mr. Rasmussen simply bought a residential condominium unit and made the final payment on his unit in good faith. It is no answer to say to Mr. Rasmussen, in these circumstances, that he can always sue Brightstar for the repayment of his loan.
- [66] The pre-existence of GCNA's collateral mortgage is not a basis, in these circumstances, for denying Mr. Rasmussen a vesting order giving him clear title to the unit he has paid for in full. In light of Mr. Rasmussen's equitable interest, the appropriate remedy in this case is for the Receiver to fulfill Brightstar's outstanding obligations to Mr. Rasmussen (which crystallized prior to the receivership) and transfer clear title to Mr. Rasmussen. A vesting order shall issue in aid of this result.

***Does Clause 72 of the APS Set Up An Estoppel Against Mr. Rasmussen?***

- [67] Clause 72 of the APS provides that the purchaser may not assert any claim in respect of the APS against anyone other than the vendor and creates an estoppel against doing so. It states:

the Purchaser shall not assert any of such rights, nor have any claim or cause of action whatsoever as a result of any matter or thing arising under or in connection with this Agreement (whether based or founded in contract law, tort law or in equity, and whether for innocent misrepresentation, negligent misrepresentation, breach of contract, breach of fiduciary duty, breach of constructive trust or otherwise), against any person, firm, corporation or other legal entity, other than the person, firm, corporation or legal entity specifically named or defined as the Vendor herein...[and that]... this acknowledgment and agreement may be pleaded as an estoppel and bar against the Purchaser in any action, [etc.]...

- [68] GCNA argues that the relief sought by Mr. Rasmussen is contrary to this clause 72 of the APS.
- [69] The problem with GCNA's argument is that Mr. Rasmussen has not commenced any action or other proceeding against GCNA or any other third party. Clause 72 cannot reasonably be read as precluding Rasmussen from seeking clear title from Brightstar, as this is exactly what he contracted for in the APS.

***Does Mr. Rasmussen's Argument Depend on Set Off?***

- [70] GCNA argues that the amount of the final payment should not be credited against any amounts owing to it by Brightstar, since GCNA did not receive the funds, does not consent to set off and, in any event, owes no money to Brightstar against which the final payment for Unit 417 could be set off. The matter of whether funds are owed by GCNA to Brightstar is a matter of dispute between those parties. This does not stand in the way of Mr. Rasmussen obtaining clear title to Unit 417 since he is not privy to the dispute between GCNA and Brightstar. His claim to clear title based on full payment does not depend on set off; it is a free-standing claim in equity. In any event, as noted above, GCNA has recourse to other avenues of recovery against Brightstar and its affiliates and principals.
- [71] I find that Mr. Rasmussen's request for a vesting order giving him title to Unit 417 does not depend on Mr. Rasmussen, or anyone else, having a set off claim against GCNA.

***Was Mr. Rasmussen's Conduct Bona Fide and Without Notice of GCNA's Claims?***

- [72] I have already dealt with most of the issues raised in connection with this argument.
- [73] While Mr. Rasmussen undoubtedly had notice of GCNA's prior mortgage, it was in the context of Brightstar's obligations under the APS and GCNA's obligations under its funding agreements with Brightstar. In other words, Mr. Rasmussen had a reasonable expectation that, if he paid the full purchase price for his unit, he would be able to close and get clear title. What Mr. Rasmussen did not have notice of, crucially, was that Brightstar was using the L&A Agreement to do an end run around its obligations to GCNA or that his prepayment of the final tranche of the purchase price to Brightstar would be in anyway detrimental to GCNA's interests.
- [74] The fact that Mr. Rasmussen had legal advice on the L&A Agreement, standing alone, changes nothing. There is no evidence about what that advice was. In any event, it is hard to see how Mr. Rasmussen's lawyer would be concerned with Brightstar's obligations to its own creditors. There is absolutely no basis for any inference that Mr. Rasmussen had constructive knowledge that Brightstar would act in a manner that was offside its obligation to GCNA or that the prepayment was in any way improper or detrimental to third parties.
- [75] I find that Mr. Rasmussen was a *bona fide* purchaser for value without notice that the manner of his final payment for Unit 417 would put Brightstar offside its obligations, or be detrimental to any third party interests.

### **Conclusion**

- [76] For the foregoing reasons, I find that Mr. Rasmussen was a *bona fide* purchaser for value and direct the Receiver to close Mr. Rasmussen's purchase of Unit 417, subject only to standard closing adjustments. In furtherance of this direction, an order shall issue vesting clear title to Unit 417 in Mr. Rasmussen's name once the closing adjustments are resolved and satisfied.

### **Other Outstanding Issues**

- [77] During the course of oral argument of the Receiver's motion regarding Unit 417, it became clear that there are some potential issues in dispute about what closing adjustments are necessary and who is liable to pay them. Since there was no evidence about this, and effectively no submissions, I declined the invitation of certain parties to wade in on this issue now.
- [78] With the benefit of my disposition on the main issue in dispute, the affected parties shall confer and attempt to resolve all outstanding accounting and other issues affecting the calculation and payment of the appropriate closing adjustments for Unit 417. If, and only if, the parties (having made Herculean efforts) are unable to resolve these issues, the Receiver may return to court for further advice and direction on this issue.

### **Costs**

- [79] No one sought costs. The issues and circumstances were, in any event, such that I would not have been inclined to make any order as to costs. Accordingly, no costs are ordered on the Receiver's current motion for directions.

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**Penny J.**

**Date:** 2022-02-25

# **TAB 11**

Colautti Construction Ltd. v. City of Ottawa

46 O.R. (2d) 236  
9 D.L.R. (4th) 265

ONTARIO  
COURT OF APPEAL  
LACOURCIERE, CORY AND TARNOPOLSKY JJ.A.  
22ND MAY 1984.

Appeal -- Grounds -- Question of fact -- Trial judge not making clear findings -- Whether new trial required.

Contracts -- Documents -- Extrinsic evidence -- Subsequent variation -- Building contract requiring all changes to be authorized in writing -- Owner making several changes orally and paying for work -- Whether contract varied.

The plaintiff contracted to install a new sewer line for the defendant city. The line marked for excavation was too close to a water-main and, after some work had been done, had to be relocated causing additional cost. The plaintiff claimed that the error arose through the defendant's fault in marking the line for excavation, and that the city's project officer had undertaken to pay the additional costs. At trial the judge made no findings of fact in respect of the way in which the error was caused or on the alleged undertaking, but he dismissed the plaintiff's claim. The contract provided that all changes were to be authorized in writing, but several other changes had been made orally and paid for.

On appeal to the Ontario Court of Appeal, held, allowing the appeal and ordering a new trial, the strict requirement of writing had been varied by the conduct of the parties. Consequently, findings of fact were essential to determine the contractual, or restitutionary, rights of the plaintiff. As the

critical findings had not been made a new trial was necessary.

#### Cases referred to

Lewis v. Todd et al., [1980] 2 S.C.R. 694, 115 D.L.R. (3d) 257, 14 C.C.L.T. 294, 34 N.R. 1; Charles Sundstrom et al. v. State of New York (1914), 213 N.Y. 68; Sir Lindsay Parkinson & Co., Ltd. v. Com'rs of Works Public Buildings, [1950] 1 All E.R. 208

APPEAL by the plaintiff from a judgment of Sirois J. in an action on a building contract.

Ronald J. Rolls, Q.C., and Raymond G. Colautti, for appellant.

Douglas R. Wallace, for respondent.

The judgment of the court was delivered by

CORY J.A.:-- On October 15, 1982, the plaintiff/appellant Colautti Construction Ltd. ("Colautti") was awarded judgment for \$9,497.23 and the balance of its claim was dismissed. Colautti is appealing this judgment.

#### The factual background

Colautti carries on business as a sewer and watermain contractor. On January 3, 1979, it entered into a contract with the Corporation of the City of Ottawa (the "City") for the construction of sanitary sewers along Roosevelt Ave.

The proposed 18-in. sanitary sewer was to be installed in a north-south direction on Roosevelt Ave. The plans and specifications which were provided to Colautti for the purposes of tendering on the contract indicated that the new sewer was to be installed near the centre of the road and some 10 ft. east of an existing 12-in. diameter sanitary sewer running

parallel to the proposed new sewer. An existing six-inch water-main was also shown on the plans. The water-main was located immediately adjacent to (within two feet) and parallel to the existing sanitary sewer. The position of the proposed new sewer line, the existing 12-in. sanitary sewer and the water-main are all clearly indicated on the plans.

The contract provided that the layout work was to be done by the City. This involved surveyors setting out the proposed line for the new sanitary sewer by staking or placing monuments or reference points such as grade stakes or picket nails. The line should have been offset 10 ft. to the east of the proposed new sewer line for it would have been impractical to set the line down the middle of Roosevelt Ave. The contractor was then to set his line by referring to the stakes and projecting the proposed line of the works from those stakes by measuring back 10 ft. The contractor was required to adhere strictly to the lines and grades set out by the City.

The surveyors for the City laid out the line on January 15, 1979. The contractor commenced construction the same date. At that time Mr. Weiss, a superintendent for Colautti, set out the proposed centre line for the new sanitary sewer by measuring back a distance of 10 ft. from the line of stakes that had been set out by the surveyors for the City. Weiss testified that he measured over from the line, made his marks on the road to show where the centre line of the proposed sewer was to be located, and commenced drilling operations.

The plans indicated that the water-main was within one or two feet of the existing 12-in. sanitary sewer. The water-main would thus be approximately eight or nine feet distant from the proposed sewer line. Uncontradicted evidence confirmed that the plans were reasonably accurate as to the location of the existing 12-in. sewer and water-main and that the water-main was located within a foot of the existing 12-in. sanitary sewer.

The contractor's method of procedure was to drill the rock along the line of the proposed sewer, blast the rock, and subsequently to excavate the rock and soil to the appropriate



depth shown on the plans. A crew would then place a proper bedding material in the trench, lay the pipe on top of that material and backfill the excavated trench.

On January 15th, when the first blasting was undertaken, it was found that the six-inch water-main had been damaged. The water-main was then exposed. The evidence was that the distance between the centre line of the proposed sewer laid out and the water-main was only three feet instead of the eight or nine feet indicated on the plans.

The City's project officer, who had the responsibility for the execution of this contract, was informed of the water-main break. He attended at the work site and directed Colautti to continue blasting along the line as laid out. Colautti resumed its drilling and blasting operations on January 16th. The watermain was again ruptured. Once again, the project officer was consulted and once again he directed to Colautti to continue its operations along the proposed line as laid out. The drilling and blasting was resumed and yet again the water-main was ruptured.

The parties then agreed that a new survey line should be set out for the proposed sewer. The new survey line was measured from the westerly side of Roosevelt Ave. Final measurements showed that the sewer, as installed, was 16.73 ft. east of the existing 12-in. sanitary sewer.

#### Correspondence between the parties

When the contract was completed, the parties exchanged correspondence pertaining to the contract and the additional costs incurred by Colautti. In a letter to the City dated September 12th, Colautti noted that the water-main was located only three feet from the proposed 18-in. sewer as staked out by the City's surveyors. It was stated that Mr. Spero (the City's project officer responsible for the work) was immediately called and a site meeting was requested. The City, in its reply, did not contest Colautti's estimate of the distance of three feet between the water-main and the proposed new sewer. Both parties agreed that the line for the proposed new sewer

was changed. Colautti said the new line was two feet inside the existing kerb of Roosevelt Ave. The City referred to the new line as being approximately five feet east of the original proposed line for the new sewer.

The City did confirm that the relocation of the sewer line was a major change in the contract. It was the City's position that the change in the line was undertaken in good faith in order to "mitigate Colautti's costs of the project".

#### Position of Colautti at trial

It was the position of Colautti at trial that the City had made a mistake in laying out the position of the line of the proposed new sewer. The plaintiff contended that the error in laying out the line was caused by the fact that the wrong manhole was used as a reference point by the surveyors in measuring out the proposed centre line and in setting out the offset stakes. The manhole which should have been used as the reference point was covered with snow and ice and had to be removed by members of the Colautti firm.

The evidence of Mr. Barney, who did the surveying for the City, was to the contrary. Unfortunately he did not keep notes of his surveying for this project contract although that apparently is good practice for surveyors. He based his recollection on the position of a stake in relation to a hydrant and also referred to its position in relation to kerbs in that position on Roosevelt Ave. Those kerbs were not installed until several years after the contract had been completed so that this segment of his evidence may have been of little assistance.

When the new line was set for the proposed sewer there was a discussion between the representatives of the City and Colautti. Mr. Colautti testified that Mr. Spero said that the City would pay for the additional costs of relocating the line. Mr. Spero, on the other hand, stated that no money claim was made by Colautti nor mentioned by him, but he advised that the City would not be liable for the relocation costs involved in the removal of trees and poles along the new line. This

difference in the evidence was referred to by the trial judge but not resolved in his reasons.

The relocation of the line for the new sewer involved additional costs for the plaintiff. It is those additional costs which are the subject-matter of the lawsuit.

#### Decision at trial

The trial judge did not accept the plaintiff 's theory as to how the error in the original excavation occurred. In his reasons he stated:

The theory of the plaintiff that the error was made when the city started at the wrong manhole, which is five feet closer to the west, does not stand. If this allegation or hypothesis were true, and if we believed that the first trench was dug as a result of that erroneous information, at three feet from the water-line, therefore being either two or four feet from the existing sewerline, and if we were to assume that the new line as laid out was to be five feet east thereof, the new sanitary sewer would be at eight feet or nine feet from the water-main whereas we also all agreed that it is 16.7 ft. from the old or existing sanitary line.

The court may infer also that because of these distances between the old and the new sanitary sewer one could deduct and find it would be proof that the first digging for the first line was at roughly 11 ft. (as called for by the plans) from the old sanitary sewer and therefore this would destroy the plaintiff 's claim as well.

I find therefore that the plaintiff has not established that it was because of the city's action that it dug the first trench at three feet from the water-main which it found was roughly one foot away from the old sanitary sewer.

The learned trial judge did not make any findings of credibility and made no reference in his reasons as to how he resolved the conflicts in the evidence.

The position of counsel on appeal as to the facts

Both counsel agreed that the error in the excavation of the proposed sewer line could only have come about in one of two ways:

(1) The offset line laid out by the City surveyors was in error, or

(2) Colautti was in error in measuring back the 10 ft. from the offset line established by the City's surveyors.

The question for determination

The issue is whether or not the judgment at trial can be maintained based, as it is, not upon a finding of credibility but on a mathematical calculation.

Cases such as *Lewis v. Todd et al.*, [1980] 2 S.C.R. 694, 115 D.L.R. (3d) 257, 14 C.C.L.T. 294, make it very clear that an appellate court must not interfere with the findings of fact of a trial judge absent an error of a palpable and overriding nature.

There could be no question of interference in this case if a finding had been made by the trial judge based on the credibility of the witnesses. Different considerations apply where the decision is based on a mathematical conclusion which may not have a sound factual basis.

Disturbing aspects of the mathematical formula

In arriving at his mathematical conclusion, the trial judge failed to consider that the new line was resurveyed from the west side of Roosevelt Ave. It was a completely new line and was not arrived at by the simple expedient of moving the original line five feet further to the east. This aspect alone would lead to some doubts as to making any mathematical calculations based on the new survey line without some clear finding of fact.

There is an additional worrisome aspect of the situation. The City conceded that it would accept the measurement that the centre of the proposed sewer line was only three feet from the water-main. The evidence confirmed that the existing pipeline was found in the position indicated for it on the plans. If the contractor erred in measuring back 10 ft. from the line set out by the City, then the measurement error was one of seven feet. That is to say, Colautti must have measured back 17 ft. instead of 10 ft. Such an error must have been readily apparent. Spero, who was responsible for the project and frequently on the job site, at no time mentioned such an error nor raised it with Colautti. There is no allegation of negligence on the part of Colautti raised either in any oral statements by City representatives or in the carefully drafted letter from the City.

By that letter the City recognized that the change in the sewer line constituted a material and significant change in the contract. One would expect that if such a change was necessitated by the negligent measurement of a short distance by Colautti, the City would refer to it. Indeed, it would be such a complete answer to the Colautti claim for extra payment that one would expect the City to announce the negligence with a clarion call and remit the claim to the contractor with a triumphant flourish. The City would say to Colautti, in effect, "don't bother us, any extra expense incurred by you arises from your negligence and inability to measure a distance of 10 ft.!" Not even in the pleadings does there appear any allegation of negligence on the part of the contractor which would put an end to the Colautti claim in this case.

Need for findings of fact in this case

The position of the parties in this case made it essential for the trial judge to make findings of fact. The City conceded that the change of line materially altered the contract and, once that concession was made, certain factual findings had to be made. For example, was the change necessitated by a negligent error in measurement by Colautti or by the negligent positioning of the survey line by the City?

There is, as well, the unresolved question as to whether or not Spero, on behalf of the City, undertook to pay for the additional costs arising from the change in the line. If such a statement was, as alleged, made at the work site, it could lead to an inference that the City's first survey line was incorrectly placed.

Can the City rely upon the strict terms of the contract to avoid liability in this case?

The City relies upon the provisions of the contract which require all additional costs to be duly authorized in writing. It is true that the contract imposes heavy burdens on the contractor.

There is no doubt that this contract, drawn as it was to protect taxpayers, attempted to limit the liability of the City to such an extent that one would expect that not even the ordered rotation of the seasons could be reasonably anticipated by the contractor. The problem with contracts such as these is that they are so rigid and so restricting that the parties tend to amend them by their actions during the course of the contract. That was the situation in this case. There were several significant changes and additions as to the work ordered by the City during the contract. None of these were in writing. All but the items in dispute in this case were paid for by the City.

In these circumstances the parties, by their conduct, have varied the terms of the contract which require extra costs to be authorized in writing. As a result, the City cannot rely on its strict provisions to escape liability to pay for the additional costs authorized by it and incurred as a result of its errors.

Legal consequences that may flow depending on the findings of fact

Once it is determined that the City cannot rely upon the strict terms of the contract, it becomes apparent that various legal consequences may flow depending upon the factual findings

that may be made. The parties are in agreement that the relocation of the line constituted a significant change in the scope of some of the major items of work. If these significant changes resulted from an error by the City then it will, in all probability, be found liable for the resulting additional costs. It has long been established in the United States that if a corporation, such as the City in this case, by its own act, causes the work to be done by its contractor to be more expensive than it otherwise would have been according to the terms of the original contract, then it is liable for those increased costs: see *Charles Sundstrom et al. v. State of New York* (1914), 213 N.Y. 68. The principle is sound and should be applicable in Ontario.

On the other hand, if the additional work was occasioned by the negligence of Colautti, then it should not be entitled to any of the amount in dispute.

Alternatively, the agreement reached between the City and Colautti to change the line of the sewer might be found to result in the completion of a contract under totally different conditions. These altered conditions arose during the course of the contract and it might be found that they could not have been contemplated by the contractor. Under those circumstances the contractor might well be able to recover its extra costs at least on a quantum meruit basis: see *Sir Lindsay Parkinson & Co., Ltd. v. Com'rs of Works & Public Buildings*, [1950] 1 All E.R. 208.

#### Disposition

This case required clear findings of fact to be made upon conflicting evidence. Here there were no findings made as to the credibility of the witnesses. Critical conflicts in the evidence remained unresolved. The mathematical formula used to determine the result does not appear to be based on a firm evidentiary foundation.

The determination as to which party must bear the responsibility for the relocation can only be based upon specific findings of fact. This Court is not in a position to

make those findings for it would involve, in part, a determination as to the credibility of witnesses.

The case must, in my view, be sent back for a new trial. In reaching this decision I can sympathize with the unhappy prospect of further litigation faced by the parties. As well, I can readily appreciate the difficulties this case presented to an able and talented judge very early in his career. Unfortunately, I can find no alternative to this result. I would allow the appeal with costs and reserve costs of the first trial to the judge presiding at the new trial.

Appeal allowed; new trial ordered.



# **TAB 12**

**CITATION:** Dolatabadi v. Top/Star Executives Realty, 2024 ONSC 2742  
**COURT FILE NO.:** CV-13-473196  
**DATE:** 20240513

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:** )  
)  
MEHRAN MOHAGHEGH ) David A. Brooker, for the Plaintiffs  
DOLATABADI, personally, MEHRAN )  
MOHAGHEGH DOLATABADI, ESTATE )  
TRUSTEE FOR THE ESTATE OF JILA )  
KHOSRAVI OSKOU EI, and 1823662 )  
ONTARIO INC. ) No one appearing for the Defendants  
)  
Plaintiffs )  
– and – )  
)  
TOP/STAR EXECUTIVES REALTY INC ., )  
LABEED & ABEYAN INC ., DAVID )  
MCAULAY, SURAJ KASHYAP, also )  
known as SUNNY KASHYAP, )  
MOHAMMAD S. ISLAM and NARQIS )  
ISLAM )  
Defendants )  
)  
)  
)  
)  
) **HEARD:** February 21, 2024

2024 ONSC 2742 (CanLII)

**PAPAGEORGIOU**

**Overview**

[1] Jila Kohsravi Oskouei (the “Deceased”), had high hopes of owning her own business.

[2] The Deceased was deceived into purchasing a business (the “Business”) from the defendant Labeed & Abeyan Inc. (“Labeed”) in reliance on false financial information provided by Labeed and Labeed’s owners, officers and directors, the defendants Mohammad S. Islam and Narqis Islam (the “Islam Defendants”). The defendants knew this information was false.

[3] The Deceased borrowed money and used her and her husband’s life savings to purchase the Business in reliance on these false representations.

[4] After she understood the state of affairs, and the Business failed, the Deceased killed herself because of her distress and inability to cope.

[5] The Plaintiff Mehran Mohaghegh Dolatabadi was the Deceased's husband. He is now the trustee of the Deceased's estate (in this capacity, the "Trustee"), as well as the sole officer, director, and shareholder of the plaintiff company 1823662 Ontario Inc ("182"), through which the Business was purchased. He sues as Trustee of the Deceased and on behalf of 182.

[6] The Defendants have never defended this claim and were noted in default in 2013.

[7] There were other defendants, the agents who acted for the Deceased, but the actions against them have been settled.

[8] This matter proceeded before me by way of a motion for default judgment in person. The evidence shows that the Plaintiffs made diligent attempts to serve the Defendants as required, but they have evaded service. I have attached as an Appendix a summary of the service attempts. To the extent that there are any issues with service, I am validating service.

### **Decision**

[9] For the reasons that follow I am granting judgment as against the Islam Defendants and Labeed, in the amounts set out at the conclusion of these reasons.

[10] In arriving at my decision, I have considered section 13 of the *Evidence Act*<sup>1</sup>, which provides that an action by executors of a deceased person requires corroboration. In my view, the corroboration requirement does not apply to deemed admissions. In any event, there is independent evidence before me consisting of the evidence of the agents who acted for the parties, the Trustee's affidavit, and documents which provide corroboration.

### **The Issues**

[11] The main issues are:

- Issue 1: Do the materials provide a basis for a finding of liability?
- Issue 2: If so, what are the damages to which the plaintiff is entitled?

### **Analysis**

#### **The test on a motion for default judgment**

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<sup>1</sup> R.S.O. 1990, c. E. 23.

[12] As noted in *Elekta Ltd. v. Rodkin*, 2012 CarswellOnt 2928 (ONSC) in determining liability, the test on a motion for default judgment is as follows: A. What deemed admissions of fact flow from the facts pleaded in the Statement of Claim? B. Do those deemed admissions of fact entitle the plaintiff, as a matter of law to judgement on the claim? C. If they do not, has the plaintiff adduced admissible evidence which, when combined with the deemed admissions, entitled it to judgement on the pleaded claim?

[13] There were many causes of action alleged, including breach of contract and fraudulent misrepresentation. Pursuant to *Central Trust v. Rafuse*, [1986] 2 S.C.R. 147, at p. 206, where there is concurrent liability in contract and tort, the plaintiff has the right to assert the cause of action that appears most advantageous to them. The Plaintiffs here have elected to proceed by way of fraudulent misrepresentation.

[14] The elements of fraudulent misrepresentation are:

- i. A false representation of fact by the defendant to the plaintiff;
- ii. Knowledge the representation was false, absence of belief in its truth, or recklessness as to its truth;
- iii. An intention that the plaintiff act in reliance on the representation;
- iv. The plaintiff in fact acts on the representation; and
- v. The plaintiff suffers a loss in doing so: *Midland Resources Holding Ltd. v. Shtaif*, 2017 ONCA 320, 135 O.R. (3d) 481, at para. 162, leave to appeal to S.C.C. refused, [2018] S.C.C.A. No. 541.

[15] I am satisfied that the Plaintiffs have established that the Defendants are liable for fraudulent misrepresentation based upon the deemed admissions in the Statement of Claim, the affidavit evidence of the Trustee, the examination for discovery evidence given by the agents, D. McAulay and S. Kashyap, who represented the Deceased, and the Affidavit of the Sale of Business given by Narqis Islam:

- In or around October 2010, through her agent, the Deceased learned of Labeed's operation of a dollar/convenience store called Dollar World Plus (the "Business").
- The Islam Defendants were the sole shareholders, officers, and directors, and at all times operated as the principals and controlling minds of Labeed. They operated the Business on a day-to-day basis.
- During the negotiating process for the purchase of the Business, the Islam Defendants made representations as to the revenue, sales, and value of the Business in order to induce the Deceased into purchasing the Business for a higher price than it was worth and to represent that it was making a profit. They provided her with financial statements that set this

information out as set out in the discovery evidence of D. McCaulay, and S. Kashyap, the Deceased's agents. In her affidavit, required under the provisions of the then Real Estate and Business Brokers Act, Nargis Islam stated that she had provided books and records of the corporation.

- The representations were made by the Islam Defendants when they knew that they were not true and were made with the sole purpose of enticing the Deceased into purchasing the Business.
- Based upon the representations of the Islam Defendants, the Deceased entered into an Agreement of Purchase and Sale to purchase the Business on October 27, 2010 (the "Agreement"). This was a pre-printed form under the Ontario Real Estate Association.
- The Agreement was in trust between the Deceased as buyer in trust for a corporation to be incorporated.
- The material terms were as follows:
  - The purchase price was \$338,000.
  - Labeed represented and warranted that the Business had been carried on in the ordinary course **and all financial statements and other information provided to the Buyer were true, accurate and correct in all material respects** and were prepared in accordance with generally accepted accounting principles.
  - Labeed represented and warranted that no expenditures would be made out of the ordinary course prior to closing and that the Business would be carried on up to the time of closing in the ordinary course in a commercially reasonable manner.
  - Labeed represented and warranted that the tangible assets would be in good condition at the time of closing.
  - Labeed represented and warranted that all chattels and fixtures as included would be in proper working order and that such representation and warranty would survive closing and not merge on completion of the transaction.
  - Labeed agreed that one of its shareholders (one of the Islam Defendants) would attend at the Business for two weeks in total after the closing for a minimum of seven hours per day for a total of 70 hours to assist the Deceased in familiarizing herself with the operation of the Business.
  - Inventory of a minimum of \$200,000 was included in the purchase price and would be physically counted after close of business. If the inventory was determined to be only \$180,000 the Deceased would be given a \$20,000 credit.

- The Agreement further stated that the “**purchaser shall not be obliged to pay for spoiled, outdated or damaged goods in purchaser's sole discretion.**”
  - The Agreement constituted the full agreement between the Deceased and Labeed and there was no representation, warranty or collateral agreement affecting the Agreement **other than as expressed**. [Emphasis added]
- Subsequently, 182 obtained a Small Business Loan from TD Canada Trust in the amount of \$164,334 by way of secured loan against the assets of the Business. The Deceased and the Trustee (her husband) personally guaranteed up to 25 % of the loan, which was \$41,084 on a joint and several basis.
- TD Canada Trust was not prepared to make a loan without the personal guarantee. The Trustee has provided an affidavit that states that he relied upon the representations made by the Defendants in the financial statements in making the guarantee. These financial statements were given to them by the Defendants and also forwarded to TD Canada Trust as part of the application process to confirm the financial state of the Business.
- The sale closed on March 8, 2011, with 182 having been incorporated to complete the transaction.
- On the date of closing, the Defendants arranged for an inventory count without the Deceased's or 182's knowledge or consent, or any input from the Deceased.
- The count prepared by the Defendants totaled \$180,480.10 in inventory. As a result, as per the Agreement, an adjustment was made to the purchase price by giving the Deceased a \$20,000 credit.
- Upon taking possession of the Business, the Deceased immediately discovered that the premises suffered from extensive structural damage including water damage in the basement and other areas of the store, causing it to be not only cosmetically displeasing but also a danger to the occupants. The damage appeared to have been covered up by paint or hidden behind shelving and other fixtures in an attempt to conceal it from the Deceased.
- In order to make the premises fit for occupation, the Deceased expended considerable expenses to repair the floors, ceilings, structural walls, and other areas of the premises.
- In addition, \$100,000 of the merchandise and inventory that was present in the store and included in the inventory list was not fit for sale and had to be discarded. The Islam Defendants were aware that the merchandise was not fit for sale and fraudulently represented its state to the Deceased. The inventory also included fixtures with a value of \$34,274 that should not have been included.

- Further, a representative of Labeed failed to attend at the Business after closing to train the Deceased for 70 hours as required, despite repeated requests.
- The Deceased also discovered that the quantum of sales represented to her by the Islam Defendants was grossly inflated and in fact Labeed had sold much of its inventory at reduced prices in order to attempt to increase sales volume to artificially increase the dollar value of the sales prior to closing.
- The financial statements that had been given to the Deceased by the Defendants for the years 2008, 2009 and 2010 showed sales in the range of 1.05M to \$1.09M, cost of goods in the range of 66% to 69% as a percentage of sales, and a gross margin ranging between \$346K and \$362K. Based on the earnings reported, the Business was profitable with a range of income between \$93,000 and \$106,000 per year.
- Sales in 2011, the first year after the Deceased took over the Business, totaled \$193,162. Sales were only \$78,357 as of June 2012—significantly less than the sales noted in the financial statements provided by the Defendants for the previous years. Indeed, the Business lost money.
- Had sales continued based upon the historic results set out in the financial statements provided to the Deceased, the Business should have earned between \$85,000 and \$105,000 per year.
- Apart from the deemed admissions that the financial statements contained fraudulent misrepresentations, I infer that if the financial statements had contained true and accurate information, sales would not have plummeted to this extent immediately following the sale.
- After operating the Business for the first weeks, the Deceased realized that there was no chance that it could be profitable given the expense for the lease, loan payments and other amounts, such as extensive repairs to make the premises suitable.
- Despite her best efforts to increase sales, the Business continued failing and losing money on a daily basis throughout 2011. She could not afford to make repairs to the premises which if not made, would eventually lead to it being unable to be occupied.
- By November 2011, she was so distressed about her situation including a loss of all of her and her husband's family savings, that she attempted suicide. This first attempt was not successful. Shortly afterwards, on December 30, 2011, she killed herself.
- Afterwards, her family attempted to operate the Business at a profit but could not because of the overpayment of the purchase price and the lack of sales.
- The contents of the store were distrained, and the Business shut down in June 2012.

- The Trustee subsequently repaid \$41,084 of the loan that he guaranteed settling both his own and the Deceased's personal liability which was on a joint and several basis.
- The Defendants actively fraudulently misrepresented aspects of the Business in order to induce the Deceased to purchase it, such misrepresentations including: overstating the gross sales of the Business; overstating the profits of the Business; taking steps to hide blatant or patent defects in the premises as well as the fixtures and chattels of the store; and falsifying the inventory list and including fixtures and chattels on it as opposed to inventory which falsely increased the value of the said inventory on closing.
- The misrepresentations were made for the sole purpose of inducing the Deceased to enter into the Agreement and in fact did induce her to enter into it. The Defendants acted in bad faith in negotiating the terms of the Agreement.
- The Islam Defendants knew at all times that the Deceased was naïve in business matters, having been a homemaker for several decades and that she was relying upon, and in fact did rely upon, them in providing her with advice as to a profitable and worthwhile business which she could purchase, afford and which would make a profit. They took advantage of her inexperience and naivety.

## **Issue 2: What are the damages to which the plaintiffs are entitled?**

### **Qualification of the Damages Expert**

[16] The Plaintiffs have provided an expert report and affidavit from Marnie Silver to quantify damages.

[17] Ms. Silver is a professional accountant with experience in economic loss quantification. She holds the following professional designations: CPA (Certified Professional Accountant), CA (Chartered Accountant), CBV (Certified Business Valuator) and others. She is a Director in the Toronto office of Matson Driscoll & Daminco Ltd., a global professional services firm practicing in the areas of economic loss quantification, business valuation and forensic accounting. She prepared her evidence in compliance with the Canadian Institute of Chartered Business Valuators standards.

[18] Ms. Silver's evidence is clearly relevant. She has reviewed all relevant documentation and quantified the loss. She has concluded that the Business was worth significantly less than had historically been reported and/or represented by the Defendants.

[19] Ms. Silver's evidence is necessary as it relates to financial matters that are beyond my knowledge. There is no exclusionary rule.

[20] Her opinion is impartial in the sense that it was prepared based upon the deemed admissions in the Statement of Claim and financial documents appended to her report without influence from the Plaintiffs. Her report does not unfairly favour the Plaintiffs over the Defendants. Indeed, she



has provided two possible scenarios, one of which results in a much lower loss. This also shows that she has indeed attempted to consider the matter independently.

[21] She has provided a Declaration of Independence that reads:

We have been engaged as independent professional accountants to provide an expert opinion. The terms of our engagement are to act in an independent and objective manner. Neither our firm or its principals have any financial interest in these proceedings. Our fees are based solely on the time expended and are not contingent upon the ultimate results or conclusions. The author of this report has prepared it acting in an independent and objective manner.

[22] She has signed a form 53 acknowledging her duty to the court and a disclosure of interests that indicates that she is unaware of any actual or potential conflict of interest.

[23] I find that all aspects of admissibility of Ms. Silver's evidence have been satisfied as per the requirements in *R. v. Mohan*, [1994] 2 S.C.R. 9. I also find that the probative value of this evidence outweighs any prejudicial effect: *White Burgess Langille Inman v. Abbotsford and Haliburton Co.*, 2015 SCC 23, [2015] S.C.R. 182. The relevance, reliability, and necessity outweigh the consumption of time, or any possible prejudice or confusion.

[24] Thus, I find that Ms. Silver is qualified as an expert in economic loss quantification.

#### **Fraudulent Misrepresentation by the Islam Defendants and Labeed.**

[25] Damages for fraudulent misrepresentation restore a party to the financial position they were in before the fraudulent misrepresentation occurred: *Parna v. G. & S. Properties Ltd.*, [1969] 2 O.R. 346, at para. 8, rev'd on other grounds, [1971] S.C.R. 306.

[26] Here, the deemed admissions are that the Deceased was induced to enter into the Agreement because of the fraudulent misrepresentations known by the Defendants to be false, in respect of the historical financial circumstances of the Business presented in its financial statements as well as the quality of the inventory present. The Deceased, and consequently 182, would not have entered into the Agreement but for the fraudulent misrepresentations. The Trustee, in his personal capacity, and the Deceased, would not have given the guarantee, but for the fraudulent misrepresentations regarding the Business.

[27] To calculate the loss, Ms. Silver appropriately considered all of the outlays made by the Deceased, and the Trustee on her behalf: *Wiebe v. Gunderson*, 2004 BCCA 456, at para. 11.

[28] Ms. Silver took into account the purchase price of \$338,000, interest paid by the Deceased on her loan in the total amount of \$12,626 and advances made to fund operations in the total amount of \$97,848.

[29] This results in a loss of \$448,474.

[30] After payment of the guarantee, the remaining loan in the amount of approximately \$129,000 was not repaid but was written off in 182's financial statements. Nevertheless, Ms. Silver indicates that the "charge is still outstanding and will become payable if any funds are received from the outcome of this litigation matter." Indeed, it would be improper for the Defendants to be able to avoid paying this amount and I agree that they are liable for this amount.

## Other Considerations

### Caveat Emptor?

[31] I note that there was a provision in the standard form Agreement which would have allowed the Deceased to inspect business invoices, but it was deleted by the Defendants with the Deceased's consent. Had the Deceased been able to review these invoices, she may have been able to determine the true state of the Business. The doctrine of caveat emptor could apply but for the exception, which holds that caveat emptor does not apply in cases of fraud or where there is a warranty: *Redican v. Nesbitt*, [1924] 1 D.L.R. 536, at p 144; *Sevidal v. Chopra* (1987), 64 O.R. (2d) 169. As noted, there is a deemed admission of fraud and there is an express warranty as to the substantial accuracy of the financial statements provided.

### Entire Agreement Clause?

[32] As well, in *Central Trust v. Rafuse*, at p. 206, the Court indicated that a concurrent liability in tort will not be permitted if the effect would be to "permit a plaintiff to circumvent or escape a contractual exclusion or limitation of liability for the act or omission that constitutes the tort".

[33] There is an entire agreement clause in the Agreement which states that "there is no representation, warranty, collateral agreement or condition affecting this Agreement other than as expressed herein." [Emphasis added]

[34] The analytical approach to determine whether to enforce an exclusionary clause like an "entire agreement" clause involves consideration of whether the exclusion clause applied to the circumstances established, whether the exclusion clause was unconscionable at the time it was made, and whether the court should refuse to enforce it for public policy reasons: *Tercon Contractors Ltd. v. British Columbia*, 2010 SCC 4, paras. 122 and 123.

[35] Here, the entire agreement clause not only fails to exclude the awarding of damages based upon misrepresentations made in the financial statements, but the Agreement itself represents and warrants that the contents of the financial statements provided are true and accurate. Therefore, as a matter of contractual interpretation, the exclusion clause, properly construed, does not exclude liability for fraudulent misrepresentation.

[36] Furthermore, and in any event, the application of the exclusion clause in this case would be unconscionable because of the Defendants' deemed knowing deception, their deemed knowledge that the Deceased was naïve in business matters and was relying upon the Defendants, and the deemed admissions that they committed an abuse of trust and took advantage of the

Deceased's inexperience and naivety. Additionally, the entire agreement clause is contained in a pre-printed standard form and there is no evidence that it was specifically brought to her attention.

[37] Courts have held that enforcing an exclusion clause was unconscionable in the context of fraudulent representations that induced a party to enter into an agreement. See *Zippy Print Enterprises Ltd. v. Pawliuk* (1994), 100 B.C.L.R. (2d) 55, at para. 115 and *Singh v. Trump*, 2016 ONCA 747, at paras. 111-122.

[38] As in the above cases, I find that it would be grossly unfair for the Deceased to be precluded from making a tort claim for fraudulent misrepresentation in all the circumstances.

### **Director and Officer Liability?**

[39] The judgment sought does not require lifting the corporate veil. As officers, and directors, the Islam Defendants are liable for independent torts committed by them: *ADGA Systems International Ltd. v. Valcom Ltd. et al.* (1999), 168 D.L.R. (4th) 351 (Ont. C.A.), at para. 38; *NDB Bank v. Dofasco Inc.* (1999), 181 D.L.R. (4th) 37 (Ont. C.A.), at para. 42.

### **Costs**

[40] Pursuant to s. 131(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, costs are in the discretion of the court. Rule 57 of the *Rules* sets out the factors which courts should have regard to when awarding costs. The overall objective is "to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, rather than an amount fixed by the actual costs incurred by the successful litigant": *Zesta Engineering Ltd. v. Cloutier* (2002), 21 C.C.E.L. (3d) 161 (Ont. C.A.), at para. 4; *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.), at para. 26; *Clarington (Municipality) v. Blue Circle Canada Inc.*, 2009 ONCA 722, 100 O.R. (3d) 66, at para. 52; and *G.C. v. Ontario (Attorney General)*, 2014 ONSC 1191, at para. 5.27.

[41] The plaintiffs have provided a detailed Bill of Costs that spans the time period of 11 years in the amount of \$134,644.37 which includes fees expended pursuing the other defendants with whom the plaintiffs have settled. The Defendants, against whom judgment is sought, were noted in default in 2013 and there was never any discovery of them.

[42] These costs include costs expended pursuing the other defendants, with whom the Plaintiffs negotiated a dismissal without costs.

[43] Thus, the costs claimed as against these Defendants are not fair and reasonable or within the reasonable contemplation of the Defendants against whom judgment is sought because they include fees expended to pursue the other defendants.

[44] I have reviewed the time dockets and assess the fair and reasonable costs for the time expended up to the noting in default of these Defendants as well as the fees expended in respect

of the motion for judgment to be \$45,000 on a partial indemnity basis inclusive of disbursements and HST.

**Conclusion**

[45] I award the Trustee for 182 and the Deceased damages for fraudulent misrepresentation as against the Defendants in the amount of \$448,474 plus costs in the amount of \$45,000 on a partial indemnity basis inclusive of HST.

[46] The plaintiffs shall provide submissions on the details of the interest calculations and when it runs from together with a draft Judgment within 14 days.

**Appendix re Service Attempts.**

[47] The Statement of Claim was issued and served on the Defendants. They did not defend and were noted in default on April 17, 2013.

[48] The Plaintiffs amended the Statement of Claim in October 2019 and served it on the Defendants on November 1, 2019, at 45 Markham Road (the “Markham Property”) which they had determined was the Defendants’ address through a parcel registry search that showed that the Narqis Islam was the registered owner. Narqis Islam and Mohammad Islam are husband and wife. A search of the Defendant Mohammed Islam’s driver’s licence shows him with a listed address of the Markham Property. Affidavits of service are in the file. The Defendants took no steps to defend the Amended Statement of Claim or to set aside the noting in default after service of the Amended Claim.

[49] The Plaintiffs began their attempts to serve the Defendants personally with the default judgment materials for a motion returnable during the week of February 20, 2024, on February 7, 2024. I note that pursuant to the Rules of Civil Procedure, service did not have to be made personally. Pursuant to Rule 16.01(4)(b)(i), it could have been made by mailing the record to the Islam Defendants’ last known address. Pursuant to Rule 16.02, service on Labeed could have been made by leaving them with an office or director.

[50] The Plaintiffs first attempted personal service at the Markham Property which still showed the Defendant Narqis Islam to hold title. The process server was told by its occupants that the Islam Defendants were the owners but did not reside there. He spoke to a woman who gave him Narqis Islam’s phone number. The process server telephoned and spoke to Narqis Islam who advised that she did not want the documents. She would not provide her or her husband’s current address. Further efforts to attempt service at this address were unsuccessful.

[51] The Plaintiffs then determined that the Islam Defendants held title to 44 Muir Drive (the “Muir Property”), also from a parcel register. The process server attempted service on February 8, 2024, twice but no one answered the door. On the second attempt, the process server observed two cars in the driveway and could hear noise in the house, but no one answered the door. He left a contact card on the door. He also placed a call to the Defendant Narqis Islam, and she did not answer. He then left a message to make arrangements, but she did not return the call.

[52] Search of the licence plates of the two vehicles showed that they were owned by Mohammad Labeed Islam, whose birthdate is January 12, 1993, whose registered address was the Markham Property. It appears that this is the Islam Defendants’ son.

[53] On February 9, 2024, the Plaintiffs attempted to deliver copies of the Motion Materials to the Markham Property and the Muir Property. The materials were successfully delivered to the Markham Property.

[54] At the Muir Property, the process server was met with an individual who refused to give his name and advised that neither of the Islam Defendants lived there, that he did not know them,

and he further refused to accept the package. Accordingly, the Plaintiffs then mailed the Motion Materials to the Islam Defendants at the Muir Property.

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Papageorgiou J.

**Released:** May 13, 2024

**CITATION:** Dolatabadi v. Top/Star Executives Realty, 2024 ONSC 2742

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

MEHRAN MOHAGHEGH DOLATABADI,  
personally, MEHRAN MOHAGHEGH  
DOLATABADI, ESTATE TRUSTEE FOR THE  
ESTATE OF JILA KHOSRAVI OSKOU EI, and  
1823662 ONTARIO INC.

Plaintiffs

– and –

TOP/STAR EXECUTIVES REALTY INC ., LABEED  
& ABEYAN INC ., DAVID MCAULAY, SURAJ  
KASHYAP, also known as SUNNY KASHYAP,  
MOHAMMAD S. ISLAM and NARQIS ISLAM

Defendants

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**REASONS FOR JUDGMENT**

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Papageorgiou J.

**Released:** May 13, 2024

# TAB 13



**S**

**S**

Citation: *Forjay Management Ltd. v. 0981478 B.C.  
Ltd.*,  
2018 BCSC 527

Date: 20180404  
Docket: H170498  
Registry: Vancouver

Between:

**r a a a e e .**

Petitioner

And

**0981478 . . . , ar a er, a a a es er r s pa r s ,  
e r a e rp ra , 625536 . . . , a es er er,  
rr s a , rs a ase a, .S. a a a ss a , ara  
es e s ., ara a r, S ra r , ar S ar, a  
, aspre S a ra, a eep S a a , r a S  
a , Saa a , S par a a , a a a a sa, Sa pa a sa ,  
ar er . a , ee a a , asa a e , 1074936 . . . , 1084165 . . .  
, 1084164 . . . , 1084322 . . . , S r a r ar ar, ar a a S  
ar ar, a ee a r , as a a r , 812 ap a s .,  
a a s sse s rp., 0951019 . . . , er ar e S e ., e  
a ., 1086286 . . . , 1085537 . . . .a 1083516 . . . .**

Respondents

Before: The Honourable Madam Justice Fitzpatrick

**eas s r e**

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Layne Hellrung

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Chandler:

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Purchasers appearing on their own behalf or  
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Marian Mahoney (for herself and  
Mitsui Saito)  
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Gerrit and Thelma Smidt, Sheila Sharples  
and Susan Ternes:

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and Karen Janzen, Walter and Elsje  
Bisschop, Gopal Naidu, John Roberts, Guy  
and Myrena Bishop, Rosalie Hersch, Jagtar  
Kainth, Jordana Charlton, Thomas and Julie  
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Dinsheet Gupta, Strephanie Fahlman, Alvin  
Los and Emily Rook, Colton Sommerville and  
Jessica Niven, Karen Batke, Drew St. Cyr,  
Frances Hansen, Allison Richardson, Elyse  
Vroom, Vitalii Lavrinovitch and Suk Da Kim,  
Kelly and Brigitte Burke, Gary and Linda  
Newton, Lisa McGhee, Warren Kindellan,  
David and Heather Ray, Nolan Killeen and  
Alisyn Burns, Alexandra Schoenit, Frederick  
and Joanne West, Doug and Laurie Lakusta,  
and Timothy Lamb:

Trevor Hande

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Counsel for HMF Home Mortgage Fund Corporation and Canadian Western Trust Company, in trust:

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Amanda Baron

Counsel for Baramundi Investments Ltd.:

Sanjeev Patro

Counsel for Zuheir Abrahams Inc.:

Ronald Argue

Counsel for Morris Kadylo:

Travis Brine

Place and Date of Hearing:

Vancouver, B.C.  
March 12-16, 2018

Place and Date of Judgment:

Vancouver, B.C.  
April 4, 2018

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[1] This receivership proceeding concerns a 92-unit strata condominium project, known as “Murrayville House”, located in Langley, B.C. (the “Development”).

[2] In October 2017, I appointed The Bowra Group Inc. as receiver manager of the Development (the “Receiver”). At that time, the respondent developer 0981478 B.C. Ltd. (“098”) and various purchasers were parties to a number of pre-sale contracts. However, despite the Development being ready for occupancy in August 2017, by the time of the receivership, none of the sales had completed. The Development remains vacant at this time.

[3] The Receiver undertook an extensive review of the pre-sale contracts toward determining the status of those contracts. In addition, the Receiver has taken steps such that it is in a position to move forward toward monetizing the Development for the benefit of all stakeholders.

[4] The Receiver now seeks directions from this Court as to how to proceed.

[5] The crux of the application before me is whether the Receiver should complete 40 of the pre-sale contracts executed by 098, being ones that it describes as “without issues”. Alternatively, the Receiver recommends that the strata units, which are the subject of those 40 pre-sale contracts, be marketed and sold as soon as possible.

[6] A substantial number of pre-sale purchasers (even some who are not within the 40 that are the subject of this application) and the Superintendent of Real Estate (the “Superintendent”) support the Receiver’s recommendation to complete these sales. Conversely, the major secured creditors, 098 and 098’s principal, the respondent Mark Chandler, oppose the completion of the sales. They argue that these contracts are not valid and enforceable and, alternatively, even if they are, the Receiver should disclaim the contracts to allow a market sale of the units.

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**S****S**

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[7] On August 25, 2017, Forjay Management Ltd. (“Forjay”) and Canadian Western Trust Company in trust and HMF Home Mortgage Fund Corporation (“CWT/HMF”) commenced these foreclosure proceedings seeking to enforce their mortgage security against 098, the Development and Mr. Chandler, a guarantor of the indebtedness. Forjay and CWT/HMF’s security ranks second in priority as against the Development.

[8] When Forjay’s foreclosure was filed, there were significant issues already affecting the Development. These included legal proceedings and certificates of pending litigation (“CPLs”) which had been registered against the lands. In addition, regulatory action had been taken, as I will discuss in more detail below, arising in part from the suggestion that 098 had sold some of the units multiple times. The house of cards quickly disintegrated from there. The insurer under the new home warranty program then took steps toward terminating coverage.

[9] Further complicating matters were that significant issues arose as between the stakeholders after Forjay’s foreclosure was filed. For example, 098 disputed the amounts owing under various mortgages, including that of Forjay and CWT/HMF; and, various secured creditors disputed the priority, validity and/or amounts claimed under other security.

[10] Some order was brought to this chaos by the appointment of the Receiver on October 4, 2017 (the “Receivership Order”). On October 12, 2017, that Order was amended to clarify that the appointment was not only over the lands, but also all of 098’s assets, undertaking and property relating to the Development.

[11] Relevant to this application, paragraph 3 of the Receivership Order grants broad powers to the Receiver in relation to the Development and in relation to various contracts entered into by 098, including the pre-sale contracts:

- c) to manage, operate and carry on the business of the Debtor [098], including the powers to enter into agreements, incur any obligations in the ordinary course of business...., or cease to perform any contracts of the Debtor;

...

h) to execute, assign, issue and endorse documents of whatever nature in respect of the Property, whether in the Receiver's name or in the name and on behalf of the Debtor, for any purpose pursuant to this Order;

...

k) to market any or all of the Property, including advertising and soliciting in offers in respect of the Property or any parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;

l) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business with the approval of this Court;

[12] After its appointment, the Receiver began immediate efforts to put itself in a position to begin marketing and selling the units in the Development, all with substantial borrowings provided by Forjay. Those efforts included: filing a new disclosure statement, in accordance with the *Real Estate Development Marketing Act*, S.B.C. 2004, c. 41 ("*REDMA*"); obtaining coverage under the statutory new home warranty program; confirming that Langley was permitting occupancy of the Development (later confirmed to have been effective on August 8, 2017); completing the outstanding construction; and otherwise ensuring that all other matters relating to the Development were moving toward completion.

[13] While these efforts were underway, the Receiver's other major task was to review the substantial number of pre-sale contracts that 098 had entered into prior to the receivership. The Receiver's efforts were discussed in its First Report to the Court dated November 16, 2017. That Report, updated to today's information, revealed various anomalies or issues:

- a) 098 had entered into 151 pre-sale contracts for 91 units, meaning a number of the units had been sold more than once. A chart prepared by the Receiver indicates some units had been sold two or three times and one had been sold four times;
- b) in 56 of the pre-sale agreements, 098 had been paid the full purchase price and the purchaser had received a promissory note;

- c) a substantial majority of the contracts (79) provided for a credit or discount of between 10 and 100% of the purchase price from that indicated in a price list issued by 098's sales centre which was operational from March 2015 to May 2016 (the "Price List");
- d) many pre-sale contracts had been signed after the closure of the sales centre in May 2016 and after market values had substantially increased beyond those indicated in the Price List; and
- e) some pre-sale contracts had been signed prior to the issuance of 098's disclosure statement, contrary to *REDMA* requirements.

[14] From this analysis, which led to its recommendations, the Receiver identified various "standard" pre-sale contracts dated from April 2015 to May 2016 that were "without issues" and which it considered "valid". In summary, those contracts are described as having the following characteristics:

- a) they were entered into after 098's issuance of a disclosure statement;
- b) a deposit of between 3 and 10% of the purchase price had been paid and was held in trust by a law firm;
- c) the purchaser has yet to pay the balance of the purchase price;
- d) the purchase price was within 90% of the Price List; and
- e) the Receiver "believed" that the pre-sale contract prices were at fair market value at the time of signing.

[15] In its First Report, the Receiver recommended that it be authorized to complete these "without issues" pre-sale contracts, after it had filed a new disclosure statement and obtained new home warranty coverage. These include the 40 pre-sale contracts that are the subject of this application. It should be noted that a number of the 40 units were sold twice, but the Receiver's intention is to disclaim these later contracts in favour of these 40 "first in time" contracts.

[16] The Receiver's analysis and recommendations were not well received by the secured creditors. In particular, there was considerable disagreement that the prices in the pre-sale contracts were at the then fair market value. In addition, the secured creditors hotly contested the Receiver's contention that they were aware of the Price List and had agreed to provide partial discharges of their security for those prices. In addition, Forjay and one of the first mortgagees, Reliable Mortgages Investment Corp. ("RMIC"), vigorously disputed that they had agreed with the Receiver to discharge their mortgages on these pre-sales.

[17] In January 2018, the Receiver brought this application for directions. The issues for which directions are sought are:

- a) the validity and enforceability of the 40 pre-sale contracts that are "without issues"; and
- b) whether the 40 pre-sale contracts should be allowed to complete (or, as I would frame it, whether the Receiver should be directed to disclaim them).

There is no dispute that, if the contracts are disclaimed, the Receiver should take immediate steps to market and sell the 40 strata units at current market value, subject to further court order.

[18] Later events disclosed that there are substantial financial consequences to various stakeholders depending on whether or not the contracts are disclaimed. An appraisal obtained by the Receiver in late January 2018 indicates that the units' value is now collectively 46% higher than the contract prices, translating into a total increase in value of \$5,461,005. In large part, the arguments advanced on this application are directed to a determination as to who should "reap the benefit" of this increase.

[19] The Receiver's analysis and arguments are largely contained in its notice of application, the First Report and the affidavit of Mario Mainella #6 sworn January 26, 2018. The Receiver continues to advance the recommendations contained in its First Report. The Receiver's materials indicate that it has embarked upon some



analysis as to validity and enforceability of these pre-sale contracts. For example, the Receiver points to the fact that on their face, these contracts have expired, yet the Receiver argues that they are still enforceable and not “void” because of the subsequent conduct of the parties to those contracts. In addition, in support of its recommendations, the Receiver refers to *REDMA* requirements and, also arguments of “good faith”.

[20] As best I can determine, there is no particular analysis by the Receiver of the disclaimer issue, beyond identifying the substantial increase in the value of the units that could maximize the recovery on the assets of 098, but “at the expense of the interest of the holders of the 40 pre-sale contracts”. The Receiver also notes that there is an “urgent need to monetize the units in the Development and to provide certainty and closure for the holders of pre-sale contracts for units in the Development”.

[21] It is trite law that a court-appointed receiver is an officer of the court and is not beholden to the secured creditor who caused its appointment. A receiver owes fiduciary duties to all parties, including the debtor, and to all classes of creditors: *Toronto-Dominion Bank v. Crosswinds Golf & Country Club Ltd.* (2002), 59 O.R. (3d) 376 at para. 15 (Ont. S.C.J.); *Philip’s Manufacturing Ltd., Re* (1992), 69 B.C.L.R. (2d) 44 at para. 17 (C.A.).

[22] The role of a court-appointed receiver was discussed in Frank Bennett, *Bennett on Receiverships*, 2nd Ed. (Toronto: Carswell, 1999) at 180:

... As an officer of the court, the receiver is not an agent but a principal entrusted to discharge the powers granted to the receiver *bona fide*. Accordingly, the receiver has a fiduciary duty to comply with such powers provided in the order and to act honestly and in the best interests of all interested parties including the debtor. The receiver’s primary duty is to account for the assets under the receiver’s control and in the receiver’s possession. This duty is owed to the court and to all persons having an interest in the debtor’s assets, including the debtor and shareholders where the debtor is a corporation. As a court officer, the receiver is put in to discharge the duties prescribed in the order or in any subsequent order and is afforded protection on any motion for advice and directions. The receiver has a duty to make candid and full disclosure to the court including disclosing not

only facts favourable to pending applications, but also facts that are unfavourable.

[23] The secured creditors take issue with both the Receiver's position and its recommendations, taking the view that the Receiver has improperly entered the fray in taking an active position on the issues where there are competing interests and in doing so, has preferred the interests of the pre-sale purchasers over theirs.

[24] It is also trite law that a court-appointed receiver has a fiduciary duty to act honestly and fairly on behalf of all interested parties. Its role is to be even handed, and not prefer one party over the other: *Bank of Montreal v. Probe Exploration Inc.* (2000), 33 C.B.R. (4th) 182 at para. 2 (C.A.) (WL). See also *Bennett* at 272.

[25] In my view, there is some basis for that criticism here. I appreciate that in its materials, the Receiver has discussed the two positions and the effect on the various stakeholders of closing (or not closing) these 40 pre-sale contracts. In addition, the factual background outlined by the Receiver has been valuable in considering the issues, as acknowledged by many counsel. However, the Receiver's position here goes far beyond that.

[26] The Receiver places great reliance on comments of the court in *Ravelston Corp., Re* (2005), 24 C.B.R. (5th) 256 (Ont. C.A.) (WL):

[40] ... Receivers will often have to make difficult business choices that require a careful cost/benefit analysis and the weighing of competing, if not irreconcilable, interests. Those decisions will often involve choosing from among several possible courses of action, none of which may be clearly preferable to the others.... The receiver must consider all of the available information, the interests of all legitimate stakeholders, and proceed in an evenhanded manner. That, of course, does not mean that all stakeholders must be equally satisfied with the course of conduct chosen by the receiver. If the receiver's decision is within the broad bounds of reasonableness, and if it proceeds fairly, having considered the interests of all stakeholders, the court will support the receiver's decision...

[27] Many counsel referred to the deference normally accorded to the views of a receiver, such as in considering the formulation of a sales process and any results of a sales process, citing *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R.

(3d) 1 (Ont. C.A.) at 5–6. However, these types of sale issues typically involve the court relying on a receiver’s expertise in such matters and in that event, deference is usually well justified. I see little relevance in that scenario to what is before me.

[28] It is clear enough that some of the issues before the Court do not involve a consideration of “business choices” made by a receiver where some deference to the knowledge and experience of a receiver would likely be accorded. The issue as to the validity and enforceability of these pre-sale contracts is a legal issue and a complex one at that. The Receiver has no particular expertise in that regard and was not tasked by the Court with a determination of that issue. I have heard substantial argument and have been taken to a large body of evidence on that issue, as noted by the volume of materials before me and numerous counsel advocating their positions. In those circumstances, where other parties are in the fray, I think it would have been best for the Receiver to have provided facts as known to it and thought to be relevant to a determination, but otherwise to have remained neutral as to the result.

[29] My comments equally apply to the Receiver’s position in respect of the issue as to completing the pre-sale contracts or disclaiming them. Given the level of conflict on the issue, neutrality would have been a better course of action, after providing all necessary facts to the parties and the Court that inform that analysis and setting forth considerations on the issue. In any event, I unfortunately agree with many of the secured creditors that the Receiver’s analysis is not particularly helpful in the determination of that issue. In some instances, the factual assertions in the First Report are unsupported (i.e. that the 40 sale prices were at fair market value); in another case, the assertion of fact (i.e. that Forjay and RMIC had agreed to discharge their security on these units) was simply wrong.

[30] I appreciate that the Receiver’s intention was to bring the matter forward as soon as possible, given the need to liquidate the units as soon as possible for the benefit of all stakeholders. In that respect, I do not question the Receiver’s good faith motives. If nothing else, the Receiver’s actions have galvanized the warring camps

to their positions and hastened this hearing so that the matter can move forward to some extent.

[31] Accordingly, I intend to rely on the unchallenged factual assertions in the Receiver's materials, including the First Report, and the circumstances that the Receiver suggests are germane to the issues. Unfortunately, I have come to the conclusion that beyond that, the Receiver's recommendations should not be afforded any deference (*Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87 at 111 (Ont. H.C.J.)); rather, I will consider the detailed submissions put forth by the respective camps, since both were well represented on this application and all made extensive submissions on the facts and the law.

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[32] Many of the arguments addressed the first issue raised by the Receiver, namely, whether the 40 pre-sale contracts were valid and enforceable at this time. In addition, other purchasers asserted that 098 was estopped from asserting that the pre-sale contracts had expired by their terms.

[33] Some arguments were based, not only on the facts as known to the Receiver and the parties, but also as to what other evidence *might* be available through ordinary litigation and the usual pre-trial discovery mechanisms. For obvious reasons, no one wishes to embark on what might be expensive and lengthy litigation to delay the matter further; however, in the absence of a full evidentiary record on at least some of the issues, it raises the definite prospect that this Court is being asked to decide legal issues in a vacuum. This also raises the unattractive prospect of an individual analysis of each of the 40 pre-sale contracts.

[34] Having considered the matter, I am satisfied that the issue can be resolved by consideration of the disclaimer issue alone, premised on the assumption that the contracts remain valid and enforceable as against 098 at this time. Within that issue, many of the factual circumstances relating to the contract issues remain relevant. By that approach, the contract validity issue only becomes relevant if I decide that the

contracts should *not* be disclaimed. For reasons set out below, I have concluded that disclaimer is appropriate here and there is no need to consider the first issue.

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[35] As noted in *Bennett* above at 180, one of the primary goals of a receiver is to maximize the recovery of the assets under its charge. See also *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, 2016 ONSC 199 at para. 103, leave to appeal ref'd 2016 ONCA 485.

[36] Having said that, and as I will discuss in detail below, it is common ground that this is not the only consideration a receiver must take into account in the performance of its duties. The receiver is required to assess all equitable interests or "equities" in the disclaimer exercise: *New Skeena Forest Products Inc. v. Kitwanga Lumber Co. Ltd.*, 2004 BCSC 1818 at para. 22, aff'd 2005 BCCA 154.

[37] One of the tools by which a receiver maximizes the value of the assets for the benefit of the stakeholders is by considering whether it is beneficial to continue to abide by contracts between the debtor and other parties, or to disclaim them. For example, in the context of pre-sale contracts, although a better realization might be obtained by a disclaimer, the extra cost and delay of remarketing and selling the units might outweigh that benefit. I would add at this point that no one has argued that this is the case here.

[38] In *Bennett* at 341-42, the author discusses that a disclaimer is considered within the context of this maximization exercise:

In a court-appointed receivership, the receiver is not bound by existing contracts made by the debtor nor is the receiver personally liable for the performance of those contracts entered into before receivership. However, that does not mean the receiver can arbitrarily break a contract. The receiver must exercise proper discretion in doing so since ultimately the receiver may face the allegation that it could have realized more by performing the contract rather than terminating it or that the receiver breached the duty by dissipating the debtor's assets. Thus, if the receiver chooses to break a material contract, the receiver should seek leave of the court. The debtor remains liable for any damages as a result of the breach...

...

In the proper case, the receiver may move before the court for an order to breach or vary an onerous contract including a lease of premises or equipment. If the receiver is permitted to disclaim such a contract between the debtor and a third party, the third party has a claim for damages and can claim set-off against any moneys that it owes to the debtor. If the court-appointed receiver can demonstrate that the breach of existing contracts does not adversely affect the debtor's goodwill, the court may order the receiver not to perform the contract even if the breach would render the debtor liable in damages. If the assets of the debtor are likely to be sufficient to meet the debt to the security holder, the court may not permit the receiver to break a contract since, by doing so, the debtor would be exposed to a claim for damages...

[Emphasis added.]

[39] Disclaimer principles as found in numerous case authorities were summarized by Justice Burnyeat in *bcIMC Construction Fund Corporation v. Chandler Homer Street Ventures Ltd.*, 2008 BCSC 897 at paras. 53-57. Burnyeat J. summarized the relevant considerations found in those authorities as follows:

[58] I am satisfied that the decisions referred to establish the following propositions: (a) the Receiver and Manager is not bound by the Contracts of either Chandler or Cook entered into before the receivership unless it decides to be bound by them; (b) the Receiver and Manager should and did seek leave of the Court before disclaiming the Contracts; (c) Chandler and Cook will remain liable for any damages if the Contracts are disclaimed by the Receiver and Manager; (d) any duty to preserve the goodwill of Chandler and/or Cook is owed to those entities and not to the creditors of Chandler and Cook; (e) the ability to disclaim contracts applies even if the party contracting with the debtor has an equitable interest as a result of the contract; and (f) if a receiver and manager decides in its discretion to be bound by the contracts of a company entered into before the receivership, then the receiver and manager be liable for the performance of those contracts.

[40] As stated above, paragraph 3(c) of the Receivership Order specifically empowered the Receiver to "cease to perform any contracts of [098]". This would include the power to not complete the sales contemplated by the 40 pre-sale contracts before me: *bcIMC* at para. 60. I agree that the Receiver has properly sought directions from the Court on that issue, given the level of conflict between the stakeholder groups.

[41] It is in the context of maximizing realizations that many of the case authorities discuss the balancing of interests—or consideration of the equities as between the

parties. This will include a consideration of the relative pre-filing positions of the parties and implicitly recognize that any failure to disclaim might result in an unjustified preference in favour of one stakeholder. For example, in *bclMC*, Burnyeat J., at para. 96, stated that if the contracts were not disclaimed, the party seeking to uphold the contract would receive a significant preference not otherwise available to other unsecured creditors. See also *Royal Bank of Canada v. Penex Metropolis Ltd.*, 2009 CanLII 45848 at para. 27 (Ont. S.C.J.).

[42] Such an approach is evident from the court's reasoning in *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.*, 2012 ONSC 4816. In that case, where similar facts were in issue, Justice Morawetz (as he then was) determined the legal priority as between the pre-sale purchasers and the lenders, and then considered whether there were any "equities" in favour of the purchasers so as to displace those prior legal rights: paras. 27, 32.

[43] In *Romspen Investment Corporation v. Horseshoe Valley Lands Ltd.*, 2017 ONSC 426 [*Romspen/Horseshoe*], Justice Wilton-Siegel stated:

[31] The central question in any motion to disclaim a contract is whether a party seeks to improve its pre-filing position at the expense of other creditors by means of a disclaimer of a contract. This determines the standard by which the equities between the parties must be assessed. For example, as noted in *Royal Bank of Canada v. Penex Metropolis Ltd.*, at para. 27, "[a] receiver should be permitted to disclaim an agreement if continuing the agreement would create a significant preference in favour of the contracting party: *bclMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.* (2008), 44 C.B.R. (5th) 171, [2008] B.C.J. No. 1297 (S.C.) at para. 96."

[32] In accordance with this standard, a receiver's duty to act in an equitable manner, and to be fair and equitable to all of the creditors of a debtor, must therefore be exercised within the framework established by the respective priorities of the creditors. The facts giving rise to the receivership, and any issue of causation of the receivership, as between the debtor and any applicant for the receivership are, on their own, irrelevant for any judicial determination as to whether a receiver should be granted the authority to disclaim a contract with a third party.

[Emphasis added.]

[44] Mr. Nied, co-counsel for the third mortgagee, 625536 B.C. Ltd. ("625"), advances an analytical framework for consideration of the disclaimer issue. I

substantially agree with those submissions and would, therefore, frame the issues as follows:

- a) Firstly, what are the respective legal priority positions as between the competing interests?
- b) Secondly, would a disclaimer enhance the value of the assets? If so, would a failure to disclaim the contract amount to a preference in favour of one party?; and
- c) Thirdly, if a preference would arise, has the party seeking to avoid a disclaimer and complete the contract established that the equities support that result rather than a disclaimer?

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[45] I will now address the respective legal positions and interests of firstly, the mortgagees or lenders and secondly, the pre-sale purchasers.

**(i) The Mortgagees' Interests**

[46] The first three mortgages came into existence in advance of the 40 pre-sale contracts.

[47] In May 2014, 625's mortgage, a take back mortgage, was granted around the time of 098's purchase of the lands. The face amount of the mortgage is \$1.8 million. In May 2014, RMIC and CWT registered their mortgage against the lands in the face amount of \$4.2 million. In December 2014, Forjay and CWT/HMF registered their mortgage against the lands in the face amount of \$10 million. There is a fourth mortgage registered against the Development by James Mercier, the principal of Forjay and RMIC. Mr. Mercier contends that the loans advanced by RMIC and Forjay were intended to be short-term construction loans, to be repaid by further construction financing.



[48] As a result of priority agreements, the relative position of the mortgages is: (1) RMIC and CWT; (2) Forjay and CWT/HMF; (3) 625; and (4) Mr. Mercier.

[49] There is nothing particularly unusual about any of the first three mortgages. They agreed to advance significant monies and in return, they expected to be repaid the full amount advanced, with interest and costs. In addition, on the subject of partial discharges upon sales of units, the mortgages all provided that partial discharges against strata units were entirely within the discretion of each of the lenders. The mortgages all provided in the standard terms:

13.(1) If the land is subdivided:

(a) this mortgage will charge each subdivided lot as security for payment of all the mortgage money, and

(b) the lender is not to discharge this mortgage as a charge on any of the subdivided lots unless all the mortgage money is paid.

(2) Even though the lender is not required to discharge any subdivided lot from this mortgage, the lender may agree to do so in return for payment of all or a part of the mortgage money. ...

[50] The 40 pre-sale contracts were executed during the existence of 098's sales centre, which was open from March 2015 until it closed in May 2016, and accordingly, well after all three mortgages were registered against title. Section 4.3 of the March 2015 disclosure statement that 098 provided to all of the purchasers under the 40 pre-sale contracts makes express reference to the existing legal rights of the three mortgagees.

[51] 098's slide into insolvency, at least from the lenders' point of view, did not commence just prior to the appointment of the Receiver. Highlights from the course of events include:

- a) in September 2014, RMIC and CWT commenced a foreclosure proceeding under their first mortgage and they presumably filed a CPL against the lands. For reasons not clear to me, this proceeding was held in abeyance;

- b) the short-term nature of Forjay/RMIC's mortgages never materialized. The take out financing was never arranged by 098;
- c) in May 2016, Mr. Mercier was advised by 098 that it did not have funds and sources of financing to complete the Development. Either Forjay or RMIC went on to advance a further \$14.2 million to 098 under their mortgages;
- d) in early July 2017, CWT/HMF filed a foreclosure action and registered a CPL against the lands. By this time, the amounts owing under the second mortgage (Forjay and CWT/HMF) were said to be just shy of \$19 million;
- e) after the filing of CWT/HMF's foreclosure and CPL, things quickly went downhill;
- f) the Kaur Group of purchasers are largely identified as those having pre-sale contracts where the full price was paid and a promissory note was executed by 098 (they are not part of the 40 pre-sale purchasers here). In early August 2017, the Kaur Group lodged a complaint with the Superintendent to the effect that some units had been sold to more than one purchaser. On August 4, 2017, the Kaur Group filed an action against 098 and others and registered a CPL against certain units, claiming in part that 098 had used the funds paid by them for improper purposes;
- g) at least in part as a result of the filing of the CWT/HMF and Kaur actions and registrations of the CPLs, the Superintendent issued a cease marketing order pursuant to *REDMA*. Under s. 1 of *REDMA*, "market" includes engaging in any transaction that will or is likely to lead to a sale. Accordingly, this order prohibited 098 from completing any sale, save with the Superintendent's concurrence. This order also gave notice to 098 that it was required to file a new disclosure statement; and
- h) Forjay's foreclosure commenced August 25, 2017 and, as stated above, led fairly quickly to the appointment of the Receiver.

[52] As I have referenced above, one of the major planks of the Receiver's position found in the First Report was the contention that Forjay and RMIC had agreed with it to partially discharge their security if these 40 pre-sale contracts were completed. However, during the course of this hearing, it became quite evident that there was considerably more complexity to Forjay and RMIC's discussions with the Receiver. The agreement to discharge was premised on the discharges being granted in "normal circumstances". Further, Forjay and RMIC required that: there were valid pre-sale contracts (which remains in dispute); the closing would occur shortly after the Receiver's appointment; and, the net sale funds would be paid to the first mortgage. None of the latter events occurred.

[53] Many of the purchasers, including the Kaur Group, suggested that Forjay agreed to partially discharge their mortgages if the units were sold for at least 90% of the Price List.

[54] The broader allegations were that all the mortgagees implicitly agreed to partially discharge their security to allow the 40 pre-sales to close. The Kaur Group argued that it was a requirement under s. 11(3) of *REDMA* that the mortgagee pre-approve such partial discharges or alternatively, that the developer make other arrangements satisfactory to the Superintendent to transfer title to a purchaser. Assuming, for present purposes, that 098 was in breach of this requirement, I fail to see that any breach *ipso facto* means that such an agreement existed on the part of the lenders.

[55] By the conclusion of this hearing, there was either evidence or concessions by the various purchasers that no such agreement existed on the part of RMIC, Forjay or CWT/HMF.

[56] Accordingly, there is no evidence of any agreement on the part of the first three mortgagees to discharge their security against the 40 units and some have expressly stated that they did not agree. There are examples where such lenders' agreements were before the court: see *bcIMC* at para. 10; *CareVest Capital Inc. v. CB Development 2000 Ltd.*, 2007 BCSC 1146 at para. 18; *Romspen Investment*

*Corporation v. Woods Property Development Inc.*, 2011 ONSC 3648 at para. 36, rev'd on other grounds 2011 ONCA 817. Such facts simply do not exist here. Nor is there any evidence that the lenders have conducted themselves in a manner to suggest that they would provide such partial discharges in certain circumstances, upon which 098 or any purchaser might rely.

**(ii) The Purchasers' Interests**

[57] As I described above, all of the 40 pre-sale purchasers executed what the Receiver described as a "standard" contract, presumably prepared by 098. All contracts included an Addendum "A", which includes relevant provisions for this hearing's purposes.

[58] The first provision is clause 1, titled " **p e a e**":

- a) ... The Completion Date will be that date set out in a notice to the Purchaser (the " **p e a e**") from the Vendor and will be no less than 21 days after the Vendor ... notifies the Purchaser... that the Strata Lot is ready to be occupied. ... The notice of the Completion Date (the " **p e e**") delivered from the Vendor ... to the Purchaser ... may be based on the Vendor's estimate as to when the Strata Lot will be ready to be occupied. If the Strata Lot is not ready to be occupied on the Completion Date so established, then the Vendor may delay the Completion Date from time to time as required, by notice of such delay to the Purchaser ... If the Completion Date has not occurred by July 31, 2016 (the " **s e a e**"), then this Agreement will be terminated, the Deposit and interest thereon will be returned to the Purchaser and the parties will be released from all of their obligations hereunder, provided that:
  - i) [a *force majeure* clause which is not relevant here]; and
  - ii) the Vendor may, at its option, exercisable by notice to the Purchaser, in addition to any extension pursuant to Section 1 (a) and whether or not any delay described in Section 1(a) has occurred, elect to extend the Outside Date for up to 120 days.

[59] The second relevant provision is clause 11, titled " **re ree e eprese a s**". In part, that clause provides that "No modification or waiver of this Agreement or any portion of this Agreement will be effective unless it is in writing and signed by the Vendor and Purchaser."

[60] The third and final relevant provision is clause 19 and clearly sets out the rights acquired by a purchaser upon execution of a contract:

**ra a s.** This offer and the Agreement which results from its acceptance create contractual rights only and not any interest in land. The Purchaser will acquire an interest in land upon completion of the purchase and sale contemplated herein.

[61] 098 issued its first disclosure statement in March 2015, by which time completion of construction was anticipated to be from January to April 2016. It is common ground that 098 never issued a “Completion Notice” setting the “Completion Date”. Needless to say, the Completion Date did not occur by the Outside Date of July 31, 2016 (clause 1(a)).

[62] As the Receiver notes, based on a reading of the contracts themselves, all 40 pre-sale contracts were terminated by their terms on November 28, 2016, which marked the end of the only 120-day extension period permitted under clause 1(a)(ii). In that regard, the Receiver suggests that it be allowed to “amend” the existing contracts to permit them to complete, presumably meaning that the contracts could be resurrected and a new “Completion Date” set.

[63] On the contract validity issue, both the Receiver and the purchasers rely on the fact that 098 continued to communicate with the 40 purchasers and purported to unilaterally “amend” the Outside Date on several more occasions, as follows:

- a) in April 2016, 098 filed an amended disclosure statement changing the estimated date for completion to between May and August 2016;
- b) an undated first notice of extension was delivered to 39 of the 40 purchasers under cover of a letter dated July 29, 2016, by which 098 exercised its right under clause 1(a)(ii) of the contract to unilaterally extend the Outside Date by 120 days, i.e. to November 28, 2016. As noted by 625’s counsel, it is not clear when the first notice of extension was sent out; in at least one case (SL 11), a notation on the July 29 covering letter indicates that it was mailed August 2, 2016, after the

original Outside Date. In one case, the July 29, 2016 covering letter relied on clause 1(a)(i) – being the *force majeure* clause – to extend the Outside Date to November 28, 2016;

- c) in September 2016, 098 filed an amended disclosure statement changing the estimated date for completion to between November 2016 and February 2017;
- d) in November 2016, 098 filed an amended disclosure statement changing the estimated date for completion to between January and May 2017;
- e) an undated second notice of extension was delivered to all 40 purchasers by which 098 purported to again unilaterally extend the Outside Date to March 31, 2017 under clause 1(a) of Addendum “A”. Purchasers were asked to “acknowledge” the new Outside Date;
- f) around March/April 2017, 098 sent out an addendum to all 40 purchasers that purported to amend the contracts by changing the Outside Date to May 31, 2017. In most cases, this addendum was not fully executed by both the purchasers and 098 until after March 31, 2017;
- g) for the vast majority of the 40 purchasers, the May 31, 2017 Outside Date addendum was the last attempt by 098 to extend the Outside Date and there were no further formal extension notices received from 098;
- h) a few purchasers received a third notice of extension from 098 dated May 31, 2017 extending the Outside Date to July 15, 2017 under clause 1(a)(ii) of Addendum “A”; and
- i) a few purchasers received a fourth notice of extension from 098 dated July 14, 2017 extending the Outside Date to August 31, 2017, under clause 1(a)(ii) of Addendum “A”.

[64] The spotty manner in which these last extensions took place is evident from the evidence of Jaspreet Dhaliwal, 098’s chief financial officer, who states that 098

“attempted” to deliver these notices of extension through various means. In any event, Mr. Dhaliwal confirms that 098 did not deliver any further notices of extension purporting to extend the Outside Date beyond August 31, 2017.

[65] In light of all these extensions, a number of purchasers actually inspected their units in the summer of 2017. In addition, some of them received notice from 098 that “occupancy had been received” just after Langley’s notice was issued on August 8, 2017. They were also advised that 098 would “begin the closing process”. When that did not happen, a number of purchasers even got to the point of filing an action in this Court for specific performance and registering a CPL against their units, all before the receivership.

[66] What, then, is the nature of the purchasers’ interests under their contracts?

[67] Again, the pre-sale contracts clearly provide that they create “contractual rights only and not any interest in land”, and that the purchasers will only acquire an interest in land “upon completion of the purchase and sale”. There is no suggestion by the purchasers to the effect that this contractual provision is not applicable due to waiver or estoppel; certainly, no evidence has been filed in support of any such contention.

[68] The law is clear that contracting parties may contract away their equitable interests, subject to the doctrines of undue influence and unconscionability (which none of the purchasers have argued): *Pan Canadian Mortgage Group III Inc. v. 0859811 B.C. Ltd.*, 2014 BCCA 113 at paras. 45, 50; *Bernum Petroleum Ltd. v. Birch Lake Energy Inc.*, 2014 ABQB 652 at para. 97.

[69] Accordingly, there is no reason to disregard the clear intent of the parties as to the nature of the interest to be held by the purchasers upon execution of the pre-sale contracts. Numerous case authorities arrived at that same result in the context of pre-sale contracts of a development.

[70] In *bc/IMC*, the Court was addressing the nature of certain pre-sale contracts, which contained similar wording to that found in clause 19. Burnyeat J. discussed

this issue at paras. 63-65 and concluded that he should give effect to that clause by confirming that no equitable interest arose.

[71] In *Pan Canadian*, the court held that certain purchasers could not have purchaser's liens (an equitable remedy) in respect of land because their contracts expressly stated that only contractual rights were created. The court discussed that the "protective" clauses in the agreements negated any intention on the part of the contracting parties to create an interest in land: paras. 36, 43-51, 58.

[72] Finally, the court in *Firm Capital* held that the lender had legal priority over the interests of purchasers where, at least in part, the pre-sale purchasers, by agreement, acquired a "... personal right only and not any interest in the Unit or property": paras. 26-27.

[73] In the alternative, I have also considered the position of the pre-sale purchasers that they have an equitable interest even in the face of clause 19. Unfortunately, this also does not assist them in seeking what is essentially an order for specific performance against the Receiver.

[74] The Court in *bcIMC* cited substantial authority at paras. 70-72 that an equitable interest cannot be specifically enforced in circumstances that are present here. Further, Burnyeat J. citing *CareVest*, stated:

[73] The holders of the Contract must be entitled to specific performance and I am satisfied that specific performance is only available in relation to contracts that require no further work or services to be performed or provided by a receiver and manager. In *CareVest*, *supra*, Pitfield J. stated in this regard:

It will be apparent from the terms of the order as I have recited them that I have concluded that the presale purchasers' agreements are not capable of specific performance. My conclusion results from the fact that the property which is the subject of purchase and sale in the presale contracts does not yet exist. It cannot be created without creating new rights and obligations in relation to the property, particularly insofar as procuring funds for completion, and securing the repayment thereof, are concerned. Were I to attempt to require the receiver to pick up where the developer left off, I would be granting the equivalent of a mandatory injunction which I construe to extend far beyond the scope of an order for specific performance of the conveyance of the property.



As a general rule, specific performance is not a remedy that is available in relation to a contract that requires work and services to be performed or provided, or in circumstances where the ongoing supervision of the court through a court-appointed receiver/manager will be required. Nor is the remedy available in respect of matters over which the court does not have complete control such as the modification of financing arrangements in order to obtain the funds required to complete construction.

(at paras. 13-4)

[Emphasis added]

[75] In *1565397 Ontario Inc. (Re)* (2009), 54 C.B.R. (5th) 262 (Ont. S.C.J.) (WL), Justice Wilton-Siegel stated:

[33] I accept that, as in *CareVest* and *bcIMC*, specific performance will not be ordered where it amounts to a mandatory order that requires the incurring of borrowing obligations against the subject property and the completion of construction in order to bring the property into existence. ...

[76] In *Pope & Talbot Ltd. (re)*, 2008 BCSC 1000, Justice Brenner, as he then was, was dealing with cross applications: the Receiver sought to disclaim an asset purchase agreement, which was in progress at the date of the receivership; and the purchaser sought an order compelling the receiver to complete the sale. Somewhat similar to the facts here, even after the agreed closing date, the parties continued making efforts to close. Then the receivership happened. At para. 25, Brenner J. noted that the purchaser asserted an equitable interest in the assets. However, the Court, as it did in *bcIMC*, considered at para. 26 that the purchaser's status was contingent upon the contract being specifically enforceable. That remedy was not available in *Pope & Talbot* since the parties were not *ad idem* on outstanding matters at the time of the receivership and the receiver did not affirm the contract: para. 29.

[77] The statements of this Court in *bcIMC* at para. 73, citing *CareVest* at paras. 13-14, ring true here in the sense of assessing whether the pre-sale purchasers could have asserted specific performance claims against 098. The circumstances would indicate otherwise:

- a) 098 did not have permission for occupancy for the units until Langley issued its notice on August 8, 2017;
- b) there were indications even before August 8, 2017 that 098's fortunes were fading, given:
  - (1) the petering out of the extension notices after May 31, 2017 are indicative of 098 seeming to have "withdrawn from the field" (see *Pope & Talbot* at para. 31);
  - (2) in July 2017, 098 was subject to a foreclosure by CWT/HMF and their CPL had been registered against title. At that time, there was no agreement on the part of CWT/HMF to provide any partial discharges that would have allowed the completion of the sales of these units. No court order could have been enforceable as against CWT/HMF if no agreement was forthcoming;
- c) by September 8, 2017, the Superintendent had shut down any sales of units by its cease marketing order. This order in part required that 098 file a new disclosure statement under *REDMA* before any further "marketing" could proceed. Again, I appreciate that 098 was making efforts to have the Superintendent's order lifted so that these sales could proceed, but it would be speculation to assume that this would have been forthcoming. In those circumstances, no order of specific performance could have required 098 to act in breach of that order;
- d) on August 25, 2017, Forjay filed its foreclosure action and registered its CPL, adding to the barriers to any closing that might have been sought by any of the purchasers. Again, Forjay did not agree to any partial discharges at any time. It goes without saying that the purchasers would not have taken title to the units with 098's mortgages still registered against them; and

e) on September 30, 2017, 098 lost its new home warranty coverage.

[78] In short, I see no basis upon which an order of specific performance could have compelled 098 to close these sales and provide clear title after occupancy had been confirmed on August 8, 2017. Certainly, there is no basis for any such remedy before that date.

[79] The appointment of the Receiver on October 4, 2017, does not improve any argument on the part of the purchasers. The Receivership Order had no effect on the relative positions as between the mortgagees and the pre-sale purchasers: *Romspen/Horseshoe* at paras. 29, 33-35.

[80] Further, the purchasers could not have sought specific performance as of or after the date of the Receivership Order. The Receiver never affirmed the contract through its conduct or otherwise: *Pope & Talbot* at paras. 31-32. As the Receiver has acknowledged, further efforts were required to complete the Development, including completing exterior work, common areas deficiencies (including landscaping) and in-suite deficiency work.

[81] In addition, the Receiver has acknowledged that upon its appointment, it was not in a position to market, sell or complete the sale of any of the units because, among other things, it had to file a new disclosure statement and obtain new home warranty coverage. The Receiver sought and obtained substantial borrowing powers in order to complete the Development, which included this extra work.

[82] In late January 2018, the Receiver described the Development as “substantially complete”. Even as of February 19, 2018, the Receiver had still not obtained the new home warranty and was seeking funds from Forjay to complete that matter and others.

[83] In *Firm Capital*, Morawetz J. stated:

[28] Counsel to the Receiver submits that the position taken by the Unitholders is essentially that they wish specific performance of their purchase agreements. Counsel to the Receiver submits that this court has previously held that specific performance (specifically in the context of an

unregistered condominium project) should not be ordered where it would amount to “a mandatory order that requires the incurring of borrowing obligations against the subject property and completion of construction ordered to bring the property into existence”. (See: *Re 1565397 Ontario Inc.* (2009), 54 C.B.R. (5<sup>th</sup>) 262.) I accept this submission.

[29] In my view, the law is clear that the Receiver is not required to borrow the required funds to close the project nor is the first secured creditor required to advance funds for such borrowing.

[84] I agree. The Receiver could not have been forced to complete the Development so as to enable the purchasers to close their sales.

[85] The other major obstacle in the path of the pre-sale purchasers lies in the requirement that specific performance is only available in the context of an agreement for the sale of land where the land is unique to the extent that a substitute would not be readily available.

[86] Uniqueness is a question of fact that must be assessed in light of the specific circumstances of the particular property in issue: *bcIMC* at paras. 95-96. A person asserting specific performance must show that the property has distinctive features that make an award of damages inadequate: *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2014 BCCA 388 at para. 45.

[87] Many of the purchasers have stated that they were drawn to Murrayville by its close proximity to the Langley hospital, shopping and the municipal recreational facilities. However, there is no indication that other units in the same vicinity are not available. In fact, there is evidence from some of the purchasers to the effect that there are other similar units available in the marketplace. For example, Nicola Quinn in respect of SL 19 (one of the 40 pre-sales) states that there currently exist “apartments similar to our Murrayville unit”.

[88] I do note that at least two of the purchasers paid for improvements to their units, which could stand as some basis upon which to assert that those were unique.

[89] When considering the purchasers’ evidence as a whole, it is clear that the defining “uniqueness” is the *price* at which they can acquire the units under the

existing contracts. Ms. Quinn states that these other apartments “cost much more”. Even so, no authority has been cited to me that would support that these units are unique in character for that reason. Indeed, such a reason more supports that a damage award would be an adequate remedy.

[90] In summary, the purchasers’ interests are grounded in contract and no equitable interests have arisen in any of the units. Those purchasers’ contractual rights have no legal priority over those held by the mortgagees. Even if the purchasers hold equitable interests in the lands, those interests are not enforceable in the circumstances.

**2 ea a s re ere es**

[91] Turning to the second question in the analysis, would a disclaimer enhance the value of the assets? If so, would a failure to disclaim the contract amount to a preference in favour of one party?

[92] In light of the recent appraisal obtained by the Receiver, there can be no doubt that remarketing and selling these 40 units would enhance the value of the assets to be distributed to the stakeholders. The Receiver described the increase in value as “material”. That fact clearly points to disclaimer as being appropriate.

[93] I also have no difficulty concluding that a failure to disclaim here would result in the purchasers receiving a preference in respect of value that would otherwise accrue to the mortgagees under their prior ranking security. In order to permit the pre-sale contracts to complete, the Court would need to order the discharge of the mortgages in circumstances where the mortgagees would not receive payment of the amounts they bargained to accept in exchange for a discharge. This would be an exceptional result and I know of no authority to order it in these circumstances. I agree with the mortgagees that it would have the effect of elevating the claims of the purchasers above the legal priority and security of the mortgagees: *bcIMC* at para. 96; *Penex* at para. 27.

3 e es

[94] Turning to the third consideration, have the pre-sale purchasers established that the equities support overriding the mortgagees' legal priority in their favour, as opposed to allowing a disclaimer?

[95] The circumstances set out above in relation to the respective interests and priorities of the mortgagees and the pre-sale purchasers remain relevant within this part of the disclaimer exercise, but I will not repeat them again.

[96] The pre-sale purchasers, both those represented by counsel and those appearing in person, presented a wide range of arguments in support of completing the sales. I will attempt to distill their arguments, and those of the Receiver, into various categories. They are set out below, in no particular ranking of importance.

[97] Actions/Inactions of 098. The Receiver states that the 40 pre-sale contracts "did not complete because of the actions of 098". The Receiver then argues that the purchasers took all steps required of them to buy their units, but that they were denied the ability to complete the purchase due to the actions of 098. Finally, the Receiver points to the fact that the purchasers remain ready, willing and able to complete, despite having received a further disclosure statement which would have afforded them rescission rights under *REDMA*. This leads to the Receiver's view that "fairness and equity" favour completing the pre-sale contracts.

[98] With respect, this argument is simplistic and, in any event, unpersuasive.

[99] I would venture to say that most, if not all, insolvency landscapes are littered with the broken promises of the debtor. Secured creditors are not paid; suppliers and trades are not paid; employees are not paid; and the list goes on. Such is the nature of insolvency. The insolvency regimes available to stakeholders (such as bankruptcy, receivership or restructuring) are intended to stabilize matters and allow an orderly realization of assets for the benefit of stakeholders generally. To suggest that a stakeholder's claim is elevated by the debtor having broken its promise to that stakeholder does little to distinguish that claim from all others.

[100] Further, such general notions of fairness or equity, as cited by the Receiver, are not meant to *ex post facto* elevate the claims of a party so as to relieve that party of the consequences of a harsh result: *Bank of Montreal v. Awards-West Ventures Inc.* (1990), 50 B.C.L.R. (2d) 363 at para. 39 (C.A.). If that were the case, claimants would be lined up to do so.

[101] Again, I do not intend to wade into the details of the contract validity/estoppel/misrepresentation/waiver issues, all in aid of the purchasers avoiding the argument that their pre-sale contracts were not even afoot at the time of the receivership such that no disclaimer is needed. However, I acknowledge the Receiver's and many purchasers' points that 098 did not provide any notice of default or termination, and that the purchasers have been waiting patiently for months, if not years now, based on 098's ongoing assurances that it was nearing completion. Some have been particularly patient, relying on temporary accommodations and moving items into storage. Many are seniors. Many question their ability to re-enter the market (even for lesser units) if they are required to go shopping for condominiums again. Certainly, the current state of the Lower Mainland real estate market is not for the faint of heart.

[102] There is no doubt that some sympathy is in order for the purchasers in these circumstances, even assuming that the contracts remained valid and enforceable to the end. However, those circumstances are not unusual in the sense of pre-sale purchasers not getting their promised unit when a developer fails and the creditors are required to step in to finish the development and sell it and thereafter, distribute the proceeds.

[103] I also consider that the purchasers are no doubt correct when they say that the mortgagees would likely be seeking to complete the pre-sale agreements if the market had gone down. The Kaur Group argues that, if the market had fallen, the mortgagees would have been supporting these sales, to the detriment of the purchasers. However, if a receiver is appointed, s. 16 of *REDMA* dictates that a new

disclosure statement must be filed, in which case any purchaser would have the option of rescinding the contract to avoid completion.

[104] The Purchasers Knew the Risks. It is obvious that the mortgagees took risks in advancing the funds to 098. Of course, the taking of security against the Development was meant to ameliorate those risks.

[105] However, there was also some risk inherent in the pre-sale contracts. The disclosure statements alerted the purchasers to the fact that financing had been arranged and was secured against title to the Development. Further, the pre-sale contracts expressly provided that the purchasers were only obtaining contractual rights and not any interest in lands until the time of completion.

[106] In addition, the purchasers were told in section 7.2(f) of the disclosure statement that, “if [098] fails to complete the sale”, they would be paid their deposit monies together with accrued interest.

[107] Accordingly, while the pre-sale purchasers enjoyed a potential upside in the event of an increase in real estate values between the date of the purchase agreement and completion, they also bore the risk that the developer would be unable to complete the contract. In this case, section 1.5(2) of the amended March 2015 disclosure statement expressly disclosed that Mr. Chandler had been issued cease marketing orders by the Superintendent in 2006 and 2007, a fact that would have highlighted the potential risk in this case.

[108] Purchasers Will Recover Deposits. All of the purchasers under the pre-sale contracts have a deposit currently held in trust. There is no dispute that the purchasers are entitled to the return of their deposits with interest and no dispute that they will be paid those amounts. As stated in *Firm Capital* at para. 34, the purchasers will not suffer any financial loss in that respect.

[109] As mentioned above, two of the purchasers have expended their own funds in making certain improvements to their proposed units. I do not consider this to be of great significance. These funds were paid to 098 before the closing and in doing so,



the purchasers took the risk that the contracts might not close: *Firm Capital* at paras. 37-38.

[110] Purchasers' Claims against 098. If the pre-sale contracts are valid and enforceable, the purchasers may have a damage claim against 098 for any losses suffered as a result of sales not completing. As in similar cases, the purchasers are free to bring a claim for damages against 098 if such a claim exists: *Re Urbancorp*, 2017 ONSC 2356 at para. 6; *Royal Bank of Canada v. Melvax Properties Inc.*, 2011 ABQB 167 at para. 6.

[111] I note that section 7.2(f) of the disclosure statement provides that, if 098 fails to complete and the deposit is repaid, "the Purchaser shall have no further claims against [098]". This section may affect any such claim but I would hasten to add that I am not making any determination as to the enforceability of the above restriction.

[112] I appreciate that, if such a claim exists, this is likely only a hollow remedy, given the status of the receivership; however, this is the remedy the purchasers bargained for under their contracts. Even assuming they had equitable rights against the land, the purchasers were fully aware, or should have been aware through the disclosure statements provided to them, that prior legal rights against the Development may trump that interest. The fact that damages, if awarded, may not be recovered from an insolvent developer cannot affect that result.

[113] Good Faith. The Receiver and many purchasers also argue that the "organizing principle" of good faith applies, as discussed in *Bhasin v. Hrynew*, 2014 SCC 71. They argue that 098 owed the pre-sale purchasers a duty of good faith in the performance of its contractual obligations.

[114] The Receiver states that there are many indications that 098 did not have an intention to treat the 40 pre-sale contracts as being at an end. Contrary indications are said to be that 098 "re-sold" some of the units and that 098 allowed the completion date to pass while electing not to complete.

[115] The Receiver concludes that, since 098 failed to complete the sale of the 40 pre-sale contracts, while continuing to hold onto those deposits, and then sold some of the very same units to other purchasers without advising the first purchasers, 098's actions "cannot be described as acting in good faith".

[116] Many of the participants on this application have levelled accusations against 098 concerning the conduct of its business over the course of this development. One purchaser alleged that they had been "strung along" by 098 as to why delays in closing were happening. Both the Kaur Group and the secured creditors have alleged that 098 improperly diverted funds advanced to 098 that were meant to be used to complete the Development. 098 denies all of these allegations. As for the Receiver's point above, 098 offers up explanations as to why the units were sold more than once; in addition, Mr. Dhaliwal's evidence is that 098 was making serious efforts right until the receivership to complete the sales.

[117] None of these issues are before me for determination. I would hasten to add that, even if 098 was acting otherwise than in good faith under the pre-sale contracts, that does not mean that the secured creditors who wish to benefit from their security were similarly acting in bad faith. It remains the case that the competing equities here are as between the pre-sale purchasers and the mortgagees; not the pre-sale purchasers and 098.

[118] Finally, in *CareVest*, Justice Pitfield affirmed that insolvency, the reasons for it, and the financial results flowing from it are independent of any concerns affecting the specific performance of land: para. 15. Further, as the court stated in *Romspen/Horseshoe*:

[30] ... as a matter of law, I do not see any support in the decision in *Royal Bank of Canada v. Penex Metropolis Ltd.* for the proposition that the cause of a receivership is an equitable consideration on its own.

...

[32] ... The facts giving rise to the receivership, and any issue of causation of the receivership, as between the debtor and any applicant for the receivership are, on their own, irrelevant for any judicial determination as to whether a receiver should be granted the authority to disclaim a contract with a third party.

[119] Accordingly, “good faith” issues such as have been raised by many of the purchasers are irrelevant to the exercise before this Court.

[120] Public Policy. Some of the pre-sale purchasers argued that the Court’s consideration of the equities should include public policy factors.

[121] These arguments are grounded in *REDMA*, which unquestionably is consumer protection legislation: *Pinto v. Revelstoke Mountain Resort Limited Partnership*, 2011 BCCA 210 at para. 17. However, there is nothing in *REDMA* that addresses either of the issues before me (the disclaimer issue or the contract validity issue). As was stated a number of times on this application, the protection afforded to the pre-sale purchasers under *REDMA* was to allow them to rescind the pre-sale contracts in certain circumstances; otherwise, no other legislative protection is afforded to the purchasers.

[122] In this case, the Court must consider the equities as between private parties. The fact that the purchasers have not availed themselves of their *REDMA* remedy does not mean that they enjoy any consideration here based on public policy. Any further protections for this cohort of purchasers must come from the Legislature, rather than this Court. I do not see that public policy arguments apply here in what is essentially a priority contest between these two camps.

[123] Winner and Losers. First, let me state the obvious – there are no winners in these circumstances. The failure of the Development will affect most, if not all, of the stakeholders. I acknowledge here that, while there are principally financial consequences, other perhaps more ephemeral consequences will be felt by others, particularly the pre-sale purchasers.

[124] Many counsel referred to the concept of “reaping the benefit” of the increase in value of the units, and more particularly, who should do the “reaping”.

[125] However, both camps rely on contractual obligations of 098. The purchasers were promised their units. The mortgagees were promised to be repaid with interest and that, if default occurred, payment would be secured against the Development. In

those circumstances, the focus is simply on recovery of the asset or the value of the asset – not obtaining any “benefit”. In that event, I reject the argument of the purchasers that allowing a disclaimer would result in a “windfall” to the mortgagees. They seek exactly what they are entitled to under their mortgages and nothing more.

[126] As of February 2018, the amounts owing to the first and second mortgagees was approximately \$44 million and accruing at approximately \$450,000 per month. The amount owed to 625, the third mortgagee, is in excess of \$7 million. Even assuming a sale of all units at the increased price confirmed in the appraisal, there will be a shortfall to the secured creditors. As noted by 625, its position is particularly vulnerable given its ranking.

[127] Some of the purchasers submit that the mortgagees were able to do due diligence and negotiate their contracts to better protect themselves. The lenders are said to be in a better position to “bear the loss”. That might be the case, but there is nothing unusual about the mortgages or the pre-sale contracts. Any failure to repay the lenders will be a real monetary loss, unlike the purchasers’ “loss” of their ability to obtain the units, which is a loss of opportunity rather than a monetary loss. The purchasers will recover their deposit monies with interest so they will not be “out of pocket” any monies under the pre-sale contract.

[128] It is also important to note that the Development’s continued progression toward completion has been due solely to Forjay’s funding of the Receiver’s borrowings. Those are estimated to be \$1.3 million at the end of the day. As of the hearing, approximately \$683,000 had been advanced. Mr. Mercier understandably objects to the pre-sale purchasers compelling sales at less than fair market value when the Receiver has been able to complete those units only after the advance of further monies by Forjay. It bears noting that these further advances have only served to increase the risk of recovery under RMIC and Forjay’s mortgages.

[129] One purchaser also suggested that the mortgagees have other means of recovery at their disposal to shore up any shortfall, unlike the purchasers. He referred to Mr. Chandler’s guarantee. He also referred to possible tracing remedies

arising from allegations that 098 improperly diverted monies from the Development to other entities. Forjay has recently filed such an action, which is being vigorously defended.

[130] In my view, it is not appropriate for the Court to rely on such a speculative matter, particularly where it is virtually impossible to assess the likelihood of success. It may be that the mortgagees recover nothing in that further litigation.

[131] Summary. Having balanced all of the above considerations, I am satisfied that the equities in favour of the pre-sale purchasers do not justify overriding the mortgagees' legal priority and giving the purchasers a preference that they would not otherwise enjoy.

**S** \_\_\_\_\_ **S**

[132] The Receiver is directed to disclaim the 40 pre-sale contracts that are the subject of this application. Further, the Receiver is directed to take immediate steps to remarket and sell these 40 units as soon as possible, subject to legal requirements, and subject to court order.

[133] I have great sympathy for the position of the pre-sale purchasers who have become embroiled in this litigation and who have now potentially lost the ability to obtain what they hoped would be their homes. Mr. Nied, 625's counsel, has suggested that one way to somewhat ameliorate the position of the pre-sale purchasers is for the Receiver to allow them a right of first refusal in respect of their units. This seems a reasonable proposal and one I would adopt.

[134] Accordingly, the Receiver is directed to fashion a process that would allow the 40 pre-sale purchasers a right of first refusal within the future marketing plan, provided that such right is exercised within a reasonable time so as not to unduly delay matters any further.

# TAB 14

**CITATION:** Galt Machine and Plating Inc. v. MLS Group Ltd., 2021 ONSC 8156  
**COURT FILE NO.:** CV-21-00672174  
**DATE:** 20211210

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

|                            |   |                                 |
|----------------------------|---|---------------------------------|
| <b>BETWEEN:</b>            | ) |                                 |
|                            | ) |                                 |
| GALT MACHINE & PLATING INC | ) |                                 |
|                            | ) | Dylan Baker for the Applicant   |
| Applicant                  | ) |                                 |
|                            | ) |                                 |
| – and –                    | ) |                                 |
|                            | ) |                                 |
| MLS GROUP LTD              | ) | Josh Suttner for the Respondent |
|                            | ) |                                 |
| Respondent                 | ) |                                 |
|                            | ) |                                 |
|                            | ) |                                 |
|                            | ) | <b>HEARD:</b> December 09, 2021 |

**M. D. SHARMA J.**

[1] This is an urgent Application brought by a commercial tenant to recover possession of leased property under s. 20 of the *Commercial Tenancies Act*, R.S.O. 1990, c. L.7 and sections 98 and 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. It was ordered to proceed as an urgent hearing by Justice Chalmers on November 30, 2021.

[2] The respondent locked the applicant out of commercially leased premises on August 26, 2021 for non-payment of a security deposit due under the lease. The applicant argues the termination of the lease was unlawful. In the alternative, it seeks an interlocutory injunction or mandatory order granting use of the property pending trial, and in the further alternative, relief from forfeiture.

[3] The applicant alleges his delay in regaining possession has caused significant harm to his business. For this reason, I have undertaken to issue this decision promptly.

**FACTS**

[4] The applicant, Galt Machining & Plating Inc. (the “Tenant”) is a machine shop that provides, among other things, chrome plating services. Since 1993, the Tenant has operated its business in Units 10 and 11 of at 520 Collier Macmillan Drive in Cambridge, Ontario (the “Property”).

[5] The respondent, MLS Group Ltd. (the “Landlord”), became the Tenant’s landlord in July of 2014 when the Property was transferred to it.

[6] The Landlord and Tenant entered into a lease commencing on January 1, 2021, with a term ending December 31, 2022 (the “Lease”). The relevant provisions are:

- a. The Tenant was to deliver a security deposit of \$11,582.50 by June 30, 2021 (s. 2.12).
- b. The Landlord can only terminate the Lease upon an Event of Default (s. 9.01).
- c. An Event of Default will occur whenever any Rent is in arrears and is not paid within three (3) days after written demand by the Landlord (s. 8(a) of Sch. C).
- d. Rent means the aggregate of Net Rent and Additional Rent (s. 22 of Sch. C).
- e. Additional Rent means all sums of money required to be paid by the Tenant under this Lease (except Net Rent) whether or not the same are designated “Additional Rent” or are payable to the Landlord or otherwise (s. 1 of Sch. C).
- f. Except as otherwise provided in the Lease, all Additional Rent shall be payable by the Tenant to the Landlord within five (5) business days after demand (s. 2.06).
- g. Notice provisions are set out in s. 11.06. The Landlord can deliver notices under the Lease in person or by registered mail “addressed...to the Tenant, at the Premises.” If notices are sent by registered mail, they are deemed to have been delivered 48 hours following the date of mailing. Emails between the parties “shall not be considered proper notice under this Lease.”
- h. Any amendments to the Lease “shall be in writing, signed, sealed and delivered by both the Landlord and Tenant” (s. 12 of Sch. C).

[7] The Tenant did not pay the security deposit due on June 30, 2021. The Landlord sent a notice of default on July 16, 2021 demanding payment by July 20, 2021 (“July Default Notice”). It was sent by email and registered mail.

[8] Negotiations followed by phone on July 20, 2021. The Landlord said that it would accept the security deposit in three equal installments, the first being due on August 15, 2021. In an email on July 21, 2021 to the Tenant, Michael Herberman for the Landlord stated “If the cheques are not available on those days or they bounce, you will immediately owe the balance of the unpaid funds immediately.” The Tenant argues that this new deadline, and the immediate consequence of default, was not set out in a signed amendment to the Lease.

[9] On August 1, 2021, the Landlord accepted payment of the Tenant’s monthly rent for August.



[10] On August 15, 2021, the Tenant did not make payment on the installment of the security deposit. Its evidence from its principal, Harjit Basra, is that this was due to the slowdown of the Tenant's business due to the COVID pandemic.

[11] On August 18, 2021, Mr. Herberman on behalf of the Landlord sent an email to the Tenant containing a notice of default, demanding delivery of the full security deposit by August 25, 2021 ("August Default Notice"). The notice said the security deposit constituted Additional Rent, and non-payment amounted to default in payment of Rent. The notice advised the Tenant it had until August 25, 2021 to remedy the default. It further stated that if the Tenant had been approved for COVID-19 rent assistance ("CERS"), the Tenant must provide proof to the Landlord before the deadline. Failing which, the Landlord would terminate the Lease.

[12] The Tenant argues he did not receive the August Default Notice by registered mail or by personal delivery. The Landlord says the August Default Notice was sent by registered mail and offered in evidence the Canada Post receipt showing it was sent on August 18, 2021 and delivered on August 19, 2021. However, the receipt does not evidence a signature from the Tenant, nor does it indicate the unit number of the Property. The Tenant says that mail is often lost among the several units in the building.

[13] The security deposit remained unpaid on August 25, 2021. On August 26, 2021, the Landlord caused bailiffs to secure and lock the Property and notice of termination of the lease was posted at the Property.

[14] On August 31, 2021, the Tenant filed applications for CERS, and was approved on September 3, 2021.

[15] On September 2, 2021, the Tenant delivered a cheque for the full amount of the security deposit, but the Landlord refused to deposit it or return possession of the Property to the Tenant.

[16] The parties attempted to subsequently resolve this issue, which were unsuccessful.

## ANALYSIS

### *Was the lease unlawfully terminated?*

[17] The Tenant argues the lease was unlawfully terminated.

#### *i. Waiver of Right to Terminate*

[18] The Tenant says the Landlord waived its right to terminate the Lease for non-payment of the security deposit by accepting rent on August 1, 2021 and after sending the July Default Notice. It relies on *Malva Enterprises Inc. v. Rosgate Holdings Ltd.* (1993), 14 O.R. (3d) 481, 104 D.L.R. (4th) 167 (C.A.) for the following proposition:

A landlord who has the right to forfeit a lease by reason of the tenant's default may waive the exercise of this right when, after the act or omission giving rise to the right of forfeiture has come to its knowledge, it does any

act whereby it recognizes the relationship of landlord and tenant as still continuing. see *Prudential Insurance Co. v. McLean*, *supra*, at pp. 382-84, and Hill and Redman, *Law of Landlord and Tenant*, 18th ed. (1988), at pp. A952-A953.

[19] The Tenant says that (a) when the security deposit was not delivered on June 30, 2021, (b) and then the Landlord delivered the July Default Notice demonstrating it was aware of the default, and (c) the Landlord accepted the August 1st rent payment, the Landlord thereby waived any rights it had to terminate the Lease for the Tenant's failure to pay the security deposit.

[20] In response, the Landlord says that waiver is an implicit assertion that the lease will continue. However, in this case, there was an explicit intention for the lease to continue, but on the condition that the Tenant pay the security deposit installments when they came due after August 1. On August 1, when rent was paid and accepted, there was a continuing intention by the Landlord that the lease would continue. However, when there was a subsequent non-payment of the first installment of the security deposit, there was a mutual intention by the Landlord and Tenant that the Landlord could then exercise its termination rights as set out in the Lease.

[21] During oral argument, counsel for the Tenant confirmed that there was an agreement reached on July 20, 2021 that the Tenant would make security deposit payments in installments; however, if there was default, the Tenant ought to have been provided with notice pursuant to the Lease to cure that default before the Landlord exercised forfeiture.

[22] In Mr. Besra's affidavit, he does not use the term "agree" when discussing what happened during the July 20, 2021 call. Instead, he states:

On July 20, 2021, during a telephone conversation between me and a director of the Landlord, Michael Herberman, the Landlord *affirmed* that it would accept the Security Deposit in three equal installments beginning on August 15, 2021. Mr. Herberman told me that he would send me a document to sign to finalize this agreement, but he never did. [emphasis added]

[23] Upon review of the affidavit materials filed on this Application and emails exchanged at this time, I find it impossible to conclude that the deal reached on July 20, 2021 was anything but an agreement. The delay in paying the security deposit through installments must have been offered by the Landlord. It benefitted the Tenant, resulting in more time to pay the security deposit and forestalling the termination of its lease. The alternative for the Tenant, pursuant to the express terms in the Lease, was for the Landlord to terminate the Lease. Given this alternative, and the relief the Tenant is now seeking on this Application, it challenges credulity to conclude that the Tenant did not agree to paying the security deposit in installments.

[24] This agreement was reached before rent was due and paid on August 1, 2021. At that time, there is no question that there was a mutual intention for the lease to continue. I cannot accept the Tenant's argument that the acceptance of rent on August 1, 2021 constituted a waiver of the Landlord's right to terminate for non-payment of the security deposit. The agreement reached on

July 20, 2021 created a new possibility for a defaulting event, but the earliest that defaulting event could occur was August 15 when the first installment was due and after rent was paid on August 1, 2021.

[25] In my view, this new agreement distinguishes this case from the cases that the Tenant relies upon. It is unlike *1328773 Ontario Inc. o/a Angling Outfitters v. 2047152 Ontario Ltd.*, 2013 ONSC 4953, 34 R.P.R. (5th) 266 where the court said at para 21:

...when the Landlord accepted rent from Angling Outfitters after indicating its knowledge of specified defaults allegedly warranting termination of the lease, it therefore made a binding implicit election and indication that it henceforth would not be relying on the alleged defaults as a basis for termination or forfeiture of the lease.

[26] In this case, the original default was not passed over by the Landlord with the result that it was waiving default of payment of the security deposit. Instead, a new agreement was reached, which did not create payment obligations until after rent was paid on August 1. Therefore, it is unlike *Angling Outfitters* where the alleged default was passed over.

[27] For these reasons, I cannot conclude that the acceptance of the August 1st rent cheque waived the Landlord's rights with respect to obligations of the Tenant to pay a security deposit which only became due on August 15, 2021 under their new agreement.

*Was the Required Notice Under the Lease Given?*

[28] The Tenant argues that the August Default Notice was defective under the Lease for several reasons. In this regard, it cites authority for the proposition that a landlord, when exercising forfeiture of a lease, must be bound to absolute conformance of its own obligations under the lease: *Arrow Holdings Ltd. v. Lakeview Shopping Centre Ltd.*, 107 N.S.R. (2d) 312, 290 A.P.R. 312 (N.S.S.C.). It also cites *Perrett v. Perrett* (1943), [1944] 1 D.L.R. 673, [1944] O.W.N. 21 (S.C.) for the proposition that courts do not look favourably upon forfeitures and "will take advantage of even trifling reasons to avoid upholding them."

[29] The Tenant argues that since the agreement to accept installment payments of the security deposit was not in writing and not signed by the parties, there was no valid amendment to the Lease due to the "entire agreement" clause in s. 12 of Schedule C of the Lease. Therefore, the security deposit was due on June 30, 2021 not August 15, 2021. For the reasons already given, I found that there was an oral agreement reached for the first installment of the security deposit to be paid on August 15, 2021, and not on June 30, 2021 as set out in the Lease.

[30] It is clear to me that the parties, by their conduct and oral agreement, intended to amend the Lease such that the entire agreement clause no longer represents the intention of the parties: See *Shelanu Inc. v Print Three Franchising Corp.* (2003), 64 O.R. (3d) 533, 226 DLR (4th) 577 (C.A.) at para. 54; *466369 Ontario Ltd. v. 2379078 Ontario Inc.*, 2018 ONSC 5877 at para. 29. I am supported in this conclusion by Mr. Herberman's affidavit which evidence an historical pattern of the parties agreeing to new terms over the phone, and with the Landlord sending email correspondence confirming their agreements. This was commercially practical.

[31] In my view, the Tenant's position would result in a commercially absurd and unfair result. The Tenant would be entitled to enjoy the benefit of the extension of time to pay the security deposit, which it committed to pay in the original Lease, but the Landlord would be without termination rights upon default of the new agreement because that agreement was not put into a signed, written amendment.

[32] While I am satisfied that there was a mutual intention to not enforce the entire agreement clause and that a new oral agreement was reached on when payment of the security deposit would occur, the *Statute of Frauds*, R.S.O. 1990, c. S.19 may preclude enforcement of that oral agreement. I discuss its relevance below. However, I do not decide this Application based on the *Statute of Frauds*. Instead, I base my decision on whether there was an agreement to change the terms of the Lease with respect to the notice the Tenant was to be given. I discuss this next.

*Was Sufficient Advance Notice of Default Given?*

[33] The Tenant next argues that there was insufficient advance notice of default. The August Default Notice was sent on August 18 by registered mail but would not have been deemed delivered until August 20, 2021 under the Lease (s. 11.06).

[34] The payment of the security deposit would have been considered "Additional Rent" under the Lease, since "Additional Rent" is defined as including "all sums of money required to be paid by the Tenant under this Lease (except Net Rent)...or are payable to the Landlord."

[35] Section 2.06 provides that "Except as otherwise provided in this Lease, all Additional Rent shall be payable by the Tenant to the Landlord within five (5) business days after demand." The fifth business day after August 20 was August 27, 2021, which was the day *after* the Lease termination.

[36] Furthermore, s. 9.01 states that Landlord may only terminate by notice to the Tenant if there is an Event of Default. Section 8(a) of Sch. C defines an Event of Default. It includes whenever "any Rent [including Additional Rent] is in arrears and is not paid within three (3) days after written demand by the Landlord." Accordingly, after sending the August Default Notice, the earliest possible date that the Landlord could have terminated the Lease for failure to pay the security deposit was Tuesday, August 31, 2021. By this date, the Lease had already been terminated for five days.

[37] The Landlord says, as evidenced by Mr. Herberman's email on July 21, 2021, that there was an agreement that if any of the installments of the security deposit were not paid, the full amount of the security deposit was payable *immediately*. Therefore, consistent with s. 2.06 of the Lease, there was a new and separate (but unwritten) agreement that these amounts would be payable immediately. In other words, the Landlord says there was a new (unwritten) provision in the Lease that said this amount was payable immediately, rather than "within five (5) business days after demand." The July 21, 2021 email to Mr. Basra said:

Jeet,

As we agreed to over the phone yesterday afternoon, Galt Machining is going to provide 3 post-dated cheques dated August 15, September 15, and October 15 for \$3,860.83 each. We will deposit on those days and security deposit will be paid.

If the cheques are not available on those days or they bounce, you will immediately owe the balance of the unpaid funds immediately.

Please mail in all the cheques as soon as possible

[38] Mr. Barsa did not reply to this email.

[39] There is no evidence before me to conclude that the Tenant agreed to having all the security deposit payable immediately, rather than within five business days of demand as set out in the Lease.

[40] I have considered the contemporaneous evidence of Mr. Herberman's email, sent one-day after his telephone call with Mr. Basra. Perhaps Mr. Herberman communicated this to Mr. Basra as being the Landlord's intention during their call, but I am not satisfied that Mr. Basra understood or agreed to immediately pay amounts outstanding, rather than within five business days. The sentence in which the requirement to pay funds "immediately" appears is separate from the paragraph which begins with, "As we agreed to over the phone..." As a result, I am left questioning whether there was agreement on this issue.

[41] Moreover, Mr. Herberman's affidavit states that he and Mr. Basra "agreed to an installment plan with respect to the security deposit", but it is silent with respect to whether there was also an agreement that upon default of payment, the amount would be payable immediately, rather than "within five business days of demand."

[42] Finally, the Lease was drafted by the Landlord. It already had a superior bargaining position with respect to the terms of the Lease. I am reluctant to eliminate a protection afforded to the Tenant in the Lease absent clear evidence that this was agreed to by the Tenant.

[43] For these reasons, I find that there was no oral agreement to have the security deposit payable immediately rather than within five business days after demand as set out in s. 2.06 of the Lease. As such, the notice of termination and the Landlord's possession of the Property on August 26, 2021 was premature and unlawful, according to the terms of the Lease.

### *Statute of Frauds*

[44] There was argument with respect to the impact of the *Statute of Frauds*, which I address briefly. The tenant argued that even if I were to find there was an oral agreement to amend the Lease to remove the five business days' notice to which the Tenant was entitled, such an oral agreement would be unenforceable, pursuant to s. 1(2) of the *Statute of Frauds*.

[45] Section 3 provides a limited exception where a lease is less than 3 years (which it is in this case), and where “the rent upon which, reserved to the landlord during such term, amounts to at least two-thirds of the full improved value of the thing demised.” There was insufficient evidence in this Application to allow me to conclude this exception applies.

[46] The Landlord argued that the Tenant did not cite the *Statute of Frauds* as a ground in its Notice of Application (although it did include the usual language of “such further and other grounds as the lawyers may advise”). Accordingly, the Landlord did not have notice to present evidence that the s. 3 exception applied.

[47] In any event, this argument is academic. Given my finding that there was no oral agreement to have the security deposit payable immediately, rather than within five business days after demand, there is no need to resort to the *Statute of Frauds*.

#### *Other Arguments Made by the Tenant*

[48] Given my findings above, it is not necessary for me to make findings on the other alternative arguments made by the Tenant, including injunctive or equitable relief from forfeiture.

[49] If I were to consider equitable relief, I note that the evidence revealed many instances where the Landlord made accommodations for the Tenant, and that the Tenant had several instances in the past where it failed to live up to its obligations. Given this history, I would not be prepared to grant an interim, interlocutory or permanent injunction restraining the Landlord from taking further action to terminate the Lease in the event of a future default under the Lease. I am not satisfied that the balance of convenience would favour granting this relief. The Tenant is cautioned to ensure it strictly complies with its legal responsibilities under the Lease.

#### **CONCLUSION**

[50] For the reasons given, and conditional on payment by the Tenant to the Landlord within 5 business days of this Judgment the security deposit of \$11,582.50, plus Rent for the month of December 2021 (including Net Rent, and any applicable Additional Rent), the following requested relief by the Tenant is granted:

- a. A declaration that the Landlord’s termination of the lease on August 25, 2021 was invalid and not lawful, and that the Lease remains in full force and effect.
- b. An order requiring the Landlord to give exclusive possession of and access to the Property in accordance with the Lease.
- c. An order that issues related to damages caused by the unlawful termination of the Lease proceed to trial.

#### **COSTS**

[51] Parties are encouraged to agree upon an appropriate cost award, with due regard to my reasons. The parties have already uploaded to CaseLines their respective Bill of Costs. If there is

no agreement, cost submissions may be submitted that do not exceed three pages. The Tenant shall deliver any cost submissions by December 23, 2022. The Landlord shall deliver its submissions by January 14, 2022. The Tenant shall delivery any reply submissions by January 21, 2022.

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M. D. Sharma J.

**Released:** December 10, 2021

**CITATION:** Galt Machine and Plating Inc. v. MLS Group Ltd., 2021 ONSC 8156  
**COURT FILE NO.:** CV-21-00672174  
**DATE:** 20211210

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

GALT MACHINE & PLATING INC

Applicant

– and –

MLS GROUP LTD

Respondent

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**REASONS FOR JUDGMENT**

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Sharma J.

**Released:** December 10, 2021



# TAB 15

**S**

**S**

Citation: *Graham v. Sable Developments Inc.*,  
2019 BCSC 1157

Date: 20190716  
Docket: 17958  
Registry: Salmon Arm

Between:

**e                      ra a , S ep e See       er,  
                         a a    1271487       er a       .**

Plaintiffs

And

**Sa e e e p e s       .**

Defendant

Before: The Honourable Mr. Justice Marchand

**eas    s    r               e**

Counsel for the Plaintiffs:

R.A. Chorneyko

Counsel for the Defendant:

S.M. Kelly

Place and Date of Trial/Hearing:

Kamloops, B.C.  
June 25, 2019

Place and Date of Judgment:

Kamloops, B.C.  
July 16, 2019

r    

[1] Judy Graham and Stephen Seelinger are common law partners who own and live at #309 – 326 Mara Lake Lane in Sicamous, in a strata development known as Legacy on Mara Lake (“Legacy”). Ms. Graham’s son, Kelly Bunnah, owns and lives at #509.

[2] A predecessor to Sable Developments Inc. (“Sable”) developed Legacy and sold unit #309 to 1271487 Alberta Ltd. (“127 Ltd.”) and unit #509 to Mr. Bunnah in 2013. 127 Ltd. is a holding company owned by Ms. Graham and Mr. Seelinger. 127 Ltd. purchased unit #309 for tax planning purposes. In 2014, Ms. Graham and Mr. Seelinger learned that the tax advice they had received was faulty and, at the expense of their tax advisor, 127 Ltd. transferred unit #309 to Ms. Graham and Mr. Seelinger.

[3] The plaintiffs allege that they were induced to purchase units #309 and #509 by the promise that they could use four additional parking stalls until the developer had completed “Phase 2” of its development. The plaintiffs did in fact use the additional parking stalls with no issue until 2018. At that time, Sable demanded that the plaintiffs vacate the additional parking stalls, even though Phase 2 had not been started, never mind completed. The plaintiffs have brought this action to enforce what they characterize as a collateral parking licence agreement.

[4] Relying on an “Entire Agreement” clause within the contracts of purchase and sale, Sable says there was no enforceable collateral agreement regarding additional parking stalls. Sable submits that it has gratuitously allowed the plaintiffs to use four additional parking stalls in accordance with the terms of a letter sent by the developer to the plaintiffs after they entered into the contracts of purchase and sale. Sable says the plaintiffs no longer have any right to use the additional parking stalls and seeks to have the plaintiffs’ claim dismissed.

[5] The matter has come before me by way of summary trial.

**re ar ss es**

[6] Sable objects to the admissibility of an affidavit provided by a legal assistant from the office of counsel for the plaintiffs, which attaches a copy of an internal email between two employees of the developer dated March 5, 2013. Sable submits that the affidavit was late and should not be introduced into evidence through the affidavit of a legal assistant without any context.

[7] Despite its late service, I admit the affidavit and attached email. The email came from Sable's documents and speaks for itself. It does not require context to be understood. In my view, admission of the email merely closes the loop on what transpired and causes no prejudice to Sable. Coming as it did, after the negotiations between the plaintiffs and the developer concerning the additional parking stalls had concluded, admission of the email does not alter the outcome of the case.

[8] Sable also objects to a Reply filed by the plaintiffs seeking alternative relief. As will be seen, I am granting the primary relief sought by the plaintiffs so there is no need for me to consider the appropriateness of their Reply.

**a r**

[9] The background is not in serious dispute.

[10] In February 2013, Mr. Seelinger entered negotiations with the developer for the purchase of two condominium units within Legacy, one for Mr. Seelinger and Ms. Graham, and the other for Mr. Bunnah. In due course, the developer agreed to sell unit #309 to 127 Ltd. for \$410,000 and unit #509 to Mr. Bunnah for \$250,000. The price included two parking stalls for each of the units.

[11] Parking was very important to the plaintiffs. They were concerned that the two stalls associated with each unit would be inadequate for their needs and hoped to secure additional parking as part of their purchases. As a result, they had a number of communications with the developer's Sales Director, Kevin Blackwell.

[12] The uncontested evidence is that Mr. Blackwell explained to Mr. Seelinger that “Phase 1” of the development had created parking stalls over and above what was required for purchasers within Phase 1. Mr. Blackwell further explained that these extra parking stalls were intended for purchasers within Phase 2. Until Phase 2 was built, Mr. Blackwell explained that the extra parking stalls were the property of the developer to deal with as it wished. On behalf of the plaintiffs, Mr. Seelinger endeavoured to secure the use of additional parking stalls until Phase 2 was complete.

[13] On February 19, 2013 at 9:47 a.m., Mr. Seelinger emailed proposals to purchase units #309 and #509 to Mr. Blackwell. One of the terms proposed by Mr. Seelinger with respect to each unit provided as follows:

Two extra parking stalls (one per level) done as a separate agreement with developer, rent to be \$1 per unit per month until phase #2 of project completed, with option to purchase for 25% of build value (Build value \$25,000) if phase #2 does not move forward.

[14] At 2:54 that afternoon, Mr. Blackwell responded “No” with respect to Mr. Seelinger’s proposals regarding extra parking stalls. Instead, Mr. Blackwell offered the following:

Extra Parking Stall - ... We can lend you 2 stalls at no cost until Phase 2. We can’t offer any future contracts for possible sales of these extra parking stalls, as they belong to Phase 2 only.

[15] On February 20, 2013, Mr. Seelinger replied to Mr. Blackwell on behalf of the plaintiffs offering to purchase unit #309 for \$410,000 and unit #509 for \$250,000. With respect to the extra parking for each unit, Mr. Seelinger wrote:

Parking – one extra stall on both p1 and p2 to be loaned as discussed for 2 [years], with some sort of agreement that if phase #2 const is delayed or canceled that the extra [stalls] on loan could be retained until const of phase #2 is complete.

[16] On February 21, 2013, Mr. Blackwell replied to Mr. Seelinger and Mr. Bunnah that the developer was in agreement with the purchase prices and various other terms. With respect to the extra parking stalls, Mr. Blackwell wrote:

Extra Parking

- 4 Stalls total (2 per unit) will be rented to units 309 + 509 for a 2 year term at no cost. At the end of 2 years if parking stalls are not required by developer then agreement will be continued to be rented for future. This will be a letter signed by developer and sent to you during the condition period.

[17] On February 22, 2013 at 8:31 a.m., Mr. Seelinger emailed Mr. Blackwell to “clarify the terms of the sale for both Units.” With respect to extra parking for each unit, Mr. Seelinger wrote:

Two Extra parking stalls... to be loaned from Developer for a 2 year period minimum as a separate agreement to purchase [of each] unit, with the added agreement that until the loaned stalls have to be placed on Title with completion of Construction of Phase 2 of the Legacy, they will continue to be loaned to the Owner [of each unit].

[18] At 9:20 a.m. that morning, Mr. Blackwell replied:

Yes the terms listed [in Mr. Seelinger’s email] are as we discussed and agreed to. The Parking wording will come from the developer in a letter but that is the basis. They are already on title for phase 2, so that wording doesn’t [necessarily] work, but will come up with something.

[19] In subsequent emails, various other details of the purchases were tidied up, including that 127 Ltd. would be the purchaser of unit #309.

[20] Mr. Seelinger’s uncontested evidence is that the “acquisition of the [additional] parking stalls was... a crucial factor” in the plaintiffs’ decision to purchase the condominium units.

[21] On March 5, 2013, the developer formally accepted offers from 127 Ltd. and Mr. Bunnah to purchase units #309 and #509 for \$410,000 and \$250,000 respectively. The contracts of purchase and sale indicated that each purchase included one boat slip, two parking stalls and one storage locker and were subject to typical conditions for the benefit of the purchasers. The conditions with respect to Mr. Bunnah’s purchase of unit #509 were to be waived or fulfilled by March 15, 2013. The conditions with respect 127 Ltd.’s purchase of unit #309 were to be waived or fulfilled by April 12, 2013.

[22] The contracts of purchase and sale were silent with respect to the extra parking stalls but did include “Entire Agreement” clauses that provided as follows:

re ree e eprese a s. The Purchaser acknowledges and agrees that this Agreement constitutes the entire agreement between the parties with respect to the sale and purchase of the Strata Lot and supersedes any prior agreements, negotiations or discussions, whether oral or written, of the Vendor and Purchaser, and that there are no representations, warranties, conditions, or collateral contracts, express or implied, statutory or otherwise, or applicable hereto, made by the Vendor, its agents or employees, or any other person on behalf of the Vendor, other than those contained herein and in the Disclosure Statement, including, without limitation, arising out of any sales brochures, models, websites, representative view sets, showroom displays, photographs, illustrations or renderings or other marketing materials, specifications, details, dimensions and floor plans set out in any materials viewed by the Purchaser or made available for his viewing. In particular, the Purchaser acknowledges and agrees that the materials, specifications, details, dimensions and floorplans set out in any materials viewed by the Purchaser are approximate and subject to change without notice in order to comply with building site conditions and municipal, structural and Vendor and/or architectural requirements.

[23] Also on March 5, 2013, Mr. Blackwell emailed the General Manager of the developer, Mary Jo Kryczka, regarding “Parking Stall Letters” as follows:

Hi Mary Jo

Here is the summary of the parking.

For both units 309 + 509.

1 Parking Stall on Level 1... and 1 Parking Stall on Level 2...

2 Year agreement at no charge to rent the stalls.

After 2 Years the agreement will be renewed on a quarterly basis until such time as Developer needs the stalls for Phase 2.

Let me know if there [are] any questions.

[24] The President of the developer, Sam Boguslavsky, signed identical letters regarding additional parking stalls addressed to 127 Ltd. and to Mr. Bunnah on March 14 and 15, 2013 respectively. These letters provided as follows:

Please accept this letter as written confirmation that upon closing... the Purchaser will be granted the temporary use of Two (2) additional underground parking stalls.

The Purchaser shall be provided with the exclusive use of [two identified parking stalls]... for a period of Two (2) years beginning on the Closing Date.

At the end of the two year period, provided the Developer does not require the use of the stalls the Developer shall notify the Purchaser in writing and this agreement shall be renewed on a quarterly basis.

As no monies are being exchanged for the temporary use of the Two (2) stalls..., there is no financial compensation owing to either the Developer or the Purchaser in conjunction with this agreement.

This agreement is exclusive to the Purchaser as named above and is for his sole and exclusive use only so long as he is the owner of [identified unit].

**s a r e e e s - r a s e r a e.**

[Emphasis in original.]

[25] Though Mr. Boguslavsky gave evidence in cross-examination on his affidavit that the usual practice would have been for the letters addressed to the plaintiffs to have been sent at the time they were signed, the uncontested evidence is that the plaintiffs did not receive the letters until later. The plaintiffs received the letter addressed to Mr. Bunnah on March 18, 2013, three days after he was required to waive or fulfill the conditions for his benefit in the contract of purchase and sale with respect to unit #509. The plaintiffs received the letter addressed to 127 Ltd. on an unspecified date after 127 Ltd. was required to waive or fulfill the conditions for its benefit in the contract of purchase and sale with respect to unit #309.

[26] The sale of unit #509 to Mr. Bunnah appears to have completed on March 27, 2013. The sale of unit #309 to 127 Ltd. appears to have completed on June 14, 2013.

[27] Mr. Seelinger was concerned that the letters regarding the additional parking stalls derogated from his understanding of the agreement he had reached with Mr. Blackwell. At some point, Mr. Seelinger contacted Mr. Boguslavsky to suggest a meeting to discuss and clarify the contents of the letters. That meeting did not occur until July 2013.

[28] At the July 2013 meeting, Mr. Seelinger raised the issue of what Mr. Boguslavsky meant when he wrote that after two years the plaintiffs could continue to use the additional parking stalls “provided the Developer does not require use of



the stalls”. The uncontested evidence is that Mr. Boguslavsky told him that meant when they were required for Phase 2, when it was completed. When Mr. Seelinger raised the issue of quarterly renewals after the first two years, Mr. Boguslavsky reassured Mr. Seelinger that was just a formality and that the developer did not really intend to send any quarterly notices. Mr. Boguslavsky told Mr. Seelinger that he had no reason to be concerned about the parking stalls moving forward.

[29] Nothing much happened with respect to the plaintiffs’ use of the extra parking stalls for several years. The only events of consequence involved 127 Ltd. transferring ownership of unit #309 to Mr. Seelinger and Ms. Graham and the developer being amalgamated into Sable. Mr. Seelinger and Ms. Graham did not seek the permission of the developer or Sable to transfer the benefit of the additional parking stalls from 127 Ltd. to themselves personally. None of the parties took any steps to “renew” the parking arrangements after the first two years.

[30] The developer made somewhat similar arrangements with other purchasers for additional parking stalls. In the summer of 2018, Sable gave notice to all unit owners with “expired temporary parking arrangements” to vacate their additional parking stalls. All of the owners, except the plaintiffs, have complied with Sable’s request to stop using their additional parking stalls.

### **S a r S a r a**

[31] I agree with the parties that this case is suitable for summary trial. There is no serious dispute on the facts and the summary trial procedure is appropriate and proportionate for this type of case.

### **e a r p e s**

[32] The parties referred me to three authorities, *Balfour v. StormCloud Network (Canada) Incorporated*, 2015 BCSC 1232 (*Balfour BCSC*), *Balfour v. Tarasenko*, 2016 BCCA 438 (*Balfour BCCA*) and *Zippy Print Enterprises Ltd. v. Pawliuk* (1994), 100 B.C.L.R. (2d) 55 (C.A.).

[33] In *Balfour BCCA* at paras. 44-46, the Court of Appeal succinctly summarized the basic principles of contract law. The Court held:

[44] A contract involves an exchange of promises, acts, or acts and promises, as a result of which each party receives something of value from the other. The promises are reciprocal undertakings as to the future conduct of the promisors. . A promise based solely on a past act or obligation is simply gratuitous, and not binding in nature. In order to create an enforceable bargain, a promise must be supported by new consideration: see G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Toronto: Thomson Carswell, 2011), at 3-5, 82-85, 108.

[45] In *The Law of Contract in Canada*, Professor Fridman explained the modern meaning of consideration. In doing so, he noted, with approval, the definition expressed by Barry C.J. in *Robertson v. Robertson* (1933), 6 M.P.R. 370 at 389 (N.B.C.A.):

The principal requisite and that which is the essence of every consideration, is that it should create some benefit to the party promising or some trouble, prejudice or inconvenience to the party to whom the promise is made.

[46] A binding contract may be evidenced in writing, orally, by conduct or by a combination thereof. When reduced to writing, subject to certain exceptions, extrinsic evidence is not admissible to add to, subtract from, vary or contradict its terms. While in principle a related but independent oral collateral agreement may also be concluded, such agreements are rare and an intention to create binding legal relations must be proved strictly. In addition, and importantly, to be enforceable an alleged collateral contract cannot stand if it clearly contradicts the terms of the written agreement: *Hawrish v. Bank of Montreal*, [1969] S.C.R. 515.

[34] Oral extrinsic evidence is also known as “parol evidence”. . The general rule is that oral extrinsic evidence is not admissible to add to, subtract from, vary or contradict a written contract. This is known as the “parol evidence rule”: *Balfour BCSC* at para. 26, *aff’d Balfour BCCA*.

[35] With respect to the interpretation of contracts, the Court in *Balfour BCCA* adopted the following passage from *Athwal v. Black Top Cabs Ltd.*, 2012 BCCA 107 at paras. 42-43:

[42] The contractual intent of parties to a written contract is objectively determined by construing the plain and ordinary meaning of the words of the contract in the context of the contract as a whole and the surrounding circumstances (or factual matrix) that existed at the time the contract was made, unless to do so would result in an absurdity. Where the language of a contract is not ambiguous (that is, when viewed objectively it raises only one

reasonable interpretation), the words of the written contract are presumed to reflect the parties' intention. An interpretation that renders one or more of the contract's provisions ineffective will be rejected.

[43] Extrinsic evidence to explain the meaning of an unambiguous contractual provision is not admissible. Evidence of a party's subjective intention in executing the contract, or of their understanding of the meaning of the words used in the contract, is not admissible to vary, modify, add to or contradict the express words of the written contract. This is particularly so where a contract contains an "entire agreement" clause. As was noted by the authors of *Cheshire, Fifoot and Furmston's Law of Contract*, 13th ed. (London, UK: Butterworths, 1996) at p. 127, "the court is usually concerned not with the parties' actual intentions but with their manifested intention."

[36] In *Zippy Print Enterprises Ltd. v. Pawliuk* (1994), 100 B.C.L.R. (2d) 55 (C.A.), the Court of Appeal explored whether a general exclusion clause in a standard form contract overrode a pre-contractual oral representation that induced a party to enter the contract. While recognizing that a properly framed exclusion clause *could* limit liability flowing from a misrepresentation, that was not always so. At paras. 41-42, the Court held:

[41] In short, apart from the application of an exclusion clause, a commercial enterprise cannot make an intentional oral representation designed to persuade a customer or other party to enter into a standard form contract of adhesion and then, by invoking the Parol Evidence Rule, rely on the fact that the contract is in writing to escape liability flowing from the fact that the representation is untrue. In those circumstances the oral representation will be regarded as forming an essential element in the relations between the parties, either on the basis that the written contract document was not intended to form the entire agreement between the parties (the one contract theory), or, alternatively, on the basis that the oral representation, when it was acted upon by the person to whom it was made entering into the written contract, became a separate or collateral contract on which liability may be founded (the two contract theory).

[42] Of course, on either theory, liability for the damages flowing from the falsity of the representation can be excluded by a properly framed exclusion clause which both parties have considered and which both parties intend should limit liability flowing from the representation. But if the exclusion clause is part of a standard form contract of adhesion it will not operate to exclude liability in contract in the face of an explicit representation which induced the making of the contract. In those circumstances the more specific term, namely the explicit representation, will prevail. For examples of cases where the general exclusion clause, excluding representations and liability arising from representations, has given way before the specific representations that were intended to induce the making of the contract, see, in England, *Esso v. Mardon* (C.A.), *Evans v. Merzario* (C.A.), *Dick Bentley Productions Ltd. v. Harold Smith (Motors) Ltd.* (C.A.) and, in Canada, *Sperry*

*Rand Canada Ltd. v. Thomas Equipment Ltd.* (N.B.C.A.), *Roberts v. Montex Development Corp.*, [1979] 4 W.W.R. 306 (B.C.S.C.), and particularly *Betker v. Williams* (1992), 63 B.C.L.R. (2d) 14 (B.C.C.A.).

[37] In *Grewal v. Grewal*, 2017 BCSC 573, Fleming J. reviewed the law on collateral contracts and entire agreement clauses at paras. 36-50. At para. 49, Fleming J. concluded as follows:

[49] Considered together, the authorities establish the effect of an entire agreement clause on an oral collateral agreement depends primarily on the parties' reasonable intentions. The court determines whether they objectively intended the entire agreement clause to apply to a collateral agreement with reference to the factual matrix. Important factors are the sophistication of the parties, whether the terms of the written agreement were negotiated with the benefit of legal advice, the words used in the entire agreement clause and perhaps the extent to which the collateral agreement induced one party to enter into the main agreement.

[38] Though *Balfour* and *Grewal* dealt with oral collateral agreements, and *Zippy Print* dealt with oral representations and an exclusion clause, in my view, the principles expressed in these cases apply equally to written collateral agreements and entire agreement clauses.

[39] The topic of implied contractual terms also came up during the parties' submissions. Though the parties did not refer me to any authority on the point, the Court in *Athwal* summarized the principles at para. 48:

[48] There is a presumption against adding an unexpressed term to a contract by implication unless: (i) it is necessary to do so in order to give the contract business efficacy (this does not include a test of reasonableness for the contract); (ii) to correct an obvious oversight for which there is "no dispute" that the parties intended to include such a term in the contract (i.e. the implied term "goes without saying"); (iii) the term can be clearly and precisely formulated; and (iv) the term will not conflict or be inconsistent with an express term of the contract. However, a term of a contract may only be implied where it is necessary to give legal effect to the parties' presumed intention, as expressed in the contract, and to give business efficacy to the contract. The onus is on the party seeking to establish an implied term of a contract. See *Perin v. Shortreed Joint Venture Ltd.*, 2009 BCCA 478 at para. 27.

a s s

[40] The main issue in this case is whether the “Entire Agreement” clauses in the standard form contracts of purchase and sale entered by the plaintiffs override the separate agreement the parties reached regarding additional parking. In my view, they do not.

[41] The objective of the Entire Agreement clauses is plain. It is to protect the developer and provide certainty to the parties about the terms of the contracts of purchase and sale. The clauses specifically state that the written contracts of purchase and sale “supersede any prior agreements... whether written or oral” and that there are “no... collateral contracts... other than those contained herein”. The non-exhaustive list of examples of matters that do not form part of the contracts make clear that typical pre-contractual exchanges between the developer and the plaintiffs did not form part of the contracts. The pre-contractual agreement of the parties with respect to additional parking stalls was, however, atypical.

[42] The developer induced the plaintiffs into parting with \$660,000 to purchase two condominium units, in part, by the promise to provide two additional parking stalls for each of the two units. Mr. Seelinger’s pre-contractual pre-occupation with additional parking demonstrates that the inducement was an important, if not critical, factor in the plaintiffs’ decision to purchase their units. A classic collateral contract was formed.

[43] While the exact wording of the collateral contract was not completely buttoned down, the terms were plain enough. If the plaintiffs purchased two units, the developer would provide the plaintiffs with two additional parking stalls for each unit for a minimum of two years until the completion of Phase 2. As Mr. Blackwell said to Mr. Seelinger in his email of February 22, 2013, “that is the basis”. Mr. Seelinger referred to this as a “separate agreement” and Mr. Blackwell agreed.

[44] Though Mr. Seelinger holds himself out as a person with considerable business experience, the Entire Agreement clauses were in a standard form that the plaintiffs had essentially no ability to negotiate. There is no suggestion that either the

developer or the plaintiffs set their minds to the terms of the Entire Agreement clauses. In fact, there is no suggestion that the plaintiffs' attention was even drawn to these clauses. Further, given the nature, number, specificity and importance of the written communications between Mr. Seelinger and Mr. Blackwell, there can be no serious dispute that the parties intended that the terms of the Entire Agreement clauses would limit the developer's liability to live up to its separate agreement with the plaintiffs regarding the additional parking stalls.

[45] Viewed objectively, the parties' intentions were clear. They intended to be bound by the terms of the collateral parking agreement in spite of the wording that might suggest otherwise in the Entire Agreement clauses. On the authority of *Zippy Print*, the more specific agreement with respect to the additional parking stalls must prevail.

[46] Though the parties' conduct following the formation of the collateral parking agreement cannot be relied on to determine their contractual intent, I take comfort from the fact that their post-collateral contract conduct demonstrates their understanding that they were bound by the separate agreement regarding additional parking stalls.

[47] After the plaintiffs had committed to their purchases, Mr. Boguslavsky provided letters to them outlining their right to use the additional parking stalls. In the letters, Mr. Boguslavsky correctly characterized the arrangement as an "agreement". There was nothing "gratuitous" about it.

[48] When Mr. Boguslavsky purported to unilaterally change the terms of the additional parking agreement by way of the letters, Mr. Seelinger called him on it. Mr. Boguslavsky responded by reassuring Mr. Seelinger that the developer would in fact live up to the terms of the original agreement – and for five years, that is exactly what the developer did. "Renewals" were never part of the additional parking agreement and, as Mr. Boguslavsky reassured Mr. Seelinger, no renewal agreements were ever sent by the developer or Sable. Phase 2 was not completed and the plaintiffs continued to use their additional parking stalls.

[49] With respect to unit #309, Sable submits that its agreement with 127 Ltd. ended when 127 Ltd. transferred unit #309 to Mr. Seelinger and Ms. Graham personally in 2014. I do not agree.

[50] Despite the statement in Mr. Boguslavsky's letters of March 14 and 15, 2013 that "the Agreement is not transferable", the original and enforceable collateral agreement Mr. Seelinger reached with Mr. Blackwell regarding additional parking stalls is silent with respect to transferability. In these circumstances, Sable submits that the additional parking agreement was only with 127 Ltd. and now that 127 Ltd. no longer owns unit #309, the additional parking agreement is at an end. The plaintiffs submit that, if anything, 127 Ltd. continues to enjoy the benefit of the additional parking agreement and exercises that benefit by allowing Mr. Seelinger and Ms. Graham to use the additional parking.

[51] The positions of both sides to the dispute require the court to imply an unexpressed term into the contract. Sable would have the court imply a term that, without further agreement, the contractual right of 127 Ltd. to use the additional parking stalls continues only so long as 127 Ltd. owns unit #309. The plaintiffs would have the court imply a term that 127 Ltd. could use the additional parking stalls, however it sees fit, until the completion of Phase 2 – even if 127 Ltd. no longer owns unit #309. Both positions are problematic. With the developer's implied term, in the event of a transfer of unit #309 from 127 Ltd. to Mr. Seelinger and Ms. Graham, the very people intended to benefit from the additional parking agreement would lose that benefit. With the plaintiffs' implied term, the developer would lose all control of the additional parking stalls until the completion of Phase 2.

[52] It is obviously necessary to imply a transferability term to give the contract business efficacy. The question is what term to imply. In my view, neither of the terms advanced by the parties fits the bill.

[53] Though 127 Ltd. was the purchaser of unit #309, the objective of the additional parking agreement was to allow the intended human occupiers of the unit, namely Mr. Seelinger and Ms. Graham, to use the additional parking stalls until the

completion of Phase 2. Had the parties foreseen what has actually transpired with respect to the ownership of unit #309 and set their minds to transferability, there can be no serious dispute about what would have happened. They would have agreed that, on a transfer of the unit from 127 Ltd. to Mr. Seelinger and Ms. Graham, Mr. Seelinger and Ms. Graham could continue to use the additional parking stalls until the completion of Phase 2. This term is precise and not inconsistent with the terms of the additional parking agreement.

**s a r e r**

[54] In the result, I grant judgment in favour of Mr. Seelinger, Ms. Graham and Mr. Bunnah. The additional parking agreement remains in full force and effect and they have the exclusive right to make use of the additional parking stalls until the completion of Phase 2 for so long as they own and occupy units #309 and #509.

[55] Mr. Seelinger, Ms. Graham and Mr. Bunnah shall also have their costs.

“L.S. Marchand J.”

MARCHAND J.



# **TAB 16**

**CITATION:** Gregor Homes Ltd. v. Woodyer, 2022 ONSC 4089

**BRACEBRIDGE COURT FILE NO.:** CV-18-00000159

**DATE:** 20220711

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

Gregor Homes Ltd.

Plaintiff

– and –

Julianne Christine Woodyer and Steven  
John Nikifork

Defendants

Judith Turner, for the Plaintiff

Neil Abbott and Erica Johnston, for the  
Defendants

**HEARD:** February 1, 8-12, 16, 17 and 26,  
2021 and January 13-14, 2022

**REASONS FOR JUDGMENT**

**MCKELVEY J.:**

**Introduction**

- [1] This action arises out of a contract for the construction of a new home by the defendants. The construction was governed by the terms of a contract which provided for cash allowances for a number of items covered under the contract. During the course of construction a number of the cash allowances were exceeded. The defendants were billed and paid for the amounts in excess of the cash allowances. Upon completion of the contract, the plaintiff sent a request for payment of the hold-back. The defendants refused to pay the hold-back amount which resulted in this claim by the builder. The homeowners have counterclaimed and claimed a set off for the amounts which are in excess of the cash allowances. They also claim damages for work which is alleged to have been defective.

**Interpretation of the Construction Contract**

- [2] Article 2.1 of the construction contract provides as follows:

Subject to the inclusion of any upgrades pursuant to paragraph 2.4 of this Agreement, the owner shall pay the builder the sum of (\$506,901.45) plus HST at 13% (the “contract price” \$572,798.64).

[3] Paragraph 2.2 (a) of the contract provides as follows:

Any and all design changes, inclusions or extras (collectively, the “upgrades”) which are requested by the owner, subsequent to the owner executing this Agreement, must be acknowledged in writing by both the owner and the builder and the appropriate amendment(s) shall be made to the contract price.

[4] Under section 2.4 of the contract:

The builder acknowledges the right of the owner to retain a construction lien hold-back from the final payment as required by the *Construction Lien Act*. The owner agrees that any such hold-backs shall be released to the builder on the forty-fifth (45<sup>th</sup>) day following the date of payment for substantial completion of the builder’s contractual obligation.

[5] Under Article 1.1, the builder agreed to perform all of the work as required to construct the home in a good and workman-like manner in accordance with the plans and specifications attached as schedules. Schedule A sets out a list of specifications for the new home. For eleven items, Schedule A sets out that, “a cash allowance has been included for this item”. Under Schedule C, cash allowances are set out. For example, \$10,000 is allocated for a well. \$20,000 is set out for a septic system. \$7,500 is set out for the driveway. \$10,000 is set out for stairs and railings, including staining.

[6] As it turned out, the cost for a number of the cash allowance items went substantially over budget. On those items the defendants take the position that this was a fixed price contract and they are not responsible for any overages above the cash allowance price. The defendants rely on the fact that none of the changes were requested by them and they did not, therefore, constitute “upgrades” to which they are liable under the contract.

[7] The issues raised by the defence on the cash allowance issue involve the following:

1. The construction of the septic system;
2. The construction of the driveway and lot clearing;
3. The construction of a well;
4. The construction of stairs and railings in the home;
5. The construction of a fireplace in the home;
6. The construction of garage doors;

7. The staining of the house;
8. The backsplash in the kitchen; and
9. The purchase of locks and handles for exterior doors.

[8] In addition to the above, the defendants claim for repairs to the roof and an air vent that were installed as part of the construction. The defence also claims for the additional cost of an air conditioning unit which was purchased after the home was completed. Further, the defendants claim for the cost of certain deficiencies in failing to paint some of the interior walls and problems with the exterior stairs, the alleged failure to properly grade the back of the house, and a failure to replace the kitchen cupboards and doors, as well as cracked newel posts. Finally, the defendants' claim for the cost of staining the home following the completion of its construction. They assert that this cost was included in the price of the contract.

### **Background**

- [9] The home in question was constructed in Muskoka on Sparrow Lake. The plaintiff Gregor Homes Ltd. ("Gregor Homes") is a local builder. The defendants lived in Toronto and purchased a 15 acre property on Sparrow Lake in 2009. In 2017, they decided to move from their residence in Toronto. Their plan was to sell their Toronto home, build a new home on Sparrow Lake, and use the remaining proceeds from the sale of their home in Toronto to finance the education of their son who was 16 at the time and also to build a nest egg for retirement. The defendants became interested in purchasing a pre-fabricated home from Timber Block Homes. The particular model of home they were interested in was called the "Labrador" Model Home.
- [10] Timber Block Homes, as the manufacturer of the pre-fabricated home was not responsible for the actual construction of the home. Instead they recommended that the defendants contract with Gregor Homes for the actual construction. The defendants followed up with Gregor Homes and had a number of meetings with James Bazely who was the president of the company. During their discussions with Mr. Bazely, they emphasized that they were on a very tight budget and that they could not afford any financial surprises. In the meetings with Mr. Bazely, there were some draft budgets prepared which set out the work that was to be done and itemized costs allocated for the work.
- [11] Prior to the signing of the contract, Mr. Bazely was provided with an email from the defendants dated February 16, 2017. This email set out details of what they were hoping to build. For example, in the great room, it was specified that they wanted a floor to ceiling fireplace clad in cultured stone, with raised hearth and a large timber mantel. They also wanted a wood burning fireplace insert with a blower suitable for heating.
- [12] In the kitchen, they specified they were looking for mission style cabinets with glass in at least some of the uppers. In this email they also raised a number of questions based on their budget. For example, they asked,

We would like to consult with you further about the exterior cladding on the walkout basement. We really like the cultured stone, but doubt our budget would support it. Instead of full cultured stone, wondering what the cost savings would be to cover only the bottom three to four inches of wall space with stone with the rest of the wall above it in wood siding.

- [13] The parties entered into a construction contract dated May 25, 2017. Under paragraph 4.2 of the Agreement, it states,

This Agreement supersedes all prior negotiations, representations, warranties or agreements, either written or oral, relating in any manner to the construction of the home on the property, and can only be amended in writing signed by both parties.

- [14] During the course of the construction the defendants signed off on overages for a variety of costs which exceeded the cash allowances.

- [15] On August 27, 2018, after completion of the construction the defendants wrote to the plaintiff. They reviewed the cost overages and noted that, “the total cost overrun for these and other items that Gregor Homes negligently underquoted or failed to provide is \$74,096 plus HST”. The defendants noted that as lay people they had no way of knowing the cost of allowance items, that they provided details of exactly what they wanted in advance of the contract and relied upon the expertise of Gregor Homes to exercise due diligence when providing estimated costs for these items. They also refer to the fact that they were very clear that their budget was tight and that they could not afford any financial surprises. They refer to the fact that Mr. Bazely assured them that he would include “healthy” amounts for all allowances to ensure there were no surprises so long as they did not make any material changes. In the letter the defendants make it clear that they would not be making the final hold-back payment and that they would hold Gregor Homes financially responsible for the difference between the value of the final draw and the amount of their “damages”.

### **The Issues to be Resolved in this Case**

- [16] According to the defence submissions there are five issues to be resolved in this case. They are as follows:

1. Did the parties enter into a fixed price contract that only allows for an increase in price in accordance with section 2.2 thereof?
2. Does an overage of the cash allowance values described in Schedule “C” to the contract result in an increase in price if no upgrade is made by the homeowners in accordance with section 2.2 thereof?
3. If an overage in the cash allowance changes the contract price, does the negligence of Gregor Homes in determining the cash allowance and/or the negligent misrepresentation of Gregor Homes in repeatedly telling the home

owners that the cash allowance was “healthy and generous” relieve the home owners from liability for any overage?

4. Notwithstanding the foregoing did the home owners waive the fixed price in the contract by signing various subtrade estimates and quotations and/or the two change orders from Gregor Homes?
5. If the home owners are entitled to set off and counterclaim against the claim of Gregor Homes, what is the appropriate amount of damages?

### **The Interpretation of the Contract in Relation to Cash Allowances**

- [17] An important issue in this litigation is the proper interpretation of the construction contract and whether the provisions with respect to cash allowances allowed the builder to increase the cost of the contract when the cash allowances have been exceeded. The defence position is that this was a fixed price contract and that unless there was an “upgrade” as defined under paragraph 2.2, they have no obligation to pay any overage.
- [18] I start from the proposition that the goal of contractual interpretation is to ascertain the objective intentions of the parties. It is a fundamental principle of contractual interpretation that a contract must be construed as a whole. These principles are clearly set out in the Supreme Court of Canada decision in *Sattva Capital Corporation v. Creston Moly Corporation*, 2014 SCC 53 (see paras. 55 and 64).
- [19] Further, the Supreme Court of Canada decision in *Sattva* makes it clear that the surrounding circumstances will be considered in interpreting the terms of a contract, although they must never be allowed to overwhelm the words of that agreement. The goal of examining such evidence is to deepen a decision maker’s understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The parol evidence rule does not apply to preclude evidence of the surrounding circumstances. Such evidence is consistent with the objective of finality and certainty because it is used as an interpretive aid for determining the meaning of the written words chosen by the parties, not to change or overrule the meaning of those words. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract.
- [20] The nature of the evidence that can be relied upon under the heading of surrounding circumstances will necessarily vary from case to case. However, it should consist only of objective evidence of the background facts at the time of the execution of the contract, that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the time of contracting. The parol evidence rule precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary or contradict a contract that has been wholly reduced to writing. The parol evidence rule does not, however, apply to preclude evidence of the surrounding circumstances. Such evidence is consistent with the objectives of finality and certainty because it is used as an interpretive aid for determining meaning of the written words

chosen by the parties, not to change or overrule the meaning of those words. The surrounding circumstances are facts known or facts that reasonably ought to be known to both parties at or before the date of contracting. Therefore, the concern of unreliability does not arise (see paras. 57-61 of the *Sattva* decision).

- [21] In considering the contract in this case, I have concluded that the provisions of Articles 2.1 and 2.2 must be read in conjunction with the provisions of Schedule A which identify that certain items are subject to a cash allowance which has been included for the item. The cash allowance is set out under Schedule C. So, for example, under Schedule A it talks about the design and installation of a septic system and notes that, “a cash allowance has been included for this item”. The cash allowance identified under Schedule C for a septic system is set at \$20,000. I interpret this provision to mean that if the cost of a septic system exceeded this amount, the cost overage would be the responsibility of the defendants.
- [22] The defendants argue that the contract for construction of their home is a “fixed price” contract and that there is no provision for increases in the price they are required to pay unless there is an “upgrade” requested by them. The defendants rely on Article 2.1 of the contract which as noted previously states, “subject to the inclusion of any upgrades pursuant to paragraph 2.4 of this Agreement the owners shall pay the builder the sum of \$572,798.64”. The applicable provision with respect to “upgrades” is found in Article 2.2 (as opposed to 2.4 of the Agreement). Article 2.2 provides for a definition of upgrades as follows: “Any and all design changes, inclusions or extras (collectively, “the upgrades”) which are requested by the owner, subsequent to the owner executing this Agreement, must be acknowledged in writing by both the owner and the builder and the appropriate amendment(s) shall be made to the contract price.” [Emphasis Added.] It is apparent from the wording of the contract that “extras” are to be added to the contract price. Schedule C sets out a series of cash allowances. The cash allowances are referenced in Schedule A which deals with the house specifications. For example item 6 of Schedule A refers to a “rough in driveway”. A cash allowance has been included for this item. It is apparent that the cash allowance represents the anticipated cost for this item but that it is subject to increase or decrease based on the actual cost. I base this conclusion on the fact that most items under Schedule A are not covered by a cash allowance and that the term in its ordinary meaning suggests that an amount has been “allowed for” in the context of any cash allowance item and that the exact cost is to be determined at a later time.
- [23] The defendants argue that they did not “request” any “upgrades” and that these extra costs were in fact passed on to them by the builder. However, for each of the cash allowance items, they were signed off by Mr. Nikifork. He clearly approved of any cost overages on the cash allowance items. By doing so I have concluded that he was requesting the extra in question. The defendants were clearly aware of the implications of signing off on an additional quotation for a cash allowance item. This is reflected in Mr. Nikifork’s email dated August 9, 2017 when he responded to the quotation from Robinson Haulage for the new septic system which was a cash allowance item and which came in above the cash allowance price. He states in his email:

Approved.

Also, we were expecting a quote on pushing in the driveway from Rob.  
Can you please provide us with a status on that estimate as well?

[24] I infer from this email that Mr. Nikifork was approving the additional charge over the original cash allowance for the septic system.

[25] Similarly, the defendants signed off or approved all the other items where there was a claim in excess of the cash allowance.

[26] As noted by the Court of Appeal in *Soboczynski v. Beauchamp*, 2015 ONCA 282, at para. 60, it is clear that the subsequent actions of the parties may be admissible to explain the true meaning and intent of the agreement.

[27] All of this leads me to conclude that there was a clear commitment on the part of the defendants to pay to Gregor Homes any amounts which they approved on the cash allowance items. All of the cash allowance items in issue were approved and paid for by the defendants as the construction proceeded.

[28] This conclusion is further supported by the email written by the defendants at the conclusion of the construction and when they advised the plaintiff that they were not prepared to pay the final contract amount. In this email, the defendants stated,

As lay people, we have no way of knowing the cost of allowance items. Therefore, we provided details of exactly what we wanted in advance of the contract and relied upon the expertise of Gregor Homes to exercise reasonable care and skill (due diligence) when providing the estimated costs for these items. Additionally, James walked the property in early May, prior to the contract being signed, so he personally saw that the property was heavily forested, required clearing, and a 500 foot driveway (a detail also provided in writing prior to our first meeting).

[29] I infer from this paragraph that the defendants were well aware as to how the cost allowance system worked under the contract. There is in fact no claim in this email that the defendants did not understand how the cost allowance system worked. Instead, their claim was based on a claim of alleged negligence by Gregor Homes in quoting on the allowance items. This is reflected in the final paragraph of the August 22, 2018 email where the defendants state,

Given that Gregor Homes was negligent by ignoring the details we provided when quoting on the allowance items, and given that our contract, written by Gregor Homes, notes that, “the parties agree that each shall be responsible to the other for negligence and that each shall reimburse the other for any damages sustained by reason of the negligence of the other party, his, her or its agents, servants, employees or anyone acting on his or her behalf”, we hold Gregor Homes financially



responsible for our damages; the cost overruns incurred during the build where no changes to the specifications had been requested. We look forward to Gregor Homes reimbursing us the difference between the value of the final draw and the amount of our damages.

- [30] It is apparent when the defendants first advised of their refusal to pay the hold back amount, that their claim was not based on a failure to understand the cost allowance system but rather on an alleged claim in negligence by the defendants for failing to exercise reasonable diligence in calculating the cash allowances referenced in the contract.
- [31] To the extent that there is any ambiguity in the terms of the provision, it is clear that the cash allowances were discussed in advance of the signing of the contract. The evidence of both Mr. Bazely and Ms. Woodyer were in agreement that the cash allowance provisions in the agreement were subject to a discussion prior to the signing of the contract. Mr. Bazely recalled that this discussion took place at the time of signing the Agreement, whereas Ms. Woodyer testified that this discussion took place in a parking lot following a meeting at the Timber Block premises. Ms. Woodyer testified that she did not really understand what a cash allowance was, but stated that Mr. Bazely assured them that if they provided detailed information he would develop a budget including the allowances. Mr. Bazely testified that he explained the cash allowance system to the defendants before the contract was signed.
- [32] There is, therefore, a significant difference between the evidence of Mr. Bazely and Ms. Woodyer. On this issue I prefer the evidence of Mr. Bazely that he fully explained the operation of cash allowances under the proposed contract. I found Mr. Bazely to be a credible witness on this issue. He gave his evidence in a straightforward manner. Generally he did not hesitate to acknowledge evidence which went against his own interest. For example, he readily acknowledged having been told by the defendants that they were on a tight budget and that he also told them his cash allowances would be generous and healthy. He also acknowledged that the defendants told him that they were in financial distress as a result of the overages.
- [33] On the other hand I found Ms. Woodyer's evidence about not being told as to how the cash allowances work to be unpersuasive. There would be no reason for Mr. Bazely to mislead Ms. Woodyer about how the cash allowances worked. In addition, in an email dated August 16, 2017 from Ms. Woodyer to the plaintiff, she stated,

Thank you Melissa, but we would still like to have all the invoices any of the items that are within the cash allowance schedule. James told us up front that is the way he works so the savings fall back to us and there are no misunderstandings. Am I missing something, I can't understand why this would be a problem since we are responsible to pay any overages or benefit of savings in those items.

- [34] As is apparent, Ms. Woodyer has correctly summarized how the cash allowance system works. If all the cash allowance is not used up entirely, then the balance returns to the client. However, if the cost goes over, the owner is responsible for paying any overage.
- [35] Ms. Woodyer was cross-examined about this email in her evidence. She maintained that this only applied to cash allowances where a higher cost of product was selected (for example, on the cost of flooring which was included as a cash allowance at \$6/sq. ft). She referred back to the earlier email from a representative of the plaintiff where Ms. Almonte, the project coordinator for Gregor Homes stated, “The clearing in the driveway was a cash allowance item as the exact costs were unknown at the time of quoting. Just like the other cash allowance items in the contract. For example, we do not know yet what flooring you will put in, so right now your allowance is \$6/sq. ft. If you pick something that is \$7/sq. ft., you will pay an additional \$1/sq. ft. If you pick something that is \$5/sq. ft., you will be credited \$1/sq. ft.”. It is readily apparent that the email from Ms. Almonte did not restrict the subject of cash allowances to items such as flooring.
- [36] Further, there is an email from February 6, 2018 from Ms. Woodyer to Ms. Almonte where she requests copies of actual invoices and receipts. In the email she states,
- I recall you sent us the invoices from suppliers for other items we requested when they went beyond the contract amount. Such as the driveway and clearing etc. Also invoices for other items that went beyond what was quoted in the contract.
- As you know the driveway, clearing, septic and fireplace were way underestimated resulting in us going over budget by nearly \$30,000 so far and cash flow remains tight, so we just want to see what we were paying for, in case there is some additional cost savings to be had. This item is also over budget, so I just want to review it like we did with the others.
- [37] This is further evidence that the defendants were proceeding on the understanding that they were responsible for payment of overages where the cash allowance on a specific item was exceeded. I reject the defendants’ evidence that they did not understand what a cash allowance was or that they believed that they were not to be responsible for any increased costs associated with the cash allowance system which they signed off on.
- [38] All of this leads me to conclude that the cash allowance provisions of the construction contract were intended by the parties as an estimate with respect to the cost for the cash allowance item and that the client would receive a credit to the extent that the cash allowance was not exhausted, but would also be responsible for any overage on that item.
- [39] I accept at the same time that the defendants were legitimately upset by the cost overruns on the contract. They had made it clear to Mr. Bazely that they were on a tight budget and the cost overruns caused a significant financial hardship on them. This leads me to consider a further defence raised by the defence. They argue that Gregor Homes

misrepresented the quote of what it would cost to build the home and that in any event, Gregor Homes was negligent in preparing the cash allowance amounts included in the contract.

[40] With respect to the negligent misrepresentation argument, Article 4.2 of the Agreement provides that the “Agreement supersedes all prior negotiations and representations, either written or oral, relating in any manner to the construction of the home.”

[41] I recognize that there is some controversy in the law over how these entire agreement clauses which specify that the written text agreed to by the parties constitutes the whole contract and excludes all representations made outside of the document. It is noted by Geoff Hall in his text: *Canadian Contractual Interpretation Law* (4<sup>th</sup> ed. 2020),

The main difficulty with entire agreement clauses is that fundamental principles of contractual interpretation pull in polar opposite directions when they are at play. On the one hand, the primary goal of contractual interpretation is to give effect to the parties’ intentions. Thus, if the parties express the intention to exclude everything outside of the contextual context, that intention should be respected and enforced. On the other hand, since the rise of the factual matrix in the 1970’s, the courts have eschewed a purely textual approach to contractual interpretation. Entire agreement clauses point towards a purely textual approach, thereby serving to exclude the very evidence that court’s want to consider in order to achieve interpretive accuracy. This fundamental tension remains unresolved in the caselaw meaning that there is little predictability to the enforcement of entire agreement clauses.

[42] In *Soboczynski*, the Court of Appeal noted that an entire agreement clause is generally intended to “lift and distill the parties’ bargain from the muck of negotiations”. In that case the court found that the entire agreement clause only covered representations made prior to or during the negotiations leading up to the signing of the contract. It did not apply to representations made after the agreement was signed. As noted in this case, all of the alleged misrepresentations pre-date the signing of the contract.

[43] There is some suggestion, however, that entire agreement clauses will not exclude misrepresentations which induced entry into the contract. This conclusion is based on a British Columbia Court of Appeal decision in *Zippy Print Enterprises Ltd. v. Pawliuk*, 100 BCLR (2d) 55 (BCCA). In that case the court stated,

A general exclusion clause will not override a specific representation on a point of substance which was intended to induce the making of the agreement unless the intended effect of the exclusion clause can be shown to have been brought home to the party to whom the representation was made by being specifically drawn to the attention of that party, or by being specifically acknowledged by that party, or in some other way.

- [44] Mr. Bazely testified that he went through the contract in a detailed way with the defendants before it was signed. However, there is no evidence before me as to whether Article 4.2 of the Agreement was specifically brought to the attention of the defendants. Nevertheless, the substantive part of the Agreement is only four and half pages long and the provision in question is governed by a headline entitled “Entire Agreement”.
- [45] There is a further issue with respect to the proper interpretation of Article 4.2 of the Agreement. In *Beer v. Townsgate Ltd.*, 1997 CanLII 976 (ON CA), the court was dealing with a case of negligent misrepresentation where the purchase and sale agreement contained a clause similar to the one in issue here that there was, “no representation, warranty, collateral agreement or condition affecting this agreement or the real property or supported hereby other than as expressed herein in writing whether contained in any sales brochures or alleged to have been made by any sales representatives or agents.” In that case, the court noted that the existence of a contractual relationship between the parties does not preclude a claim in tort. In the decision, Justice Brooke stated, “I am not convinced that the wording of para. 24 precludes a claim in tort.”
- [46] I have therefore come to the conclusion that the “Entire Agreement” clause would not preclude a claim for negligent misrepresentation.
- [47] Having said that, the proper interpretation of the “Entire Agreement” clause would appear to be moot in light of Article 3.7 of the Agreement which provides as follows:
- The parties agree that each shall be responsible to the other for negligence and that each shall reimburse the other for any damages sustained by reason of the negligence of the other party, his, her, or its agents, servants, employees or anyone acting on his, her or its behalf.
- [48] The defendants assert that Gregor Homes was negligent in its calculation of the cash allowances and that they are therefore entitled to claim damages for the cash allowance overages which they incurred. The defendants argument is that the plaintiff negligently misrepresented the actual amounts which would be incurred in the cost allowances and that they are therefore entitled to claim damages for the cash allowance overages which they incurred. This therefore raises the same issue with respect to the alleged negligent misrepresentations of the plaintiff.
- [49] The Supreme Court of Canada decision in *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35, concludes that the manner in which pure economic loss is said to have occurred does not signify that the defendant whose negligence caused that loss owes the plaintiff a duty of care. The relevant “category” for purposes of supporting a duty of care is that of the proximity of the relationship.
- [50] In the *Maple Leaf Foods* decision, at para. 21, the Supreme Court notes that pure economic loss may be recoverable in certain circumstances. One of these circumstances is a negligent misrepresentation or performance of a service. On the surface, therefore, it

would appear that pure economic loss caused by a negligent misrepresentation is recoverable.

[51] As noted by the Court of Appeal in the *Beer* decision, there are five elements of the tort of negligent misrepresentation as set out in *Queen v. Cognos Inc.*, 1993 CanLII 146 (SCC). These elements are as follows:

- (1) there must be a duty of care based on a “special relationship” between the representor and the representee;
- (2) the representation in question must be untrue, inaccurate, or misleading;
- (3) the representor must have acted negligently in making said representation;
- (4) the representee must have relied, in a reasonable manner, on said negligent representation; and
- (5) the reliance must have been detrimental to the representee in the sense that damages resulted.

[52] At para. 32, of their decision in *Maple Leaf Foods*, the Supreme Court notes that in cases of negligent misrepresentation two factors are determinative of whether proximity is established. These factors are the defendant’s undertaking and the plaintiff’s reliance. Specifically, where the defendant undertakes to provide a representation in circumstances that invite the plaintiff’s reasonable reliance, the defendant becomes obligated to take reasonable care.

[53] I accept in the present case that the duty of care factor has been satisfied by the defendants. As noted previously, the defendants made it clear to Mr. Bazley that they were on a tight budget and that cost overruns would cause a financial hardship to them. The defendants provided details of exactly what they wanted in the home in advance of the contract and relied upon the expertise of Gregor Homes to exercise due diligence when providing estimated costs for the cash allowance items. The defendants had no reasonable way of ascertaining whether the cost allowances were reasonable and relied on Gregor Homes to come up with cash allowances which were reasonable. In these circumstances I am satisfied that there was a “special relationship” between the parties which created a duty of care.

[54] The second requirement is that the representation in question must be untrue, inaccurate or misleading. There is no doubt that in this case a significant number of the cash allowances were inaccurate and seriously under estimated the true cost of the work that was needed to be done.

[55] The next requirement is that the representor must have acted negligently in making the said representation. In connection with the alleged negligence, the defendants did not

introduce any evidence before the court that Gregor Homes breached a standard of care in calculating the cash allowance estimates. While it is certainly clear that the estimates for the cash allowances were inaccurate, often by a large margin, there was no evidence introduced by the defendants that Gregor Homes acted negligently. While it is clear that the defendants impressed upon Gregor Homes that they were on a tight budget and the defendants also provided Gregor Homes with details of what they wanted for their new home, what is missing is evidence from the defendants to document in what manner Gregor Homes breached the standard of care. The plaintiff's position generally was that they used historical data to develop the cash allowances. There was no evidence introduced by the defendants to challenge the plaintiff's evidence in this regard or which would support a conclusion that the plaintiff was negligent in preparing the cash allowance schedule. In the end, while I was suspicious of the efforts made by Gregor Homes to come up with realistic estimates for the cash allowances, the defendants have not met the onus of establishing that Gregor Homes was in fact negligent in preparing its Schedule C estimates. For the above reasons, I have concluded that the defendants' allegations of negligent misrepresentation must, therefore, be dismissed.

- [56] A further issue which I have concluded would defeat the allegations of negligent misrepresentation is promissory estoppel. The principle of promissory estoppel was definitively spelled out in the 1991 Supreme Court of Canada decision in *Maracle v. Travellers Indemnity Co. of Canada*, 1991 CanLII 58 (SCC). This decision held as follows:

The party relying on the doctrine of promissory estoppel must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. The representee must also establish that, in reliance on the representation, he acted on it or in some way changed his position.

- [57] In the present case, the conduct of the defendants which is relied upon by the plaintiff is the defendants' authorization agreement to pay the additional amounts for the cash allowance items and the subsequent payment for these cash allowance items. The plaintiff's maintain that it was in reliance on the defendants' representations that they proceeded to do the work.
- [58] I agree that the doctrine of promissory estoppel precludes the defendants in the present case from arguing that they are entitled to claim damages for the cost overages on the cash allowance items. Their authorization of those charges constituted an unequivocal promise to pay those charges and it was clearly acted on by Gregor Homes who performed the work authorized by the defendants. It is significant to note that in a number of situations the defendants did not agree to pay for an item which would have involved an overage charge. For example, the defendants contracted with another contractor for the installation of the fireplace.
- [59] In *(Re) Med-Chem Health Care Inc.*, [2000] O.J. No. 4009, the court refers at para. 8 to the Ontario Court of Appeal decision in *Owen Sound Public Library Board v. Mial*

*Developments* (1979), 102 D.L.R. (3d) 685 (ON CA). The court states in that decision that the Ontario Court of Appeal,

emphasized the importance to the doctrine of promissory estoppel of finding an intention to affect legal relations. With respect to proof of that element Lacourciere J.A. stated, “Knowledge by the promisor that the promisee is likely to regard the promise as affecting their legal relations constitutes an appropriate basis from which the inference of the existence of a sufficient intent can be drawn (at 693)”.

- [60] The defendants argue that by authorizing the overages in the cash allowances, they were not abandoning their rights to claim reimbursement for the extra costs. They refer to emails complaining about the extra costs and the financial pressures they were under. In one email dated February 22, 2018, Mr. Nikifork wrote to Gregor Homes and stated,

I would once again like to reiterate our dismay that the \$10k allowance for the stairs and railing identified by Gregor Homes was less than 1/3<sup>rd</sup> the actual cost to build the stairs and railing as originally specified. We had relied on Gregor Homes’ perceived, and stated expertise as an experienced builder to provide us with an accurate estimate as to the finished cost of our home so that we could ensure it would fit within our budget, and if not, we would have made design changes to ensure the build could be completed within our budget envelope. This is why we provided Gregor Homes with detailed specifications on all of our allowance items including the railings and stairs. We had no reason to believe that Gregor Homes would instead ignore the detailed specifications supplied them and provide us with a figure based upon irrelevant “historical numbers” instead of the floor plan, and visual reference provided as to the style of the staircase expected. And, we took Gregor Homes at their word when repeatedly reassured by its owner that all Gregor Homes allowances were “generous” so as to avoid financial surprises and acrimony down the road.

- [61] Later in the same email, however, Mr. Nikifork stated,

Now, in a state of financial duress, we find ourselves needing to make tradeoffs on the stairs and railing we would not otherwise have made. Out of financial necessity, and our desire to mitigate our financial harm, we will proceed with the quote from H&J Unique Wood Works for \$22,630 with the walled-in stairs and closed risers in the basement (basement stairs and hand rail will still be stained oak) and stay with the open staircase and railing (with simple black metal spinals) on the main floor and loft as proposed and consistent with the look of the Timber Block model home. You will find the signed estimate attached.

- [62] While Mr. Nikifork clearly expresses his displeasure in the email about the cost overage for the stairway, at no point does he indicate an intention not to pay for the cost overage on the staircase. In fact he approves the estimate which was provided to him.
- [63] It was always open to the defendants to hire another contractor to do the work covered by the Schedule C estimates. As noted previously, they did this by hiring their own contractor to install the fireplace. They also elected to forgo any stone on the walkout to the home which resulted in a credit of \$12,000 which to some extent reduced the impact of the cost overages.
- [64] It was not until after the home had been substantially completed on August 27, 2018 that the defendants first advised Gregor Homes that it was holding it responsible for the cost overages which totalled \$74,096 plus HST. I have concluded, however, that the doctrine of promissory estoppel precludes them from asserting this claim.
- [65] A further defence raised by the defendants arises out of the provision in the contract under Article 4.1 which provides that in the event of any dispute between the parties as to the interpretation, application or administration of the Agreement, the parties shall make all reasonable efforts to resolve the dispute by amicable negotiations before a third party mediator. If the dispute has not been resolved within a period of 10 working days after the mediator was requested to assist, either party may, by giving notice to the other party, refer the dispute to be finally determined by a single arbitrator.
- [66] At the commencement of trial this provision was raised before the parties and a mediation was arranged which ultimately was not successful in resolving the dispute. With respect to the issue of a mandatory arbitration, Section 4 of the *Construction Act*, R.S.O. 1990, c. C.30 (which was in effect at the relevant time), provides as follows:
- An agreement by any person who supplies services or materials to an improvement that this Act does not apply to the person or that the remedies provided by it are not available for the benefit of the person is void.
- [67] The provisions of the *Construction Act* provide for the creation of a lien and a judgment from a court. I have concluded that the commencement of a civil action by the plaintiff and their failure to refer the matter to arbitration does not disentitle them to bring this case before the court for adjudication.
- [68] The contract provided for a series of progress draws which also included a construction lien hold back of 10% which was due and payable 45 days after substantial completion of the home. The 10% hold back of \$57,279.86 plus HST was never paid by the defendants. The defendants accept the accounting calculations of the plaintiff, but deny the plaintiff's entitlement to recover this amount on the basis that it is entitled to set off its damages for the errors which were made in estimating the cash allowances. In addition, the defendants claim for a number of deficiencies in the work which was done by Gregor Homes.



- [69] With the above noted general principles in mind, I turn now to the individual items which have been identified by the parties in this action.

### ***The Septic System***

- [70] The septic system was covered by a cash allowance in the sum of \$20,000. The quotation received for installation of the septic system was for the sum of \$23,200 plus HST. Mr. Bazely testified that \$1,900 of the increased cost was due to the fact that the septic had to be installed at the side of the house at an elevation above the basement level. Locating the septic at the side of the house required a sewage pump to be installed to pump the sewage up from the basement of the house to the septic.
- [71] Mr. Nikifork was advised of the estimate for the septic system. In his response dated August 9, 2017, he stated, “approved”. In addition, Mr. Nikifork signed off on the quote which included the septic system. In my view, for the reasons stated above, Gregor Homes is entitled to claim for the cost in excess of the cash allowance for the septic system.

### ***Driveway and Lot Clearing***

- [72] The cost of constructing a “rough-in driveway” was included in the contract with a cash allowance of \$7,500. A quote from Robinson Haulage Inc. also included the cost to clear the site of trees and to haul the stumps off the property. The cost of the driveway as per the quote from Robinson Haulage Inc. which was provided to the plaintiff was \$15,750 plus HST. The cost to clear the site of trees was \$7,200 plus HST and there was an additional cost to haul stumps off the property of \$3,800 plus HST.
- [73] In responding to Robinson Haulage Inc. and Gregor Homes, Mr. Nikifork wrote an email as follows:
- Thank you for venturing out to our property again. I have signed back the estimate less the \$3,800 for hauling away the stumps. As I had indicated in a previous email, our preference is that you simply push the stumps into a pile out of the way somewhere and I will cut them up and burn them over time.
- [74] Mr. Nikifork also signed off on the Robinson Haulage Inc. quote with the condition noted under his signature, “approved with deletion of \$3,800 for hauling away stumps”.
- [75] It is significant to note that Mr. Nikifork did not raise any issue with respect to the issue of the allowances for the construction of the driveway, nor did he raise any issue with respect to the additional cost for clearing trees.
- [76] I have concluded that the cost overage for the construction of the driveway as well as the cost of clearing the construction site (less the \$3,800 of hauling away the stumps) over the allowance of \$7,500 are both claims that are properly charged to the defendants.

### ***The Well***

- [77] On May 4, 2018, Ms. Almonte from Gregor Homes wrote to the defendants advising that they had received a quote for the well which totalled \$13,500 plus HST. This contrasted with the cash allowance for the well which was set at \$10,000. Mr. Nikifork responded by commenting to Ms. Almonte,

I know you would be disappointed if I didn't ask why again is the best estimate \$3,500 over the \$10,000 allowance established by Gregor Homes when we have not changed any of our requirements.

- [78] This was followed up by a further email on May 6, 2018, from Mr. Nikifork to Ms. Almonte which read as follows:

Further to my email below, there is absolutely no reason that the estimate should be over the allowance as initially established by Gregor Homes. The requirements have not changed. If you did not do your due diligence before creating the allowance, it is not our responsibility. We have no more funding and will pay the \$10,000 as per the original allowance. You will need to find out a way to economize on the well.

- [79] Ultimately Gail Bazely wrote back to the defendants on May 7, 2018, responding as follows:

Julie, you have to remember that we priced your home over a year ago. We have no control of costs going up with our trades and suppliers. We base our cash allowances on historical data and have paid anywhere between \$8,000-\$10,000 in the past consistently for several years. We will however get a quote on one more company to see if it comes in lower. However, if the price comes in the same as the other three there is nothing we can do. Thanks so much for your understanding in this matter.

- [80] In the end, the quote for the well did not come in under the figure of \$13,500. Mr. Nikifork signed a change order form adding the additional \$3,500 plus HST to the cost of the contract. For the reasons outlined earlier, I therefore conclude that the defendants are obliged to pay the additional cost for the well.

### ***Stairs and Railings***

- [81] The cash allowance for stairs and railings was \$10,000. Mr. Bazely testified that this was based on historical data from previous jobs. He testified that they had built a similar model of this home. Unfortunately, the initial estimate for the stairs and railings came in three times the allowance. In writing to the defendants enclosing a copy of the relevant quotes, Ms. Almonte proposed some alternatives which eliminated the need for the railing to go from the main floor to the basement and offered to build and drywall the walls to the basement at no cost to the defendants. In doing so, the defendants would save

\$4,500 off the quote. In the end, the defendants agreed to go with the revised plan. In an email dated February 22, 2018, Mr. Nikifork wrote to Gregor Homes and stated,

Had Gregor Homes fulfilled its fiduciary responsibility and provided us with a reasonably accurate estimate based upon the information supplied to them at the time (which for the record is no different than the information you have today) we would have changed our design to exclude the walk-out basement. For example, instead of compromising on the stairs and railing which is an integral element to the design and ambiance of the house. Now, in a state of financial duress, we find ourselves needing to make trade offs on the stairs and railing we would not otherwise have made. Out of financial necessity, and our desire to mitigate our financial harm, we will proceed with the quote from H&J Unique Woodworks for \$22,630 with the walled-in stairs enclosed risers in the basement (basement stairs and handrail will still be stained oak) and stay with the open oak staircase and railing (with simple black metal spindles) on the main floor and loft as proposed and consistent with the look of the timber block model home. You will find the signed estimate attached.

- [82] Consistent with my ruling on the other cash allowance items, I find that the defendants are obliged to pay the cost overage on the cost allowance for the railing and stairs.

### ***The Fireplace***

- [83] The cash allowance for a wood burning fireplace in the great room of the home was \$10,000. However, through inadvertence this was not included initially in Schedule C of the contract. It was however, subsequently added to the contract. The quotations for the fireplace came in significantly above this figure. Ultimately the defendants elected to contract directly with Napoleon for the installation of the fireplace. The involvement of Gregor Homes was limited to cutting out a space in the wall in the great room to accommodate the fireplace and to coordinate with Napoleon to install the fireplace itself and the chimney. In an email dated January 26, 2018, Mr. Nikifork set out the arrangements which had been agreed upon as follows:

I wanted to advise you that after some research we would like Gregor Homes Ltd. to proceed with the structural work required to install the fireplace and frame out the surround as per the pricing provided below: \$3,175.50 (plus HST), but we will be engaging another contractor to do the finishing work in a bid to recoup some of our ballooning construction cost.

To be double certain on the scope of Gregor Homes involvement for the \$3,175.50, Gregor Homes will:

- Appropriately cut out the wall between the great room and the Muskoka room to accommodate the fireplace.
- Coordinate with Napoleon to install the fireplace and the chimney. We will pay Napoleon directly for the balance outstanding on the fireplace unit and the chimney parts and installation.
- Properly insulate around the fireplace
- Frame out the surround front and back including the raised hearth area.
- Install cement board and any other sheeting materials required.
- Supply all of the materials required to complete the tasks as outlined above.

[84] The installation of the fireplace proceeded on this basis and a credit was given to the defendants for the balance of the cash allowance for the fireplace.

[85] In light of the agreement which was reached for the installation of the fireplace and the fact that the appropriate credit was subsequently given to the defendants as agreed upon, I find that there was no basis to assert any further claim against Gregor Homes in relation to the installation of the fireplace.

### ***Garage Doors***

[86] The cash allowance for the garage doors was \$3,500. The defendants added garage door openers at a cost of \$508. This was approved by Mr. Nikifork in a change order dated December 13, 2017.

[87] For the reasons previously given, I find that the defendants are responsible for paying this amount over and above the cash allowance.

### ***Staining of the House***

[88] The Timber Block product came with one application of stain on the outside of the building. The owner was expected to apply a second coating of stain after the home was constructed. Timber Block supplied the stain as part of the package. Gregor Homes took the position that staining of the home was not covered under the contract. In a note under Schedule A it states, "exterior stain not included". The defendants were provided with a quotation from a painter to do the staining at a cost of \$14,200 plus HST. This was based on six work men working for seven days according to an email from Ms. Almonte to the defendants dated March 16, 2018. The defendants' position is that the use of the word "stain" excludes only the cost of the stain from the contract and that Gregor Homes was required to apply the stain. They refer to the fact that under Schedule C, the cash allowance for stairs and railings includes "staining". Mr. Bazely in his evidence candidly

acknowledged that he could have used clearer wording in the contract. I agree. Under Schedule A of the contract Gregor Homes is required as per item 16 for the,

Installation of Timber Block package, including subfloor, wall panels, roof shingles, windows, doors and wall trims (garage included).

- [89] In my view, this would include application of the stain which was provided by Timber Block and which therefore formed part of the Timber Block package. As it has not been specifically excluded under the contract, Gregor Homes was required to apply the stain.
- [90] In the end, the defendants elected to apply the stain themselves. They hired a family friend to help them apply the final coat of stain to the entire house in July 2018 and paid him a total of \$5,000. They also rented a hydraulic lift on two occasions to allow the safe application of the stain at a cost of \$1,680.20 plus HST. The evidence of the defendants is that it took them approximately three weeks to stain the outside of the home and that they took time off work without pay to complete the project. The defendants are seeking a labourer's rate for their work of \$20 per hour for a total of 240 hours or \$4,800. When combined with their out of pocket expenses, the claim comes to a total of \$11,698.62. I find that the defendants are entitled to set off this amount from what is otherwise owed to the plaintiff.

### ***Backsplash in Kitchen***

- [91] In his evidence at trial, Mr. Bazely acknowledged that a kitchen backsplash would have been included as part of the cash allowance for cabinetry and counter tops. However, in an email dated May 23, 2018, from Ms. Almonte, she states,

Additionally, is there something in the contract I am missing? I cannot seem to find where we stated we would be completing the kitchen backsplash.

- [92] As a result, the kitchen backsplash was never installed. As the cost of the kitchen cabinets exceeded the cash allowance, there is no basis to claim for the cost of material. However, there is a basis for the defendants to claim the cost of labour in installing the backsplash. The backsplash has not yet been installed and therefore we do not have a figure to cover the cost of the installation of a backsplash nor is there any estimate for the installation of the backsplash. These claims were abandoned during the course of final argument. Nevertheless, given that Gregor Homes was bound by the contract to install a backsplash I would encourage them to honour this obligation.

### ***Locks and Handles for Exterior Doors***

- [93] The plaintiff claims the sum of \$878.90 for the cost of locks on the exterior doors of the home.
- [94] Exterior hardware was not provided by Timber Block Homes. Gregor Homes agreed to install hardware but insisted that the hardware itself be provided by the defendants. There

is nothing in the contract which obliges Gregor Homes to provide exterior hardware. Their responsibility under Schedule A is to install the Timber Block package, together with other specific items, none of which require Gregor Homes to provide exterior locks for the doors. This claim is, therefore dismissed.

### ***The Air Conditioning Unit***

- [95] As part of the Timber Block package, the defendants were entitled to the installation of an air conditioning unit. In order to trim costs, however, they made an agreement to delete the air conditioning unit and receive a credit of \$2,500 plus HST. This was documented in an email from Ms. Woodyer to Ms. Almonte where she states,

Thank you Melissa, I think that given the financial duress we are under due to the other items that went so far over budget we will eliminate the AC and take the credit.

- [96] In 2019, however, the defendants elected to install air conditioning in their home. The cost of the unit was \$4,010 plus HST. The defendants claim the cost differential in this action. However, in my view, having reached an agreement with the plaintiff on the amount of the credit, there is no basis for this claim and it is, therefore, dismissed.

### ***Repairs to the Roof***

- [97] The defendants testified that in December 2019 they experienced significant leaking of their roof that ran into the interior of the house. The defendants went to Sapphire Roofing who did the original roofing on the home. Sapphire Roofing took no responsibility for the deficiencies and provided the defendants with a quote for \$3,819.40 to fix the roof venting and to re-flash around the chimney. It appears that a significant problem in the roof was created when Napoleon installed the chimney for the fireplace and that the chimney will need to be moved. This remains an issue for the defendants.
- [98] To the extent that the roof problems are related to the installation of the chimney, this work was not done by Gregor Homes but rather by Napoleon. As noted previously, the defendants contracted separately with Napoleon for the installation of the fireplace and chimney. Gregor Homes is not responsible for dealing with that issue.
- [99] With respect to the roof vents, the defendants did not make a claim with Gregor Homes for the problems they were experiencing. Under the contract, “all labour and materials supplied by the builder are guaranteed to be free of defect for a period of 24 months from the date of substantial completion”. As no claim was filed with Gregor Homes with respect to the alleged defects, they are not responsible for dealing with them. In addition, the contract provides that in order for the warranty provisions to apply, payment under the contract must be paid in full, which is not the case in this situation. Further, there is no evidence that the defendants have to date incurred any expenses for the repair of the roof. This claim is, therefore, dismissed.

### ***Failure to Paint Certain Parts of the Interior of the Home***

- [100] The defendants testified that Gregor Homes installed drywall in the garage and around the stairs in the basement, but failed to prime the garage walls and did not paint any of the walls. Gregor Homes does not specifically deny this allegation but suggests that if this had been brought to their attention, they would have arranged for this issue to have been addressed.
- [101] The responsibility of Gregor Homes was to complete the contract by performing the work required. There was no requirement for them to be notified about their failure to do the necessary interior painting. Because of the pandemic, the defendants were not able to obtain a written quote to complete the painting. They state, however, that they received a high level verbal quote for \$1,800.
- [102] This verbal quote is hearsay and is inadmissible for the truth of its contents. There is no evidence to suggest that the defendants have incurred any expense to paint this area. The defendants have failed to prove their damages on this item and this claim is, therefore dismissed. However, given that Gregor Homes was bound by the contract to paint these areas, I would encourage them to provide this service to the defendants.

### ***Kitchen Cupboards***

- [103] It is acknowledged that some of the kitchen cupboards were installed upside down. New cupboards have been received from the manufacturer by Gregor Homes but have not yet been given to the defendants. Gregor Homes states that they are prepared to release the doors to the defendants and will arrange for their installation. The defendants have accepted their offer and an order will issue in accordance with the terms of the agreement reached by the parties.

### ***Cracked Newel Posts***

- [104] The defendants testified that 13 of the 14 newel posts that support the stairs and railings have cracked. The damage was first noticed in March, 2020. The defendants are seeking a total of \$2,925 to replace the 13 cracked newel posts.
- [105] Article 3.2 of the construction contract provides that, “the builder shall not be responsible for the repair or rectification of any exterior work resulting from ordinary or natural settlement, including but limited to, driveway, paving, walkways, patio stones or sodded areas or for any damage to interior household improvements or décor caused by material shrinkage, twisting or warping”. [Emphasis added.] This would exclude the claim for damage to the newel posts. Further, it does not appear that this claim was submitted as a warranty claim within two years from the date of substantial completion of the home. Finally, there is no evidence that the problem is connected with the construction of the home, as opposed to the supply of material by Timber Block. This claim is, therefore, dismissed.

### ***Exterior Stairs and Grading***

- [106] The defendants claim that water has been pooling against the south west corner of the house. In order to get a final sign off from the building inspector they dug a trench leading away from the house to drain the water away, but this has not been a permanent fix to the grading issue. They further complain about the height from the ground to the first step of the external stairway leading up to the deck in this same area. To remedy these deficiencies Mr. Nikifork removed the stairs from the landing and re-attached them slightly higher which made the gap from the bottom stairs to the ground larger.
- [107] Article 2.4 of the Agreement provides that the contract price shall not include and the owner shall be responsible for landscaping features, haulage of fill, material or topsoil on or off the property and any other costs or expenses associated with obtaining the building permit or any lot specific costs. Further, Article 3.2 provides that the builder shall not be responsible for the repair or rectification of any exterior work resulting from ordinary or natural settlement, including but not limited to, driveway, paving, walkways, patio stones, or sodded areas. Finally, the warranty provisions in the agreement are limited to a period of two years from the date of substantial completion of the home. This aspect of the claim is therefore dismissed.

### **Conclusion**

- [108] Subject to the set off as set out in my Reasons, the plaintiff is entitled to a claim of \$57,022.15 plus HST for a total of \$64,434.78. From that amount the defendants are entitled to a set off for the amounts set out in my Reasons. The net amount owed is a lien on the defendants' property in accord with the terms of the *Construction Act*.
- [109] If there are any issues that remain outstanding as between the parties with respect to the issues in this litigation, I may be spoken to.
- [110] If counsel are not able to agree on costs, then an appointment may be taken out through the trial coordinators office within 30 days of the release of these Reasons to set a date for an attendance before me to deal with the issue of costs. In the event that an attendance before me is necessary to deal with costs, then the parties should at least two days prior to that hearing, submit brief written submissions on the issue of costs.

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Justice M. McKelvey

**Released:** July 11, 2022



**CITATION:** Gregor Homes Ltd. v. Woodyer, 2022 ONSC 4089

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

Gregor Homes Ltd.

Plaintiff

**– and –**

Julianne Christine Woodyer and Steven John Nikifork

Defendants

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**REASONS FOR JUDGMENT**

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Justice M. McKelvey

**Released:** July 11, 2022

# TAB 17

**CITATION:** Highclass v. Ansari, 2023 ONSC 4138

**COURT FILE NO.:** CV-15-4026

**DATE:** 2023 07 13

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Hannif Highclass and Genie Sabre Realty Ltd.

**AND:**

Ali Hashsham Ansari, Doctors Urgent Care Inc., 2323398 Ontario Inc. and North American Health Care Inc.

**BEFORE:** M.T. Doi J.

**COUNSEL:** Jonathan Rosenstein, for the Plaintiffs

John I. O’Kane, for the Defendants

**HEARD:** January 12, 13, 16, 17 and 18, 2023

**REASONS FOR JUDGMENT**

**Overview**

[1] In this action, the Plaintiffs seek to recover real estate commissions and other amounts from the purchase and sale of certain units in a commercial plaza.<sup>1</sup>

[2] For the reasons that follow, the action is granted in part.

**Parties**

[3] The individual Plaintiff, Hannif Highclass, is a realtor. The other Plaintiff, Genie Sabre Realty Ltd. (“Genie Realty”), carries on business as a real estate brokerage. Mr. Highclass is the broker of record for Genie Realty which is his closely-held company.

[4] The Defendant, Dr. Ali Hashsham Ansari (“Dr. Ansari”), is a family physician. He is also a principal officer and director of the Defendant corporations Doctors Urgent Care Inc., 2323398 Ontario Inc. (“398”), and North American Health Care Inc. (“North American Health”), which are provincially-incorporated companies. Dr. Khalid Saeed Malik (“Dr. Malik”) and Dr. Muhammad

Ali Vajid (“Dr. Vajid”) previously were principal officers and directors with 398 and North American Health, respectively, but are no longer involved with either company.<sup>2</sup>

## **Background**

[5] This action arises from the sale of commercial units in a plaza located in Scarborough.

[6] During his career, Mr. Highclass came to know Parm Joshi who developed several commercial plazas in Brampton. When Mr. Joshi chose to develop a plaza in Scarborough, he engaged Mr. Highclass to acquire vacant land for the development project. Mr. Joshi later retained Mr. Highclass sell units in the plaza. Mr. Joshi owns the company that owns the plaza.

[7] Over the years, Mr. Highclass bought and sold his own units in the Scarborough plaza. He still owns one unit in the plaza that is occupied by a tenant. Mr. Highclass has no ownership interest in the company that owns the plaza.

[8] This action relates to the sale of units #12, 13, 14 and 15 in the Scarborough plaza. Initially, after the plaza was built, a chiropractor bought these units, along with unit #16, and took a second mortgage to fund extensive renovations that led to more than \$350,000.00 in total leasehold improvements to the units. After the renovations were completed, the chiropractor defaulted on the second mortgage. In late May 2012, 2322669 Ontario Inc. (“669”), a company owned by Mr. Joshi, retained Genie Realty to sell all of these units under power of sale.

[9] To sell the units, Genie Realty and 669 entered into listing agreements. Due to computer storage and retrieval issues, the Plaintiffs apparently could not produce all of the sale records. Instead, they produced only a limited number of records. Their productions included the listing agreement for unit #16 dated May 25, 2012. Under this agreement, Genie Realty was entitled to receive 6% in total commissions (i.e., based on the seller and buyer each paying a 3% commission) in accordance with Mr. Joshi’s instructions on behalf of 669. Mr. Highclass and Mr. Joshi testified that Genie Realty and 669 entered into similar listing agreements that day for units #12 to #15 on the same commission terms. They also testified that leasehold improvement costs for each unit were to be separately negotiated (i.e., as an adjustment to each unit’s purchase price) under the terms of each listing agreement. Mr. Joshi explained that this pricing approach reflected a

marketing decision to list all of the available renovated and unfinished units for sale at the same price and to recover the leasehold improvement costs separately.

[10] The Plaintiffs produced a joint MLS listing for units #14 and #15 that collectively referred to all five (5) units, set out their configurations (i.e., unit #12 was a physiotherapy clinic, unit #13 was a chiropractic clinic, units #14 and #15 were clinics for family doctors, and unit #16 was a pharmacy), and expressly provided (i.e., by stating “*Leasehold Improvements Negotiable*” as a listing term) that leasehold improvement costs were separately negotiable from the purchase price. Mr. Highclass and Mr. Joshi testified that the listing for each unit contained the same commission and leasehold improvement terms. Their evidence on this point was corroborated by the invoices that Genie Realty later provided the Defendant buyers via their solicitor which set out the 3% commission and leasehold improvement costs that each buyer owed the brokerage.<sup>3</sup> From all of the oral and documentary evidence, such as it is, I find that 669 retained Genie Realty to sell units #12 to #16 and entered into listing agreements by which: a) Genie Realty was entitled to a 6% total commission on each unit sold (i.e., comprising a 3% commission plus HST payable by 669, and a further 3% commission plus HST payable by the buyer); and b) leasehold improvement costs were to be negotiated and separately paid over and above each unit’s listing price.

[11] Around this time, Dr. Ansari and several colleagues were looking to acquire commercial premises to start up a multi-service health clinic with a pharmacy. One colleague, Jay Rajora, a pharmacist, learned of the units for sale in the Scarborough plaza and told Dr. Ansari about them. Along with their colleagues Dr. Malik and Dr. Vajid, Dr. Ansari and Mr. Rajora developed an interest in these available units in the plaza.

### **Purchase of the Units in the Plaza**

[12] Dr. Ansari and Mr. Rajora visited the plaza to view the listed units. Both met Mr. Highclass who showed the units, shared the MLS listings (i.e., which posted a listing price of \$375,000.00 for each of units #12 to #15 and \$475,000.00 for unit #16, respectively), gave a per unit estimate of the leasehold improvement costs (i.e., which Mr. Highclass stated was \$60,000.00 to \$70,000.00 per unit based on an estimated \$355,000.00 in total leasehold improvements for all of the units), advised that leasehold improvement costs had to be negotiated as an adjustment to the purchase price for each unit, explained the commission structure that included a 3% buyer’s commission,

and gave some information about the vendor.<sup>4</sup> Although Dr. Ansari and Mr. Rajora liked the units, they felt that the listing prices, leasehold improvement costs and commission amounts were high. As a result, they continued to look at other properties while periodically returning to the plaza to further view the units as they considered which premises they wished to acquire.

[13] During a visit to the plaza, Dr. Ansari claims that Mr. Highclass told him and Mr. Rajora that he would be the realtor for both the seller and the buyer on any unit purchases. According to Dr. Ansari, he and Mr. Rajora responded by telling Mr. Highclass that they were entitled to have their own realtor. Dr. Ansari claims that he told Mr. Highclass that his friend and neighbour, Shafi Azam, had been his realtor when he bought his home, and that Mr. Highclass was less than enthusiastic on hearing that Dr. Ansari might retain Mr. Azam as his co-operating realtor to buy a listed unit in the plaza.

[14] Sometime thereafter, Dr. Ansari and Mr. Rajora met with Mr. Highclass who asked if they were still interested in buying the units as another group of doctors was thinking of acquiring them. Dr. Ansari and Mr. Rajora responded by expressing interest in the units.

[15] A few weeks later, Dr. Ansari claims that he and Mr. Azam went to the plaza to speak with Mr. Highclass about the units for sale. Before going to the plaza, Dr. Ansari did not formally retain Mr. Azam to act as his realtor. When they arrived at the plaza, Dr. Ansari claims that Mr. Highclass told Mr. Azam to return to his car and stay there. Dr. Ansari then met Mr. Highclass alone and purportedly learned that he could not buy a unit without Genie Realty as his co-operating realtor after Mr. Highclass indicated that he would not present any offers from other realtors. Dr. Ansari allegedly understood from this that retaining his own realtor would effectively prevent him from buying a unit in the plaza. Without Mr. Highclass as his realtor, no deal would be possible.

[16] Mr. Highclass denies that Dr. Ansari or any of his colleagues ever had their own realtor, denies meeting Mr. Azam or telling him to go to his vehicle, denies requiring buyers to retain him as their co-operating realtor to buy any units, and denies threatening to withhold units from buyers that did not retain him. He claims that realtors for other buyers visited the plaza on occasion to view the listed units. He agreed that it would be highly improper for a listing realtor to insist on being retained as the co-operating realtor (i.e., over the buyer's objections) in order for a buyer to make an offer or to close a deal. He also testified that a listing realtor who engaged in this kind of

blatant misconduct would inevitably face serious repercussions because a co-operating realtor in such a situation would almost certainly make a complaint to the Real Estate Council of Ontario (“RECO”) and seek regulatory enforcement action. In turn, Mr. Highclass testified that he would never engage in this type of serious misconduct.

[17] Sometime before July 2012, Dr. Ansari, Mr. Rajora, Mr. Highclass and Mr. Joshi met to discuss the units that were listed for sale. During the meeting, Mr. Joshi claims that he described the units and the power of sale, confirmed the listing price for each unit, confirmed the buyer’s obligation to pay 3% plus HST in commissions, and asked for \$70,000.00 to \$75,000.00 per unit in leasehold improvements before expressing his willingness to settle for \$50,000.00 per unit. He claims that Dr. Ansari and Mr. Rajora offered \$50,000.00 per unit in leasehold improvements but declined to pay any commissions. Although prepared to settle for \$50,000.00 per unit in leasehold improvements, Mr. Joshi was not prepared to assume the buyer’s commission costs. As such, he declined their offer and left the meeting.

[18] In his evidence at trial, Dr. Ansari initially claimed that Mr. Joshi never asked for more than \$25,000.00 per unit in leasehold improvement costs. However, during his examination for discovery in 2019, Dr. Ansari had no recollection of discussing the leasehold improvements with Mr. Joshi. When challenged, Dr. Ansari claimed that his memory had improved over time after he had reviewed transcripts and other case materials, and after he had thought more carefully about the events that unfolded in this matter.

[19] After Mr. Joshi left the meeting, Mr. Highclass claims that Dr. Ansari continued to state an unwilling to pay any commissions as he recently bought a home whereby the seller had paid all commissions on the deal. Mr. Highclass replied that residential deals differ from commercial ones where the buyer typically pays the co-operating realtor’s commission. Later on, Dr. Ansari claims that he tried to negotiate a 1.5% commission with Genie Realty as the listing and cooperating brokerage. Mr. Highclass denies that any such negotiations ever occurred.

[20] Thereafter, Dr. Ansari periodically visited the plaza to speak with Mr. Highclass about the power of sale, hydro meters for the units, and other details related to the listings. After viewing the units several times, Dr. Ansari and his colleagues offered to pay \$25,000.00 per unit in

leasehold improvements. Mr. Highclass declined the offer knowing that Mr. Joshi would not agree to it.

[21] Mr. Highclass and Mr. Joshi testified that Mr. Rajora then offered to contribute \$25,000.00 in leasehold improvements for each unit that Dr. Ansari or another doctor bought (i.e., in addition to \$25,000.00 per unit in leasehold expenses that each buyer would themselves pay) to help close a deal. Mr. Rajora had plans to operate a pharmacy in unit #16 and wanted the doctors to establish a clinic in the plaza that would generate business to make the pharmacy financially viable. Although Dr. Ansari denies that any such offer was made, Mr. Rajora (who was listed as a defence witness) did not testify at trial for reasons that were not explained.

[22] In June 2012, Mr. Highclass and Mr. Joshi met with Dr. Ansari and his brother to further negotiate pricing and leasehold improvement costs. I find that Dr. Ansari spoke for his colleagues at the meeting. After Mr. Joshi indicated that he was prepared to accept Mr. Rajora's proposal, Dr. Ansari advised that the doctors were short of cash and could not afford their \$25,000.00 share of the leasehold improvements. Among other things, Dr. Ansari explained that he had just bought a home and needed a one (1) year interest-free period before paying \$25,000.00 in improvement costs for his unit. Mr. Joshi refused to defer any payments and insisted on being paid up-front. The parties discussed various financing options but could not agree on terms. To preserve the deal, Mr. Highclass proposed: a) that Mr. Joshi be paid the doctors' share of the unit leasehold improvement costs by offsetting these amounts against the commissions payable by the developer to Mr. Highclass for having sold units in the plaza; and b) that each doctor receive a 1-year interest-free period from him to pay their leasehold improvement costs and buyer commissions which would come due when the interest-free period ended. His proposal contemplated that each doctor would pay a 3% buyer's commission on the purchase price of each unit. I am satisfied that everyone agreed on these terms.

[23] In his evidence at trial, Dr. Ansari initially claimed that he only attended one meeting with Mr. Joshi to discuss the units despite agreeing during his 2019 examination for discovery that he had attended two meetings with Mr. Joshi. Dr. Ansari later tried to reconcile this discrepancy in his evidence by explaining that he had attended only one "serious" meeting and maybe a second "casual" meeting with Mr. Joshi.



[24] During negotiations, Dr. Ansari and his colleagues collectively expressed their interest in buying all five (5) available units. The first unit to be acquired was unit #15 which Dr. Ansari bought. Despite his inability to negotiate better terms to purchase the unit, which he believed was priced too high, the plaza was conveniently located near his home and seemed to offer good potential for building a family medicine practice. Ultimately, he decided to buy the unit.

[25] On July 9, 2012, Dr. Ansari signed: a) a buyer representation agreement (“BRA”) for Genie Realty to act as his agent to buy unit #15 in the plaza with a 3% commission on the \$375,000.00 purchase price plus HST and a \$25,000.00 adjusted sale price (i.e., for the leasehold improvement costs that Mr. Highclass fronted);<sup>5</sup> and b) an agreement of purchase and sale (“APS”) for a company to be incorporated to buy unit #15 from 669 for \$375,000.00. The APS named Genie Realty as both the listing and co-operating brokerage for the transaction. Mr. Highclass testified that Mr. Rajora was present when Dr. Ansari signed both agreements after their terms were explained to him. Later that day, Mr. Joshi signed the APS on behalf of 669. Within days, Mr. Highclass emailed signed copies of the BRA and APS to Dr. Ansari, Mr. Rajora and Tejdeep Chattha, the buyers’ solicitor.<sup>6</sup> The closing was set initially for August 31, 2012 before it was extended twice to October 4, 2012 as Dr. Ansari was unable to close before then.

[26] After signing the APS to buy unit #15, Dr. Ansari and others met with Mr. Highclass and negotiated a first option for the doctors to buy units #12, #13 and #14 within six (6) months on the same terms (i.e., a \$375,000.00 per unit price plus \$25,000.00 in leasehold improvements payable a year later without interest). Similarly, the doctors negotiated a first option to buy units #11 and #17 in the plaza (i.e., for purchase prices of \$238,000.00 and \$365,000.00, respectively) with the same arrangement for paying the leasehold improvement costs. Dr. Ansari claims that these options were negotiated after Mr. Highclass advised that others were interested in buying the units. Dr. Ansari memorialized the options in an email to Mr. Highclass on August 18, 2012 that also confirmed Dr. Malik’s intention to enter into an APS that day to buy the unit #14 family clinic on terms mirroring Dr. Ansari’s purchase of unit #15 (i.e., a \$375,000.00 purchase price and \$25,000.00 for improvements payable in one year without interest) with a March 30, 2013 closing.

[27] On August 18, 2012, Dr. Ansari and Dr. Malik met Mr. Highclass at the plaza. During this meeting, Dr. Malik signed: a) a BRA for Genie Sabre to act as his agent to purchase unit #14 in exchange for a 3% commission on the \$375,000.00 purchase price plus a further sum of \$25,000.00

as an adjustment to the seller for leasehold improvements; and b) an APS on behalf of a company to be incorporated to purchase unit #14 from 669 on the above-mentioned terms with a \$10,000.00 deposit. Along with the BRA, Dr. Malik also signed a standard Ontario Real Estate Association (“OREA”) form entitled “*Working with a Commercial Realtor: The Agency Relationship*” to acknowledge his agency relationship with Genie Sabre. Mr. Highclass claims that the other buyers signed the same OREA form to acknowledge their respective agency relationships with Genie Realty. However, although the form that Dr. Malik signed was produced, the forms that Dr. Ansari and Dr. Vajid signed were lost (i.e., apparently due to computer problems). The same OREA form that Mr. Rajora is said to have signed around that time to buy unit #16 was also produced.

[28] By email to Mr. Chattha on or about September 28, 2012, Genie Realty invoiced Dr. Ansari for its commission on the purchase of unit #15 (i.e., \$11,250.00 or 3% of the \$375,000.00 purchase price and \$1,462.50 in HST) plus the buyer’s \$25,000.00 share of leasehold improvement costs, for a total of \$37,712.50 payable by September 1, 2013 without interest. In the same email, Genie Realty also invoiced Mr. Rajora for the commission and leasehold improvement costs that he owed the brokerage on his purchase of unit #16.

[29] When he received his invoice from Genie Realty, Dr. Ansari claims that he was surprised to learn that his \$25,000.00 share of the leasehold improvement costs for unit #15 was to be paid separately to the brokerage and not financed through the mortgage on the unit as he had expected. But when asked about his financing arrangements with his banker, Dr. Ansari conceded that he never told his banking officer that he needed to finance a further \$37,712.50 (i.e., the 3% buyer’s commission and leasehold improvement costs) in addition to the \$375,000.00 purchase price for his unit. Although Dr. Ansari gave his banker a business plan for the mortgage, it did not include the commission or leasehold improvement costs and his banker never offered to lend additional funds before the purchase transaction closed. As a result, it is unclear why Dr. Ansari would have expected his lender to extend mortgage financing for any more than the purchase price of the unit at closing. Dr. Ansari did not raise this issue with his solicitor or instruct him to inquire about financing before closing. Dr. Ansari later suggested that he may have inquired about a further \$37,000.00 loan with his banker who required documentation to show that the leasehold improvements belonged to the seller, but no records were produced to corroborate this. In any event, Dr. Ansari maintains that he knew that the leasehold improvement costs were owed but that

he was not aware that a separate payment for these costs would be required. In addition, Dr. Ansari denies that he had negotiated a 1-year interest-free period with Mr. Highclass or that he had agreed to pay these amounts by September 1, 2013. But on this last point, Dr. Ansari's own notes from the negotiations show that he obtained an interest-free period for paying the commission and improvement costs to Genie Realty, as set out in its invoice to him.

[30] By email to Mr. Highclass sent on September 28, 2012, Mr. Chattha wrote that he had forwarded the invoices to his clients and that funds and closing documents would be released after *"everything is worked out between [Mr. Highclass] and [Mr. Chattha's] clients ... to complete the transaction."* According to Mr. Chattha, the commission payments still needed to be worked out. On October 1, 2012, Mr. Highclass replied that he had *"talked with both Dr. Ansari & Jay [Rajora] re: the Real Estate Commission and [sic] Jays Shareholders Agreement. There is no problem with it and we can deal with it later – after the deal has closed."* [Emphasis added]

[31] At trial, Mr. Chattha testified that his understanding from his clients was that Genie Realty's invoices had to be resolved before the release of escrow on closing. Dr. Ansari claims that the *"it"* mentioned by Mr. Highclass in his October 1, 2012 email was the matter of Genie Realty's commissions which remained unresolved. But the BRA's for units #12, #13 and #14 clearly set out the terms for Genie Realty's commissions and were fully executed when Mr. Chattha received them. Mr. Highclass denies that Genie Realty's entitlement to the invoiced commissions was unresolved and testified that the only outstanding matter for the units was Mr. Rajora's request to have a hydro meter and disconnection device installed in unit #16 (i.e., as these devices previously had been shared with unit #17 and installed there). Mr. Highclass explained that Mr. Rajora agreed to have a master electrician install the devices in unit #16 after the deal closed. He also testified that Mr. Rajora had considered buying unit #17 which, if purchased, would have removed the need to install the devices in unit #16 and explains why he indicated in his October 1, 2012 email that the matter could later be dealt with after closing. Mr. Chattha could not recall whether any hydro-related issues were outstanding at that time. As stated earlier, Mr. Rajora did not testify at trial. Dr. Ansari's notes from the negotiations confirm the arrangement in place for the above-mentioned devices to be installed.

[32] On December 6, 2012, Dr. Ansari, Dr. Malik and Dr. Vajid signed: a) a BRA to appoint Genie Sabre as their agent to buy units #12 and #13; and b) an APS which named themselves and

North American Health as the buyers for the purchase of units #12 and #13 from 669 for a price of \$750,000.00 with a \$10,000.00 deposit and a March 29, 2013 closing date.

[33] By invoice dated March 27, 2013, Genie Realty confirmed the buyer's commission payable for the purchase of units #12 and #13 (i.e., being \$22,500.00 or 3% of the \$750,000.00 purchase price and \$2,925.00 for HST on the commission) and the buyer's \$50,000.00 share of leasehold improvements for both units, for a total of \$75,425.00 due on or before March 29, 2014 without interest. In a further invoice that day, Genie Realty confirmed the buyer's commission payable for the purchase of unit #14 (i.e., being \$11,250.00 or 3% of the \$375,000.00 purchase price and \$1,462.50 in HST on the commission) and the buyer's \$25,000.00 share of leasehold improvement costs for the unit, for a total of \$37,712.50 payable on or before March 29, 2014 without interest.<sup>7</sup> Mr. Highclass emailed the invoices to Mr. Chattha on March 27, 2013. Mr. Chattha responded by asking Mr. Highclass to seek payment directly from his clients who instructed him to convey this.

[34] After the invoices were sent, Mr. Highclass approached Dr. Ansari to have the buyers sign promissory notes to secure the outstanding commission and leasehold improvement payments. Mr. Highclass claims that Dr. Ansari responded by assuring him that Genie Realty would be paid when its debts came due, and by refusing to sign promissory notes. Dr. Ansari and Mr. Highclass then discussed different financing options for paying the leasehold improvement costs but were unable to agree on a payment method. Dr. Ansari claims that he requested written confirmation that 669 owned the leasehold improvements so that he could arrange to have the improvement costs paid under the mortgage with his bank which needed the confirmation. But the confirmation was not given which Dr. Ansari claims left him unable to pay for the improvement costs. After exhausting their discussions about financing, Mr. Highclass chose to trust the buyers, including Dr. Ansari whom he regarded as his family doctor, and wait until the debts came due before demanding payment on the invoices.

[35] The invoice for unit #15 came due on September 1, 2013 but was not paid. The invoices for units #12, #13 and #14 went unpaid after the March 29, 2014 payment date expired. The total debt was over \$150,000.00.

[36] On April 20, 2014, Mr. Highclass, Dr. Ansari, Dr. Malik and Dr. Vajid met at a restaurant in Markham to discuss the overdue debts. During the meeting, Dr. Ansari advised that the doctors

could not afford to pay their invoices as the clinics had not been as profitable as they previously had expected. Some of this was due to the fact that the chiropractic clinic in unit #12 and the physiotherapy clinic in unit #13 had remained vacant. To make better use of the premises and reduce carrying costs, Mr. Highclass claims that Dr. Ansari advised that the doctors were thinking of converting unit #12 to a medical imaging facility and selling unit #13 within a 6-month period. Mr. Highclass claims that he responded by expressing a willingness to extend the due date on the invoice for unit #13 until after the unit sold by charging interest (i.e., after the 1-year interest-free period had expired), which then prompted Dr. Ansari to seek better loan terms. Dr. Ansari claims that the doctors offered to pay the outstanding 3% commissions and asked to confirm ownership of the leasehold improvements in writing to secure mortgage financing for those costs, which led Mr. Highclass to suggest other financing options (i.e., a line of credit or a private loan) that were unacceptable to the buyers. By the end of the meeting, Mr. Highclass indicated that the interest-free period would be extended for a further 6 months when full payment of the debt was due or, in the alternative, interest payments (i.e., based on an 8% annual rate) to carry the debt would begin. Dr. Ansari understood that Mr. Highclass wanted to charge 8% on the debt if it remained unpaid after the further 6-month interest-free period expired, but claims that none of the doctors agreed to this or any other terms that Mr. Highclass proposed or announced. Later that day, Mr. Highclass emailed Dr. Ansari and Dr. Malik to memorialize the discussion at the meeting.

[37] After waiting 6 months, Mr. Highclass met with Dr. Ansari on October 24, 2014 to demand payment. According to Mr. Highclass, Dr. Ansari advised that unit #13 was being sold and asked to have until March 2015 to repay the entire debt with 8% interest. Mr. Highclass testified that he agreed to these terms. Dr. Ansari did not clearly recall this meeting but claims that he stated a willingness to pay the outstanding 3% commission subject to leasehold improvement costs being paid with mortgage financing.

[38] Later in March or April 2015, Mr. Highclass claims that he agreed to Dr. Ansari's request for a further extension of 2 or 3 months to allow the sale of unit #13 to close, understanding that the doctors would use the sale proceeds to pay the outstanding debt to Genie Realty. Dr. Ansari claims that he offered to pay the 3% commission at the meeting (i.e., in partial satisfaction of what he owed under the invoice) but that Mr. Highclass insisted on receiving a single full payment and

provided another interest-free period. Dr. Ansari claims that it never occurred to him to give Genie Realty partial payments against the invoiced debt.

[39] The sale of unit #13 later closed but the debts to Genie Realty remained unpaid.

[40] On August 1, 2015, Mr. Highclass emailed Dr. Ansari, Dr. Vajid and Dr. Malik to demand payment and attended Dr. Ansari's clinic to discuss the matter. During this meeting, Dr. Ansari declined to pay Mr. Highclass at Mr. Rajora's behest as Mr. Highclass had started a collections lawsuit against his pharmacy.

[41] According to Dr. Ansari, unit #12 is now owned by North American Health (n.b., which previously also owned unit #13 before the unit was sold), unit #14 is currently owned by 398, and unit #15 is now operated by Doctors Urgent Care Centre Inc. (i.e., which is a different entity from Doctors Urgent Care Inc., which is named as a Defendant).

### **Limitations**

[42] For the reasons that follow, I find that the claim falls within the limitation period.

[43] The claim is subject to ss. 4 (*Basic limitation period*) and 5 (*Discovery*) of the *Limitations Act, 2002*, SO 2002, c 24, Sched B ("*Limitations Act*"), which state:

#### **Basic limitation period**

4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.

#### **Discovery**

5. (1) A claim is discovered on the earlier of:

- (a) the day on which the person with the claim first knew,
  - (i) that the injury, loss or damage had occurred,
  - (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
  - (iii) that the act or omission was that of the person against whom the claim is made, and
  - (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

- (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

**Presumption**

(2) A person with a claim shall be presumed to have known of the matters referred to in clause (1)(a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

**Demand Obligations**

(3) For the purposes of subclause (1) (a) (i), the day on which injury, loss or damage occurs in relation to a demand obligation is the first day on which there is a failure to perform the obligation, once a demand for the performance is made

[44] A claim is statute-barred unless commenced within two years from the date on which the claim is discovered: s. 4 of the *Limitations Act*.

[45] A claimant is presumed to have known of the claim on the day the act or omission on which the claim is based took place, unless the contrary is proved: ss. 5(2) of the *Limitations Act*. The claimant bears the burden of showing that they could not have discovered the claim on the day the act or omission took place: *1352194 Ontario Inc. v. Vince*, 2021 ONSC 8192 (Div Ct) at para 22.

[46] In *Clarke v. Sun Life Assurance Company of Canada*, 2022 ONCA 11, the Court of Appeal gave the following guidance in addressing the discoverability of a claim:

[19] The discoverability analysis required by s. 5(1) and (2) of the *Act* contains cumulative and comparative elements.

[20] Section 5(1)(a) identifies the four elements a court must examine cumulatively to determine when a claim was "discovered". When considering the four s. 5(1)(a) elements, a court must make two findings of fact:

- (i) the court must determine the "day on which the person with the claim first knew" all four of the elements. In making this first finding of fact, the court must have regard to the presumed date of knowledge established by s. 5(2): "A person with a claim shall be presumed to have known of the matters referred to in clause (1)(a) on the day the act or omission on which the claim is based took place, unless the contrary is proved"; and

- (ii) the court must also determine "the day on which a reasonable person with the abilities and in the circumstances of the person with the

claim first ought to have known" of the four elements identified in s. 5(1)(a).

Armed with those two findings of fact, s. 5(1) then requires the court to compare the two dates and states that a claim is discovered on the earlier of the two dates: see *Nasr Hospitality Services Inc. v. Intact Insurance* (2018), 142 O.R. (3d) 561, [2018] O.J. No. 4514, 2018 ONCA 725, at paras. 34-35.

[47] The items in ss. 5(1)(a)(i) to (iv) are conjunctive. Accordingly, the limitation period does not run until a claimant is actually aware of all these items or until a reasonable person, with the abilities and in the circumstances of the claimant, first ought to have known of them: *Longo v. MacLaren Art Centre*, 2014 ONCA 526 at para 41. In addition, ss. 5(2) establishes a rebuttable presumption of the claimant's knowledge of these items which codifies their need to diligently pursue a claim: *Kumarasamy v. Western Life Assurance Company*, 2021 ONCA 849 at para 24.

[48] The discoverability analysis under ss. 5(1)(a) and (b) includes a requirement for the court to find: a) under ss. 5(1)(a)(iv), the day when the claimant first knew that a proceeding would be an appropriate means to remedy the claim having regard to the injury, loss or damage; and b) under ss. 5(1)(b), the day when a reasonable person with the abilities and in the circumstances of the claimant first ought to have known of that matter: *Clarke* at para 21. An "appropriate" means under ss. 5(1)(a)(iv) refers to a legally appropriate means, which does not allow a party to delay the start of a proceeding for tactical or other reasons: *Markel Insurance Co. of Canada v. ING Insurance Co. of Canada*, 2012 ONCA 218 at para 34.

[49] Courts have applied the ss. 5(1) factors to find that the limitation period on an unpaid invoice begins to run once a reasonable period of time for its payment has elapsed: *Collins Barrow Toronto LLP v. Augusta Industries Inc.*, 2017 ONCA 883 at paras 5-6; *Vince* at para 24.

[50] In this case, I find that Dr. Ansari, on behalf of Dr. Malik, Dr. Vajid and himself, agreed to Mr. Highclass' proposal at the June 2012 meeting for each doctor to receive a 1-year interest-free period to pay the leasehold improvement costs and buyer commissions owed to Genie Realty on the purchase of their units under their BRA's. By invoice dated September 28, 2012, Genie Realty invoiced Dr. Ansari for \$37,712.50 (i.e., the leasehold improvement costs and commissions) on his purchase of unit #15 with payment due by September 1, 2013. Later, on March 27, 2013, the brokerage similarly invoiced Dr. Malik for \$37,712.50 on his purchase of unit #14, and separately



invoiced Drs. Ansari, Malik and Vajid for \$75,425 on their group purchase of units #12 and #13, with payment for each invoice due by March 29, 2014.

[51] Genie Realty's invoice for the purchase of unit #15 went unpaid after the 1-year interest-free period ended on September 1, 2013 and the debt came due.<sup>8</sup> Subsequently, its invoices for the purchase of units #12 and #13, and of unit #14, respectively, went unpaid after the interest-free period for both invoices ended on March 29, 2014.

[52] The Plaintiffs started this action on August 31, 2015.

[53] I am not persuaded that the action is untimely. The invoices from Genie Realty stated that payment was due on September 1, 2013 and March 29, 2014, respectively. The limitation period on an unpaid invoice starts to run once a reasonable period of time for its payment has elapsed: *Collins Barrow* at paras 5-6; *Vince* at para 24. It follows that the limitation period started to run when the Plaintiffs first knew of the loss when the invoices went unpaid after the due dates passed. In addition, I find that the Plaintiffs first knew that a proceeding would be an appropriate means to remedy the loss only after the invoices went unpaid past the due dates, when a reasonable person would first have come to know that: *Clarke* at para 21. The initial invoice from Genie Realty came due on September 1, 2013. It follows that this action, which was issued on August 31, 2015, was started within the applicable 2-year limitation period.

[54] Accordingly, I find that the claim is not statute-barred.

### **Amount of the Claim**

[55] In this case, the amount of the underlying claim is not controversial.

[56] As set out earlier, Genie Realty invoiced Dr. Ansari on September 28, 2012 for \$37,712.50 on his purchase of unit #15. Similarly, on March 17, 2012 the brokerage invoiced Dr. Malik the same amount on his purchase of unit #14, and separately invoiced Drs. Ansari, Malik and Vajid for \$75,425.00 on their group purchase of units #12 and #13. None of this is disputed.

[57] After the invoices were sent, Mr. Highclass approached Dr. Ansari to have the buyers sign promissory notes to secure the outstanding leasehold improvement and commission payments. Although Dr. Ansari refused to have any promissory notes signed, I find that he acknowledged the

amounts owed under the invoices and assured Mr. Highclass that Genie Realty would be paid as the payment dates under the invoices came due.

[58] During the restaurant meeting on April 20, 2014, Dr. Ansari, Dr. Malik and Dr. Vajid met with Mr. Highclass to discuss the overdue debt. During the meeting, I find that the doctors asked for additional time to pay the invoices and acknowledged their indebtedness to Genie Realty. I also find that the doctors further acknowledged their indebtedness to Genie Realty in subsequent meetings held on October 24, 2014 and later in March or April 2015 when additional extensions to pay the invoiced debts were negotiated and granted.

### **Interest**

[59] In my view, pre-judgement interest should apply to the unpaid debts after the forbearance extensions had expired.

[60] As part of the forbearance arrangement, Mr. Highclass claims that the parties agreed to an 8% compounded interest rate that was payable once the extended interest-free period had expired. Dr. Ansari denies that the parties agreed to apply an 8% rate or to compound the interest.

[61] I accept that Mr. Highclass proposed an 8% interest rate on unpaid debts that were past due at the April 20, 2014 meeting and in his follow-up email message. However, I find that the doctors never agreed to apply this or any other interest rate after the interest-free payment period ended. Furthermore, I find that the parties never expressly agreed to apply compound interest as required to have this form of interest: *Khan v. Shaheen Investment Inc.*, 2022 ONSC 3033 at para 18.

[62] In the alternative, the Plaintiffs seek to apply a 5% interest rate to unpaid debts that were past due by relying on s. 3 of the *Interest Act*, RSC 1985, c. I-15 which provides:

#### **Interest rate when none provided**

3 Whenever any interest is payable by the agreement of parties or by law, and no rate is fixed by the agreement or by law, the rate of interest shall be five per cent per annum. [Emphasis added]

However, it is clear from s. 3 of the *Interest Act* that its default 5% interest rate will not apply in the absence of an agreement that interest is payable. Moreover, the interest provisions at ss. 128

to 130 of the *Courts of Justice Act*, RSO 1990, c. C.43 provide law for the payment of interest that ousts the application of the default rate under s. 3 of the *Interest Act*: *Pizzey v. Crestwood Lake Limited* (2004), 69 OR (3d) 306 (CA) at para 25. It follows that the default 5% interest rate under s. 3 of the *Interest Act* should not apply in this case.

[63] Absent an agreement on interest by the parties, I conclude that pre-judgment interest under ss. 128 (1) of the *Courts of Justice Act*, RSO 1990, c. C.43, should apply to the unpaid debts as of August 1, 2015 when the forbearance extensions for paying the debts without interest had ended.

### **Liability of Defendant Corporations**

[64] As further explained below, I find that the corporate Defendants North American Health and 398 should be jointly and severally liable for the amounts owed to Genie Realty under the BRA's for units #12, 13 and 14, respectively. In addition, I find that the other corporate Defendant, Doctors Urgent Care Inc., should not be liable under the BRA for unit #15.

[65] At trial, the Plaintiffs sought to have Dr. Ansari and all three (3) defendant corporations, namely North American Health, 398 and Doctors Urgent Care Inc., held liable for any judgment on the claims under the BRA's by relying on the pre-incorporation provision under ss. 21(3) of the *Business Corporations Act*, RSO 1990, c B.16 ("*OBCA*"), which provides:

#### **Non-adoption of contract**

(3) Except as provided in subsection (4), whether or not an oral or written contract made before the coming into existence of a corporation is adopted by the corporation, a party to the contract may apply to a court for an order fixing obligations under the contract as joint or joint and several or apportioning liability between the corporation and the person who purported to act in the name of or on behalf of the corporation, and, upon such application, the court may make any order it thinks fit.

[66] Pursuant to ss. 21(3) of the *OBCA*, the court may impose liability on a corporation for a pre-incorporation contract made on its behalf before it came into existence, regardless of whether or not the corporation later adopts the contract: *MacNaughton Hermesen Britton Clarkson Planning Limited v. The Royalton Retirement Residence Inc.*, 2011 ONSC 179 at para 39.

[67] At trial, Dr. Ansari testified that North American Health now owns unit #12 (i.e., and also owned unit #13 before it was sold), 398 now owns unit #14, and Doctors Urgent Care Centre Inc. now owns unit #15.

[68] From the evidence, I find that the doctors entered into the BRA's to engage Genie Realty as their co-operating brokerage to buy units #12, 13, 14, and 15 on behalf of their corporations. For instance, the APS for units #12 and #13 identifies the buyer under the agreement as "*Dr. M. Vajid & Dr. A. Ansari & Dr. K. Malik (North American Health Care Inc.)*," and clearly shows that the doctors bought these units for North American Health.

[69] In addition, the APS for unit #14 clearly identifies the buyer as "*Khalid Malik (COMPANY TO BE INCORPORATED)*," and the APS for unit #15 identifies the buyer as "*Dr. Ansari Ali Hashsham (COMPANY TO BE INCORPORATED)*," respectively. It is noteworthy that the BRA and the APS for each of these units were signed simultaneously on the same day.<sup>9</sup> Based on this, I find that Dr. Malik bought unit #14 for 398.

[70] Although there is no evidence that any of the above-mentioned corporations ever adopted the BRA's, I accept that North American Health and 398 clearly benefitted from the BRA's which enabled them to acquire the respective units which they now own. Given that North American Health and 398 obviously are connected to and have benefitted from the purchases of their respective units under their BRA's, I find that it is fair and just to apply ss. 20(3) of the *OBCA* to impose liability under the BRA for units #12 and #13 on North American Health. Similarly, I find that liability under the BRA for unit #14 should be imposed on 398. In addition, I find that both corporations should be liable under ss. 20(3) for the oral agreements to extend the period for paying the leasehold improvement costs and commissions owed to Genie Realty under the BRA's as they had benefitted from these extensions.

[71] Dr. Ansari explained that unit #15 is owned by Doctors Urgent Care Centre Inc. which is *not* a party to this action and is separate and distinct from Doctors Urgent Care Inc. that has been named as a Defendant. In his uncontradicted evidence on this point, Dr. Ansari testified that Doctors Urgent Care Inc. operates the medical practice at the clinic in unit #15, whereas Doctors Urgent Care Centre Inc. is a separate entity that owns the premises. Given this arrangement, I find that Dr. Ansari bought unit #15 on behalf of Doctors Urgent Care Centre Inc. and *not* for Doctors

Urgent Care Inc., which is a separate entity. In the circumstances, I find that Doctors Urgent Care Inc. should not be liable as the “buyer” under the BRA for unit #15 and I decline to impose liability on the corporation under ss. 20(3) of the *OBCA*.

### **The Entire Agreement Clause**

[72] I am not persuaded that the entire agreement clauses that appear in each of the BRAs should apply to exclude the buyer commissions, leasehold improvement costs, or the 1-year interest-free period for paying these amounts.

[73] As mentioned earlier, I am satisfied that Mr. Highclass and Dr. Ansari, who spoke for his colleagues, agreed to the buyer commissions, leasehold improvement costs, and the 1-year interest-free payment period at the June 2012 meeting.

[74] Thereafter, the doctors entered into BRA’s with Genie Sabre to have the brokerage act as their co-operating realtor on the purchase of the subject units in the plaza. Each BRA included the following entire agreement clause:

If there is any conflict or discrepancy between any provision added to this Agreement and any provision in the standard pre-set portion hereof, the added provision shall supersede the standard pre-set provision to the extent of such conflict or discrepancy. This Agreement, including any provisions added to the Agreement, shall constitute the entire Authority from the Buyer to the Brokerage. There is no representation, warrant, collateral agreement or condition, which affects this Agreement other than as expressed herein. [Emphasis added]

[75] An entire agreement clause is construed in the same manner as an exclusionary clause: *Shelanu Inc. v. Print Three Franchising Corp.* (2003), 64 OR (3d) 533 (CA) at paras 30-36. It follows that the following 3-stage analysis for an exclusion clause applies to the construction of an entire agreement clause:

- (a) Did the parties intend for the exclusion clause to apply to the circumstances of the particular case?
- (b) If the clause applies, was it unconscionable?
- (c) If the clause applied and was not unconscionable, was it contrary to overriding policy?

*Tercon Contractors v. British Columbia (Minister of Transportation and Highways)*, 2010 SCC 4 at paras 121-123;

[76] The defence submits that the entire agreement clause in each BRA specifically precludes any representation, collateral agreement or condition made outside of the BRA from affecting its terms. In turn, the defence argues that the entire agreement clause excludes the prior agreement from the June 2012 meeting for the buyers to have a 1-year interest-free period to pay Genie Realty the leasehold improvement costs and buyer commissions owing on each unit that was purchased.

[77] Under step one of the *Tercon* analysis, I am satisfied that the parties did not intend for the exclusion clause to preclude the buyers from paying commissions or leasehold improvement costs to Genie Realty as each BRA had a term that expressly required the buyer to pay the brokerage the following commissions and leasehold improvement costs:

- a. A commission of 3% of the \$750,000.00 purchase price (i.e., \$22,500.00) + HST plus \$50,000.00 in unit improvement costs for units #12 and #13;
- b. A commission of 3% of the \$375,000.00 purchase price (i.e., \$11,250.00) + HST and a further \$25,000.00 in unit improvement costs for unit #14; and
- c. A commission of 3% of the \$375,000.00 purchase price (i.e., \$11,250.00) + HST and a further \$25,000.00 in unit improvement costs for unit #15.

The parties clearly agreed that buyers would pay these commissions and leasehold improvements to Genie Realty. These costs were not intended to be excluded from the BRAs.

[78] Furthermore, I am satisfied that the parties did not intend to apply the entire agreement clause to exclude the prior oral agreement for the 1-year interest-free period for buyers to pay their commissions and leasehold improvement costs. The buyers clearly benefited from the interest-free period which they negotiated at the June 2012 meeting after asking for more time to pay given their limited funds at the time. Moreover, after receiving the invoices from Genie Realty, none of the buyers raised any concerns with the 1-year interest-free period for paying the brokerage, as clearly set out in each invoice.

[79] Step two of the *Tercon* analysis focusses on whether the clause is unconscionable by considering the combination of inequality of bargaining power and the stronger party's use of that inequality to obtain an improvident bargain: *ABB Inc. v. Domtar Inc.*, 2007 SCC 50 at para 82; *2190322 Ontario Ltd. v. Ajilon Consulting*, 2014 ONSC 21 (Div Ct) at para 67. I do not find that such circumstances existed in this case. Both sides to each transaction were sophisticated and neither had a stronger informational position that led to an improvident agreement. In my view, the agreements were freely concluded and not unconscionable: *Tercon* at para 131, citing *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 SCR 426 at 462.

[80] Under the third step of the *Tercon* analysis, I find that there is a public policy reason for not applying the entire agreement clause in each BRA to exclude the oral agreements reached on the 1-year interest-free period for paying the buyer commissions and leasehold improvement costs. The doctors agreed to the commissions and improvement costs payable on each unit they bought after negotiating hard to obtain the interest-free period. They clearly benefitted from having their realtor front the leasehold improvement costs and extend an interest-free payment period that made it more immediately affordable for them to buy their units. In light of this, I find that the doctors should not be allowed to shelter under the entire agreement clause to avoid their contractual obligations and realize an unintended windfall, which would be contrary to public policy.

[81] Accordingly, I am satisfied that the entire agreement clause as set out in each BRA should not apply to exclude the commissions, improvement costs, or the 1-year interest-free period to pay these costs. To find otherwise would not align with the parties' intentions and cause an injustice.

### **Defence of Illegality**

[82] For the reasons that follow, I find that Mr. Highclass' non-compliance with regulatory requirements under the *Real Estate and Business Brokers Act*, 2002, SO 2002, c 30, Sched C ("*REBBA*"), and specifically the *Code of Ethics* under O.Reg. 580/05 ("*Code of Ethics*"), should not implicate the defence of illegality in this case.

[83] The defence of illegality, also known as the *ex turpi causa* doctrine, bars an otherwise valid claim due to a party's wrongdoing: *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63 at para 98. In the leading case of *Hall v. Hebert*, [1993] 2 SCR 159 at 170-171, McLachlin J. (as she then was) described the rationale for the defence of illegality as follows:

The power expressed in the maxim *ex turpi causa non oritur actio* finds its roots in the insistence of the courts that the judicial process not be used for abusive, illegal purposes. Thus Professor Gibson, in "Comment: Illegality of Plaintiff's Conduct as a Defence" (1969), 47 *Can. Bar Rev.* 89, at p. 89, writes:

Few would quarrel with the proposition that a man who murders his wealthy aunt should not be allowed to receive the proceeds of her life insurance as beneficiary, or that two robbers who disagree over the division of the spoils would not be allowed to settle their dispute in a court of law. It was to deal with flagrant abuses like these that English courts developed the principle expressed in the maxim: *ex turpi causa non oritur actio* -- no right of action arises from a base cause. [Emphasis added.]

The use of the doctrine of *ex turpi causa* to prevent abuse and misuse of the judicial process is well established in contract law and insurance law, where it provokes little controversy.

See also *British Columbia v. Zastowny*, 2008 SCC 4 at para 20.

[84] Relying on the principles set out in *Hall* and *Zastowny*, the Supreme Court summarized the defence of illegality in *Deloitte* at para 98 as follows:

[98] The defence of illegality bars an otherwise valid action in tort on the basis that the plaintiff has engaged in illegal or immoral conduct and, therefore, should not recover (*Hall v. Hebert*, 1993 CanLII 141 (SCC), [1993] 2 S.C.R. 159, at p. 169; *British Columbia v. Zastowny*, 2008 SCC 4, [2008] 1 S.C.R. 27, at para. 20). Grounded in public policy, it is available in very "limited" circumstances, only where it is necessary to preserve the "integrity of the justice system" (*Hall*, at pp. 179-80). And, the integrity of the justice system will only be compromised where a "damage award in a civil suit would, in effect, allow a person to profit from illegal or wrongful conduct, or would permit an evasion or rebate of a penalty prescribed by the criminal law" (*Hall*, at p. 169; *Zastowny*, at para. 3).

[85] The defence of illegality bars an otherwise valid action on the basis that the claimant has engaged in illegal or immoral conduct and, therefore, should not recover damages to preserve the integrity of the justice system: *Ibid*; *Hall* at 179-80; *Zastowny* at para 20. It is available in only very limited circumstances when necessary to preserve the integrity of the justice system where awarding civil damages would amount to profiting from illegal or wrongful conduct, or evading a penalty under criminal law: *Hall* at 169; *Zastowny* at paras 3 and 20. The defendant has the onus to prove the illegal or immoral conduct that precludes the claim: *Zastowny* at para 20. That said, the defence does not confer a discretion to withhold a remedy for civil damages merely because



the plaintiff has engaged in misconduct, as the overriding concern is whether permitting recovery would give rise to inconsistency in the law and damage the integrity of the legal system: *Aviva Canada Inc. v. 1843538 Ontario Inc.*, 2019 ONSC 3874 at para 66, citing *Livent Inc v. Deloitte & Touche*, 2016 ONCA 11 at para 113, reversed but not on this point 2017 SCC 63. The defence of illegality calls for claims constituting profit from illegal or immoral conduct, or the evasion of a criminal law penalty, to be distinguished other claims: *Zastowny* at para 20.

[86] To maintain the integrity of the legal system, the court may determine whether to decline to apply the defence of illegality to avoid an unjust enrichment after weighing the illegality and the unjust enrichment in balancing these competing policies: *First City Development Corp. Ltd. v. Durham (Regional Municipality)*, [1989] OJ No 87 (HC) at paras 116-118, citing *Menard v. Genereux* (1982), 39 OR (2d) 55 (HC) at 72, and *Berne Development Ltd. v. Haviland* (1983), 40 OR (2d) 238 (HC) at 250-251. The test for unjust enrichment has three elements: i) the enrichment of one party; ii) a corresponding deprivation by the other party; and iii) an absence of juristic reason for the enrichment: *Madi v. King*, 2023 ONCA 443 at para 23, citing *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at para 30.

[87] To invoke the doctrine of illegality, the defence submits that Mr. Highclass engaged in unlawful or wrongful conduct by variously breaching his regulatory duties as a realtor.

[88] Relying on the *Code of Ethics* at OReg 580/05 to the *Real Estate and Business Brokers Act, 2002*, the defence submits that Mr. Highclass unlawfully insisted that Dr. Ansari retain him as his co-operating broker and refused to present any offers from Dr. Ansari unless retained in this role. Both sides agree that this alleged conduct would contravene the *Code of Ethics*.<sup>10</sup>

[89] In my view, the defence has not proven that Mr. Highclass engaged in illegal or wrongful conduct by improperly insisting on being Dr. Ansari's broker. Only after the action was started did Dr. Ansari raise this uncorroborated allegation, which Mr. Highclass flatly denies. Dr. Ansari claims that Mr. Highclass insisted on being his broker on two separate occasions when Mr. Rajora and Mr. Azam were present, but neither were called to testify despite being listed as defence witnesses. The defence initially asserted that Mr. Azam was to have been Dr. Ansari's realtor on the purchase of unit #15, but Dr. Ansari conceded under cross-examination that he never actually

retained Mr. Azam. Having regard to all of the evidence, I find on balance that Mr. Highclass did not act unlawfully or wrongfully as alleged on this point.

[90] In addition, the defence raised the defence of illegality by claiming that Mr. Highclass failed to properly disclose in writing to the buyers: a) his relationship to the seller, namely to 669 and Mr. Joshi, contrary to s. 17 of the *Code of Ethics*, and b) his interest in the plaza contrary to ss. 18(1)(1.) and (2) to (3) of the *Code of Ethics*. (Sub)sections 17 and 18(1) to (3) of the *Code of Ethics* provide as follows:

**Nature of relationship**

**17.** If a registrant represents or provides services to more than one buyer or seller in respect of the same trade in real estate, the registrant shall, in writing, at the earliest practicable opportunity and before any offer is made, inform all buyers and sellers involved in that trade of the nature of the registrant's relationship to each buyer and seller.

**Disclosure of interest**

**18. (1)** A registrant shall, at the earliest practicable opportunity and before any offer is made in respect of the acquisition or disposition of an interest in real estate, disclose in writing the following matters to every client represented by the registrant in respect of the acquisition or disposition:

1. Any property interest that the registrant has in the real estate.
2. Any property interest that a person related to the registrant has in the real estate, if the registrant knows or ought to know of the interest.
3. Any property interest that a personal real estate corporation controlled by the registrant has in the real estate.
4. Any property interest that a person related to a personal real estate corporation controlled by the registrant has in the real estate, if the registrant knows or ought to know of the interest.

(2) A brokerage shall, at the earliest practicable opportunity and before any offer is made in respect of the acquisition or disposition of an interest in real estate, disclose in writing the matters referred to in paragraphs 1 and 2 of subsection (1) to every customer with whom the brokerage has entered into an agreement in respect of the acquisition or disposition.

(3) A broker or salesperson shall, at the earliest practicable opportunity and before any offer is made in respect of the acquisition or disposition of an interest in real estate, disclose in writing the matters referred to in paragraphs 1 and 2 of subsection (1) to every customer of the broker or salesperson with whom the

brokerage that employs the broker or salesperson has entered into an agreement in respect of the acquisition or disposition.

[91] In his evidence, Mr. Highclass conceded that he did not arrange for the buyers and sellers to sign a *Confirmation of Co-operation and Representation* (OREA Form 320) and, thereby, failed to provide written notice to the buyers of his relationship to the seller in breach of the requirement at s. 17 of the *Code of Ethics*. But before any offers were made, I accept that Mr. Highclass met Dr. Ansari (i.e., who was acting for Drs. Malik and Vajid) and Mr. Rajora. During this meeting, I find that Mr. Highclass verbally advised them that he (i.e., through his brokerage, Genie Realty) was acting for the seller as the listing realtor, confirmed that the listed units were being sold under power of sale, reviewed the sale terms (i.e., the purchase prices, commissions, and leasehold improvement costs for the listed units), shared the MLS listing for the listed units which confirmed these details, and gave them some information about the seller. More importantly, Dr. Ansari, Mr. Rajora, Mr. Joshi and Mr. Highclass attended an in-person meeting to discuss the terms of sale for the listed units before any formal offers to buy the units were made. Taking this all into account, I find that Mr. Highclass' relationship to both the buyers and the seller was clearly disclosed at these meetings and, therefore, was quite apparent to everyone involved in the purchase and sale of the listed units. Although his failure to give written disclosure of his relationships breached s. 17 of the *Code of Conduct*, I accept that the breach was mitigated by oral disclosures *before* any offers were made. As a realtor, he was obliged to serve his clients fairly, honestly and with integrity to promote and protect their best interests using reasonable knowledge, skill and judgment, which included complying with written notice requirements: ss. 2(1) and 3-5 of the *Code of Conduct*. That said, and without condoning his omission, I am persuaded that his breach of s. 17 of the *Code of Conduct* by not giving written disclosure of his client relationships was less serious than otherwise would have been the case had these relationships not previously been disclosed verbally and during in-person meetings.

[92] Similarly, I accept the defence submission that Mr. Highclass breached ss. 25(1) and (2) of the *Code of Conduct* by failing to disclose the existence and details of his seller's commission to the buyers. Subsections 25(1) and (2) of the *Code of Conduct* provide as follows:

**Agreements relating to remuneration**

25. (1) If a brokerage has a seller as a client and an agreement between the brokerage and the seller contains terms that relate to remuneration and that may affect whether an offer to buy is accepted, the brokerage shall disclose the existence of and the details of those terms to any person who makes a written offer to buy, at the earliest practicable opportunity and before any offer is accepted.

(2) Subsection (1) applies, with necessary modifications, to a brokerage that has a seller as a customer, if the brokerage and the seller have an agreement that provides for the brokerage to receive written offers to buy.

[93] Mr. Highclass testified that he disclosed the full commission structure to the buyers, and implicitly revealed the seller's 3% commission (i.e., by indicating that the 6% total commission included 3% payable by the buyers), although Dr. Ansari denies that the seller's commission was ever disclosed. On balance, I accept that Mr. Highclass did not adequately reveal the seller's commission to satisfy his obligation under s. 25 of the *Code of Conduct* to make this disclosure. Nevertheless, and without condoning this omission, I am satisfied that this lack of disclosure did not prejudice the buyers as none was raised by the defence when specifically asked by the court to identify any during submissions.

[94] I am not persuaded that Mr. Highclass breached a disclosure obligation under ss. 18(1)(1.) of the *Code of Ethics* by not advising the doctors that he owned another unit in the same plaza where the listed units were being sold. To properly understand a registrant's disclosure obligation under ss. 18(1)(1.), the words of that provision should be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme, object and legislative intent of the *Code of Ethics* and the *Real Estate and Business Brokers Act, 2002*, respectively: *Carmichael v. GlaxoSmithKline Inc.*, 2020 ONCA 447 at para 79, citing *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21. Based on the words in ss. 18(1)(1.), I find that the disclosure requirement is meant to address or mitigate actual or potential conflicts of interest from any property interest the registrant has in the real estate being bought and sold. There is no evidence that Mr. Highclass' unit was related to any units that were listed for sale, or that his unit would have impacted or been impacted by the listed units. Accordingly, on the particular facts of this case, I see no potential conflicts or other concerns arising from his ownership of another unit in the plaza to justify a requirement under ss. 18(1)(1.) to disclose this interest, particularly as the defence did not identify any clear conflicts or prejudice in submissions. Accordingly, I am satisfied that Mr. Highclass'

non-disclosure of his interest in another unit in the plaza did not breach ss. 18(1)(1.) of the *Code of Ethics*.

[95] I do not find that Mr. Highclass breached ss. 18(1)(1.) of the *Code of Conduct* by not giving written disclosure (i.e., before offers to purchase were made) of a purported interest in the listed units that arose when he agreed to front the leasehold improvement costs for the buyers. From the evidence, I find that Mr. Highclass and Mr. Joshi met Dr. Ansari (i.e., who represented the other buyers) and his brother in June 2012 to negotiate a purchase of the listed units. During this meeting, I find that Mr. Highclass agreed to give the buyers a 1-year interest-free period to pay the leasehold improvements and commissions on each unit purchased. In the circumstances, I accept that everyone involved in the transactions had clear prior knowledge of the amounts that would come due under the payment terms. That said, I am not persuaded that any contractual rights to these payments should constitute an interest in “real estate” under ss. 18(1)(1.) of the *Code of Conduct* as the provision, in my view, clearly refers to property being bought or sold and not to interests rising from contractual obligations related to any such sale.

[96] Taking the foregoing into account, I find that the defence has shown that Mr. Highclass and Genie Realty breached ss. 17 and 25 of the *Code of Conduct* by failing to disclose to the buyers in writing their relationship to the seller and the seller’s commission. However, I am not persuaded that this should justify an application of the defence of illegality to preserve the integrity of the justice system. The breach under the *Code of Conduct* was mitigated by the verbal disclosure of the realtors’ relationship with the seller. The buyers clearly knew about the relational dynamics surrounding the sale of the listed units in the plaza. Moreover, I would attribute the lack of written disclosure to inattention or neglect, and not to any flagrant or nefarious abuse that would implicate the defence of illegality: *Hall* at 170-171. Importantly, the buyers were not prejudiced by the lack of written disclosure. In my view, this is not one of those very limited instances where the doctrine of illegality must be applied to preserve the integrity of the justice system: *Deloitte* at para 98. To the contrary, I find that barring the claim under the doctrine of illegality would cause unjust enrichment by discharging the buyers from otherwise binding contractual debt obligations that would confer a windfall at the expense of the realtors without adequate juristic reason given the parties’ knowledge and expectations and the lack of any prejudice from the wrongful omission: *Madi* at para 23.

[97] Accordingly, I decline to apply the defence of illegality.

### **Outcome**

[98] Based on all of the foregoing, the action is allowed in part.

[99] The Plaintiffs shall have judgment in accordance with these reasons, including:

- a. a declaration that the claims are not statute-barred;
- b. the Defendants Dr. Ali Hashsham Ansari and North American Health Care Inc. are jointly and severally liable for the amount of \$75,425.00 (i.e., being \$25,425.00 in commissions, inclusive of HST, plus \$50,000.00 in leasehold improvements on the purchase of units #12 and #13 in the plaza);
- c. the Defendant 2323398 Ontario Inc. is liable for the amount of \$37,712.50 (i.e., being \$12,712.50 in commissions, inclusive of HST, plus \$25,000.00 in leasehold improvements costs owing on the purchase of unit #14 in the plaza);
- d. the Defendant Dr. Ali Hashsham Ansari is liable for the amount of \$37,712.50 (i.e., being \$12,712.50 in commissions, inclusive of HST, plus \$25,000.00 in leasehold improvement costs owing on the purchase of unit #15 in the plaza);
- e. effective August 1, 2015, pre-judgment interest shall run at 1% per annum pursuant to the *Courts of Justice Act*;
- f. post-judgment interest shall apply at 6% per annum pursuant to the *Courts of Justice Act*; and
- g. apart from costs, the balance of the claims in the action are dismissed.

[100] Should the parties be unable to resolve the matter of costs, the Plaintiffs may deliver written costs submissions not exceeding five (5) pages (excluding any bill of costs and offer(s) to settle) within 15 days, the Defendants may deliver costs submissions on the same terms within a further

15 days, and the Plaintiffs may deliver reply costs submissions not exceeding two (2) pages within a further 10 days.

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M.T. Doi J.

**Date:** July 13, 2023

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<sup>1</sup> Although a counterclaim was pleaded, the Defendants abandoned the counterclaim at trial.

<sup>2</sup> The Plaintiff initially named Dr. Malik and Mr. Vajid as Defendants in the action. By consent Order dated March 6, 2020, the action as against Dr. Malik and Mr. Vajid was dismissed without costs.

<sup>3</sup> Although the invoices from Genie Sabre purported to require the unit buyers to sign promissory notes (i.e., which Mr. Highclass later delivered in draft for them to sign), I am satisfied that the buyers never agreed to any such requirement as Mr. Highclass candidly conceded in his evidence at trial. That said, I accept that the intent behind the draft promissory notes was to memorialize the debt terms which the parties previously had agreed to verbally.

<sup>4</sup> When the individual defendants made pre-purchase inquiries into the value of the leasehold improvements for the purpose of obtaining property insurance quotes, Mr. Highclass inquired with the contractor who renovated all five units which informed his \$355,000.00 estimated total cost for all of the leasehold improvements.

<sup>5</sup> On or about May 21, 2012, Mr. Highclass prepared the BRA and gave a copy to Dr. Ansari for his lawyer to review before signing the document. Although Mr. Highclass expected Dr. Ansari to sign the BRA within a week or so, Dr. Ansari did not sign the BRA until July 9, 2012 when he also signed the APS to purchase the family clinic at unit #15 in the plaza.

<sup>6</sup> At trial, the defence asserted that the version of the BRA which Mr. Chattha received was missing the second page (i.e., which set out the commission and adjusted price terms). Mr. Highclass responded that Mr. Chattha never indicated that he was missing a page to the BRA or asked for the missing page to be sent over.

<sup>7</sup> By email sent on March 27, 2013, Mr. Highclass sent both invoices to Mr. Chattha who wrote that he was not dealing with these matters and that Mr. Highclass should deal directly with his clients for payment.

<sup>8</sup> Although Genie Realty's invoice to Dr. Ansari dated September 18, 2012 stipulates a September 1, 2013 payment due date, I find that Dr. Ansari had until at least September 28, 2013 (i.e., one year from the date of the invoice) to make payment after the 1-year interest-free period would have expired, if not until October 4, 2013 which was one year after the deal to buy unit #15 closed. However, as the action was brought on August 31, 2015, none of these dates are material to my finding that the action was commenced in timely fashion.

<sup>9</sup> On May 1, 2012, Dr. Malik signed the BRA and APS to buy unit #15. On August 18, 2012, Dr. Malik signed the BRA and APS to buy unit #14. On December 6, 2012, Drs. Vajid, Ansari and Malik signed the BRA and APS to buy units #12 and #13.

<sup>10</sup> See ss. 2(1) (*Brokers and salespersons*), 3 (*Fairness, honesty, etc.*), 4 (*Best interests*), 7(1) and (2) (*Dealings with other registrants*), 8(2) (*Services from others*); 24 (*Conveying offers*); 38 (*Error, misrepresentation, fraud, etc.*); 39 (*Unprofessional conduct, etc.*) and 40 (*Abuse and harassment*) of the *Code of Ethics*.

**CITATION:** Highclass v. Ansari, 2023 ONSC 4138  
**COURT FILE NO.:** CV-15-4026  
**DATE:** 2023 07 13

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Hannif Highclass and Genie Sabre  
Realty Ltd.

**AND:**

Ali Hashsham Ansari, Doctors  
Urgent Care Inc., 2323398 Ontario  
Inc. and North American Health  
Care Inc.

**BEFORE:** Doi J.

**COUNSEL:** Jonathan Rosenstein, for the  
Plaintiffs

John I. O’Kane, for the Defendants

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**REASONS FOR JUDGMENT**

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M.T. Doi J.

DATE: July 13, 2023



# **TAB 18**

**Paul Housen** *Appellant*

v.

**Rural Municipality of Shellbrook**  
**No. 493** *Respondent*

**INDEXED AS: HOUSEN v. NIKOLAISEN**

**Neutral citation: 2002 SCC 33.**

File No.: 27826.

2001: October 2; 2002: March 28.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

*Torts — Motor vehicles — Highways — Negligence — Liability of rural municipality for failing to post warning signs on local access road — Passenger sustaining injuries in motor vehicle accident on rural road — Trial judge apportioning part of liability to rural municipality — Whether Court of Appeal properly overturning trial judge's finding of negligence — The Rural Municipality Act, 1989, S.S. 1989-90, c. R-26.1, s. 192.*

*Municipal law — Negligence — Liability of rural municipality for failing to post warning signs on local access road — Passenger sustaining injuries in motor vehicle accident on rural road — Trial judge apportioning part of liability to rural municipality — Whether Court of Appeal properly overturning trial judge's finding of negligence — The Rural Municipality Act, 1989, S.S. 1989-90, c. R-26.1, s. 192.*

*Appeals — Courts — Standard of appellate review — Whether Court of Appeal properly overturning trial judge's finding of negligence — Standard of review for questions of mixed fact and law.*

The appellant was a passenger in a vehicle operated by N on a rural road in the respondent municipality. N

**Paul Housen** *Appelant*

c.

**Municipalité rurale de Shellbrook**  
**n° 493** *Intimée*

**RÉPERTORIÉ : HOUSEN c. NIKOLAISEN**

**Référence neutre : 2002 CSC 33.**

N° du greffe : 27826.

2001 : 2 octobre; 2002 : 28 mars.

Présents : Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour et LeBel.

EN APPEL DE LA COUR D'APPEL DE LA SASKATCHEWAN

*Délits civils — Véhicules automobiles — Routes — Négligence — Responsabilité d'une municipalité rurale qui omet d'installer des panneaux d'avertissement le long d'une voie d'accès locale — Blessures subies par un passager dans un accident automobile sur une route rurale — Responsabilité imputée en partie à la municipalité rurale par la juge de première instance — La Cour d'appel a-t-elle eu raison d'infirmar la décision de la juge de première instance concluant à la négligence de la municipalité rurale? — The Rural Municipality Act, 1989, S.S. 1989-90, ch. R-26.1, art. 192.*

*Droit municipal — Négligence — Responsabilité d'une municipalité rurale qui omet d'installer des panneaux d'avertissement le long d'une voie d'accès locale — Blessures subies par un passager dans un accident automobile sur une route rurale — Responsabilité imputée en partie à la municipalité rurale par la juge de première instance — La Cour d'appel a-t-elle eu raison d'infirmar la décision de la juge de première instance concluant à la négligence de la municipalité rurale? — The Rural Municipality Act, 1989, S.S. 1989-90, ch. R-26.1, art. 192.*

*Appels — Tribunaux judiciaires — Norme de contrôle applicable en appel — La Cour d'appel a-t-elle eu raison d'infirmar la décision de la juge de première instance concluant à la négligence de la municipalité rurale? — Norme de contrôle applicable à l'égard des questions mixtes de fait et de droit.*

L'appellant était passager dans le véhicule conduit par N sur une route rurale située sur le territoire de la

to the following types of questions: (1) questions of law; (2) questions of fact; (3) inferences of fact; and (4) questions of mixed fact and law.

#### A. *Standard of Review for Questions of Law*

On a pure question of law, the basic rule with respect to the review of a trial judge's findings is that an appellate court is free to replace the opinion of the trial judge with its own. Thus the standard of review on a question of law is that of correctness: Kerans, *supra*, at p. 90.

There are at least two underlying reasons for employing a correctness standard to matters of law. First, the principle of universality requires appellate courts to ensure that the same legal rules are applied in similar situations. The importance of this principle was recognized by this Court in *Woods Manufacturing Co. v. The King*, [1951] S.C.R. 504, at p. 515:

It is fundamental to the due administration of justice that the authority of decisions be scrupulously respected by all courts upon which they are binding. Without this uniform and consistent adherence the administration of justice becomes disordered, the law becomes uncertain, and the confidence of the public in it undermined. Nothing is more important than that the law as pronounced . . . should be accepted and applied as our tradition requires; and even at the risk of that fallibility to which all judges are liable, we must maintain the complete integrity of relationship between the courts.

A second and related reason for applying a correctness standard to matters of law is the recognized law-making role of appellate courts which is pointed out by Kerans, *supra*, at p. 5:

The call for universality, and the law-settling role it imposes, makes a considerable demand on a reviewing court. It expects from that authority a measure of expertise about the art of just and practical rule-making, an expertise that is not so critical for the first court. Reviewing courts, in cases where the law requires settlement, make law for future cases as well as the case under review.

les normes de contrôle se rapportant à chacune des catégories de questions suivantes : (1) les questions de droit; (2) les questions de fait; (3) les inférences de fait; (4) les questions mixtes de fait et de droit.

#### A. *La norme de contrôle applicable aux questions de droit*

Dans le cas des pures questions de droit, la règle fondamentale applicable en matière de contrôle des conclusions du juge de première instance est que les cours d'appel ont toute latitude pour substituer leur opinion à celle des juges de première instance. La norme de contrôle applicable à une question de droit est donc celle de la décision correcte : Kerans, *op. cit.*, p. 90.

Au moins deux raisons justifient l'application de la norme de la décision correcte aux questions de droit. Premièrement, le principe de l'universalité impose aux cours d'appel le devoir de veiller à ce que les mêmes règles de droit soient appliquées dans des situations similaires. Notre Cour a reconnu l'importance de ce principe dans *Woods Manufacturing Co. c. The King*, [1951] R.C.S. 504, p. 515 :

[TRADUCTION] Il est fondamental, pour assurer la bonne administration de la justice, que l'autorité des décisions soit scrupuleusement respectée par tous les tribunaux qui sont liées par elles. Sans cette adhésion générale et constante, l'administration de la justice sera désordonnée, le droit deviendra incertain et la confiance dans celui-ci sera ébranlée. Il importe plus que tout que le droit, tel qu'il a été énoncé, [. . .] soit accepté et appliqué comme l'exige notre tradition; et même au risque de nous tromper, tous les juges étant faillibles, nous devons préserver totalement l'intégrité des rapports entre les tribunaux.

Une deuxième raison, connexe, d'appliquer la norme de la décision correcte aux questions de droit tient au rôle qu'on reconnaît aux cours d'appel en matière de création du droit et qu'a souligné Kerans, *op. cit.*, p. 5 :

[TRADUCTION] Le principe de l'universalité — et le rôle de création du droit qu'il emporte — exige beaucoup du tribunal de révision. Il exige de ce tribunal qu'il fasse preuve d'un certain degré d'expertise dans l'art d'élaborer une règle de droit juste et pratique, expertise qui ne revêt pas une importance aussi cruciale pour le premier tribunal. Dans les affaires où le droit n'est pas fixé, le tribunal de révision élabore des règles de droit applicables tout autant à d'éventuelles affaires qu'à celle dont il est saisi.

operational basis, whether at head office or across the sea.

35

Stated differently, the lower courts committed an error in law by finding that sub-delegation was a factor identifying a person who is part of the “directing mind” of a company, when the correct legal factor characterizing a “directing mind” is in fact “the capacity to exercise decision-making authority on matters of corporate policy”. This mischaracterization of the proper legal test (the legal requirements to be a “directing mind”) infected or tainted the lower courts’ factual conclusion that Captain Kelch was part of the directing mind. As this erroneous finding can be traced to an error in law, less deference was required and the applicable standard was one of correctness.

36

To summarize, a finding of negligence by a trial judge involves applying a legal standard to a set of facts, and thus is a question of mixed fact and law. Matters of mixed fact and law lie along a spectrum. Where, for instance, an error with respect to a finding of negligence can be attributed to the application of an incorrect standard, a failure to consider a required element of a legal test, or similar error in principle, such an error can be characterized as an error of law, subject to a standard of correctness. Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of “mixed law and fact”. Where the legal principle is not readily extricable, then the matter is one of “mixed law and fact” and is subject to a more stringent standard. The general rule, as stated in *Jaegli Enterprises, supra*, is that, where the issue on appeal involves the trial judge’s interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error.

le simple fait de mettre en œuvre ces politiques dans un cadre opérationnel, que ce soit au siège social ou en mer.

En d’autres termes, les juridictions inférieures ont commis une erreur de droit en concluant que la subdélégation était un facteur permettant de qualifier une personne d’« âme dirigeante » d’une société, alors que le facteur juridique applicable à cet égard est en fait « la capacité d’exercer un pouvoir décisionnel sur les questions de politique générale de la personne morale ». Cette formulation erronée du critère juridique approprié (les conditions juridiques requises pour être une « âme dirigeante ») a entaché ou vicié la conclusion factuelle des juridictions inférieures selon laquelle le capitaine Kelch était une âme dirigeante de la société. Comme cette conclusion erronée était imputable à une erreur de droit, un degré moindre de retenue s’imposait et la norme applicable était celle de la décision correcte.

En résumé, la conclusion de négligence que tire le juge de première instance suppose l’application d’une norme juridique à un ensemble de faits et constitue donc une question mixte de fait et de droit. Les questions mixtes de fait et de droit s’étalent le long d’un spectre. Lorsque, par exemple, la conclusion de négligence est entachée d’une erreur imputable à l’application d’une norme incorrecte, à l’omission de tenir compte d’un élément essentiel d’un critère juridique ou à une autre erreur de principe semblable, une telle erreur peut être qualifiée d’erreur de droit et elle est contrôlée suivant la norme de la décision correcte. Les cours d’appel doivent cependant faire preuve de prudence avant de juger que le juge de première instance a commis une erreur de droit lorsqu’il a conclu à la négligence, puisqu’il est souvent difficile de départager les questions de droit et les questions de fait. Voilà pourquoi on appelle certaines questions des questions « mixtes de fait et de droit ». Si le principe juridique n’est pas facilement isolable, il s’agit alors d’une « question mixte de fait et de droit », assujettie à une norme de contrôle plus rigoureuse. Selon la règle générale énoncée dans l’arrêt *Jaegli Enterprises*, précité, si la question litigieuse en appel soulève l’interprétation de l’ensemble de la preuve par le juge de première instance, cette interprétation ne doit pas être infirmée en l’absence d’erreur manifeste et dominante.

# TAB 19

# COURT OF APPEAL FOR ONTARIO

CITATION: James Bay Resources Limited v. Mak Mera Nigeria Limited, 2025  
ONCA 448

DATE: 20250620

DOCKET: COA-24-CV-0045

Gillese, Roberts and Coroza JJ.A.

BETWEEN

James Bay Resources Limited

Plaintiff (Respondent)

and

Mak Mera Nigeria Limited a.k.a. Mak Mera Limited and  
Adewale Olorunsola a.k.a. Wale Sola

Defendants (Appellants)

Darryl A. Cruz and Audrey-Anne Delage, for the appellants

Hilary Book and William McLennan, for the respondent

Heard: January 20, 2025

On appeal from the judgment of Justice Eugenia Papageorgiou of the Superior Court of Justice, dated December 4, 2023, with reasons reported at 2023 ONSC 6844.

**L.B. Roberts J.A.:**

## **A. OVERVIEW**

[1] This appeal involves the correct application of principles of contract interpretation to related agreements. It also turns on the proper assessment of damages for defamation owing to a corporate plaintiff.

[2] The respondent, James Bay Resources Limited (“James Bay”), is an Ontario corporation. It sought to acquire oil and gas contracts in Nigeria. Under Nigerian law, as a non-Nigerian entity, James Bay had to partner with at least one Indigenous Nigerian business to extract oil and gas in Nigeria. James Bay was introduced to the corporate appellant, Mak Mera Nigeria Limited a.k.a. Mak Mera Limited (“Mak Mera”), a Nigerian company that carries on business as a consultant and service provider in the oil and gas sector in Nigeria, and to the appellant, Wale Sola, Mak Mera’s president and business development manager, who interfaced with foreign companies seeking to do business in Nigeria’s oil and gas industry.

[3] James Bay entered into two agreements with Mak Mera dated, respectively, March 9, 2011 (the “2011 agreement”), and February 1, 2012 (the “2012 agreement”) (together, the “Agreements”). Each of the Agreements provided that Mak Mera would receive monetary compensation and shares for providing services to James Bay in pursuing business opportunities in Nigeria’s oil and gas industry. There is no dispute that, at least initially, the appellants provided valuable services to James Bay. James Bay paid Mak Mera the total amount of US\$405,000. As the conditions in the Agreements for the issuance of the shares were not met, James Bay did not issue shares to Mak Mera.

[4] The parties’ relationship deteriorated. In a July 2, 2014 letter written to the Department of Petroleum Resources of the Nigerian Government (the “DPR”), the

department responsible for approving oil and gas contracts, the appellants accused James Bay of breaching the intention of the 2012 agreement by excluding them from participating in James Bay's acquisition of the Oil Mining Lease ("OML")-25 (the "complaint letter"). They asserted that if they were to receive no benefit from James Bay's acquisition, they would consider themselves to have been **"defrauded by misrepresentations and deceptive conduct"** (bolded type in the original). They asked the DPR to suspend the award of the OML-25 to James Bay to allow them to resolve the matter.

[5] James Bay ultimately did not succeed in obtaining any oil and gas contracts in Nigeria and decided to abandon its efforts. It commenced an action against the appellants seeking repayment of the amounts paid under the Agreements and damages for defamation because of the complaint letter.

[6] By judgment dated December 4, 2023 (the "Judgment"), the trial judge ordered Mak Mera to pay James Bay the amount of US\$405,000, which she characterized as "advances". She found that the appellants had defamed James Bay by the publication of the complaint letter and ordered the appellants to pay James Bay damages for defamation in the amount of \$200,000. By order dated April 19, 2024 (the "Costs Order"), she awarded James Bay costs of the action of \$304,401.91, plus interest.



[7] The appellants submit that the trial judge erred in her interpretation of the Agreements. Specifically, they argue she misconstrued the compensation terms of the Agreements. This led her to wrongly characterize the US\$405,000 as advances, imply repayment terms, and order the funds' repayment. The appellants have not challenged the trial judge's finding of defamation but appeal her substantial damages award. They submit nominal damages of \$1,000 would have been appropriate in the circumstances of this case.

[8] I accept that the trial judge erred in both respects. I would allow the appeal, set aside the damages award, and substitute an award of damages for defamation in the amount of \$1,000.

## **B. BACKGROUND**

### **(1) The Agreements**

[9] The parties were introduced by an investment broker. They initially discussed a particular venture, the OML-11, that had significant proven and probable oil reserves but was at that time out of production for political reasons. Mak Mera had a relationship with the company, D & H Solutions AS ("D & H"), that had been given certain rights to operate in the OML-11's geographic area.

[10] Within days of meeting, on March 9, 2011, the parties entered into the 2011 agreement, which was drafted by James Bay's principal and approved by James Bay's Board of Directors. It was not limited to the OML-11 opportunity, but

covered more broadly “the acquisition of Nigerian oil & gas assets”. James Bay agreed to “fund [an] initial \$2 million of risk capital to acquire oil & gas assets in Nigeria” and to “raise an additional \$25 million in order to fund development of assets acquired in Nigeria”.

[11] The relevant compensation terms read as follows:

4. [James Bay] will pay [Mak Mera<sup>1</sup>] 12 million shares of [James Bay] and [US]\$300,000

a) 3 million shares to be issue[d] upon successful completion of due diligence and acquisition of oil & gas assets in Nigeria

b) 3 million shares to be issue[d] upon [James Bay] reaching 1,500 [barrels of oil equivalent: “boe”] per day

c) 3 million shares to be issue[d] upon [James Bay] reaching 4,000 boe per day

d) 3 million shares to be issued upon [James Bay] reaching 5,500 boe per day.

[12] On March 21, 2011, James Bay and D & H entered into a Memorandum of Understanding (“MOU”) for the expressed purpose of working together “to review and evaluate projects in Nigeria (whether currently known or unknown to D & H) which could be mutually beneficial”. One such project identified in the MOU was the OML-11.

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<sup>1</sup> The wording of the 2011 agreement is that payment would be to Mr. Sola; however, the parties agree that this provision should read as payment to Mak Mera.

[13] The appellants and James Bay worked towards the acquisition of the OML-11. By August 2011, James Bay determined that the acquisition of the OML-11 was proving difficult and decided to place less importance on it. As the trial judge explained: “Given that James Bay had spent hundreds of thousands of dollars in due diligence and had become comfortable in Nigeria, James Bay determined that it would look at other opportunities in Nigeria.”

[14] Between March 2011 and February 2012, James Bay paid Mak Mera US\$240,000 under the 2011 agreement.

[15] On February 1, 2012, the parties entered into the 2012 agreement. It provided for the following compensation to be paid to Mak Mera:

1. The parties agree that if an interest in a Potential Target (as defined in the MOU)<sup>2</sup> under the OML-11 License, for at least a 15% interest is obtained for the benefit of the Parties, then the terms of the Services Agreement<sup>3</sup> shall apply with regard to that transaction and [Mak Mera] shall receive in addition to the shares under Section 2, the balance of the 6 million (6,000,000) shares in the capital of James Bay as provided in the Services Agreement.

2. For Projects other than those in paragraph 1 above, James Bay shall issue to [Mak Mera] an aggregate of up to 6.5 million (6,500,000) shares. In such a case James Bay agrees that it will issue 3.5 million (3,500,000) common shares in the capital of James Bay (the “**Common Shares**”) to [Mak Mera], as soon as **practicably** possible upon a definitive agreement being

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<sup>2</sup> “MOU” is defined in the third preamble to the 2012 agreement as the memorandum of understanding that James Bay entered into with D & H.

<sup>3</sup> “Services Agreement” is defined in the first preamble to the 2012 agreement as the memorandum of understanding made on March 9, 2011. In these reasons, it is referred to as the 2011 agreement.

entered into with regard to acquisition of an interest in an oil and gas project in Nigeria, and a further 3 million (3,000,000) Common Shares to [Mak Mera], as soon as practicably possible if such project(s): (i) achieve average production of at least 1,500 BOE/D over a period of 60 days or (ii) a minimum of P50 recoverable estimate of 50 million BOE (defined by an independent third party report).

3. ...The conditions to the issuance of the 6.5 million Common Shares contained in items (i) and (ii) of paragraph 2 must be met on or prior to December 31, 2013, otherwise any obligations of James Bay pursuant to paragraph 2 of this Agreement shall cease to exist.

4. James Bay agrees that it will pay to [Mak Mera] the amount of US\$165,000, as compensation for the services rendered. The parties acknowledge that the US\$165,000 is to be paid at the same time the initial 3.5 million Common Shares are issued to [Mak Mera] under this Agreement. [Emphasis in original.]

[16] The appellants introduced James Bay to the OML-90 opportunity. Their efforts resulted in James Bay entering into an agreement to acquire an interest in the OML-90 in May 2012. In accordance with the terms of the 2012 agreement, between February and October 2012, James Bay paid Mak Mera monetary compensation of US\$165,000. In or around May 2013, James Bay received approval from the DPR to acquire the OML-90 and passed a shareholders resolution for the issuance of shares to Mak Mera. James Bay did not ultimately issue those shares because it could not obtain TSX Venture Exchange approval before the December 31, 2013 deadline under the 2012 agreement. Nor did it proceed with the acquisition of OML-90 because it could not find lenders.

[17] The 2012 agreement between the parties terminated in accordance with its terms on December 31, 2013, because no oil and gas contracts had been obtained.

[18] In May 2014, Crestar Integrated Natural Resources (“Crestar”) contracted with Shell Corporation (“Shell”) with respect to the OML-25. James Bay’s country manager, Adeniyi Olaniyan, had incorporated Crestar and James Bay subsequently acquired an interest in Crestar. Mr. Olaniyan had originally brought the OML-25 opportunity to James Bay in 2013.

## **(2) The complaint letter**

[19] In July 2014, the appellants sent the complaint letter to the DPR and representatives of Shell. As previously noted, the DPR’s approval was required for oil and gas contracts, such as the OML-25. In the complaint letter, the appellants alleged, among other things, that James Bay breached their agreement and treated them unfairly. The complaint letter stated in part that: “If we are to get NO BENEFIT from the OML-25 acquisition by JAMES BAY GROUP by virtue of the **opaque relationship** between CRESTAR and JAMES BAY, we do consider that [Mak Mera] would have been **defrauded by misrepresentations and deceptive conduct**” (underlining added; capitalization and bold in original).

[20] The appellants asked that the DPR “please suspend the award of OML-25 to JAMES BAY/CRESTAR to give us the required time to resolve the matters

raised with JAMES BAY. The two parties, [Mak Mera] and [D & H] want answers to the nagging questions” (capitalization in original).

[21] On July 15, 2014, James Bay sent a “cease and desist” letter through its lawyers to the appellants. The appellants’ counsel replied by letter on August 9, 2014, advising that if James Bay did not comply with their demands, Mak Mera would “commence a number of blistering legal proceedings that will cause untold hardship and damages to your Clients’ activities and reputation, not only in Nigeria, but worldwide.”

[22] The appellants wrote a further letter to the DPR, repeating their allegations and request that James Bay and Crestar not be granted any interest in the OML-25.

[23] In or around the fall of 2014, the DPR decided to pre-empt the company with whom Shell could choose to partner in the OML-25. Neither James Bay nor Crestar ultimately obtained any interest in the OML-25. James Bay ceased to do business in Nigeria.

[24] On September 2, 2014, James Bay commenced the present proceedings against the appellants, alleging breach of contract and defamation.

## **C. THE TRIAL JUDGE'S DECISION**

### **(1) The trial judge's interpretation of the Agreements**

[25] The trial judge accepted James Bay's argument that the monetary payments to Mak Mera under both Agreements were contingent on the success of James Bay's acquisition of oil and gas assets in Nigeria and that the US\$405,000 in payments made under the Agreements to Mak Mera therefore constituted advances and had to be returned. She also found that the 2011 agreement was entirely superseded by the 2012 agreement.

[26] As part of the surrounding circumstances that she used to interpret the Agreements, the trial judge found that:

- The exploration for oil is risky, especially in Nigeria, because of required government approval and technical issues. Large amounts of capital are required with no guaranteed return.
- The purpose of both Agreements was to facilitate James Bay's acquisition of an interest in oil and gas.
- Prior to the [2011 agreement],<sup>4</sup> James Bay had no presence in Nigeria.
- James Bay needed to partner with a Nigerian company to meet the Local Content requirement.
- Mak Mera had the ability to assist James Bay in fulfilling the Local Content requirement.

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<sup>4</sup> The trial judge defined the MOU as the 2011 agreement.

- Mak Mera was also able to assist James Bay by providing valuable contacts in the Nigerian oil and gas industry as well as other services.

[27] Other than its general purpose, the trial judge did not consider the specific provisions of the 2011 agreement as part of the surrounding circumstances, nor whether any of those provisions had already been performed and therefore were spent. The core of her interpretation and findings as to the effect of the 2012 agreement on the compensation payable under the 2011 agreement is set out at paragraph 69 of the reasons:

The [2012 agreement] specifically stated that it replaced the [2011 agreement] and that the terms of the [2011 agreement] would only apply if James Bay acquired at least a 15-percent interest in OML-11. Thus, all aspects of the [2011 agreement] were contingent on James Bay acquiring this interest in OML-11. James Bay never acquired any interest in OML-11. Thus, the [US]\$300,000 payment referenced in the [2011 agreement] was never due.

[28] She therefore concluded that “[t]he only remaining financial remuneration to which Mak Mera could have been entitled under [the 2012 agreement] was the [US]\$165,000 with respect to oil interests other than OML-11”.

[29] The trial judge determined that Mak Mera was not entitled to this US\$165,000 payment, nor the US\$240,000 it had been paid under the 2011 agreement, and ordered Mak Mera to return the US\$405,000 it received.



**(2) The trial judge's award of substantial damages for defamation**

[30] The trial judge concluded that the allegations of misconduct in the complaint letter were defamatory of James Bay and would tend to lower James Bay's reputation in the mind of a reasonable person, finding: "The overall tenor of the impugned statements is that James Bay violated an Indigenous Nigerian company by using its assistance and then cutting them out unilaterally after reaping benefits from [the appellants'] work."

[31] The trial judge held that the appellants' defences of fair comment and qualified privilege were defeated because the "dominant subjective motive" of their complaint letter was actual or express malice.

[32] The trial judge found that there were several factors that justified a significant damages award.

[33] First, she characterized the appellants' allegations as serious and concluded it was significant that they were made to the DPR "who held James Bay's fate in its hands, as well as its partner in a venture, Shell".

[34] Further, she determined that the appellants' complaint letter had "a significant enough impact" on James Bay's reputation in Nigeria and that "it affected the OML-25 bid" because "there was no other explanation for the DPR's decision to pre-empt the bid".

[35] Finally, she concluded that James Bay's abandonment of its more than \$1.3 million dollar investment in Nigeria "supports the inference that it had to [exit the Nigerian market] because its reputation was so significantly undermined in the eyes of the DPR and others in the oil and gas field as a result of [the complaint letter]".

[36] The trial judge said there were no mitigating circumstances but there were the following aggravating circumstances: 1) the appellants refused to apologize or retract the complaint letter; and 2) the appellants advanced a defence of justification "which is essentially a republication of the defamatory statements right up until trial".

[37] Relying on *Second Cup Ltd. v. Eftoda* (2006), 41 C.C.L.T. (3d) 111 (Ont. S.C.), at para. 40, the trial judge concluded that absent an apology from the appellants, the amount required to vindicate James Bay's reputation was a substantial award of damages in the amount of \$200,000.

#### **D. ISSUES**

[38] The appellants raise three issues:

1. Did the trial judge err by finding that monetary payments for services rendered under the 2011 agreement were contingent on James Bay acquiring an interest in the OML-11?

2. Did the trial judge err by implying that monetary payments for services rendered under the Agreements would have to be repaid?
3. Did the trial judge err in awarding a substantial award of compensatory damages for defamation?

#### **E. ANALYSIS**

**(1) Issue 1: Did the trial judge err by finding that monetary payments for services rendered under the 2011 agreement were contingent on James Bay acquiring an interest in the OML-11?**

**(a) Standard of review and governing contractual interpretation principles**

[39] The trial judge’s contractual interpretation involves questions of mixed fact and law and is entitled to appellate deference absent errors on extricable questions of law, which are reviewable on the more exacting correctness standard, or a palpable and overriding error of fact: *Earthco Soil Mixtures Inc. v. Pine Valley Enterprises Inc.*, 2024 SCC 20, 491 D.L.R. (4th) 389, at paras. 27-28; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, 2 S.C.R. 633, at paras. 50-51; *Callidus Capital Corporation v. McFarlane*, 2017 ONCA 626, 51 C.B.R. (6<sup>th</sup>) 1, at para. 36.

[40] Extricable errors of law in the course of contractual interpretation include “the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant fact”: *Sattva*, at para. 53, citing

*King v. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80, 270 Man. R. (2d) 63, at para. 21.

[41] The governing “practical, common-sense approach” that the Supreme Court instructed in *Sattva*, at para. 47, should be applied to the interpretation of contracts, is as follows:

The overriding concern is to determine “the intent of the parties and the scope of their understanding”. To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. [Citations omitted.]

[42] Ascertaining the surrounding circumstances in which a contract was made requires the court to know “the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating”: *Sattva*, at para. 47, quoting *Reardon Smith Line v. Hansen-Tangen*, [1976] 3 All E.R. 570 (H.L.), at p. 574, *per* Lord Wilberforce.

**(b) Analysis**

[43] I accept that the trial judge erred by finding that monetary payments for services rendered under the 2011 agreement were contingent on James Bay acquiring an interest in the OML-11. More broadly, she erred by interpreting the

2012 agreement as tying compensation under both Agreements to James Bay's achieving success in its business ventures, including specifically the OML-11.

[44] The trial judge's overarching error was her failure to apply the interpretive principles that I have just reviewed. Although she referenced them, she failed to read the words of the Agreements in their ordinary and grammatical meaning in the context of the surrounding circumstances. Had she correctly applied the *Sattva* framework, the trial judge would have considered the Agreements together. The Agreements were part of the surrounding circumstances matrix that the trial judge was required to review to properly interpret them.

[45] The trial judge's analytical error primarily stems from her interpretation of the 2012 agreement without consideration of the 2011 agreement. In particular, she narrowly interpreted the statement in the preamble of the 2012 agreement that "[t]he parties propose to accordingly replace the [2011 agreement]" to mean that the 2011 agreement was no longer relevant to her analysis as part of the surrounding circumstances giving rise to the 2012 agreement. This interpretation ignores the plain language of the 2012 agreement: the reference to the 2011 agreement at paragraph 1 highlights the ongoing relevance of the 2011 agreement as part of not only the surrounding circumstances but also the plain language of the 2012 agreement.

[46] By considering it in isolation, the trial judge's interpretation of the 2012 agreement alone became the lens through which she viewed all aspects of the parties' relationship and, significantly, the monetary and share compensation structure to which they agreed and on which they operated. This led her to erroneously conclude that the monetary payments were contingent on James Bay's achieving success in its business ventures.

[47] Specifically, the trial judge erred by finding that monetary payments for services rendered under the 2011 agreement were contingent on James Bay acquiring an interest in the OML-11. In making this finding, she did not consider provisions in the 2011 agreement that were already spent or performed prior to the parties entering the 2012 agreement. These included the payment of the US\$240,000 as monetary compensation to Mak Mera for services already rendered under the 2011 agreement. The 2012 agreement confirms the parties' intention to modify their contractual arrangement moving forward, not to retroactively change the terms for payments already received for services rendered.

[48] Further the trial judge's interpretation of the Agreements failed to distinguish between the purpose of share compensation versus monetary compensation. In both Agreements, the issuance of shares was clearly tied to the success of James Bay's business ventures in Nigeria. The monetary compensation was not tied to any condition.

[49] For ease of reference, I reproduce paragraph 4 of the 2011 agreement:

4. [James Bay] will pay [Mak Mera<sup>5</sup>] 12 million shares of [James Bay] and [US]\$300,000

- a) 3 million shares to be issue[d] upon successful completion of due diligence and acquisition of oil & gas assets in Nigeria
- b) 3 million shares to be issue[d] upon [James Bay] reaching 1,500 boe per day
- c) 3 million shares to be issue[d] upon [James Bay] reaching 4,000 boe per day
- d) 3 million shares to be issued upon [James Bay] reaching 5,500 boe per day.

[50] On its face, the 2011 agreement ties payment of shares to achieving certain business milestones. The monetary payment, in contrast, is not contingent on achieving any particular milestone, including acquiring an interest in the OML-11.

[51] The 2012 agreement draws the same distinction. Paragraph 4 of the 2012 agreement provides: “[James Bay] agrees that it will pay to [Mak Mera] the amount of US\$165,000 as compensation for the services rendered. The parties acknowledge that the US\$165,000 is to be paid at the same time the initial 3.5 million Common Shares are issued to [Mak Mera] under this Agreement.”

[52] The trial judge rejected the appellants’ submission that paragraph 4 contains only a timing provision for the US\$165,000 payment and concluded that it creates

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<sup>5</sup> See Footnote 1.

a pre-condition for the payment itself. The trial judge determined that this interpretation was commercially reasonable as:

There are many commercial arrangements where businesses provide services and are not ultimately remunerated unless a final arrangement is reached. The clearest example is real estate transactions where real estate agents are often, if not usually, only remunerated when a deal closes, even if they have provided valuable services.

[53] She reasoned further that: “One could argue that payment that is not contingent on success makes less commercial sense because [Mak Mera] would receive 30% of James Bay’s shares upon a successful acquisition. If it was remunerated for its services all along, why would it receive 30% in James Bay’s shares as well?”

[54] First, this interpretation is inconsistent with the plain language of the 2012 agreement. It fails to give effect to the provisions of paragraph 1 of the 2012 agreement that referenced the 2011 agreement and reads the second sentence of paragraph 4 in isolation from its first sentence. The first sentence clearly provides that there are no conditions attached to the US\$165,000 payment and that it is consideration for the provision of the appellants’ services. When the second sentence is read in connection with the first sentence of paragraph 4, the only reasonable interpretation is that the second sentence stipulates a deadline by which the US\$165,000 amount had to be paid.



[55] The stipulation of an ultimate payment deadline did not foreclose earlier payment for services rendered, which is what happened in this case. This is consistent with the rest of the agreement which sets out conditions related to only the issuance of the shares and not to the payment of monetary compensation.

[56] Second, the trial judge's interpretation ignores the way in which the parties structured their relationship, as manifested in both Agreements, and, in particular, the compensation to be paid to Mak Mera for partnering with James Bay in its risky Nigerian business ventures.

[57] In both Agreements, the parties clearly distinguished between monetary compensation to be paid for services rendered, without any other condition, and the issuance of shares that were explicitly made conditional on the success of James Bay's business ventures. The 2011 agreement provided for payment of US\$300,000 to Mak Mera without any conditions; the issuance of shares was subject to the acquisition of oil and gas contracts, as well as a certain level of oil and gas production. In the same way, the 2012 agreement stipulated that US\$165,000 would be paid to Mak Mera for services rendered without any conditions; the share issuance was again dependent on the acquisition of oil and gas contracts and production.

[58] The trial judge erred by failing to look at the parties' actual relationship as reflected in the clear terms of both of their Agreements. The provision for two

different streams of compensation – monetary compensation for services rendered to get James Bay’s foot in the door of the Nigerian market – and the more lucrative share issuance to reward the successful completion of the parties’ efforts – made complete commercial sense.

[59] The trial judge accordingly erred by finding that monetary payments were contingent on James Bay’s achieving success in its business ventures, including by specifically conditioning the monetary payment under the 2011 agreement on James Bay’s acquisition of an interest in the OML-11.

**(2) Issue 2: Did the trial judge err by implying repayment terms into the Agreements?**

**(a) Standard of review and governing contractual interpretation principles**

[60] The standard of review and governing principles for issues of contractual interpretation are set out above. Additionally, the principles for implying a contractual term are relevant to this ground of appeal.

[61] There is a high threshold for implying terms into agreements. Contractual terms may be inferred “based on the presumed intention of the parties where the implied term must be necessary ‘to give business efficacy to a contract or as otherwise meeting the ‘officious bystander’ test as a term which the parties would say, if questioned, that they had obviously assumed””: *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, at para. 27, quoting

*Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711, at p. 775. Implied terms must have a “certain degree of obviousness” and cannot be found “if there is evidence of a contrary intention”, such as that expressed in the clear terms of the contract: *M.J.B. Enterprises Ltd.*, at para. 29. Implied terms cannot contradict express provisions of an agreement, be unreasonable or add terms that the parties could have provided for: *First National Financial GP Corporation v. Golden Dragon Ho 10 Inc. and Golden Dragon Ho 11 Inc.*, 2022 ONCA 621, 474 D.L.R. (4th) 650, at paras. 70-71, leave to appeal refused, [2022] S.C.C.A. No. 40456.

**(b) Analysis**

[62] The trial judge erred by implying repayment terms that were absent from and contrary to the plain language of the Agreements.

[63] Here, the terms of the Agreements that provide for monetary compensation to Mak Mera are clear. Again, unlike the terms relating the issuance of shares to the success of James Bay’s business ventures, the monetary payments to Mak Mera are unconditional.

[64] It is common ground that James Bay needed the appellants’ services to gain a foothold in the Nigerian oil and gas market regardless of whether oil and gas contracts were ultimately acquired and knowing that the business venture was

risky. There is no dispute that the appellants rendered valuable services to James Bay.

[65] As a result, the unconditional payment of monetary compensation in consideration for the appellants' services for obtaining entry into the Nigerian oil and gas market made commercial sense. The implied repayment terms based on the success of James Bay's business ventures in Nigeria were therefore unnecessary to give business efficacy to the parties' Agreements and contrary to the plain language of the Agreements. By implying the repayment terms and ordering repayment of the US\$405,000 already paid to the appellants for services rendered, the trial judge effectively rewrote the unambiguous Agreements. This was an error.

[66] For ease of reference, I repeat the relevant provisions of the Agreements. First, paragraph 4 of the 2011 agreement provides that "James Bay will pay [Mak Mera<sup>6</sup>] 12 million shares of James Bay and [US]\$300,000." However, while that paragraph goes on to set out the conditions under which the shares will be issued, as I have earlier noted, there is no language in that paragraph or elsewhere in the 2011 agreement that qualifies payment of the US\$300,000. Second, the first sentence of paragraph 4 of the 2012 agreement provides that James Bay "will pay"

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<sup>6</sup> See Footnote 1.

Mak Mera “the amount of US\$165,000, as compensation for the services rendered.” Again, nothing qualifies the payment.

[67] On a plain reading of the provisions in both the Agreements, the monetary payments were to be made for services rendered. To interpret the Agreements as making the monetary payments conditional on the success of James Bay’s business ventures in Nigeria is contrary to the plain wording of the Agreements.

[68] Moreover, interpreting the Agreements to imply repayment terms in the absence of success ignores the surrounding circumstances. There is no dispute that the appellants rendered valuable services to James Bay in its pursuit of its business ventures in Nigeria in accordance with the terms of the Agreements. It is unchallenged that whether it acquired anything, James Bay needed the appellants’ services simply to get its foot in the door. It therefore made good commercial sense for the parties to provide for two different streams of compensation: monetary compensation for services rendered to assist James Bay in establishing a foothold in Nigeria; and shares of exceedingly greater value if James Bay’s business ventures in Nigeria were successful.

[69] As the trial judge found, James Bay’s proposed business venture was risky and required a substantial amount of investment without any guarantee of success. There was an acknowledged risk that despite its best efforts, James Bay might never acquire any oil and gas contracts. That is what occurred. James Bay did not

acquire any oil and gas contracts and abandoned its business in Nigeria. As a result – and in accordance with the terms of the Agreements – James Bay paid Mak Mera monetary compensation for the services it rendered but it issued no shares to Mak Mera.

[70] Further, by the time the 2012 agreement was negotiated, the surrounding circumstances included the 2011 agreement and the US\$240,000 monetary payment already made under that agreement. It would have been a simple thing to include a repayment provision in the Agreements and, in particular, the 2012 agreement that followed the US\$240,000 payment. The parties were sophisticated and represented by experienced counsel. However, the Agreements do not provide for any such repayment. Absent such explicit language, a plain reading of the 2012 agreement does not support an interpretation that there is an implied term in the Agreements for the repayment for services that had already been rendered.

[71] For the purposes of contractual interpretation, it is of no moment that James Bay did not pay the entire US\$300,000 stipulated under the 2011 agreement. That is an accounting issue between the parties that does not affect the fact that payment had been made for services rendered by Mak Mera and that neither Agreement provided for its repayment.

[72] I also reject James Bay's submission that the timing of the payment of the US\$165,000 in the 2012 agreement was conditional on the issuance of shares. This interpretation ignores the plain language of both Agreements that monetary compensation was separate from the share compensation. Again, it would have been a simple thing to make the payment of the monetary compensation conditional on terms, as was the case for the share issuance, or provide for its repayment. This was not done.

[73] Apart from the breach of the implied repayment terms – which, as I have explained were incorrectly implied – the trial judge found no other breach of the Agreements by the appellants. There is therefore no basis for ordering the repayment of the amounts paid to the appellants for services rendered to James Bay.

**(3) Issue 3: Did the trial judge err in awarding a substantial award of compensatory damages for defamation?**

[74] The appellants do not challenge the trial judge's finding that the complaint letter was defamatory of James Bay. Their appeal is limited to the trial judge's damages award. In sum, they submit that there was no basis for an award of substantial damages and that nominal damages of \$1,000 should have been awarded.

**(a) Standard of review**

[75] The standard of review of an award of damages for defamation is highly deferential: appellate courts should not interfere with judge-alone defamation awards except where the judge has made an error in law, applied a wrong principle, seriously misapprehended the evidence, or made an award that is “so inordinately high or low” as to make the award an entirely erroneous estimate of the damages: *Barrick Gold Corporation v. Lopehandia* (2004), 71 O.R. (3d) 416 (C.A.), at paras. 24-26.

[76] As this court instructed in *Walker v. CFTO Ltd.* (1987), 59 O.R. (2d) 104 (C.A.), at p. 115, on appellate review: “The question to be addressed here is whether the amount awarded ... falls within the range of damages reasonably required to compensate the company for the reputational harm suffered by it and publicly to clear its good name.”

**(b) Analysis**

[77] I am persuaded that the appellants have met the high threshold justifying appellate interference with the trial judge’s damages award. The award of \$200,000 was inordinately high because it was unsupported by the evidence and the product of legal error.



**(i) The absence of evidence to support the substantial damages award**

[78] It was an error to award James Bay substantial damages for defamation absent admissible evidence of harm or impact.

[79] It is well-established that damages are presumed if defamation is established. However, there is no presumption as to the impact or amount of those damages: *United Soils Management Ltd. v. Mohammed*, 2019 ONCA 128, 53 C.C.L.T. (4th) 1, at para. 22, leave to appeal refused, [2019] S.C.C.A. No. 38592. Moreover, while a corporation may be entitled to general damages beyond nominal damages without proof of specific loss, it is unlikely to obtain a substantial award without proof of special damages or at least of a general loss of business or impact on reputation or goodwill: *Walker*, at pp. 113-14.

[80] As this court further noted in *Walker*, at p. 113: “[U]nlike an individual, a company is not entitled to compensation for injury to hurt feelings or, it follows, to compensation by way of aggravated damages for a loss of this nature.” In the often-cited words of Lord Reid in *Lewis v. Daily Telegraph Ltd.*, [1963] 2 All E.R. 151 (H.L.), at p. 156: “A company cannot be injured in its feelings, it can only be injured in its pocket. Its reputation can be injured by a libel but that injury must sound in money.”

[81] As noted earlier, the trial judge founded her substantial damages award principally on her findings of reputational harm and economic loss (the latter

stemming from James Bay's abandonment of its investment in Nigeria).<sup>7</sup> Specifically, the trial judge based her findings on, first, the DPR's decision to pre-empt James Bay's OML-25 bid and, second, the "credibility issue" confrontations that James Bay argued it experienced. The trial judge concluded that the damage to James Bay's reputation caused by the appellants' complaint letter induced James Bay to withdraw from its business ventures in Nigeria. However, James Bay did not plead or prove special damages or provide admissible evidence of reputational harm or economic loss or of any other impact. The trial judge's finding of reputational and economic harm to James Bay thus lacked any admissible evidentiary support and instead depended on evidence of opinions from third parties who did not testify at trial.

[82] For example, in support of her finding that the DPR pre-empted the bid because of the appellants' complaint letter, the trial judge relied on an alleged conversation between James Bay's principal and the Minister at the DPR, who did not testify at trial. James Bay's evidence was that the Minister "asked about [the complaint letter]." From this, the trial judge drew the speculative inference that the DPR was motivated by the complaint letter to pre-empt James Bay's bid. She explained her reasoning at para. 291 of her reasons that:

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<sup>7</sup> The trial judge also held that the lack of an apology or retraction and the continuation of the defence of justification at trial were aggravating factors. I will return to the significance of these findings later in my reasons.

James Bay had been taken seriously in the oil and gas industry in Nigeria up until [the complaint letter]. It had negotiated an agreement with [Bicta Energy & Management Systems Limited<sup>8</sup>] regarding OML-90 and obtained DPR approval. There is no other explanation for the DPR's decision to pre-empt the bid. Thus, I conclude that [the complaint letter] did have a significant enough impact on James Bay's reputation, that it affected the OML-25 bid even though there is no request for special damages with respect to it. [Emphasis added.]

[83] This unsubstantiated explanation for the pre-emption of James Bay's bid and its departure from Nigeria is not only speculative but depends on an alleged conversation with a Minister of the DPR who did not testify at trial and is contrary to the trial judge's findings about the riskiness of James Bay's business ventures in Nigeria.

[84] As earlier noted, the trial judge found that James Bay's exploration for oil and gas in Nigeria was risky and large amounts of capital were required with no guaranteed return. Moreover, the evidence was uncontroverted that prior to the delivery of the complaint letter, only one of James Bay's other bids for different licences was approved and none of James Bay's other bids came to fruition for reasons unrelated to the complaint letter. It is therefore not surprising that James Bay made the business decision to cut its losses and leave Nigeria.

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<sup>8</sup> Bicta Energy & Management Systems Limited was an Indigenous company that had acquired the OML-90 and was seeking financing.

[85] Accordingly, it was an error for the trial judge to conclude that there was “no other explanation” for the pre-emption of James Bay’s bid and its departure from Nigeria other than because of the reputational impact caused by the complaint letter.

[86] Similarly, the trial judge’s finding that James Bay’s “credibility” and business prospects were greatly harmed by the appellants’ complaint letter was not founded on admissible evidence presented at trial. At para. 293 of her reasons, the trial judge supported her finding that James Bay lost credibility and was forced to abandon its Nigerian business ventures by reference to “confrontations” that James Bay’s country manager apparently had with third parties:

James Bay and its related companies ultimately left Nigeria and did not successfully obtain any other interests. Although Mr. Olaniyan did not provide any particulars on any conversations, he said that after [the complaint letter], when he tried to do business in Nigeria he was repeatedly confronted with James Bay’s “credibility issue” and eventually had to call it quits. James Bay’s subsidiary, JBENL, is being wound up. James Bay expended more than \$1.3 million in Nigeria. The fact that it would walk away from this investment supports the inference that it had to because its reputation was so significantly undermined in the eyes of the DPR and others in the oil and gas field as a result of [the complaint letter]. [Emphasis added.]

[87] However, no one from the DPR, Shell or any “others in the oil and gas field” in Nigeria were called as witnesses at trial. Moreover, the trial judge found that: “[T]here is no evidence of any media publications of [the complaint letter]”. Other

than the publication of the letter to the DPR and Shell, there was no admissible evidence, nor did James Bay plead, that the appellants' complaint letter was sent to or known by any parties apart from the DPR and Shell.

[88] Further, the trial judge found that, "there was very little evidence" as to why James Bay's relationship with Shell fell apart, other than evidence about an international arbitration between the parties which James Bay lost. As a result, the trial judge could not find that the appellants' complaint letter caused the end of the relationship between James Bay and Shell.

[89] Accordingly, the trial judge's finding that James Bay's reputation was "so significantly undermined in the eyes of DPR and others" (emphasis added) was not supported by any admissible evidence, was inconsistent with her other findings regarding the cause of the end of James Bay's relationship with Shell and the limited publication of the complaint letter, and represented a misapprehension of the evidence.

[90] The trial judge thus erred in awarding James Bay substantial damages in the absence of admissible evidence of harm or impact.

**(ii) The absence of an apology to support the substantial damages award**

[91] The trial judge relied heavily on the absence of an apology by the appellants to justify her substantial award of damages, finding that the absence of an apology aggravated James Bay's damages and that a substantial award of damages was

the only way to vindicate James Bay's reputation. This represented a misapplication of the governing analytical framework governing the significance of an apology, or its absence, in the determination of damages for defamation for a corporate plaintiff.

**The significance of an apology or its absence in the determination of damages**

[92] In the case of a corporate plaintiff, the absence of an apology, by itself, cannot serve to aggravate damages or justify an award of substantial damages. This is because of the different function that the presence or absence of an apology plays in the analysis of damages for an individual versus a corporate plaintiff. While the lack of an apology is a relevant factor for both corporate and individual plaintiffs, its significance and treatment in the analysis are not equivalent.

[93] The primary function of an apology in the assessment of damages for corporate plaintiffs is its mitigating effect. A "prompt correction, retraction or apology may be far more valuable than an award in damages" because it recognizes the wrongfulness of the defamation and stops its pernicious, ongoing impact: *Grossman v. CFTO-TV Ltd.* (1982), 39 O.R. (2d) 498 (C.A.), at p. 504.

[94] Accordingly, the significance of the absence of an apology for corporate plaintiffs is that the seriousness of the defamation and its impact are not attenuated. As this court explained in *United Soils Management Ltd.*, at para. 25,

“the timely and unqualified apology and retraction” of the offensive libel can be “a crucial factor in assessing harm caused or likely to be caused” to the plaintiff because an apology may go “a long way to eliminating any possible future harm to the [plaintiff’s] reputation” and serves to achieve the vindication of the plaintiff’s “good name”.

[95] With respect to an individual plaintiff, however, the absence of an apology, *per se*, may give rise to an entitlement on the part of an individual claimant to aggravated damages, which are not for injury to reputation but for the additional separate element of injury to feelings: *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at paras. 192-94; *Ratzen v. Mirror Group Newspapers (1986) Ltd.*, [1994] Q.B. 670 (Eng. C.A.), at p. 683; and *Rai v. Bholowasia*, [2015] EWHC 382 (Eng. Q.B.), at para. 175, citing *John v. MGN Ltd.*, [1997] Q.B. 586 (Eng. C.A.), at p. 607. Similarly, this court explained in *Walker*, at p. 111, that: “Aggravated damages are damages which take into account the additional harm caused to the plaintiff’s feelings by such reprehensible or outrageous conduct on the part of the defendant” (emphasis added).

[96] As I have already noted, a corporate claimant is not entitled to recover damages for injury to its feelings. It is therefore critical that in its determination of damages, a court not conflate the two and award to a corporation under the guise of a substantial award of damages what really are aggravated damages for injured feelings or humiliation.

[97] The presence of an apology is significant because, as this court instructed in *United Soils Management Ltd.*, at para. 25, by itself, an unqualified and timely apology can vindicate a corporate plaintiff's good name. However, the reverse is not true. The significance of a failure to apologize is that the ongoing damage of the defamation, particularly if the defamation is widespread, continuing and destructive, remains unattenuated. It is the unchecked extent of the latter factors, and not the mere absence of an apology, that may support a substantial award of damages for corporate plaintiffs: *Valley Traffic Systems Inc. v. Malak*, 2024 BCCA 370, 96 B.C.L.R. (6th) 199, at paras. 49-51, *aff'g Malak v. Hanna*, 2023 BCSC 1337, 96 B.C.L.R. (6th) 199.

[98] Aggravated damages must be distinguished from aggravating factors. A corporate plaintiff cannot be awarded aggravated damages. Aggravating factors, however, may support a substantial award of damages. That said, absent evidence of damage or impact, a substantial award of damages cannot be supported by the mere absence of an apology, unless there are other aggravating factors such as widespread publication and continued, longstanding and repetitive libel.

[99] For example, in *Barrick Gold Corporation*, this court held, at para. 51, that the individual defendant's "refusal to retract his statements, or to apologize for them" served as an aggravating factor in the circumstances of that case, including the defendant's "dogged pursuit of the libelous campaign", the virtually unlimited publication of the defamation on the internet, and the demonstrated impact on the



corporate plaintiff's reputation. A careful reading of the reasons in *Barrick Gold Corporation* demonstrates that the absence of an apology was characterized as aggravating the "vicious and widespread" defamation in that case and, as a result, failed to attenuate the huge and ongoing impact of the vicious and widespread defamation in that case. It was the unchecked nature and extent of the defamation and ensuing impact that supported the substantial award of damages substituted by this court.

[100] Similarly, in *Valley Traffic Systems Inc.*, the absence of an apology or a retraction by itself did not serve to increase the damages assessed in favour of the corporate plaintiff. The British Columbia Court of Appeal rejected the submission that the trial judge had erred in his treatment of the absence of an apology or a retraction, noting, at para. 65 of the reasons, that: "in assessing general damages [for the individual and corporate plaintiffs] the judge expressly rejected absence of an apology or retraction as factors justifying a higher award" and considered the failure to apologize only in the assessment of aggravated damages for the individual plaintiff.

[101] The circumstances in *Valley Traffic Systems Inc.* that the trial judge found supported a substantial award of damages included widespread publication of seriously defamatory statements accusing the plaintiffs of illegal kickbacks and other corrupt activities, which were the product of a common design by competitors to defame both the corporate and individual plaintiffs and resulted in reputational

and inferred business losses to the corporate plaintiffs. The trial judge found that these defamatory statements were particularly harmful having regard to the corporate plaintiffs' customers who were quasi-public/public bodies that "generally wish to avoid public controversy": *Malak*, at para. 198. He explained that it was those factors and not the defendants' failure to apologize or issue a retraction that justified a higher award of damages because: "It is not surprising that given the ongoing litigation, and the legal position taken by [the defendants] that they were not part of a common design to defame the plaintiffs, that they did not issue a retraction or apology": *Malak*, at para. 221.

### **The *Walker* analytical framework**

[102] In the present case, the trial judge's award of substantial damages in the absence of the appellants' apology relied on the highlighted portion of para. 40 of the reasons in *Second Cup Ltd.*:

It has been observed that a company cannot be injured in its feelings and therefore "damages may be small in commercial terms, unless the defendants' refusal to retract or apologize makes it possible to argue that the only way in which the reputation of the company can be vindicated in the eyes of the world is by way of a 'really substantial award of damages'." (see: *Walker v. CFTO* (1987), 59 O.R. (2d) 104 at para. 26 (*per* Robins J.A. for the Court) quoting with approval from Carter-Ruck, *Libel and Slander* (3<sup>rd</sup> Edn.) 1985 at pp. 156-157). [Emphasis added.]

[103] The trial judge erred in her application of these principles because she interpreted and applied the highlighted portion as a dispositive factor without looking at all the relevant circumstances.

[104] The highlighted portion appears in the context of a larger, more general discussion in *Walker*, at pp. 113-14, about a company's limited entitlement to damages in defamation absent proof of loss or harm to reputation. The text comes from the following long passage from Peter F. Carter-Ruck & Richard Walker, *Carter-Ruck on Libel and Slander*, 3rd ed. (London: Butterworths, 1985), at pp. 156-57:

Limited companies, and other corporations, may also be awarded general damages for libel or slander, without adducing evidence of specific loss. However, it is submitted that in practice, in the absence of proof of special damages, or at least of a general loss of business, a limited company is unlikely to be entitled to a really substantial award of damages. As was made clear by Lord Reid in *Lewis v Daily Telegraph Ltd*, 'A company cannot be injured in its feelings, it can only be injured in its pocket. Its reputation can be injured by a libel but that injury must sound in money.' Whilst Lord Reid went on to say 'The injury need not necessarily be confined to loss of income; its goodwill may be injured', a company, which is unable at trial, some two or three years after the original defamatory publication, to point to the slightest hiccup in its trading figures, may be hard pressed to persuade a court that even an unpleasant libel has seriously injured its reputation. Unlike a personal plaintiff, it cannot tug the jury's heart strings by describing its distress and humiliation on reading the defamatory words. This presents a problem for a limited company which has been defamed, since it is often difficult to *prove* that the publication caused either a specific or a general

loss of business. That there is an entitlement to general damages which are more than nominal damages is certain, but the amount likely to be awarded to a corporation may be small in commercial terms, unless the defendant's refusal to retract or apologise makes it possible to argue that the only way in which the reputation of the company can be vindicated in the eyes of the world is by way of a really substantial award of damages. [Citations omitted.] [Underlining added; italics in original.]

[105] The last sentence of the above quote must be interpreted in the context of the entire passage. A defendant's refusal to retract or apologize by itself does not allow for "a really substantial award of damages". Rather, the absence of the apology must be looked at in the context of all relevant circumstances, including the nature, gravity and extent of the defamation, the wrongdoer's conduct, and the impact of the defamation. This is the way in which this court in *Walker* applied the above-cited passage.

[106] In *Walker*, during a television program broadcast across Canada, the defendants suggested that the plaintiff company and its principals had abused the public trust through their allegedly dangerous and unlawful disposition of toxic waste. As in the present case, the plaintiffs in *Walker* did not claim specific damages or sustain any financial loss. The defendants did not apologize or retract the libellous statements. The jury awarded damages to the plaintiffs in the amount of \$883,000.

[107] This court, at p. 115 of its reasons in *Walker*, reviewed whether the jury award of \$883,000 fell “within the range of damages reasonably required to compensate the company for the reputational harm suffered by it and publicly to clear its good name”, and, in so doing, considered whether it was the only way in which the reputation of the company could be vindicated:

In considering this question, it is to be recognized that Walker Brothers sustained no financial loss as a consequence of the libel. It is undisputed that in the four years from the date of the broadcast to the date of trial it suffered no diminution of profits or loss of business, and there is nothing to indicate any likelihood that it will do so in the future. While this may raise doubts about the effect of the libel on the company’s reputation, it does not dictate that the compensatory damages be merely nominal; the action is maintainable per se without proof of damage, general or special. However, if there is no evidence of damage, the view has been expressed that “the damages given (to a corporation) will probably be small” (*South Helton Coal Co. v. North-Eastern News Ass’n, Ltd.*) and, in the same vein, “the amount likely to be awarded to a corporation may be small in commercial terms” (Carter-Ruck). Although the award may be small or nominal, it is manifest that the judgment enables the plaintiff publicly to brand the defamatory publication as false or groundless, and, when there is no actual damage, can perform the vindictory function of this cause of action. In the final analysis, however, the amount necessary to uphold the corporate reputation can only be determined by a consideration of all the circumstances of the case viewed in the light of the applicable law. There may be some cases where even absent proof of loss the impact of the libel is such that, as Carter-Ruck points out at p. 157, “the only way in which the reputation of the company can be vindicated in the eyes of the world is by a really substantial award of damages”. [Citations omitted.] [Emphasis added.]

[108] I have reproduced this long passage to show how this court in *Walker* interpreted and applied the statement from *Carter-Ruck on Libel and Slander* that “the only way in which the reputation of the company can be vindicated in the eyes of the world is by a really substantial award of damages”. The passage demonstrates that in determining whether a substantial award of damages is the only way to vindicate a company’s reputation, all relevant circumstances must be considered, and these circumstances are not limited to an absence of an apology. Importantly, absent proof of loss, the court must consider the “impact” of the libel and whether that impact is such that only a substantial award of damages will vindicate the reputation of the defamed company. If there is no such impact, then absent proof of loss, a substantial award of damages will not be justified, and the judgment, with small or nominal damages and costs, will suffice to perform “the vindicatory function”.

[109] Having accepted “the gravity of the libel and viewed the circumstances in a manner most favourable to the company’s position”, this court in *Walker* set aside the jury award of \$883,000 as “so inordinately large as to bear no reasonable relationship to the defamatory publication or the consequences flowing from it”: at pp. 115-16. The court concluded, at p. 116, that:

Furthermore, in this case, there is no question of any pecuniary loss. All that has to be compensated for here is the injury to Walker Brothers’ corporate reputation. The figure set by this jury as being the amount necessary to vindicate that reputation in the eyes of right thinking

people in the community goes far beyond the maximum limit of any range that can conceivably be regarded as fair or reasonable compensation for this company in these circumstances. It is so exorbitant and irrational a sum that it should not be allowed to stand. [Emphasis added.]

[110] The trial judge in *Second Cup Ltd.* followed the same analytical approach as instructed in *Walker*. The defamation consisted of a long campaign by the defendants against Second Cup Ltd. (“Second Cup”), as franchisor, whom the defendants described as being “one of the most unprincipled franchisors operating in Canada”, accusing it of “misrepresentation, lack of support, exploitation, harassment, deception, and fraud”: *Second Cup Ltd.*, at para. 8. The defendants encouraged Second Cup franchisees to sue Second Cup. The trial judge found that Second Cup had suffered damage to its reputation and in its relationship with its franchisees, and substantial economic loss in defending itself against the defamation. The defendants refused to apologize or retract their statements.

[111] In *Second Cup Ltd.*, the trial judge did not consider the lack of an apology alone as justifying the substantial damages he awarded. Rather, the defendants’ failure to apologize or retract their libellous statements was considered as part of all the circumstances. These circumstances included the defendant’s overall conduct that the court found caused considerable damage and justified an award of substantial damages to vindicate Second Cup’s reputation. Specifically, the court held, at para. 38, that the individual defendant’s “actions have severely

harmed Second Cup and many Second Cup franchisees and have dramatically aggravated the damages at a time when he could have mitigated the impact of his actions” (emphasis added) by apologizing or retracting the vitriolic statements that he had made.

[112] Although the trial judge did not reference *Barrick Gold Corporation* for this point, in that decision, this court referenced, at para. 49, the analytical approach in *Walker* and the above-noted cite to *Carter-Ruck on Libel and Slander*. Specifically, the court in *Barrick Gold Corporation* did not consider the lack of an apology or retraction of the defamation in isolation but in the particular context of the case. These circumstances included that the individual defendant had engaged in a “dogged pursuit of the libelous campaign even after commencement of the proceedings” against the integrity and *bona fides* of Barrick Gold Corporation (“Barrick”) and its officers and directors in the world-wide forum of the internet. The defendant’s actions were described, at para. 3, as:

‘[A] systematic, extensive and vicious campaign of libel ... over an extraordinarily lengthy period’ with the express purpose and intent of embarrassing Barrick and injuring its reputation. This campaign was conducted over the Internet, and involved the posting of hundreds of false and defamatory statements concerning Barrick on various websites.

[113] This court concluded, at para. 51, that the motions judge had erred in not granting a substantial award of damages because she failed to consider all relevant factors:



The motions judge found that [the individual defendant] would likely continue his defamatory statements. Had she considered the lack of retraction and apology, along with repetition, in the context of determining whether “a really substantial award of damages” was required to vindicate Barrick’s reputation. In the circumstances, she might well have come to a different conclusion than she did.

[114] The court acknowledged, at para. 52, that “[i]t is readily apparent that a successful judgment in a defamation case will be of assistance to the plaintiff in vindicating the plaintiff’s reputation” but cautioned against relying on the judgment itself as sole vindication and reducing “an otherwise appropriate damage award” necessary to vindicate the plaintiff’s reputation where the circumstances support such a damage award. While there were no proven economic losses, there was evidence of damage to Barrick’s reputation that supported a substantial damages award. Unlike the present case, there was specific evidence of inquiries and complaints as a result of the defamatory postings, including from Barrick shareholders and professional and regulatory bodies. The court concluded that in the circumstances of the case, \$75,000 for general damages and \$50,000 for punitive damages were appropriate.

[115] In this case, the trial judge should have considered whether, in the absence of circumstances supporting a substantial award of damages, there were other ways to vindicate James Bay’s reputation, such as the fact of the judgment itself, including nominal damages, and costs. This was not like the circumstances in

*Barrick Gold Corporation* where an award of substantial damages was otherwise appropriate and could therefore not be reduced by the fact of the judgment itself serving as vindication. The trial judge therefore erred in her analysis.

[116] In the circumstances of this case, where there was no admissible evidence of any harm or impact on James Bay's reputation by the appellants' defamation, the lack of apology alone and the absence of its attenuating effect did not support a substantial award of damages.

[117] As a result of these legal errors, the trial judge's award of damages cannot stand.

**(iii) The appropriate damages award**

[118] In my view, there was no basis for an award of substantial damages in the circumstances of this case.

[119] The present case is different from the circumstances in *Barrick Gold Corporation*, where the libel was published widely over the internet, or in *Second Cup Ltd.*, where the libel against the franchisor was published to all its franchisees. In both cases, the widely published defamation had a considerable impact on the reputation of the corporate plaintiff and caused tangible losses.

[120] Here, the defamation was not published to a potentially unlimited world-wide audience but only to the DPR and Shell in Nigeria. As the trial judge found, there was no evidence that the DPR or Shell republished the libel and no admissible

evidence that they acted on it. James Bay has not proven financial loss nor other impact on its reputation arising from the appellants' defamation, either at the time of the appellant's complaint letter or in the ensuing decade.

[121] While not raised as a ground of appeal, as earlier noted, the trial judge found as an additional aggravating factor in relation to damages that the appellants had advanced an unsuccessful defence of justification, which, in her view, amounted to further publication of the defamation against James Bay. Absent proven loss or impact on reputation, I am not persuaded that this factor alone justifies a substantial award of damages.

[122] The repetition of defamation by way of an unsuccessful plea of justification as part of a defence may aggravate the damages of an individual because it perpetuates hurt feelings and humiliation: *Hill*, at para. 191. However, in the case of a corporate plaintiff, the mere repetition of a libel by way of a plea of justification is insufficient, by itself, to establish reputational or economic loss or impact. As this court noted in *Barrick Gold Corporation*, at para. 51, "[r]epetition [of the libel] ... is only one factor to be considered in determining what award of damages is required to vindicate a plaintiff's reputation". Accordingly, it should be considered in the context of other relevant factors such as the conduct of the defendant and the mode and extent of the publication: *Second Cup Ltd.*, at paras. 32-35. It is not automatically applicable: in *Walker* and *Malak*, for example, the failed defences of

justification did not serve to ground a substantial award of damages to the corporate plaintiff.

[123] In the case of a corporate plaintiff, absent proof of loss or impact, it is unlikely that substantial damages will be awarded. Rather, the judgment itself will often serve as a vindication of the plaintiff's rights. As this court in *Walker* explained, "the judgment enables the plaintiff publicly to brand the defamatory publication as false or groundless, and, when there is no actual damage, can perform the vindictory function of this cause of action": at p. 113. The real value of such an action thus lies in the corporate plaintiff securing a court pronouncement of the falseness of the defamation and thus rehabilitating the plaintiff's reputation in the public's eye. It may therefore be that the judgment, along with nominal damages plus costs, will serve this vindictory purpose. For these reasons, a substantial award of damages is unwarranted.

[124] The appellants submit that, applying the proper principles, nominal damages should be awarded in the circumstances of this case.

[125] I agree. Despite the absence of an apology or a retraction, nominal damages are appropriate where, as here, the corporate plaintiff can establish a cause of action but there is extremely limited publication and there is no substantial loss or the loss is unproven: see *Langille v. McGrath* (2001), 243 N.B.R. (2d) 360 (C.A.), at para. 18, citing Jamie Cassels, *Remedies: The Law of Damages* (Toronto,

Irwin Law, 2000), at pp. 281, 285; *Skaftco Ltd. v. Abdalla*, 2020 ONSC 136, 62 C.C.L.T. (4th) 14, at para. 66; and *Singh v. Doad*, [1990] A.J. No. 240 (Alta. Q.B.), at para. 9.

[126] I conclude that damages in the nominal amount of \$1,000 should have been awarded.

## **F. DISPOSITION**

[127] I would allow the appeal.

[128] I would set aside the Judgment, except for the paragraphs numbered 2, 3<sup>9</sup> and 4.

[129] I would not set aside paragraph 2 of the Judgment, in which the court dismissed James Bay's claim for breach of the Agreements by Wale Sola. However, I would amend the paragraph to dismiss the claim for breach of the Agreement by Mak Mera as well.

[130] I would not set aside paragraph 3 of the Judgment, in which the court dismissed James Bay's claim for unjust enrichment against the appellants.

[131] With respect to paragraph 4, I would substitute an award of damages of \$1,000 in place of \$200,000.

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<sup>9</sup> Two paragraphs in the Judgment are numbered 3. For greater clarity, I have specified the terms of the orders contained in the paragraphs that I would not set aside.

[132] I would order pre-judgment interest on the \$1,000 damage award. If the parties cannot agree on the calculation of pre-judgment interest, I would permit them to make brief submissions of no more than one page about the appropriate amount within 7 days of the release of these reasons.

[133] I would also set aside the Costs Order.

[134] The appellants ask that they be awarded costs of the action. After factoring in the results on appeal, it is my view that the appellants have been largely successful. However, James Bay remains successful on its claim for defamation, albeit with a reduction in damages to a nominal amount.

[135] If the parties cannot agree on the disposition of the trial costs, I would permit them to deliver brief written submissions of no more than two pages within 7 days of the release of these reasons. In those submissions, the parties should address the issue of whether James Bay should be entitled to any trial costs because it was successful in its defamation claim brought “to establish a legal right, wholly irrespective of whether any substantial remedy is obtained”: *101100002 Saskatchewan Ltd. v. Saskatoon Co-operative Association Limited*, 2022 SKCA 12, 467 D.L.R. (4th) 632, at para. 26, quoting *Anglo-Cyprian Trade Agencies Ltd. v. Paphos Wine Industries Ltd.*, [1951] 1 All E.R. 873 (K.B.), at p. 874.

[136] I would award the appellants costs of the appeal in the agreed upon all-inclusive amount of \$50,000.

Released: June 20, 2025 "E.E.G."

"L.B. Roberts J.A."  
"I agree. E.E. Gillese J.A."  
"I agree. S. Coroza J.A."

**TAB 20**



**Court of Queen's Bench of Alberta**

**Citation: Kathryn Farms Ltd v 1572548 Alberta Ltd, 2021 ABQB 245**

**Date:** 20210330  
**Docket:** 2101 01967  
**Registry:** Calgary

Between:

**Kathryn Farms Ltd, Marion Randall, Nancy Kissinger, Patricia Harding and Lori Randall  
also known as Lori Chang**

Applicants

- and -

**1572548 Alberta Ltd**

Respondent

**Corrected judgment:** A corrigendum was issued on April 20, 2021; the corrections have been made to the text and the corrigendum is appended to this judgment.

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**Reasons for Decision  
of the  
Honourable Mr. Justice P.R. Jeffrey**

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[1] The Applicants (collectively “**Kathryn Farms**”) seek an order requiring the Respondent 1572548 Alberta Ltd. (“**157**”) to remove its caveat from the titles to their 4409.515 acres (the “**Lands**”). They also seek injunctive relief to regain possession of the Lands back from 157 or, failing that, that 157 post security for damages.

[2] The caveat was placed on the titles by 157 as notice that it claimed a purchaser’s interest in those Lands pursuant to an agreement it reached with Kathryn Farms (the “**Agreement**”). The core issue in this application is the present status of that Agreement – whether 157 continues to have a purchaser’s interest (or any proprietary interest) in the Lands.

[3] Kathryn Farms and 157 entered into the Agreement on November 29, 2018. By it 157 promised to pay a deposit of \$100,000 to Kathryn Farms within 3 days of signing the Agreement and the remainder of the purchase price (the “**Balance**”) on April 1, 2019, their agreed “**Closing Date**”, subject to standard adjustments. The Balance would be over \$27,500,000.

[4] If 157 was unable to pay the Balance by the Closing Date, because of an inability to obtain the funds from the completion of a sale of land in Germany (the “**Triggering Event**”), then the deal would close on the “**Extended Closing Date**” of November 30, 2019, plus some additional terms would govern their relationship between those dates (the “**Extension Terms**”). Those Extension Terms are significant to the issue now before the Court and include:

- a. 157 shall still receive vacant possession of the Lands on the Closing Date (Article 6.2);
- b. As of the Closing Date, 157 would not be restricted from any use of the Lands that it wished, such as harvesting timber, marketing aggregates from off the Lands, subletting some or all of the Lands or assigning agreements associated with the Lands;
- c. All of the purchase price adjustments in Article 2.6 would still be made as of the Closing Date not the Extended Closing Date (Article 2.6 (b)) so, for example, 157 became responsible for the property taxes and all other expenses as of the Closing Date even though it had not paid the Balance, and after the Closing Date not the Extended Closing Date 157 became entitled to all revenues from the Lands such as surface lease payments;
- d. 157 would lease the Lands from Kathryn Farms between the Closing Date and one month after the Extended Closing Date, at a rent specified in the Agreement (Article 2.4 (d));
- e. Kathryn Farms would apply the amount 157 pays as rent against the outstanding Balance (Article 2.4 (d)); and
- f. 157 would pay interest to Kathryn Farms at the rate of 2% per annum on the unpaid Balance after the Closing Date until the earlier of the Extended Closing Date and payment of the Balance (Article 2.4 (c));

[5] In the Agreement Kathryn Farms promised to transfer to 157 the titles to the Lands on whichever of the two dates they received the Balance.

[6] 157 paid the \$100,000 deposit but was delayed in delivering the Balance by reason of the Triggering Event.

[7] Pursuant to the Extension Terms, the parties entered into a lease of the Lands from April 1 to December 31, 2019 (“**Lease 1**”). Lease 1 refers to the Agreement in its recitals. It incorporates some of the Extension Terms but reverses others. It contains an “entire agreement” clause.

[8] Lease 1 terminated December 31, 2019.

[9] 157 was still unable to pay the Balance by the Extended Closing Date. Kathryn Farms says therefore the Agreement terminated on November 30, 2019, by its terms. 157 says it has not terminated – because of the Extension Terms and the parties’ dealings since November 30, 2019, resulting in it being an “agreement for sale” preventing Kathryn Farms from defeating its equitable interest summarily.

[10] The parties attempted to agree on terms that would amend the Agreement, by which Kathryn Farms would permit 157 to pay the Balance on an even later date. Those negotiations continued long after the Extended Closing Date, but the parties never did reach an agreement to extend the Extended Closing Date, despite a willingness on both sides.

[11] The parties did agree to a second renting of the Lands (“**Lease 2**”). Lease 2 ran from April 1, 2020, to February 28, 2021. Lease 2 does not address the fact three months transpired between the end of Lease 1 and the start of Lease 2. Lease 2 does not contain any of the Extension Terms; it does not mention either the Balance or the Agreement.

[12] Lease 2 requires 157 to “at the termination thereof, yield up the [Lands]” (Article 16). It also contains an “entire agreement” clause.

[13] The ongoing discussions between the parties about the sale shifted from both parties speaking of amending the Agreement. In September 2020 Kathryn Farms spoke of the need for “a new contract”.

[14] On December 21, 2020, Kathryn Farms reminded 157 that “there is nothing in writing with [157] at the moment which would commit [it] to purchasing” the Lands. 157 did not dispute that characterization of the Agreement.

[15] On December 21, 2020, Kathryn Farms also notified 157 that they had received more than one other offer for the Lands, not actively solicited, and that they would need a “binding Amending Agreement” or a “binding written commitment” from 157 to justify not accepting one of the new offers. 157 did not respond saying the Agreement was just such a commitment that was already binding on Kathryn Farms and on it, or that in any way the Agreement still limited Kathryn Farms’ options.

[16] Kathryn Farms heard nothing from 157 until they received, on January 7, 2021, a proposal from 157 in the form of a “Draft 2021 Revised Amending Agreement”.

[17] On January 9, 2021, Kathryn Farms entered into an agreement to sell the Lands to a third party, for \$28,500,000. That agreement requires, I am told, Kathryn Farms to transfer the titles clear of the caveat on or before its closing date of March 5, 2021. That date passed before this application came before me for emergency hearing.

[18] On January 10, 2021, Kathryn Farms responded to the January 7 proposal from 157. They notified 157 of their decision not to proceed with any further agreement with 157 and of having accepted a conditional offer from a third party. They asked 157 to discharge the purchaser’s caveat.

[19] 157 has not done so. 157 says the Agreement is an “agreement for sale” and that it is entitled in equity to an opportunity to redeem the titles to the Lands.

[20] Kathryn Farms never requested earlier that 157 discharge its caveat. In fairness, it appears the constructive and professional dialogue between the parties up to then may have given Kathryn Farms no reason to suspect 157 would not readily withdraw the caveat. Nothing turns on this point.

[21] At the time of hearing this application, 157 said it was still unable to pay the Balance. Nothing turns on this point either.

### **Application Process**

[22] Kathryn Farms apply for a declaration that the Agreement is not an “agreement for sale”, for an order discharging the caveat and, because 157 has been in occupation of the Lands, for injunctions that 157 vacate the Lands and remove all their property therefrom. In the alternative they seek an order requiring 157 to provide security for damages in the amount of \$28,500,000, the amount of the consideration for the Lands expected from the third-party purchaser.

[23] Kathryn Farms did not follow the process established by section 138 of the *Land Titles Act* to require 157 as caveator to take proceedings in court by application to substantiate its interest claimed in the lands. Had it done so, 157 would have 60 days to substantiate its interest, failing which the caveat would lapse.

[24] Kathryn Farms did not follow the process established by section 141 of the *Land Titles Act* for asking the Court to discharge a caveat. That process would require notice to 157 to show cause why the caveats should not be discharged and typically would be followed by a hearing or application on that issue. That process may be commenced, says s 141, “at any time”.

[25] For Kathryn Farms, it appears, getting the caveat off the titles had become urgent. If it commenced either statutory process it would be subject to how quickly or slowly 157 might choose to proceed. Even if Kathryn Farms commenced either statutory process immediately after signing the new sale agreement with the third-party purchaser, it could not be certain of a court order by the March 5, 2021, deadline that it voluntarily agreed to with that third-party purchaser. The 60 days under the s 138 process, for example, permitted 157 until after March 5.

[26] Kathryn Farms filed this application on February 10, 2021.

[27] 157 says any urgency to this Application is entirely of Kathryn Farms own making. Kathryn Farms knew of 157’s interest, it says, and the third-party purchaser had notice of its interest from the caveat.

[28] I infer that Kathryn Farms opted for this application process so it could drive an abbreviated court timing to the timing contemplated in the statutorily prescribed processes. Upon filing its application, Kathryn Farms wrote to the Court and petitioned for an immediate hearing. One of my colleagues granted the request without, it appears, having the prescribed statutory processes brought to her attention by Kathryn Farms. She added the application as an emergency onto my Commercial Chambers sittings for hearing March 16. I moved it back another day to give 157 a bit more time to submit an abbreviated written response to the late filings of Kathryn Farms.

[29] 157 does not ask me to deny the discharge application for not following either prescribed statutory process, but does say it ought to affect the test I am to apply. 157 says the process commenced by Kathryn Farms is tantamount to a request that its claim be dismissed summarily. 157 says to succeed, Kathryn Farms “must prove that there is no triable issue with respect to the validity of the caveat,” that it has no argument of merit to sustain the caveat.

[30] I agree that the approach taken by Kathryn Farms has compromised 157’s opportunity to frame the basis for its position and its time in which to marshal its evidence and formulate its arguments. 157’s counsel has done so impressively in the abbreviated time available. This constraint has not adversely affected the merits of those arguments and under the process chosen by Kathryn Farms they bear the burden not 157. But I agree that in the circumstances I should apply to the issues regarding the nature of the Agreement, its present status, and the caveat discharge request, the summary dismissal test. That test is summarized by our Court of Appeal in *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49 at paras 47 – 49.

[31] I am satisfied, having regard to the state of the record and the issues, that it is possible to fairly resolve the dispute now. There are no disputes about the facts, the record or the law, just about the law’s application to the record. The core issue is one of contractual interpretation and the effect at law of the events and the parties’ communications since, based on an undisputed record. There is no genuine issue here requiring a trial.

[32] Further, Kathryn Farms must persuade me to a much higher standard of confidence than merely on balance.

### **Caveat: The Nature and Current Status of the Agreement**

[33] The terms of the Agreement state that it terminates if 157 fails to pay the Balance when due. Kathryn Farms says that according to law the Agreement has terminated and 157 has no remaining purchaser’s interest. Therefore, it says, the caveat must be removed from the titles to the Lands.

[34] 157 says the Agreement has not yet terminated and in these circumstances Kathryn Farms are not entitled to terminate it. 157 says the caveat protects its property interest as purchaser of the Lands.

[35] 157 says the Agreement did not terminate and it still holds a purchaser’s interest in the Lands because of the Extension Terms and because the parties continued to discuss amending the Agreement after the Extended Closing Date.

[36] 157 says that the Extension Terms are hallmarks of an agreement for sale, that by the Agreement Kathryn Farms conveyed to 157 the fruits of the Lands, without a means to get the property back. 157 says the Agreement is akin to a rent to own and to a vendor taking back the mortgage. Kathryn Farms is financing 157’s purchase until the Extended Closing Date. It does not matter, says 157, whether the future payments due a vendor are amortized over 25 years or (as here) 8 months, the essential nature of the arrangement is the same. The payment is over time with the purchaser possessing the Lands in every sense of the word in the interim. While in possession

157 bears responsibility as the full owner subject only to the right of Kathryn Farms to receive the Balance in the future.

[37] 157 says, further, the ongoing communications between the parties plus their conduct post Extended Closing Date render Kathryn Farms unable to rely on the “time is of the essence” clause in the Agreement. It says Kathryn Farms cannot satisfy all three parts of the test in *Shaw v Holmes*, [1952] 2 DLR 330 (Ont CA) (citations omitted):

Time may be insisted upon as of the essence of the agreement by a litigant, (a) who has shown himself to be ready, desirous, prompt and eager to carry out his agreement: ...; (b) who has not himself been the cause of the delay or in default: ...; and (c) who has not subsequently recognized the agreement as still subsisting; he must not play fast and loose at his pleasure.

[38] In my view, Kathryn Farms is entitled to rely on the “time is of the essence” clause in the Agreement. I find that Kathryn Farms has been ready and willing to complete the sale transaction. Kathryn Farms has not been the cause of the delay. Kathryn Farms had not “played fast and loose”. And they did not scour about for a better price from another acquirer while preserving the 157 deal in their back pockets just in case. Kathryn Farms did not conceal from 157 that others had expressed interest in acquiring the Lands. Kathryn Farms did not actively solicit those offers. Kathryn Farms patiently accommodated 157’s delays, though with understandable disappointment, until they tired of 157’s unrealized assurances, forecasts and representations. Kathryn Farms was extremely forbearing as 157, over time, demonstrated that its predictions were not reliable. Kathryn Farms did nothing by which they can be taken to have waived their right to rely on the “time is of the essence” clause in the Agreement. Therefore, they are able to hold 157 to the Agreement terminating on the Extended Closing Date.

[39] Kathryn Farms and 157 agreed on the terms of 157’s two separate leases of the Lands. Each contained an “entire agreement” clause. That is also most significant in this case as I will now attempt to explain.

[40] Lease 1 encompassed the time between the Closing Date and the Extended Closing Date. It reversed some of the Extension Terms in the Agreement. The parties did not, therefore, ‘convey to 157 the fruits of the Lands without a means of getting them back.’

[41] After this reversion by Lease 1, the result is more consistent with an agreement of purchase and sale than an agreement for sale. Under the Agreement the closing adjustments were to be made as at the Closing Date, not the Extended Closing Date and 157 would enjoy the rights of ownership between the Closing Date and the Extended Closing Date. These approaches to the Extension Terms reflect more 157 taking on full ownership despite not yet paying the entire Balance.

[42] But the parties changed that in Lease 1. By Lease 1 the parties reverted to Kathryn Farms continuing as full owner between the Closing Date and the Extended Closing Date, and beyond if the Balance was still not paid. The parties agreed to the closing adjustments being made as of the Extended Closing Date not the Closing Date. Under Lease 1 Kathryn Farms retained all responsibilities and rights of ownership, for example, paying all property taxes and other expenses and receiving third party surface revenues. Lease 1 involved Kathryn Farms as landlords and 157

as having only tenancy rights of possession. Lease 1 prohibited 157 from harvesting timber, marketing sand, gravel or clay from the Lands, subletting any of the Lands, or any of the broad range of rights for property ownership that the Agreement said transferred to 157 on the Closing Date.

[43] I infer from these changes in Lease 1, supplanting the approach taken in the Agreement, that the parties had realized their addition of the Extended Closing Date and the Extension Terms in the Agreement had not reflected their true intentions. By Lease 1 they stated their true intention when agreeing to the possibility of the Extended Closing Date. Their true intentions, captured in Lease 1, were ‘in force’ before the commencement of the extended term.

[44] Article 7.2 of the Agreement contemplated amendments to the Agreement provided they were in writing. At Article 7.2 the Agreement says:

This Agreement shall not be deemed to be or construed to be, modified or amended except by instrument in writing signed by [Kathryn Farms] and [157] specifically.

[45] An amendment to the Agreement need not say something like “By these terms that follow the parties are amending the Agreement” or other comparable declaration. The requirement is only that there be an “instrument in writing signed by” both parties. The two Leases satisfy this requirement.

[46] To the extent either of the Leases contain terms that differ from the Agreement, they prevail over the terms in the Agreement, both by the effect of Article 7.2 of the Agreement and by common sense that the more recent in time, by the same parties and about the same Lands, can be understood to be made with knowledge of the prior and therefore prevail over the prior. Where two agreements among the same parties address the same matters in conflicting ways, the more recent in time prevails, all other things being equal.

[47] The Agreement contemplates Lease 1, in Article 2.4(d), but to the extent the terms of Lease 1 deviate from or vary the Agreement, Lease 1 constitutes an amendment to the Agreement and prevails over it.

[48] The “entire agreement” clause in Lease 1 prohibits consideration of anything that occurred before Lease 1 was signed in interpreting Lease 1 and determining its effect. The “entire agreement” clause in the Agreement does not prevent amendments to it after its execution. See, in this regard: *Soboczynski v Beauchamp*, 2015 ONCA 282 at paras 43 – 53. Therefore, Lease 1 amended the Agreement on an important consideration to whether or not the Agreement was an agreement for sale.

[49] Therefore, further, if 157 is correct that it still had a continuing interest in the Lands after the Extended Closing Date, entitling it to not relinquish possession, then Lease 2 amended that aspect of the Agreement by requiring yielding up the Lands on February 28, 2021 (Article 16). Lease 2 contains an “entire agreement” clause.

[50] An entire agreement clause also does not preclude from consideration in interpreting the contract the conduct of the parties after its execution: *Soboczynski*, at paras 60 – 63. The post-contractual conduct of the parties here, in particular (i) their reversing significant Extension Terms

in the Agreement by Lease 1 and (ii) their requirement that 157 yield up possession of the Lands in Lease 2, demonstrate they meant the Agreement to terminate on the Extended Closing Date absent payment of the Balance by 157; they meant it remain an agreement of purchase and sale, not an agreement for sale that bestowed any residual proprietary interest to 157.

[51] The post-contractual conduct of the parties, particularly their apparent common understanding between December 21, 2020, and January 7, 2021, that it had terminated, also militates strongly in favour of the interpretation that it had terminated, not continued in any way by the parties' negotiations after the Extended Closing Date.

[52] I conclude the Agreement is not an "agreement for sale" but remained a "purchase and sale agreement". It is not one from which 157 still retains any caveatable interest. While the Extension Terms that remained after Lease 1 was signed are consistent with an agreement for sale, alone they are not sufficient to transform what started out as a purchase and sale agreement into an agreement for sale following the Triggering Event. They are merely the parties' agreement to keep each other relatively whole for the brief period between the Closing Date and the Extended Closing Date, in the event of the Triggering Event only.

[53] The most recent property interest 157 has enjoyed in the Lands is that of tenant, under Lease 2. That expired February 28, 2021. 157 is overholding.

[54] 157 says it was necessary for Kathryn Farms to exercise a right to terminate the Agreement and it does not have that right in these circumstances. I disagree; it did not need a right to terminate in the agreement and then to exercise it. The Agreement is expressly clear that the Agreement terminates automatically if the Balance is not paid by one of the closing dates. Article 2.4 states:

... in the event [the Balance] is not paid and releasable to [Kathryn Farms] on or before the Extended Closing Date, this agreement shall be deemed to have terminated ... and neither the Vendor nor the Purchaser shall be obligated to complete the purchase and sale transaction contemplated herein.

And Article 2.8 states

[I]f the Purchaser fails to perform any provision of this Agreement then ... this Agreement shall terminate.

[55] The term of the Agreement was not indefinitely extended as a consequence of the parties continuing to discuss a further extension. By the terms of the Agreement, any such amendment had to be in writing (Article 7.2). Therefore, even though both sides expressed a willingness to amend the Agreement to further extend the closing date, they never did. Absent such an amendment in writing to further extend the closing date, the Agreement terminated in accordance with its terms.

[56] In any event, I find the December 21, 2020, communication from Kathryn Farms to 157 sufficient notice that Kathryn Farms treated the Agreement as terminated.

[57] 157 says Kathryn Farms cannot now repudiate the Agreement. Repudiation arises when a breach complained of would have the effect of depriving the innocent party of substantially the



whole or a major benefit under the agreement: *Booster Juice Inc v West Edmonton Mall Property Inc*, 2019 ABCA 58, at para 13. At such time the innocent party is considered as relieved from further performance but only if it elects that outcome right away. In *Dresser Industries, Inc v Raven Muds Ltd*, 1976 AltaSCAD 229, the Alberta Supreme Court, Appellate Division, said at para 24:

It seems clear that if the repudiation is not acted upon or accepted as such immediately, or certainly within a reasonable time, the contract remains alive to the end for the benefit of both parties: *Cromwell v. Morris*, (1917) 2 W.A.R. 377; and *Guy-Pell v. Foster* (1930) 2 Ch. 169.

[58] With respect, that is not what Kathryn Farms are doing. For the reasons herein, I am satisfied they are enforcing their rights as fee simple owners following the termination of the Agreement and the expiry of the latest tenancy.

[59] 157 says Kathryn Farms failed to perform their obligations under the Agreement, preventing 157 from lawfully tendering the Balance. Specifically, 157 says Kathryn Farms failed to deliver to 157 in advance of the Closing Date various documents, such as registerable transfers, water permits and licences, and a certificate for *Income Tax Act* purposes that Kathryn Farms are not non-residents, among others. Their delivery was required “reasonably far in advance of the Closing Date to allow ... registration of the title ... prior to or on the Closing Date”: (Article 6 of the Agreement).

[60] This “failure” is of no consequence because, first, in the circumstances of the ongoing communications between the conveyancing solicitors for both sides, it was known there was no point in the document preparation and delivery because 157 had made it clear that it would not be able to pay the Balance on the Closing Date. The parties’ attentions were properly focused on developing Lease 1. Kathryn Farms non-delivery of closing documents was, I find, solely and entirely because 157 admitted at the time it would not tender the funds Balance.

[61] Second, 157 never objected to Kathryn Farms failing to prepare and deliver superfluous documents – ones that would only have to be revised or recreated later.

[62] Third, 157 had the option of the Lands being registered in the name of a nominee, or some nominees, so Kathryn Farms could not prepare registerable transfer documents affecting the Lands without hearing first from 157 on that. It never did. I find, rather, that Kathryn Farms remained at all times poised and ready to close; 157 was not.

[63] Fourth, if 157 construed that document delivery omission by Kathryn Farms as relieving it from performing its obligation under the Agreement to tender the Balance, then it was necessary for it to communicate its chosen treatment of that failure “immediately, or certainly within a reasonable time” thereafter: *Dresser Industries, Inc v Raven Muds Ltd*, 1976 AltaSCAD 229 at para 24. An innocent party may be taken by reason of silence to have elected *not* to treat its obligations under the contract as at an end: *Denmark Productions Ltd. v Boscobel Productions Ltd.*, (1969) 1 Q.B. 699 at 732. 157 cannot say it was relieved of its obligation to pay the Balance after it failed to tell 157 at the time of Kathryn Farms’ non-delivery of closing documents, of its choice to treat that non-delivery as relieving it from the obligation to pay them the Balance. 157

continued to act as though the Agreement remained in force and binding on both parties – indeed, it insists in response to this application that the Agreement remains in force.

[64] I note, further, that the Agreement’s treatment of the possible forfeiture or refund of the \$100,000 deposit implies that for Kathryn Farms to actually be in breach (for deposit forfeiture purposes) it must fail to perform the *entire* Agreement, unlike 157, which forfeits the deposit if it fails to perform *any* provision (Article 2.8).

[65] 157 relies on *Co-op Centre Credit Union Ltd v Greba* (1984), 55 AR 176 (Alta CA), in support of its position that it is entitled to redeem the titles to the Lands. I disagree that *Co-op* applies here. If *Co-op* applied at all, it would be to prevent Kathryn Farms from enforcing a right to payment under the Agreement and, failing that, to have 157 removed from title and possession. But, first, Kathryn Farms does not have any right to enforce payment of the Balance against 157. Kathryn Farms’ remedies for 157 not paying the Balance are retention of the \$100,000 deposit and 2% interest on the Balance until the Extended Closing Date, nothing more. There is no surviving covenant by 157 to pay any deficiency. Second, 157 does not have possession under the Agreement, only under leases that have expired. And third, 157 does not have title to the Lands.

[66] I find the facts here to be closer to those in the recent decision of *Ingarra v 301099 Ontario Limited (Previn Court Homes)*, 2020 ONCA 103, a case referred to in one of the authorities submitted by 157. In *Ingarra* neither vendor nor purchaser could close the transaction on the first “Firm Closing Date” of January 11, 2018. The vendor could not provide an occupancy permit and the purchaser was not yet in funds. The parties did not follow their agreement in changing their closing date; instead by agreement of their lawyers they extended it to January 15, 2018. The vendor could close on the new date but the purchaser still could not. He continued to be without the funds and, on the 15<sup>th</sup>, he requested one additional day. The vendor agreed to the further extension and set it to January 17. On the 17<sup>th</sup> again the purchaser was without funds to close; he asked for a further extension. The vendor declined, declared the purchaser to be in breach, deemed the deposit forfeit, and proceeded to relist the property.

[67] After addressing the effect of the “time is of the essence” clause in their contract, the Court said, at para 21:

Since [the purchaser] was not in funds to close on the new agreed closing date, it was open to [the vendor] to terminate the agreement of purchase and sale.

[68] Similarly, here, the Agreement by its terms was deemed terminated when 157 was still not in funds by the Extended Closing Date. Kathryn Farms’ gracious forbearance thereafter did not serve to revive or to continue the Agreement. Any amendment to the Agreement extending even later the closing date had to be in writing. That did not occur.

[69] Even if Kathryn Farms’ forbearance did serve to revive or continue the Agreement, the communications between the parties since the Extended Closing Date made sufficiently clear Kathryn Farms’ position that the Agreement had terminated. The wording of Lease 2 is far more consistent with the Agreement having terminated than the alternative. The December 21, 2020, communication from Kathryn Farms to 157 gave sufficiently clear notice that the Agreement had

terminated and that there was no reason preventing Kathryn Farms from accepting one of the other offers they had received.

[70] The only relevant difference between this case and *Ingarra* is 157 taking possession of the subject property while trying to source the funds to complete the purchase, whereas in *Ingarra* the purchaser had not taken possession while trying to source the funds to close. But here that possession arose under the leases, not the Agreement, so this case is in fact on all fours with *Ingarra*. Even if one were to interpret the Agreement, containing the agreement to agree on a lease, as providing for possession of the Lands by 157 pending completion of the purchase on or before the Extended Closing Date, that was superseded by Lease 1, itself an “entire agreement” in respect of the basis of the possession *as tenant*. Further, by Lease 2, the possession *as tenant* was on a basis entirely distinct from the Agreement. Lease 2, again, also has an “entire agreement” clause.

[71] I am convinced (that is, I am not just persuaded on balance), therefore, that 157 had no purchaser’s interest after November 30, 2019, presently no longer has any caveatable interest in the Lands, and that the caveat must be removed.

### **Injunctions and Security for Damages**

[72] Kathryn Farms also seeks two injunctions, one prohibitory and the other mandatory. The former asks that 157 be enjoined from attending the Lands; the latter asks that 157 be required to remove all its property from the Lands. The prohibitory requires they show a serious issue to be tried for the first part of the tripartite test, whereas the mandatory injunction requires they show a strong *prima facie* case.

[73] By my conclusions on the nature of the Agreement and on the application to discharge the caveat, Kathryn Farms have prevailed, not just shown a strong *prima facie* case. Therefore, they have satisfied both formulations of the first part of the test.

[74] I am satisfied Kathryn Farms will suffer irreparable harm if the injunctions are not granted. One of the applicants is over 82 years of age and her remaining opportunity to enjoy redeploying her proceeds of the sale are more limited. This is not compensable monetarily. Also, as a land parcel of substantial size in aggregate, the Lands are unique and of potential interest to a more limited market. The possibility of future events in these uncertain times during a further delay in the absence of the injunctions could scare off other potential buyers.

[75] I am satisfied the balance of convenience favours Kathryn Farms. The harm to Kathryn Farms will be greater if I do not grant the injunctions, in light of my findings above, than will be the harm to 157 if I do.

[76] Customarily the Court’s role is to enforce contracts. The Court is doing nothing more than aiding the performance of the terms of the parties’ three agreements, each freely negotiated with the benefit of counsel, and voluntarily signed.

[77] I therefore grant both injunctions. Under the mandatory injunction, however, the requirement that 157 remove all its property from the Lands shall not be construed as a breach of the prohibitory injunction and shall exclude any crops already harvested by 157 from the Lands and that are currently stored on the Lands. This is to reflect the parties’ agreement at Article 32 of

Lease 2. Any such previously harvested crops must be clearly identified by both parties and must be removed by 157 no later than June 30, 2021. 157 shall be responsible for their safe keeping, preservation, and for the preservation of their quality, until removal.

[78] In light of my conclusions on the primary grounds of relief sought by Kathryn Farms, it is not necessary for me to consider the relief they sought in the alternative, for security for damages.

### **Conclusions**

[79] I conclude the Agreement is not an “agreement for sale”. I conclude 157 no longer has a purchaser’s interest in the Lands. I order removal of the caveat.

[80] I find 157’s tenancy on the Lands to have ended and that 157 is overholding.

[81] I grant the injunctions requested, modified as I have indicated.

[82] The parties may speak to me about costs if they cannot agree, provided they do so within 30 days.

Heard on the 17<sup>th</sup> day of March, 2021.

**Dated** at the City of Calgary, Alberta this 29<sup>th</sup> day of March, 2021.

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**P.R. Jeffrey**  
**J.C.Q.B.A.**

### **Appearances:**

Terry Czechowskyj and Halley Auger  
for the Applicants

C Michael Smith  
for the Respondent

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**Corrigendum of the Reasons for Decision  
of  
The Honourable Mr. Justice P.R. Jeffrey**

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The following changes were made to the Reasons for Decision:

1. Paragraph 50 was amended as follows: "...absent payment of the Balance by 157; they meant..."
2. Paragraph 80 was amended as follows: "I find 157's tenancy on the Lands to have ended and that 157 is overholding."

**TAB 21**

**CITATION:** Kielb v. National Money Mart Company, 2015 ONSC 3790  
**COURT FILE NO.:** CV-12-451806  
**DATE:** 20150612

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**BETWEEN:** )  
 )  
 )  
 JONATHAN KIELB ) *Jeff C. Hopkins*, for the Plaintiff  
 )  
 Plaintiff )  
 )  
 – and – )  
 ) *Susan Crawford*, for the Defendant  
 NATIONAL MONEY MART COMPANY )  
 )  
 Defendant )  
 )  
 )  
 )  
 ) **HEARD:** April 27-28, 2015

**S.A.Q. AKHTAR J.**

## INTRODUCTION

[1] This case involves allegations of broken promises, ambiguous clauses and inequitable treatment and, at its heart, a contract that was both enticing in its promises and cruel in its execution. The plaintiff claims damages from the defendant, the National Money Mart Company (“Money Mart”), for an unpaid bonus to which he claims he was entitled under contract. In defending this action, Money Mart relies upon a clause restricting bonus payments only to those employees who were still with the company at the time of the payout (the “Limitation Clause”).

## FACTUAL BACKGROUND

[2] The facts of this case are not really in dispute. The defendant is a national financial services company providing services to both individuals and corporations. It was owned by Dollar Financial Group, a publicly traded company based in Pennsylvania. The plaintiff, a lawyer, began employment with the defendant on or about December 1, 2008, in the position of Vice President and Division General Counsel. The plaintiff's employment history includes a

number of “in house” counsel roles. Prior to joining Money Mart, he served as general counsel at ICI Canada. His employment with the defendant ended on April 21, 2010 when he was dismissed without cause.

### **The Build Up to the Employment Agreement**

[3] In order to fully understand the issues in this case, it is necessary to examine the discussions between the plaintiff and the defendant prior to the plaintiff’s acceptance of the offer of employment.

[4] The plaintiff became aware of an opening at Money Mart after seeing a posting in the Ontario Reports. He spoke to Kerry Heller, a member of the legal recruitment team of the company handling the employment vacancy for Money Mart. Although the plaintiff appeared to be an ideal fit for the job, he was unhappy with the base salary, which he considered inadequate, and thus did not express any further interest in the position. Shortly after their initial discussion however, Ms. Heller contacted the plaintiff expressing her view that his experience made him a suitable candidate and urged him to pursue the opportunity. The plaintiff did so with the intentions of conducting negotiations with the Money Mart management.

[5] On October 28, 2008, the plaintiff spoke with Roy Hibberd by telephone, with Ms. Heller acting as intermediary. The conversation with Hibberd was one area of controversy at this trial. The plaintiff, in discussing his prospective employment position with Hibberd, took written notes outlining the content of the conversation conducted by telephone. Those notes were admitted into evidence at trial and their significance revolved around the issue of Money Mart’s Key Management Bonus Program (“KMB”).

[6] The plaintiff testified that, in negotiations with Hibberd, he insisted that his base salary be increased. Hibberd was aware of the plaintiff’s wage concerns and had raised the issue himself during their conversation. Hibberd talked at length about the company’s bonus program. According to the plaintiff, Hibberd explained that the bonus program would more than make up for the deficiencies in salary and would form a significant part of the plaintiff’s compensation.

[7] Hibberd insisted that the maximum salary on offer was the sum of \$170,000.00. The bonus program, as explained by Hibberd, was a potentially lucrative avenue for the plaintiff. It operated in two stages. The first was a payment of up to 30% of an employee’s salary based on company performance. The second, described as a “stretch” payment could be a further amount up to an additional 30% payable if the company exceeded targets outlined in the KMB year plan. The plaintiff testified that Hibberd assured him that any shortcomings in the plaintiff’s desired salary would be met by the KMB. Although there was no guarantee of the amount, the historical results of the program demonstrated a healthy return of 45-50% of salary which would more than satisfy the plaintiff’s demands. The program was even more attractive as the bonus was paid out on the basis of company or business unit performance rather than individual performance. According to the plaintiff, Hibberd informed him of the company’s successful history in performance and business payout and told the plaintiff that since he, Hibberd, had come on



board, the company revenues had doubled to \$350 million. Revenues were likely to double again in “18-20 months”. Even though Hibberd reiterated that he could not increase the plaintiff’s salary above the \$170,000.00 level, the compensation provided by the bonus had to be looked at “as the entire package.” According to the plaintiff, Hibberd used the KMB as an incentive to entice him to work for Money Mart. Certainly the plaintiff’s concern regarding his base salary had been alleviated by the KMB and he was sold on the company. The plaintiff and defendant disagree as to whether the KMB program was an integral part of the plaintiff’s total compensation package.

[8] Shortly afterwards, on November 14, 2008, the plaintiff received an email from Mary Ann McMenamin, an employee of the Dollar Finance Group, Money Mart’s parent company. Attached to the email was the formal offer of employment which was reviewed by the plaintiff. This document is marked as Exhibit 1 Tab 2. The plaintiff engaged in further discussions with Hibberd, raising concerns about the base salary offered, the length of notice in the event of termination without cause and the non-competition clauses in the agreement. As a consequence, a revised offer of employment was forwarded to the plaintiff on November 21, 2008. Hibberd informed the plaintiff that he until the following Monday, November 24, 2008 to accept or reject the offer. He accepted on Monday, November 24, 2008 at 4:55pm.

### **The Revised Employment Agreement**

[9] There are four terms of the revised employment agreement that play a significant role in this case. They are reproduced in full below:

(a) The Bonus Plan Clause (“the Limitation Clause”)

**KEY MANAGEMENT BONUS and LONG TERM INCENTIVE PLAN**

Bonus: Annual bonus earnings of up to 30% of your annual base salary each fiscal, based upon the attainment of annual Company and Dollar Financial Corp (DFC) profitability targets. It is possible that your said 30% bonus earnings may increase up to an additional of 30% of your annual base salary if the Company and DFC exceed their profitability targets as outlined in the Company’s management bonus program. All annual bonus amounts will be prorated based on your months of employment for the first fiscal year. The Company is on a fiscal year ending June 30. The Company may amend the terms of the bonus plan from year to year. Your business unit designation for the fiscal year 2009 will be “Canadian Retail”. Any bonus which may be paid is entirely at the discretion of the Company, does not accrue, and is only earned and payable on the date that it is provided to you by the Company. For example, if your employment is terminated, with or without cause, on the day before the day on which a bonus would otherwise have been paid, you hereby waive any claim to that bonus or any portion thereof. In the event that your employment is terminated without cause, and a bonus would ordinarily be paid after the expiration of the statutory notice period, you hereby waive any claim to that bonus or any portion thereof. You also hereby waive any claim to constructive dismissal based on

the fact that a bonus is not paid, is less than was previously paid, or is less than is paid to another employee.

The terms of the Key Management Bonus Program are as provided under the terms of that Program from time to time, and as may change at the Company's sole discretion.

This clause set out the scope and criteria for the KMB payouts. Most significantly, it specified that KMB did not accrue and would only be payable to the employee at the date provided by the Company. The 2010 date was September 17, 2010 and eligibility for the KMB payout depended on being an employee at the time of the payout or, if terminated, an employee within the statutory notice period.

(b) "The Notice Period Clause"

TERMINATION BY THE COMPANY

The company shall be entitled to terminate your employment with the Company at any time:

(a) for just cause without notice or compensation effective immediately on written notice to you; or

(b) without cause, provided that:

(i) The Company shall give you written notice of such termination as required by the ESA, which notice may be effective immediately (in which case you will be provided with pay in lieu of notice); and,

(ii) The Company shall, within 10 business days from the date of giving such notice, or pay in lieu thereof, pay to you 4 (four) weeks per year of service and pro-rated for partial years of service (the "Termination Payment"), inclusive of any amounts paid in clause (i) above, in return for your execution of a full and final release of any and all claims by you as against the Company, Dollar, or any related entities. You agree to accept the Termination Payment in full satisfaction of all entitlement arising from such termination, whether under statute, contract or common law, including entitlements to reasonable notice;

(c) "The Independent Legal Advice Clause"

INDEPENDENT LEGAL ADVICE

You acknowledge that you have had sufficient time to review and consider the provisions contained herein, that you have read and understand these provisions and your obligations as they have been described herein, and that you have been given an opportunity to obtain independent legal advice concerning the interpretation and effect of

these provisions, and you're [sic] the [sic] signature below is an acknowledgment of same.

(d) "The Entire Agreement Clause"

#### ACCEPTANCE

This letter contains the entire agreement between you and the Company, Dollar and DF . There are no other oral or written agreements or representations between you and the Company, Dollar and DFC.

The revised offer contained new clauses which reflected the plaintiff's concerns with respect to the November 14, 2008 offer. For example, the clause dealing with severance had been altered from what was effectively a two week notice period to include additional notice reflecting years of service.

#### **The Plaintiff's Reaction**

[10] However, the plaintiff testified that he was "surprised" at what he'd been sent. The plaintiff was particularly dismayed by the language of the Limitation Clause which had expanded significantly from the offer received on November 14, 2008. The plaintiff viewed the wording as "harsh and unnecessary". Of particular concern was the example given whereby, in the event of termination without cause, the plaintiff would be deemed to have waived his bonus. He felt that the contract itself was one sided and the language seemed more akin to that of a "bully".

[11] The plaintiff also testified about the independent legal advice clause contained in the revised agreement. He appeared to indicate that this was a clause which had not been present in the first offer of employment sent on November 14, 2008. In this respect, he was not entirely accurate as a clause recommending that the plaintiff obtain legal advice did exist in the letter accompanying the prior agreement. The November 21, 2008 offer stipulated that, as part of the agreement, the plaintiff was obliged to acknowledge that he had had "sufficient time to review and consider the provisions" and been given an opportunity to obtain legal advice. The plaintiff, however, testified that neither of these conditions had actually been fulfilled. The acceptance deadline of the following Monday meant there was insufficient time to contact a lawyer. In the plaintiff's view, he had "no choice" but to accept what was, in effect, a take it or leave it ultimatum by the company. At 4.55 pm, on Monday November 24, 2008, the plaintiff emailed Hibberd to accept his offer.

## **Employment and Termination**

[12] The plaintiff began employment with Money Mart on December 1, 2008. The agreement, however, was eventually signed on December 11, 2008, approximately 18 days after the plaintiff had accepted the employment offer by email.

[13] Pursuant to the agreement, and the KMB, the plaintiff received a pro-rated bonus for the 7 months that he was employed during the 2008/09 fiscal year. The “fiscal year” upon which the KMB is calculated, defined internally by Money Mart, runs between July 1 and June 30 annually. The plaintiff’s KMB payout for September 2009 amounted to \$10,855.95. Further, in July 2009 the plaintiff’s salary was increased to \$172,479.12. In August 2009, the plaintiff received a copy of Money Mart’s 2010 KMB outline.

[14] On April 21, 2010, the plaintiff’s employment with Money Mart was terminated on a without cause basis. No evidence was led as to the reason for his departure. The plaintiff was offered a termination package of 2 weeks statutory termination pay combined with a further six week’s salary pursuant to his employment contract. The additional six week salary was, however, contingent upon the plaintiff signing a full and final release obviating Money Mart from any further financial obligations. The plaintiff refused to sign that release and received only the statutory payment.

[15] Money Mart took the position that since he was not an employee at the required payout date—September 17, 2010—he was ineligible for KMB payment for that year. The 2009/2010 bonuses amounted to 59.4% of an employee’s base salary.

## **THE PLAINTIFF’S CLAIMS**

[16] The plaintiff seeks damages for his termination of employment with Money Mart. He claims:

- (a) the amount representing his 2009/10 bonus accrued to his date of termination in the amount of \$86, 239.56;
- (b) the amount representing his bonus accrued over his 8 week contractual notice period; and,
- (c) the salary he would have earned over the 8 week contractual notice period.

[17] The plaintiff argues that the Limitation Clause relied upon by the defendant is unenforceable because it:

- (a) is contrary to public policy;
- (b) has been inconsistently applied; and/or,
- (c) is ambiguous, contradictory and illegal.

## I - IS THE AGREEMENT CONTRARY TO PUBLIC POLICY?

[18] In answering this issue, two questions require determination. Firstly, was the KMB part of the overall compensation that the plaintiff was entitled to? Secondly, did the Limitation Clause apply to restrict the Plaintiff's entitlement to the bonus? Thirdly, if so, is the effect contrary to public policy?

### (i) Was the KMB Part of the Plaintiff's Total Compensation?

[19] In both *Schumacher v. Toronto Dominion Bank* (1997), 147 D.L.R. (4th) 128, [1997] O.J. No. 2004 (Ont. Ct. J. [Gen. Div.]) and *Prins v. Lakeview Development of Canada* (1990), 22 A.C.W.S. (3d) 936, [1990] O.J. No. 1647 (Ont. S.C. [H.C.]), the courts decided that a key factor in awarding a dismissed employee his bonus was the fact that the bonus constituted "an integral part of the plaintiff's financial package". Mr. Hopkins, for the plaintiff, argues that his client's position matches that of the plaintiff in *Schumacher*, wherein the defendant company also sought to rely upon a contractual clause that limited bonuses only to those employed at the company at the time of payment.

[20] In the instant case, the plaintiff's testimony with respect to the negotiations leading up to agreement of employment leaves no doubt that the bonus program was represented as part of the overall compensation package. This is particularly true given that the program was presented as a panacea to the plaintiff's dissatisfaction with the base salary being offered. Hibberd never testified at trial and Mr. Hopkins asks me to draw an adverse inference against the defendant in light of their failure to call him. I choose not to go that far, but choose instead, to accept the uncontradicted evidence of the plaintiff. Accordingly, I find that in their verbal communications, Money Mart, through Hibberd, held out the bonus plan as an important and integral part of the plaintiff's overall compensation package in an effort to ensure his services.

[21] Ms. Crawford, for the defendant, counters with the proposition that even if representations were made in the manner testified to by the plaintiff, they could not constitute contractual terms due to the Entire Agreement Clause contained in the offer of employment that bound the parties exclusively by the terms contained within the written agreement. Thus, regardless of any findings with respect to the telephone conversation between the plaintiff and Hibberd, this court cannot consider any of the discussions prior to the creation of the written employment agreement.

[22] There is a line of authorities governing the applicability of entire agreement clauses and in what circumstances they may be unenforceable. In *Shelanu Inc. v. Print Three Franchising Corp.* (2003), 64 O.R. (3d) 533, 226 D.L.R. (4th) 577 (C.A.), the Court of Appeal for Ontario held that entire agreement clauses should be construed in the same manner as exclusionary clauses. This approach is sensible as both types of clauses seek to limit the liability of one of the parties to the agreement. The exclusionary clause excludes liability for damages for breach of contract, whilst the entire agreement clause excludes liability to for representations made outside the written contract.

[23] In *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, the Supreme Court of Canada founded a new approach upon which exclusionary clauses should be analyzed. The Court adopted a three pronged approach:

(1) Did the parties intend for the exclusion clause to apply to the circumstances of the particular case? This question depends on the court's interpretation of the intention of the parties as expressed in the contract.

(2) If the clause applies, was it unconscionable?

(3) If the clause applied and was not unconscionable, was it contrary to overriding public policy?

[24] Does this new approach to exclusionary clauses also apply to entire agreement clauses, as per *Shelanu*? The Divisional Court, in *7326246 Canada Inc. v. Ajilon Consulting*, 2014 ONSC 28, [2014] O.J. No 538 (Div. Ct.) held that it did, and applied the *Tercon* principles to the entire agreement clause in that case. I agree that this is a necessary corollary to *Tercon*. I find that the Entire Agreement Clause is unenforceable on the basis of all three prongs as a result of Hibberd's representations.

[25] With respect to the intention of the parties, I cannot accept the proposition that both parties intended the discussions held prior to the written agreement to be ignored as a result of the Entire Agreement Clause. The plaintiff's central concern, communicated in the clearest of fashion, was the amount of remuneration that he was to receive if he accepted Money Mart's job offer. Hibberd's response was equally clear: the KMB would make up the shortfall between the base salary and the plaintiff's target. Even though there were no guarantees of how much extra the plaintiff would earn, it was, if the company financial criteria were met, automatically paid out. These assurances were not made to be ignored.

[26] However, if I am wrong and the clause did indeed exclude the verbal enticement made by Hibberd, I also find it to be unconscionable given the circumstances under which the agreement was negotiated. In *ABB Inc. v. Domtar Inc.*, 2007 SCC 50, [2007] 3 S.C.R. 461 at para. 82, the Supreme Court of Canada described "unconscionability" as follows:

Under the doctrine of unconscionability, a limitation of liability clause will be unenforceable where one party to the contract has abused its negotiating power to take undue advantage of the other. This doctrine is generally applied in the context of a consumer contract or contract of adhesion.

[27] In this case, the plaintiff was given a straight "take it or leave it" position with a deadline of three days (including the weekend) to accept a job offer that he had negotiated on more than one occasion. Hibberd, in his November 21, 2008 letter, indicated that the revised terms "reflects the discussions we had over the past week and it certainly reflects a considerable number of concessions and additional benefits that we are pleased to offer you." By making this statement, Hibberd was expressly referencing the terms discussed with the plaintiff. The letter contained no

express warning that the KMB was not an integral part of the plaintiff's compensation. The contract itself, save for the phrase "the award is discretionary", painted the picture of an automatic bonus following the achievement of specified company financial objectives. Indeed, the description of the KMB as contained in Schedule A of the agreement speaks to financial criteria for payout and emphasizes in bold the maximum potential "if all maximum Base and Stretch Bonus EBITDA levels are attained: 60%". The Entire Agreement Clause took on much greater significance given Hibberd's representations and the plaintiff's well known desire to reap the benefit of the KMB. Like the court in the *Ajilon Consulting* case, I find the defendant abused its stronger informational position in the circumstances to entice the plaintiff into consenting to an improvident clause.

[28] Finally, I conclude that the Entire Agreement Clause is unenforceable on public policy grounds in the sense that it would exclude the prior discussions between the plaintiff and Hibberd. It ill serves the public interest to permit companies and their recruitment agencies to orally promise automatic financial benefits and bonuses in order to secure prospective employment candidates and then eliminate those benefits without a clear and timely warning.

[29] I conclude therefore that the KMB payment was an integral part of the plaintiff's compensation package.

(ii) Did the Limitation Clause Apply to Restrict the Plaintiff's Right to the Bonus?

[30] Even though I agree with the plaintiff's position that the KMB was an integral part of his compensation package, I disagree with the notion that this point alone resolves the case in his favour. In making this argument, the plaintiff relies heavily on the case of *Schumacher*. He also cites a number of other decisions that, he argues, give rise to the following principle: once a bonus plan is found to be an integral part of a claimant's compensation plan, any limitation clause is contrary to public policy. For instance, the plaintiff notes that in *Prins* at p. 6 (O.J.) the court observed that "[i]t would be completely unfair to allow an employer to avoid paying a performance bonus that was part of the employment contract by terminating an employee."

[31] In *Schumacher*, the plaintiff, a senior vice president of a bank, discovered that his employer hired another financial manager to oversee operations that until that point had been solely his responsibility. The new hire affected the plaintiff's job description and his financial compensation by reducing his annual bonus. There had been no discussion of the new hire with the plaintiff because the bank feared that the plaintiff might leave if he knew. The plaintiff felt compelled to resign and brought an action for wrongful dismissal. Kiteley J. agreed that he had been constructively dismissed without cause. In assessing damages, Kiteley J. examined the bonus payment program that operated during the plaintiff's tenure at the company. As in the instant case, the plaintiff's employment agreement stipulated that, in order to receive the bonus payment, an employee would have to be actively employed by the company on the date of payment. Kiteley J. concluded that the bonus payment, was an integral part of the plaintiff's compensation. She also held that the company, in dismissing the plaintiff without cause, should have provided reasonable notice, and calculated that period as being 13 months which would,

had reasonable notice been given, made the plaintiff an employee at the time of payment. At para. 223 of her reasons, Kiteley J. made the following observation, which the plaintiff relies upon to establish his cause of action in this case:

[The plaintiff's] involuntary inability to comply with the condition of the PCP ought not to be justification for the Bank in declining the award of the bonus as part of Schumacher's damages. If that were the case, an employer would achieve a significant advantage by wrongfully terminating an employee because the severance package would not have to include any bonus. Where the bonus was promoted as an integral part of the employee's cash compensation, it would be inappropriate and unfair to the employee to be deprived of the bonus by reason of the unilateral action of the employer. I do not agree with the position taken by the Bank on this third issue. Schumacher remains entitled to consideration of a bonus, both for the period he worked and the notice period.

[32] The plaintiff urges this court to follow the same principle and to find that if the KMB formed an integral part of the plaintiff's total compensation, he is entitled to a pro-rated award for the period up until his dismissal and the duration of the notice period. In doing so, Kiteley J.'s concern that "it would be inappropriate and unfair to the employee to be deprived of the bonus by reason of the unilateral action of the employer" is avoided. Mr. Hopkins very effectively argues the public policy value of this type of interpretation.

[33] This argument, at first blush, appears very attractive. In both *Schumacher* and the instant case, the plaintiffs were dismissed without cause. The bonus payment was contractually contingent upon the plaintiff being an active employee on the payment date itself. In both cases, it could be argued that the employer was seeking an advantage by using the without cause termination date to deprive the plaintiff of financial remuneration. However, there are a number of significant distinguishing features between *Schumacher* and the other cases relied upon by the plaintiff that distinguish them from the current case.

[34] The most significant distinguishing factor, in my view, is the existence of the Limitation Clause and its language. Although the clause had the same effect as that in *Schumacher*, namely the requirement that the plaintiff had to be employed at the time that the bonus was payable, the qualifications on the payout outlined in the same clause appear to be far more restrictive, particularly in the use of examples given. I agree with Ms. Crawford that the language used in the plaintiff's contract is not found in the cases cited.

[35] In *Kieran v. Ingram Micro Inc.* (2004), 189 O.A.C. 58, [2004] O.J. No. 3118 (C.A.), leave to appeal dismissed, [2004] S.C.C.A. No. 423, the Court of Appeal for Ontario distinguished *Schumacher* on this basis. Lang J.A., for a unanimous court wrote, at paras. 56-58:

Under Ontario law, Mr. Kieran would be entitled to damages for the loss of the Plans, as they formed part of his compensation, absent contractual terms to the contrary. In the presence of contrary contractual terms, those terms govern: see



Gryba v. Moneta Porcupine Mines Ltd., [2000] O.J. No. 4775 (C.A.) at para. 49; Brock v. Matthews Group Ltd. (1991), 43 O.A.C. 369.

Mr. Kieran argues that the Plan provisions should be interpreted to find that they do not address a situation of dismissal without cause, and should be construed strictly against the employer who controlled their drafting. Interpreted in that context, the Plans, it is said, would be found to include as "employment", the period of notice given a wrongfully dismissed employee. That argument, applied to this case, would mean that Mr. Kieran would be considered an employee during the nine months of notice after his termination and entitled, during that period, to exercise his options.

There is, however, no ambiguity in the Plans at issue. This is not a plan such as the one examined by Kiteley J. in *Schumacher v. Toronto-Dominion Bank* (1997), 29 C.C.E.L. (2d) 96 (Ont. Gen. Div.). In that case, the "Phantom Options" contained contractual terms that negated the participant's right to his options when he "ceases to be an employee". A person ceases to be an employee, in the case of a wrongful dismissal, after the period of reasonable notice: see paras. 237-240. While a plan that addresses only "cessation of employment" may create an ambiguity, the plans at issue in this case do not. The focus of the inquiry is on the wording of the particular plan: Brock v. Matthews, *supra*, at para. 22. [Emphasis added].

[36] Moreover, Kiteley J.'s calculation of the notice period in *Schumacher* was based on common law principles of reasonable notice; a procedure necessitated by the absence of a defined contractual notice period. Her conclusion that a period of 13 months was the appropriate notice period led to the result that Mr. Schumacher would still be considered an active employee within that period. That situation is very different in the case at hand due to the contractual notice period personally negotiated by the plaintiff, which mandated the defendant to provide eight weeks notice on termination, subject to further qualifications. Since the plaintiff was dismissed in April 2010, even with the eight week notice period taking him to June 2010, he would fall outside the qualification period required for the bonus payment.

(iii) Is the Limitation Clause Contrary to Public Policy?

[37] The most significant distinguishing factor is the action of the plaintiff himself. The Limitation Clause was no secret to the parties. Indeed, the plaintiff testified as to his concerns when he first received the revised offer. Yet, despite his reservations, the plaintiff chose to accept the revised employment agreement. He testified that he had "no choice" but to accept the agreement. I found this part of his testimony unconvincing. The plaintiff had already re-negotiated several terms in the original offer, including an additional weeks' vacation and a \$5000.00 signing bonus. In addition, he had persuaded the defendant to remove the probationary clause existing in the first agreement and substantially increased the notice period in the event of termination. Given the time that elapsed between the date of the offer and his actual signing of

the agreement, I find that he had sufficient time to obtain independent legal advice on the matter. The plaintiff had a number of “choices” open to him. He could have sought further re-negotiation of the Limitation Clause, asked it be removed or, ultimately declined the revised offer. He chose none of these options and accepted the defendant’s offer. He was lured, no doubt, by the handsome compensation—potentially his base salary plus 60%—that he readily believed would be forthcoming. His choice was to live with the less favourable clauses in his contract and the risks that they entailed.

[38] It may well have been that some of the provisions, particularly the “full and final release” clause in the termination provision, could be viewed as harsh. However, harshness of the provision does not make it invalid if both parties have agreed to it: *Jivraj v. Strategic Maintenance Ltd.*, 2014 ABQB 463, 244 A.C.W.S. (3d) 861.

[39] Public policy would be ill served by permitting the plaintiff to accept a potentially lucrative position with the full knowledge that it contained a potentially unfavourable limitation clause and then to complain when that clause was actually executed.

[40] For the above reasons, I find that the agreement was not contrary to public policy.

## **II - IS THE AGREEMENT UNENFORCEABLE BECAUSE IT HAS BEEN APPLIED INCONSISTENTLY?**

### **(i) Is the Plaintiff Estopped from Leading Evidence Regarding Diana Brough?**

[41] As a preliminary point with respect to this aspect of the case, Ms. Crawford brought an application seeking the exclusion of evidence to be led by the plaintiff purporting to demonstrate Money Mart’s more favourable treatment of another employee, Ms. Diana Brough. Ms. Crawford alleged that the plaintiff was estopped from tendering this evidence as a result of a ruling by Master Short dated December 1, 2014, where he dismissed the plaintiff’s application to “Seek Answers on Two Refusals on Discovery”.

[42] The questions asked at discovery were:

(1) to inquire whether other Canadian executives who were terminated prior to September 17, 2010 still received a Bonus payment ; and,

(2) with respect to the other Canadian executives who were terminated prior to September 17, 2010 get received a Bonus payment, advise:

- i) the names of those who received the Bonus;
- ii) on what dates they left the company during fiscal 2009-10; and,
- iii) the Bonus amount received.

[43] According to Ms. Crawford, the Master's finding that he was "not satisfied that he either refused question is relevant in its present form to the plaintiff's entitlement, if any in this case" acted as a bar to the plaintiff's use of Ms. Brough's evidence. I agreed with Ms. Crawford's descriptions of the principles of res judicata and estoppel (emanating from *Carl Zeiss Stiftung v. Rayner and Keeler Ltd. (No. 2)*, [1967] A.C. 853 and approved by the Supreme Court of Canada in *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248, 47 D.L.R. (3d) 544), which outline the following three conditions to establish issue estoppel:

1. the same question has been decided;
2. the judicial decision which is said to create the estoppel was final; and,
3. the parties to the judicial decision were the same persons or parties to which the estoppel was raised.

[44] I rejected Ms. Crawford's position on how the test should be applied to this case. Whilst it is undisputed that the parties to the decision were the same, Master Short was not deciding the same question, nor was he creating a judicial decision that was final.

[45] The question before Master Short was whether the defendant should provide information to the plaintiff as part of the discovery process. In his view, since "neither refused question" was relevant, he declined to make the defendant provide an answer to those questions. That is a fundamentally different question than that asked here i.e. whether the plaintiff can tender evidence showing an inconsistency in Money Mart's treatment of employees.

[46] Further, it could hardly be said that Master Short's decision that the refused questions need not be answered due to their lack of relevancy is a final determination of whether the plaintiff could actually lead Ms. Brough's evidence at trial. That decision is firmly reserved to the judge adjudicating at trial (or a different pre-trial motions judge if agreed by the parties). It would be a fundamental shift if a Master asked to resolve questions at a Discovery hearing was able to make future evidentiary rulings binding a future trial judge.

[47] As a result, I dismissed Ms. Crawford's estoppel argument and permitted Mr. Hopkins to lead the evidence of Ms. Brough.

(ii) The Evidence of Deirdre Brough

[48] Deirdre Brough was employed by the defendant from October 2008 to July 2010, initially as Vice President of Marketing and subsequently as Director of Marketing. Her employment overlapped with that of the plaintiff and she participated in the same KMB. Like the plaintiff, she too viewed the KMB as an integral part of her compensation. Her employment was terminated without cause on July 8, 2010 and she was offered severance pay of approximately \$14,000.00. No bonus payments were initially offered. However, after Ms. Brough complained, the company offered, on August 9, 2010, what it described as a "gratuitous payment" of \$62,000.00. This was roughly the amount that Ms. Brough would have been entitled to under the KMB for the fiscal

year of 2010. Ms. Brough took this to be the bonus payment and it is not seriously disputed by the defendant that it was not. It is also not disputed that Ms. Brough's employment agreement would not have extended from July 8, 2010 to the payout date of September 17, 2010.

(iii) Does the Inconsistent Treatment make the Plaintiff's Contract Unenforceable?

[49] The plaintiff submits that he was in no different to Ms. Brough and yet was treated differently, and, therefore, unfairly. I reject that argument for the following reasons.

[50] Firstly, the language in Ms. Brough's offer of employment is markedly different to that of the plaintiff's. The plaintiff's Limitation Clause is far broader than Ms. Brough's as evidenced by the absence, in Ms. Brough's employment agreement, of the "for example" passage, cited above. Secondly, Ms. Brough's employment agreement, Exhibit 4 in these proceedings, contained a bare outline of the bonus provisions with promises of "Details to follow". The detailed KMB provision, marked as Exhibit 2, in these proceedings and provided to the plaintiff as part of his offer was not given to Ms. Brough at the same time as the offer of employment. She would, therefore, have been unaware of the details when she sought legal advice and signed the contract offered to her. Accordingly, the limitation restricting the plaintiff's bonus entitlement would not have applied to Ms. Brough.

[51] Furthermore, Ms. Brough worked for the entire fiscal year unlike the plaintiff who was two months short of that total. Whilst that fact alone might not have been sufficient, it is, taken into consideration with the other factors referred to above, a significant enough difference between the plaintiff and Ms. Brough to justify distinguishing between the two. It should also be noted that Ms. Brough did not receive a pro-rated bonus for her contractual notice period.

[52] Finally, the fact that Money Mart treated Ms. Brough differently does not, per se, entitle the plaintiff to a bonus payment when he was otherwise legitimately denied it on the basis of his employment contract. There was nothing to stop Money Mart from being more generous to Ms. Brough, so long as it acted in good faith and without ulterior motive: *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494. Certainly, there is no evidentiary basis to suggest that Money Mart acted in an improper exercise of its discretion.

### **III – WAS THE AGREEMENT AMBIGUOUS?**

[53] The plaintiff argues the Limitation Clause is unenforceable due to its ambiguous and contradictory nature. The portion to which he objects is reproduced as follows:

Any bonus which may be paid is entirely at the discretion of the Company, does not accrue, and is only earned and payable on the date that it is provided to you by the Company. For example, if your employment is terminated, with or without cause, on the day before the day on which a bonus would otherwise have been paid, you hereby waive any claim to that bonus or any portion thereof. In the event that your employment is terminated without cause, and a bonus would

ordinarily be paid after the expiration of the statutory notice period, you hereby waive any claim to that bonus or any portion thereof.

[54] The position advanced is that the clause initially purports to remove the bonus payment if the plaintiff's employment is terminated, even if the payment would otherwise be payable within the plaintiff's statutory notice period. The next sentence, however, purports to contradict that notion by stipulating that any bonus payable *after* the statutory notice period would be deemed to be waived, thereby implying that a bonus payable within the statutory notice period could still be claimed. This, says the plaintiff, flies in the face of authorities requiring clear language of contracts that seek to restrict employment rights: *Taggart v. Canada Life Assurance Co.* (2006), 146 A.C.W.S. (3d) 674, [2006] O.J. No. 310 (C.A.).

[55] In addition, relying on the doctrine of *contra proferentem*—where an ambiguity in a contract is resolved against the party that inserted it and is relying upon it—the plaintiff submits that the Limitation Clause becomes illegal as it contravenes s. 60 of the *Employment Standards Act*, 2000, S.O. 2000, c. 41 (“ESA”) which reads:

- (1) during a notice period under section 57 or 58, the employer,
  - (a) shall not reduce the employee's wage rate or alter any other term or condition of employment;

[56] If the ambiguity is resolved in the plaintiff's favour, he argues that the clause would prevent him from receiving a bonus during his statutory notice period and therefore run afoul of the ESA.

[57] Regrettably for the plaintiff, I find the clause to be unambiguous in its restrictive nature. The clause is to be read in its entirety and, in my view, makes clear that if the plaintiff's notice period fell within the bonus payment period, it would be honoured. Any doubts about the ambiguity argument are resolved by the plaintiff himself; he clearly understood what it meant. He testified to his surprise and dismay at the language in the clause and the manner in which it favoured Money Mart. According to him, the clause was harsh and contained “bully language.”

[58] Even though I have already found the clause to be unambiguous, I pause to note that application of the *contra proferentem* doctrine would not assist the plaintiff in this case. Application of that doctrine would lead to an interpretation whereby Money Mart would be precluded from relying on the unfavourable aspect of the ambiguity: disentitlement to the bonus during the statutory notice period. The plaintiff's argument on this point seems to take the doctrine into reverse by only allowing the interpretation unfavourable to the plaintiff.

[59] For these reasons, I find the Limitation Clause to be unambiguous and enforceable by Money Mart.

**CONCLUSION AND COSTS**

[60] I find the contract to be enforceable both in respect to the bonus payment and the issue of termination payments. Whilst one may find the termination payment to be somewhat draconian in its application, particularly in requiring a full and final release for an additional period of payment, it was part of an agreement entered into with full knowledge by the plaintiff. He is bound by its terms. The plaintiff's claim is therefore dismissed.

[61] I invite both parties to make submissions as to costs. Each submission must be no longer than 5 pages in length. The defendant shall file its submissions within 30 days of this judgment with the plaintiff to file his submissions within 30 days thereafter.

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S.A.Q. Akhtar J.

**Released:**

**CITATION:** Kielb v. National Money Mart Company, 2015 ONSC 3790  
**COURT FILE NO.:** CV-12-451806  
**DATE:** 20150612

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

JONATHAN KIELB

Plaintiff

– and –

NATIONAL MONEY MART COMPANY

Defendant

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**REASONS FOR JUDGMENT**

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S.A.Q. Akhtar J.

**TAB 22**



**CITATION:** KingSett Mortgage Corporation et al. v. Vandyk-Uptowns Limited et al., 2024  
ONSC 6205

**COURT FILE NO.:** CV-23-00709180-00CL

**DATE:** 20241015

**SUPERIOR COURT OF JUSTICE – ONTARIO – COMMERCIAL LIST**

**IN THE MATTER OF AN APPLICATION UNDER SUBSECTION 243(1) OF THE  
BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, AS AMENDED, AND  
SECTION 101 OF THE COURTS OF JUSTICE ACT, R.S.O. 1990, c. C.43, AS AMENDED**

**RE:** KINGSETT MORTGAGE CORPORATION AND DORR CAPITAL  
CORPORATION, Applicants

**AND:**

VANDYK – UPTOWNS LIMITED, VANDYK – HEART LAKE LIMITED,  
2402871 ONTARIO INC., VANDYK – THE RAVINE LIMITED, VANDYK –  
LAKEVIEW- DXE-WEST LIMITED AND VANDYK – LAKEVIEW-DXE  
EAST LIMITED, Respondents

**BEFORE:** Justice Peter J. Osborne

**COUNSEL:** David Rosenblat, for KSV Restructuring Inc., in its capacity as Receiver

*Sean Zweig*, for the Applicants

*James Wayne Maclellan*, for The Trisura Guarantee Insurance Company

*Kate Parker*, for Kohn Partnership Architects Inc. and Aquila Project Solutions,  
Construction Lien Claimants (Lakeview)

*Murtaza Tallat and Sierra Farr*, the Receiver

*Thomas Sanderson*, for The Corporation of the City of Mississauga

*Dillon Beaulne*, for 560789 Ontario Inc. o/a R&M Construction, a Construction  
Lien Claimant (Lakeview)

**HEARD:** October 15, 2024

**ENDORSEMENT**

[1] The Receiver moves for two orders:

- a. a Third Amended and Restated Receivership Order approving the Heart Lake CM Contract and directing the Receiver to perform same, authorizing the Receiver to

borrow up to an aggregate principal amount of \$120,325,000 pursuant to the Heart Lake Commitment Letter and granting a corresponding Borrowings Charge; and

- b. an Ancillary Relief Order authorizing the Receiver to enter into Agreement of Purchase and Sale (“APS”) APS Amendments in respect of the Pre-Sale APSs, terminating and disclaiming those Uptowns Project homebuyer Pre-Sale APSs where the homebuyers do not enter into an APS Amendment by the APS Amendment Deadline, and sealing the Uptowns Project Pro-Forma and APS Amendment Schedule until the earlier of the completion of the Uptowns Project or further order of this Court;

both as described in the Notice of Motion.

[2] The Notice of Motion had also sought relief in the form of a Conveyance and Easement Order vesting title to the Subject Property in favour of the Corporation of the City of Mississauga and the Regional Municipality of Peel in connection with development approvals. As agreed with counsel for the City who was present at the hearing of the motion, that relief is not being sought today and is adjourned until certain pre-conditions have been satisfied, at which time the motion for that relief may be brought back on.

[3] The Receiver relies on the Fifth Report dated October 7, 2024, together with appendices thereto. No other materials were filed by any other party, and the motion was strongly supported by KingSett, the primary financial stakeholder of Uptowns, and was unopposed, although as further described below, a significant number of Pre-Sale APS homebuyers were present in court and had questions about the process.

[4] Defined terms in this Endorsement have the meaning given to them in earlier Endorsements made in this proceeding, and/or the motion materials unless otherwise stated. To be clear, each counterparty to the Pre-Sale APSs was served with the motion materials (which is why so many were present in Court today).

[5] For the reasons below, I am satisfied that the proposed relief should be granted.

[6] Each of the Debtors is a single-purpose real estate development company that owns a specific project being developed on its respective Real Property, all of which are located in the Greater Toronto Area.

[7] I approved a sale process on March 8, 2024 for the Real Property owned by each of Heart Lake, 240 and Ravine along with certain other entities within the Vandyk Group. With respect to Uptowns and Lakeview, the Receiver, following on discussions with key stakeholders, determined that those Projects should be completed during the receivership to maximize benefits for stakeholders.

[8] Uptowns owns the Real Property at 10302 Heart Lake Road, Brampton, Ontario, where it is developing a residential project consisting of 342 stacked townhomes of which 329 were presold pursuant to APSs executed prior to the Receivership Order. Those have Termination Dates with the majority expiring in April, 2025 and a smaller subset expiring in March, 2026, after which time counterparties may have the ability to terminate those agreements.

[9] 287 of those 329 APSs contemplate a purchase price that in the professional opinion of the Receiver is now significantly below current market values. Based on the Uptowns Project Pro-Forma, the Uptowns Project is projected to have a deficit of approximately \$57.3 million, with the result that KingSett is not prepared to advance additional financing without an adequate increase to the purchase prices. The proposed APS Amendments, and proposed authority to negotiate and enter into same or terminating disclaiming them, are being sought for that purpose.

[10] The amendments sought would extend the Termination Date to October 1, 2027 and increase the purchase prices for the 287 of 329 Pre-Sale APSs that are currently under market value to a Court-approved maximum increase per pre-sold unit. The Receiver submits that the proposed new Termination Date provides an adequate time frame within which to complete the Uptowns Project.

[11] The Ancillary Relief Order is a condition precedent to securing any further advances under the Uptowns Construction Facility, and those advances are required since the total loan amount provided for under the Uptowns Commitment Letter is insufficient to cover anticipated costs of completing the Uptowns Project for which it is estimated that an additional \$120,550,000 in financing will be required.

[12] The Receiver submits, and I accept, that it is unlikely that a lender would be willing to provide the Uptowns Project with any further construction financing at this time, as such construction financing is generally not available unless a developer has presold 60% to 75% of units at “market” price, which requirement is not satisfied and cannot be satisfied by the current Pre-Sale APSs. In short, the Receiver cannot continue construction without the Ancillary Matters Order and that result would reduce potential recovery and benefits to stakeholders.

[13] The proposed Amended Prices allow homebuyers to retain value in their Pre-Sale APSs, as the Amended Prices are submitted by the Receiver to be below current market rates (by, on average, 13%), while providing for the prospect of achieving the presale thresholds in the near term required for the Uptowns Project to be financeable. Homebuyers have the election of terminating their APSs if they do not wish to agree to the Amended Price, in which case they would look to an existing Trisura surety policy which the Receiver expects would respond as to 100% of deposits paid in respect of Pre-Sale APSs that are disclaimed. Trisura was also present in Court today.

[14] The Pre-Sale APS provides that the purchaser subordinates and postpones their agreement to any mortgages arranged by Uptowns and any advances thereunder, and the agreement does not confer on the purchaser any legal, equitable or proprietary interest in the Real Property. No pre-Sale APSs are registered on title to the Real Property of Uptowns.

[15] In the unfortunate circumstances of this development, I am satisfied that approving the relief sought is the best path forward. As noted, a number of Pre-Sale APS homebuyer counterparties were present in court and had their questions answered. The Receiver has been and will continue to keep stakeholders up to date through communications and its website. In addition, in the near future, each Pre-Sale APS homebuyer will receive a package of materials outlining the applicable Amended Price and the protocol for agreeing to same by the deadline. For those who elect not to do so, subsequent information and materials will be provided with respect to how those homebuyers can make a claim against the Trisura surety policy in respect of the money paid as a deposit.

[16] The material proposed to be sealed includes the APS Amendment Schedule, which in turn includes the proposed Amended Prices. I am satisfied that, as the Receiver submits, public disclosure of those prices could harm the future marketability of units if homebuyers elect not to execute the APS Amendments, in which case the Receiver would likely have to secure a higher price upon resale to recover additional costs, and the disclosure of the Amended Prices could create an artificial ceiling for new sale prices.

[17] The Receiver submits that sealing the Uptowns Project Pro-Forma and the APS Amendment Schedule is vital for safeguarding the integrity and financial viability of the Project. I agree. I am also satisfied that the order is proportionate and time-limited until the earlier of the completion of the Project or further order of the Court, which can be sought at any time. In short, I am satisfied that the factors applicable to a determination of whether a sealing or confidentiality order should be granted pursuant to section 137(2) of the *Courts of Justice Act* as set out by the Supreme Court of Canada in *Sierra Club* and refined in *Sherman Estate* have been met here.

[18] With respect to the Heart Lake Project, it is a single-purpose real estate development company that owns the real property at 10194 Heart Lake Road, Brampton, Ontario, where it is developing a residential project of 200 stacked townhomes of which 109 had been presold. Subject to obtaining the Third Amended and Restated Receivership Order, the Receiver intends to complete the Heart Lake Project to maximize recoveries for all stakeholders.

[19] A sale process was conducted in the spring of this year as contemplated by order granted by this Court on March 15, 2024. Two offers were received by the deadline, neither of which was determined by the Receiver in consultation with KingSett, the first ranking mortgagee of Heart Lake, to be satisfactory primarily since the contemplated purchase prices were insufficient to repay the KingSett loans, let alone any other subordinated debt.

[20] As a result, the Receiver, in consultation with KingSett, engaged with Elm to evaluate the feasibility of completing the Heart Lake Project and prepared a budget and proforma, following which the Receiver and Elm entered into a CCDC-5A Construction Management Contract - the Heart Lake CM Contract.

[21] I am satisfied that it should be approved. Elm is an experienced construction manager specifically with experience in building similar townhome projects and is known to the Receiver.

The proposed Contract is supported by KingSett, and I am satisfied will create value for stakeholders of Heart Lake.

[22] KingSett has agreed to provided construction financing facility in the amount of \$120,325,000 pursuant to a commitment letter dated October 7, 2024, conditional on the Third Amended and Restated Receivership Order being granted and other conditions being satisfied. The Receiver is of the view that the terms are reasonable and that the effect of annualized interest rate of the loans is consistent with, or lower than, market for a loan of this nature.

[23] The Heart Lake Construction Facility is required to restart construction of the Heart Lake Project and that is in the interest of all stakeholders if recoveries are to be maximized. KingSett is already the existing primary financial stakeholder in these proceedings and supports the relief sought and the development of the Project to which it is directed. KingSett requires the Receiver's Heart Lake Borrowings Charge to fund the Facility.

[24] This Court has the jurisdiction to direct a receiver to disclaim presale homebuyer agreements in the context of real property receiverships: See, for example, *KingSett Mortgage Corp. v. Stateview Homes et al.*, (November 16, 2023), Ont. S.C.J. [Commercial List], Court File No. CV-23-00698576 at para. 16 [*Stateview Homes*]; *KingSett Mortgage Corp. and Dorr Capital Corp. v. Stateview Homes (Minu Towns) Inc.*, (September 14, 2023), Ont. S.C.J. [Commercial List], Court File No. CV-23-00698576 at p. 1 [*On the Mark Endorsement*]; *Firm Capital Mortgage Fund Inc. v. Stateview Homes (Hampton Heights) et al.*, (August 18, 2023), Ont. S.C.J. [Commercial List], Court File No. CV-23-00700356-00CL at para. 6 [*Hampton Heights*]; *Forjay Management Ltd. v. 0981478 B.C. Ltd.*, 2018 BCSC 527 at paras. 131-132 [*Forjay Management*].

[25] This authority derives from the duty of a receiver to maximize the recovery of assets under its jurisdiction, in service of which it may affirm or disclaim contracts: *Peoples Trust Company v. Censorio Group (Hastings & Carleton) Holdings Ltd.*, 2020 BCSC 1013 at para. 25 [*Peoples Trust Company*].

[26] The criteria to be considered in determining whether to authorize such disclaimers were set out in *Forjay Management* at paragraph 44 (see also *Stateview Homes* at paragraph 17):

- a. the respective legal priorities of the competing interests;
- b. whether the disclaimer would enhance the value of the assets, and if so, would a failure to disclaim amount to a preference in favour of a particular party; and
- c. whether, if a preference would arise, the party seeking to avoid the disclaimer has established that the equities support such a preference.

[27] I am satisfied that the factors are met here. The proposed disclaimers would occur only in relation to Pre-Sale APSs for which an APS Amendment is not executed within 30 days of being sent to the counterparty or such later date as determined by the Receiver. The mortgages registered

against the Uptowns Real Property constitute senior charges ranking in priority over the Pre-Sale APSs, none of which are registered on title.

[28] The authorization of the Receiver to disclaim is required to avoid the projected deficit, obtain financing and complete the Uptowns Project. Absent the relief sought, the Receiver would likely need to conduct a sales process, and in its submission, that in turn would likely lead to significantly lower recoveries.

[29] Moreover, granting the requested relief will minimize further construction delays, which in turn could further erode stakeholder value, and it should provide certainty and expediency for those homebuyers who wish to agree to the APS Amendments. Courts have held that a failure to authorize the disclaimer of purchase agreements in such circumstances would amount to a preference in favour of homebuyers: *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.*, 2008 BCSC 897 at para. 96; *Forjay Management*, at para. 93; and *Peoples Trust Company*, at para. 57.

[30] Further, equitable considerations do not support a departure from the existing priorities and granting a preference to homebuyers. Each of those parties has been served with these motion materials, as noted above. Deposits made by homebuyers under the Pre-Sale APSs are covered by a Trisura surety policy thereby allowing counterparties to disclaimed agreements to seek a refund of their deposit.

[31] In further addition, the interests of the homebuyers have been protected by the Amended Prices, which the Receiver submits are fair and appropriate in the circumstances and represent an average discount of 13% below current market prices. The alternative of a sales process would overwhelmingly likely result in the termination of all Pre-Sale APSs, depriving the homebuyers of all value.

[32] For all of these reasons, I am satisfied that the disclaimer relief is appropriate.

[33] With respect to the Third Amended and Restated Receivership Order and the approval of the Heart Lake CM Contract, this Court has broad discretion, flowing from section 243(1)(c) of the *Bankruptcy and Insolvency Act*, which permits the court to authorize a receiver to take any other action that the court considers advisable.

[34] Courts have routinely approved the entering into of key contracts to facilitate the receivership, including the retention of a construction manager: see *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508 at para. 85; *KingSett Mortgage Corporation et al. v. Vandyk – Uptowns Limited et al.*, (June 13, 2024), Ont S.C.J. [Commercial List], Court File No. CV-23-709180-00CL at paras. 6-7; *KEB Hana Bank as Trustee v. Mizrahi Commercial (The One) LP et al.*, (March 7, 2024), Ont S.C.J. [Commercial List], Court File No. CV-23-00707839-00CL at para. 20.

[35] For the reasons set out above, I am satisfied that this agreement should be approved here.

[36] I am further satisfied that retaining Elm as a construction manager is in the best interest of the Heart Lake Project going forward for the above reasons, including but not limited to stakeholder benefit and support. It follows that the Construction Facility and Borrowings Charge should also be approved. In this regard, section 31(1) of the *BIA* authorizes a receiver to borrow in order to fund the duties of the receiver, and further permits a receiver to give security on the property of the debtor in any amount, on any terms and on any property that may be authorized by the Court. Further jurisdiction is found under section 243(1)(c) of the *BIA* which gives the Court the power to take any other action that the court considers advisable.

[37] At the conclusion of submissions from all counsel for interested parties, a number of observers present in Court, who consisted virtually exclusively of Pre-Sale APS homebuyer counterparties, were given the opportunity to ask questions of the Receiver through its counsel, with a view to providing in simple and understandable terms answers to the questions asked about the relief being sought and the path forward.

[38] For all of these reasons, the relief is granted.

[39] Orders to go in the form signed by me which are effective immediately without the necessity of issuing and entering.

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Osborne J.

**TAB 23**



**Ledcor Construction Limited** *Appellant*

v.

**Northbridge Indemnity Insurance Company,  
Royal & Sun Alliance Insurance Company  
of Canada and Chartis Insurance Company  
of Canada** *Respondents*

- and -

**Station Lands Ltd.** *Appellant*

v.

**Commonwealth Insurance Company,  
GCAN Insurance Company and  
American Home Assurance Company**  
*Respondents*

**INDEXED AS: LEDCOR CONSTRUCTION LTD. v.  
NORTHBRIDGE INDEMNITY INSURANCE CO.**

**2016 SCC 37**

File No.: 36452.

2016: March 30; 2016: September 15.

Present: McLachlin C.J. and Abella, Cromwell,  
Moldaver, Karakatsanis, Wagner, Gascon, Côté and  
Brown JJ.

**ON APPEAL FROM THE COURT OF APPEAL FOR  
ALBERTA**

*Insurance — Property insurance — All risks policy  
— Exclusion clauses — Interpretation — Builders' risk  
policy excluding from coverage cost of making good faulty  
workmanship — Windows of building under construction  
scratched by contractor hired to clean them and windows  
needing replacement — Whether faulty workmanship ex-  
clusion to coverage applicable.*

*Appeals — Courts — Standard of review — Contrac-  
tual interpretation — Standard of appellate review ap-  
plicable to trial judge's interpretation of standard form  
insurance contract.*

**Ledcor Construction Limited** *Appelante*

c.

**Société d'assurance d'indemnisation  
Northbridge, Royal & Sun Alliance  
du Canada, société d'assurances et  
Compagnie d'assurance Chartis  
du Canada** *Intimées*

- et -

**Station Lands Ltd.** *Appelante*

c.

**Commonwealth Insurance Company,  
GCAN Insurance Company et  
American Home Assurance Company**  
*Intimées*

**RÉPERTORIÉ : LEDCOR CONSTRUCTION LTD. c.  
SOCIÉTÉ D'ASSURANCE D'INDEMNISATION  
NORTHBRIDGE**

**2016 CSC 37**

N° du greffe : 36452.

2016 : 30 mars; 2016 : 15 septembre.

Présents : La juge en chef McLachlin et les juges Abella,  
Cromwell, Moldaver, Karakatsanis, Wagner, Gascon,  
Côté et Brown.

**EN APPEL DE LA COUR D'APPEL DE L'ALBERTA**

*Assurances — Assurances de biens — Police d'assu-  
rance tous risques — Clauses d'exclusion — Interpré-  
tation — Police d'assurance chantier soustrayant à la  
garantie les frais engagés pour remédier à une malfa-  
çon — Besoin de remplacer les fenêtres d'un immeuble  
en construction égratignées par l'entrepreneur qui avait  
été engagé pour les nettoyer — L'exclusion relative à la  
malfaçon s'applique-t-elle?*

*Appels — Tribunaux — Norme de contrôle — In-  
terprétation contractuelle — Norme de contrôle qu'il  
convient d'appliquer en appel à l'interprétation d'un  
contrat d'assurance type retenue par le juge de première  
instance.*

IV. Issues on Appeal

[16] The Exclusion Clause in the standard form builders' risk insurance policy at issue in these appeals raises two questions that this Court must answer.

[17] First, what standard of appellate review applies to a trial judge's interpretation of a standard form insurance contract?

[18] Second, what is the proper interpretation to be given to the faulty workmanship exclusion clause and the "resulting damage" exception to that exclusion contained in builders' risk insurance policies?

V. AnalysisA. *The Standard of Review Is Correctness*

[19] In my view, the trial judge's interpretation of the Policy should be reviewed for correctness.

[20] These appeals present an opportunity to clarify how *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, applies to the interpretation of standard form contracts, sometimes called contracts of adhesion.

[21] In *Sattva*, Rothstein J. held that "[c]ontractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix" (para. 50). As a result, the palpable and overriding error standard of review applies to a trial court's interpretation of a contract: *Heritage Capital Corp. v. Equitable Trust Co.*, 2016 SCC 19, [2016] 1 S.C.R. 306, at paras. 21-24. However, Rothstein J. acknowledged that the correctness standard of review still applies to the "rare" extricable questions of law that arise in the interpretation process, such as "the application of an incorrect principle, the failure to consider a required element of a legal test,

IV. Questions en litige

[16] La clause d'exclusion figurant dans la formule type d'assurance chantier en cause dans les pourvois soulève deux questions auxquelles notre Cour doit répondre.

[17] Premièrement, quelle norme de contrôle s'applique en appel à l'interprétation d'un contrat d'assurance type retenue par le juge de première instance?

[18] Deuxièmement, quelle est l'interprétation que doit recevoir la clause d'exclusion relative à la malfaçon et l'exception visant les « dommages en découlant » contenues dans les polices d'assurance chantier?

V. AnalyseA. *La norme de contrôle est celle de la décision correcte*

[19] À mon avis, il faut contrôler l'interprétation de la police retenue par le juge de première instance selon la norme de la décision correcte.

[20] Les présents pourvois offrent une occasion de clarifier l'application de *Sattva Capital Corp. c. Creston Moly Corp.*, 2014 CSC 53, [2014] 2 R.C.S. 633, à l'interprétation des contrats types, parfois appelés contrats d'adhésion.

[21] Dans l'arrêt *Sattva*, le juge Rothstein conclut que « [l']interprétation contractuelle soulève des questions mixtes de fait et de droit, car il s'agit d'en appliquer les principes aux termes figurant dans le contrat écrit, à la lumière du fondement factuel » (par. 50). En conséquence, la norme de l'erreur manifeste et dominante s'applique à l'interprétation donnée par le tribunal de première instance à un contrat (*Heritage Capital Corp. c. Équitable, Cie de fiducie*, 2016 CSC 19, [2016] 1 R.C.S. 306, par. 21-24). Le juge Rothstein a cependant reconnu que la norme de la décision correcte s'applique toujours aux « rares » questions de droit qui peuvent se dégager au cours de l'exercice d'interprétation, par exemple lorsque le décideur a « appliqu[é] le

or the failure to consider a relevant factor”: *Sattva*, at paras. 53 and 55, quoting *King v. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80, 270 Man. R. (2d) 63, at para. 21. This is consistent with the jurisprudence on the standard of review for questions of mixed fact and law: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 36. However, in this case, the Court of Appeal did not purport to identify an extricable question of law that arose in the interpretation process. Rather, it concluded that the interpretation of the contract itself should be reviewed for correctness, despite *Sattva*’s holding that contractual interpretation is a question of mixed fact and law and is owed deference on appeal: paras. 18-19.

[22] Appellate courts have disagreed on whether this Court’s holding in *Sattva* on the standard of review of contractual interpretation applies to standard form contracts. Many appellate courts have held that *Sattva* does not apply, and have conducted correctness review: *Vallieres v. Vozniak*, 2014 ABCA 290, 5 Alta. L.R. (6th) 28, at paras. 11-13; *Portage LaPrairie Mutual Insurance Co. v. Sabeau*, 2015 NSCA 53, 386 D.L.R. (4th) 449, at para. 13; *Precision Plating Ltd. v. Axa Pacific Insurance Co.*, 2015 BCCA 277, 387 D.L.R. (4th) 281, at paras. 28-30; *Stewart Estate v. 1088294 Alberta Ltd.*, 2015 ABCA 357, 25 Alta. L.R. (6th) 1, at para. 273, per McDonald J.A.; *MacDonald v. Chicago Title Insurance Co. of Canada*, 2015 ONCA 842, 127 O.R. (3d) 663, at paras. 40-41; *Monk v. Farmers’ Mutual Insurance Co.*, 2015 ONCA 911, 128 O.R. (3d) 710, at paras. 22-24; *Daverne v. John Switzer Fuels Ltd.*, 2015 ONCA 919, 128 O.R. (3d) 188, at paras. 12-14; *True Construction Ltd. v. Kamloops (City)*, 2016 BCCA 173, at para. 34 (CanLII); and *Sankar v. Bell Mobility Inc.*, 2016 ONCA 242, at para. 26 (CanLII).

[23] In other cases, however, courts of appeal have applied *Sattva* and have deferred to trial courts’ interpretations of standard form contracts: *Kassburg v. Sun Life Assurance Co. of Canada*, 2014 ONCA 922, 124 O.R. (3d) 171, at para. 33; *Anderson v.*

mauvais principe ou néglig[é] un élément essentiel d’un critère juridique ou un facteur pertinent » (*Sattva*, par. 53 et 55, citant *King c. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80, 270 Man. R. (2d) 63, par. 21). Cela s’accorde avec la jurisprudence sur la norme de contrôle applicable aux questions mixtes de fait et de droit (*Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235, par. 36). Toutefois, en l’espèce, la Cour d’appel n’a pas dégagé une question de droit qui s’est posée au cours de l’exercice d’interprétation. Elle a plutôt conclu qu’il y a lieu de contrôler l’interprétation du contrat lui-même selon la norme de la décision correcte malgré la conclusion tirée dans *Sattva* selon laquelle l’interprétation contractuelle est une question mixte de fait et de droit et commande la déférence en appel (par. 18-19).

[22] Les cours d’appel ont exprimé des avis contradictoires au sujet de la question de savoir si la conclusion tirée dans *Sattva* sur la norme de contrôle applicable en matière d’interprétation contractuelle vise aussi les contrats types. Elles ont été nombreuses à juger que *Sattva* n’est pas applicable et ont effectué un contrôle selon la norme de la décision correcte (*Vallieres c. Vozniak*, 2014 ABCA 290, 5 Alta. L.R. (6th) 28, par. 11-13; *Portage LaPrairie Mutual Insurance Co. c. Sabeau*, 2015 NSCA 53, 386 D.L.R. (4th) 449, par. 13; *Precision Plating Ltd. c. Axa Pacific Insurance Co.*, 2015 BCCA 277, 387 D.L.R. (4th) 281, par. 28-30; *Stewart Estate c. 1088294 Alberta Ltd.*, 2015 ABCA 357, 25 Alta. L.R. (6th) 1, par. 273, le juge McDonald; *MacDonald c. Chicago Title Insurance Co. of Canada*, 2015 ONCA 842, 127 O.R. (3d) 663, par. 40-41; *Monk c. Farmers’ Mutual Insurance Co.*, 2015 ONCA 911, 128 O.R. (3d) 710, par. 22-24; *Daverne c. John Switzer Fuels Ltd.*, 2015 ONCA 919, 128 O.R. (3d) 188, par. 12-14; *True Construction Ltd. c. Kamloops (City)*, 2016 BCCA 173, par. 34 (CanLII); *Sankar c. Bell Mobility Inc.*, 2016 ONCA 242, par. 26 (CanLII)).

[23] En revanche, dans d’autres affaires, les cours d’appel ont appliqué *Sattva* et s’en sont remises aux interprétations des contrats types retenues par les tribunaux de première instance (*Kassburg c. Sun Life Assurance Co. of Canada*, 2014 ONCA 922,

**TAB 24**

CITATION: Mynerich v. Hampton Inns Inc., 2009 ONCA 281

DATE: 20090403

DOCKET: C48697

COURT OF APPEAL FOR ONTARIO

MacPherson, Sharpe and Rouleau JJ.A.

BETWEEN:

Nancy Mynerich and John Sproule

Plaintiffs (Respondents)

and

Hampton Inns Inc. operating as Hampton Inn & Suites Laval

Defendant (appellant)

Daniel J. Reisler for the respondents

Christopher Bialkowski for the appellant

Heard & released orally: April 2, 2009

On appeal from the judgment of Justice Gordon E. Lemon of the Superior Court of Justice dated April 4, 2008.

ENDORSEMENT

[1] This appeal relates to the jurisdiction of the Ontario courts to entertain a claim by an Ontario resident for damages arising from a slip and fall injury at a hotel in Québec. The plaintiff alleges that she suffered a complex knee injury. The Québec defendant moves to stay or dismiss the action on the grounds

- (1) that there is no “real and substantial connection” to support jurisdiction *simpliciter*, and

(2) that jurisdiction should be declined on the ground of *forum non-conveniens*.

[2] We are not persuaded that the motion judge erred in relation to the real and substantial connection test.

[3] While deference is ordinarily owed to the discretionary decision on *forum non-conveniens*, in our view, the motion judge failed to apply the correct legal test in deciding this issue.

[4] First, the motion judge conflated the test for jurisdiction simpliciter with the test for *forum non-conveniens* by stating that the same factors applied. While there may be some similarity and overlap between the two, the test *forum non-conveniens* is different and distinct.

[5] Second, the motion judge does not appear to have considered all relevant factors pertaining to *forum non-conveniens*. Had he done so, we are persuaded that the inevitable conclusion would have been that Quebec is clearly the more appropriate forum.

[6] The following factors identified in *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 at para. 41 pertain to this case:

1. the location of the majority of the parties
2. the location of key witnesses and evidence
3. the avoidance of a multiplicity of proceedings
4. the applicable law and its weight in comparison to the factual questions to be decided
5. geographical factors suggesting the natural forum
6. whether declining jurisdiction would deprive the plaintiff of a legitimate juridical advantage available in the domestic court

[7] The motion judge failed to take into account factors 1 and 5. Given the likelihood of third party proceedings, factor 1 favoured Quebec. As the alleged tort occurred in Quebec, under factor 5 there was a geographical factor suggesting Quebec as the natural forum. The motion judge erred in relation to factor 4. The application of Quebec law was not neutral but rather favoured Quebec jurisdiction. With respect to factor 6, in his reasons on real and substantial connection, the motion judge appears to have considered the fact that the *defendant* would be unable to request a jury trial as a factor favouring Ontario jurisdiction. As the defendant was resisting Ontario jurisdiction, this reasoning misapplied the loss of juridical advantage factor.

[8] When all relevant factors are considered, none favour Ontario, two are neutral - the location of key witnesses and evidence and loss of juridical advantage, and the other four all favour Québec.

[9] Accordingly, the appeal is allowed and the action is stayed on grounds of *forum non-conveniens*. The appellant is entitled to costs for the motion below and this appeal fixed at \$4,000, inclusive of disbursements and GST.

Robert J. Sharpe J.A.”  
“J.C. MacPherson J.A.”  
“Paul Rouleau J.A.”

**TAB 25**



COURT OF APPEAL FOR ONTARIO

CITATION: North v. Metaswitch Networks Corporation, 2017 ONCA 790

DATE: 20171016

DOCKET: C62624

Feldman, Sharpe and Roberts JJ.A.

BETWEEN

Doug North

Applicant (Appellant)

and

Metaswitch Networks Corporation

Respondent (Respondent)

Ben Hahn, for the appellant

Tracy Kay and Carrington Hickey, for the respondent

Heard: March 27, 2017

On appeal from the judgment of Justice Meredith Donohue of the Superior Court of Justice, dated August 3, 2016.

Feldman J.A.:

[1] Doug North's employment with Metaswitch Networks Corporation was governed by a written employment contract (the "Agreement"). When North's employment was terminated without cause, a dispute arose as to whether he was entitled to be paid in accordance with the Agreement, or based on common law reasonable notice.

[2] The Agreement contained a termination clause that amounted to contracting out of an employment standard mandated by the *Employment Standards Act, 2000*, S.O. 2000, c. 41 (the “ESA”). However, the Agreement also contained a severability clause. The issue before the application judge and on this appeal is the interpretation and application of the two clauses in light of s. 5 of the ESA, which prohibits employers and employees from waiving or contracting out of any employment standard prescribed by the ESA, except to provide a greater benefit to the employee.

[3] The application judge used the severability clause to excise what she found to be the offending part of the termination clause. For the reasons that follow, I would set aside the decision of the application judge and find that North is entitled to receive termination pay based on common law pay in lieu of reasonable notice.

## **S**

[4] The appellant was employed from November 2012 to March 2016 with the respondent, pursuant to the Agreement. His earnings consisted of salary plus commission.

[5] His employment was terminated in accordance with paragraph 9(c) of the Agreement, under Termination of Employment, the relevant part of which provides:

**9. er a p e**

(c) Without Cause – The Company may terminate your employment at any time in its sole discretion for any reason, without cause, upon by [sic] providing you with notice and severance, if applicable, in accordance with the provisions of the Ontario *Employment Standards Act* (the “Act”). In addition, the Company will continue to pay its share all [sic] of your employee benefits, if any, and only for that period required by the Act.

The reference to notice in paragraphs 9(b) and (c) can, at the Company’s option, be satisfied by our provision to you of pay in lieu of such notice. The decision to provide actual notice or pay in lieu, or any combination thereof, shall be in the sole discretion of the Company. All pay in lieu of notice will be subject to all required tax withholdings and statutory deductions.

In the event of the termination of your employment, any payments owing to you shall be based on your Base Salary, as defined in the Agreement.

[6] The appellant took the position that this part of the Agreement was void under s. 5(1) of the ESA, because the sentence that provides that payments are to be based “on your Base Salary” contravened the ESA by excluding his commission. Therefore, he was entitled to receive termination compensation based on common law pay in lieu of reasonable notice.

[7] The respondent’s position was that if the termination clause was illegal because of the one offending sentence, then that sentence should be excised from the Agreement, using the severability clause contained in para. 17(a) which provides:

**17. e e r a r s s**

(a) If any part of the Agreement is found to be illegal or otherwise unenforceable by any court of competent jurisdiction, that part shall be severed from this Agreement and the rest of the Agreement's provisions shall remain in full force and effect.

[8] That would leave the balance of para. 9 in force, and the appellant would be paid termination pay calculated in accordance with the ESA.

[9] The appellant sought to have the issue of the applicability and effect of the severability clause determined by the court on an application under Rule 14 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, where the determination of rights depends on the interpretation of a contract and there are unlikely to be any material facts in dispute.

**S**

[10] The application judge accepted that the sentence in the termination clause, para. 9 of the Agreement, that reads: “[i]n the event of the termination of your employment, any payments owing to you shall be based on your Base Salary, as defined in the Agreement”, had the effect of excluding payment of commission to which the appellant was entitled, and therefore contravened the ESA.

[11] “Employment standard” is defined in s. 1(1) of the ESA as “a requirement or prohibition under this Act that applies to an employer for the benefit of an employee”. Sections 57, 60 and 61 set out employment standards in relation to termination of employment. Section 57 of the ESA stipulates minimum notice

periods for termination. Section 60 provides that during such a notice period, wages cannot be reduced and employees are entitled to their regular wages. Section 61 allows an employer to terminate the employment of an employee without notice, so long as the employer makes a lump sum payment equivalent to the amount that would have been received under s. 60 (i.e., based on regular wages) and continues to make benefit plan contributions. The definition of regular wages includes wages, which are defined broadly in the ESA, in s. 1(1), as:

- (a) monetary remuneration payable by an employer to an employee under the terms of an employment contract, oral or written, express or implied,
- (b) any payment required to be made by an employer to an employee under this Act, and
- (c) any allowances for room or board under an employment contract or prescribed allowances[.]

[12] The definition goes on to list certain exclusions that are not relevant in this case. Wages have been held to include commissions: see Kimberly A. Parry and David A. Ryan, *Employment Standards Handbook*, 3d ed. (Toronto: Thomson Reuters, 2017) vol. 1, at p. 1-29; and *Paquette c. Quadraspec Inc.*, 2014 ONCS 2431, 121 O.R. (3d) 765, at para. 27. By excluding commissions, the employer therefore contravened the employment standard of ss. 60 and 61. In oral argument before this court, the respondent did not dispute this illegality.

[13] The application judge addressed the severability clause and found that para. 17(a) expressed the intention of the parties that “any illegal or unenforceable parts were to be severed to allow the rest of the agreement to stand.” She then recited the portion of the termination clause, para. 9(c), which states that notice and severance, if applicable, were to be provided “in accordance with the provisions of the Ontario *Employment Standards Act*”. She concluded that the parties’ intention was to comply with the ESA.

[14] In interpreting and giving effect to the severability clause, the application judge referred to the reasoning of Dunphy J. in *Oudin v. Centre Francophone de Toronto, Inc.*, 2015 ONSC 6494, 27 C.C.E.L. (4th) 86, aff’d 2016 ONCA 514, 34 C.C.E.L. (4th) 271, leave to appeal to SCC refused, [2016] S.C.C.A. No. 391, where, using a severability provision, he excised from a termination provision one reason among a list of reasons for dismissal without pay, stating, at para. 41, that “[t]he excision of the offending reason from the list does no violence to the integrity of the remainder of s. 4 which contains a list of other unrelated grounds for termination.”

[15] The application judge found that the same reasoning would apply to the Agreement: the illegal clause limiting the pay upon termination to be based on base salary only “could be removed in its entirety pursuant to the para. 17(a) severability clause. The parties would be left with [para.] 9(c) as to what payments would be owing.” She was satisfied that the term “any part” in para.

17(a) was not ambiguous and could apply to the offending sentence. She rejected the argument that the severability clause was void as a result of s. 5(1) of the ESA.

**SS S**

[16] The issues on this appeal are:

- 1) Did the application judge err in law by using the severability clause of the Agreement to save the termination clause that contravened the ESA?
- 2) Did the application judge err in law by failing to find that the severability clause had no application to a clause of the Agreement that was rendered void by s. 5(1) of the ESA?

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[17] When deciding this case, the application judge did not have the benefit of this court's recent decision in *Wood v. Fred Deeley Imports Ltd.*, 2017 ONCA 158, 134 O.R. (3d) 481, on the issue of the interpretation and treatment of termination clauses in an employment contract. While deference is owed to the application judge on issues of contractual interpretation, no deference is owed where there is an extricable error of law: see *Wood*, at para. 43; and *Ledcor*

*Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23, at paras. 21, 36.

[18] In *Wood*, Laskin J.A. set out the principles that govern the payment owed to an Ontario employee whose employment is terminated without cause. He summarized the law as follows, beginning at paras. 15-16:

At common law, an employee hired for an indefinite period can be dismissed without cause, but only if the employer gives the employee reasonable notice. In *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at p. 998, the Supreme Court characterized the common law principle of termination of employment on reasonable notice “as a presumption, rebuttable if the contract of employment clearly specifies some other period of notice”.

Ontario employers and employees can rebut the presumption of reasonable notice by agreeing to a different notice period. But their agreement will be enforceable only if it complies with the minimum employment standards in the ESA. If it does not do so, then the presumption is not rebutted, and the employee is entitled to reasonable notice of termination.

[19] And continuing at paras. 25-28:

The question of the enforceability of the termination clause turns on the wording of the clause, the purpose and language of the ESA, and the jurisprudence on interpreting employment agreements. That jurisprudence is now well-established. I will summarize it briefly.

In general, courts interpret employment agreements differently from other commercial agreements. They do so mainly because of the importance of employment in



a person's life. As Dickson C.J.C. said in an oft-quoted passage:

Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.

As important as employment itself is the way a person's employment is terminated. It is on termination of employment that a person is most vulnerable and thus is most in need of protection.

The importance of employment and the vulnerability of employees when their employment is terminated give rise to a number of considerations relevant to the interpretation and enforceability of a termination clause:

- When employment agreements are made, usually employees have less bargaining power than employers. Employees rarely have enough information or leverage to bargain with employers on an equal footing.
- Many employees are likely unfamiliar with the employment standards in the ESA and the obligations the statute imposes on employers. These employees may not seek to challenge unlawful termination clauses.
- The ESA is remedial legislation, intended to protect the interests of employees. Courts should thus favour an interpretation of the ESA that "encourages employers to comply with the minimum requirements of the Act" and "extends its protections to as many employees as possible", over an interpretation that does not do so.

- Termination clauses should be interpreted in a way that encourages employers to draft agreements that comply with the ESA. If the only consequence employers suffer for drafting a termination clause that fails to comply with the ESA is an order that they comply, then they will have little or no incentive to draft a lawful termination clause at the beginning of the employment relationship.
- A termination clause will rebut the presumption of reasonable notice only if its wording is clear. Employees should know at the beginning of their employment what their entitlement will be at the end of their employment.
- Faced with a termination clause that could reasonably be interpreted in more than one way, courts should prefer the interpretation that gives the greater benefit to the employee. [Citations omitted.]

[20] Section 5 of the ESA prohibits employers and employees from waiving or contracting out of any of the employment standards prescribed in the ESA, except to provide a greater benefit to the employee. Any such contracting out is void. The text of s. 5 is as follows:

5. (1) Subject to subsection (2), no employer or agent of an employer and no employee or agent of an employee shall contract out of or waive an employment standard and any such contracting out or waiver is void.

(2) If one or more provisions in an employment contract or in another Act that directly relate to the same subject matter as an employment standard provide a greater benefit to an employee than the employment standard, the provision or provisions in the contract or Act apply and the employment standard does not apply.

[21] Most importantly, in *Wood*, at para. 21, the court explained the effect of the principles established by the Supreme Court in *Machtinger* regarding the consequences of s. 5(1) of the ESA:

Contracting out of even one of the employment standards and not substituting a greater benefit would render the termination clause void and thus unenforceable, in which case [the employee] would be entitled to reasonable notice of termination of her employment at common law.

[22] This interpretation of the operation and effect of s. 5(1) of the ESA explains how a court is to approach the interpretation of termination clauses that waive or contract out of one employment standard, but comply with others.

#### **pp a e pr p es**

[23] In my view, the application judge erred in her approach to the interpretation and application of the severability clause. It is convenient to restate para. 17(a) of the agreement here for ease of reference:

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(a) If any part of the Agreement is found to be illegal or otherwise unenforceable by any court of competent jurisdiction, that part shall be severed from this Agreement and the rest of the Agreement's provisions shall remain in full force and effect.

[24] The severability clause directs that the part of the agreement that is to be severed is the part that a court would find to be illegal. The rule from *Wood*, following *Machtinger*, is that where a termination clause contracts out of one

employment standard, the court is to find the entire termination clause to be void, in accordance with s. 5(1) of the ESA. It is an error in law to merely void the offending portion and leave the rest of the termination clause to be enforced.

[25] As a result, the application judge erred in law by severing only the offending sentence that referred to using only base salary to calculate termination pay in lieu of notice, rather than the entire termination clause. Para. 17(a) requires that the part to be severed is the part that a court would find to be illegal, which must be the entire termination clause.

[26] Because of the conclusion I have reached based on the meaning and application of para. 17(a), there is no need in this case to address the Supreme Court decision in *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6, [2009] 1 S.C.R. 157, referred to by the appellant, and to what extent the rules regarding blue pencil and notional severance may apply in the context of the severability clause drafted by the parties.

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[27] The appellant also argued, in the alternative, that the effect of s. 5(1) of the ESA is to make the severability clause void. The application judge rejected that submission.

[28] While I agree with the application judge that the severability clause is not rendered void by s. 5(1), I would frame the issue differently. The issue is not whether the severability clause is void, but whether it can have any application on the termination clause, if that clause is void as a result of s. 5(1).

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[29] Section 5(1) prohibits contracting out of or waiving an employment standard, and provides that any such contracting out or waiver is void. An employment standard is defined in s. 1(1) as: “a requirement or prohibition under this Act that applies to an employer for the benefit of an employee”.

[30] The result is that an offending termination clause that is void has no application to oust the common law, which again applies, requiring pay in lieu of reasonable notice. As discussed above, in *Wood*, at para. 21, this court explained that where a termination clause contains “even one” instance of contracting out of an ESA employment standard, the clause is void.

[31] In *Machtiger*, Iacobucci J. gave a number of policy reasons for finding that where there is contracting out of an employment standard within a termination clause, the effect is to void the entire clause (resulting in entitlement to reasonable notice), and not just the removal of the impugned clause (resulting in entitlement to the statutory minimum termination pay provisions).

[32] He stated at p. 1003, that in light of the objective of the ESA to protect the interests of employees:

[A]n interpretation of the [ESA] which encourages employers to comply with the minimum requirements of the [ESA], and so extends its protections to as many employees as possible, is to be favoured over one that does not.

[33] He continued at p. 1004:

If the only sanction which employers potentially face for failure to comply with the minimum notice periods prescribed by the [ESA] is an order that they minimally comply with the [ESA], employers will have little incentive to make contracts with their employees that comply with the [ESA].

[34] And as many employees are not aware of their legal rights or will not go to the trouble or expense of trying to have the contract set aside in court, they will accept the illegality: see *Machtinger*, at p. 1004.

[35] Nor would it be a hardship for the employer to draft a contract that complies with or accounts for potential changes in the ESA. As Iacobucci J. stated, at pp. 1004-1005:

Absent considerations of unconscionability, an employer can readily make contracts with his or her employees which referentially incorporate the minimum notice periods set out in the [ESA] or otherwise take into account later changes to the [ESA] or to the employees' notice entitlement under the [ESA].

[36] Justice Iacobucci concluded his analysis by observing, at p. 1005:

Given that the employer has attempted, whether deliberately or not, to frustrate the intention of the legislature, it would indeed be perverse to allow the employer to avail itself of legislative provisions intended

to protect employees, so as to deny the employees their common law right to reasonable notice.

[37] In my view, these same policy considerations should inform the approach to be taken when considering the operation of s. 5(1), where an employment contract contains a severability clause.

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[38] When a severability clause is introduced into the contract, the issue is whether: (i) the severability clause can be used to remove the illegality in the termination clause; or (ii) because the termination clause as drafted is void as a result of s. 5(1), there is nothing on which the severability clause can act.

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[39] In *Oudin*, the motion judge relied on the wording of the specific severability provision in the employment contract that directed modification “only to the extent necessary” to comply with the law: see *Oudin*, at paras. 35, 40. The motion judge found that this established the clear intention of the parties: see *Oudin*, at para. 42. Similarly in *Miller v. Convergys CMG Canada Limited Partnership*, 2014 BCCA 311, 16 C.C.E.L. (4th) 49, leave to appeal to SCC refused, [2014] S.C.C.A No. 424, the court stated at para. 42:

Where the parties anticipated the possibility of severance and chose contractual language to govern this eventuality, severability is not just a remedial question. Before turning to remedy, the starting point must be to give effect to what the parties reasonably

intended if a provision of the contract is found unenforceable by reason of illegality.

[40] The problem with this approach is that, to the extent that it effectively rewrites or reads down the offending provisions, it has the very effect referred to by Iacobucci J. in *Machtinger* – employers will be incentivized to contract out of the ESA but include a severability clause to save the offending provision in the event that an employee has the time and money to challenge the contract in court. Similar concerns were recognized by this court in *2176693 Ontario Ltd. v. Cora Franchise Group Inc.*, 2015 ONCA 152, 124 O.R. (3d) 776, where the court declined to order severance of an illegal clause in a franchise agreement because, if the only consequence to a franchisor is that the illegal clause is read down to make it legal, franchisors would be encouraged to draft illegal contracts.

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[41] The other approach is to first assess the termination clause to see whether there is any contracting out of an employment standard. If there is, then the termination clause is void, and there is nothing to which the severability clause can be applied. In that way, the severability clause is not void, but it is inoperative where the agreement contracts out of or waives an employment standard.

[42] In my view, this approach is the one that is consistent with the intent of the ESA and the Supreme Court decision in *Machtinger*. Nor does it do any injustice to the contractual interpretation principle of ascertaining the intention of the



parties. Because the termination clause is void, it cannot be used as evidence of the parties' intentions to comply with the ESA: see *Machtinger*, at p. 1001.

[43] This approach also causes no disadvantage to employers, who, as noted by Iacobucci J., are free to make a legal contract that limits an employee's rights on termination to the standards set by the ESA.

[44] As noted above, this conclusion does not make the severability clause void. It continues to have application to the rest of the agreement. However, it cannot have any effect on clauses of the contract that have been made void by statute. Those terms are null and void for all purposes and cannot be rewritten, read down or interpreted through the application of a severability clause to provide for the minimum standard imposed by the ESA.

[45] I would therefore hold that s. 5(1) of the ESA makes the severability clause, para. 17(a), inoperative on the termination clause, which contracts out of an employment standard.

[46] This result may appear to be inconsistent with this court's dismissal of the appeal in *Oudin*. The application judge found the motion judge's reasons in *Oudin* to be analogous. However, the courts in *Oudin* also did not have the benefit of this court's subsequent decision in *Wood*. Further, the issue of the applicability of the severability provision in light of s. 5(1) of the ESA was not discussed in the endorsement as the basis of the appeal. Rather, the basis of the appeal was primarily focused on the correctness of the motion judge's

determination that the termination provisions respecting notice did not offend the ESA. Therefore, this court's endorsement in *Oudin* should not be viewed as supporting a broad, overarching principle regarding the motion judge's application of the severability provision in that case: see *R. v. Timminco Limited* (2001), 54 O.R. (3d) 21 (C.A.), at para. 36; and *R. v. Singh*, 2014 ONCA 293, 120 O.R. (3d) 76, at para. 12.

**S**

[47] I would allow the appeal with costs, set aside the decision of the application judge, and order that the appellant is entitled to receive termination pay based on common law reasonable notice. I would fix the costs of the appeal at \$17,000 inclusive of HST and disbursements, and the costs of the application at \$8,000 inclusive of disbursements and HST.

Released: "K.F." October 16, 2017

"K. Feldman J.A."

"I agree. Robert J. Sharpe J.A"

"I agree. L.B. Roberts J.A."

**TAB 26**

COURT OF APPEAL FOR ONTARIO

CITATION: Packall Packaging Inc. v. Ciszewski, 2016 ONCA 6

DATE: 20160106

DOCKET: C60652

Doherty, Brown and Miller J.J.A.

BETWEEN

Packall Packaging Inc., Packall Consultants (1981) Limited, 967915 Ontario Limited and Henry Ciszewski, personally and in his capacity as Trustee of the Ciszewski Family Trust

Plaintiffs (Respondents)

and

Anita Ciszewski, personally and in her capacity as Trustee of the Ciszewski Family Trust and 2300078 Ontario Limited

Defendants (Appellants)

AND BETWEEN

Anita Ciszewski, personally and in her capacity as Trustee of the Ciszewski Family Trust and 2300078 Ontario Limited

Plaintiffs by Counterclaim  
(Appellants)

and

Packall Packaging Inc., Packall Consultants (1981) Limited, 967915 Ontario Limited, Henry Ciszewski, personally and in his capacity as Trustee of the Ciszewski Family Trust, 835474 Ontario Limited, James F. Billett, in his personal capacity and in his capacity as Trustee of the Ciszewski Family Trust, Stephan Ciszewski and Frank Del Duca

Defendants to Counterclaim  
(Respondents)

Peter W.G. Carey, for the appellants

Geoffrey D.E. Adair, Q.C., for the respondents

Heard: December 17, 2015

On appeal from the judgment of Justice Laurence A. Pattillo of the Superior Court of Justice, dated June 9, 2015, with reasons reported at 2015 ONSC 2837.

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[1] The appellants, Anita Ciszewski and her personal holding company, 2300078 Ontario Limited (“Anita Co.”), appeal from the judgment of Pattillo J. dated June 9, 2015. The appellants submit that the motion judge erred in granting a permanent injunction restraining Anita from selling or marketing her shares in Anita Co. without the consent of her husband, Henry Ciszewski, and in dismissing their motion for certain corporate governance relief in respect of the respondents, Packall Consultants (1981) Limited, 967915 Ontario Limited and 835474 Ontario Limited (which, together with Packall Packaging Inc. (“PPI”), are referred to as the “Packall Group of Companies”).

[2] Henry founded and operates PPI, a manufacturer of flexible food packaging. Ownership of PPI is split between Henry and Anita through a complex structure of holding companies and a family trust. In Anita’s case, she holds her interests in PPI through two chains of ownership. Under one ownership chain, Anita Co. holds shares in 967915 which, through Packall Consultants, holds

shares in PPI. Under the other ownership chain, The Ciszewski Family Trust (the “Family Trust”) – of which Anita is one of three trustees and the residuary beneficiary – owns shares in PPI directly and indirectly through 835474 and Packall Consultants. Henry has effective voting control of PPI.

[3] Henry and Anita were divorced in June 2010, and entered into a written separation agreement on September 22, 2011 (the “Separation Agreement”). Both parties were represented by counsel during the negotiation of the Separation Agreement.

[4] The Separation Agreement provides for the financial support of Anita in several ways. First, shortly after the execution of the Separation Agreement, Anita received two lump-sum payments, one paid by Henry in cash and one funded by a dividend declared by PPI. Thereafter, during the joint lives of Henry and Anita, Anita is to receive a dividend of \$575,000 in each fiscal year of PPI upon that company declaring a dividend on its common shares (s. 4.3). The Separation Agreement specifies how the dividend income is to flow from PPI to Anita through the intermediary holding companies and trust. If PPI does not declare a dividend or does not declare a dividend sufficient to make the annual payment, Henry must make the payment to Anita or “top-up” the dividend to reach the required amount of annual support (ss. 4.6 and 4.7).

[5] In the event Henry predeceases Anita, s. 4.12 of the Separation Agreement provides that “financial provision for Anita shall be made for her by PPI in lieu of any such provision being made by Henry’s estate” in accordance with an agreement entered into concurrently by PPI and Anita. The latter agreement was attached as Schedule “C” to the Separation Agreement.

[6] Shortly before the execution of the Separation Agreement, Anita’s counsel requested the inclusion of what became s. 4.14 for tax and estates reasons. The motion judge summarized the substance of that article at para. 15 of his reasons:

Article 4.14 of the Separation Agreement provides that either Henry or Anita may reorganize the way in which they hold the shares by transferring all or part of them to a holding company controlled by each of them respectively, provided (a) completion of the transaction does not cause adverse tax consequences to the opposite party and (b) the holding company and not the individual will be the recipient of the dividend payments and will be deemed to be party to the Schedule “C” Agreement.

[7] Almost a year after the parties signed the Separation Agreement, Anita sought to open discussions with Henry about creating a succession plan covering potential tax liabilities in the event of the sale or deemed disposition of their shares in 967915. No agreement was reached. Anita then threatened to sell her shares in 967915 and, in early 2014, began to solicit interest from third parties – including competitors of PPI – to acquire the shares of her personal holding company, Anita Co., which held her interest in 967915.

[8] Henry thereupon moved to restrain Anita from selling or offering for sale her shares of 967915 or her holding company, Anita Co., without his consent. Anita brought a cross-motion seeking summary judgment dismissing Henry's claim and partial summary judgment seeking a variety of relief regarding the corporate governance of the Packall Group of Companies, an accounting by Henry of all monies received by him from the Packall Group of Companies since June 1, 2005, and a declaration that she was free to sell her shares in Anita Co.

[9] The motion judge granted the order sought by Henry restraining Anita from selling her shares in Anita Co. in the absence of Henry's consent, and he granted some of the corporate governance relief sought by Anita. However, the motion judge did not grant the orders sought by Anita that the Packall Group of Companies deliver audited financial statements (except for PPI, which already produced audited financial statements) or that Henry provide a complete accounting of all monies received by him from the Packall Group of Companies since June 1, 2005. Anita appeals the grant of the restraining order and the dismissal of her claim for audited financial statements and an accounting.

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[10] The appellants moved for leave to file fresh evidence consisting of the financial statements of the Packall Group of Companies delivered by the respondents pursuant to the judgment several weeks before the hearing of the appeal. The appellants submit that the fresh evidence satisfies the test for



admission set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759 and *Sengmueller v. Sengmueller* (1994), 17 O.R. (3d) 208 (C.A.), because it is relevant to whether the motion judge erred in failing to order the production of audited financial statements under s. 148 of the *Business Corporations Act*, R.S.O. 1990, c. B.16 (the “OBICA”). In my view, the recently-produced financial statements do not assist in determining the issue on this appeal which is whether, as a matter of law, the motion judge possessed any discretion to exempt the Packall Group of Companies from their financial statement obligations under the OBICA. Accordingly, I would dismiss the motion for leave to file fresh evidence.

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[11] Anita Co. holds Anita’s shares in 967915, which holds an indirect interest in the operating company, PPI. There is no dispute that the articles of incorporation of 967915 restrain a shareholder from transferring his or her shares in that company without the approval of the Board of Directors or the consent of the shareholders holding 75% of the voting shares. There is also no dispute that the motion judge correctly held that s. 4.14 of the Separation Agreement – which permitted Anita to place her shares in 967915 into her personal holding company – does not restrict the ability of Anita to dispose of her shares in Anita Co.

[12] The appellants submit, however, that the motion judge erred in concluding that there was an implied term in the Separation Agreement which prevented

either Henry or Anita from disposing of their shares in their respective holding companies without the consent of the other.

[13] The appellants acknowledge that the motion judge, at para. 36 of his reasons, accurately stated the law concerning the circumstances in which a court may imply a term in a contract. One such circumstance is based on the presumed intention of the parties where the implied term must be necessary to give business efficacy to a contract or as otherwise meeting the “officious bystander” test as a term which the parties would say, if questioned, that they had obviously assumed: *Rankin Construction Inc. v. Ontario*, 2014 ONCA 636, 376 D.L.R. (4th) 697, at para. 29. The appellants submit that the motion judge erred in applying that principle of law in two ways. First, he erred in finding that the implication of a term was necessary to give business efficacy to the Separation Agreement. Second, he erred in failing to find that the express terms of the Separation Agreement prevented the finding of an implied term.

[14] I am not persuaded by either submission.

#### **s e s s e a**

[15] The key findings made by the motion judge about the presumed intentions of the parties regarding the Separation Agreement are found in paras. 39, 40, 43 and 45 of his reasons where he stated:

[39] The Separation Agreement by its terms settles all issues between Henry and Anita arising from their

marriage and divorce (Article 1.5). In particular, it provides for Anita's annual financial support through the payment of dividends from the Packall Group of Companies, primarily through 967915. As a result, it is clear in my view that in agreeing to such a provision, Anita's intention at the time she entered into the Separation Agreement was that she would not sell her shares in 967915 whether she owned those shares directly or through a holding company without Henry's consent as a director and shareholder of 967915 given that Henry would be personally liable to her in the event she did not receive the dividends.

[40] Similarly, in order to ensure that Henry and the Packall Group of Companies met their obligations under the Separation Agreement, Henry would have to retain control of the Packall Group of Companies. Accordingly, it is clear that Henry too intended that he would not sell his shares in 967915 except to a holding company as agreed without Anita's consent.

...

[43] In the absence of such an implied term, Anita would be free to sell her shares in Anita Co., which would result in her no longer being able to receive dividends from 967915, which are the primary means of her ongoing support. Such action clearly defeats the main purpose of the Separation Agreement which is to provide for the ongoing annual financial support for Anita. Further, if Anita Co.'s shares in 967915 were sold, Anita would cease receiving the dividends. Anita could then argue that Henry was liable for such payments pursuant to the Separation Agreement. That is not what the Separation Agreement intended.

...

[45] I am also satisfied that the "officious bystander" test is satisfied in respect of the implied term being sought. I am satisfied, given the circumstances and the provisions of the Separation Agreement, that if asked at the time the Separation Agreement was entered into,

both Anita and Henry would have said at that any disposal of their shares in 967915, either directly or through a holding company, can only be done with the consent of the other party.

[16] Not only were those conclusions open to the motion judge to make on the record before him, but I agree with them. The Separation Agreement clearly expressed the parties' intentions that Henry's support obligations to Anita would be funded by dividends originating with the operating company, PPI. Only in the event that PPI was unable to declare such dividends would Henry bear personal responsibility for the support obligations. To give effect to that intention of the parties, Anita needs to remain a shareholder of her holding company to which PPI dividends flow through 967915.

[17] The motion judge also found that an implied term preventing Henry or Anita from disposing of the shares of any holding company having their shares in 967915 in the absence of the other's consent was necessary to give business efficacy to the Schedule "C" Agreement to the Separation Agreement. The Schedule "C" Agreement concerns the 14 common shares of PPI held by the Family Trust (the "Trust PPI Shares") which, upon Henry's death, are to be conveyed to Anita. The Schedule "C" Agreement requires PPI to purchase a percentage of the Trust PPI Shares conveyed to Anita for cancellation each year based on a stipulated formula. At para. 44 of his reasons, the motion judge stated:

As noted, the Schedule “C” Agreement provides for financial provision for Anita in the event that Henry predeceases her through the mechanism of Packall Packaging repurchasing Anita’s shares. The purpose of the Schedule “C” Agreement, as noted in Article 4.12 of the Separation Agreement, is to both provide financial provision for Anita and remove any obligation in that regard from Henry’s estate. *By selling her shares in Anita Co., who is deemed by Article 4.14(b) of the Separation Agreement to be a party to the Schedule “C” Agreement, Anita defeats the purpose of the Schedule “C” Agreement as she will no longer be entitled to any financial provision from Packall Packaging.* [Emphasis added.]

[18] The appellants submit the motion judge fundamentally misunderstood the meaning of the Schedule “C” Agreement in reaching that conclusion because it could be implemented whether or not Anita Co. sold its shares in 967915.

[19] I accept that the motion judge was mistaken in concluding that a sale by Anita of her shares in Anita Co. would defeat the purpose of the Schedule “C” Agreement. Anita Co. has an indirect interest in 84 common shares of PPI through 967915. It is difficult to see how Anita’s sale of her shares in Anita Co. could affect the operation of the Schedule “C” Agreement because Anita Co. has no interest in the Trust PPI Shares which pass to Anita on Henry’s death. However, in my view that mistake by the motion judge has no effect on his conclusion that an implied term preventing Anita from selling her shares in Anita Co. without Henry’s consent was necessary to give business efficacy to the Separation Agreement. Anita’s continued ownership of Anita Co., while Henry

lives, gives effect to the parties' bargain that support payments to Anita will be funded by dividends declared by PPI. That bargain necessitates implying the term that prevents Anita from selling her shares in Anita Co. without Henry's consent, as the motion judge found.

**e er e er s e Separ ree e pre e a p e er**

[20] The appellants submit that three terms of the Separation Agreement prevented the motion judge from implying a term restricting Anita from selling her shares in Anita Co. without Henry's consent. Section 1.6 states: "This Agreement replaces all oral or written agreements made between the parties." Section 5.2 states:

Anita and Henry do not want any court to order a change which deviates from or overrides the terms of this agreement, and more particularly this release. Anita and Henry want the court to uphold this agreement in its entirety inasmuch as they are basing their future lives upon this release.

Finally, s. 9.1 states: "There are no representations, collateral agreements, warranties or conditions affecting this Agreement."

[21] The motion judge referred only to s. 9.1, holding that it does not deal with implied terms: at para. 46.

[22] I do not accept the appellants' submission on this issue. I agree with the motion judge that the language of s. 9.1 does not preclude the implication of a term. Nor does the language of ss. 1.6 and 5.2. In any event, as this court stated

in *CivicLife.com Inc. v. Canada (Attorney General)* (2006), 215 O.A.C. 43, at para. 52, the presence of an entire agreement clause will not preclude the implication of a term of the contract because the term is already part of the existing agreement: finding an implied term does not add a term to the agreement that was not part of the parties' bargain, but enforces the parties' reasonable expectations.

[23] Accordingly, I would give no effect to this ground of appeal.

**Se r ppea e e err re s re re  
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[24] Of all the companies in the Packall Group of Companies, only PPI, the operating company, prepares annual audited financial statements. The appellants sought an order requiring all of the companies in the Packall Group of Companies to deliver, on an on-going basis, audited annual financial statements.

The motion judge dismissed their request, holding, at para. 58:

The evidence of Mr. Billet, a chartered accountant who has done work for the Packall Group of Companies since their inception is that audited financial statements for the Packall Group of Companies other than Packall Packaging would not provide any additional useful information to the unaudited statements and would cost more money to prepare. Anita has provided no basis for her request for audited financial statements for all of the Packall Group of Companies. I consider the request to be a nuisance request rather than required. In the circumstances, therefore, it makes no sense in my view to require the financial statements of Packall

Consultants, 967915 and 835474 Ontario Limited to be audited.

[25] The appellants submit that the motion judge erred in so holding because *OBCA* s. 148 makes it mandatory to provide audited financial statements unless all shareholders consent to an exemption from that requirement.

[26] I agree, but only in respect of 967915, of which Anita Co. is a shareholder.

[27] Each of the corporations in the Packall Group of Companies was incorporated under the *OBCA*. Part XII of the *OBCA* imposes certain audit and financial statement requirements on corporations, including the appointment of an auditor (s. 149), the placement by the directors before an annual meeting of shareholders of annual financial statements (s. 154(1)(a)), and the examination by an auditor of the financial statements placed before the shareholders (s. 153(1)).

[28] It is a core obligation of a corporation to its shareholders to provide them with an annual report card of the corporation's financial position in the form of audited financial statements: *Pandora Select Partners, LP v. Strategy Real Estate Investments Ltd.* (2007), 27 B.L.R. (4th) 299 (Ont. S.C.), at para. 12. A shareholder's right to information or material, including audited financial statements, as granted to her under the *OBCA* is a clear, mandatory right, and it is not necessary for a shareholder to give any reason in exercising her directly



held rights under the *OBCA*: *Labatt Brewing Co. v. Trilon Holdings Inc.* (1998), 41 O.R. (3d) 384 (Gen. Div.), at p. 387.

[29] Section 148 of the *OBCA* provides a limited exemption from these obligations in the following terms:

148. In respect of a financial year of a corporation, the corporation is exempt from the requirements of this Part regarding the appointment and duties of an auditor if,

(a) the corporation is not an offering corporation; and

(b) all of the shareholders consent in writing to the exemption in respect of that year.

[30] As can be seen from s. 148, the decision whether to exempt a non-offering corporation from the requirements of Part XII regarding the appointment and duties of an auditor in respect of a particular financial year rests solely with the corporation's shareholders: *Pandora Select Partners*, para. 12. Section 148 of the *OBCA* does not authorize a court to exempt a corporation from complying with the mandatory requirement to provide shareholders with annual audited statements. Conceivably, a court could grant an exemption by way of relief in an oppression application pursuant to *OBCA* s. 248(3). However, the motion judge, at para. 52, specifically rejected the respondents' request to exempt the corporations from such financial disclosure on that basis because they had not pleaded oppression in their statement of claim. As a result, it was not open to the

motion judge to exempt the Packall Group of Companies from the requirements of *OBCA* s. 148.

[31] Since Anita Co. is a shareholder of 967915, it is entitled to current and on-going audited financial statements of that company.

[32] Neither Anita nor Anita Co. is a shareholder of Packall Consultants; 967915 and 835474 own the shares of that company. Accordingly, the appellants are not entitled to audited financial statements of Packall Consultants under *OBCA* s. 148.

[33] Finally, as to 835474, its shares are owned by the Family Trust. In her factum, Anita submits that as one of the three co-trustees of the Family Trust, she is “a direct shareholder” of 835474 and therefore entitled to its audited financial statements. I disagree. The record before us did not disclose whether the share register of 835474 recorded its shareholder as the Family Trust or the three individual co-trustees. Regardless, section 4.1 of the Trust Agreement provides that all questions requiring action by the trustees “shall be determined by the approval or consent of a majority of the Trustees for the time being in office.” Neither of the other two trustees – Henry and James Billet – support Anita’s position that 835474 should provide audited financial statements to the Family Trust. Consequently, Anita, in her capacity as a trustee of the Family

Trust, is not entitled to audited financial statements of 835474 under *OBCA* s. 148.

[34] Accordingly, I would grant the appeal to the extent of varying paragraph 7 of the judgment to require 967915 to provide Anita Co. with current and on-going audited financial statements within 30 days following their completion.

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[35] In their factum the appellants raised a third issue, although they did not press it at the hearing. The appellants sought an order compelling Henry to provide a complete accounting of all monies received by him, directly or indirectly, legally or beneficially, from any of the Packall Group of Companies since June 1, 2005. The motion judge required 967915 to disclose the monies Henry had received from it after 2010, but dismissed the balance of Anita's request, holding, at para. 62:

Anita is a director of 967915. In that capacity, she is entitled to information from that company as to the monies Henry has taken from 967915. Otherwise she is at best a shareholder or shareholder of a shareholder and, in the absence of some evidence of wrongdoing or suspicion of wrongdoing on Henry's part, is not entitled as a shareholder to the information requested. In that regard, she has had the financial statements up to 2012 and has raised no concern in respect of remuneration as indicated on those statements.

[36] The appellants submit that this result is profoundly unfair and constitutes oppressive conduct on the part of Henry. However, the appellants have not demonstrated that in reaching his decision on this issue the motion judge erred in principle or law, failed to consider a relevant factor, took into account an irrelevant factor, or made a palpable and overriding error in respect of any finding of fact. As a result, I see no basis for appellate interference with his conclusion.

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[37] For the reasons set out above, I would allow the appeal to the extent of varying paragraph 7 of judgment to require 967915 Ontario Limited to provide Anita Co. with current and on-going audited financial statements within 30 days following their completion. I would otherwise dismiss the appeal.

[38] If the parties are unable to agree on the costs of the appeal, they shall exchange and file written cost submissions no later than Friday, January 15, 2016. Those submissions, excluding any bill of costs, shall not exceed three pages in length.

Released: January 6, 2016 (DD)

“David Brown J.A.”  
“I agree Doherty J.A.”  
“I agree B.W. Miller J.A.”

**TAB 27**

**S**

**S**

Citation: *Parkland Industries Ltd. v. Smart Gas and  
Auto Detailing Ltd.*,  
2013 BCSC 1046

Date: 20130613  
Docket S118327  
Registry: Vancouver

Between:

Parkland Industries Ltd.

Plaintiff

And

Smart Gas and Auto Detailing Ltd., Nobia Masoom and  
Masoom Agha Qazilbash

Defendants

And:

Parkland Industries Ltd.

Defendant by Counterclaim

Before: The Honourable Mr. Justice R. Punnett

**eas s r e**

(In Chambers)

Counsel for the Plaintiff:

S.D. Hansen  
K. Thompson

Counsel for the Defendants:

N. Ahmed

Place and Date of Hearing:

Vancouver, B.C.  
March 12 & 13, 2013

Place and Date of Judgment:

Vancouver, B.C.  
June 13, 2013

[1] The plaintiff claims by summary trial for damages for breach of a fuel supply contract between the plaintiff fuel distributor and the defendant gas station as well as judgment pursuant to the guarantees of the principals of the corporate defendant.

[2] The matter is currently set for trial for five days in November 2013. Documents have been exchanged and the plaintiff has completed its examination for discovery of the defendants. The defendants have yet to discover the plaintiff.

[3] I have concluded that this proceeding is not suitable for summary disposition for the reasons that follow.

**a r**

[4] The defendants have operated Smart Gas and Auto Detailing Ltd. (Smart Gas) on Canada Way in Burnaby, British Columbia for a number of years. It is not disputed that throughout 2009 and early 2010 the plaintiff's representative Sean Meindl repeatedly approached the defendant Masoom Agha Qazilbash, the principal of Smart Gas, seeking to persuade the defendants to become a Fas Gas branded station.

[5] On March 25, 2010 the plaintiff and the corporate defendant Smart Gas entered into a letter of agreement. Over the next two months they finalized the terms and on May 25, 2010 entered in a contract entitled "Petroleum Products Supply and Purchase Agreement" (the "Agreement"). Also on May 25, 2010, the two principals of the corporate defendant, Masoom Agha Qazilbash and Nobia Masoom, who are husband and wife, signed individual guarantees described as guarantees of "Corporate Indebtedness" (the "Guarantees").

[6] The Agreement provided that the corporate defendant would have the use of the Fas Gas brand and that it would purchase all of its light petroleum fuels for resale from the plaintiff for a term of five years, with an automatic four year renewal unless the plaintiff gave notice. Pursuant to the Agreement the defendant company was to purchase a minimum of 700,000 litres and maximum of 2,000,000 litres per year.

[7] The price was to be determined daily by the seller and would reflect the price in effect at their loading rack plus delivery charges and taxes. The Agreement at para. 10:01 states:

10.01 The Buyer will pay to the Seller for light petroleum fuels sold hereunder the price in effect at the Seller's designated loading rack at the time that the light petroleum fuels are loaded for delivery by the Buyer, plus the cost of delivery, plus all applicable taxes. The light petroleum fuels prices will be established daily by the Seller and are subject to change at any time and without notice. ...

[8] Pursuant to the Agreement the plaintiff supplied fuel to the defendants' gas station from July 2010 until September 2011. Fuel was to be paid for on delivery. Despite that arrangement, deliveries occurred without payment being made and the defendant company fell into arrears on its fuel payments. On September 12, 2011 the plaintiff informed Smart Gas that it had been moved to "prepaid status" such that prepayment of the fuel was required three to five days before the fuel was delivered.

[9] As of September 2011 the plaintiff claimed a balance due of \$91,949.82. Smart Gas disputed that amount acknowledging a debt of only \$49,664.40.

[10] On October 3, 2011 the plaintiff provided a notice of default to Smart Gas given they had learned that Smart Gas was purchasing petroleum fuel from other suppliers contrary to the Agreement. The notice of default also demanded payment of the \$91,949.82. Payment was not received.

[11] On November 4, 2011 the plaintiff gave notice that the Agreement would terminate on November 14, 2011 and that thereafter the plaintiff would attend at the Smart Gas premises to remove its equipment. A representative of the plaintiff attended on two occasions to retrieve the plaintiff's brand name, trademarks, trade names and colour scheme from the Smart Gas premises but was refused entry. The circumstances of such refusals are disputed.

[12] The defendants continued to use the equipment and operate its business under the plaintiff's brand name until, as a result of an agreement between counsel,



the equipment and branding materials were removed on or about December 15, 2011.

**ss es**

[13] The plaintiff seeks the following:

- a) A declaration that the defendants breached the Agreement and that the plaintiff is entitled to treat it as at an end;
- b) Judgment for fuel delivered in the sum of \$91,949.82;
- c) Damages for loss of profits in the approximate amount of \$143,290;
- d) Damages for the cost of branding in the sum of \$75,265.52;
- e) Interest;
- f) Costs on a solicitor/client basis.

[14] The defendants raise a number of defences. They submit that it is the plaintiff who breached the Agreement and thereby repudiated it. They allege the breaches by the plaintiff include the failure to provide credit as agreed. They further allege that the plaintiff misrepresented the terms of the Agreement and also made misrepresentations and promises to induce the defendant company to enter into the Agreement.

[15] The defendants filed a counterclaim in which they allege the plaintiff made false, fraudulent or negligent misrepresentations relied upon by the defendants. They allege breach of fiduciary duty, deceit, unconscionability and breach of contract. They also advance a claim in negligence for breach of an alleged duty of care.

[16] The defendants do not apply for summary judgment on the counterclaim.

[17] The plaintiff asserts that its claim can properly be resolved summarily and that if decided in its favour it will render the defendants' counterclaim *res judicata*. They acknowledge the claim is legally complex but assert that it is not factually complex.

[18] The defendants submit that the matter is not suitable for summary resolution because there is a lack of sufficient evidence before the court, there are significant credibility issues going directly to the facts in issue, and that it would be inappropriate to resolve the plaintiff's claims with the counterclaim remaining outstanding, as it involves the same issues and facts and to resolve any of the plaintiff's claims would effectively divide the litigation into slices.

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[19] Rule 9-7(15) provides that on a hearing of a summary trial application, the court may:

- (15) ...
  - (a) grant judgment in favour of any party, either on an issue or generally, unless
    - (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
    - (ii) the court is of the opinion that it would be unjust to decide the issues on the application[.]
- ...

[20] A recent summary of the application of the rule is found in *Gichuru v. Pallai*, 2013 BCCA 60, where Madam Justice D. Smith for the court said:

[30] In *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.), the court confirmed that the court under this rule “tries the issues raised by the pleadings on affidavits”, that “a triable issue or arguable defence will not always defeat a summary trial application”, and that “cases will be decided summarily if the court is able to find the facts necessary for that purpose, even though there may be disputed issues of fact and law” provided that the judge does not find “it is unjust to do so” (p. 211). In determining the latter issue (whether it would be unjust to proceed summarily), the Chief Justice identified a number of relevant factors to consider (at p. 215):

In deciding whether it will be unjust to give judgment the chambers judge is entitled to consider, inter alia, the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this important question.

[31] To this list has been added other factors including the cost of the litigation and the time of the summary trial, whether credibility is a critical factor in the determination of the dispute, whether the summary trial may create an unnecessary complexity in the resolution of the dispute, and whether the application would result in litigating in slices: *Dahl v. Royal Bank of Canada et al.*, 2005 BCSC 1263 at para. 12, upheld on appeal at 2006 BCCA 369.

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[21] The plaintiff alleges that the defendants breached the Agreement by not paying for fuel delivered and that when the plaintiff ceased delivery because of non-payment the defendants further breached the Agreement by purchasing fuel from other suppliers.

[22] The defendants acknowledge entering into an agreement with the plaintiff and concede that there is money owing by them pursuant to it. However, they dispute the amount and allege that they were overcharged. They allege it is the plaintiff who breached the Agreement by improperly pricing the fuel in contravention of the plaintiff's representations.

[23] The defendant Mr. Qazilbash alleges that Mr. Meindl "called about a dozen times at least through 2009 and early 2010. He would spend over an hour or more trying to convince me to switch over to Fas Gas and citing various perceived benefits".

[24] Mr. Qazilbash alleges that Mr. Meindl made various representations to him and it was only because of those representations that he entered into negotiations with the plaintiff. He states:

7. He promised that Parkland would deliver gas at rack price plus taxes and only charge delivery which he said would be at cost and calculated at the

industry standards of 1 cent a litre for delivery. In addition he said we would get credit facilities, as that was how I was operating with my existing supplier at the time.

8. For my business, pricing was crucial and everything. The location is very competitive and has a Husky and Esso nearby. I have been successfully able to undercut Husky by at least 1 cent and that was how I was surviving. Sean Meindl promised that Parkland pricing would also be competitive and allow me to continue to undercut Husky. In particular he expressly promised that the rack price plus delivery would be lower than our existing supplier.

[25] Mr. Meindl in his affidavit filed in support of the plaintiff's application said this:

9. I am the only Parkland representative who dealt with the Defendants prior to the execution of the Agreement. At no time did I make any of the representations alleged by the Defendants to induce them to enter into the Agreement.

10. Specifically, I did not make express representations that the whole sale price for fuel would be:

- (a) competitive to allow the Defendant to undercut Husky;
- (b) two cents below the rack price; or
- (c) at or below the rate of Smart Gas' existing supplier.

[26] The Agreement does not provide details of how the plaintiff sets the price charged to the defendant company. Mr. Meindl in his affidavit states:

11. ...the Agreement provided for pricing in that the Buyer would purchase fuel at the daily rack pricing plus processing, tax and delivery charges on the day the fuel is loaded onto the truck. The daily rack pricing is an amount set daily by the refiners at the Shell Terminal and is a commodity price based on the markets which fluctuate daily. The processing fee is a static amount that is Parkland's profit and the delivery amounts are determined based on the load/purchase size.

[27] The Agreement however refers to "price in effect at the Seller's designated loading rack" but does not refer to any processing charges.

[28] In addition the Agreement does not define "Seller's designated loading rack" nor "market rack price". The plaintiff addressed this issue in the second affidavit of Mr. Meindl as follows:

3. The Agreement (defined in my first affidavit) provides that the Buyer will pay "the price in effect at the Seller's designated loading rack at the time that the light petroleum fuels are loaded or delivery to the Buyer, plus the cost of delivery, plus all applicable taxes." The "price in effect at the Seller's

designated loading rack” is different from the “market rack price”. The Seller’s designated loading rack price is calculated by taking the market rack price, which is the price that Parkland pays to the designated terminal refinery owner, and then Parkland adds a processing fee which represents Parkland’s profit margin. ...

[29] The alleged misrepresentations bear directly on the issue of the price of the fuel.

[30] The plaintiff submits that the defendants have not been consistent in what misrepresentations were alleged to have been made, noting the following:

- a) the notice of civil claim alleges that the price would be competitive and at or below the rate of Smart Gas’ existing supplier;
- b) following requests at the examination for discovery of the defendants the defendants particularized their claim for fraud by stating that the Agreement was for two cents per litre below the rack price;
- c) the affidavit of Mr. Qazilbash states that he was relying on a promise of rack price plus one cent per litre.

[31] As a result the plaintiff submits that the defendants cannot argue that they relied on a misrepresentation when they are unclear on what the misrepresentation was.

[32] The plaintiff also submits that the alleged misrepresentations are irrelevant given there is an “entire agreement” clause in the Agreement and the fact that the representations are inconsistent with the terms of that written agreement.

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[33] The plaintiff claims the sum of \$75,000 for rebranding costs. Pursuant to the Agreement the plaintiff loaned to the defendants certain equipment including a highway pole sign with acrylics, a canopy sign with acrylics, an electronic price sign, a point of sale machine, a printer, and a manual credit card imprinter. It is not disputed that the defendant received the listed equipment. The plaintiff states that it

incurred \$75,000 in costs to provide the above equipment and to renovate and brand the premises.

[34] The plaintiff's evidence in support of the expenditures allegedly incurred is a list of expenditures unsupported by any invoices or receipts. The defendants state that such renovations were not done. The plaintiff produces photos of the rebranded station allegedly supporting that they were done.

[35] The plaintiff has now removed the loaned equipment and the station branding. The defendants in their counterclaim claim damages arising from the branding and de-branding of the premises.

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[36] The plaintiff seeks \$1,451.52 in de-branding costs. The evidence in support of this claim consists of invoices from a third party hired to effect removal of the branding equipment and materials. It is alleged the cost was increased by the breach of the defendants in not permitting access to the premises.

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[37] The plaintiff also advances a claim for loss of profit calculated on the 700,000 per annum litre base not only for the five year term of the Agreement but also the four year extension that was available at the option of the plaintiff. There is no evidence that the plaintiff would in fact have permitted the term to be extended.

[38] The claim is based on an alleged average profit of \$0.0267 cents per litre. Jason Park, Assistant Controller of Retail for the plaintiff deposed as follows:

9. The price of the fuel pursuant to the Agreement is calculated based on the rack pricing (which fluctuates) plus the processing fee and delivery charges (which remain static) applicable to that Premises.

10. Parkland's profit (the "Site Contribution Margin") is calculated based on its profits made on fuel purchases net of discounts (the "Fuel Margin"), plus other non-petroleum revenue, less its operating expenses. For the 2011 year, the average actual Site Contribution Margin to Parkland taking into account the Fuel Margin, discounts and expenses was \$0.0267 per litre for the Premises. ...

[39] Mr. Park then attaches a profit and loss statement for the premises which he states “illustrates Parkland’s profits for that year”. On the basis of that he has forecast the future loss of profits of the plaintiff and has attached his calculations in support.

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[40] The relevant portion of the guarantees signed by the personal defendants read as follows:

**GUARANTEE**

TO: **S S S**,  
 a limited partnership subsisting under the laws of the Province of Alberta, by  
 its general partner,  
**S S**.  
 236, 4919-59 Street,  
 RED DEER, Alberta T4N 6C9  
 (hereinafter called “Parkland”)

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The undersigned (hereinafter called the “Guarantor”) being a principal of  
**S ar asa e a**. (hereinafter called the “Corporation”) in  
 consideration of Parkland granting or extending credit (the “Indebtedness”) to  
 the Corporation arising from any dealings between Parkland and the  
 Corporation, present or future, direct or indirect, including but not limited to  
 the purchase of petroleum products, including all accessories related thereto,  
 do hereby for myself, my heirs, executors, administrators (and where there  
 are more than one undersigned Guarantor, jointly and severally)  
 unconditionally guarantee the payment when due of all Indebtedness, interest  
 and penalties thereon, if applicable, owing to Parkland by the Corporation  
 from time to time and unconditionally guarantee the performance of all  
 obligations of the Corporation to Parkland. ...

[41] The individual defendants plead *non-est factum*, that the guarantees are unconscionable, that there was a breach of fiduciary duty and that they were not given the opportunity to obtain independent legal advice.

**S SS**

[42] While the plaintiff has examined the defendants for discovery the defendants have yet to examine the plaintiff. The failure to do so in this instance is not a factor in the conclusion I have reached. In addition I note that neither party sought to cross-examine the other on the affidavits filed.

[43] The plaintiff argues that credibility is not a central consideration. It submits that the court can find the facts necessary to decide the issues of fact and law. It further submits that disposition of the application depends on the interpretation of the Agreement and whether either party breached it.

[44] Fundamental to the enforceability of the Agreement and the issue of its breach is the issue of the alleged misrepresentations. The affidavit evidence of Mr. Meindl and Mr. Qazilbash is in direct conflict. Their credibility is in issue.

[45] Clearly there is an issue between the parties over price. The interpretation of the contract is in issue -- a fact evidenced by the plaintiff filing affidavit material that "explains" certain portions of the Agreement, in particular the manner in which price was determined.

[46] In addition the misrepresentations alleged may or may not be inconsistent. For example, I cannot determine on the evidence if the "inconsistent misrepresentations" are necessarily inconsistent (depending on how rack price is defined) or whether they each amount to a mode of pricing that would be consistent with the alleged representation of competitive pricing. There may or may not be a lack of clarity on what the misrepresentations were. There may or may not be an express conflict with the terms of the Agreement. In my view these are issues that cannot be resolved summarily given the fuel pricing issue and the parties' contradictory affidavits.

[47] As noted the plaintiff points as well to the "entire agreement" clause in the Agreement which states "This Agreement constitutes the entire Agreement between the parties and there are no Agreements, representations, conditions or warranties concerning the subject matter of this Agreement that are not merged herein or superseded hereby."

[48] The plaintiff acknowledges that there are exceptions to the general rule that an entire agreement clause precludes consideration of alleged representations founded on discussions prior to the execution of the agreement, for example where



the representations were collateral to and not inconsistent with the written contract or where it can be shown the agreement does not truly represent the contract itself. The plaintiff argues however that such exceptions do not apply on the facts of this case.

[49] It relies on *Sultani v. Blenz the Canadian Coffee Company Ltd.*, 2005 BCCA 578, for the proposition that a representation made outside the four corners of a written agreement where there is an “entire agreement clause” must not be considered where the alleged representation alters an express term of the Agreement. It submits that the representations alleged to have been made conflict with express terms of the Agreement. In doing so however it assumes the Agreement is clear and complete on the issue of price.

[50] The issue is not that simple, as illustrated in *Canadian Contractual Interpretation Law*, Second Edition (Markham: LexisNexis Canada, 2012) by Geoff R. Hall, where the author comments on “entire agreement” clauses as follows at pp. 270-271:

...

#### 8.10.1 e pr p e

Entire agreement clauses -- provisions that specify that the written text agreed by the parties constitutes the whole contract and that exclude all representations made outside the document -- are one of the most confusing areas of the law of contractual interpretation in Canada. There appears to be no overarching theory of how the courts should or do approach such provisions, so it is difficult to predict in any particular case whether an entire agreement clause will be enforced or not.

A number of seemingly unrelated principles appear to be at play. An entire agreement clause will in general not be interpreted to be forward-looking, but rather will only be considered to apply to events occurring prior to contracting. An entire agreement clause will not prevail over an oral agreement where the parties did not intend the written contract to encompass their entire relationship, although since this principle is easier to state in the abstract than it is to apply in practice, the application of this principle has been quite inconsistent. An entire agreement clause will not apply to exclude false representations which induced a party to enter into a contract, unless the clause was specifically brought to the attention of the party to whom the representation was made.

To the extent that there is a consistent theme to the various concepts which seem to be at play, it appears to be that entire agreement clauses will only be

enforced against a party who understood (or ought to have understood) the effect of the clause and whose attention was specifically drawn to the provision. Thus an entire agreement clause is much more apt to be enforced against a sophisticated party than against an unsophisticated one, and entire agreement clauses which are buried in fine print in standard form contracts are apt not to be enforced. In other words, entire agreement clauses tend only to be enforceable where contracting parties expressly turn their minds to them, or where they ought to have done so because of their sophistication and ability to obtain legal advice.

...

[51] In this case there is no evidence that the entire agreement clause was brought to the attention of the defendants.

[52] As noted above, the defendants assert multiple meetings leading up to the execution of the agreement. The representative of the plaintiff does not deny such meetings but offers simply a blanket statement denying that he made any of the alleged representations. This puts the credibility of the parties in issue. Multiple meetings by the plaintiff's representative to persuade the defendants to sign an agreement with the plaintiff raises issues of what was said that a bare denial does not resolve.

[53] There are other concerns. In terms of the debt claimed, the material consists of the evidence of Mr. Mendl and of Mr. Park as well as copies of the invoices relating to the fuel delivered. While those documents support the amount claimed they do not reveal the breakdown of the charges rendered nor that they were rendered in accordance with the Agreement. This is problematic when firstly the meaning of the Agreement is in issue and secondly the documents used different terminology respecting pricing such as "Base Price" with no reference to the terminology used in the Agreement.

[54] I turn to the remaining issues. As noted earlier the evidence provided in support of the claim for branding expenses consists of a summary of expenses said to have been incurred. There are no supporting invoices. Many of the costs were apparently incurred in-house. That is, third parties did not invoice the plaintiff for the services and materials used. Given the defendants deny the work was done this

claim is clearly controversial. The plaintiff has the obligation to satisfy the evidential burden to show the costs incurred and, given they are denied, how they were incurred and calculated. This is not an issue that can be resolved on the evidence.

[55] The claim for future loss of profits is equally problematic. The evidence in support consists of a calculation of the profit per litre times the total possible term of the Agreement including the four year renewal based on the minimum litres required under the Agreement. There is no evidence that the plaintiff had decided or would decide to permit the contract to continue after five years. While the claim is for the minimum under the Agreement the evidence is that minimum was never reached during the period prior to the alleged breach of the contract. Whether the plaintiff would have been content with that continuing is unknown. The amount claimed is also a figure that does not take into account the present value of the alleged loss of profit over the future years claimed. There may as well be other contingencies to be accounted for. Again, aside from the issue of the terms of the contract itself and the party responsible for the breach, the evidence does not provide a sufficient basis to assess future loss of profit.

[56] With respect to the issue of the guarantees, given the credibility issues that exist in this case and that the issue of the Agreement giving rise to those guarantees requires a full trial, it would not be appropriate to resolve the guarantee issue summarily.

[57] In *Mayer v. Mayer*, 2012 BCCA 77, the British Columbia Court of Appeal made a number of observations on the issue of summary trial suitability at paras. 77-81:

[77] With respect, the judge erred in approaching the issues in the way he did. As Justice Sopinka stated in *Borowski v. Canada* (Attorney General), [1989] 1 S.C.R. 342 at 358-59,

... a court's competence to resolve legal disputes is rooted in the adversary system. The requirement of an adversarial context is a fundamental tenet of our legal system and helps guarantee that issues are well and fully argued by parties who have a stake in the outcome.

[Emphasis added.]

To the same effect, this Court stated, in *R. v. Barton*, 2001 BCCA477, 51 W.C.B. (2d) 4,

[7] One of the fundamental principles upon which our legal system operates is the right of each side in a legal dispute to be heard. ... The Court is impressed with the duty to fully hear and consider both sides and to render a considered judgment as to the proper disposition of the case.

[Emphasis added.]

[78] The system is founded on the conception that the parties to a lawsuit will bring forward all relevant evidence available to support their case and will present their case in its best light. In that way, "it guarantees to each of the parties who are affected the right to prepare for themselves the representations on the basis of which their dispute is to be resolved": Professor Paul Weiler, "Two Models of Judicial Decision-Making" (1968), 46 Can. Bar Rev. 406 at 412, quoted with approval in *R. v. Swain*, [1991] 1 S.C.R. 933 at 972.

[79] Litigants do not always have access to all of the relevant evidence bearing on the issues raised. Often, relevant documents are in the sole possession or control of their opponents. Documentary discovery requires the opponents to disclose such documents and enables the litigants to use them in support of their case. Also, oral discovery offers the opportunity to learn of relevant evidence otherwise not known to the examining party, to obtain helpful admissions, and to explore the strengths and weaknesses of the opponent's case: see *Anglo-American Timber Products Ltd. v. British Columbia Electric Company Limited* (1960), 23 D.L.R. (2d) 656 at 657-58, 31 W.W.R. 604 (B.C.C.A.). Moreover, when a party is unable to tender necessary evidence in any other way, the party may adduce such evidence from his opponent: Rule 40(20) [now Civil Rule 12-5(26)]. Clearly, parties are not confined to reliance on their own evidence.

[80] Further, cross-examination is essential to protect trial fairness since, without it, the court cannot assess the probative value of the evidence: see *R. v. Darrach*, 2000 SCC 46, [2000] 2 S.C.R. 443 at para. 63. In *R. v. Osolin*, [1993] 4 S.C.R. 595 at 663, Cory J. made the following remarks which, although made in a criminal context, are apposite to this discussion:

There can be no question of the importance of cross-examination. It is of essential importance in determining whether a witness is credible. Even with the most honest witness cross-examination can provide the means to explore the frailties of the testimony. ... Its importance cannot be denied. It is the ultimate means of demonstrating truth and of testing veracity. ...

I would add that, in cases of conflicting evidence, cross-examination of the parties offering the conflicting evidence is essential -- the credibility of one or the other cannot be considered in a vacuum.

[81] In addition to exposing credibility to scrutiny, cross-examination may also cast a different light on the evidence given by witnesses and may bring

out relevant information that might not otherwise be disclosed, thus enabling the court to be informed of all the evidence bearing on the issues.

[58] In my view the credibility issues in this case relate directly to material facts. This is not a situation where documentary evidence resolves the issues. It is not clear from the material how sophisticated the defendants are. The discovery evidence indicates concerns respecting their facility with English. There are numerous issues in dispute. I conclude that I am “unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law”. As a result I would exercise my discretion against the plaintiff on this application. I say this because of the factors outlined in these reasons and in particular because of the issues of credibility and the outstanding counterclaim. It would be unjust in all of the circumstances to dispose of the plaintiff’s claim or portions of it summarily.

[59] As mentioned the counterclaim raises another impediment to summary disposition. It contains the same allegations and as well advances claims in negligence arising from damages to the fixtures and furniture of the defendant corporation caused by the rebranding and the subsequent de-branding. It also advances claims for loss of revenue arising from loss of business caused by the actions of the plaintiff.

[60] In *Kaspersky Lab, Inc. v. Bradshaw*, 2010 BCSC 68, Mr. Justice Smith considered the law respecting summary trial applications in which a counterclaim is advanced as follows at paras. 13 and 22:

[13] Although the Rule allows judgment “on an issue or generally”, the Court of Appeal has warned this court of the danger of “litigating in slices”: *Bacchus Agents (1981) Ltd. v. Philippe Dandurand Wines Ltd.*, 2002 BCCA 138. However, it is also clear that the mere existence of a counterclaim is not a bar to a judgment under Rule 18A unless the issues are “inextricably interwoven”: *Natco International Inc. v. Photo Violation Technologies Corp.*, 2009 BCSC 1504 at para. 10.

...

[22] The claim and counterclaim in this case not only arise out of the same agreement, but each party relies on the same sentence within the agreement. The plaintiff says it exercised its right to terminate the agreement and the

defendants say the plaintiff did so without giving the required notice and opportunity to cure the breach. In my view, those issues are inextricably intertwined and it would be unjust to decide only part of the case on this application. It would also not assist the efficient resolution of this proceeding because most of the same evidence would still have to be considered on the trial of the counterclaim.

[61] In addition findings on this application may embarrass the court hearing the counterclaim. In such a situation it would not be appropriate to address the issues raised. (*Otter Farm and Home Co-op v. Sekhon*, 2001 BCCA 636.)

[62] In my view the issues before the court on this application are “inextricably interwoven” with the issues raised in the counterclaim. Much of the same evidence would be considered on the counterclaim. I am not convinced that resolution of the plaintiff’s claim would as asserted by the plaintiff render the counterclaim res judicata. To proceed as sought by the plaintiff would result in litigating in slices.

[63] As a result I am of the opinion that summary resolution of the plaintiff’s claim is not appropriate and would be unjust. The matter should proceed to a full trial.

[64] The plaintiff’s application for summary judgment is therefore dismissed.

[65] Costs shall be in the cause.

“Punnett J.”

**TAB 28**

**Sattva Capital Corporation (formerly  
Sattva Capital Inc.)** *Appellant*

*v.*

**Creston Moly Corporation (formerly  
Georgia Ventures Inc.)** *Respondent*

and

**Attorney General of British Columbia and  
BCICAC Foundation** *Interveners*

**INDEXED AS: SATTVA CAPITAL CORP. v. CRESTON  
MOLY CORP.**

**2014 SCC 53**

File No.: 35026.

2013: December 12; 2014: August 1.

Present: McLachlin C.J. and LeBel, Abella, Rothstein,  
Moldaver, Karakatsanis and Wagner JJ.

**ON APPEAL FROM THE COURT OF APPEAL FOR  
BRITISH COLUMBIA**

*Arbitration — Appeals — Commercial arbitration  
awards — Parties entering into agreement providing for  
payment of finder's fee in shares — Parties disagreeing as  
to date on which to price shares for payment of finder's  
fee and entering into arbitration — Leave to appeal arbi-  
tral award sought pursuant to s. 31(2) of the Arbitration  
Act — Leave to appeal denied but granted on appeal to  
Court of Appeal — Appeal of award dismissed but dis-  
missal reversed by Court of Appeal — Whether Court of  
Appeal erred in granting leave to appeal — What is ap-  
propriate standard of review to be applied to commer-  
cial arbitral decisions made under Arbitration Act —  
Arbitration Act, R.S.B.C. 1996, c. 55, s. 31(2).*

*Contracts — Interpretation — Parties entering into  
agreement providing for payment of finder's fee in shares  
— Parties disagreeing as to date on which to price the  
shares for payment of finder's fee and entering into arbitra-  
tion — Whether arbitrator reasonably construed contract*

**Sattva Capital Corporation (anciennement  
Sattva Capital Inc.)** *Appelante*

*c.*

**Creston Moly Corporation (anciennement  
Georgia Ventures Inc.)** *Intimée*

et

**Procureur général de la  
Colombie-Britannique et  
BCICAC Foundation** *Intervenants*

**RÉPERTORIÉ : SATTVA CAPITAL CORP. c. CRESTON  
MOLY CORP.**

**2014 CSC 53**

N° du greffe : 35026.

2013 : 12 décembre; 2014 : 1<sup>er</sup> août.

Présents : La juge en chef McLachlin et les juges LeBel,  
Abella, Rothstein, Moldaver, Karakatsanis et Wagner.

**EN APPEL DE LA COUR D'APPEL DE LA  
COLOMBIE-BRITANNIQUE**

*Arbitrage — Appels — Sentences arbitrales commercia-  
les — Conclusion d'une entente entre les parties prévoyant  
le versement en actions des honoraires d'intermédiation  
— Désaccord des parties sur la date applicable à l'éva-  
luation du cours de l'action aux fins du versement des  
honoraires d'intermédiation et recours à l'arbitrage —  
Autorisation d'appel de la sentence arbitrale deman-  
dée en application de l'art. 31(2) de l'Arbitration Act  
— Rejet initial de la demande d'autorisation d'appel,  
qui est accueillie à l'issue d'un appel devant la Cour  
d'appel — Rejet de l'appel interjeté de la sentence infirmé  
par la Cour d'appel — La Cour d'appel a-t-elle accordé  
à tort l'autorisation d'appel? — Quelle est la norme de  
contrôle applicable aux sentences arbitrales commerciales  
rendues sous le régime de l'Arbitration Act? — Arbitration  
Act, R.S.B.C. 1996, ch. 55, art. 31(2).*

*Contrats — Interprétation — Conclusion d'une entente  
entre les parties prévoyant le versement en actions des  
honoraires d'intermédiation — Désaccord des parties sur  
la date applicable à l'évaluation du cours de l'action aux  
fins du versement des honoraires d'intermédiation*



assured to be literate and therefore capable of reading the contract (Hall, at p. 126; and Lewison, at pp. 173-74).

[44] This historical rationale no longer applies. Nevertheless, courts in the United Kingdom continue to treat the interpretation of a written contract as always being a question of law (*Thorner v. Major*, [2009] UKHL 18, [2009] 3 All E.R. 945, at paras. 58 and 82-83; and Lewison, at pp. 173-77). They do this despite the fact that U.K. courts consider the surrounding circumstances, a concept addressed further below, when interpreting a written contract (*Prenn v. Simmonds*, [1971] 3 All E.R. 237 (H.L.); and *Rear-don Smith Line Ltd. v. Hansen-Tangen*, [1976] 3 All E.R. 570 (H.L.)).

[45] In Canada, there remains some support for the historical approach. See for example *Jiro Enterprises Ltd. v. Spencer*, 2008 ABCA 87 (CanLII), at para. 10; *QK Investments Inc. v. Crocus Investment Fund*, 2008 MBCA 21, 290 D.L.R. (4th) 84, at para. 26; *Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd.*, 2010 ABCA 126, 25 Alta. L.R. (5th) 221, at paras. 11-12; and *Minister of National Revenue v. Costco Wholesale Canada Ltd.*, 2012 FCA 160, 431 N.R. 78, at para. 34. However, some Canadian courts have abandoned the historical approach and now treat the interpretation of written contracts as an exercise involving either a question of law or a question of mixed fact and law. See for example *WCI Waste Conversion Inc. v. ADI International Inc.*, 2011 PECA 14, 309 Nfld. & P.E.I.R. 1, at para. 11; 269893 *Alberta Ltd. v. Otter Bay Developments Ltd.*, 2009 BCCA 37, 266 B.C.A.C. 98, at para. 13; *Hayes Forest Services Ltd. v. Weyerhaeuser Co.*, 2008 BCCA 31, 289 D.L.R. (4th) 230, at para. 44; *Bell Canada v. The Plan Group*, 2009 ONCA 548, 96 O.R. (3d) 81, at paras. 22-23 (majority reasons, *per* Blair J.A.) and paras. 133-35 (*per* Gillese J.A., in dissent, but not on this point); and *King*, at paras. 20-23.

[46] The shift away from the historical approach in Canada appears to be based on two developments. The first is the adoption of an approach to contractual interpretation which directs courts to have regard for the surrounding circumstances of the contract

pouvait être certain qu'il savait lire et écrire et, par conséquent, qu'il était en mesure de prendre connaissance du contrat (Hall, p. 126; Lewison, p. 173-174).

[44] Cette justification historique ne s'applique plus. Néanmoins, pour les tribunaux du Royaume-Uni, l'interprétation d'un contrat écrit ressortit toujours à une question de droit (*Thorner c. Major*, [2009] UKHL 18, [2009] 3 All E.R. 945, par. 58 et 82-83; Lewison, p. 173-177), et ce, même s'ils tiennent compte des circonstances — un concept que nous aborderons — dans l'interprétation du contrat écrit (*Prenn c. Simmonds*, [1971] 3 All E.R. 237 (H.L.); *Rear-don Smith Line Ltd. c. Hansen-Tangen*, [1976] 3 All E.R. 570 (H.L.)).

[45] Au Canada, l'approche historique n'a pas perdu tous ses adeptes. Voir par exemple *Jiro Enterprises Ltd. c. Spencer*, 2008 ABCA 87 (CanLII), par. 10; *QK Investments Inc. c. Crocus Investment Fund*, 2008 MBCA 21, 290 D.L.R. (4th) 84, par. 26; *Dow Chemical Canada Inc. c. Shell Chemicals Canada Ltd.*, 2010 ABCA 126, 25 Alta. L.R. (5th) 221, par. 11-12; *Canada c. Costco Wholesale Canada Ltd.*, 2012 CAF 160 (CanLII), par. 34. Or, des tribunaux canadiens ont délaissé l'approche historique au profit d'une nouvelle démarche qui conçoit l'interprétation des contrats écrits soit comme une question de droit soit comme une question mixte de fait et de droit. Voir par exemple *WCI Waste Conversion Inc. c. ADI International Inc.*, 2011 PECA 14, 309 Nfld. & P.E.I.R. 1, par. 11; 269893 *Alberta Ltd. c. Otter Bay Developments Ltd.*, 2009 BCCA 37, 266 B.C.A.C. 98, par. 13; *Hayes Forest Services Ltd. c. Weyerhaeuser Co.*, 2008 BCCA 31, 289 D.L.R. (4th) 230, par. 44; *Bell Canada c. The Plan Group*, 2009 ONCA 548, 96 O.R. (3d) 81, par. 22-23 (les juges majoritaires, sous la plume du juge Blair) et par. 133-135 (la juge Gillese, dissidente, mais pas sur ce point); *King*, par. 20-23.

[46] La tendance à délaissé l'approche historique au Canada semble s'expliquer par deux changements. Le premier est l'adoption d'une méthode d'interprétation contractuelle qui oblige le tribunal à tenir compte des circonstances — que l'on appelle

— often referred to as the factual matrix — when interpreting a written contract (Hall, at pp. 13, 21-25 and 127; and J. D. McCamus, *The Law of Contracts* (2nd ed. 2012), at pp. 749-51). The second is the explanation of the difference between questions of law and questions of mixed fact and law provided in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 35, and *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 26 and 31-36.

[47] Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine “the intent of the parties and the scope of their understanding” (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27, *per* LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 64-65, *per* Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:

No contracts are made in a vacuum; there is always a setting in which they have to be placed. . . . In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

(*Reardon Smith Line*, at p. 574, *per* Lord Wilberforce)

[48] The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement (see *Moore Realty Inc.*

souvent le fondement factuel — dans l’interprétation d’un contrat écrit (Hall, p. 13, 21-25 et 127; J. D. McCamus, *The Law of Contracts* (2<sup>e</sup> éd. 2012), p. 749-751). Le deuxième découle des explications formulées dans les arrêts *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748, par. 35, et *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235, par. 26 et 31-36, sur ce qui distingue la question de droit de la question mixte de fait et de droit.

[47] Relativement au premier changement, l’interprétation des contrats a évolué vers une démarche pratique, axée sur le bon sens plutôt que sur des règles de forme en matière d’interprétation. La question prédominante consiste à discerner « l’intention des parties et la portée de l’entente » (*Jesuit Fathers of Upper Canada c. Cie d’assurance Guardian du Canada*, 2006 CSC 21, [2006] 1 R.C.S. 744, par. 27, le juge LeBel; voir aussi *Tercon Contractors Ltd. c. Colombie-Britannique (Transports et Voirie)*, 2010 CSC 4, [2010] 1 R.C.S. 69, par. 64-65, le juge Cromwell). Pour ce faire, le décideur doit interpréter le contrat dans son ensemble, en donnant aux mots y figurant le sens ordinaire et grammatical qui s’harmonise avec les circonstances dont les parties avaient connaissance au moment de la conclusion du contrat. Par l’examen des circonstances, on reconnaît qu’il peut être difficile de déterminer l’intention contractuelle à partir des seuls mots, car les mots en soi n’ont pas un sens immuable ou absolu :

[TRADUCTION] Aucun contrat n’est conclu dans l’abstrait : les contrats s’inscrivent toujours dans un contexte. [ . . . ] Lorsqu’un contrat commercial est en cause, le tribunal devrait certes connaître son objet sur le plan commercial, ce qui présuppose d’autre part une connaissance de l’origine de l’opération, de l’historique, du contexte, du marché dans lequel les parties exercent leurs activités.

(*Reardon Smith Line*, p. 574, le lord Wilberforce)

[48] Le sens des mots est souvent déterminé par un certain nombre de facteurs contextuels, y compris l’objet de l’entente et la nature des rapports créés par celle-ci (voir *Moore Realty Inc. c. Manitoba*

*v. Manitoba Motor League*, 2003 MBCA 71, 173 Man. R. (2d) 300, at para. 15, *per* Hamilton J.A.; see also Hall, at p. 22; and McCamus, at pp. 749-50). As stated by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.):

The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [p. 115]

[49] As to the second development, the historical approach to contractual interpretation does not fit well with the definition of a pure question of law identified in *Housen* and *Southam*. Questions of law “are questions about what the correct legal test is” (*Southam*, at para. 35). Yet in contractual interpretation, the goal of the exercise is to ascertain the objective intent of the parties — a fact-specific goal — through the application of legal principles of interpretation. This appears closer to a question of mixed fact and law, defined in *Housen* as “applying a legal standard to a set of facts” (para. 26; see also *Southam*, at para. 35). However, some courts have questioned whether this definition, which was developed in the context of a negligence action, can be readily applied to questions of contractual interpretation, and suggest that contractual interpretation is primarily a legal affair (see for example *Bell Canada*, at para. 25).

[50] With respect for the contrary view, I am of the opinion that the historical approach should be abandoned. Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix.

[51] The purpose of the distinction between questions of law and those of mixed fact and law further

*Motor League*, 2003 MBCA 71, 173 Man. R. (2d) 300, par. 15, la juge Hamilton; voir aussi Hall, p. 22; McCamus, p. 749-750). Pour reprendre les propos du lord Hoffmann dans *Investors Compensation Scheme Ltd. c. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.) :

[TRADUCTION] Le sens d’un document (ou toute autre déclaration) qui est transmis à la personne raisonnable n’équivaut pas au sens des mots qui le composent. Le sens des mots fait intervenir les dictionnaires et les grammaires; le sens du document représente ce qu’il est raisonnable de croire que les parties, en employant ces mots compte tenu du contexte pertinent, ont voulu exprimer. [p. 115]

[49] Relativement au deuxième changement, l’approche historique de l’interprétation contractuelle ne cadre pas bien avec la définition de la pure question de droit formulée dans les arrêts *Housen* et *Southam*. Les questions de droit « concernent la détermination du critère juridique applicable » (*Southam*, par. 35). Or, lorsqu’il s’agit d’interprétation contractuelle, le but de l’exercice consiste à déterminer l’intention objective des parties — un but axé sur les faits — par l’application des principes juridiques d’interprétation. Il me semble que cela se rapproche plutôt de la question mixte de fait et de droit, définie dans l’arrêt *Housen* comme supposant « l’application d’une norme juridique à un ensemble de faits » (par. 26; voir aussi *Southam*, par. 35). Toutefois, certains tribunaux ont émis des doutes sur l’application directe de cette définition, qui avait été établie à l’égard d’une action intentée pour négligence, à des questions d’interprétation contractuelle et laissent entendre que cette dernière est d’abord et avant tout une affaire de droit (voir par exemple *Bell Canada*, par. 25).

[50] Avec tout le respect que je dois aux tenants de l’opinion contraire, à mon avis, il faut rompre avec l’approche historique. L’interprétation contractuelle soulève des questions mixtes de fait et de droit, car il s’agit d’en appliquer les principes aux termes figurant dans le contrat écrit, à la lumière du fondement factuel.

[51] Cette conclusion est étayée par les raisons qui sous-tendent la distinction établie entre la

[53] Nonetheless, it may be possible to identify an extricable question of law from within what was initially characterized as a question of mixed fact and law (*Housen*, at paras. 31 and 34-35). Legal errors made in the course of contractual interpretation include “the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor” (*King*, at para. 21). Moreover, there is no question that many other issues in contract law do engage substantive rules of law: the requirements for the formation of the contract, the capacity of the parties, the requirement that certain contracts be evidenced in writing, and so on.

[54] However, courts should be cautious in identifying extricable questions of law in disputes over contractual interpretation. Given the statutory requirement to identify a question of law in a leave application pursuant to s. 31(2) of the AA, the applicant for leave and its counsel will seek to frame any alleged errors as questions of law. The legislature has sought to restrict such appeals, however, and courts must be careful to ensure that the proposed ground of appeal has been properly characterized. The warning expressed in *Housen* to exercise caution in attempting to extricate a question of law is relevant here:

Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of “mixed law and fact”. Where the legal principle is not readily extricable, then the matter is one of “mixed law and fact” . . . [para. 36]

[55] Although that caution was expressed in the context of a negligence case, it applies, in my opinion, to contractual interpretation as well. As mentioned above, the goal of contractual interpretation, to ascertain the objective intentions of the parties, is inherently fact specific. The close relationship between the selection and application of principles of

[53] Néanmoins, il peut se révéler possible de dégager une pure question de droit de ce qui paraît au départ constituer une question mixte de fait et de droit (*Housen*, par. 31 et 34-35). L’interprétation contractuelle peut occasionner des erreurs de droit, notamment [TRADUCTION] « appliquer le mauvais principe ou négliger un élément essentiel d’un critère juridique ou un facteur pertinent » (*King*, par. 21). En outre, il est indubitable que nombre d’autres questions se posant en droit des contrats mettent en jeu des règles de droit substantiel : les critères de formation du contrat, la capacité des parties, l’obligation que soient constatés par écrit certains types de contrat, etc.

[54] Le tribunal doit cependant faire preuve de prudence avant d’isoler une question de droit dans un litige portant sur l’interprétation contractuelle. Compte tenu de l’obligation, prévue au par. 31(2) de l’AA, que la demande d’autorisation soulève une question de droit, le demandeur et son représentant chercheront à qualifier de question de droit toute erreur qu’ils invoquent. Toutefois, le législateur a pris des mesures visant à limiter ce genre d’appels, et les tribunaux doivent examiner soigneusement le motif d’appel proposé pour déterminer s’il est bien caractérisé. La mise en garde exprimée dans *Housen* qui appelle à la prudence lorsqu’il s’agit d’isoler une question de droit s’applique dans le cas présent :

Les cours d’appel doivent cependant faire preuve de prudence avant de juger que le juge de première instance a commis une erreur de droit lorsqu’il a conclu à la négligence, puisqu’il est souvent difficile de départager les questions de droit et les questions de fait. Voilà pourquoi on appelle certaines questions des questions « mixtes de fait et de droit ». Si le principe juridique n’est pas facilement isolable, il s’agit alors d’une « question mixte de fait et de droit » . . . [par. 36]

[55] Certes, cette mise en garde a été formulée dans le contexte d’une action pour négligence, mais elle s’applique également à mon avis à l’interprétation contractuelle. Comme je le mentionne précédemment, le but de l’interprétation contractuelle — déterminer l’intention objective des parties — est, de par sa nature même, axé sur les faits. Le rapport



contractual interpretation and the construction ultimately given to the instrument means that the circumstances in which a question of law can be extricated from the interpretation process will be rare. In the absence of a legal error of the type described above, no appeal lies under the AA from an arbitrator's interpretation of a contract.

(b) *The Role and Nature of the “Surrounding Circumstances”*

[56] I now turn to the role of the surrounding circumstances in contractual interpretation and the nature of the evidence that can be considered. The discussion here is limited to the common law approach to contractual interpretation; it does not seek to apply to or alter the law of contractual interpretation governed by the *Civil Code of Québec*.

[57] While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (*Hayes Forest Services*, at para. 14; and Hall, at p. 30). The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (Hall, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62).

[58] The nature of the evidence that can be relied upon under the rubric of “surrounding circumstances” will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (*King*,

étroit qui existe entre, d'une part, le choix et l'application des principes d'interprétation contractuelle et, d'autre part, l'interprétation que recevra l'instrument juridique en dernière analyse fait en sorte que rares seront les circonstances dans lesquelles il sera possible d'isoler une question de droit au cours de l'exercice d'interprétation. En l'absence d'une erreur de droit du genre de celles décrites plus haut, aucun droit d'appel de l'interprétation par un arbitre d'un contrat n'est prévu à l'AA.

b) *Le rôle et la nature des « circonstances »*

[56] Abordons le rôle des circonstances dans l'interprétation du contrat et la nature des éléments admis à l'examen. La présente analyse ne traite que de la démarche d'interprétation contractuelle fondée sur la common law; elle ne se veut ni une application ni une modification du droit relatif à l'interprétation contractuelle régi par le *Code civil du Québec*.

[57] Bien que les circonstances soient prises en considération dans l'interprétation des termes d'un contrat, elles ne doivent jamais les supplanter (*Hayes Forest Services*, par. 14; Hall, p. 30). Le décideur examine cette preuve dans le but de mieux saisir les intentions réciproques et objectives des parties exprimées dans les mots du contrat. Une disposition contractuelle doit toujours être interprétée sur le fondement de son libellé et de l'ensemble du contrat (Hall, p. 15 et 30-32). Les circonstances sous-tendent l'interprétation du contrat, mais le tribunal ne saurait fonder sur elles une lecture du texte qui s'écarte de ce dernier au point de créer dans les faits une nouvelle entente (*Glaswegian Enterprises Inc. c. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62).

[58] La nature de la preuve susceptible d'appartenir aux « circonstances » variera nécessairement d'une affaire à l'autre. Il y a toutefois certaines limites. Il doit s'agir d'une preuve objective du contexte factuel au moment de la signature du contrat (*King*, par. 66 et 70), c'est-à-dire, les renseignements qui

**TAB 29**

**Shelanu Inc. v. Print Three Franchising Corporation  
Print Three Franchising Corporation v. Shelanu Inc. et al.  
[Indexed as: Shelanu Inc. v. Print Three Franchising  
Corp.]**

**64 O.R. (3d) 533  
[2003] O.J. No. 1919  
Docket No. C35392**

**Court of Appeal for Ontario,  
Weiler, Austin and Laskin JJ.A.  
May 20, 2003**

2003 CanLII 52151 (ON CA)

Contracts -- Breach of contract -- Fundamental breach -- Breach of duty of good faith -- Entire agreement clause -- Exclusionary clauses -- [page534] Dispute between franchisor and franchisee -- Franchisee entitled to enforce oral agreement about royalty rebates -- Oral agreement not precluded by exclusionary clauses in franchise agreement -- Where parties have by their conduct amended their written agreement so that it no longer represents their intention, court will refuse to enforce written agreement -- Franchisor breaching contract and breaching duty of good faith -- Breaches not excusing franchisee from future performance of agreement -- Both franchisor and franchisee entitled to damages for breach of contract.

In 1987, BCD Print Inc. ("BCD"), a company owned by Brian Deslauriers, purchased a copy and print store franchise from the defendant Print Three Franchising Corporation ("Print Three") for 239 Bloor Street East in Toronto, and in 1989, Deslauriers and his wife, purchased the shares of the plaintiff Shelanu Inc. ("Shelanu"), which had outlets at 60 and 200 Bloor Street West.

The franchise agreement for Print Three Outlets provided for the payment of royalties to Print Three with royalty rebates depending upon the volume of sales. The franchise agreement contained three exclusionary clauses: paragraph 20 provided that delay exercising a right was not a waiver; paragraph 26 provided that there was no waiver or amendment to the agreement unless signed by all parties; and paragraph 27 was an entire agreement clause providing that the written agreement constituted the entire agreement between the parties with respect to all matters.

In 1991, the 200 Bloor Street outlet was closed without written formalities. In 1993, the 239 Bloor Street West outlet was closed, and its operation was moved eventually to 60 Bloor Street, again without written formalities. In January 1995, pursuant to an oral agreement with Print Three, the BCD franchise was cancelled, and Shelanu began reporting its sales as a single franchise, which would entitle it to a greater royalty rebate under the franchise agreement than was the case when sales were divided between BCD and Shelanu.

By letter on May 2, 1997, Shelanu purported to terminate the franchise agreement, and in August 1997, it sued Print Three for damages. Print Three counterclaimed. Despite the litigation,

Shelanu continued to remit royalty payments on the basis of one franchise. It continued to use the Print Three name on its store. The franchise agreement expired naturally in December 1999.

The trial judge held that the 1995 oral agreement was enforceable. He held that Print Three had breached its contractual obligations and a duty of good faith in four respects, that is: (1) by attempting to rescind the agreement; (2) by unilaterally changing the terms of an Air Miles program; (3) by its failures to make royalty payments; and (4) by allowing the establishment of a Le Print Express franchise, a new franchise concept that would operate in competition with its existing franchise operation. In relation to the first three breaches, the trial judge awarded damages for breach of contract. He did not award separate damages for the breach of the duty of good faith. The trial judge held that the breach entitled Shelanu to terminate the franchise agreement, and he dismissed the counterclaim, although he assessed damages. Print Three appealed. Shelanu cross-appealed on the trial judge's assessment of damages with respect to the counterclaim.

Held, the appeal and cross appeal should be allowed. [page535]

The oral agreement was enforceable and not precluded by the exclusion clauses in the franchise agreement, which had the purpose of limiting the parties' duties to each other to what was reduced to writing and to exclude other duties. In construing an exclusion clause, the issue is whether it covers the alleged occurrence or breach in question. If the clause covers the alleged occurrence or breach, then it is enforceable unless it would be unconscionable or unless the clause is unfair, unreasonable or otherwise contrary to public policy. In the immediate case, the terms of the oral agreement did not conflict with the franchise agreement. Paragraph 20 did not apply because Shelanu was not in breach and the paragraph by its language did not apply to the oral agreement. Paragraph 26 did not apply to Shelanu as there was no change in its obligations relating to the terms of its franchise agreement. With respect to BCD, para. 26 did not apply because there was no waiver or amendment to its franchise agreement; rather, there was a surrender and termination by agreement of the parties. Paragraph 26 did not contemplate what actually occurred. Paragraph 27, the entire agreement clause, did not apply. It could not be said that the entire agreement clause was intended to cover any and all future contractual relations between Shelanu and Print Three.

Since the exclusion clauses did not apply, it was, strictly speaking, unnecessary to address whether the court should exercise its discretion not to enforce the exclusion clauses; however, since the point was fully argued, it should be considered. Where parties have, by their conduct amended their written agreement so that it no longer represents their intention, the court will refuse to enforce the written agreement. To do otherwise is to not give effect to the intentions of the parties, and the writing should not be enforced if it no longer represents the intention of the parties. Enforcing an exclusion clause that is contrary to the reasonable expectation and understanding of the parties would be unfair and unreasonable. Therefore, even if the exclusion clauses applied, the trial judge was entitled to refuse to enforce paras. 20, 26 and 27 of the agreement. The trial judge did not err in finding that Shelanu was entitled to enforce the agreement against Print Three. Therefore, Shelanu was entitled to damages as found by the trial judge.



The trial judge was correct in concluding that Shelanu had breached a duty of good faith. In some instances, a duty of good faith may arise out of the nature of the relationship or the circumstances created by the other party. In the Supreme Court of Canada judgment of *Wallace v. United Grain Growers Ltd.*, a duty of good faith was found to exist in employment contracts, where there typically is a power imbalance between employer and employee. The situation for franchisees was similar. It was unusual for a franchisee to have equal bargaining power to the franchisor. The franchise contract is usually a contract of adhesion. Further, the franchisee is dependent on the franchisor for information and is subject to training and continuing supervision and inspections. Courts have recognized that a duty of good faith exists at common law in the context of a franchisor-franchisee relationship. In the immediate case, the trial judge did not hold Print Three to a higher standard than that imposed by the duty of good faith, namely the duty of a fiduciary. When exercising its powers or discretions, a fiduciary must act only in accordance with the interests of the beneficiary. In contrast, a contracting party under a duty of good faith, in exercising its powers or discretions must give consideration to the interests of the other contracting party as well as its own interests. The trial judge knew the distinction and did not hold Print Three to a fiduciary standard. Whether or not a party under a duty of good faith has breached that duty will depend on all the circumstances of the case, including whether the party subject to the duty conducted itself fairly. There was evidence [page536] upon which the trial judge could hold that there had been breaches of a duty of good faith with respect to the payment of royalty rebates and its advertising program. However, the trial judge committed a palpable and overriding error in concluding that the establishment of the Le Print Express business was a breach of a duty of good faith.

The remaining breaches of the agreement did not support the trial judge's conclusion that there had been a fundamental breach of the agreement entitling Shelanu the right to treat the franchise agreement at an end. For a fundamental breach, the test is restrictive, namely, whether the breaching party's conduct deprived the other party of substantially the whole benefit of the contract. In the immediate case, the trial judge failed to consider the fact that Shelanu continued to use the name of Print Three and continued to have an exclusive territory. To measure whether the innocent party should be excused from future performance, the following factors may be applied: (a) the ratio of the party's obligation not performed to the obligation as a whole; (b) the seriousness of the breach to the innocent party; (c) the likelihood of repetition of such breach; (d) the seriousness of the consequences of the breach; and (e) the relationship of the part of the obligation to the whole obligation. Applying these factors to the breaches of Print Three in this case, Shelanu was not entitled to treat the agreement at an end. Shelanu was not deprived of substantially the whole of the benefit of its agreement with Print Three. Consequently, Shelanu was not entitled to recover the \$199,622 royalties paid by it since May 8, 1997 nor \$59,870 in advertising fees. It was, however, entitled to receive credit for royalty rebates.

There being no fundamental breach excusing Shelanu from future performance, Print City was entitled to succeed on its counterclaim, although the trial judge's assessment of the damages was incorrect. Shelanu was liable for damages for one year. It was liable to pay an amount equal to the loss of one franchise fee, namely \$64,500 for failing to surrender its customer list, telephone and fax numbers. It was liable for loss of revenue and loss of advertising fees for one year at \$29,700 in addition to the franchise fee for a total of \$94,200. The appeal and cross-appeal should be allowed accordingly.

APPEAL from a judgment of Nordheimer J. (2000), 11 B.L.R. (3d) 69, [2000] O.J. No. 4129 (QL) (S.C.J.) for damages for breach of a franchise agreement.

Cases referred to 702535 Ontario Inc. v. Lloyd's London, Non-Marine Underwriters (2000), 184 D.L.R. (4th) 687, [2000] I.L.R. 1-3826 (Ont. C.A.) [Leave to appeal to S.C.C. dismissed, [2000] S.C.C.A. No. 258]; 968703 Ontario Ltd. v. Vernon (2002), 58 O.R. (3d) 215, 22 B.L.R. (3d) 161, [2002] O.J. No. 580 (QL), 155 O.A.C. 386 (C.A.); 978011 Ontario Ltd. v. Cornell Engineering Co. (2001), 53 O.R. (3d) 783, 198 D.L.R. (4th) 615, 12 B.L.R. (3d) 240, 8 C.C.E.L. (3d) 169 (C.A.), revg (1998), 41 B.L.R. (2d) 219, 41 C.C.E.L. (2d) 118 (Ont. Gen. Div.); Algoma Steel Inc. v. Union Gas Ltd. (2003), 63 O.R. (3d) 78, 39 C.B.R. (4th) 5, 168 O.A.C. 89, [2003] O.J. No. 71 (QL) (C.A.), revg in part (2001), 30 C.B.R. (4th) 163, [2001] O.J. No. 5046 (QL) (S.C.J.); Bayer Aktiengesellschaft v. Apotex Inc. (1998), 82 C.P.R. (3d) 526, 113 O.A.C. 1, [1998] O.J. No. 3849 (QL) (C.A.) [Leave to appeal to S.C.C. refused (1999), 239 N.R. 200n], affg (1995), 60 C.P.R. (3d) 58 (Ont. Gen. Div.), supp. reasons (1995), 62 C.P.R. (3d) 1 (Ont. Gen. Div.); Beer v. Townsgate I Ltd. (1997), 36 O.R. (3d) 136, 152 D.L.R. (4th) 671, 12 R.P.R. (3d) 193 (C.A.) [Leave to appeal to S.C.C. refused (1998), 228 N.R. 92n], revg in part (1995), 25 O.R. (3d) 785, 48 R.P.R. (2d) 27 (Gen. Div.); Betker v. Williams (1991), 63 B.C.L.R. (2d) 14, 86 D.L.R. (4th) 395, [1992] 2 W.W.R. 534 (C.A.); Canada (Director of Investigation and Research) v. Southam Inc., [1997] 1 S.C.R. 748, 144 D.L.R. (4th) 1, 209 N.R. 20, 71 C.P.R. (3d) 417; Colautti Construction Ltd. v. City of Ottawa (1984), 46 O.R. (2d) 236, 5 O.A.C. 74, 9 D.L.R. (4th) 265 (C.A.); Ellis v. Abell, [1884] 10 O.A.R. 226 (C.A.); [page537] Fairbanks Soap Co. v. Sheppard, [1953] 1 S.C.R. 314, [1953] 2 D.L.R. 193; Farber v. Royal Trust Co., [1997] 1 S.C.R. 846, 145 D.L.R. (4th) 1, 210 N.R. 161, 97 C.L.L.C. 210-006; Gateway Realty Ltd. v. Arton Holdings Ltd. (1992), 112 N.S.R. (2d) 180, 307 A.P.R. 180, [1992] N.S.J. No. 175 (QL) (C.A.), affg (1991), 106 N.S.R. (2d) 180, 288 A.P.R. 180 (S.C.); Greenberg v. Meffert (1985), 50 O.R. (2d) 755, 18 D.L.R. (4th) 548, 7 C.C.E.L. 152, 37 R.P.R. 74 (C.A.); Guarantee Co. of North America v. Gordon Capital Corp., [1999] 3 S.C.R. 423, 178 D.L.R. (4th) 1, 247 N.R. 97, 49 B.L.R. (2d) 68, [2000] I.L.R. 1-3741, 39 C.P.C. (4th) 100; Harvard College v. Canada (Commissioner of Patents), 2002 SCC 76, 219 D.L.R. (4th) 577, 296 N.R. 1, 21 C.P.R. (4th) 417, [2002] S.C.J. No. 77 (QL); Hodgkinson v. Simms, [1994] 3 S.C.R. 377, 97 B.C.L.R. (2d) 1, 117 D.L.R. (4th) 161, 171 N.R. 245, [1994] 9 W.W.R. 609, 16 B.L.R. (2d) 1, 22 C.C.L.T. (2d) 1, 57 C.P.R. (3d) 1, 95 D.T.C. 5135, 5 E.T.R. (2d) 1; Hongkong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd., [1962] 1 All E.R. 474, [1962] 2 Q.B. 26, [1962] 2 W.L.R. 474, 106 Sol. Jo. 35, [1961] 2 Lloyd's Rep. 478 (C.A.); Housen v. Nikolaisen, 2002 SCC 33, (2002), 219 Sask. R. 1, 211 D.L.R. (4th) 577, 286 N.R. 1, 272 W.A.C. 1, [2002] 7 W.W.R. 1, 30 M.P.L.R. (3d) 1, 10 C.C.L.T. (3d) 157, [2002] S.C.J. No. 31 (QL); Hunter Engineering Co. v. Syncrude Canada Ltd., [1989] 1 S.C.R. 426, 35 B.C.L.R. (2d) 145, 57 D.L.R. (4th) 321, 92 N.R. 1, [1989] 3 W.W.R. 385 (sub nom. Syncrude Canada Ltd. v. Hunter Engineering Co.); Imasco Retail Inc. (c.o.b. Shoppers Drug Mart) v. Blamaru (1996), 113 Man. R. (2d) 269, 131 W.A.C. 269, [1997] 2 W.W.R. 295 (C.A.), affg (1995), 104 Man. R. (2d) 286, [1995] 9 W.W.R. 44 (Q.B.); Jirna Ltd. v. Mister Donut of Canada Ltd., [1975] 1 S.C.R. 2, 40 D.L.R. (3d) 303, 12 C.P.R. (2d) 1, affg [1972] 1 O.R. 251, 22 D.L.R. (3d) 639, 3 C.P.R. (2d) 40 (C.A.); Kelsey Group Inc. v. 756766 Ontario Ltd. (1990), 30 C.P.R. (3d) 355, [1990] O.J. No. 598 (QL) (H.C.J.); Kentucky Fried Chicken Canada, a Division of Pepsi-Cola Canada Ltd. v. Scott's Food Services Inc. (1998), 41 B.L.R. (2d) 42, 114 O.A.C. 357 (C.A.), revg (1997), 35 B.L.R. (2d) 21 (Ont. Gen. Div.); Kenyon, Son & Craven Ltd. v. Baxter Hoare & Co. Ltd., [1971] 1 W.L.R. 519 (Q.B.); Khagen

Investments Ltd. v. 710497 Ontario Ltd., [1999] O.J. No. 2152 (QL), 98 O.T.C. 241 (S.C.J.); LeMesurier v. Andrus (1986), 54 O.R. (2d) 1, 12 O.A.C. 299, 25 D.L.R. (4th) 424, 38 R.P.R. 183 (C.A.), revg (1984), 31 R.P.R. 143 (Ont. H.C.J.); Machias v. Mr. Submarine Ltd. (2002), 24 B.L.R. (3d) 228, [2002] O.J. No. 1261 (QL) (S.C.J.); Majdpour v. M & B Acquisition Corp. (2001), 56 O.R. (3d) 481, 206 D.L.R. (4th) 627, 45 R.P.R. (3d) 199, 151 O.A.C. 351, [2001] O.J. No. 4932 (QL) (C.A.), affg (2001), 43 R.P.R. (3d) 312, 25 C.B.R. (4th) 62, [2001] O.J. No. 1113 (QL) (S.C.J.); Manitoba (Hydro Electric Board) v. John Inglis Co. (1999), 142 Man. R. (2d) 1, 181 D.L.R. (4th) 470, 212 W.A.C. 1, [2000] 1 W.W.R. 516, [1999] M.J. No. 506 (QL) (C.A.), affg (1998), 128 Man. R. (2d) 199 (Q.B.); Manulife Bank of Canada v. Conlin, [1996] 3 S.C.R. 415, 30 O.R. (3d) 577n, 139 D.L.R. (4th) 426, 203 N.R. 81, 30 B.L.R. (2d) 1, 6 R.P.R. (3d) 1; Martin v. Goldfarb (1998), 41 O.R. (3d) 161, 163 D.L.R. (4th) 639, 44 B.L.R. (2d) 158, 42 C.C.L.T. (2d) 271 (C.A.) [Leave to appeal to S.C.C. refused (1999), 239 N.R. 193n], revg in part (1997), 31 B.L.R. (2d) 265 (Ont. Gen. Div.); Mason v. Freedman, [1958] S.C.R. 483, 14 D.L.R. (2d) 529; Mellco Developments Ltd. v. Portage la Prairie (City), [2002] M.J. No. 381 (QL), 222 D.L.R. (4th) 67, [2003] 1 W.W.R. 216, 32 M.P.L.R. (3d) 1, 28 B.L.R. (3d) 17, 19 C.L.R. (3d) 1, 2002 MBCA 125, 4 R.P.R. (4th) 28 (C.A.), affg [2001] 11 W.W.R. 282, 22 M.P.L.R. (3d) 227, 11 C.L.R. (3d) 227, 2001 MBQB 236 (Q.B.); Metro-Pacific Cellular Inc. v. Rogers Cantel Inc. (1994), 57 C.P.R. (3d) 538 (B.C.S.C.); Naylor Group Inc. v. Ellis-Don Construction Ltd., [2001] 2 S.C.R. 943, 55 O.R. (3d) 312n, 204 D.L.R. (4th) 513, 277 N.R. 1, 2001 SCC 58, 17 B.L.R. (3d) 161, 10 C.L.R. (3d) 1; Photo Production Ltd. v. Securicor Transport Ltd., [1980] A.C. 827, [1980] 1 All E.R. 556, 2 W.L.R. 283, 124 Sol. Jo. 147, [1980] 1 Lloyd's Rep. 545, 130 N.L.J. 188 (H.L.); [page538] River Wear Commissioners v. Adamson (1877), 2 App. Cos. 743, [1874-80] All E.R. Rep. 1, 47 L.J.Q.B. 193, 37 L.T. 543, 42 J.P. 244, 26 W.R. 217, 3 Asp. M.L.C. 521 (H.L.); Robson v. Thorne, Ernst & Whinney (1999), 127 O.A.C. 215, [1999] O.J. No. 4638 (QL) (C.A.); Schmidt v. Air Products of Canada Ltd., [1994] 2 S.C.R. 611, 20 Alta. L.R. (3d) 225, 115 D.L.R. (4th) 631, 168 N.R. 81, [1994] 8 W.W.R. 305, 4 C.C.E.L. (2d) 1, 3 E.T.R. (2d) 1 (sub nom. Stearns Catalytic Pension Plans (Re)); Shah v. Xerox Canada Ltd. (2000), 49 C.C.E.L. (2d) 166, 2000 C.L.L.C. 210-022, [2000] O.J. No. 849 (QL), 131 O.A.C. 44 (C.A.), affg (1998), 49 C.C.E.L. (2d) 30, 99 C.L.L.C. 210-003, [1998] O.J. No. 4349 (QL), 77 O.T.C. 171 (Gen. Div.); Solway v. Davis Moving & Storage Inc. (2002), 62 O.R. (3d) 522, 222 D.L.R. (4th) 251, [2002] O.J. No. 4760 (QL) (C.A.), revg (2001), 57 O.R. (3d) 205 (S.C.J.); Supermarché A.R.G. Inc. v. Provigo Distribution Inc. (1997), [1998] R.J.Q. 47, [1997] A.Q. No. 3710, J.E. 98-39 (C.A.); Turner v. Visscher Holdings Inc. (1996), 23 B.C.L.R. (3d) 304, [1996] B.C.J. No. 998 (QL), 77 B.C.A.C. 48 (C.A.); Wallace v. United Grain Growers Ltd., [1997] 3 S.C.R. 701, 123 Man. R. (2d) 1, 152 D.L.R. (4th) 1, 219 N.R. 161, 159 W.A.C. 1, [1999] 4 W.W.R. 86, 36 C.C.E.L. (2d) 1, 97 C.L.L.C. 210-029, 3 C.B.R. (4th) 1; Whiten v. Pilot Insurance Co., 2002 SCC 18, [2002] 1 S.C.R. 595, 209 D.L.R. (4th) 257, 283 N.R. 1, [2002] I.L.R. 1-4048, 20 B.L.R. (3d) 165, [2002] S.C.J. No. 19 (QL), revg (1999), 42 O.R. (3d) 641, 170 D.L.R. (4th) 280, [1999] I.L.R. 1-3659, 32 C.P.C. (4th) 3 (C.A.); Whiting v. Winnipeg River Brokenhead Community Futures Development Corp. (1998), 126 Man. R. (2d) 176, 159 D.L.R. (4th) 18, 167 W.A.C. 176, [1998] 9 W.W.R. 584 (C.A.), revg in part (1997), 116 Man. R. (2d) 89, 27 C.C.E.L. (2d) 142 (Q.B.); York Condominium Corp. No. 167 v. Newrey Holdings Ltd. (1981), 32 O.R. (2d) 458, 122 D.L.R. (3d) 280, 14 R.P.R. 62 (C.A.) [Leave to appeal to S.C.C. refused [1981] 1 S.C.R. xi]; Zippy Print Enterprises Ltd. v. Pawliuk (1994), 100 B.C.L.R. (2d) 55, [1995] 3 W.W.R. 324, 20 B.L.R. (2d) 170 (C.A.); Zurich Insurance Co. v. 686234 Ontario Ltd. (2002), 62 O.R. (3d) 447, 222 D.L.R. (4th) 655, [2003] I.L.R. 1-4137, [2002] O.J. No. 4496 (QL) (C.A.), (2001), [2002]

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Benjamin Zarnett and Elliot S. Birnboim, for appellant.  
F. Scott Turton, for respondents.

The judgment of the court was delivered by

WEILER J.A: --

## I. INTRODUCTION

[1] Print Three is a franchisor of copying and print stores. Shelanu was a Print Three franchisee owned by Brian Deslauriers and his wife, Mary. Shelanu alleged that Print Three breached its obligations as a franchisor and, in addition to claiming damages, alleged that it was entitled to be released from further performance of its obligations as a franchisee from the date it gave notice of termination of the franchise agreement (the "agreement"). Print Three denied any breach of its obligations and counterclaimed for damages. Nordheimer J. held in favour of Shelanu with respect to both damages and fundamental breach and dismissed Print Three's counterclaim. Despite this finding, he assessed the damages under the counterclaim.

## II. OVERVIEW

[2] Print Three's appeal raises three main issues. The first issue is whether the trial judge erred in holding that Print Three breached any of its obligations to Shelanu. In connection with this issue, Print Three alleges that the trial judge erred in holding that it breached an oral agreement entered into after the written franchise agreement. The effect of the oral agreement was to entitle Shelanu to a greater royalty rebate under the agreement. Print Three submits that the oral agreement is unenforceable due to the existence of an entire agreement clause and other clauses excluding oral amendments and waivers not in writing in the agreement (collectively referred to, for ease of reference, as the exclusion clauses) and due to lack of consideration. The second issue is whether the trial judge erred in holding that the parties owed each other a duty of good faith and that Print Three breached that duty by allowing for the [page540] establishment of a Le Print Express

franchise. If Print Three did breach its obligations to Shelanu, the third issue is whether the breach was so fundamental that Shelanu was released from further performance of the agreement from the date it gave notice of termination of the agreement.

[3] In the event that Shelanu was not released from further performance of its obligations as a franchisee, I must consider Shelanu's cross-appeal of the trial judge's assessment of damages under Print Three's counterclaim.

[4] With respect to the first issue, based on the twofold approach I adopt, I would hold that the subsequent oral agreement is enforceable despite the existence of the exclusion clauses. First, I determine whether these clauses apply to the subsequent oral agreement and I conclude that they do not. I would also uphold the trial judge's finding that there was consideration for the oral agreement. Second, because the appellant has not appealed the trial judge's finding that the oral agreement exists and there is no dispute as to its terms, I find that the subsequent oral agreement represents the intentions and legitimate expectations of the parties and, in these circumstances, should prevail.

[5] With respect to the second issue, the trial judge recognized a common law and statutory duty of good faith between Print Three and Shelanu. I would hold that the trial judge did not err in recognizing the existence of a duty of good faith at common law. For reasons I will specify later, the circumstances giving rise to the duty of good faith that the Supreme Court recognized in the employment context in *Wallace v. United Grain Growers Ltd. (c.o.b. Public Press)*, [1997] 3 S.C.R. 701, 152 D.L.R. (4th) 1 are equally present in the franchisor franchisee relationship here. Print Three had a duty of good faith in the sense that it had an obligation to have regard to Shelanu's legitimate interests and to deal promptly, honestly, fairly and reasonably with Shelanu. I would also hold that the trial judge did not impose a higher, fiduciary duty on Print Three.

[6] Given my conclusion, it is unnecessary to decide whether the Arthur Wishart Act (Franchise Disclosure), 2000, S.O. 2000, c. 3, which applies to existing franchises, is applicable in this case where the acts in issue took place prior to the coming into force of the Act.

[7] I agree with the trial judge that Print Three breached its obligations to Shelanu with respect to payment of royalty rebates and its advertising program. I disagree, however, with the trial judge's conclusion that the establishment of the Le Print Express business was a breach of Print Three's duty of good faith towards [page541] Shelanu. The trial judge committed a palpable and overriding error in coming to that conclusion.

[8] With respect to the third issue, fundamental breach, having regard to my conclusion that the establishment of the Le Print Express franchise was not a breach of Print Three's obligations towards Shelanu and to the fact that Shelanu continued to derive the benefit of the use of Print Three's name and an exclusive territory after it purported to terminate the agreement, I would hold that the trial judge erred in excusing Shelanu from further performance under the agreement.

[9] In relation to the cross-appeal respecting damages, though I have concluded that Shelanu was not excused from further performance under the agreement, I would hold that the trial judge

committed an error in principle in holding Shelanu liable for damages over a period of ten years, or the life of a franchise agreement. Instead, based on Shelanu's breach of its one-year non-competition clause, I would hold Shelanu liable for damages for one year. I would agree with the trial judge that Shelanu is liable to pay Print Three an amount equal to the loss of one franchise fee -- namely \$64,500 -- for failing to surrender its customer list, telephone and fax numbers at the end of the agreement. In accordance with the figures used by the trial judge, I would assess the damages to Print Three for loss of revenue and loss of advertising fees for one year at \$29,700 in addition to the franchise fee of \$64,500 for a total of \$94,200. My reasons follow.

### III. LEGAL ISSUES

[10] The decision of the trial judge is reported at [2000] O.J. No. 4129 (QL), 11 B.L.R. (3d) 69 (S.C.J.) and, therefore, a brief outline of the facts relating to the alleged breaches will suffice to appreciate the legal arguments and these reasons.

#### 1. Enforceability of the Oral Agreement

##### A. Facts

[11] In 1987, BCD Print Inc., a company owned by Brian Deslauriers, purchased a Print Three franchise for a location at 239 Bloor Street East in Toronto. BCD is not a party to this action, although it is a party to the oral agreement.

[12] Two years later, Brian Deslauriers and his wife, Mary, purchased the shares of Shelanu Inc., which had two Print Three franchises at 60 and 200 Bloor Street West. They entered into two new franchise agreements with Print Three for each of these locations and gave a personal guarantee of the debts of Shelanu. [page542] In September 1991, there was a downturn in the economy and, with the oral agreement of Jack Banks, the principal behind Print Three, Shelanu closed the operation at 200 Bloor Street West. Paragraph 26 of the franchise agreement required that any change to the terms or covenants of the agreement be in writing. No such documentation was ever requested or required by Print Three when the 200 Bloor Street West location was closed.

[13] Over the next few years, the Deslauriers continued to struggle with their businesses and eventually BCD closed the 239 Bloor Street East location and moved it to 80 Bloor Street West. Pursuant to the written franchise agreement, Print Three was to lease the space but was not interested in doing so. BCD leased the space directly at 80 Bloor Street West and used it as a production facility for Shelanu's business. Print Three did not object. Instead, Banks orally offered to let the Deslauriers surrender BCD's franchise but said that, if they did, he would feel free to put a new franchise in at 239 Bloor Street East. Afraid of the competition, the Deslauriers declined Banks' offer at this time.

[14] On January 13, 1995, two years after the closure of the 239 Bloor Street East outlet, the Deslauriers met with Banks and asked him if they could surrender the BCD franchise. (By this time BCD had moved into space at 60 Bloor Street West, above the premises occupied by

Shelanu). He agreed but asked that they confirm this agreement with his legal counsel. Three days later, Mary Deslauriers wrote a letter on BCD letterhead as follows:

This is to confirm our discussion of Friday, January 13, 1995, with Jack Banks, that we would like to operate our business as one franchise, that being the franchise located at 60 Bloor St. W. Therefore, we are hereby cancelling our licensing agreement for the franchise formerly located at 239 Bloor Street East (location #73). We will then submit royalties for all revenues on one report. If possible, we would like this change to be effective January 1, 1995.

[15] The reference to submitting royalties is a reference to Shelanu's obligation to pay Print Three a monthly royalty of six per cent of gross sales pursuant to para. 3 of the franchise agreement.

[16] The franchise agreement provided that a percentage of the royalties paid was to be remitted to the franchisee based on the franchisee's aggregate sales each quarter. As certain gross sales levels were met, the percentage of royalties rebated increased. As two franchises, the sales were split between BCD and Shelanu with the result that gross sales levels would be lower for both [page543] franchises and, consequently, the percentage royalty rebate owed by Print Three would be lower. Conversely, if Shelanu reported all sales, gross sales levels would be higher and the royalty rebate would be at a higher percentage.

[17] In early February 1995, the Deslauriers reported as one franchise, Shelanu, and sent the royalty statement based on sales for the month of January. Charlotte Krebs, a Print Three employee, called Mary Deslauriers and told her that one franchise report was missing. Mary Deslauriers told her of the agreement reached with Banks. Subsequently, Krebs called Mary Deslauriers again and said that Banks might require a new franchise agreement to be signed. Mary Deslauriers was surprised at this and said she would speak to Banks. Although Mary Deslauriers called and left messages for Banks asking why a new agreement would be necessary, he never returned her call, and the question of a new franchise agreement was not raised again.

[18] On April 6, 1995, Mary Deslauriers sent a letter to Krebs enclosing Shelanu's royalty cheque for March as one franchise. The letter stated in part:

Since your inquiry, we have left several messages for Jack to see if he has any concerns about this. We have not heard back from him, so we assume that we are and have been since January, one franchise. We are therefore looking forward to a Royalty Rebate for this quarter accordingly.

[19] Around this time a dispute arose between Print Three and many of the franchisees regarding advertising. This dispute is the subject of an issue called the Air Miles program that I will discuss later. The fact that the Deslauriers sided with the other franchisees on this issue angered Banks. On May 8, 1995, Banks expressed some of this anger during a telephone conversation with Mary Deslauriers. According to Mary Deslaurier's note, he stated, among other things, "Every franchise that did not pay the 3 per cent for April [for the Air Miles advertising program], Jack [Banks] is going to go after, and he's going to close them down. And he's going to write a letter

to us saying that he will never help us out again . . .". Following this conversation, Banks wrote a letter to the Deslauriers purporting to deny the "request to terminate one of your franchise agreements and to consolidate your two centres".

[20] The quarter following the phone call (July to September 1995) was the first time the royalty rebate was withheld. Print Three also withheld the royalty rebate for the fourth quarter (October to December 1995). [page544]

[21] The royalty rebates remained an outstanding problem. Print Three also withheld royalty rebates for the second quarter of 1996 without explanation. On October 3, 1996, a meeting took place between Bob Davis, a former franchisee who had become president of Print Three, and the Deslauriers to deal with the issue of royalty rebates. Davis asked to see the production facility now located on the 12th floor of 60 Bloor Street West and Brian Deslauriers refused to show it to him. He wanted to discuss the unpaid rebates. Towards the end of the meeting, Davis handed over a royalty rebate cheque for the royalty rebates due for the second quarter of 1996 apparently on the basis of there being two franchises. On October 7, 1996, the royalty rebates for the third and fourth quarters of 1995 were also paid on the basis that there were two franchises. On October 8, at Davis' request, Brian Deslauriers sent a letter to Davis again outlining the 1995 agreement he had with Banks. The next day Davis replied, stating they were in breach of the franchise agreement for refusing to allow him to see the production facility, and, as a result, were not entitled to any royalty rebate. The amount of this rebate was \$2,241 or \$8,947, depending upon whether the January 13, 1995 agreement was enforceable (i.e. depending on whether they were reporting as one or two franchises). Brian Deslauriers wrote back saying Davis could see the production facility any time it was convenient for him. This visit took place on January 16, 1996 and lasted only a few minutes. On January 24, 1996, Davis sent a letter to Brian Deslauriers indicating that he had decided he would continue to treat their operation as two stores for rebate purposes.

[22] On May 2, 1997, Shelanu wrote a letter alleging a number of breaches of the franchise agreement and purporting to terminate the franchise agreement with Print Three. In August 1997, Shelanu commenced an action against Print Three for royalty rebates it claimed were owing. Despite the litigation, Shelanu continued to remit royalty payments on the basis of one franchise. Shelanu also continued to use the name Print Three on its store until October 16, 1999. The franchise agreement expired naturally in December 1999.

[23] Neither Banks nor Krebs testified at trial.

#### B. The findings of the trial judge

[24] Since neither Banks nor Krebs testified, the trial judge inferred that their evidence would not have supported the defence position respecting the lack of any oral agreement. From this inference, and the evidence as a whole, the trial judge found [page545] that an oral agreement was reached in January 1995 in which Print Three agreed to cancel BCD's franchise for the 239 Bloor Street East location and to allow BCD to combine its production operations with the retail operations of Shelanu. Because an oral agreement had been reached in January 1995, Banks'



letter of May 1995 and Davis' letter in January 1996, unilaterally refusing to treat the production facility and the store at 60 Bloor Street West as one location, had no effect.

[25] The trial judge rejected the appellant's argument that the agreement was unenforceable. He found that the defendant did not require any formal written documentation when Shelanu terminated the franchise at the 200 Bloor Street West location or when BCD closed the 239 Bloor Street East location and moved it to 80 Bloor Street West and, consequently, it was not now open to Print Three to insist on strict compliance with its rights under the written agreement.

[26] With respect to the issue of consideration, the trial judge found that this was a three-party agreement and that there was consideration flowing to Print Three from both BCD and Shelanu. From BCD, Print Three obtained the release of the territory related to the 239 Bloor Street East location that it could then sell to a new franchisee. From Shelanu, Print Three received the benefit of Shelanu's improved financial situation. Presumably, the trial judge meant that Print Three received the benefit of increased royalties from Shelanu resulting from its increased sales which, in turn, were derived from the synergies of combining BCD's and Print Three's operations into one. On the issue of privity, the trial judge found that the representatives of both BCD and Shelanu, the Deslauriers, were present with Print Three's representative, Banks, at the meeting where the agreement was reached. He saw no reason why Shelanu -- one of the parties to the agreement and its principal beneficiary -- could not enforce it.

[27] The evidence respecting the making of the oral agreement and its existence were explored extensively at trial. On appeal, the appellant accepts the finding of the trial judge that there was an oral agreement in January 1995, but submits that the trial judge erred in law in holding that this oral agreement was enforceable.

[28] The paragraphs in the written franchise agreement which the appellant submits are contrary to the oral agreement are para. 20 (delay in exercising a right or breach of default is not waiver of right), para. 26 (no waiver, amendment or change of any terms unless signed by all parties) and para. 27 (this [written] agreement constitutes the entire agreement between the parties with respect to all matters herein). [page546]

[29] Simply put, the appellant's position is that the parties' bargain is to be equated with the document they have signed.

### C. Analysis

#### (i) Exclusion clauses: interpretive approach

[30] Before deciding not to enforce the exclusion clauses, the trial judge did not specifically consider whether they applied to the oral agreement. This seems to me to be a necessary first step. Once a determination has been made that the exclusion clauses apply, the court can then consider whether they should be enforced.

[31] Paragraphs 20, 26, and 27 are not limitation or exclusion clauses in the traditional sense that they limit or exclude liability for damages for breach of contract or for a tort connected to the

contract. Their purpose is, rather, to limit the parties' duties to each other to what has been reduced to writing and, as a corollary, to exclude any other duties. More specifically, an entire agreement clause seeks to exclude liability for statements other than those set out in the written contract and is sometimes referred to as an exclusion clause. See H.G. Beale et al., eds., *Chitty on Contracts*, 28th ed. (London: Sweet & Maxwell, 1999), vol. 1 at 12-102; *Kenyon, Son & Craven Ltd. v. Baxter Hoare & Co. Ltd.*, [1971] 1 W.L.R. 519 (Q.B.) at p. 522; *Betker v. Williams* (1991), 86 D.L.R. (4th) 395, 63 B.C.L.R. (2d) 14 (C.A.); *Zippy Print Enterprises Ltd. v. Pawliuk* (1994), 100 B.C.L.R. (2d) 55 (C.A.). Further, in construing an entire agreement clause, in *Beer v. Townsgate I Ltd.* (1997), 36 O.R. (3d) 136, 152 D.L.R. (4th) 671 (C.A.) at p. 147 O.R., this court resorted to the reasoning typically associated with an exclusion clause that limits liability for damages.

[32] The approach that I am adopting here is consistent with the approach to construing and enforcing exclusion or limitation clauses relating to damages as stated in *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426, 57 D.L.R. (4th) 321. Dickson C.J., with whom La Forest J. concurred, held that exclusion clauses are not inherently unreasonable. In construing an exclusion clause, the issue to be addressed is whether, as a matter of construction, the exclusion clause covers the alleged occurrence or breach in question. Exclusion clauses are to be approached with the aid of the cardinal rules of contractual construction: they must be read *contra proferentem* and clear words are necessary for the exclusion clause to apply. See *Photo Production Ltd. v. Securicor Transport Ltd.*, [1980] A.C. 827, [1980] 1 All E.R. 556 (H.L.) per Lord [page547] Wilberforce at p. 846 A.C., cited by Dickson C.J. at p. 458 S.C.R. of his judgment.

[33] When the exclusion clause covers the alleged occurrence or breach, the question is whether to enforce the exclusion clause. Where the court is of the opinion extreme unfairness would result from the enforcement of an exclusion clause, such as, for example, where there was inequality of bargaining power, this concern should be addressed directly through the doctrine of unconscionability. Dickson C.J. held that courts should no longer use the term fundamental breach to avoid the operation of an exclusion clause as this term is confusing. The approach of directly addressing the concerns respecting enforcement of the exclusion clause would allow the courts to focus expressly on the real grounds for refusing to enforce a contractual term agreed to by the parties.

[34] The other major opinion in *Hunter Engineering*, *supra*, is that of Wilson J. with whom L'Heureux-Dubé J. concurred. Wilson J. held that the court's responsibility did not end with construing the contract to ascertain the bargain that the parties had made. She was of the opinion that the court had a responsibility to assess the reasonableness of enforcing the exclusion clause in the contract in light of subsequent events. The doctrine of unconscionability did not suffice to relieve a party from the effect of an exclusion clause that operated unfairly because it was traditionally restricted to inequality of bargaining power and the circumstances existing at the time the contract was made: see *Hunter Engineering*, *supra*, at pp. 511-18 S.C.R. See also N. Rafferty, "Developments in Contract and Tort Law: The 1999-2000 Term" (2000) 13 S.C.L.R. (2d) 125 at pp. 141-43.

[35] In *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, 178 D.L.R. (4th) 1, the Supreme Court of Canada ". . . interpreted *Hunter Engineering* in such a way as to indicate that there was little distinction between the approaches of Dickson C.J. and Wilson J." respecting the enforceability of exclusion clauses: Rafferty, *supra*, at p. 143. I agree. At para. 52 of the reasons in *Gordon Capital*, *supra*, Iacobucci and Bastarache JJ. stated:

The only limitation placed upon enforcing the contract as written . . . would be to refuse to enforce an exclusion of liability in circumstances where to do so would be unconscionable, according to Dickson C.J., or unfair, unreasonable or otherwise contrary to public policy, according to Wilson J.

[36] With this framework for contractual interpretation in mind, I will now turn to the agreements in issue with a view [page548] to determining whether the paragraphs in issue apply to the oral agreement.

(ii) Does the tripartite oral agreement conflict with the wording of the exclusion clauses in the franchise agreement?

[37] Paragraph 3B of the agreement requires the franchise owner to pay a continuing royalty -- amounting to six per cent of all monthly gross sales -- for the use of the franchisor's on-going assistance, trademarks and know-how. Regardless of whether Shelanu operated as one franchise or as two, it had to pay Print Three six per cent of all monthly gross sales. It was in relation to the royalty rebate provided for in the agreement that the dispute arose. In this regard the wording of the agreement is again instructive. Paragraph 3C states that the rebate on quarterly gross sales from \$81,501 to [\$]135,850 is 33 and 1/3 per cent. On sales between \$135,851 and \$190,190, the rebate is 66 and 2/3 per cent, and on sales over \$190,191 it is 100 per cent. The next relevant sentence is:

The foregoing royalty rebate calculation assumes Franchise Owner has just one (1) location.

If the franchisee has two locations, gross sales must attain \$163,001 before the rebate of 33 1/3 [per cent] of gross sales is payable.

(Emphasis added)

[38] Paragraph 5 requires the franchise owner to operate only at the location specified in the agreement. The address indicated for Shelanu's approved location is 60 Bloor Street West, Toronto, Ontario. With respect to Shelanu's franchise agreement, nothing changed in January 1995; it was operating as a single franchise out of a single location, namely 60 Bloor Street West. Consistent with the oral agreement reached with Jack Banks on January 13, 1995, BCD had cancelled its franchise with Print Three. BCD effectively merged with Shelanu; however, Shelanu's franchise did not change. It continued to operate as a single franchise under the terms of the franchise agreement. The oral agreement reached was not inconsistent with para. 5.

[39] I will now consider whether the paragraphs in issue are inconsistent with the alleged oral agreement.

[40] Paragraph 20 states:

No delay or omission to exercise a right, power or remedy accruing to one party on any breach or default of this Agreement shall be construed as a waiver of such right, power or remedy of said party nor will it prevent Franchisor from thereafter enforcing strict compliance with any and all of the terms and conditions herein set forth. [page549]

[41] The words "right, power or remedy" are not used in a vacuum but relate to "any breach or default of this Agreement". Para. 20 has no application because Shelanu was not in breach of its agreement and because para. 20 does not apply to the three-party oral agreement that was reached. It applies only to "this Agreement", that is, the written franchise agreement between Print Three and Shelanu.

[42] The appellant also relies on paras. 26 and 27 of the franchise agreement between Shelanu and Print Three. Paragraph 26 is as follows:

No waiver, amendment or change of any of the terms or covenants of this Agreement or non-compliance therewith, shall be binding or effective unless effected by a notice signed by any and all parties hereto. The Franchise Owner shall execute such further and other documents, including, without limitation a registered user agreement in respect of the Mark, as may be required from time to time, by the franchisor, to carry out the full intent and purpose of this Agreement.

[43] Again the words, "waiver amendment or change" are not used in a vacuum. They are tied to "any of the terms or covenants of this Agreement". Shelanu owned one franchise and there was no change in its obligations relating to the terms or covenants of that agreement. This is indirectly acknowledged in para. 36 of the appellant's factum which states, "Nothing about Print Three observing or not observing the January 13, 1995 Agreement could be a breach of Shelanu's Franchise Agreement."

[44] The oral agreement would only be enforceable if it was valid and binding on all three parties, including BCD. BCD's written franchise agreement with Print Three contained the same wording as Shelanu's. In considering the enforceability of the tri-partite agreement I will also therefore consider whether the exclusion paragraphs applied to BCD. Paragraph 20 of the written agreement between BCD and Print Three also applies only to the two parties and would not apply to the three party oral agreement that was reached. I turn now to consider whether, as against BCD, the words, "waiver, amendment or change" in para. 26 would apply. The surrender of the franchise was not a waiver or amendment to BCD's franchise agreement as both these words envisage the continuation of some aspect of the franchise agreement and not, as is the case here, its surrender and termination by agreement of the parties. As Cory J. held in *Schmidt v. Air Products of Canada Ltd.*, [1994] 2 S.C.R. 611, 115 D.L.R. (4th) 631 at para. 66 in concluding that a power to amend a trust did not include the power to revoke it, ". . . amendment means change not cancellation which the word revocation connotes". Similarly, in this case, we are dealing with a revocation of [page550] a franchise licence, not an amendment or change to the licence. Further, in interpreting the Patent Act, R.S.C. 1985, c. P-4, in *Harvard College v.*

Canada (Commissioner of Patents), 2002 SCC 76, [2002] S.C.J. No. 77 (QL), at para. 161, McLachlin C.J.C. on behalf of the majority, stated:

It is a well-known principle of statutory interpretation that the meaning of questionable words or phrases in a statute may be ascertained by reference to the meaning of the words or phrases associated with them (P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at pp. 313-14.). Also, a collective term that completes an enumeration is often restricted to the same genus as those words, even though the collective term may ordinarily have a much broader meaning (at p. 315).

[45] The principles which govern the interpretation of contracts are essentially the same as for statutory interpretation: *River Wear Commissioners v. Adamson* (1877), 2 App. Cos. 743, [1874-80] All E.R. Rep. 1 (H.L.) at pp. 763-65 App. Cos. adopted by L'Heureux-Dubé J. in dissent but not on this point in *Manulife Bank of Canada v. Conlin*, [1996] 3 S.C.R. 415, 139 D.L.R. (4th) 426 at para. 40 and also *Manitoba (Hydro-Electric Board) v. John Inglis Co.*, [1999] M.J. No. 506 (QL), 181 D.L.R. (4th) 470 (C.A.). Applying these principles of interpretation to the phrase, "waiver, amendment or change" in this case, the word change would be construed as including a change that would nevertheless result in the continuation of the agreement not, as here, its revocation and termination. The paragraph does not contemplate what occurred pursuant to the oral agreement, namely, a surrender and revocation of the franchise for 239 Bloor Street East by mutual agreement. Paragraph 26 in BCD's agreement does not conflict with the oral agreement.

[46] Paragraph 27 of the agreement reads as follows:

This agreement constitutes the entire Agreement between the parties with respect to all of the matters herein and its execution has not been induced by, nor do any of the parties hereto rely upon or regard as material, any representation or right not incorporated herein. Any representations, inducements, promises, and agreements, oral or otherwise not contained herein shall have no force or effect in the construction of the rights and obligations of the parties created by this Agreement.

[47] Paragraph 27 deals "with . . . all of the matters herein" and states that any oral or other representations have no force or effect in the "construction of the rights and obligations of the parties created by this Agreement". The rights and obligations of the parties to the oral agreement, namely, BCD, Shelanu and Print Three are, as I have said, not "matters herein" and were not "created" by the franchise agreement between Shelanu and Print Three or, for that matter, BCD and Print Three. [page551]

[48] Further, the ordinary meaning of the language used in para. 27 is that the written agreement represented the entire agreement between the parties at the time it was signed. J. Beatson, in *Anson's Law of Contract*, 27th ed. (Oxford: Oxford University Press, 1998) at pp. 494-95 states:

A simple contract, . . . whether in writing or not, may be varied by a subsequent agreement either written or oral. This in no way conflicts with the rule that extrinsic evidence is not admissible to vary or add to the contents of the written document, for that principle merely refers to the ascertainment of the original intention of the parties.

(Emphasis added)

[49] Indeed, an exception to the parol evidence rule is the existence of any subsequent oral agreement to rescind or modify a written contract provided that the agreement is not invalid under the Statute of Frauds: *Ellis v. Abell*, [1884] 10 O.A.R. 226 (C.A.) at para. 85.

[50] Clauses such as the entire agreement clause in issue here are normally used to try to exclude representations made prior to the signing of the written agreement. See P.M. Perell, "A Riddle Inside an Enigma: The Entire Agreement Clause" (1998) *Advocates' Q.* 287. Nothing in para. 27 suggests that an oral agreement to surrender the franchise several years later would be of no effect. It cannot be said the entire agreement clause was clearly intended to cover any and all future contractual relations between Shelanu and Print Three. See *Turner v. Visscher Holdings Inc.*, [1996] B.C.J. No. 998 (QL), 23 B.C.L.R. (3d) 304 (C.A.). The fact that Print Three and Shelanu entered into and acted upon an oral agreement respecting the surrender of the franchise at 200 Bloor Street West indicates this was not the case. Indeed, J.M. Perillo, ed., *Corbin on Contracts* (St. Paul, MN: Western Publishing Co., 1993) states at para. 1295 that an express provision in a written contract forbidding oral variation of the terms of a contract or its discharge is generally unsuccessful with respect to subsequent agreements. The reason he gives is that:

Two contractors cannot by mutual agreement limit their power to control their legal relations by future mutual agreement. Nor can they in this manner prescribe new rules of evidence and procedure in the proof of facts and events.

[51] Paragraph 27 has no application either.

[52] The wording of the exclusion paragraphs does not conflict with the subsequent tri-partite oral agreement of January 13, 1995 and does not prevent effect being given to this oral agreement. [page552]

(iii) Discretion not to enforce the exclusion clauses

[53] In view of my conclusion above, it is not strictly necessary for me to address the enforceability of the exclusion clauses. However, given the trial judge's conclusion and the extent of argument on the question of whether he erred in refusing to give effect to the clauses, I will consider this issue.

[54] At the trial, the existence of the oral agreement and thus the intention of the parties was in issue. The trial judge relied on the parties' subsequent course of conduct to infer that they did not intend to continue to be bound by the exclusion clauses in the agreement. The trial judge found that Print Three had orally agreed to the surrender of a franchise by Shelanu on a previous occasion, and had allowed Shelanu to change locations and to lease space directly without anything being in writing. Where the parties have, by their subsequent course of conduct, amended the written agreement so that it no longer represents the intention of the parties, the court will refuse to enforce the written agreement. This is so even in the face of a clause requiring changes to the agreement to be in writing. See *Colautti Construction Ltd. v. City of Ottawa* (1984), 46 O.R. (2d) 236, 9 D.L.R. (4th) 265 (C.A.), per Cory J.A.

[55] On appeal, the appellant has conceded the existence of the oral agreement and its terms but asks this court to enforce the written agreement instead. That submission, in effect, asks this court not to give effect to the intention of the parties. Such a submission is contrary to the classical theory of contract interpretation which emphasizes that courts should ascertain and give effect to the intention of the parties: R. Sullivan, "Contract Interpretation in Practice and Theory" (2000) 13 S.C.L.R. (2d) 369.

[56] Sullivan states, at p. 378, that, "if a conflict arises between the intention of the parties as inferred from the totality of the evidence on the one hand and the meaning of the text on the other, intention should win." Professor Waddams has also argued that if a party knows or has reason to know that a written contract on which that party relies does not represent the intention of the other party, it should not be enforced. See S.M. Waddams, *The Law of Contracts*, 3rd ed. (Toronto: Canada Law Book, 1993) at paras. 328-29.

[57] The rationale of Sullivan and Waddams is similar, namely, that in addition to certainty, legal values such as fairness, equity and justice underlie contractual interpretation and enforcement. Before the court allows the coercive power of the state to be used to serve the private interests of a party to a contract, [page553] the court will want to ensure that the contract does not offend these legal values.

[58] I would also note that the agreement that we are dealing with is a franchise agreement. A franchise agreement is a type of contract of adhesion, that is, a type of contract whose main provisions are presented on a "take it or leave it basis". In such situations, the case for holding that an exclusion clause represents the intention of the signer and that the signer should be bound by it is weaker because there is usually an inherent inequality of bargaining power between the parties. See Waddams, *supra*, at para. 342. Examples of cases involving contracts of adhesion where this court has refused to apply an exclusion clause because it did not accord with the intention or reasonable expectations of the parties include: *Beer v. Townsgate I*, *supra*; *Solway v. Davis Moving & Storage Inc.* (2002), 62 O.R. (3d) 522, [2002] O.J. No. 4760 (QL) (C.A.) at para. 21; and *Zurich Insurance Co. v. 686234 Ontario Ltd.* (2002), 62 O.R. (3d) 447, [2002] O.J. No. 4496 (QL) (C.A.). See also *Mellco Developments Ltd. v. Portage la Prairie (City)*, [2002] M.J. No. 381 (QL), 222 D.L.R. (4th) 67 (C.A.).

[59] Enforcing an exclusion clause that is contrary to the reasonable expectation and understanding of the parties in these circumstances would not be fair or reasonable and would also come within the exception enunciated in *Gordon Capital*, *supra*.

[60] I would hold that even if the exclusion clauses applied, the trial judge was entitled to refuse to enforce paras. 20, 26, and 27 of the agreement.

#### (iv) Consideration

[61] I also agree with the trial judge's conclusion that there was consideration for the oral agreement. BCD provided consideration by giving up its territory. Shelanu provided consideration by promising to report the joint earnings of itself and BCD, thereby agreeing to

pay the six per cent royalty on higher sales. Rather than having two franchises that were in financial difficulty, Print Three gained the benefit of one healthy franchise and the peace of mind and greater financial certainty of royalties in difficult economic times that brought. The consideration from Print Three was its promise to allow Shelanu to merge BCD's sales with its sales and to report them as one.

[62] For these reasons, I would hold that the trial judge did not err in finding that Shelanu was entitled to enforce the three-party oral agreement against Print Three. Print Three breached [page554] its obligation to pay Shelanu the royalty rebate in accordance with the oral agreement and, therefore, is liable for damages as found by the trial judge.

## 2. The Duty of Good Faith and Fiduciary Duty

[63] The trial judge found that the appellant owed the respondent a duty of good faith either under the Arthur Wishart Act, *supra*, or at common law. Having regard to my conclusions regarding good faith, set out below, it is unnecessary to decide whether the Arthur Wishart Act, which applies to existing franchises, is applicable in this case where the acts in issue took place prior to the coming into force of the Act.

### A. Circumstances giving rise to a duty of good faith

[64] In *Wallace v. United Grain Growers Ltd.* (c.o.b. Public Press), [1997] 3 S.C.R. 701, 152 D.L.R. (4th) 1, the majority of the Supreme Court was prepared to recognize a good faith obligation in employment contracts. Indeed, at paras. 91-95, Iacobucci J. held that contracts of employment have unique characteristics that set them apart from ordinary commercial contracts. He described three special characteristics of employment contracts: (1) the formation of the contract is not the result of the exercise of bargaining power between two equals; (2) the person in the weaker position is unable to achieve more favourable contractual terms because of, for example, that person's inability to access information; (3) the power imbalance continues to affect other facets of the relationship after the contract has been entered into.

[65] In some instances a duty of good faith may arise ordinarily out of the nature of the relationship, or the circumstances created by the other party: see *978011 Ontario Ltd. v. Cornell Engineering Co.* (2001), 53 O.R. (3d) 783, 198 D.L.R. (4th) 615 (C.A.) at para. 35.

[66] The relative position of the parties as outlined by Iacobucci J. in *Wallace* also exists in the typical franchisor- franchisee relationship. First, it is unusual for a franchisee to be in the position of being equal in bargaining power to the franchisor: See *Kentucky Fried Chicken Canada, a Division of Pepsi-Cola Canada Ltd. v. Scott's Food Services Inc.* (1998), 41 B.L.R. (2d) 42, 114 O.A.C. 357 (C.A.), per Goudge J.A. at para. 16; *Machias v. Mr. Submarine Ltd.*, [2002] O.J. No. 1261 (QL), 24 B.L.R. (3d) 228 (S.C.J.) at para. 109. The second characteristic, inability to negotiate more favourable terms, is met by the fact that a franchise agreement is a contract of adhesion. As I have indicated, a [page555] contract of adhesion is a contract in which the essential clauses were not freely negotiated but were drawn up by one of the parties on its behalf and imposed on the other. Further, insofar as access to information is concerned, the franchisee is dependent on the franchisor for information about the franchise, its location and



projected cash flow, and is typically required to take a training program devised by the franchisor. The third characteristic, namely that the relationship continues to be affected by the power imbalance, is also met by the fact the franchisee is required to submit to inspections of its premises and audits of its books on demand, to comply with operation bulletins, and, often is dependent on, or required to buy, equipment or product from the franchisor. It is hardly surprising, therefore, that a number of courts, including the Manitoba Court of Appeal in *Imasco Retail Inc. (c.o.b. Shoppers Drug Mart) v. Blanaru*, [1995] 9 W.W.R. 44, 104 Man. R. (2d) 286 (Q.B.), *affd* (1996), [1997] 2 W.W.R. 295, 113 Man. R. (2d) 269 (C.A.) have recognized that a duty of good faith exists at common law in the context of a franchisor- franchisee relationship.

#### B. Whether the trial judge held Print Three to a fiduciary duty

[67] The appellant submits that the trial judge held Print Three to a higher standard than that imposed by the duty of good faith, namely, the duty of a fiduciary. The appellant's submission that the trial judge applied a fiduciary standard to Print Three rests on the trial judge's comment that the relationship of franchisor to franchisee is akin to a partnership. The appellant states partners owe each other a fiduciary duty and that this is the standard that he applied to Print Three's relationship with Shelanu.

[68] The imposition of a duty of good faith and a fiduciary duty are closely related. As stated in *Cornell*, *supra*, at para. 33 they, along with the standard of unconscionability:

[a]re points on a continuum in which the law acknowledges a limitation on the principle of self-reliance and imposes an obligation to respect the interests of the other. They are defined by P. Finn, "The Fiduciary Principle" in T. Youdan, ed., *Equity, Fiduciaries and Trusts*, (1989), 1 at 4 as follows:

"Unconscionability" accepts that one party is entitled as of course to act self-interestedly in his actions towards the other. Yet in deference to that other's interests, it then proscribes excessively self-interested or exploitative conduct. "Good faith," while permitting a party to act self-interestedly, nonetheless qualifies this by positively requiring that party, in his decision and action, to have regard to the legitimate interests therein of the other. The "fiduciary" standard for its part enjoins one party to act in the interests of the other -- to act selflessly and with [page556] undivided loyalty. There is, in other words, a progression from the first to the third: from selfish behaviour to selfless behaviour. Much the most contentious of the trio is the second, "good faith." It often goes unacknowledged. It does embody characteristics to be found in the other two [footnotes omitted].

[69] There is at least one important difference between the duty of good faith and a fiduciary duty. If, for example, A owes a fiduciary duty to B, A must act only in accordance with B's interests when A exercises its powers or exercises a discretion arising out of the relationship: see *York Condominium Corp. No. 167 v. Newrey Holdings Ltd.* (1981), 32 O.R. (2d) 458, 122 D.L.R. (3d) 280 (C.A.) at p. 467 O.R., p. 289 D.L.R., leave to appeal to the Supreme Court of Canada refused [1981] 1 S.C.R. xi; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, 117 D.L.R. (4th) 161. If, on the other hand, A owes a duty of good faith to B, A must give consideration to B's

interests as well as to its own interests before exercising its power. Thus, if A owes a duty of good faith to B, so long as A deals honestly and reasonably with B, B's interests are not necessarily paramount: see for example *Mason v. Freedman*, [1958] S.C.R. 483, 14 D.L.R. (2d) 529.

[70] The trial judge recognized that the relationship between a franchisor and a franchisee would not normally be characterized as a fiduciary one in accordance with *Jirna Ltd. v. Mister Donut of Canada Ltd.*, [1972] 1 O.R. 251, 22 D.L.R. (3d) 639 (C.A.), *affd* [1975] 1 S.C.R. 2, 40 D.L.R. (3d) 303. I do not agree that it logically follows from the trial judge's reference to partners that he applied the fiduciary standard in this case. At a later point in his reasons, the trial judge reiterated that a franchise relationship was akin to that of a partnership and, accordingly, like a partnership required mutual respect. He quoted from the decision of Kelly J. in *Gateway Realty Ltd. v. Arton Holdings Ltd.* (1991), 106 N.S.R. (2d) 180 (Sup. Ct.) at pp. 191-92, *affd* (1992), 112 N.S.R. (2d) 180, [1992] N.S.J. No. 175 (QL) (C.A.), to the effect that parties to a contract are required to exercise their rights under that agreement honestly, fairly, and in good faith, and that, when a party acts contrary to community standards of honesty and reasonableness or fairness, he acts in bad faith. The trial judge well knew the distinction between a duty of good faith and a fiduciary duty and did not hold Print Three to a fiduciary duty.

[71] Moreover, the fact that contractual terms are ultimately complied with, does not mean that there has been no breach of the duty of good faith. [page557]

### C. Breaches of Print Three's obligations as found by the trial judge

[72] The trial judge found that Print Three breached its duty of good faith towards Shelanu in four respects. The specific breaches found by the trial judge are:

- Print Three's attempts to rescind the May 1995 agreement were not only a breach of that agreement but, in the circumstances, evinced a lack of good faith dealing by the franchisor;
- Print Three unilaterally changed the terms and conditions upon which the franchisees agreed to participate in the Air Miles program, and in so doing, breached the representations made and acted upon by Shelanu;
- Print Three failed to make prompt payment of several royalty rebates and its refusal to pay a royalty rebate for the fourth quarter of 1996; and
- Print Three's establishment of the Le Print Express system, "not only would but did take work and customers from existing Print Three franchises". As a consequence he held that, "... the establishment of such an enterprise by the very person who owned and controlled the defendant was fundamentally at odds with the defendant's obligations, including the obligation to deal in good faith, to its franchisees."

[73] In relation to the first three breaches, the trial judge awarded damages for breach of contract. He did not award separate damages for breach of the duty of good faith. No damages were

awarded for the establishment of the Le Print Express franchise. The breaches, including his finding respecting the establishment of the Le Print Express franchise, led the trial judge to conclude that Print Three did not intend to honour or be bound by the commitments it had made to its franchisees and that, as a result, Shelanu should be discharged from any further obligation under the contract.

[74] Whether or not a party under a duty of good faith has breached that duty will depend on all the circumstances of the case, including whether the party subject to a duty of good faith conducted itself fairly throughout the process. See by analogy: 702535 Ontario Inc. v. Lloyd's London, Non-Marine Underwriters (2000), 184 D.L.R. (4th) 687, [2000] I.L.R. 1-3826 (Ont. C.A.), per O'Connor J.A., at paras. 28-37, leave to appeal to [the] Supreme [page558] Court of Canada dismissed, [2000] S.C.C.A. No. 258. See also the decision of Laskin J.A. in the Court of Appeal in Whiten v. Pilot Insurance Co. (1999), 42 O.R. (3d) 641, 170 D.L.R. (4th) 280, in dissent, affd [2002] 1 S.C.R. 595, [2002] S.C.J. No. 19 (QL).

### 3. Breaches of Print Three's Obligations to Shelanu

#### A. Royalty rebates

##### (i) Refusal to recognize the 1995 oral agreement

[75] I have already dealt with the facts and findings of the trial judge in relation to the 1995 oral agreement and have held that Print Three breached that agreement.

[76] Where a duty of good faith exists, not every breach of contract will be a breach of the duty of good faith. An honest disagreement concerning the interpretation of a franchise agreement ultimately decided in favour of the franchisee could be a breach of contract but need not be a breach of the duty of good faith owed by the franchisor. Denial of payment under an agreement should not, however, be made in order to gain leverage or bargaining advantage in a dispute with the other party or out of vindictiveness. In this case the evidence indicates that Print Three's refusal to pay Shelanu the royalty rebate pursuant to the oral agreement was linked to Banks' anger concerning Shelanu's position respecting the Air Miles advertising program. There was evidence upon which the trial judge could hold that the refusal to recognize the 1995 oral agreement was also a breach of the duty of good faith.

##### (ii) Delay in payment of undisputed royalty rebates

[77] Print Three withheld all royalty rebates payable to Shelanu for the third and fourth quarters of 1995 (July to September 1995 and October to December 1995). All royalty rebates for April to June 1996 were also withheld but that portion about which there was no dispute was paid when Bob Davis met with Shelanu in October 1996. Similarly, the rebates for 1995 were paid in September. No explanation was given for the delay in paying that portion of the royalty rebate about which there was no dispute. The trial judge found Print Three acted arbitrarily in withholding payment of the royalty rebates. I agree Print Three had no reasonable basis for refusing to pay the royalty rebates that were not in dispute.

[78] The fact that the royalty rebates were ultimately paid does not mean that Print Three did not breach its obligations towards Shelanu. The duty of good faith comprises a time component. [page559] That time component requires the party under a duty of good faith to respond promptly to a request from the other party and to make a decision within a reasonable time of receiving that request. Parties under a duty of good faith also have an obligation to make payment of any amounts that are clearly owed to the other party in a timely manner: 702535 Ontario Inc. v. Lloyd's London, supra.

(iii) Disputed royalty rebate because of refusal to allow inspection

[79] Print Three submits that the royalty rebate for the fourth quarter of 1996 was never paid because the Deslauriers refused to allow Davis to inspect the production facility at 60 Bloor Street West. Brian Deslauriers testified that he did not take Davis' request seriously because the stated purpose of the meeting on October 3, 1996 was to discuss the 1995 agreement and he wished to get on with that discussion. The royalty rebate for the fourth quarter of 1996 remained outstanding at the commencement of trial.

[80] The trial judge found that, on a strict reading of the franchise agreement, Davis was entitled to conduct an inspection but that, in view of Print Three's past practice of not enforcing the strict terms of the franchise agreement, Shelanu was entitled to some form of notification that Print Three intended to strictly enforce its rights under the agreement and that, in any event, Print Three could not withhold the royalty rebate once Shelanu made it clear Davis could inspect the production facility. The respondent submits that the trial judge erred in ordering that a royalty rebate be paid for this period. I would uphold the trial judge's conclusion that the rebate is payable based on a different analysis of the franchise agreement.

[81] A franchisee is only entitled to receive a royalty rebate according to para. 3C of the franchise agreement: "if he or she has fully complied with all the terms and conditions of this agreement during the pertinent time period".

[82] Paragraph 3C defines what constitutes full compliance with the agreement. It stipulates that "[i]n addition to other provisions of this agreement", "full compliance means timely submission of provincial sales tax returns, timely payment of advertising fees, royalties, other amounts owing to the franchisor or amounts guaranteed by the franchisor to third parties." The phrase, "other provisions of this agreement" is vague and ambiguous. The terms specified all have a financial component. It makes commercial sense that Print Three would not grant Shelanu a rebate if [page560] Shelanu were in default of money owing to it for which it could be responsible to pay; this is the main thrust of the provision.

[83] Paragraph 5G of the franchise agreement states that the Franchisee shall permit the franchisor to enter on the premises to conduct:

[a] compliance audit to determine whether Franchise Owner is abiding by the terms of this Agreement and conforming to standards of operation as may have been otherwise detailed in the Operations Manuals, Technical Bulletins or other publications supplied by Franchisor. Franchisor may advise Franchise Owner in writing regarding any deficiencies in

Franchise Owner's compliance with Franchisor's standards. Franchise Owner shall have thirty (30) days to cure such deficiencies from the date such written notice is received by Franchise Owner.

[84] On the other hand, para. 7B states that the franchisee shall permit the franchisor to enter the premises:

[i]n order to inspect and audit all aspects of Franchise Owner's business including, but not limited to: books, records, facilities, business equipment, materials and any other matters relating to Franchise Owner's obligations set out in this Agreement.

[85] Thus the right to inspect is contained in both paras. 5G and 7B. Paragraph 5G envisages a compliance audit with respect to standards of operation and gives a franchisee 30 days in which to cure a "deficiency". The term "breach" is not used. The word "deficient" is defined in Webster's Dictionary, 1989 ed., as "inadequate". A franchisee could be in compliance with its franchise agreement but still have inadequacies in its operation that the franchisor wanted corrected. Provided the deficiency was corrected within 30 days, the franchisee would be in compliance with the agreement. Paragraph 7B contains similar wording but envisages a financial audit and contains no time component.

[86] There is no evidence to suggest that Davis wished to conduct a financial audit or, indeed, an audit of any kind. He simply stated he wished to inspect the premises. In any event, upon receiving written notice from Print Three, Shelanu promptly offered to remedy the situation. The inspection had no financial impact and none of the specific requirements defined as "full compliance" was breached. In these circumstances, Shelanu's refusal did not affect its right to a royalty rebate and Print Three could not refuse to pay it.

[87] I would not have considered the dispute with respect to this single payment to be a breach of Print Three's duty of good faith, in and of itself.

[88] Shelanu is entitled to the payment of the disputed royalty rebates. [page561]

## B. Air Miles

### (i) Facts and finding of the trial judge

[89] The franchise agreement provided that franchisees were to pay an annual three per cent advertising fee to Print Three. The relevant portion of para. 9 respecting advertising states:

Due to the inherent importance and value of advertising and the need for standardization and promotion of the Print Three public image and program, the Franchise Owner agrees to pay to Franchisor an advertising fee of THREE PERCENT (3%) of each month's gross sales. Such payment is due by the tenth (10th) day of the month following the month for which the gross sales were made. The advertising fees paid directly to the Franchisor are intended to reasonably compensate Franchisor for the actual cost of advertising and promotional campaigns; provide reasonable

and adequate compensation for Franchisor's personnel engaged in the preparation, purchase and arrangement of advertising activities; and to reimburse Franchisor for any fees paid to advertising and other organizations. Franchisor shall have complete discretion to use such advertising funds in such ways as it feels will best promote the products and services offered by the franchise system.

[90] Following a vote by the franchisees, the advertising fee was suspended between 1991 and 1994, primarily because of the recession. In November 1994, at the franchisees' convention, a vote was held on whether to reintroduce the fee and whether to enter into the Air Miles program. The trial judge found that, without the vote, the franchisees could be obligated to pay the fee and the vote was really about whether to embark on the Air Miles program or some other advertising program. Print Three represented that, "the entire three percent advertising fee had to go to the Air Miles program in order for Print Three to qualify to be part of that program." Based on the documents presented in evidence, the trial judge found that that representation was false. The misrepresentation was important because one of the reasons the franchisees were reluctant to participate in the program was that it would consume all of the advertising fees.

[91] A second reason that some franchisees, including the Deslauriers, were opposed to participating in the Air Miles program was because it was apparent to them that, although all of the advertising fees went into the program, not all of the benefits of that program would be capable of being used for the franchisees' business. The trial judge found that in order to get over the franchisees' opposition to the Air Miles program, Print Three represented to the franchisees that any air miles purchased under the program, and not distributed by the franchisees to their customers, could be used by the franchisees for their own purposes [page 562] including personal travel. Both Print Three's letter dated May 2, 1995 and the operations manual for the program support the trial judge's finding in this regard.

[92] Shortly after the Air Miles program began, however, Print Three changed these arrangements and directed that all undistributed Air Miles for each outlet could only be used with its approval. The unused Air Miles were placed in accounts in the personal names of certain of its employees. The trial judge found that this unilateral change was a clear breach of the representations made to the franchisees. He held that Shelanu was entitled to damages equivalent to the value of the undistributed Air Miles earned by its franchise to the end of the program.

#### (ii) Argument and analysis

[93] The appellant submits that any representations respecting unused Air Miles were not in writing and signed by the parties and, therefore, cannot be enforced because they amounted to an amendment of the franchise agreement that was not in writing and signed by the parties as required by that agreement. Further, Print Three submits that it had an absolute discretion respecting the use of the advertising funds and any use of unused Air Miles and thus, the fact it did not abide by its representations is of no consequence. Finally, the appellant also asserts that the representations were "gratuitous offers to Shelanu regarding advertising which were more advantageous than the terms of the Franchise Agreement".

[94] I have already indicated that parties to a written agreement may subsequently enter into a new oral agreement. I have also indicated that courts will refuse to enforce a written agreement requiring that amendments be in writing where that clause no longer represents the intention of the parties. (See paras. 54 and following). With respect to the Air Miles program, the parties agreed to an oral amendment of the agreement respecting advertising fees and their subsequent conduct is indicative that the oral agreement was performed in part. The trial judge clearly found that not all of the money collected was used for the Air Miles program -- the only advertising undertaken -- and this finding is supported by the evidence.

[95] The appellant's submission that Print Three possessed an absolute discretion with respect to the use of advertising funds ignores para. 9 of the franchise agreement which stipulates that the three per cent advertising fee is to compensate Print Three "for the actual cost of advertising and promotional [page563] campaigns" (emphasis added), to provide reasonable compensation to its employees in preparing and purchasing advertising activities, and to reimburse the franchisor for advertising fees paid. Furthermore, nothing in para. 9 gives Print Three the right to use Shelanu's three per cent advertising fees for non-advertising related or personal purposes as happened here. Paragraph 26 of the agreement respecting amendments being in writing has nothing to do with excusing breaches of the agreement.

[96] Even if para. 9 is only a statement of intent and Print Three had an absolute discretion with respect to the use of the Air Miles, Print Three could not exercise that discretion without regard to Shelanu's interests; it was obliged to exercise the discretion in a reasonable manner. See J.D. McCamus, "The Duty of Good Faith Contractual Performance" (N.J.I.: Civil Law Seminar, Contract Law: From Form to Remedies, Osgoode Hall Law School, 17 May 2000). Professor McCamus is of the opinion that under ordinary contract principles, a party has an obligation to act reasonably in exercising a discretionary power. Applying this principle, he says the same result could have been reached in cases recognizing the existence of a duty of good faith in the execution of a contract such as *Mason v. Freedman*, [1958] S.C.R. 483, 14 D.L.R. (2d) 529 at p. 486 S.C.R.; *Greenberg v. Meffert* (1985), 50 O.R. (2d) 755, 18 D.L.R. (4th) 548 (C.A.), leave to appeal to the Supreme Court of Canada dismissed (1985), 30 D.L.R. (4th) 768; *LeMesurier v. Andrus* (1986), 54 O.R. (2d) 1, 25 D.L.R. (4th) 424 (C.A.); and *Gateway Realty Ltd. v. Arton Holdings Ltd.*, supra. In *Greenberg v. Meffert*, supra, where a breach of a duty of good faith was found, this court held that the words "at the sole discretion", in relation to payment of commission by a real estate company to its real estate agent after termination of the relationship meant that the company, "must act reasonably in exercising its discretion, and also honestly and in good faith". Those standards not having been attained, the agent was entitled to his commission. Here, the trial judge found Print Three acted arbitrarily and unreasonably and not in conformity with the standards for exercising a discretion. On the evidence, it was open to him to make this finding.

[97] Lastly, the misrepresentations were not a gratuitous offer. The consideration for the agreement to credit unused air miles was that Shelanu entered into the Air Miles program as opposed to some other advertising program.

[98] As found by the trial judge, Shelanu is entitled to the cash value of the unused Air Miles. [page564]

## C. Le Print Express

### (i) Facts and finding of the trial judge

[99] Around October 1990, the appellant set up a business initially known as Print Three Express that subsequently became known as Le Print Express. The trial judge found that these outlets were to be smaller than Print Three franchises in order to target individuals and small businesses. The cost to purchase these franchises was lower than the cost to purchase a Print Three franchise and some financing was also offered to potential Le Print Express franchisees. Shelanu complained that the establishment of the Le Print Express concept involved the franchisor in a business that competed with existing Print Three franchises. Brian Deslauriers testified that Le Print Express offered the same kinds of products and services that were, to a large extent, offered by Print Three. In support of his evidence he produced a flyer from the Le Print Express at the Eaton Centre that had been faxed to Shelanu. He further testified that contrary to his understanding that the Le Print Express operations were to be small, occupying 200 square feet, the Eaton operation was three to four times this size and had the same kind of equipment and capabilities as Shelanu. The same personnel and staff who operated and marketed Print Three franchises also handled the requirements of the new franchise. The trial judge held:

It seems to me to be intrinsically troublesome for a franchisor to develop a concept for a new franchise operation that will operate in competition with its existing franchise operation. Even though Le Print Express franchisees were directed at a specific segment of the industry, I am satisfied that they not only would, but did, take work and customers from existing Print Three franchisees. As a consequence, in my view, the establishment of such an enterprise by the very person who owned and controlled the defendant was fundamentally at odds with the defendant's obligations, including the obligation to deal in good faith, to its franchisees. The defendant could not properly and fairly institute this new concept without at least obtaining the agreement of the existing Print Three franchisees to this crucial change to their contractual relationship which, of course, the defendant made no attempt to do. The establishment of the Le Print Express franchises fundamentally altered the nature of the Print Three franchise network and impacted directly on the business environment in which the Print Three franchisees operated.

### (ii) Argument and analysis

[100] The appellant challenges the trial judge's finding of fact that Le Print Express competed with Shelanu's business as well as his conclusion that the establishment of this business took [page565] work and customers from Print Three franchisees and Shelanu in particular. The appellant emphasizes that, while there may have been some overlap of services, Le Print Express was in a different business sector than Print Three.

[101] In *Housen v. Nikolaisen*, 2002 SCC 33, [2002] S.C.J. No. 31 (QL), the Supreme Court held, at para. 10, that "[t]he standard of review for findings of fact is that such findings are not to be reversed unless it can be established that the trial judge made a 'palpable and overriding error'" (citations omitted). This deferential standard is also applicable to appellate review of inferences of fact: see *Housen*, supra, at para. 25.



[102] The franchise agreement is silent as to whether the franchisor can engage in a similar business during the term of the agreement. [See Note 1 at end of document] Print Three did, however, agree not to take any action that would be likely to injure the goodwill or reputation associated with the Print Three trademark, logo or mark. [page566]

[103] Print Three targeted corporate accounts, whereas Le Print Express did small copying jobs for individuals and small businesses. None of the Le Print Express franchises was established within Shelanu's exclusive territory; the three Le Print Express locations were the Eaton Centre, Union Station, and Scotia Bank Plaza. Shelanu did not complain about Le Print Express for almost seven years after it was established and Shelanu presented no evidence that it lost income as a result of competition from Le Print Express. The trial judge's reasons do not address these considerations.

[104] The trial judge also rejected a number of Shelanu's submissions that would have affected its claim respecting Le Print Express. Shelanu's statement of claim claimed damages for misrepresentation on the basis that the franchise agreement contained representations that Print Three was an expanding organization; it had a commitment to continue to introduce leading edge technologies and systems in document reproduction technology; it would continue to develop the credibility and presence of the Print Three name and logo; and it would continue to improve and modify the know-how it had developed. The trial judge held that the failure of these representations to materialize were not breaches of the franchise agreement but goals that had not been achieved. In other words, they were not representations of fact.

[105] On the issue of technology, the trial judge described the contribution of Print Three as the bare minimum a franchisee ought to expect in return for royalty payments and held that ". . . in the end result, I am not satisfied on the evidence that the failures of the defendant [Print Three] on this issue were so great as to constitute a breach of its obligations under the franchise agreement." The trial judge noted that the evidence in this case was like that in *Khagen Investments Ltd. v. 710497 Ontario Ltd.*, [1999] O.J. No. 2152 (QL), 98 O.T.C. 241 (S.C.J.), in that there was no evidence as to the standard of service given to other franchisees or whether provision of the same level of service to other franchisees resulted in their failure. He held that these issues could not justify Shelanu's position that it was entitled to treat the franchise agreement at an end as of May 8, 1997.

[106] Brian Deslauriers testified that the number of Print Three franchises declined after Le Print Express was created. The trial judge held that, on balance, the reduction in the number of Print Three franchises was largely the result of prevailing economic conditions. By implication, therefore, the establishment of Le Print Express did not contribute to the decline in the number of Print Three franchises. [page567]

[107] I would therefore, hold that the appellant has met the high standard required to overturn a trial judge's finding of fact that Le Print Express competed with Shelanu and took business from it. My reasons for doing so may be summarized as follows: (1) the different nature of the business engaged in by Le Print Express; (2) Shelanu's delay in complaining about the establishment of that business; (3) the lack of evidence before the trial judge as to Shelanu's consequential loss of income; (4) the trial judge's findings that there had been no

misrepresentation concerning what Print Three was to provide in exchange for royalty payments and that Print Three had done the minimum required to discharge those obligations; and (5) the trial judge's finding that the decline in Print Three franchises was primarily due to prevailing economic conditions. The finding that Print Three breached "reasonable commercial standards" must also fail for the same reasons.

[108] Inasmuch as I have not upheld the trial judge's finding of fact in respect of Le Print Express, I would not uphold his conclusion that the establishment of Le Print Express was a breach of Print Three's duty of good faith.

#### 4. Fundamental Breach

##### A. The findings of the trial judge

[109] The trial judge concluded that the various failings and breaches of the franchise agreement by Print Three constituted a fundamental breach of the franchise agreement. The trial judge further held Shelanu was entitled to terminate the franchise agreement because the breaches

[a]lso reveal an attitude of the defendant generally toward this franchisee, at least, and toward its obligations under the franchise agreement which demonstrates an intention by the defendant that it was not going to be bound by, nor honour, its obligations under the franchise agreement unless it suited its purpose to do so.

##### B. The standard of review and analysis

[110] A trial judge's finding of fundamental breach is a matter of mixed fact and law. This is because it is a question "about whether the facts satisfy the legal tests": *Housen, supra*, at para. 26, citing *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, 144 D.L.R. (4th) 1 at para. 55. The appropriate standard of review is dependent on where the error lies. As stated by Iacobucci and Major JJ. at para. 36:

Matters of mixed fact and law lie along a spectrum. Where, for instance, an error with respect to a finding of negligence can be attributed to the [page568] application of an incorrect standard, a failure to consider a required element of a legal test, or similar error in principle, such an error can be characterized as an error in law, subject to a standard of correctness. Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact". Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" and is subject to a more stringent standard. The general rule, as stated in *Jaegli Enterprises, supra*, is that, where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error.

Thus, as stated by Rosenberg J.A. in *Algoma Steel Inc. v. Union Gas Ltd.* (2003), 63 O.R. (3d) 78, [2003] O.J. No. 71 (QL) (C.A.) at para. 19, "where the issue concerns application of a legal

standard to a set of facts the question is one of mixed fact and law and a somewhat less deferential standard may be appropriate, although not the standard of correctness required for questions of law."

[111] In order to conclude that Print Three had committed a fundamental breach of its obligations to Shelanu, the trial judge relied on the evidence as a whole, requiring the application of the more stringent standard of review. At the same time, it must be borne in mind that I have not upheld the trial judge's finding that Print Three breached its duty of good faith to Shelanu by establishing the Le Print Express franchise. It is therefore necessary to consider whether the remaining breaches can support the trial judge's conclusion that there was a fundamental breach of the agreement. I am of the opinion that they cannot. As of the date Shelanu gave notice of termination of its obligations to Print Three, Print Three had abused its discretion respecting Air Miles, failed to make payment of the full royalty rebate based on there being a single franchise, delayed in making payment of royalty rebates admittedly due on three occasions, and refused to pay one royalty rebate allegedly based on Shelanu's breach of the franchise agreement for refusing to allow Davis to inspect its premises. The breaches respecting the Air Miles program and non-payment of royalty rebate were the subject of damages awarded by the trial judge.

[112] It is also necessary to consider what appears to me to be a further palpable and overriding error on the part of the trial judge. This is the trial judge's failure to consider the fact that although Shelanu gave notice of termination of the agreement on May 8, 1997, it continued to use the name Print Three for a further two and a half years and continued to have an exclusive [page569] territory. Shelanu was therefore able to carry on the commercial purpose of the agreement.

[113] In *Majdpour v. M & B Acquisition Corp.* (2001), 56 O.R. (3d) 481, 206 D.L.R. (4th) 627 (C.A.), the event alleged to have triggered a fundamental breach of the franchise agreement by the franchisor was a bankruptcy. Because the franchisee was able to carry on the commercial purpose of the agreement intact after the bankruptcy, MacPherson J.A. dismissed the franchisee's claim it was discharged from further performance. That reasoning is equally applicable in this case.

[114] In dismissing the claim for fundamental breach, MacPherson J.A. noted that the test was a restrictive one, namely, whether the conduct of one party deprived the other party of "substantially the whole benefit of the contract" as stated by Wilson J. in *Hunter Engineering*, supra. [See Note 2 at end of document] This is the classic formulation of the test as set out by Diplock L.J. in *Hongkong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd.*, [1962] 1 All E.R. 474, [1962] 2 Q.B. 26 (C.A.) at p. 66 Q.B.:

[D]oes the occurrence of the event deprive the party who has further undertakings still to perform of substantially the benefit which it was the intention of the parties as expressed in the contract that he should obtain in consideration for performing those undertakings?

[115] Print Three submits that, because the trial judge relied on the words of Gonthier J. at para. 33 of his reasons in *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846, 145 D.L.R. (4th) 1, namely that, "where one party to a contract demonstrates an intention no longer to be bound by it, that

party is committing a fundamental breach of the contract that results in its termination", the trial judge applied the wrong legal test for fundamental breach. The appellant submits that this phraseology is only appropriate for employment law contracts and that the only correct phraseology for fundamental breach is whether the failure of one party to perform its contractual obligations had the effect of depriving the other of "substantially the whole benefit" of the contract.

[116] I do not agree that the phraseology used by Gonthier J. in *Farber*, supra, is restricted to the employment law context. Indeed this is precisely the phraseology used by G.C. Cheshire [page570] and C.H.S. Fifoot to describe the circumstances in which a breach of contract will excuse further performance in their text *The Law of Contract*, 5th ed. (London: Butterworths, 1960) at p. 488:

A breach of contract is a cause of discharge only if its effect is to render it purposeless for the innocent to proceed further with performance. Further performance is rendered purposeless if one party either shows an intention no longer to be bound by the contract or breaks a stipulation of major importance to the contract.

[117] I agree, however, that the deprivation of "substantially the whole benefit of the contract" is the phraseology adopted by this court to describe the test for fundamental breach in *Robson v. Thorne, Ernst & Whinney* (1999), 127 O.A.C. 215, [1999] O.J. No. 4638 (QL) (C.A.), at para. 18 and *Bayer v. Aktiengesellschaft v. Apotex Inc.* (1998), 113 O.A.C. 1, 82 C.P.R. (3d) 526 (C.A.) at para. 34, as well as *Majdpour*, supra. In the circumstances of this case, the phraseology chosen by the trial judge to describe the test for fundamental breach may not have been the most appropriate one to define the sort of breach that would excuse Shelanu from further performance of its obligations.

[118] Professor Waddams addresses the variety of expressions that have been used to define the sort of breach that will excuse a party from further performance under a contract in his text: *Waddams*, supra, at para. 583. Waddams says that behind all of these expressions lies a single notion, that of substantial failure of performance. Irrespective of the expression used, he proposes five factors derived from the jurisprudence to measure whether future performance under a contract should be excused at para. 587. In *968703 Ontario Ltd. v. Vernon* (2002), 58 O.R. (3d) 215, 22 B.L.R. (3d) 161 (C.A.), this court, after referring to the decisions in *Robson*, supra, and *Bayer*, supra, adopted and applied the factors suggested by Waddams to measure whether future performance should be excused. They are: (a) the ratio of the party's obligation not performed to the obligation as a whole; (b) the seriousness of the breach to the innocent party; (c) the likelihood of repetition of such breach; (d) the seriousness of the consequences of the breach; and (e) the relationship of the part of the obligation performed to the whole obligation. Applying those factors to the breaches by Print Three in this case would not lead to the conclusion that Shelanu should be excused from further performance of its obligations.

[119] Applying Waddams' guidelines in this case would not lead to the conclusion that Shelanu should be excused from future performance. The first and fifth factors appear to be aimed at helping a court to ascertain whether the contract was [page571] substantially performed. See *Fairbanks Soap Co. v. Sheppard*, [1953] 1 S.C.R. 314, [1953] 2 D.L.R. 193. The crux of the

agreement between Print Three and Shelanu was the licence to use Print Three's name and trademark in exchange for royalty payments and its exclusive territory. Print Three did not revoke or undermine Shelanu's licence to use Print Three's name and trademark and Shelanu continued to use them. In return, Shelanu was obligated to make royalty payments which it did. Over the ten years of the franchise agreement, Print Three also paid Shelanu the majority of its royalty rebates. I would also disagree that Print Three evinced an intention to no longer be bound by the agreement as a whole although it certainly refused to be bound by parts of it. Print Three did not place another franchisee in Shelanu's territory until after Shelanu's franchise agreement had expired. Shelanu was not deprived of substantially the whole of the benefit of its agreement with Print Three.

[120] The second and fourth factors are aimed at measuring the effect of the breach on the innocent party while the third factor, the likelihood of repetition of the breach, is aimed specifically at whether the aggrieved party should be released because continued performance would be intolerable due to repetition of the breaches. To a small business like Shelanu, the delay in payment of royalty rebates on three occasions, the failure to pay the rebate based on there being a single franchise and the abuse of discretion respecting the advertising program were undoubtedly serious but they do not appear to have made it intolerable for Shelanu to continue to operate the franchise because that is what it continued to do.

[121] Consequently, Shelanu is not entitled to recover the royalties paid by it since May 8, 1997 which the trial judge assessed at \$199,622 nor the \$59,870 in advertising fees paid by it after that date. (The latter amount would be subject to any credit for unused Air Miles until that program was discontinued.)

[122] Lastly, I would point out that in *Hunter Engineering*, supra, the court was concerned with the delivery of damaged equipment. The court was not dealing with a contractual relationship that required the parties to continue to interact with each other on an ongoing basis. The same is also true of the situation in *Hongkong Fir Shipping*, supra. In the context of a franchise agreement, which, as I have noted bears certain similarities to the employment law situation, there is an ongoing, interactive relationship. I note that, following *Farber*, supra, this court has held that a party may be excused from further performance of an employment contract and the employer held [page572] in constructive breach of the agreement where the employer's treatment of the employee makes continued employment intolerable: *Shah v. Xerox Canada Ltd.*, [2000] O.J. No. 849 (QL), 49 C.C.E.L. (2d) 166 (C.A.). See also *Whiting v. Winnipeg River Brokenhead Community Futures Development Corp.* (1998), 159 D.L.R. (4th) 18, 126 Man. R. (2d) 176 (C.A.).

[123] Having regard to the current jurisprudence, the trial judge might have chosen more apt phraseology to describe the test for fundamental breach but I would not hold that the trial judge erred in law in using the phraseology that he did. Rather, as I have indicated, it is in the application of the test for fundamental breach that he erred.

C. Amounts owing because there was no fundamental breach

[124] Because Shelanu is not excused from its obligations under the franchise agreement, Shelanu is not entitled to recover the royalties it paid to Print Three, which the trial judge assessed at \$199,622.

[125] Against the amount of \$199,622, I would hold, however, that Shelanu is entitled to receive credit for royalty rebates withheld by Print Three.

[126] Shelanu's notice of termination would not, of itself, disentitle Shelanu to the royalty rebate provided that it continued to be in compliance with its obligations under the agreement. Because the agreement did not expire until December 1999 and Shelanu continued to pay royalties that Print Three accepted until October of that year, it was not in breach of the one-year non-competition clause contained in the agreement while it paid royalties. The trial judge held that an error Print Three made with respect to a Yellow Pages advertisement was not a breach of the agreement and I would agree with his conclusion in that regard.

[127] Shelanu is entitled to a royalty rebate credit during the period it paid royalties.

[128] Print Three is entitled to the \$59,870 in advertising fees paid by Shelanu after it gave notice of termination. The latter amount would be subject to any credit for unused Air Miles until that program was discontinued, or to the advertising rebate otherwise payable under the agreement.

[129] Having found that the trial judge erred in holding that Print Three had fundamentally breached the franchise agreement I now turn to Print Three's appeal from the trial judge's dismissal of its counterclaim and Shelanu's cross-appeal on damages. [page573]

## 5. The Counterclaim and Cross-Appeal

[130] I approach my review of the damages assessed bearing in mind that a trial judge's assessment of damages is ordinarily entitled to great deference. As stated by the Supreme Court of Canada in *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, [2001] 2 S.C.R. 943, 204 D.L.R. (4th) 513, at pp. 977-78 S.C.R.:

It is common ground that the Court of Appeal was not entitled to substitute its own view of a proper award unless it could be shown that the trial judge had made an error of principle of law, or misapprehended the evidence, or it could be shown there was no evidence on which the trial judge could have reached his or her conclusion, or the trial judge failed to consider relevant factors in the assessment of damages, or considered irrelevant factors, or otherwise, in the result, made "a palpably incorrect" or "wholly erroneous" assessment of the damages. Where one or more of these conditions are met, however, the appellate court is obliged to interfere.

[131] The trial judge held that, in the event he was wrong in concluding there had been a fundamental breach of the agreement, Print Three was entitled to damages that he assessed at \$465,500 over a ten-year period. The award has three components: \$64,500 for the waiver of a

franchise fee; \$225,000 for lost royalties and \$176,000 for lost advertising fees, both calculated over a ten-year period.

[132] The trial judge dismissed the following claims by Print Three, because there was no evidence to support those assessments:

-- A claim for \$750,000 for Shelanu's business, as a turn-key operation, on the basis that "[a]ll of the assets of that business would be the property of the plaintiff with the exception of the name and the telephone number."

-- A complaint that Shelanu did not assign the lease in accordance with para. 15F of the franchise agreement. Print Three took no steps to negotiate a lease so Shelanu could stay in its location when the existing lease expired during the currency of the franchise agreement and Print Three was subject to a number of judgments from creditors. The trial judge held the only commercially reasonable thing for Shelanu to do was to negotiate the lease in its own name.

-- A claim for \$180,000 for the cost of equivalent signage. While the trial judge accepted that the loss of the Print Three name in a well-travelled shopping concourse area in a busy section of Toronto could result in damages, he dismissed that claim because there was no evidence before [page574] him sufficient to establish an actual loss or the amount of such a loss.

-- The claim for one new or renewed franchise in Shelanu's territory on the basis that Mr. Davis' evidence that another franchisee would be unwilling to locate in the territory was nothing more than sheer speculation.

[133] Only the finding respecting the lease requires further comment. Under clause 19 of the franchise agreement, Print Three had agreed to give Shelanu an exclusive territory at 60 Bloor Street West until the expiry of the franchise in 1999. In failing to renegotiate the terms of the lease or, if that was not possible, offering to relocate Shelanu at Print Three's expense within the territory, Print Three breached this provision. Once Shelanu had renegotiated the lease in its own name, Print Three did not execute a sublease with Shelanu and reimburse it for any rental deposit as required by the franchise agreement. Given the lapse of time of about three years with neither party complaining about the state of the lease this appears to be yet another instance of the parties amending the agreement by their conduct about which Print Three cannot now complain. In any event, having failed to fulfill its obligations under the franchise agreement, Print Three cannot benefit from its breaches by asserting the right to have the lease assigned to it at the end of the franchise agreement.

[134] I must now deal with the claims the trial judge did allow. The waiver of the franchise fee arose when Paul Kim, an existing franchisee, approached Print Three about putting a franchise in Shelanu's territory about six months prior to the expiry of Shelanu's franchise. Print Three gave Mr. Kim a franchise just north of Shelanu's territory. The Kim franchise was required to operate in direct competition with Shelanu, which continued to operate at the Bloor Location, and, since Print Three could not deliver either the Bloor Location, the customer list, the telephone or fax

numbers to the Kim Franchise, Print Three waived its usual franchise fee of \$64,500 in order to secure the Kim Franchise without this. The trial judge found that in order for Print Three to mitigate its damages it was necessary for Print Three to waive its franchise fee in granting Mr. Kim a franchise. Having regard to the evidence, there is no basis on which to interfere with the trial judge's finding in this regard.

[135] The trial judge's award of damages for lost royalties and advertising fees over a period of ten years is problematic. The [page575] underpinning for his conclusion appears to be in para. 81 of his reasons wherein he stated:

The loss of the 6 [per cent] royalty and the loss of the advertising fees for ten years assumes that the plaintiff would have continued to be a franchisee or that another franchisee would have been found for the plaintiff's location. While that assumption is fair enough, the claim must be subject to a duty to mitigate, that is, the defendant had an obligation to mitigate its damages by locating another franchisee in the same territory where the plaintiff was continuing to operate. Indeed, the defendant did exactly that when it sold a franchise to Mr. Kim, an existing franchisee, to operate a franchise outlet on Cumberland Street which is just north of the plaintiff's location.

(Emphasis added)

I am of the opinion that the trial judge erred in assessing damages based on this assumption.

[136] In assessing damages, the onus is on Print Three to prove its damages on a reasonable preponderance of credible evidence. The trial judge was required to put Print Three in the same position it would have been in had the agreement been performed, that is, had Shelanu not competed for one year in a defined geographic area. Having regard to the trial judge's finding that Print Three was not entitled to Shelanu's business or lease once the franchise agreement ended, which I have upheld, another franchisee could not have been placed in Shelanu's location. The trial judge was not entitled to base his award of damages on an assumption that did not accord with the specific facts of this case. Print Three would not have had a franchisee in Shelanu's location. It would only have had, as it did, a franchisee located just north of Bloor and Cumberland.

[137] The trial judge erred in principle in concluding that Print Three was entitled to damages based on the projected revenue stream from Shelanu's franchise less Mr. Kim's projected revenue over a ten-year period, the entire life of a franchise agreement. If Shelanu had observed the one-year non-competition clause in the franchise agreement, there is no evidence to suggest that all of Shelanu's customers would have become customers of the new franchisee. The Shelanu Print Three franchise was not the only copying business in the geographic area. The geographic restrictions contained in the one-year non-competition clause were five miles from one specific franchisee and seven miles from another. If Shelanu had moved its business just outside the geographic area, there is no evidence to suggest it would have lost all its customers or personal goodwill. As noted earlier, the evidence indicates that Shelanu targeted corporate and business accounts, not walk-in trade. After one year, Shelanu was entitled to compete again with Print Three within the same geographic area. There [page576] is no evidence that, after one year,



Shelanu's goodwill would have been so impaired that many of its customers would not have returned to it.

[138] Based on Shelanu's breach of the non-competition clause some damages must also be assessed for loss of revenue to Mr. Kim over one year. The figures for all 42 Print Three franchisees for the five years prior to October 1999, disclosed that the average franchisee paid approximately \$25,000 annually in royalties and \$4,700 annually in advertising fees. This figure was about one-half the annual royalties and advertising fees paid by Shelanu. The trial judge chose to adopt this average figure as the basis for his calculation and Print Three does not challenge it as being too low. By taking the average yearly sales of the average franchisee as his basis for awarding damages for loss of royalties and advertising fees the trial judge effectively took account of the complex contingencies that Shelanu's personal goodwill may not have been transferred to another franchisee and that Mr. Kim may not have been as competent as Shelanu in operating its franchise. In *Martin v. Goldfarb* (1998), 41 O.R. (3d) 161, 163 D.L.R. (4th) 639 (C.A.) at p. 187 O.R., Finlayson J.A. held that a defendant is not entitled to have damages assessed by guesswork when the party bearing the burden of adducing the evidence has failed to do so. However, where there are complex contingencies, incapable of proof, a court must then do its best to assess the quantum of damages.

[139] Having regard to these considerations, in addition to the franchise fee of \$64,500, I would substitute an award of damages for one year's loss of revenue and advertising fees which, in accordance with the trial judge's figure for one year, I would fix at \$29,700 for a total of \$94,200.

#### IV. DISPOSITION

[140] For the reasons given, I would allow both the appeal and cross-appeal as indicated. In view of the divided success on this appeal, I would order that the parties bear their own costs.

Order accordingly.

#### Notes

Note 1: The present regulations to the franchise legislation in Ontario now require that the franchise agreement contain a statement of the franchisor's policy respecting setting up a competing business by it. The regulations also require that the franchisee be provided with a description of the franchisor's policy, if any, respecting the proximity between an existing franchise and another franchise granted by the franchisor that distributes similar products or services under a different trade-mark, trade name or logo. In the absence of such disclosure, "... there is an expectation on the part of the franchisee that the franchisor will not establish a corporate or franchise location (or another business of channel of distribution) within such proximity or in such a manner that would negatively effect the franchisee's business." See J.P. Hoffman, "Statutory Obligations of Fair Dealing and Good Faith in Canada" (2nd Annual Franchise Law Conference: A New Act, A New Era of Disclosure -- One Year Later, Ontario Bar Association C.L.E., 22 February 2002) [unpublished], at p. 22. Among the cases discussed are *Supermarché A.R.G. Inc. v. Provigo Distribution Inc.*, [1997] A.Q. No. 3710, [1988] R.J.Q.

47 (C.A.), which held that Provigo owned the supermarkets bearing its name a duty to provide assistance and to support the franchise system and not to compete with it, particularly in the area of pricing. Provigo had breached its statutory duty of good faith under the Civil Code. *Kelsey Group Inc. v. 75766 Ontario Ltd.*, [1990] O.J. No. 598 (QL), 30 C.P.R. (3d) 355 (H.C.J.) where notices of termination delivered by the franchisor to its franchisee were held to be a smoke screen to enable it to establish another franchise in the franchisee's territory; and *Metro-Pacific Cellular Inc. v. Rogers Cantel Inc.* (1994), 57 C.P.R. (3d) 538 (B.C.S.C.), where the court held that Cantel could not compete directly with its non-exclusive dealer in downtown Vancouver. Presumably one factor that would be a consideration as to whether the franchisor can set up a competing business is whether the franchisee has an exclusive territory.

Note 2: In *Hunter Engineering*, supra, at para. 137ff. Dickson C.J. restricted his comments to the use of fundamental breach in the context of enforcing exclusion clauses in a contract and did not express an opinion on the other meaning of fundamental breach which he termed "substantial failure of performance" to relieve a party from future obligations under a contract.

**TAB 30**

**Simcoe Vacant Land Condominium Corporation No. 272 et al. v. Blue Shores Developments Ltd. et al.**

**[Indexed as: Simcoe Vacant Land Condominium Corp. No. 272 v. Blue Shores Developments Ltd.]**

Ontario Reports

Court of Appeal for Ontario,  
MacFarland, LaForme and Lauwers JJ.A.

May 27, 2015

126 O.R. (3d) 39 | 2015 ONCA 378

### **Case Summary**

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**Real property — Condominiums — Developer retaining legal title to clubhouse which was part of condominium complex — Disclosure statements given by developer to purchasers of condominium units providing for conveyance of clubhouse to condominium corporations within 120 days from date that developer was no longer registered owner of any lands within project — Conveyance obligation in disclosure statements not functioning as executory contract of purchase and sale which gave condominium corporations equitable interests in clubhouse. [page40 ]**

The respondent developer retained legal title to a clubhouse which was part of a condominium complex. The disclosure statements that the respondent gave to purchasers of the condominium units under s. 72 of the *Condominium Act*, 1998, S.O. 1998, c. 19 provided for the conveyance of the clubhouse to the applicant condominium corporations within 120 days after the date that the respondent was no longer the registered owner of any lands within the project. The applicants brought an application for a declaration that they owned the clubhouse and that a mortgage over it granted by the respondent was void or subordinate to their interests. The application was dismissed. The applicants appealed.

**Held**, the appeal should be dismissed.

*Per* Lauwers J.A. (dissenting in part): The applicants had an equitable interest in the clubhouse. The essential terms of an agreement for purchase of land -- the parties, the properties, the price and the date of conveyance -- were all clearly set out in the conveyance obligation in the disclosure statements. No contractual element was missing. The conveyance obligation was a valid executory contract of purchase and sale for real property. It is settled law that a valid contract for the purchase and sale of land gives rise to a trust relationship, with the purchaser acquiring a beneficial interest in the property. Sections 71 and 71(1.1) of the *Land Titles Act*, R.S.O. 1990, c. L.5 applied and permitted the applicants to register a notice of an unregistered interest in respect of the clubhouse conveyance obligation.

The condominium documents did not contain a provision prohibiting the respondent from

granting encumbrances on the clubhouse property. The trust that arises from an agreement of purchase and sale of land is qualified. The vendor can deal with the property as it sees fit, provided it can still comply with the terms of the conveyance obligation. Even though the applicants had an equitable interest in the clubhouse, the respondent was entitled to place a mortgage on the clubhouse, and doing so did not interfere with the applicants' interest.

The application judge did not err in finding that the respondent's conduct did not constitute oppression under s. 135 of the *Condominium Act*.

*Per MacFarland J.A. (LaForme J.A. concurring):* The disclosure statements did not contain an executory contract between the appellants and the respondents in relation to the clubhouse. The requirement to convey the clubhouse for consideration in the future was an obligation that the respondent would have in the future. The disclosure statements expressly indicated that an interest in the clubhouse was not being conveyed with the sale of each condominium unit. No equitable title passed to the applicants. The applicants did not have an interest in the clubhouse that could be registered under s. 17(1) or (1.1) of the *Land Titles Act*. In all other respects, the reasons of Lauwers J.A. are agreed with.

*Peel Condominium Corp. No. 417 v. Tedley Homes Ltd.* (1997), 35 O.R. (3d) 257, [1997] O.J. No. 3541, 103 O.A.C. 143, 12 R.P.R. (3d) 278, 73 A.C.W.S. (3d) 691 (C.A.), **distsd**

### Other cases referred to

*90 George Street Ltd. v. Ottawa-Carleton Standard Condominium Corp. No. 815*, [2015] O.J. No. 188, 2015 ONSC 336, 51 R.P.R. (5th) 287 (S.C.J.); *Buchanan v. Oliver Plumbing & Heating Ltd.*, [1959] O.R. 238, [1959] O.J. No. 659, 18 D.L.R. (2d) 575 (C.A.); *Frontenac Condominium Corp. No. 1 v. Joe Macciocchi & Sons Ltd.* (1975), 11 O.R. (2d) 649, [1975] O.J. No. 2617, 67 D.L.R. (3d) 199 (C.A.); *Hadley v. London Bank of Scotland Ltd.* (1985), 3 De. G.J. & Sm. 63; [page41] *Holborn Property Investments Inc. v. Romspen Investment Corp.*, [2008] O.J. No. 5722, 77 R.P.R. (4th) 262 (S.C.J.); *Lysaght v. Edwards* (1876), 2 Ch. D. 499; *McKenzie v. Walsh* (1920), 61 S.C.R. 312, [1920] S.C.J. No. 68, 57 D.L.R. 24, [1921] 1 W.W.R. 1017; *Metropolitan Toronto Condominium Corp. No. 1250 v. Mastercraft Group Inc.*, [2009] O.J. No. 3104, 2009 ONCA 584, 255 O.A.C. 253, 310 D.L.R. (4th) 256, 82 R.P.R. (4th) 1, 179 A.C.W.S. (3d) 1215; *Middlesex Condominium Corp. No. 87 v. 600 Talbot Street London Ltd.* (1998), 37 O.R. (3d) 22, [1998] O.J. No. 450, 156 D.L.R. (4th) 587, 107 O.A.C. 1, 17 R.P.R. (3d) 146, 77 A.C.W.S. (3d) 657 (C.A.); *Peel Condominium Corp. No. 505 v. Cam-Valley Homes Ltd.* (2001), 53 O.R. (3d) 1, [2001] O.J. No. 714, 196 D.L.R. (4th) 621, 142 O.A.C. 251, 14 B.L.R. (3d) 169, 7 C.L.R. (3d) 184, 103 A.C.W.S. (3d) 636 (C.A.); *Robinson v. Moffatt* (1916), 37 O.L.R. 52, [1916] O.J. No. 107, 31 D.L.R. 490 (S.C. (App. Div.)); *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415, [1996] S.C.J. No. 71, 136 D.L.R. (4th) 1, 197 N.R. 379, 91 O.A.C. 379, 3 R.P.R. (3d) 1, 63 A.C.W.S. (3d) 973; *Toronto Standard Condominium Corp. No. 2095 v. West Harbour City (I) Residences Corp.*, [2014] O.J. No. 4947, 2014 ONCA 724, 46 R.P.R. (5th) 1, 328 O.A.C. 255, 246 A.C.W.S. (3d) 206; *Wall v. Bright* (1820), 37 E.R. 456, 1 Jac. and W. 494 (Ch.); *York Condominium Corp. No. 167 v. Newrey Holdings Ltd.* (1981), 32 O.R. (2d) 458, [1981] O.J. No. 2965, 122 D.L.R. (3d) 280, 8 A.C.W.S. (2d) 156 (C.A.)

## Statutes referred to

*Condominium Act*, R.S.O. 1990, c. C.26, s. 3(3)

*Condominium Act*, 1998, S.O. 1998, c. 19, ss. 2, 7(4) (d), 72 [as am.], (1), (2), 73(1), (2), 74(1), (6) [as am.], 78(1), 109 [as am.], (3), 113 [as am.], (3), 133(1), (2) [as am.], 135 [as am.], (2)

*Land Titles Act*, R.S.O. 1990, c. L.5, s. 71 [as am.], (1.1)

*Statute of Frauds*, R.S.O. 1990, c. S.19, s. 1(1)

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Warner La Forest, Anne, *Anger & Honsberger Law of Real Property*, 3rd ed., looseleaf (Toronto: Canada Law Book, 2014)

APPEAL from the order of E.M. Morgan J., [2014] O.J. No. 86, 2014 ONSC 187 (S.C.J.) dismissing a motion for a declaration.

*Jonathan H. Fine and Benjamin J. Rutherford*, for appellants.

*Stephen Schwartz*, for respondent Blue Shores Developments Ltd.

*Reeva Finkel*, for respondent Duca Financial Services Credit Union Ltd. [page42 ]

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**LAUWERS J.A.** (dissenting in part): —

A. Introduction

[1] The appellants are four condominium corporations. They are part of a large project that comprises about 200 dwelling units, some recreational facilities including a marina, and a clubhouse, located on the shores of Georgian Bay near Collingwood, Ontario. The respondent Blue Shores Developments Ltd. developed the project.

[2] The dispute between the appellants and Blue Shores relates to the ownership and control of the clubhouse, which Blue Shores has owned and operated it from the outset.

[3] The appellants applied for a declaration that they own the clubhouse, and that the mortgage over it granted by Blue Shores to the respondent Duca Financial Services Credit Union Ltd. is void or subordinate to their interests. The application judge dismissed their application[.] He also dismissed their request for an accounting of clubhouse expenses and revenues, and their claims that Blue Shores was liable for oppression under s. 135 of the *Condominium Act, 1998*, S.O. 1998, c. 19 (the "Act").

[4] For the reasons that follow, I conclude that the appellants have an equitable interest in the clubhouse based on an executory contract between Blue Shores and the appellants. This executory contract compels Blue Shores to transfer ownership of the clubhouse to the appellants after Blue Shores no longer owns any lands within the project. Although I would set aside the application judge's contrary holding, I do not accept the appellants' argument that their equitable interest in the clubhouse precluded Blue Shores from placing a mortgage on the clubhouse. I also would reject the appellants' arguments that the mortgage is void, that Blue Shores is required to operate the clubhouse on a non-profit basis and that Blue Shores' conduct has been oppressive towards them.

## B. *Factual Overview*

[5] Blue Shores is the developer of this lakeside condominium project. The development is governed by five condominium corporations, including the four appellants. The fifth condominium corporation governs only the marina and vacant undeveloped lands and is not a party to this appeal. The dispute centres on the ownership and operation of the clubhouse.

[6] The disclosure statements that Blue Shores gave to purchasers of the condominium units, under s. 72 of the *Condominium Act, 1998*, provided for the conveyance of the clubhouse to the appellants within 120 days after the date that Blue Shores is [page43] no longer registered owner of any lands within the project (the "conveyance obligation").

[7] The easement and cost sharing agreement ("EACSA") between the appellants and Blue Shores provides that so long as Blue Shores owns and operates the clubhouse, each condominium unit owner is required to pay a monthly clubhouse membership fee to the condominium corporation in which the unit is located; the corporation in turn is required to remit the aggregate of these fees to Blue Shores. Blue Shores has used these payments for its own purposes and refuses to provide an accounting to the appellants.

[8] Since Blue Shores had not yet sold all of the vacant units or the lands within the project, the conveyance obligation had not been triggered. As a result, Blue Shores continues to own and operate the clubhouse.

[9] In November 2009, Blue Shores granted a mortgage to Duca in the amount of \$1 million, which Duca registered against title to the clubhouse. The mortgage was renewed in November 2011.

[10] In April 2012, after the registration and renewal of the Duca mortgage, the appellants registered a notice of an unregistered estate, right, interest or equity against title to the clubhouse under s. 71 of the *Land Titles Act*, R.S.O. 1990, c. L.5. With this registered instrument, the appellants gave public notice that they claim a property right in the title to the clubhouse.

[11] In August 2012, the appellants brought an application for a declaration of ownership over the clubhouse. Their application was dismissed and they now appeal.

### C. Analysis

[12] This appeal raises the following issues:

- (1) Do the appellants have an equitable or inchoate interest in the clubhouse?
- (2) Did Blue Shores have the right to mortgage the clubhouse to Duca?
- (3) Is Duca's mortgage subordinate to or void against the appellants' interest in the clubhouse?
- (4) Are the appellants entitled to an order that Blue Shores take steps to convert the clubhouse from a freehold interest to a unit within a condominium corporation?
- (5) Is Blue Shores required to operate the clubhouse on a non-profit basis and account to the appellants? [page44 ]
- (6) Does the limitation period is s. 113 of the *Condominium Act* bar the appellants' claim?
- (7) Does Blue Shores' conduct constitute oppression under s. 135 of the *Condominium Act*?

I address each issue in turn.

#### (1) *Do the appellants have an equitable or inchoate interest in the clubhouse?*

[13] The appellants argue that they have an equitable interest in the clubhouse, which entitles them to the relief they seek.

#### (a) *The application judge's decision*

[14] The application judge explained his understanding of the role of the clubhouse in the development, at para. 8:

The Disclosure Statements make it clear that Blue Shores kept for itself the ownership of the Clubhouse until all of its interest in the balance of the project and abutting property was sold. The reason for this has always been obvious to all concerned: the Clubhouse, with its social, athletic, and other recreational facilities, is an essential amenity in the marketing of the



project. Ensuring that it was properly operated and maintained until the last of Blue Shore's property is sold is important to Blue Shores as developer of the entire project.

[15] The standard form purchase agreement for each condominium unit provided that the purchaser took title "subject to the Condominium Documents". The application judge found, at paras. 20-21, that this phrase could not be read as incorporating the disclosure statements into each purchase agreement, so as to give each purchaser some form of legal or equitable interest in the clubhouse.

[16] The application judge found that the appellants do not have an equitable interest in the clubhouse. He rejected their characterization of the conveyance obligation in the disclosure statements as an "executory contract" for the purchase of the clubhouse that gave them an equitable interest in it. In his view, the disclosure statements, and the conveyance obligation in particular, were not clearly written as existing and paid-for contracts for the purchase and sale of property, as he asserted was required by s. 1(1) of the *Statute of Frauds*, R.S.O. 1990, c. S.19.

[17] Rather, the application judge found, at paras. 20-23, that the disclosure statements "specifically provide[] that an interest in the Clubhouse is *not* being conveyed with each sale" [emphasis in original]. In his view, the incorporation of the disclosure statements into the agreement of purchase and sale of each unit [page45 ] "confirms that each of those agreements excludes the purchase and sale of the Clubhouse".

[18] The application judge noted, at para. 24, that the standard form purchase agreement for each condominium unit did not allocate any portion of the purchase price to the clubhouse and did not convey an interest in the clubhouse to the appellant condominium corporations as consideration for the unit purchasers' payments.

[19] Instead, the application judge found, at para. 25, that the conveyance obligation imposed a future requirement that the appellants and Blue Shores enter into an agreement for the purchase and sale of the clubhouse once Blue Shores sold the remaining properties. The appellants would only get a legal or equitable interest in the clubhouse upon the completion of this future agreement. Although Blue Shores has a future obligation to convey the clubhouse, the application judge found, at para. 41, that it was entitled to retain ownership of the clubhouse until it sold the remaining properties.

[20] While the application judge acknowledged, at para. 32, that Blue Shores had a statutory obligation under s. 78(1) of the *Condominium Act* to "take all reasonable steps to sell the other residential units . . . without delay", he found, at para. 41, that the appellants had not proven Blue Shores had breached this obligation.

[21] According to the line of cases flowing from *York Condominium Corp. No. 167 v. Newrey Holdings Ltd.* (1981), 32 O.R. (2d) 458, [1981] O.J. No. 2965 (C.A.), discussed in detail below, condominium developers hold the common elements and fixtures in trust for condominium corporations, such that the corporations have an equitable interest in those elements. However, the application judge, at para. 30, distinguished the situation before him from *Newrey* on the basis that the clubhouse was not a fixture or a common element and, therefore, found, at para. 3, that Blue Shores did not hold the clubhouse in trust for the appellants.

[22] In the application judge's view, expressed at para. 30, if the clubhouse were a common element, each purchaser would have obtained an interest in the clubhouse with the purchase of

his or her condominium unit, which the standard form purchase agreement and the conveyance obligation in the disclosure statements made clear did not occur. He found, at para. 31, that classifying the clubhouse as a common element would render meaningless and unnecessary Blue Shores' future conveyance obligation in the disclosure statements to transfer title to the clubhouse, which could not have been the intention of the parties. [page46 ]

*(b) The positions of the parties*

[23] The appellants submit that the unit owners paid for an interest in the clubhouse when they purchased their units. As a result, the conveyance obligation in the disclosure statements functions as an executory contract of purchase and sale, which gives the appellants an equitable interest in the clubhouse. Alternatively, they argue they have an inchoate interest in the clubhouse, that is, a "proprietary interest that has not as yet vested". The appellants submit the *Newrey* line of cases supports their claims, contrary to the application judge's interpretation.

[24] Blue Shores argues that even if the conveyance obligation were an executory contract of purchase and sale, the transfer date has not yet arisen; the appellants do not, therefore, presently have an equitable or inchoate interest in the clubhouse.

[25] Blue Shores and Duca together argue the application judge correctly distinguished the *Newrey* line of cases on the basis that, even though the clubhouse is subject to a future conveyance obligation, it is not a common element or asset in which the unit owners obtained an equitable interest along with the purchase of their units.

[26] Before attending to the analysis of this issue, I describe the relevant condominium documents.

*(c) The condominium documentation*

[27] As the evolving language shows, the condominium documentary edifice in this case was a work in progress; all the documents must be read together to understand their full meaning.

[28] The standard form purchase agreement provides that the purchaser accepts title to the unit subject to the "Condominium Documents", defined to include the disclosure statements. The documents evolved somewhat over the four phases of the project as build-out progressed. In the disclosure statement for the first condominium, for example, the clubhouse was described as something that the declarant Blue Shores "intends to develop". The disclosure statement for the fourth condominium stated simply that the "Declarant has developed a clubhouse".

[29] Blue Shores' obligation to convey the clubhouse to the appellants is found in a para. in art. 4.4 of the phase I disclosure statement, in art. 4.3 of the phase II and phase III disclosure statements, and in art. 4.2 of the phase IV disclosure statement. Although its language evolved somewhat, the conveyance obligation in the phase IV disclosure statement is materially the same as that found in the three previous disclosure statements, and provides: [page47 ]

Ownership of the Clubhouse Facilities unit shall ultimately be transferred to the Phased Condominiums [each according to their ownership as tenants-in-common] by the Declarant (or any successor or assignee thereof for total consideration of Two dollars (\$2.00). Such conveyance shall occur within one hundred and twenty (120) days following the date that the

Declarant (or any successor or assignee thereof) is no longer the registered owner of any lands within the Project (including the Phased Condominiums and/or the Future Development Lands) or such earlier time as the Declarant may determine in its sole and unfettered discretion (the "Clubhouse Transfer Date").

[30] Blue Shores' declarations under the *Condominium Act* for each phase refer to a cost sharing agreement that each new condominium corporation must enter into with respect to "Shared Facilities and clubhouse facilities".

[31] It is common ground that the "Cost Sharing Agreement" referred to in the disclosure statements is the EACSA, dated August 28, 2003. The EACSA recitals note that "[t]he Declarant intends, but is under no obligation to construct the Clubhouse Facilities within the Future Phase Lands and to register the Clubhouse Facilities as a unit within the Future Phase Corporations." (This recital was overtaken by the construction of the clubhouse.) The EACSA is intended to cover shared costs for shared facilities and to allocate the costs among the condominium corporations, both while Blue Shores, as the declarant, is on the scene and after it has departed.

[32] The declarations also refer to the "Clubhouse Transfer Date". Despite the provision in the declarations that the "Clubhouse Transfer Date" would be defined in the "Cost Sharing Agreement", it is not found in the EACSA, but only in the disclosure statements.

[33] The shared facilities include the clubhouse, but "subject to art. 5.00". Article 5.00 governs the ownership and use of the clubhouse facilities by Blue Shores as the declarant, and substantiates the application judge's view that Blue Shores retained ownership and control over the clubhouse as "an essential amenity in the marketing of the project." Article 5.01 provides:

The Clubhouse Facilities shall be registered as one recreational unit by the Declarant to be located within the Future Phase Condominium and the Declarant shall continue to own the Clubhouse Facilities for its use and for the use and enjoyment of residents and their guests of the Condominium Corporations, and/or, on a user fee basis (or as otherwise determined by the Declarant in its sole discretion) any other members of the public. Accordingly, the Declarant, its sales staff, agents employees and invitees, shall have a continued right of access to inspect and view the Clubhouse Facilities, and to use, without fee or charge, any portion of the Clubhouse Facilities, as part of its marketing/sales program, as a sales/rental/administrative office, and for advertising, signage and displays. The Declarant shall not be charged for the use of such space nor any utility service supplied thereto, [page48 ]nor shall the Condominium Corporations prevent or interfere with the Declarant's right of access to use and operate the Clubhouse Facilities in the manner aforesaid. The Declarant shall have the exclusive right to establish reasonable hours of use and permitted uses of the Clubhouse Facilities.

#### *Discussion*

[34] Justice Wilson remarked prophetically in the early days of condominium law: "There is no doubt that special problems arise out of the peculiar character of ownership in condominium project": *Newrey*, at para. 16. The barrage of cases under the *Condominium Act* confirms the perduring accuracy of her remark. She identified the court's task as reconciling the ordinary law of contract and real property with condominium law.

[35] In undertaking that task in this appeal, I conclude that the appellant condominium corporations have an equitable interest in the clubhouse, notice of which is capable of being registered under s. 71 of the *Land Titles Act*. I reach this result by application of the principles of contract law and real estate law in the statutory and regulatory context governing condominiums. Although the appellants argue forcefully that the *Newrey* line of cases also compels this result, I do not agree.

(i) *The conveyance obligation in the disclosure statement is an executory contract*

[36] Stepping back, I note that the clubhouse is to be conveyed to the appellants for the nominal consideration of \$2.00; while it may be true, as the application judge noted, that the standard form purchase agreement did not expressly allocate any portion of a unit's purchase price to the clubhouse, the revenue generated by the sale of the units must have funded its construction and eventual conveyance, since there is no other available source of funds for those purposes.

[37] In my view, with respect to the conveyance of the clubhouse, the essential terms of an agreement for purchase of land -- the parties, the properties, the price and the date of conveyance -- are all clearly set out in the conveyance obligation in the disclosure statements: *McKenzie v. Walsh* (1920), 61 S.C.R. 312, [1920] S.C.J. No. 68, at para. 1. No contractual element is missing. This was not in any sense a mere agreement to agree; there is no need for a new contract to be negotiated on, or immediately before, the clubhouse transfer date, as the application judge suggested at para. 25.

[38] Therefore, the conveyance obligation is a valid contract. Specifically, it is an executory contract because "one or other of the parties [has] not fully performed its obligations": [page49] Angela Swan and Jakub Adamski, *Canadian Contract Law*, 3rd ed. (Markham, Ont.: LexisNexis, 2012), at para. 8.164. As Kevin P. McGuinness explains in *Halsbury's Laws of Canada*, "Guarantee and Indemnity" (Markham, Ont.: LexisNexis, 2014 Reissue), at para. HGI-21, "Guarantees as Executory Contracts":

An executed contract is one under which one party has fully performed its obligations (the most obvious example being in the case of a sales contract, where the buyer pays the full purchase price). In contrast, an executory contract is one that requires further performance by both of the parties (although either or both may have already completed part of their performance obligations under the contract).

[39] Two decisions from this court support the proposition that condominium documents can be enforceable contracts that may give rise to obligations to convey property in the condominium context. First, in *Peel Condominium Corp. No. 417 v. Tedley Homes Ltd.* (1997), 35 O.R. (3d) 257, [1997] O.J. No. 3541 (C.A.), at para. 3, the condominium declaration and the disclosure statements both provided that the condominium corporation was under a "duty and obligation" to purchase a superintendent's unit and two guest units in each of the two buildings pursuant to the terms of the "conveyance and purchase agreement", which was attached to the statements in draft form. The court framed the issue, at para. 17, as "whether the [condominium] corporation can be required by means of a provision in the declaration to purchase such units". The court concluded, at para. 16, that obliging the condominium corporation to purchase the

units from the declarant was "consistent with [the corporation's] objects", as required by s. 3(3) [of the *Condominium Act*, R.S.O. 1990, c. C.26], now s. 7(4)(d) of the *Condominium Act*, 1998.

[40] While that section of the Act is not at issue in this case, *Tedley* demonstrates that a disclosure statement and declaration can impose an enforceable obligation on a condominium corporation to purchase property, and, therefore, a reciprocal obligation on the declarant to convey it. The court made this clear at para. 21:

I would not think it open to the elected directors after closing to effectively amend the declaration by refusing to complete a transaction that had been accepted by all of the owners, including the directors themselves . . . [I]n completing the agreement the first directors were acting in compliance with a *contract* the terms of which had been approved by the unit owners.

(Emphasis added)

[41] The documentary package in *Tedley* appears to have been more complete and consistent than the package in this case. The terms of the sale in *Tedley* were found in an attached purchase agreement rather than only in the provisions of the disclosure [page50] statement, as in this case. Further, the purchase agreement in *Tedley* had terms a good deal more elaborate than the simple conveyance terms in this case: it identified the units to be purchased by the condominium corporation, their full prices, the financing terms, and so on. However, I do not consider the absence of a similar purchase agreement to be fatal to this case, nor a good reason to distinguish between *Tedley* and this appeal, because the essential contractual elements are all set out in the conveyance obligation.

[42] In the second decision, *Peel Condominium Corp. No. 505 v. Cam-Valley Homes Ltd.* (2001), 53 O.R. (3d) 1, [2001] O.J. No. 714 (C.A.), the disclosure statements provided for the potential construction of an outdoor recreational area ("ORA"). The declarant reserved the right not to move forward with the ORA, and retained title to the lands pending development. However, the statements also provided that if the ORA were developed, it would be conveyed to the condominium corporations. After the declarant decided not to construct the ORA, the corporations sought a declaration that they were the beneficial owners of the ORA lands.

[43] The court affirmed the trial judge's conclusion that if the declarant had completed the ORA, it would have been required to convey it to the condominium corporations. At para. 14 of *Cam-Valley Homes*, the court characterized the disclosure documents as setting out the developer's "obligations" with respect to the ORA lands. More specifically, at paras. 30-31, the court stated that the declarant would have had an "*affirmative obligation* to convey the ORA Lands" (emphasis added) if they had been developed. This is precisely Blue Shores' situation, since it did build the clubhouse.

[44] I conclude that the conveyance obligation in the disclosure statements contains the requisite elements of a valid executory contract of purchase and sale for real property -- the clubhouse -- between Blue Shores and the appellants. The compliance of the contractual package as a whole with the *Statute of Frauds* is manifest; the motion judge's conclusion to the contrary, at para. 19, was, with respect, wrong in law.

[45] I now turn to the principles of real estate law.

(ii) *The principles of real estate law give rise to an equitable interest*

[46] The common law has long recognized that a valid contract for the purchase and sale of land gives rise to a trust relationship, with the purchaser acquiring a beneficial interest in the [page51 ]property: Jessel M.R. summarized this principle in *Lysaght v. Edwards* (1876), 2 Ch. D. 499, at p. 506:

[I]t appears to me that the effect of a contract for sale has been settled for more than two centuries . . . [T]he moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser[.]

See, also, Anne Warner La Forest, *Anger & Honsberger Law of Real Property*, 3rd ed., looseleaf (Toronto: Canada Law Book, 2014), c. 11, at p. 52; Anthony Duggan, "Constructive Trusts from a Law and Economics Perspective" (2005), 55 U.T.L.J. 217, at p. 218.

[47] The trust relationship, known as "equitable conversion", has been described as "[p]ossibly the oldest, and certainly the most frequent, use of the constructive trust": Robert Chambers, "Constructive Trusts in Canada" (1999), 37 Alta. L. Rev. 173, at p. 186.

[48] This court described the qualified nature of the trust that arises from an agreement of purchase and sale in *Buchanan v. Oliver Plumbing & Heating Ltd.*, [1959] O.R. 238, [1959] O.J. No. 659 (C.A.), at pp. 242 and 244 O.R.:

The relationship created by such a contract does not entail all the obligations of an ordinary trusteeship. The vendor is not a mere dormant trustee; he is a trustee having a personal and substantial interest in the property, a right to protect, and an active right to assert that interest if anything is done in derogation of it.

. . . . .

[T]he trusteeship is not from the beginning an absolute one, for it is recognized that the vendor has a personal and substantial interest in the property which he is bound to protect.

[49] This principle also applies to condominiums, as Finlayson J.A. observed in *Peel Condominium Corp. No. 505 v. Cam-Valley Homes Ltd.*, *supra*, at para. 43:

The developer does not hold the condominium property in trust for the purchaser of the unit, it holds the title to the unit in trust for the prospective purchaser who has executed an agreement of purchase and sale to purchase a unit. The developer's good faith obligation, or duty, is to carry out the terms of the agreement and deliver whatever title the contract between the parties calls for. This obligation or duty is circumscribed by the documentation required by the Condominium Act. *The purchaser, for his or her part, has an equitable interest in the unit by virtue of the agreement that is signed*; an equitable interest that equity will enforce by specific performance. However, there is no overarching fiduciary duty arising out of the relationship of a vendor and purchaser as such.

(Emphasis added) [page52 ]

*Disposition of the issue*

[50] Since the conveyance obligation in the disclosure statements is a valid executory contract for the conveyance of the clubhouse by Blue Shores to the appellants, I conclude that the principles of contract law and real estate law operate to give the appellants an equitable interest in the clubhouse. The corollary is that s. 71 and (1.1) of the *Land Titles Act* apply and permit the appellants to register a notice of an unregistered interest in respect of the clubhouse conveyance obligation. Therefore, the application judge was wrong in finding, at paras. 104-109, that the appellants were not entitled to register the notice on the clubhouse title and in ordering its discharge. To be clear, it is the appellants who have the equitable interest, not the unit owners. However, this does not give the appellants the remedy they seek, as I note below.

[51] Given the central role that the clubhouse plays physically and socially in this project, and, more specifically, played in its design and marketing by Blue Shores, I do not think that damages would be an adequate remedy. See *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415, [1996] S.C.J. No. 71. It would be unconscionable, in equity's sense of the term, if Blue Shores were to take an action that would frustrate the conveyance obligation, such as by selling the clubhouse to a third party. In my view, equity should intervene to prevent that possibility. That is the purpose of my proposed disposition.

[52] I do not rely on *Newrey* to reach this conclusion, for the following reasons.

(iii) *The Newrey line of cases does not assist the appellants*

[53] My conclusion that the appellants have an equitable interest in the clubhouse is based on the executory contract for its purchase and sale. I reject the appellant's argument that their equitable interest arises from the *Newrey* line of cases. As I explain below, the principle in these cases applies only to common elements and fixtures. The clubhouse is neither.

[54] The application judge was correct in noting that the clubhouse is not a common element, nor is it intended to become one. Article 5.01 of the EACSA and the disclosure statements related to two of the appellants provide that Blue Shores is to register the clubhouse as a condominium unit in one of the appellants. Blue Shores has not yet done so and instead continues to hold it in freehold ownership. Once the clubhouse is [page53 ]conveyed, it will be owned proportionately by the appellants and will become an asset, but not a common element.

[55] As will be seen from the following discussion, the application of *Newrey* is presently confined to common elements and fixtures, consistent with the *Condominium Act*. The appellants urge this court to enlarge the reach of *Newrey* so that it applies not only to common elements and fixtures, but also to assets like the clubhouse. This requires the court to confront the principle set in a number of cases that, while the court, as in *Newrey*, will enforce statutory obligations related to condominiums, it will otherwise give effect to the language of the condominium documents.

[56] I begin with a discussion of the *Newrey* principle and the cases that have followed it, followed by a discussion of the cases that limit *Newrey's* reach to common elements and

fixtures.

*The principle in Newrey*

[57] The root principle in *Newrey* set out by Wilson J.A., at para. 15:

It seems to me that as soon as a unit purchaser enters into an agreement of purchase and sale of a unit he becomes the equitable owner of the unit and the interests appurtenant thereto even although the agreement cannot be closed until registration of the declaration.

In her view, noted at para. 17, "the parties have incorporated into their agreements by reference the provisions of the Act and declaration".

[58] The dispute in *Newrey* was about whether the janitor's suite, to which the developer had retained title, was properly a common element that belonged to the condominium corporation. The court there followed the result of a similar dispute in *Frontenac Condominium Corp. No. 1 v. Joe Macciocchi & Sons Ltd.* (1975), 11 O.R. (2d) 649, [1975] O.J. No. 2617 (C.A.), in which the developer was required to convey the suite to the condominium corporation at no cost.

[59] Justice Wilson found that once the declarant has embarked upon the sale of units, even before registration, the policy orientation of the *Condominium Act* comes into play. She said [at para. 18]:

I do not think the position of the owner-developer remains unchanged after he starts to sell units. I think that at that point he has committed the character of the project to that of condominium under the Act and declaration. I think he has also placed himself in a fiduciary relationship to the unit purchasers not only with respect to their units but also with respect to the interests appurtenant thereto. He therefore holds the property in trust for the unit purchasers, present and prospective, and for the condominium [page54 ]corporation which will come into being upon registration of the declaration. I believe he is under a duty to protect the interests of all unit owners, present and prospective, and cannot put his own interests in conflict with theirs even although he himself continues to be an owner as long as any units remain unsold.

[60] *Newrey* was invoked in *Middlesex Condominium Corp. No. 87 v. 600 Talbot Street, London Ltd.* (1998), 37 O.R. (3d) 22, [1998] O.J. No. 450 (C.A.), which also concerned the conveyance of a superintendent's suite. The principle in *Newrey* was affirmed, at para. 39, where Rosenberg J.A. said:

To summarize, *Frontenac* and *Newrey Holdings* stand for the proposition that *with respect to the common elements*, the declarant is bound not to prefer its interests over those of the group of unit owners. Where the reasonable interpretation of the evidence is that, notwithstanding the registered title, the declarant intended a reasonable purchaser to believe or to justifiably assume that the superintendent's suite was a common element or an asset of the corporation, the declarant will be required to convey the unit to the corporation. If this constituted a departure from established contract and real property law, it was a departure required by the exigencies of condominium ownership.



[Emphasis added]

[61] He concluded, at para. 41:

To protect both the purchaser and the declarant the test surely must be an objective one. If the declarant caused the purchasers to assume that the superintendent's suite was a common element, and if a reasonable purchaser would make such an assumption, a matter of interpreting the disclosure documents, this is sufficient to overcome the registered title.

[62] This court reached a similar conclusion in *Metropolitan Toronto Condominium Corp. No. 1250 v. Mastercraft Group Inc.*, [2009] O.J. No. 3104, 2009 ONCA 584, where the issue concerned the developer's attempt to hive off the HVAC equipment and lease it back to the condominium. The court found that it was part of the common elements. The principle in *Newrey* was recited at para. 37, and applied at paras. 38-41.

*Newrey does not limit contractual rights beyond common elements and fixtures*

[63] As noted earlier, any extension of *Newrey* beyond common elements and fixtures would require the court to confront the principle set out in a number of cases that, while the court will enforce statutory obligations applicable to condominiums, it will otherwise give effect to the language of the documents.

[64] In *Tedley*, the court compelled the condominium corporation to purchase a superintendent's unit and two guest units in each of the two buildings, as required by the condominium documents. [page55 ]

[65] In *Cam-Valley Homes*, this court held that the developer's good faith obligation to carry out the purchase agreement was circumscribed by the documentation required by the *Condominium Act*. There was no overarching fiduciary duty arising out of the relationship of the vendor and purchaser to prevent the developer from constructing townhouses on project land originally intended for recreational facilities, since the agreement of purchase and sale indicated clearly that the recreational facilities might not be built and contained the purchaser's acknowledgment that the vendor may construct another building on the land. Finlayson J.A noted, at para. 38:

However, to the extent that Wilson J.A.'s statement can be read along with her earlier statements in *Newrey* to hold that the developer is in a fiduciary relationship with prospective unit holders, this position is unsupported by the general law and is contradicted by recent decisions[.]

[66] Similarly, in *Toronto Standard Condominium Corp. No. 2095 v. West Harbor City (I) Residences Corp.*, [2014] O.J. No. 4947, 2014 ONCA 724, 46 R.P.R. (5th) 1, this court upheld an agreement entered into between the declarant and the captive board it appointed to limit the declarant's liability for construction deficiencies, on the basis that the agreement was not contrary to the *Condominium Act* and had been fully disclosed to the unit purchasers.

[67] I have noted that the application judge was correct in finding that the clubhouse is not a common element, and is not intended to become one. He did not err in refusing to apply *Newrey* to the clubhouse. Based on the case law, I would decline the appellants' invitation to enlarge the

reach of *Newrey* so that it applies not only to common elements and fixtures, but also to assets like the clubhouse.

[68] This court's observation in *Tedley*, at para. 16, may be apt:

Whether developers should be entitled to exclude from the common elements facilities of this nature or, indeed, other amenities ordinarily expected to be included in the common elements so as to have them purchased or otherwise dealt with after the unit purchases have been completed is a matter of policy for legislative and not judicial determination.

(2) *Did Blue Shores have the right to mortgage the clubhouse to Duca?*

[69] The appellants submit that the existence of their equitable interests meant that Blue Shores had no right to mortgage the clubhouse. Blue Shores and Duca support the application judge's decision that Blue Shores could do so. [page56 ]

(a) *The application judge's decision*

[70] The application judge held that his answer to the first issue applied to the second issue; since Blue Shores owns the clubhouse and the appellants have no interest in it, Blue Shores was entitled to mortgage the clubhouse. He pointed out, at paras. 50 and 61, that nothing in any of the relevant documentation prohibited Blue Shores from mortgaging the clubhouse.

[71] The application judge noted, at paras. 50-51, there has always been a mortgage on the property including the clubhouse. Blue Shores' purchase of the property in 2003 was financed by a mortgage loan from HSBC Bank for \$6 million; the principal amount was increased in 2004 to \$17 million, and it has since been discharged. The Duca mortgage in the amount of \$1 million was placed in 2009 and renewed in 2011.

(b) *The positions of the parties*

[72] The appellants submit that Blue Shores was prohibited from dealing with the clubhouse in a manner that could defeat the appellants' equitable or inchoate interests, including mortgaging the clubhouse.

[73] Blue Shores and Duca submit that because Blue Shores had title to the clubhouse, it was permitted to mortgage the property. There was nothing in the condominium documents to the contrary, and the clubhouse was already subject to a mortgage when the disclosure statements were executed. Duca argues the appellants are effectively asking the court to imply a term into the disclosure statements prohibiting Blue Shores from mortgaging the property.

(c) *Discussion*

[74] The condominium documents in this case, including the disclosure statements and the standard form purchase agreement, do not contain a provision prohibiting Blue Shores from granting encumbrances on the clubhouse property, as the application judge noted. Even though I have concluded that the principles of contract and real estate law give the appellants an equitable interest in the clubhouse, in my view Blue Shores was entitled to place a mortgage on the clubhouse, and doing so was not an interference with the appellants' interest.

[75] The trust that arises from an agreement of purchase and sale of land is qualified. At least until the full purchase price is paid and the vendor is bound to convey, the vendor retains for certain purposes its ownership over the property: *Wall v. Bright* (1820), 37 E.R. 456, 1 Jac. and W. 494 (Ch.), at p. 459 E.R.; [page57] see, also, J. Victor Di Castri, *Law of Vendor and Purchaser*, 3rd ed., looseleaf (Toronto: Carswell, 1988), c. 13, at p. 16.1; *La Forest*, c. 11, at p. 53. As noted earlier, this principle was accepted by this court in *Buchanan v. Oliver Plumbing & Heating Ltd.*, and applied to condominiums in *Cam-Valley Homes*.

[76] Di Castri suggests that while the vendor whose title is subject to an equitable interest cannot deal with the property in a manner that would defeat the interest, it can do anything that does not cause prejudice: *Di Castri*, at pp. 13-17, citing *Hadley v. London Bank of Scotland Ltd.* (1985), 3 De G.J. & Sm. 63, at p. 69. This view appears to be consistent with this court's decision in *Robinson v. Moffatt* (1916), 37 O.L.R. 52, [1916] O.J. No. 107, 31 D.L.R. 490 (S.C. (App. Div.)). Explaining the relationship between a vendor and purchaser under an agreement for purchase and sale of land, the court wrote, at para. 14:

Both at law and in equity, the vendor is the owner of the land in the sense of having the lawful title to it; the purchaser has only an equitable right to it . . . An agreement may never be carried into effect, it may end in nothing by various ways, and it may be that Equity, however measured, may refuse specific performance, and so the vendor may remain owner, unaffected by the agreement, without the aid of any Court. But, whether he does or not, he is still owner and can convey his ownership, subject of course to any equitable right which the purchaser may have: he has none at law except a personal action against the vendor if he should refuse or be unable to carry out his contract.

(The last sentence of the quote has to do with the arcanities of the different remedies at law and at equity, which do not concern us here.)

[77] In other words, the vendor can deal with the property as it sees fit, provided it can still comply with the terms of the conveyance obligation. Applying this principle to the facts of this appeal, the Duca mortgage has not prevented Blue Shores from conveying the clubhouse in accordance with the disclosure statements. Blue Shores stated, at para. 20 of their application factum, that the "Duca Mortgage will be discharged from title prior to or at the time Blue Shores transfers ownership of the Clubhouse to the Applicants."

[78] Therefore, I conclude that Blue Shores was not precluded, by its trustee role or otherwise, from mortgaging the clubhouse.

(3) *Is Duca's mortgage subordinate to or void against  
the appellants' interest in the clubhouse?*

[79] This issue follows from the preceding issue in which it was determined that Blue Shores was entitled to mortgage the clubhouse. It considers the effect of the appellants' registration of the notice of unregistered interest on the clubhouse title on [page58] April 27, 2012, after the mortgage in favour of Duca had been both registered and renewed.

(a) *The application judge's decision*

[80] The application judge found, at paras. 53-55, that the issue of priority as between Duca and the appellants, should Blue Shores default on the mortgage, was premature, since "[t] here is no claim or suggestion that Blue Shores has defaulted or that Duca is exercising its mortgage remedies, and no hint in the evidence that a default is likely". He declined to answer this "speculative" and "merely hypothetical" question, noting that Blue Shores indicated it would discharge the Duca mortgage before conveying the clubhouse to the appellants; there was no reason to doubt this statement at the time of the application.

(b) *The positions of the parties*

[81] The appellants argue that if the Duca mortgage is valid, it is subordinate to their interest in the clubhouse, notice of which was registered on title. They submit that the application judge's finding, at para. 51, that Duca had actual knowledge of the conveyance obligation when it renewed its mortgage in November 2011, is sufficient reason to subordinate Duca's mortgage to the appellants' interest in the clubhouse.

[82] Blue Shores and Duca submit that since the application judge was correct in finding that Blue Shores had the right to mortgage the clubhouse, questions about priority are premature.

(c) *Discussion*

[83] I agree with the application judge that the issue of priority as between Duca and the appellants, should Blue Shores default on the mortgage, is premature and might never arise for practical purposes in this development.

[84] Given the prospect that a condominium corporation could register a notice of an unregistered interest against a declarant's title might have implications for the financing of condominium projects more generally, I make a few observations.

[85] The financing pattern in this project shows that the developer borrowed money to buy the property and later to finance construction, and then paid down the mortgage security as units were sold. It is possible that the registration of a notice of an unregistered interest by a condominium corporation against property owned by the developer that is eventually to be transferred to the corporation could interfere with the project's financing, since lenders understandably abhor priority fights over their security. [page59 ]

[86] Duca cites *Holborn Property Investments Inc. v. Romspen Investment Corp.*, [2008] O.J. No. 5722, 77 R.P.R. (4th) 262 (S.C.J.) for the proposition that it would take express language in the relevant agreement to permit the future recipient of title to prevent the registered owner from encumbering the property. In that case, the purchaser agreed, in the contract for sale of land, that it would not register its interest under s. 71(1.1) of the *Land Titles Act*. After the agreement was signed, the vendor refinanced two mortgages and granted a new mortgage, then defaulted. Addressing the question of priority between the purchaser and the mortgagee, Wilton-Siegel J. wrote, at para. 45:

By precluding registration of the Agreement on title, clause 20(d) of the Agreement constitutes an interest in the Property that is subordinated to Romspen's interest as chargee under the First Mortgage and the Second Mortgage. The only reasonable inference from a

covenant not to register, in an agreement that does not contain a covenant against further encumbering the Property, is that the Agreement is intended to be subordinate to any encumbrance registered against the Property after the date of the Agreement.

[87] Whether the *Holborn Property* type of contractual subordination is an available approach in the condominium area is not raised on the facts in this case and is best left to one where it is directly in issue. As noted earlier in these reasons, while the court will enforce statutory obligations, it will otherwise give effect to the language of the documents, as illustrated by *Tedley*, *Cam-Valley Homes* and *West Harbor City*.

[88] The context of the ongoing tension between condominium corporations and developers is shown in the cases discussed earlier. Some developers do seek opportunities to increase their profits at the expense of condominium corporations and unit owners. As the *Newrey* line of cases shows, these efforts are sometimes not successful. Other times, they are. As this court observed in *Tedley*, the adjustment of the balance of power is a matter for legislation.

*(4) Are the appellants entitled to an order that Blue Shores take steps to convert the clubhouse from a freehold interest to a unit within a condominium corporation?*

[89] As noted, art. 5.01 of the EACSA and the disclosure statements related to two of the appellants provide that Blue Shores is to register the clubhouse in one of the appellant corporations as a condominium unit. However, Blue Shores has not yet done so and instead continues to hold it in freehold ownership.

[90] On the application judge's reading of the disclosure statements and the EACSA, the clubhouse could be registered as [page60] a unit at any time. He found that Blue Shores' failure to register the clubhouse as a unit had not resulted in any prejudice to the appellants and did not give rise to any remedy. There is no error in the application judge's reasoning.

[91] Blue Shores indicates in its factum that it is prepared to consent to the conversion of the clubhouse from freehold tenure to a condominium unit. Blue Shores took the same position before the application judge.

[92] Section 109(3) of the *Condominium Act* permits a judge of the Superior Court of Justice to make an order to amend the declaration or description registered under s. 2 of the Act. Given Blue Shores' consent to the amendment, I would grant an order to amend the declarations and descriptions to convert the clubhouse to a condominium unit, but I would direct the parties to prepare the text of it.

*(5) Is Blue Shores required to operate the clubhouse on a non-profit basis and account to the appellants?*

[93] As noted earlier, the EACSA between the appellants and Blue Shores provides that, as long as Blue Shores owns and operates the clubhouse, each condominium unit owner is required to pay a monthly clubhouse membership fee to the owner's respective condominium corporation. Each appellant condominium corporation is required to remit the aggregate of these membership fees to Blue Shores, which constitute each appellant's allocated cost contribution ("ACC") for the clubhouse under the EACSA. Article 6.01 of the EACSA sets the initial monthly fee payable by each unit owner at \$100, and provides for an increase of up to 10 per cent per

year.

[94] The preamble to the EACSA provides that:

The Phase 1 Corporation and the Declarant have on its own behalf and on behalf of the Future Phase Corporations entered into this Agreement on a non-profit basis in order to confirm the mutual use, management, operation, maintenance, repair, replacement and cost sharing of the Share Facilities[.]

(a) *The application judge's decision*

[95] The application judge concluded, at para. 68, that the monthly fee at the time of the application, \$128.26 per month per unit, was well within the permissible range of a \$100 starting fee plus up to 10 per cent annual increase from 2006 to 2011 set out in the EACSA. He noted, at paras. 78-79, that art. 6.01 demonstrates that the ACC calculation is not dependent on operating costs, since it provides that the ACC would be calculated "irrespective of . . . the cost of operating and maintaining" the clubhouse. [page61 ]

[96] The appellants rely on the preamble of the EACSA to argue that Blue Shores was obliged to operate the clubhouse on a "non-profit basis" and to account to the appellants. The application judge rejected their interpretation of the meaning of "non-profit basis", since it would render other portions of the EACSA essentially meaningless, such as the provision for a 10 per cent annual fee increase regardless of operating costs. He found no basis on which the appellants could claim an accounting with respect to the operation of the clubhouse.

[97] The application judge also rejected the appellants' argument that Blue Shores could not use the ACC to pay the Duca mortgage. He found that Blue Shores was entitled to use its revenues to pay its bills in the ordinary course of business, which includes making payments on the Duca mortgage.

(b) *The positions of the parties*

[98] The appellants argue the application judge erred by not recognizing that the clubhouse is a community centre, rather than a health club, which led him to misinterpret the ACC as a monthly membership fee rather than as a contribution "toward the costs incurred by the Declarant in connection with the Clubhouse Facilities". They reiterate their argument that the preamble of the EACSA, which calls for the operation of EACSA on a "non-profit basis", applies also to the clubhouse and prohibits Blue Shores from earning a profit on it. They assert that the application judge should have applied the principle of *contra proferentem* in favour of the appellants to conclude that none of the parties can profit at the other parties' expense. The appellants sought an accounting of the clubhouse's revenue and expenses to ensure this had not occurred.

[99] The appellants submit that the permitted annual increase of the ACC, "not exceeding 10%", must be interpreted in light of the requirement that the clubhouse be operated on a non-profit basis. They argue that the inclusion of this provision in the EACSA is evidence that the parties intended "some criteria" be applied to determine the appropriate annual increase to the ACC. In particular, the ACC can only be increased to the meet operating costs.

[100] Blue Shores adopts the application judge's conclusion that the appellants' proposed interpretation of the EACSA does not make commercial sense.

(c) *Discussion*

[101] The application judge's interpretation of the "non-profit basis" phrase in the preamble to the EACSA was reasonable. [page62 ]The appellants' interpretation would result in a preambular provision effectively rendering important substantive provisions of the EACSA meaningless. Similarly, the appellants' request for an accounting of clubhouse expenses and profits has no basis in the EASCA.

[102] In context, the EACSA is intended to govern the clubhouse during the time that Blue Shores is there and after it leaves. The commercial purpose of the arrangement while Blue Shores is on the site as the declarant must be taken into account. Most of the provisions in the EACSA govern what are called the "Shared Facilities" and the "Shared Costs", and these are meant to be allocated on a "non-profit basis", hence the preamble.

[103] The important qualifier for the purpose of this appeal is that the clubhouse is a "Shared Facility" under art. 4.01, but "subject to the provisions of Article 5.00". Articles 5.00 and 6.00 govern the ownership and use of the clubhouse facilities by Blue Shores as the declarant. Blue Shores preserved for itself the right to operate the clubhouse almost entirely free of constraint, while it is on the site marketing units, but leaving it open to use by "the residents and the guests of the Condominium Corporations". In particular, under art. 5.02, Blue Shores, as the declarant, has "the right to permit members of the public, on a user-fee basis" to use the clubhouse, and "shall have no obligation to account for same to the Condominium Corporations". These provisions amply substantiate the application judge's view that Blue Shores retained ownership and control over the clubhouse as [at para. 8] "an essential amenity in the marketing of the project".

[104] While the appellants' theory is that the clubhouse is intended to be a community centre will eventually hold sway, that will only be after Blue Shores conveys the clubhouse and ceases to be the declarant.

(6) *Does the limitation period in s. 113 of the Condominium Act bar the appellants' claim?*

[105] Section 113(3) of the *Condominium Act, 1998* permits a court to amend or terminate an agreement such as the EACSA if the disclosure statements did not provide sufficient disclosure, and the agreement "produces a result that is oppressive or unconscionably prejudicial" to the condominium corporation.

[106] The application judge found, at paras. 64-65, that, since the appellants did not meet the 12-month deadline for challenging the terms of the EACSA, as set out in s. 113 of the *Condominium Act, 1998*, they were limited to claiming damages for breach of its terms. [page63 ]

[107] The appellants disclaim any effort to challenge the EACSA, but only sought its interpretation in terms favourable to them. Contrary to the appellants' submissions, I have concluded that the application judge's interpretation of the EACSA was reasonable. In my view,

s. 113 of the *Condominium Act* has no application to this case.

(7) *Did Blue Shores' conduct constitute oppression?*

[108] Under s. 135 of the *Condominium Act*, a court can make an order to rectify conduct that "is or threatens to be oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant".

[109] The application judge acknowledged, at para. 97, that the oppression remedy in s. 135(2) of the *Condominium Act* can capture conduct that is legal but is nonetheless unfair in the sense that it violates the reasonable expectations of a party. However, he found that the conduct of Blue Shores did not breach this standard. The application judge determined that Blue Shores had not violated the appellants' contractual or property rights and the appellants had not demonstrated any unfair conduct by Blue Shores that undermined their reasonable expectations.

[110] Since I have agreed with the application judge that the appellants have not established that Blue Shores has done anything wrong in its use and operation of the clubhouse, it is clear that Blue Shores is not liable for oppression.

D. *Disposition*

[111] I would allow the appeal. I would set aside para. 1 of the judgment ordering that instrument SC976990 be discharged from title to the clubhouse, and I would require the parties to prepare a consent order to convert the clubhouse from freehold tenure to a condominium unit, under s. 109(3) of the *Condominium Act*.

[112] MACFARLAND J.A. (LAFORME J.A. concurring): -- I have read my colleague's reasons and part company with him on two related points. First, I disagree that the disclosure statement contained an executory contract between Blue Shores Developments Ltd. ("Blue Shores") and the appellant condominium corporations in relation to the clubhouse. Second, I disagree that the appellants have an interest in the clubhouse that can be registered under s. 71(1) or (1.1) of the *Land Titles Act*, R.S.O. 1990, c. L.5. [page64 ]

[113] I would also decline to make an order under s. 109 of the *Condominium Act*, 1998, S.O. 1998, c. 19 (the "Act") to amend the declaration. The parties are free to seek such an amendment in the Superior Court on consent. Apart from these points of disagreement, I agree with my colleague's disposition on the remaining issues.

A. *The Disclosure Statement is not an Executory Contract*

[114] The disclosure statement provides as follows:<sup>1</sup>

The Declarant (or if applicable, its successors, or assigns) shall retain ownership of the Clubhouse Facilities and shall be responsible for the management, operation and control of same[.]

Ownership of the Clubhouse Facilities shall ultimately be transferred to the Phased Condominiums, each as to one-quarter ownership as tenants-in-common by the Declarant (or any successor or assignee thereof) for total consideration of Two (\$2.00) Dollars. Such



conveyance shall occur within one hundred and twenty (120) days following the date that the Declarant (or any successor or assignee thereof) is no longer the registered owner of any lands within the Project (including the Phased Condominiums and/or the Future Development Lands) or such earlier time as the Declarant may determine in its sole and unfettered discretion (the "Clubhouse Transfer Date").

[115] In my opinion, the application judge was correct when he concluded, at para. 40, that this passage in the disclosure statement is not an executory contract between the appellants and Blue Shores:

In short, the requirement to convey the Clubhouse for consideration in the future is an obligation that Blue Shores will have in the future. It is not an executory contract which entitles the Applicants, or any of the unit purchasers, to equitable title and the equitable remedy of specific performance. That is not what any document says because it is not what the Applicants, or any of the individual condominium purchasers, bargained for.

[116] The requirement to provide a disclosure statement is set out in s. 72(1) of the Act. Under s. 72(1), a declarant must provide "to every person who purchases a unit or a proposed unit from the declarant a copy of the current disclosure statement made by the declarant for the corporation of which the unit or proposed unit forms part". Agreements of purchase and sale for a condominium unit are not binding on the purchaser until the disclosure statement is delivered: s. 72(2). When the purchaser receives the disclosure statement, he or she may [page65] rescind the agreement of purchase and sale "before accepting a deed to the unit being purchased that is in registerable form": s. 73(1). The Act sets out the formal requirements for a rescission: s. 73(2).

[117] The declarant is also required to deliver a revised disclosure statement to the purchaser "[w]henever there is a material change in the information contained or required to be contained in a disclosure statement": s. 74(1). Purchasers again have rights to rescind the agreement of purchase and sale after delivery of the revised disclosure statement "before accepting a deed to the unit being purchased that is in registerable form", and in other circumstances: s. 74(6).

[118] The Act provides enforcement mechanisms. For example, s. 133(1) provides that a declarant shall not, in a statement that it is required to provide, "make a material statement or provide material information that is false, deceptive or misleading" or "omit a material statement or material information that the declarant is required to provide". Where such a material misstatement or omission is made, a corporation or unit owner may sue for damages in certain circumstances: s. 133(2).

[119] One purpose of the disclosure statement is to "enable individuals contemplating the purchase of a condominium unit to have a full understanding of their rights and obligations on unit purchase but more importantly, what the costs of owning it will be": *90 George Street Ltd. v. Ottawa-Carleton Condominium Corp. No. 815*, [2015] O.J. No. 188, 2015 ONSC 336, 51 R.P.R. (5th) 287 (S.C.J.), at para. 7. Furthermore, as Rosenberg J.A. observed in *Middlesex Condominium Corp. No. 87 v. 600 Talbot Street London Ltd.* (1998), 37 O.R. (3d) 22, [1998] O.J. No. 450 (C.A.), at p. 37 O.R.:

[A]n aspect of the disclosure requirement is to assist in resolving disputes between the declarant and the owners and the corporation about which assets and common elements are intended to be included in the purchase price.

[120] Accordingly, a disclosure statement provided under s. 72 of the Act has a unique purpose within the condominium law regime.

[121] My colleague relies on *Peel Condominium Corp. No. 417 v. Tedley Homes Ltd.* (1997), 35 O.R. (3d) 257, [1997] O.J. No. 3541 (C.A.) for the proposition that condominium documents can be enforceable contracts that may give rise to obligations to convey property in the condominium context. In my view, however, *Tedley* is distinguishable. In *Tedley*, the disclosure statement and declaration given to prospective purchasers specified that the condominium corporation was under a "duty and [page66] obligation" to purchase a superintendent's unit and two guest units in each of the buildings, pursuant to the terms of the "conveyance and purchase agreement", which was attached to the disclosure statement in draft form. The condominium documents also provided the total purchase price and a payment schedule. The first directors of the condominium corporation subsequently enacted a by-law authorizing the execution of the conveyance and purchase agreement and completed the agreement on behalf of the condominium corporation. The condominium corporation then brought an application seeking a declaration that the conveyance and purchase agreement was void.

[122] My colleague refers to Robins J.A.'s remarks on the effect of the declaration and disclosure statement, at p. 265 O.R.:

I would not think it open to the elected directors after closing to effectively amend the declaration by refusing to complete a transaction that had been accepted by all of the owners, including the directors themselves. . . . The agreement to purchase the six suites cannot be considered "unilateral" in these circumstances or treated as having been "foisted" on the corporations or its directors or the unit owners. To the contrary, as I have said, in completing the agreement the first directors were acting in compliance with a *contract* the terms of which had been approved by the unit owners[.]

(Emphasis added)

[123] When Robins J.A. used the word "contract", he was referring to the draft conveyance and purchase agreement that had been appended to the disclosure statement. This is made clear by his description of the purchase documents, at p. 263 O.R.:

Clearly, each of [the condominium unit owners] agreed by way of their purchase documents that the superintendent and guest suites were not included in the purchase price. The disclosure statement and declaration made it abundantly clear that these suites were to be purchased by the condominium corporation and used as common elements *in accordance with the terms of the conveyance and purchase agreement*.

(Emphasis added)

[124] Therefore, *Tedley* does not support the proposition that the disclosure statement could, in and of itself, constitute a contract between the developer and the condominium corporation.

Indeed, in *Tedley*, the condominium corporation executed a separate conveyance and purchase agreement in order to purchase the superintendent's unit and guest units.

[125] Moreover, I agree with the application judge's conclusion that, in this case, the disclosure statements expressly indicated that an interest in the clubhouse was not being conveyed with the sale of each condominium unit. The application judge wrote, at paras. 23-25: [page67 ]

The purchasers take their title to each unit "subject to the Condominium Documents", which means that the Condominium Documents must actually be read in order to determine their actual impact on title. While the Applicants [*i.e.*, the appellant condominium companies] are correct that the phrase "Condominium Documents" includes the Disclosure Statement, they are incorrect in their interpretation of the impact of that inclusion. As indicated above, article 4.3 of the Disclosure Statement specifically provides that an interest in the Clubhouse is *not* being conveyed with each sale. The Disclosure Statement's incorporation by reference into the agreement of purchase and sale of each unit confirms that each of those agreements excludes the purchase and sale of the Clubhouse.

The agreements of purchase and sale allocate no money to the purchase of the Clubhouse, and contain no requirement that the Clubhouse be conveyed to the Applicants in return for the purchasers' respective purchase prices. Article 4.3 provides that a contract for the purchase of the Clubhouse shall be entered into in the future between the Applicants and Blue Shores, and at that point the Applicants will pay the stipulated purchase price. The purchase price, although nominal, has not yet been paid by the Applicants, as the contract of sale for the Clubhouse has not yet been entered into.

In other words, Blue Shores, as developer, is obliged under the statutorily required Disclosure Statement to contract with the Applicants for the sale of the Clubhouse once all of the units and other property have been sold. The basic terms of that future contract, but not its date, have been described in art. 4.3, but no consideration has flowed and there is no existing executory contract. No equitable title has passed to the Applicants as it would if Blue Shores had actually entered an agreement of purchase and sale of the Clubhouse with the Applicants, and there is therefore nothing on which specific performance might operate in the usual way that it does with agreements to convey real estate.

[126] My conclusion that the disclosure statement did not constitute a binding executory contract between Blue Shores and the appellants does not necessarily leave the latter without a remedy. As mentioned above, under s. 133(2) of the Act, a condominium corporation has a statutory right to sue for damages in certain circumstances, in the event that the disclosure statement contains a material statement or material information that is false, deceptive or misleading:

133(2) A corporation or an owner may make an application to the Superior Court of Justice to recover damages from a declarant for any loss sustained as a result of relying on a statement or on information that the declarant is required to provide under this Act if the statement or information,

- (a) contains a material statement or material information that is false, deceptive or misleading; or
- (b) does not contain a material statement or material information that the declarant is required to provide. [page68 ]

[127] However, as the parties have not raised s. 133(2), I should not be taken as expressing an opinion on its application in the circumstances of this case now or in the future.

[128] Accordingly, I agree with the application judge that the provision in the disclosure statement obliging Blue Shores to ultimately transfer ownership of the clubhouse to the appellants does not constitute an executory contract.

#### *B. The Appellants Have no Interest that Can be Registered under the Land Titles Act*

[129] Given my conclusion that the disclosure statement does not constitute an executory contract, I do not agree with my colleague that the principles of contract law and real estate law operate to give the appellants an equitable interest in the clubhouse. However, I agree with my colleague that the line of cases beginning with *York Condominium No. 167 v. Newrey Holdings Inc.* (1981), 32 O.R. (2d) 458, [1981] O.J. No. 2965 (C.A.) does not support the appellants' argument that they have an equitable interest in the clubhouse.

[130] Thus, in my view, the appellants have no rights that are capable of registration under either s. 71(1) or (1.1) of the *Land Titles Act*. Accordingly, I would not interfere with the application judge's order vacating the registration that the appellants entered on the register.

#### *C. Duca Mortgage and Priorities*

[131] I agree with my colleague's conclusion that the Duca mortgage is valid.

[132] The evidence discloses that Blue Shores is still the owner of the clubhouse. Under the disclosure statement, Blue Shores has no obligation to convey the clubhouse until 120 days after the date on which it is no longer the registered owner of any lands within the project. As owner of the property, Blue Shores was entitled to mortgage the property and there is no prohibition to it doing so in any of the condominium documentation.

[133] Blue Shores has undertaken to discharge the mortgage from title before it conveys title to the appellants.

#### *D. Conversion of the Clubhouse from Freehold to a Condominium Unit*

[134] At para. 52 of its factum, Blue Shores stated that it is prepared to consent to the conversion of the clubhouse from [page69 ]freehold tenure to a condominium unit, although it points out it has no obligation to do so.

[135] The appellants may bring an application on consent to the Superior Court of Justice under s. 109 of the Act for the necessary order.

#### *E. Remaining Issues*

[136] I agree with my colleague's disposition of the remaining issues, namely

- (a) whether Blue Shores is obligated to run the clubhouse on a non-profit basis and to account;
- (b) whether the limitation period in s. 113 of the Act bars the appellants' claim; and
- (c) whether Blue Shores' conduct constitutes oppression under s. 135 of the Act.

#### F. *Disposition*

[137] In the result, I would dismiss the appeal. I would award costs of the appeal to the respondent Blue Shores fixed in the sum of \$18,000, and to the respondent Duca Financial Services Credit Union Ltd., in the sum of \$15,000, both on a partial indemnity basis and inclusive of disbursements and HST.

*Appeal dismissed.*

#### Notes

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- 1** As my colleague points out, the language of the conveyance obligation evolved somewhat through the various disclosure statements. I have quoted from art. 4.2 of the phase IV disclosure statement.

**TAB 31**

**Soboczynski et al. v. Beauchamp et al.  
[Indexed as: Soboczynski v. Beauchamp]**

Ontario Reports

Court of Appeal for Ontario,  
Hoy A.C.J.O., Epstein and Hourigan JJ.A.  
April 23, 2015

**125 O.R. (3d) 241** | 2015 ONCA 282

## **Case Summary**

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**Sale of land — Agreement of purchase and sale — "Entire agreement" clause in agreement of purchase and sale not precluding purchaser's action in negligent misrepresentation against vendor for non-contractual representations made subsequent to agreement but before closing.**

**Torts — Negligent misrepresentation — Vendors completing seller property information statement ("SPIS") before closing of house sale in which they stated that property was not subject to flooding and undertook to inform purchasers of any important changes to information in SPIS — Vendors failing to disclose pre-closing flooding of basement — Purchasers' negligent misrepresentation claim failing in absence of evidence that they relied on vendors' representations.**

The parties entered into an agreement of purchase and sale which contained an "entire agreement" clause. Before the transaction closed, the defendant vendors completed a seller property information statement ("SPIS") in which they stated that the property was not subject to flooding and undertook to inform the plaintiff purchasers of any important changes to the information contained in the SPIS. The defendants failed to inform the plaintiffs of a pre-closing basement flood. After the closing, the basement flooded again, and the plaintiffs found out about the earlier flood. They sued the defendants for damages for negligent misrepresentation. The trial judge found that the entire agreement clause in the agreement of purchase and sale acted as a bar to the action. The Divisional Court allowed the plaintiffs' appeal. The defendants appealed.

**Held**, the appeal should be allowed.

The action was not precluded by the entire agreement clause. The entire agreement clause operated retrospectively, not prospectively. Its application was restricted to limit representations, warranties, collateral agreements and conditions made prior to or during the negotiations leading up to the signing of the agreement of purchase and sale. When the defendants made representations in the SPIS, a document completed after the agreement of purchase and sale was signed, the entire agreement clause was spent.

The plaintiffs' negligent misrepresentation claim failed in the absence of evidence that they relied on the defendants' representations.

*Shelanu Inc. v. Print Three Franchising Corp.* (2003), 64 O.R. (3d) 533, [2003] O.J. No. 1919, 226 D.L.R. (4th) 577, 172 O.A.C. 78, 38 B.L.R. (3d) 42, 123 A.C.W.S. (3d) 267 (C.A.); supp. reasons [2006] O.J. No. 1729, 269 D.L.R. (4th) 152, 19 B.L.R. (4th) 19, 147 A.C.W.S. (3d) 571 (C.A.), **consd**

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*BG Checo International Ltd. v. British Columbia Hydro and Power*, [1993] 1 S.C.R. 12, [1993] S.C.J. No. 1, 99 D.L.R. (4th) 577, 147 N.R. 81, [1993] 2 W.W.R. 321, J.E. 93-271, 20 B.C.A.C. 241, 75 B.C.L.R. (2d) 145, 14 C.C.L.T. (2d) 233, 5 C.L.R. (2d) 173, 37 A.C.W.S. (3d) 1202; *Dzourellov v. T.B. Bryk Management and Development Ltd.*, [2004] O.J. No. 4109, 190 O.A.C. 321, 40 C.L.R. (3d) 301, 31 R.P.R. (4th) 238, 134 A.C.W.S. (3d) 234 (Div. Ct.); [page242] *Farmer v. H.H. Chambers Ltd.*, [1973] 1 O.R. 355, [1972] O.J. No. 1982, 31 D.L.R. (3d) 147 (C.A.); *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1964] A.C. 465 (U.K. H.L.); *Inntrepreneur Pub Co. v. East Crown Ltd.*, [2000] 41 E.G. 209, [2000] 2 Lloyd's Rep. 611, [2000] 3 E.G.L.R. 31 (U.K. Ch.); *Kaufmann v. Gibson*, [2007] O.J. No. 2711, 59 R.P.R. (4th) 293, 158 A.C.W.S. (3d) 1016 (S.C.J.); *Krawchuk v. Scherbak* (2011), 106 O.R. (3d) 598, [2011] O.J. No. 2064, 2011 ONCA 352, 279 O.A.C. 109, 82 C.C.L.T. (3d) 179, 332 D.L.R. (4th) 310, 5 R.P.R. (5th) 173, 4 C.L.R. (4th) 1, 201 A.C.W.S. (3d) 848 [Leave to appeal to S.C.C. refused [2011] S.C.C.A. No. 319]; *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87, [1993] S.C.J. No. 3, 99 D.L.R. (4th) 626, 147 N.R. 169, J.E. 93-270, 60 O.A.C. 1, 45 C.C.E.L. 153, 14 C.C.L.T. (2d) 113, 93 CLLC Â14,019 at 12082, 37 A.C.W.S. (3d) 1304, D.T.E. 93T-198; *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co.*, [1991] 3 S.C.R. 3, [1991] S.C.J. No. 67, 84 D.L.R. (4th) 291, 126 N.R. 354, [1991] 6 W.W.R. 385, J.E. 91-1513, 3 B.C.A.C. 1, 59 B.C.L.R. (2d) 129, 8 C.C.L.T. (2d) 225, 29 A.C.W.S. (3d) 181; *Strand v. Emerging Equities Inc.*, [2008] A.J. No. 50, 2008 ABCA 23, 37 B.L.R. (4th) 44, 425 A.R. 314, 54 C.C.L.T. (3d) 8, 164 A.C.W.S. (3d) 720; *Usenik v. Sidorowicz*, [2008] O.J. No. 1049, 166 A.C.W.S. (3d) 181, 2008 CanLII 11373 (S.C.J.)

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APPEAL from the order of the Divisional Court (Kent, Herman and Harvison Young JJ.) dated May 28, 2013 allowing the appeal from the judgment of Little J., [2011] O.J. No. 5120, 2011 ONSC 6791 (S.C.J.).

*Benjamin G. Blay*, for appellants.

*W. Scott Gallagher*, for respondents.

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The judgment of the court was delivered by  
**EPSTEIN J.A.:** —

## I. Overview

[1] The appellants, Don and Louise Beauchamp, sold their home to the respondents, Adam and Olga Soboczynski.

[2] The issue at the centre of this appeal is the legal effect of an entire agreement clause in an agreement of purchase and sale. Specifically, does the clause preclude a purchaser's action in negligent misrepresentation against a vendor for [page243] non-contractual representations made subsequent to entering into the agreement but before closing?

[3] The appellants and respondents entered into the agreement of purchase and sale (the "APS") on November 21, 2007. The purchase price was \$290,000. Following the execution of the agreement, but before the transaction closed, the appellants, at the respondents' request, completed and signed a seller property information statement (the "SPIS"). In the SPIS, the appellants stated that the property was not subject to flooding. They also undertook to inform the respondents of any "important changes" to the information contained in the SPIS based on events, if any, that took place prior to closing.

[4] On January 9, 2008, the basement of the house flooded, causing relatively minor damage. The appellants fixed the damage but did not disclose the incident to the respondents. The transaction closed as scheduled on January 18, 2008.

[5] On February 6, 2008, the basement flooded again. After learning of the pre-closing flood, the respondents sued the appellants for damages based on negligent misrepresentation, arguing that the SPIS required the appellants to disclose the January 9 flood to them.

[6] The trial judge concluded that the entire agreement clause in the APS acted as a bar to the respondents' action. Notwithstanding this conclusion, the trial judge proceeded to assess

damages. He found that if the respondents had been successful, they would have been entitled to \$25,000 in damages for negligent misrepresentation.

[7] The Divisional Court disagreed with the trial judge's conclusion that the entire agreement clause precluded the respondents' tort action. The SPIS required the appellants to tell the respondents about the pre-closing flood. They failed to do so. And the other elements of the tort of negligent misrepresentation had been made out. Therefore, the court awarded damages to the respondents in the amount assessed by the trial judge.

[8] The appellants appeal on two main grounds. First, the Divisional Court erred in finding that the entire agreement clause in the APS does not preclude a claim based on representations made in the SPIS. Second, the court erred in holding that the tort of negligent misrepresentation had been made out.

[9] I would allow the appeal. I agree with the Divisional Court that the representations the appellants made in the SPIS are actionable notwithstanding the entire agreement clause in the APS. However, in my view, the evidence does not support a finding that the respondents relied on the representations that form [page244] the basis of their claim for negligent misrepresentation. In the absence of reliance, the respondents' claim must fail.

## II. *Factual Background*

### (i) *The APS and the SPIS*

[10] The APS was subject to two conditions -- satisfactory financing, and a satisfactory home inspection. The APS also contained an entire agreement clause. It read:

[The APS] including any Schedule attached hereto, shall constitute the entire Agreement between Buyer and Seller. There is no representation, warranty, collateral agreement or condition, which affects [the APS] other than as expressed herein.

[11] On November 22, 2007, the day after the APS was signed, Mr. Soboczynski gave the appellants the SPIS to fill out. After consulting their lawyer, the appellants completed and signed the SPIS. In the document, the appellants indicated that (i) the property was not subject to flooding; (ii) they were not aware of any moisture or water problems; and (iii) they were not aware of any damage due to wind, fire, water, insects, termites, rodents, pets or wood rot. The SPIS concluded with the following statement: "Any important changes to this information known to the sellers will be disclosed by the sellers prior to closing."

[12] As previously noted, the APS was conditional on the "[r] esults of an inspection from an inspector of [the respondents'] choice". On November 28, 2007, the respondents obtained a satisfactory home inspection from their chosen inspector. As Mr. Soboczynski testified, "We received the inspection report. There was nothing significant there to be concerned about that we thought. My wife saw the inspection report as well and I took it home to her." Having obtained a satisfactory home inspection, the respondents waived the home inspection condition. They also secured financing and waived the financing condition. As of November 28, 2008, the APS was no longer conditional.

[13] The SPIS was not incorporated into the terms of, or otherwise referenced in, the APS.

(ii) *The two floods*

[14] On January 9, 2008, the basement of the house flooded after a period of heavy rainfall and melting snow. Water entered the basement through the window wells. The carpet was saturated with water. The appellants repaired the damage by drying out the rug and replacing the underpad. The repairs cost \$1,648.59. [page245]

[15] The appellants consulted their lawyer about the flood but did not inform the respondents of the incident. The appellants' evidence was that they believed the flood was an isolated occurrence and was not an "important change" requiring them to give notice to the respondents under the terms of the SPIS.

[16] The sale closed on January 18, 2008. The respondents were unaware of the January 9 flood. On February 6, 2008, after another period of heavy rainfall, the basement flooded again. The respondents repaired the damage and took steps to prevent further flooding. The respondents hired an expert and discovered that the backyard was ponding and the window wells were lower than the surrounding land. The remedial steps the respondents took cost \$22,598.17.

[17] The respondents eventually found out about the January 9 flood. By statement of claim dated November 17, 2009, they commenced this action against the appellants. The respondents sued only in tort. They claimed damages based on alleged fraudulent or negligent misrepresentations made in the SPIS.

III. *Decisions Below*

(i) *Superior Court of Justice*

[18] The trial judge dismissed the respondents' claim.

[19] He was not satisfied that the respondents had demonstrated that the property had been subjected to any flooding prior to the January 9 flood. He found that the cause of the flood was not clearly established but reasoned that after a period of heavy rainfall and melting snow, water had entered through the window wells. He further found that the appellants made a conscious decision not to disclose the January 9 flood to the respondents because they thought it was a "one off occurrence".

[20] Citing *Krawchuk v. Scherbak* (2011), 106 O.R. (3d) 598, [2011] O.J. No. 2064, 2011 ONCA 352, leave to appeal to S.C.C. refused [2011] S.C.C.A. No. 319, the trial judge reasoned that statements in an SPIS can amount to non-contractual representations and can give rise to the tort of negligent misrepresentation. However, here, the SPIS was not part of or otherwise connected with the APS. The trial judge concluded that, as a result, the entire agreement clause in the APS "prevails to exclude" the representations in the SPIS. The respondents could therefore not rely on them.

[21] The trial judge expressed some reluctance about whether the tort would be made out if he had reached a different conclusion about the effect of the entire agreement clause. At para.

62, he wrote: [page246]

[I]t is doubtful that the incident, which I find the Beauchamps believed to have been a one off incident, was an "important change to the information" requiring disclosure to the purchasers as per the wording of the S.P.I.S.

[22] Notwithstanding this reluctance, the trial judge dealt with the respondents' damages. He assessed them at \$25,000 -- an amount that included \$22,598.17 for the costs of fixing the damage and preventing further flooding. The balance was intended to compensate the respondents for mental distress and loss of enjoyment. The amount of damages was not in issue before the Divisional Court and is not in issue before this court.

[23] The trial judge died shortly after releasing his decision in this matter but before deciding the issue of costs. The appellants suggested that costs be referred to another judge of the Superior Court or be determined by the Divisional Court. The respondents suggested that costs be determined by the Divisional Court.

#### (ii) *Divisional Court*

[24] The Divisional Court allowed the respondents' appeal.

[25] First, I note that at the conclusion of the hearing before the Divisional Court, counsel were asked the following question. If the court determined that the trial judge had erred by reviewing the appellants' conduct on a subjective rather than an objective standard, were the parties content that the court make findings of fact on the correct standard rather than send the matter back to trial? Both counsel agreed with the Divisional Court's proposal.

#### *The entire agreement clause and an action in tort*

[26] The Divisional Court held, at para. 40, that "the trial judge erred in law when he concluded that the [respondents] could not rely on the representation in the SPIS because of the entire agreement clause in the [APS ]". The court reasoned that the entire agreement clause in the APS did not interfere with the respondents' claim based on a negligent misrepresentation made in the SPIS, even though it was signed after the APS was entered into but before closing.

[27] In coming to this conclusion, Herman J., writing for the court, noted that in *Dzourellov v. T.B. Bryk Management and Development Ltd.*, [2004] O.J. No. 4109, 190 O.A.C. 321 (Div. Ct.), Dawson J. interpreted the first sentence of a comparable entire agreement clause as "deal[ing] with the situation at the time the agreement was signed. It has the effect of excluding the possibility of any representation, warranty or collateral [page247] agreement at that time, that was not included in the written agreement": para. 13.<sup>1</sup> Justice Dawson concluded that the entire agreement clause did not preclude a claim arising out of the formation of a subsequent oral agreement.

[28] The court also pointed to several decisions in which courts have held that representations in an SPIS can give rise to an action in tort for negligent misrepresentation.<sup>2</sup> The court noted, however, that in each case the completed SPIS was provided to the purchaser before the agreement of purchase and sale was entered into.

#### *Was the tort made out?*

[29] The Divisional Court then proceeded to determine whether the respondents had established a claim for negligent misrepresentation on the basis of the appellants' failure to advise them of the pre-closing flood.

[30] After concluding that the appellants owed the respondents a duty of care, the court found that the January 9 flood constituted an "important change" and, under the terms of the SPIS, the appellants were required to notify the respondents of the occurrence. Their failure to do so constituted an untruth.

[31] The court then held that the trial judge erred in law by applying a subjective test to the appellants' obligations under the SPIS by focusing on their honest belief that the incident did not amount to an "important change". In keeping with the approach set out in *Krawchuk*, an objective standard must be applied. The question is whether a reasonable person in the circumstances would have disclosed the flood.

[32] The court found that it was not reasonable for the appellants to not advise the respondents of the change. Therefore, the appellants "acted negligently in not disclosing the change in the situation": para. 59.

[33] In considering the issue of reliance, the court started with the proposition that purchasers are entitled to rely on representations in an SPIS. The court then wrote, at para. 61: [page248]

Had the [respondents] known about the flood, they might well have retained their own expert to investigate the situation to determine the cause of the problem. If it was determined that the problem was significant and was more than a one-time event, the contractual options of rescission or abatement might have been available to them.

[34] In concluding its analysis of the tort of negligent misrepresentation, the Divisional Court found that the respondents sustained damage as a result of the misrepresentation and gave judgment to the respondents in the unchallenged amount of \$25,000.

#### *Costs award*

[35] After considering written costs submissions, the Divisional Court rejected the appellants' argument that costs should be reduced because the respondents had pleaded but did not establish fraud. The court found that the fraud allegations had not been actively pursued at trial. The central issue at trial was negligent misrepresentation.

[36] The court awarded the respondents their trial costs fixed in the amount of \$15,000, plus \$10,171.69 in disbursements. The court also awarded the respondents costs of the appeal in the amount of \$7,500.

#### *IV. Issues on Appeal*

[37] The appellants advance three main grounds of appeal. They submit that the Divisional Court erred

- (1) by finding that the entire agreement clause in the APS did not preclude a claim in tort based on an alleged negligent misrepresentation made in the SPIS;

- (2) by concluding that the respondents had made out a claim for damages based on negligent misrepresentation; and
- (3) in its trial costs award to the respondents.

## V. Analysis

(i) *Did the Divisional Court err by finding that the entire agreement clause in the APS did not preclude a claim in tort based on an alleged negligent misrepresentation made in the SPIS?*

[38] The appellants submit that the entire agreement clause, which expressly stated that there are no representations affecting their agreement other than as expressed in the APS, precludes the respondents from advancing a claim in tort based on [page249] representations in the SPIS. The appellants point out that the respondents could have avoided the consequences of the entire agreement clause by incorporating the SPIS into the APS, but did not do so.

[39] It is well-settled that contract and tort duties may arise concurrently. In *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12, [1993] S.C.J. No. 1, the Supreme Court wrote, at p. 26 S.C.R., "where a given wrong *prima facie* supports an action in contract and in tort, the party may sue in either or both, except where the contract indicates that the parties intended to limit or negative the right to sue in tort". The court continued, at p. 27 S.C.R., "In so far as the tort duty is not contradicted by the contract, it remains intact and may be sued upon."

[40] Accordingly, the key question is whether the entire agreement clause in the APS negatives the respondents' right to sue in tort based on misrepresentations made in the SPIS -- a document completed after the APS was entered into.

[41] In my view, the answer to the question is that, in the circumstances of this case, any consequences flowing from representations made in the SPIS were outside the reach of the entire agreement clause. The entire agreement clause in the APS operates retrospectively, not prospectively. In other words, the application of the clause is restricted to limit representations, warranties, collateral agreements and conditions made *prior to or during* the negotiations leading up to the signing of the APS. When the appellants made representations in the SPIS, a document completed *after* the APS had been signed by all parties, the entire agreement clause was spent.

[42] This conclusion is supported by the general purpose of entire agreement clauses, jurisprudence from this court, the plain meaning of the entire agreement clause at issue in this case, and the post-contractual conduct of the parties.

### *General purpose of entire agreement clauses*

[43] An entire agreement clause is generally intended to lift and distill the parties' bargain from the muck of the negotiations. In limiting the expression of the parties' intentions to the written form, the clause attempts to provide certainty and clarity.

[44] In *Inntrepreneur Pub Co. v. East Crown Ltd.*, [2000] 41 E.G. 209, [2000] Lloyd's Rep. 611 (U.K. Ch.), Lightman J. colourfully described the purpose of an entire agreement clause as

follows:

The purpose of an entire agreement clause is to preclude a party to a written agreement threshing the undergrowth and finding *in the course of [page250] negotiations* some (chance) remark or statement (often long forgotten or difficult to recall or explain) on which to found a claim such as the present to the existence of a collateral warranty . . . For such a clause constitutes a binding agreement between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere.

(Emphasis added)

[45] Legal commentators appear to be united in their view that entire agreement clauses are, generally speaking, retrospective in nature. According to Angela Swan, "An 'entire agreement' clause deals only with what was done or said *before* the agreement was made and seeks to exclude those statements and acts from muddying the interpretation of the agreement; it is a contractual invocation of the parol evidence rule": *Canadian Contract Law*, 3rd ed. (Markham, Ont.: LexisNexis Canada, 2012), at p. 600 (emphasis in original); see, also, John D. McCamus, *The Law of Contracts*, 2nd ed. (Toronto: Irwin Law, 2012), at p. 733.

[46] Justice P.M. Perell agrees. He says that "[t]he parol evidence rule then directs that the written contract may not be contradicted by evidence of the oral and written statements made by the parties *before* the signing of the contract. The entire agreement clause is essentially a codification of the parol evidence rule": "A Riddle Inside an Enigma: The Entire Agreement Clause" (1998), 20 *Advoc. Q.* 287, at 290-91 (emphasis added).

[47] And according to Professor M.H. Ogilvie, entire agreement clauses are "patently not applicable . . . where the representation *postdates* the contract": "Entire Agreement Clauses: Neither Riddle Nor Enigma" (2009), 87 *Can. Bar Rev.* at 642 (emphasis added).

#### *Jurisprudence from this court*

[48] While there appears to be little jurisprudence on the effect of an entire agreement clause on representations made *after* the contract containing the clause is entered into, some assistance can be found in this court's decision in *Shelanu Inc. v. Print Three Franchising Corp.* (2003), 64 O.R. (3d) 533, [2003] O.J. No. 1919 (C.A.), subsequent proceedings [2006] O.J. No. 1729, 19 B.L.R. (4th) 19 (C.A.).

[49] *Shelanu* involved a contractual dispute in which the question was whether an entire agreement clause in a written agreement rendered unenforceable a subsequent oral agreement between the parties. Justice Weiler, writing for the court, concluded it did not.

[50] *Shelanu* clarified certain points about entire agreement clauses. [page251]

[51] First, an entire agreement clause does not prevent the parties from amending the terms of their agreement. In other words, post-contract events can affect both the enforceability of the obligations in the agreement and add new obligations to those imposed by its terms.

[52] Second, and relatedly, entire agreement clauses do not apply prospectively unless the wording expressly so provides. In the words of Weiler J.A., at paras. 49-50 [ (2003), 64 O.R.

(3d) 533 (C.A.)]:

[A]n exception to the parol evidence rule is the existence of any subsequent oral agreement to rescind or modify a written contract provided that the agreement is not invalid under the Statute of Frauds: *Ellis v. Abell*, [1884] O.J. No. 70, 10 O.A.R. 226 at para. 85.

*Clauses such as the entire agreement clause in issue here are normally used to try to exclude representations made prior to the signing of the written agreement.* See P.M. Perell, "A Riddle Inside an Enigma: The Entire Agreement Clause" (1998) *The Advocates' Q.* 287. Nothing in [the entire agreement clause] suggests that an oral agreement to surrender the franchise several years later would be of no effect. It cannot be said the entire agreement clause was clearly intended to cover any and all future contractual relations between Shelanu and Print Three.

(Emphasis added)

[53] Both the general purpose of entire agreement clauses set out above and the approach to their application evident in this court's decision in *Shelanu* support the conclusion that, subject to express wording to the contrary, these clauses do not apply to agreements or representations that post-date the contract in which the clause is found.

[54] I now turn to the specific circumstances in this case.

*Specific words used in the entire agreement clause in the APS*

[55] A consideration of the precise words the parties used to record their bargain is central to the interpretation of the entire agreement clause in the APS. For convenience, I again set out the text of the entire agreement clause in issue:

This Agreement including any Schedule attached hereto, shall constitute the entire Agreement between Buyer and Seller. There is no representation, warranty, collateral agreement or condition, which affects this Agreement other than as expressed herein.

[56] The clause is worded in the present tense -- "[t]here *is* no representation" affecting the APS (emphasis added). On their face, the words of the clause do not preclude an action for negligent misrepresentation based on a representation made post-contract. The words that reflect the parties' bargain are [page252] therefore consistent with the general legal principles animating entire agreement clauses.

[57] This interpretation of the clause is also consistent with the Divisional Court's analysis in *Dzourellov* -- a case relied upon by the Divisional Court in this case. In *Dzourellov*, the entire agreement clause was very similar to the one in this case. It read: "The parties acknowledge that there *is no* representation, warranty, collateral agreement or condition, affecting the Agreement except as contained in this agreement. This agreement may not be amended other than in writing" (emphasis added). In interpreting this clause, Dawson J. wrote [at para. 13]:

The exclusive agreement clause in question consists of two sentences. I agree with the appellant's submission that the first sentence *deals with the situation at the time the*



*agreement was signed*. It has the effect of excluding the possibility of any representation, warranty or collateral agreement *at that time*, that was not included in the written agreement.

(Emphasis added)

[58] Thus, *Dzourellov* confirms that entire agreement clauses drafted in the present tense look backwards, not forwards.

[59] The entire agreement clause in this case is saying, "These are the terms of our agreement and nothing that was said beforehand is relevant. You have no basis for relying on anything other than the terms of the agreement. The agreement stands on its own".

#### *Post-contractual conduct of the parties*

[60] Finally, Canadian courts often look to the post-contractual conduct of the parties to shed light on what they intended the words enshrined in their written agreement to mean. The trend in Canada toward analyzing the subsequent actions of the parties is captured by G.H.L. Fridman in *The Law of Contract in Canada*, 6th ed. (Toronto: Carswell, 2011), at pp. 450-51:

Canadian courts have adopted the view that subsequent conduct can be a useful guide to the interpretation of a written contract . . . In one case, concerned with whether a restrictive covenant in a contract was personal to the parties or went with the land, Thomson J. of the Supreme Court of Saskatchewan, said that in cases involving an ambiguity in an agreement, "there is no better way of determining what the parties intended than to look to what they did under it [*Bank of Montreal v. Univ. of Saskatchewan* (1953), 9 W.W.R. (N.S.) 193 (Sask. Q.B.), at 199]. There is much to be said for this approach, as many Canadian judges since 1970, have declared. In Canada it seems clear that the subsequent actions of the parties may be admissible to explain the true meaning and intent of their agreement.

(Citations omitted)

[61] An examination of the conduct of the parties to the APS after they entered into their agreement supports the conclusion [page253] that they intended that the appellants' obligations under the SPIS would be enforceable.

[62] It was not necessary for the appellants to complete the SPIS. If one contracting party asks, post contract, for a representation or warranty, the other does not have to give it: he or she can say, "No, the contract expresses the limit of my obligations." But that is not what transpired in this case. The fact that the appellants completed the SPIS, after consulting their lawyer, provides insight into their intentions in relation to the entire agreement clause. It reveals that the appellants considered the SPIS seriously.

[63] Moreover, in the SPIS, the appellants undertook to inform the respondents of any "important changes" to the information they provided in the document. This ongoing obligation to which the appellants committed themselves indicates that all parties considered the SPIS as affecting their relationship.

[64] For these reasons, I agree with the Divisional Court that the entire agreement clause, properly interpreted, does not preclude the respondents' claim for damages based on negligent misrepresentation. In my view, the appellants should be held to any consequences that flow, in

law, from the representations they made in the SPIS. To conclude otherwise would render the entire SPIS exchange meaningless.

*The doctrine of caveat emptor*

[65] Before proceeding, I pause to briefly address the doctrine of *caveat emptor* ("let the buyer beware").

[66] The appellants submit that circumventing the parties' intentions as expressed by the entire agreement clause in the APS erodes the doctrine of *caveat emptor*. I disagree with the premise of this submission. Having concluded that the entire agreement clause in this case operates retrospectively, not prospectively, it cannot be said that the respondents' claim for negligent misrepresentation has the effect of circumventing the parties' intentions or the entire agreement clause.

[67] At para. 38 of its reasons, the Divisional Court quoted from Killeen J.'s decision in *Kaufmann*, at para. 119, for the proposition that, "once a vendor 'breaks his silence' by signing the SPIS, the doctrine of *caveat emptor* falls away as a defence mechanism and the vendor must speak truthfully and completely about the matters raised in the unambiguous questions at issue". Although the SPIS at issue in *Kaufmann* was expressly incorporated into the agreement of purchase and sale, I agree with the thrust of Killeen J.'s remarks. So long as a purchaser's action is not precluded by the agreement of purchase and sale, [page254] the vendor cannot hide behind the doctrine of *caveat emptor* if he or she breaks the silence by signing a SPIS.

[68] I would not give effect to this argument.

(ii) *Did the Divisional Court err by concluding that the respondents had made out a claim for damages based on negligent misrepresentation?*

[69] Despite my conclusion that the entire agreement clause does not prevent the respondents from advancing a claim in negligent misrepresentation, in my view, their claim still fails because they have not established the fourth element of negligent misrepresentation -- reasonable reliance.

[70] The tort of negligent misrepresentation has five elements: *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1964] A.C. 465 (U.K. H.L.); *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87, [1993] S.C.J. No. 3, at p. 110 S.C.R. These elements are (1) a duty of care based upon a special relationship between the plaintiff and defendant; (2) an untrue, inaccurate or misleading statement by the defendant; (3) negligence on the part of the defendant in making the statement; (4) reasonable reliance by the plaintiff on the statement; and (5) damage suffered by the plaintiff as a result.

[71] On appeal, the parties made no written or oral submissions on the first element, the duty of care. My analysis proceeds on the assumption that the appellants owed the respondents a duty of care in these circumstances. I accept the Divisional Court's finding that the appellants were negligent in failing to advise the respondents of the pre-closing flood.

[72] Reasonable reliance is fundamental to the tort of negligent misrepresentation. The reasonable reliance element "states a factual test for causation": Allen Linden and Bruce Feldthusen, *Canadian Tort Law*, 9th ed. (Markham, Ont.: LexisNexis, 2011), at p. 473.

[73] In *Farmer v. H.H. Chambers Ltd.*, [1973] 1 O.R. 355, [1972] O.J. No. 1982 (C.A.), McGillvary J.A. wrote, at p. 357 O.R.: "To recover under the rationale of the *Hedley Byrne* case, representation must not only be made but it has to be such as to cause the plaintiff, as a result, to do some act to his detriment." Although reliance can be inferred in certain circumstances, such an inference must be supported by the facts and evidence: *Strand v. Emerging Equities Inc.*, [2008] A.J. No. 50, 2008 ABCA 23, 37 B.L.R. (4th) 44, at para. 6.

[74] The problem here is that it is far from clear that the respondents would have had a remedy even if the January 9 water incident had been disclosed prior to closing. Put another [page255] way, the misrepresentation did not cause the respondents to "do some act to [their] detriment": *Farmer*, at p. 357 O.R.

[75] As noted above, the respondents sued in tort. They claim damages for negligent misrepresentation. However, there is no allegation of reliance in their statement of claim.

[76] Notwithstanding the state of the respondents' pleading, in their closing submissions at trial, the respondents advanced two arguments on the reliance issue. They argued that they relied on the misrepresentation in the SPIS because they waived the home inspection condition after receiving the SPIS. The respondents also argued that they relied on the misrepresentation in the SPIS because they were deprived of the opportunity to seek remedies available to them under the APS.

[77] I address each submission in turn.

[78] There are two difficulties with the respondents' submission that they relied on the SPIS in waiving the home inspection condition in the APS. First, when the respondents waived the home inspection condition, there was nothing for the appellants to disclose. They waived the condition prior to the January 9 water incident. Second, and more significantly, there is no evidence that the inspector who performed the home inspection on behalf of the respondents relied on the SPIS in conducting his home inspection or even knew that it existed. Further, the trial judge rejected Mr. Soboczynski's testimony that the SPIS was "part of the property inspection" process. He also expressly found, at para. 30, that the SPIS "was unrelated to the results of an inspection". In the light of these findings, I would not give effect to this submission.

[79] This takes me to the respondents' argument that had the appellants advised them of the January 9 flood they would have taken advantage of remedies available to them under the APS. In terms of the available remedies, the respondents turn to s. 14 of the APS, which provided:

*INSURANCE:* All buildings on the property and all other things being purchased shall be and remain until completion at the risk of Seller. Pending completion, Seller shall hold all insurance policies, if any, and the proceeds thereof in trust for the parties as their interests may appear and *in the event of substantial damage*, Buyer may either terminate this Agreement and have all monies paid returned without interest or deduction or else take the proceeds of any insurance and complete the purchase. No insurance shall be transferred on completion. If Seller is taking back a Charge/Mortgage, or Buyer is assuming a Charge/Mortgage, Buyer shall supply Seller with reasonable evidence of adequate insurance to protect Seller's or other mortgagee's interest on completion.

(Emphasis added)

[80] The APS does not define "substantial damage". [page256]

[81] The respondents' argument is problematic as it is unclear what rights would have been available to them under this provision. And the Divisional Court's somewhat conclusory statement, at para. 61, that "the contractual options of rescission and abatement might have been available to [the respondents]" does little to clarify the situation.

[82] The respondents' access to the remedies available under s. 14 depended on a finding of "substantial damage". The difficulty the respondents face is that no finding was made as to whether the property sustained substantial damage as a result of the January 9 flood. In my view, on this record, the trial judge would likely have concluded that the January 9 flood did not constitute "substantial damage" in the light of the observation he made, at para. 62 of his reasons reproduced above, that "it is doubtful" the January 9 flood was an "important change" as contemplated by the SPIS. The point is, however, that no finding was made.

[83] In any event, at the time the property changed hands on January 18, 2008, the \$1,648.59 worth of damage caused by the January 9 flood had been repaired. There was no damage to speak of, substantial or otherwise.

[84] A consideration of the role damages play in tort cases illuminates why the respondents did not rely on the appellants' negligent misrepresentations. In *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co.*, [1991] 3 S.C.R. 3, [1991] S.C.J. No. 67, at p. 14 S.C.R., the Supreme Court outlined how to assess damages in a negligent misrepresentation action: "The plaintiff seeking damages in an action for negligent misrepresentation is entitled to be put in the position he or she would have been in if the misrepresentation had not been made."

[85] Here, had the appellants told the respondents of the January 9 flood, the respondents' position in relation to their obligations under the APS would not have changed. The respondents would have been obliged to complete the transaction under the terms of the APS. The fact that the respondents did not suffer any damage compensable in tort solidifies their inability to prove reliance.

[86] To prove reasonable reliance, it was incumbent on the respondents to adduce evidence sufficient for the court to conclude that the misrepresentation somehow caused them to act to their detriment. This they did not do. Although reasonable reliance can be inferred from the circumstances, there is not, in my view, sufficient evidence upon which to base such an inference. [page257]

[87] I conclude the respondents have not established the fourth element of negligent misrepresentation. Their tort claim must therefore fail.

(iii) *Did the Divisional Court err in its trial costs award?*

[88] The appellants argue that the Divisional Court erred in assessing the trial costs instead of referring them to the Superior Court. They say that proceeding in this fashion deprived them of a right of appeal.

[89] They also contend that the court erred in assessing costs on the basis that the respondents' allegation against them in fraud was not actively pursued. They say the unsuccessful allegation of fraud was pursued through to the end of trial and that the costs award should reflect the extent to which these allegations increased trial costs.

[90] The appellants seek costs payable by the respondents on a substantial indemnity basis. The appellants argue that even if they are unsuccessful in this appeal, they should still be entitled to substantial indemnity costs of the action because the respondents made completely unsubstantiated accusations of fraud against them. Unproven allegations of fraud attract this kind of costs award because they go to the root of a person's integrity.

[91] In my view, in the light of the trial judge's death, and the parties' submissions set out above, the Divisional Court was fully entitled to assess costs. The Divisional Court found as a fact that the plaintiffs did not actively pursue the fraud allegation at trial. The trial was about negligence, not fraud. The appellants were not entitled to substantial indemnity costs.

[92] I see no reason to interfere with the court's decision regarding the costs of the trial. The court's assessment of the trial costs is entitled to deference.

#### VI. *Disposition*

[93] For these reasons, I would allow the appeal, set aside the decision of the Divisional Court, and restore the decision of the trial judge dismissing the action.

[94] I would award the appellants their costs of this appeal in the agreed-upon amount of \$5,000, including disbursements and applicable taxes.

*Appeal allowed.*

#### Notes

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- 1 The entire agreement clause at issue in *Dzourelou* stated: "The parties acknowledge that there is no representation, warranty, collateral agreement or condition, affecting the Agreement except as contained in this agreement. This agreement may not be amended other than in writing."
  - 2 The Divisional Court cited the following three cases for this proposition: *Krawchuk*; *Kaufmann v. Gibson*, [2007] O.J. No. 2711, 59 R.P.R. (4th) 293 (S.C.J.); and *Usenik v. Sidorowicz*, [2008] O.J. No. 1049, 2008 CanLII 11373 (S.C.J.).

**TAB 32**

**Tercon Contractors Ltd.** *Appellant*

v.

**Her Majesty The Queen in Right of the  
Province of British Columbia, by her Ministry  
of Transportation and Highways** *Respondent*

and

**Attorney General of Ontario** *Intervener*

**INDEXED AS: TERCON CONTRACTORS LTD. v.  
BRITISH COLUMBIA (TRANSPORTATION AND  
HIGHWAYS)**

**2010 SCC 4**

File No.: 32460.

2009: March 23; 2010: February 12.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps,  
Fish, Abella, Charron, Rothstein and Cromwell JJ.

**ON APPEAL FROM THE COURT OF APPEAL FOR  
BRITISH COLUMBIA**

*Contracts — Breach of terms — Tender — Ineligible bidder — Exclusion of liability clause — Doctrine of fundamental breach — Province issuing tender call for construction of highway — Request for proposals restricting qualified bidders to six proponents — Province accepting bid from ineligible bidder — Exclusion clause protecting Province from liability arising from participation in tendering process — Whether Province breached terms of tendering contract in entertaining bid from ineligible bidder — If so, whether Province's conduct fell within terms of exclusion clause — If so, whether court should nevertheless refuse to enforce the exclusion clause because of unconscionability or some other contravention of public policy.*

The Province of British Columbia issued a request for expressions of interest ("RFEI") for the design and construction of a highway. Six teams responded with submissions including Tercon and Brentwood. A few months later, the Province informed the six proponents

**Tercon Contractors Ltd.** *Appelante*

c.

**Sa Majesté la Reine du chef de la Colombie-  
Britannique, représentée par le ministère des  
Transports et de la Voirie** *Intimée*

et

**Procureur général de l'Ontario** *Intervenant*

**RÉPERTORIÉ : TERCON CONTRACTORS LTD. c.  
COLOMBIE-BRITANNIQUE (TRANSPORTS ET  
VOIRIE)**

**2010 CSC 4**

N<sup>o</sup> du greffe : 32460.

2009 : 23 mars; 2010 : 12 février.

Présents : La juge en chef McLachlin et les juges Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein et Cromwell.

**EN APPEL DE LA COUR D'APPEL DE LA  
COLOMBIE-BRITANNIQUE**

*Contrats — Inexécution — Appel d'offres — Soumissionnaire inadmissible — Clause de non-responsabilité — Principe d'inexécution fondamentale — Appel d'offres lancé par la province pour la construction d'une route — Demande de propositions tenant seulement six entreprises pour admissibles — Acceptation par la province de la proposition d'un soumissionnaire inadmissible — Clause de non-recours protégeant la province contre toute responsabilité découlant de la participation à l'appel d'offres — La province s'est-elle rendue coupable d'inexécution du contrat issu de l'appel d'offres en considérant la proposition d'un soumissionnaire inadmissible? — Dans l'affirmative, son comportement tombait-il sous le coup de la clause de non-recours? — Dans l'affirmative, un tribunal devrait-il néanmoins refuser de faire respecter la clause en raison de son iniquité ou pour quelque autre atteinte à l'ordre public?*

La province de la Colombie-Britannique a lancé une demande d'expression d'intérêt (« DEI ») pour la conception et la construction d'une route. Elle a reçu six soumissions, dont celles de Tercon et de Brentwood. Quelques mois plus tard, la province a fait savoir aux

that it now intended to design the highway itself and issued a request for proposals (“RFP”) for its construction. The RFP set out a specifically defined project and contemplated that proposals would be evaluated according to specific criteria. Under its terms, only the six original proponents were eligible to submit a proposal; those received from any other party would not be considered. The RFP also included an exclusion of liability clause which provided: “Except as expressly and specifically permitted in these Instructions to Proponents, no Proponent shall have any claim for compensation of any kind whatsoever, as a result of participating in this RFP, and by submitting a Proposal each Proponent shall be deemed to have agreed that it has no claim.” As it lacked expertise in drilling and blasting, Brentwood entered into a pre-bidding agreement with another construction company (“EAC”), which was not a qualified bidder, to undertake the work as a joint venture. This arrangement allowed Brentwood to prepare a more competitive proposal. Ultimately, Brentwood submitted a bid in its own name with EAC listed as a “major member” of the team. Brentwood and Tercon were the two short-listed proponents and the Province selected Brentwood for the project. Tercon successfully brought an action in damages against the Province. The trial judge found that the Brentwood bid was, in fact, submitted by a joint venture of Brentwood and EAC and that the Province, which was aware of the situation, breached the express provisions of the tendering contract with Tercon by considering a bid from an ineligible bidder and by awarding it the work. She also held that, as a matter of construction, the exclusion clause did not bar recovery for the breaches she had found. The clause was ambiguous and she resolved this ambiguity in Tercon’s favour. She held that the Province’s breach was fundamental and that it was not fair or reasonable to enforce the exclusion clause in light of the Province’s breach. The Court of Appeal set aside the decision, holding that the exclusion clause was clear and unambiguous and barred compensation for all defaults.

*Held* (McLachlin C.J. and Binnie, Abella and Rothstein JJ. dissenting): The appeal should be allowed. The Court agreed on the appropriate framework of analysis but divided on the applicability of the exclusion clause to the facts.

*The Court*: With respect to the appropriate framework of analysis the doctrine of fundamental breach

six entreprises intéressées qu’elle entendait désormais concevoir elle-même la route et demander des propositions pour sa construction. La demande de propositions (« DP ») décrivait un projet précis et indiquait que les propositions seraient considérées au regard de certains critères. Elle stipulait que seules les six entreprises intéressées initialement étaient admises à soumissionner et que les propositions présentées par d’autres personnes ne seraient pas examinées. La DP renfermait également une clause de non-recours, dont le texte était le suivant : « Sauf ce que prévoient expressément les présentes instructions, un proposant ne peut exercer aucun recours en indemnisation pour sa participation à la DP, ce qu’il est réputé accepter lorsqu’il présente une soumission. » Comme elle n’avait pas d’expertise dans le forage et le dynamitage, Brentwood a conclu avec une autre entreprise de construction (« EAC ») — qui n’était pas admise à soumissionner — une entente préalable à la soumission prévoyant qu’elles réaliseraient les travaux en coentreprise. De la sorte, elle pouvait présenter une proposition plus concurrentielle. Elle a finalement soumissionné en son nom, présentant EAC comme un « membre important » de son équipe. La liste des adjudicataires possibles a été ramenée à deux entreprises — Brentwood et Tercon —, puis le ministère a finalement opté pour la première. Tercon a intenté une action en dommages-intérêts contre la province et elle a eu gain de cause. La juge de première instance a conclu que la soumission de Brentwood était en fait celle de la coentreprise formée avec EAC, et que la province, qui le savait, avait contrevenu aux stipulations expresses du contrat intervenu avec Tercon en acceptant la soumission d’une autre entreprise qui n’était pas admissible, puis en confiant les travaux à cette même entreprise. Elle a aussi statué que le libellé de la clause de non-recours ne faisait pas obstacle à l’indemnisation pour les inexécutions relevées. La clause était équivoque et elle l’a interprétée en faveur de Tercon. Elle a estimé que l’inexécution reprochée à la province était fondamentale et qu’il n’était ni juste ni raisonnable de faire respecter la clause de non-recours étant donné la nature de l’inexécution. La Cour d’appel a annulé sa décision, statuant que la clause de non-recours était claire et non équivoque et qu’elle faisait obstacle à l’indemnisation pour toute inexécution.

*Arrêt* (la juge en chef McLachlin et les juges Binnie, Abella et Rothstein sont dissidents) : Le pourvoi est accueilli. Les juges de la Cour conviennent du cadre de l’analyse qui s’impose, mais ils sont partagés sur l’applicabilité de la clause de non-recours aux faits de l’espèce.

*La Cour* : Pour ce qui concerne le cadre d’analyse approprié, il convient de donner le « coup de grâce » au



should be “laid to rest”. The following analysis should be applied when a plaintiff seeks to escape the effect of an exclusion clause or other contractual terms to which it had previously agreed. The first issue is whether, as a matter of interpretation, the exclusion clause even applies to the circumstances established in evidence. This will depend on the court’s interpretation of the intention of the parties as expressed in the contract. If the exclusion clause applies, the second issue is whether the exclusion clause was unconscionable and thus invalid at the time the contract was made. If the exclusion clause is held to be valid at the time of contract formation and applicable to the facts of the case, a third enquiry may be raised as to whether the court should nevertheless refuse to enforce the exclusion clause because of an overriding public policy. The burden of persuasion lies on the party seeking to avoid enforcement of the clause to demonstrate an abuse of the freedom of contract that outweighs the very strong public interest in their enforcement. Conduct approaching serious criminality or egregious fraud are but examples of well-accepted considerations of public policy that are substantially incontestable and may override the public policy of freedom to contract and disable the defendant from relying upon the exclusion clause. Despite agreement on the appropriate framework of analysis, the court divided on the applicability of the exclusion clause to the facts of this case as set out below.

*Per LeBel, Deschamps, Fish, Charron and Cromwell JJ.:* The Province breached the express provisions of the tendering contract with Tercon by accepting a bid from a party who should not even have been permitted to participate in the tender process and by ultimately awarding the work to that ineligible bidder. This egregious conduct by the Province also breached the implied duty of fairness to bidders. The exclusion clause, which barred claims for compensation “as a result of participating” in the tendering process, did not, when properly interpreted, exclude Tercon’s claim for damages. By considering a bid from an ineligible bidder, the Province not only acted in a way that breached the express and implied terms of the contract, it did so in a manner that was an affront to the integrity and business efficacy of the tendering process.

Submitting a compliant bid in response to a tender call may give rise to “Contract A” between the bidder and the owner. Whether a Contract A arises and what its terms are depends on the express and implied terms and conditions of the tender call and the legal consequences of the parties’ actual dealings in each case.

principe de l’inexécution fondamentale. L’analyse qui suit vaut lorsque le demandeur tente de se soustraire à l’application d’une clause d’exonération ou d’une autre stipulation contractuelle dont il a précédemment convenu. Il faut d’abord déterminer, par voie d’interprétation, si la clause de non-recours s’applique aux faits mis en preuve, ce qui dépend de l’intention des parties qui se dégage du contrat. Lorsque la clause s’applique, il faut en deuxième lieu se demander si elle était inique et de ce fait invalide au moment de la formation du contrat. Lorsqu’elle est jugée valide au moment de la formation du contrat et applicable aux faits de l’espèce, le tribunal peut se demander dans un troisième temps s’il devrait tout de même refuser de la faire respecter en raison d’une considération d’ordre public prépondérante. Il incombe à la partie qui tente de se soustraire à l’application de la clause de prouver un abus de la liberté contractuelle qui l’emporte sur le très grand intérêt public lié au respect des contrats. Le comportement qui se rapproche de l’acte criminel grave ou de la fraude monumentale n’est qu’un exemple de considération d’ordre public bien établie et « foncièrement incontestable » pouvant primer la liberté contractuelle, elle aussi d’ordre public, et empêcher le défendeur de se retrancher derrière la clause de non-recours. Même si les juges de la Cour conviennent du cadre de l’analyse qui s’impose, ils sont partagés sur l’applicabilité de la clause de non-recours aux faits de l’espèce, comme il appert ci-après.

*Les juges LeBel, Deschamps, Fish, Charron et Cromwell :* La province a contrevenu aux stipulations expresses du contrat issu de l’appel d’offres et intervenu avec Tercon en acceptant la proposition d’une entreprise qui n’était pas admise à prendre part au processus d’appel d’offres, puis en confiant les travaux à cette même entreprise inadmissible. Par ce comportement inacceptable, la province a également manqué à son obligation tacite d’équité envers les soumissionnaires. Correctement interprétée, la clause de non-recours, qui écartait toute demande d’indemnisation « pour [l]a participation » à l’appel d’offres, ne faisait pas obstacle au recours en dommages-intérêts de Tercon. En considérant l’offre d’un soumissionnaire inadmissible, la province a non seulement manqué à ses obligations contractuelles expresses et tacites, mais elle l’a fait d’une manière qui portait outrageusement atteinte à l’intégrité et à l’efficacité commerciale du processus d’appel d’offres.

Le dépôt d’une soumission conforme en réponse à un appel d’offres peut faire naître un « contrat A » entre le soumissionnaire et le propriétaire. L’existence d’un tel contrat et sa teneur dépendent des conditions expresses et tacites de l’appel d’offres ainsi que des conséquences juridiques des échanges intervenus entre les parties.

Here, there is no basis to interfere with the trial judge's findings that there was an intent to create contractual obligations upon submission of a compliant bid and that only the six original proponents that qualified through the RFEI process were eligible to submit a response to the RFP. The tender documents and the required ministerial approval of the process stated expressly that the Province was contractually bound to accept bids only from eligible bidders. Contract A therefore could not arise by the submission of a bid from any other party. The trial judge found that the joint venture of Brentwood and EAC was not eligible to bid as they had not simply changed the composition of their team but, in effect, had created a new bidder. The Province fully understood this and would not consider a bid from or award the work to that joint venture. The trial judge did not err in finding that in fact, if not in form, Brentwood's bid was on behalf of a joint venture between itself and EAC. The joint venture provided Brentwood with a competitive advantage in the bidding process and was a material consideration in favour of the Brentwood bid during the Province's evaluation process. Moreover, the Province took active steps to obfuscate the reality of the true nature of the Brentwood bid. The bid by the joint venture constituted "material non-compliance" with the tendering contract and breached both the express eligibility provisions of the tender documents, and the implied duty to act fairly towards all bidders.

When the exclusion clause is interpreted in harmony with the rest of the RFP and in light of the commercial context of the tendering process, it did not exclude a damages claim resulting from the Province unfairly permitting an ineligible bidder to participate in the tendering process. The closed list of bidders was the foundation of this RFP and the parties should, at the very least, be confident that their initial bids will not be skewed by some underlying advantage in the drafting of the call for tenders conferred only upon one potential bidder. The requirement that only compliant bids be considered and the implied obligation to treat bidders fairly are factors that contribute to the integrity and business efficacy of the tendering process. The parties did not intend, through the words found in this exclusion clause, to waive compensation for conduct, like that of the Province in this case, that strikes at the heart of the tendering process. Clear language would be necessary to exclude liability for breach of the implied obligation, particularly in the case of public procurement where

En l'espèce, il n'y a pas lieu de modifier la conclusion de la juge de première instance selon laquelle la présentation d'une soumission conforme était censée faire naître des obligations contractuelles et seules les six entreprises intéressées initialement, devenues admissibles à l'issue de la DEL, pouvaient donner suite à la DP. L'obligation de la province de considérer seulement les propositions de soumissionnaires admissibles figurait expressément dans le dossier d'appel d'offres et dans l'approbation ministérielle requise du processus. Un contrat A ne pouvait donc pas naître de la présentation d'une soumission par une autre personne. La juge de première instance a conclu que la coentreprise formée de Brentwood et d'EAC n'était pas un soumissionnaire admissible, car la composition de l'équipe n'était pas simplement modifiée, mais un nouveau soumissionnaire voyait en fait le jour. La province le savait bien et elle estimait qu'elle ne pouvait ni considérer la proposition de cette coentreprise ni adjuger le contrat à celle-ci. La juge de première instance n'a pas eu tort de conclure qu'en dépit des apparences, la soumission de Brentwood était en fait présentée par la coentreprise formée avec EAC. L'existence de la coentreprise a fait bénéficier Brentwood d'un avantage concurrentiel dans le processus d'appel d'offres, et la province l'a considérée comme un élément favorable à Brentwood lors de son processus d'évaluation. De plus, la province a pris des mesures pour masquer la véritable nature de la soumission de Brentwood. La présentation d'une proposition par une coentreprise constituait une « inexécution importante » du contrat issu de l'appel d'offres ainsi qu'une inobservation des conditions expresses d'admissibilité et de l'obligation tacite d'agir équitablement vis-à-vis de tous les soumissionnaires.

Interprétée en harmonie avec les autres conditions de la DP et eu égard au contexte commercial de l'appel d'offres, la clause de non-recours n'écartait pas le recours en dommages-intérêts intenté au motif que la province avait inéquitablement permis à une entreprise inadmissible de prendre part au processus. La limitation du nombre de soumissionnaires admissibles constituait l'assise de la DP, et un soumissionnaire devait à tout le moins être assuré que l'évaluation de sa soumission initiale ne serait pas biaisée par quelque avantage sous-entendu dans le dossier d'appel d'offres et dont ne bénéficiait qu'un seul soumissionnaire éventuel. L'exigence que seules soient examinées des soumissions conformes et l'obligation tacite de traiter tous les soumissionnaires équitablement sont généralement considérées comme des éléments contribuant à l'intégrité et à l'efficacité commerciale du processus d'appel d'offres. Les parties n'ont pas voulu, en employant le libellé de la clause de non-recours, écarter toute indemnisation pour un comportement comme celui reproché à la province

transparency is essential. Furthermore, the restriction on eligibility of bidders was a key element of the alternative process approved by the Minister. When the statutory provisions which governed the tendering process in this case are considered, it seems unlikely that the parties intended through this exclusion clause to effectively gut a key aspect of the approved process. The text of the exclusion clause in the RFP addresses claims that result from “participating in this RFP”. Central to “participating in this RFP” was participating in a contest among those eligible to participate. A process involving other bidders — the process followed by the Province — is not the process called for by “this RFP” and being part of that other process is not in any meaningful sense “participating in this RFP”.

*Per McLachlin C.J. and Binnie, Abella and Rothstein JJ. (dissenting):* The Ministry’s conduct, while in breach of its contractual obligations, fell within the terms of the exclusion compensation clause. The clause is clear and unambiguous and no legal ground or rule of law permits a court to override the freedom of the parties to contract with respect to this particular term, or to relieve Tercon against its operation in this case. A court has no discretion to refuse to enforce a valid and applicable contractual term unless the plaintiff can point to some paramount consideration of public policy sufficient to override the public interest in freedom of contact and defeat what would otherwise be the contractual rights of the parties. The public interest in the transparency and integrity of the government tendering process, while important, did not render unenforceable the terms of the contract Tercon agreed to.

Brentwood was a legitimate competitor in the RFP process and all bidders knew that the road contract would not be performed by the proponent alone and required a large “team” of different trades and personnel to perform. The issue was whether EAC would be on the job as a major sub-contractor or identified with Brentwood as a joint venture “proponent” with EAC. Tercon has legitimate reason to complain about the Ministry’s conduct, but its misconduct did not rise to the level where public policy would justify the court in depriving the Ministry of the protection of the exclusion of compensation clause freely agreed to by Tercon in the contract.

en l’espèce, un comportement qui porte directement atteinte à l’intégrité de l’appel d’offres. Seul un libellé clair peut écarter la responsabilité consécutive au non-respect de l’obligation tacite, spécialement dans le cas de la passation de marchés publics, où la transparence est de rigueur. Qui plus est, l’admissibilité restreinte constituait un élément essentiel de l’autre processus approuvé par le ministre. Au regard du cadre législatif régissant l’appel d’offres en l’espèce, il est peu probable que les parties aient vraiment voulu, en stipulant la clause de non-recours, supprimer un aspect essentiel de ce processus. Le texte de la clause de non-recours de la DP vise les demandes d’indemnisation d’un préjudice découlant de la « participation à la DP ». La participation à un concours ouvert aux seules personnes admises à y prendre part était donc au cœur de la « participation à la DP ». Un processus ouvert à d’autres entreprises — ce qui était le cas du processus suivi par la province — ne saurait s’entendre de « la DP », et le fait d’y prendre part ne saurait véritablement être considéré comme une « participation à la DP ».

*La juge en chef McLachlin et les juges Binnie, Abella et Rothstein (dissidents) :* Même s’il n’a pas respecté ses obligations contractuelles, le ministère bénéficie de la clause de non-recours en indemnisation. La clause est claire et non équivoque, et aucune règle de droit ou autre fondement juridique ne permet aux tribunaux de passer outre à la liberté des parties de convenir de cette condition ni de soustraire Tercon à son application en l’espèce. Le tribunal n’a pas le pouvoir discrétionnaire de refuser de faire respecter une clause contractuelle valide et applicable, sauf lorsque le demandeur fait valoir une considération d’ordre public prépondérante qui l’emporte sur l’intérêt public lié à la liberté de contracter et qui fait obstacle à ce qui, autrement, constitueraient les droits contractuels des parties. L’intérêt public lié à la transparence et à l’intégrité du processus gouvernemental d’appel d’offres, même s’il est important, n’a pas rendu inapplicables les clauses du contrat auxquelles Tercon avait consenti.

Brentwood était un concurrent légitime dans le processus de DP. Tous les soumissionnaires savaient que le contrat de construction routière ne serait pas exécuté seulement par le proposant retenu, mais bien par une grande « équipe » pluridisciplinaire. La question était celle de savoir si EAC serait sous-traitant principal ou « proposant » dans le cadre de la coentreprise avec Brentwood. Tercon a raison de dénoncer le comportement du ministère, mais celui-ci n’était pas répréhensible au point que l’ordre public justifie le tribunal de refuser au ministère la protection de la clause de non-recours en indemnisation à laquelle Tercon avait librement consenti.

Contract A is based not on some abstract externally imposed rule of law but on the presumed (and occasionally implied) intent of the parties. At issue is the intention of the actual parties not what the court may project in hindsight would have been the intention of reasonable parties. Only in rare circumstances will a court relieve a party from the bargain it has made.

The exclusion clause did not run afoul of the statutory requirements. While the *Ministry of Transportation and Highways Act* favours “the integrity of the tendering process”, it nowhere prohibits the parties from negotiating a “no claims” clause as part of their commercial agreement and cannot plausibly be interpreted to have that effect. Tercon — a sophisticated and experienced contractor — chose to bid on the project, including the risk posed by an exclusion of compensation clause, on the terms proposed by the Ministry. That was its prerogative and nothing in the “policy of the Act” barred the parties’ agreement on that point.

The trial judge found that Contract A was breached when the RFP process was not conducted by the Ministry with the degree of fairness and transparency that the terms of Contract A entitled Tercon to expect. The Ministry was at fault in its performance of the RFP, but the process did not thereby cease to be the RFP process in which Tercon had elected to participate.

The interpretation of the majority on this point is disagreed with. “[P]articipating in this RFP” began with “submitting a Proposal” for consideration. The RFP process consisted of more than the final selection of the winning bid and Tercon participated in it. Tercon’s bid was considered. To deny that such participation occurred on the ground that in the end the Ministry chose a Brentwood joint venture (an ineligible bidder) instead of Brentwood itself (an eligible bidder) would be to give the clause a strained and artificial interpretation in order, indirectly and obliquely, to avoid the impact of what may seem to the majority *ex post facto* to have been an unfair and unreasonable clause.

Moreover, the exclusion clause was not unconscionable. While the Ministry and Tercon do not exercise the same level of power and authority, Tercon is a major contractor and is well able to look after itself in a commercial context so there is no relevant imbalance of bargaining power. Further, the clause is not as draconian as Tercon portrays it. Other remedies for breach of Contract A were available. The parties expected, even if they did not like it, that the “no claims” clause would

L’assise du contrat A demeure l’intention présumée (et parfois inférée) des parties, et non quelque règle de droit abstraite imposée par un tiers. C’est l’intention des parties elles-mêmes qui importe, et non ce qui, à l’issue d’une analyse rétrospective du tribunal, aurait été l’intention de parties raisonnables. Ce n’est qu’en de rares circonstances que le tribunal relève une partie de ses engagements.

La clause de non-recours ne dérogeait pas aux exigences légales. La *Ministry of Transportation and Highways Act* favorise « l’intégrité du processus d’appel d’offres », mais aucune de ses dispositions n’empêche les parties de faire figurer dans leur accord commercial une clause « écartant toute indemnisation » ni ne peut vraisemblablement être interprétée comme ayant cet effet. Tercon — une entreprise avertie et expérimentée — a décidé de participer au processus aux conditions proposées par le ministère malgré le risque posé par la clause de non-recours en indemnisation. C’était sa décision, et la « raison d’être de la Loi » ne faisait aucunement obstacle à la convention des parties sur ce point.

La juge du procès a conclu à l’inexécution du contrat A du fait que, dans sa DP, le ministère n’a pas agi avec l’équité et la transparence auxquelles Tercon était en droit de s’attendre vu le libellé du contrat A. Le ministère a été fautif dans sa mise en œuvre de la DP, mais le processus n’a pas cessé pour autant d’être la DP à laquelle Tercon avait décidé de prendre part.

Les juges dissidents ne souscrivent pas à l’interprétation des juges majoritaires à cet égard. La « participation à la DP » a commencé par la « présent[ation d’une] soumission ». Le processus de DP ne se résumait pas au choix final de l’adjudicataire, et Tercon y a participé. La soumission de Tercon a été considérée. Nier cette participation au motif que le ministère a finalement choisi la coentreprise inadmissible dont faisait partie Brentwood, et non Brentwood elle-même (qui était admissible), équivaut à une interprétation forcée et artificielle visant à éviter, par des moyens indirects et détournés, les conséquences de ce qui peut sembler aux juges majoritaires, *ex post facto*, avoir été une clause injuste et déraisonnable.

En outre, la clause de non-recours n’était pas inique. Tercon n’a ni le pouvoir ni l’autorité du ministère, mais c’est une entreprise importante parfaitement en mesure de défendre ses intérêts commerciaux. Il n’y avait donc pas d’inégalité déterminante du pouvoir de négociation. Aussi, la clause de non-recours n’est pas aussi draconienne que le laisse entendre Tercon. L’inexécution du contrat A donnait ouverture à d’autres recours. Les parties s’attendaient, même si cette éventualité ne les

operate even where the eligibility criteria in respect of the bid (including the bidder) were not complied with.

Finally, the Ministry's misconduct did not rise to the level where public policy would justify the court in depriving the Ministry of the protection of the exclusion of compensation clause freely agreed to by Tercon in the contract.

### Cases Cited

By Cromwell J.

**Applied:** *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619; *Martel Building Ltd. v. Canada*, 2000 SCC 60, [2000] 2 S.C.R. 860; **considered:** *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426; *Cahill (G.J.) & Co. (1979) Ltd. v. Newfoundland and Labrador (Minister of Municipal and Provincial Affairs)*, 2005 NLTD 129, 250 Nfld. & P.E.I.R. 145; *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423; *Fraser Jewellers (1982) Ltd. v. Dominion Electric Protection Co. (1997)*, 34 O.R. (3d) 1; **referred to:** *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711; *Double N Earthmovers Ltd. v. Edmonton (City)*, 2007 SCC 3, [2007] 1 S.C.R. 116; *Hillis Oil and Sales Ltd. v. Wynn's Canada, Ltd.*, [1986] 1 S.C.R. 57.

By Binnie J. (dissenting)

*Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426; *The Queen in right of Ontario v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111; *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619; *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58, [2001] 2 S.C.R. 943; *Martel Building Ltd. v. Canada*, 2000 SCC 60, [2000] 2 S.C.R. 860; *Double N Earthmovers Ltd. v. Edmonton (City)*, 2007 SCC 3, [2007] 1 S.C.R. 116; *Tercon Contractors Ltd. v. British Columbia (1993)*, 9 C.L.R. (2d) 197, aff'd [1994] B.C.J. No. 2658 (QL); *Karsales (Harrow) Ltd. v. Wallis*, [1956] 1 W.L.R. 936; *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423; *ABB Inc. v. Domtar Inc.*, 2007 SCC 50, [2007] 3 S.C.R. 461; *Re Millar Estate*, [1938] S.C.R. 1; *Plas-Tex Canada Ltd. v. Dow Chemical of Canada Ltd.*, 2004 ABCA 309, 245 D.L.R. (4th) 650.

### Statutes and Regulations Cited

*Ministry of Transportation and Highways Act*, R.S.B.C. 1996, c. 311, ss. 4, 23.

enchantait guère, à ce que la clause « écartant toute indemnisation » s'applique advenant même le non-respect des critères d'admissibilité de la soumission (et de son auteur).

Enfin, l'inconduite n'était pas répréhensible au point que l'ordre public justifie le tribunal de refuser au ministère la protection de la clause de non-recours en indemnisation à laquelle Tercon a librement consenti.

### Jurisprudence

Citée par le juge Cromwell

**Arrêts appliqués :** *M.J.B. Enterprises Ltd. c. Construction de Défense (1951) Ltée*, [1999] 1 R.C.S. 619; *Martel Building Ltd. c. Canada*, 2000 CSC 60, [2000] 2 R.C.S. 860; **arrêts examinés :** *Hunter Engineering Co. c. Syncrude Canada Ltée*, [1989] 1 R.C.S. 426; *Cahill (G.J.) & Co. (1979) Ltd. c. Newfoundland and Labrador (Minister of Municipal and Provincial Affairs)*, 2005 NLTD 129, 250 Nfld. & P.E.I.R. 145; *Guarantee Co. of North America c. Gordon Capital Corp.*, [1999] 3 R.C.S. 423; *Fraser Jewellers (1982) Ltd. c. Dominion Electric Protection Co. (1997)*, 34 O.R. (3d) 1; **arrêts mentionnés :** *Société hôtelière Canadien Pacifique Ltée c. Banque de Montréal*, [1987] 1 R.C.S. 711; *Double N Earthmovers Ltd. c. Edmonton (Ville)*, 2007 CSC 3, [2007] 1 R.C.S. 116; *Hillis Oil and Sales Ltd. c. Wynn's Canada, Ltd.*, [1986] 1 R.C.S. 57.

Citée par le juge Binnie (dissident)

*Hunter Engineering Co. c. Syncrude Canada Ltée*, [1989] 1 R.C.S. 426; *La Reine du chef de l'Ontario c. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 R.C.S. 111; *M.J.B. Enterprises Ltd. c. Construction de Défense (1951) Ltée*, [1999] 1 R.C.S. 619; *Naylor Group Inc. c. Ellis-Don Construction Ltd.*, 2001 CSC 58, [2001] 2 R.C.S. 943; *Martel Building Ltd. c. Canada*, 2000 CSC 60, [2000] 2 R.C.S. 860; *Double N Earthmovers Ltd. c. Edmonton (Ville)*, 2007 CSC 3, [2007] 1 R.C.S. 116; *Tercon Contractors Ltd. c. British Columbia (1993)*, 9 C.L.R. (2d) 197, conf. par [1994] B.C.J. No. 2658 (QL); *Karsales (Harrow) Ltd. c. Wallis*, [1956] 1 W.L.R. 936; *Guarantee Co. of North America c. Gordon Capital Corp.*, [1999] 3 R.C.S. 423; *ABB Inc. c. Domtar Inc.*, 2007 CSC 50, [2007] 3 R.C.S. 461; *Re Millar Estate*, [1938] R.C.S. 1; *Plas-Tex Canada Ltd. c. Dow Chemical of Canada Ltd.*, 2004 ABCA 309, 245 D.L.R. (4th) 650.

### Lois et règlements cités

*Ministry of Transportation and Highways Act*, R.S.B.C. 1996, ch. 311, art. 4, 23.



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APPEAL from a judgment of the British Columbia Court of Appeal (Donald, Mackenzie and Lowry JJ.A.), 2007 BCCA 592, 73 B.C.L.R. (4th) 201, 40 B.L.R. (4th) 26, 289 D.L.R. (4th) 647, [2008] 2 W.W.R. 410, 249 B.C.A.C. 103, 414 W.A.C. 103, 66 C.L.R. (3d) 1, [2007] B.C.J. No. 2558 (QL), 2007 CarswellBC 2880, setting aside a decision of Dillon J., 2006 BCSC 499, 53 B.C.L.R. (4th) 138, [2006] 6 W.W.R. 275, 18 B.L.R. (4th) 88, 51 C.L.R. (3d) 227, [2006] B.C.J. No. 657 (QL), 2006 CarswellBC 730. Appeal allowed, McLachlin C.J. and Binnie, Abella and Rothstein JJ. dissenting.

*Chris R. Armstrong, Brian G. McLean, William S. McLean and Marie-France Major*, for the appellant.

*J. Edward Gouge, Q.C., Jonathan Eades and Kate Hamm*, for the respondent.

*Malliha Wilson and Lucy McSweeney*, for the interveners.

The judgment of LeBel, Deschamps, Fish, Charron and Cromwell JJ. was delivered by

CROMWELL J. —

## I. Introduction

[1] The Province accepted a bid from a bidder who was not eligible to participate in the tender and then took steps to ensure that this fact was not disclosed. The main question on appeal, as I see it, is whether the Province succeeded in excluding

**Doctrine citée**

- Hall, Geoff R. *Canadian Contractual Interpretation Law*. Markham, Ont. : LexisNexis, 2007.
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POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (les juges Donald, Mackenzie et Lowry), 2007 BCCA 592, 73 B.C.L.R. (4th) 201, 40 B.L.R. (4th) 26, 289 D.L.R. (4th) 647, [2008] 2 W.W.R. 410, 249 B.C.A.C. 103, 414 W.A.C. 103, 66 C.L.R. (3d) 1, [2007] B.C.J. No. 2558 (QL), 2007 CarswellBC 2880, qui a infirmé une décision de la juge Dillon, 2006 BCSC 499, 53 B.C.L.R. (4th) 138, [2006] 6 W.W.R. 275, 18 B.L.R. (4th) 88, 51 C.L.R. (3d) 227, [2006] B.C.J. No. 657 (QL), 2006 CarswellBC 730. Pourvoi accueilli, la juge en chef McLachlin et les juges Binnie, Abella et Rothstein sont dissidents.

*Chris R. Armstrong, Brian G. McLean, William S. McLean et Marie-France Major*, pour l'appelante.

*J. Edward Gouge, c.r., Jonathan Eades et Kate Hamm*, pour l'intimée.

*Malliha Wilson et Lucy McSweeney*, pour l'intervenant.

Version française du jugement des juges LeBel, Deschamps, Fish, Charron et Cromwell rendu par

LE JUGE CROMWELL —

## I. Introduction

[1] La province a accepté la soumission d'une entreprise non admise à participer à l'appel d'offres, puis elle a pris des mesures pour dissimuler ce fait. De mon point de vue, la principale question que soulève le pourvoi est celle de savoir si, grâce à

its liability for damages flowing from this conduct through an exclusion clause it inserted into the contract. I share the view of the trial judge that it did not.

[2] The appeal arises out of a tendering contract between the appellant, Tercon Contractors Ltd., who was the bidder, and the respondent, Her Majesty the Queen in Right of the Province of British Columbia, who issued the tender call. The case turns on the interpretation of provisions in the contract relating to eligibility to bid and exclusion of compensation resulting from participation in the tendering process.

[3] The trial judge found that the respondent (which I will refer to as the Province) breached the express provisions of the tendering contract with Tercon by accepting a bid from another party who was not eligible to bid and by ultimately awarding the work to that ineligible bidder. In short, a bid was accepted and the work awarded to a party who should not even have been permitted to participate in the tender process. The judge also found that this and related conduct by the Province breached the implied duty of fairness to bidders, holding that the Province had acted “egregiously” (2006 BCSC 499, 53 B.C.L.R. (4th) 138, at para. 150). The judge then turned to the Province’s defence based on an exclusion clause that barred claims for compensation “as a result of participating” in the tendering process. She held that this clause, properly interpreted, did not exclude Tercon’s claim for damages. In effect, she held that it was not within the contemplation of the parties that this clause would bar a remedy in damages arising from the Province’s unfair dealings with a party who was not entitled to participate in the tender in the first place.

[4] The Province appealed and the Court of Appeal reversed (2007 BCCA 592, 73 B.C.L.R. (4th) 201). Dealing only with the exclusion clause issue, it held that the clause was clear and unambiguous and barred compensation for all defaults.

la clause de non-recours en indemnisation (« clause de non-recours ») qu’elle a insérée dans le contrat, la province parvient à échapper à la responsabilité civile découlant de ces actes. À l’instar de la juge de première instance, je conclus par la négative.

[2] Le pourvoi fait suite au contrat issu de l’appel d’offres et intervenu entre l’appelante Tercon Contractors Ltd., le soumissionnaire, et l’intimée Sa Majesté la Reine du chef de la Colombie-Britannique (la « province »), l’auteur de l’appel d’offres. Le dénouement de l’affaire tient à l’interprétation des clauses du contrat relatives à l’admissibilité à soumissionner et à l’exclusion de toute indemnité pour la participation à la demande de propositions.

[3] La juge de première instance conclut que la province a contrevenu aux stipulations expresses du contrat intervenu avec Tercon en acceptant la proposition d’un autre soumissionnaire qui n’était pas admissible, puis en confiant les travaux à ce même soumissionnaire. Pour faire court, une proposition a été acceptée et le marché a été accordé à une entreprise qui n’aurait même pas dû être admise à participer au processus. La juge de première instance conclut également que par ces actes et d’autres mesures connexes, la province a manqué à son obligation tacite d’équité envers les soumissionnaires et qu’elle a agi [TRADUCTION] « de manière inacceptable » (2006 BCSC 499, 53 B.C.L.R. (4th) 138, par. 150). Elle se penche ensuite sur la clause de non-recours qui, selon la province, ferait obstacle à toute demande d’indemnisation [TRADUCTION] « pour [l]a participation » à l’appel d’offres. Elle estime que, correctement interprétée, la clause ne faisait pas obstacle au recours en dommages-intérêts de Tercon. Elle statue en effet que les parties n’ont pas envisagé que la clause empêche un tel recours intenté pour l’iniquité dont a fait preuve la province en se mettant en rapport avec une entreprise qui n’était même pas admise à soumissionner.

[4] La province s’est adressée à la Cour d’appel, qui lui a donné raison, se prononçant uniquement sur la clause de non-recours et statuant qu’elle était claire et non équivoque et qu’elle faisait obstacle à l’indemnisation pour toute inexécution (2007 BCCA 592, 73 B.C.L.R. (4th) 201).

[5] On Tercon's appeal to this Court, the questions for us are whether the successful bidder was eligible to participate in the request for proposals ("RFP") and, if not, whether Tercon's claim for damages is barred by the exclusion clause.

[6] In my respectful view, the trial judge reached the right result on both issues. The Province's attempts to persuade us that it did not breach the tendering contract are, in my view, wholly unsuccessful. The foundation of the tendering contract was that only six, pre-selected bidders would be permitted to participate in the bidding. As the trial judge held, the Province not only acted in a way that breached the express and implied terms of the contract by considering a bid from an ineligible bidder, it did so in a manner that was an affront to the integrity and business efficacy of the tendering process. One must not lose sight of the fact that the trial judge found that the Province acted egregiously by "ensuring that [the true bidder] was not disclosed" (para. 150) and that its breach "attacked the underlying premise of the [tendering] process" (para. 146), a process which was set out in detail in the contract and, in addition, had been given ministerial approval as required by statute.

[7] As for its reliance on the exclusion clause, the Province submits that the parties were free to agree to limitations of liability and did so. Consideration of this submission requires an interpretation of the words of the clause to which the parties agreed in the context of the contract as a whole. My view is that, properly interpreted, the exclusion clause does not protect the Province from Tercon's damage claim which arises from the Province's dealings with a party not even eligible to bid, let alone from its breach of the implied duty of fairness to bidders. In other words, the Province's liability did not arise from Tercon's participation in the process that the Province established, but from the Province's unfair dealings with a party who was not entitled to participate in that process.

[8] I would allow the appeal and restore the judgment of the trial judge.

[5] Dans le pourvoi formé par Tercon, la Cour est appelée à déterminer si l'adjudicataire était admis à participer à la demande de propositions (« DP ») et, dans la négative, si la clause de non-recours fait obstacle au recours en dommages-intérêts de Tercon.

[6] En toute déférence, j'estime que la juge de première instance tranche correctement les deux questions. La province n'est pas du tout parvenue, selon moi, à convaincre la Cour qu'elle n'avait pas manqué à ses obligations contractuelles. Suivant le contrat issu de l'appel d'offres, seules six entreprises présélectionnées pouvaient prendre part à l'appel d'offres. La juge statue qu'en considérant l'offre d'un soumissionnaire inadmissible, la province a manqué à ses obligations contractuelles expresses et tacites, et ce, d'une manière qui portait outrageusement atteinte à l'intégrité et à l'efficacité commerciale du processus d'appel d'offres. Sans oublier qu'à son avis, la province a agi de manière inacceptable en [TRADUCTION] « veillant à ce que [l'identité du véritable soumissionnaire] ne soit pas révélée » (par. 150). La juge ajoute que cette inexécution [TRADUCTION] « a sapé l'assise du processus [d'appel d'offres] » (par. 146), lequel était décrit en détail dans le contrat et, qui plus est, avait obtenu l'approbation ministérielle exigée par la loi.

[7] Pour ce qui concerne l'application de la clause de non-recours, la province soutient que les parties étaient libres de limiter leur responsabilité comme elles l'ont fait. Statuer sur cette prétention exige que l'on interprète le libellé de la clause dont les parties ont convenu, au vu du contrat dans son entier. J'estime que, correctement interprétée, la clause de non-recours ne protège pas la province contre l'action en dommages-intérêts intentée par Tercon pour la mise en rapport de la province avec une entreprise qui n'était même pas admise à soumissionner, sans compter le manquement à son obligation tacite d'équité envers les soumissionnaires. Autrement dit, la responsabilité de la province ne résulte pas de la participation de Tercon au processus, mais bien de l'iniquité dont la province s'est rendue coupable en se mettant en rapport avec une entreprise non admise à prendre part à ce processus.

[8] Je suis d'avis d'accueillir le pourvoi et de rétablir le jugement de première instance.



## II. Brief Overview of the Facts

[9] I will have to set out more factual detail as part of my analysis. For now, a very brief summary will suffice. In 2000, the Ministry of Transportation and Highways (also referred to as the “Province”) issued a request for expressions of interest (“RFEI”) for designing and building a highway in northwestern British Columbia. Six teams made submissions, including Tercon and Brentwood Enterprises Ltd. Later that year, the Province informed the six proponents that it now intended to design the highway itself and would issue a RFP for its construction.

[10] The RFP was formally issued on January 15, 2001. Under its terms, only the six original proponents were eligible to submit a proposal. The RFP also included a clause excluding all claims for damages “as a result of participating in this RFP” (s. 2.10).

[11] Unable to submit a competitive bid on its own, Brentwood teamed up with Emil Anderson Construction Co. (“EAC”), which was not a qualified bidder, and together they submitted a bid in Brentwood’s name. Brentwood and Tercon were the two short-listed proponents and the Ministry ultimately selected Brentwood as the preferred proponent.

[12] Tercon brought an action seeking damages, alleging that the Ministry had considered and accepted an ineligible bid and that, but for that breach, it would have been awarded the contract. The trial judge agreed and awarded roughly \$3.5 million in damages and prejudgment interest. As noted, the Court of Appeal reversed and Tercon appeals by leave of the Court.

## III. Issues

[13] The issues for decision are whether the trial judge erred in finding that:

1. the Province breached the tendering contract by entertaining a bid from an ineligible bidder.

## II. Bref aperçu des faits

[9] Je reviendrai plus en détail sur les faits, mais pour l’heure, en voici un bref résumé. En 2000, le ministère des Transports et de la Voirie (également appelé la « province ») a lancé une demande d’expression d’intérêt (« DEI ») pour la conception et la construction d’une route dans le nord-ouest de la Colombie-Britannique. Elle a reçu six soumissions, dont celles de Tercon et de Brentwood Enterprises Ltd. Plus tard la même année, la province a fait savoir aux six entreprises intéressées qu’elle entendait désormais concevoir elle-même la route et demander des propositions pour sa construction.

[10] Lancée officiellement le 15 janvier 2001, la DP précisait que seules les six entreprises intéressées initialement étaient admises à soumissionner. Elle comportait aussi une clause écartant tout recours en indemnisation [TRADUCTION] « pour [l]a participation à la DP » (clause 2.10).

[11] Incapable de présenter seule une soumission concurrentielle, Brentwood s’est jointe à Emil Anderson Construction Co. (« EAC »), qui n’était pas un soumissionnaire admissible, et une proposition commune a été présentée au nom de Brentwood. La liste des adjudicataires possibles a été ramenée à deux entreprises — Brentwood et Tercon —, puis le ministère a finalement opté pour la première.

[12] Tercon a intenté une action en dommages-intérêts, alléguant que le ministère avait examiné puis accepté une soumission inadmissible et que, n’eût été ce manquement, elle aurait obtenu le contrat. Elle a eu gain de cause en première instance et obtenu une indemnité d’environ 3,5 millions de dollars plus l’intérêt avant jugement, mais elle a été déboutée en Cour d’appel. Tercon se pourvoit devant notre Cour sur autorisation.

## III. Les questions en litige

[13] Notre Cour doit déterminer si la juge de première instance a eu tort ou non de tirer les conclusions suivantes :

1. la province a manqué à une obligation contractuelle en considérant la proposition d’un soumissionnaire inadmissible;

2. the exclusion clause does not bar the appellant's claim for damages for the breaches of the tendering contract found by the trial judge.

#### IV. Analysis

##### A. *Was the Brentwood Bid Ineligible?*

[14] The first issue is whether the Brentwood bid was from an eligible bidder. The judge found that the bid was in substance, although not in form, from a joint venture of Brentwood and EAC and that it was, therefore, an ineligible bid. The Province attacks this finding on three grounds:

- (i) a joint venture is not a legal person and therefore the Province could not and did not contract with a joint venture;
- (ii) it did not award the contract to EAC and EAC had no contractual responsibility to the Province for failure to perform the contract;
- (iii) there was no term of the RFP that restricted the right of proponents to enter into joint venture agreements with others; this arrangement merely left Brentwood, the original proponent, in place and allowed it to enhance its ability to perform the work.

[15] While these were the Province's main points, its position became more wide-ranging during oral argument, at times suggesting that it had no contractual obligation to deal only with eligible bidders. It is therefore necessary to take a step back and look at that threshold point before turning to the Province's more focussed submissions.

##### 1. The Province's Contractual Obligations in the Bidding Process

[16] The judge found, and it was uncontested at trial, that only the six original proponents that

2. la clause de non-recours ne faisait pas obstacle au recours en dommages-intérêts de l'appelante pour les inexécutions contractuelles relevées par le tribunal.

#### IV. Analyse

##### A. *La proposition de Brentwood était-elle admissible?*

[14] La première question est celle de savoir si la proposition de Brentwood était présentée par un soumissionnaire admissible. La juge de première instance conclut que, malgré sa forme, la proposition provenait essentiellement d'une coentreprise formée de Brentwood et d'EAC et qu'elle était donc inadmissible. La province invoque trois motifs à l'encontre de cette conclusion :

- (i) une coentreprise étant dépourvue de la personnalité morale, elle ne pouvait contracter avec une telle entité et elle ne l'a pas fait;
- (ii) elle n'a pas adjugé le marché à EAC, et EAC n'avait envers elle aucune responsabilité en cas d'inexécution contractuelle;
- (iii) aucune disposition de la DP n'interdisait aux proposants de s'associer à des tiers en coentreprise : Brentwood, proposant initial, demeurait simplement en lice et accroissait sa capacité d'exécuter les travaux.

[15] Ce sont les principaux arguments invoqués par la province, mais celle-ci a défendu une thèse beaucoup plus large en plaidoirie orale, faisant valoir à certains moments qu'elle n'était pas contractuellement tenue de se mettre en rapport seulement avec des soumissionnaires admissibles. Il faut donc revenir sur cette question préliminaire avant d'analyser les points plus précis de son argumentation.

##### 1. Les obligations contractuelles de la province dans le processus d'appel d'offres

[16] La juge de première instance conclut — ce qui n'a pas été contesté au procès — que seules les

qualified through the RFEI process were eligible to submit a response to the RFP. This finding is not challenged on appeal, although there was a passing suggestion during oral argument that there was no contractual obligation of this sort at all. The trial judge also held, noting that this point was uncontested, that a joint venture between Brentwood and EAC was ineligible to bid. This is also not contested on appeal. These two findings are critical to the case and provide important background for an issue that is in dispute, namely whether the Brentwood bid was ineligible. It is, therefore, worth reviewing the relevant background in detail. I first briefly set out the legal framework and then turn to the trial judge's findings.

## 2. Legal Principles

[17] Submitting a compliant bid in response to a tender call *may* give rise to a contract — called Contract A — between the bidder and the owner, the express terms of which are found in the tender documents. The contract may also have implied terms according to the principles set out in *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711; see also *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, and *Martel Building Ltd. v. Canada*, 2000 SCC 60, [2000] 2 S.C.R. 860. The key word, however, is “may”. The Contract A/Contract B framework is one that arises, if at all, from the dealings between the parties. It is not an artificial construct imposed by the courts, but a description of the legal consequences of the parties’ actual dealings. The Court emphasized in *M.J.B.* that whether Contract A arises and if it does, what its terms are, depend on the express and implied terms and conditions of the tender call in each case. As Iacobucci J. put it, at para. 19:

What is important . . . is that the submission of a tender in response to an invitation to tender may give

six entreprises intéressées initialement, devenues admissibles à l’issue de la DEI, pouvaient donner suite à la DP. Cette conclusion n’est pas contestée en appel même si, en plaidoirie orale, la province a laissé entendre qu’elle n’avait pas d’obligation contractuelle concomitante. La juge estime également — et relève l’absence de contestation sur ce point — que la coentreprise formée de Brentwood et d’EAC n’était pas un soumissionnaire admissible. Cette conclusion n’est pas non plus contestée en appel. Ces deux conclusions sont cruciales en l’espèce et elles offrent une toile de fond importante pour trancher une question en litige, à savoir l’admissibilité de la proposition de Brentwood. Il convient donc d’examiner ce contexte en détail. Je ferai brièvement état du cadre juridique applicable avant de me pencher sur les conclusions de la juge de première instance.

## 2. Les principes juridiques

[17] Le dépôt d’une soumission conforme en réponse à un appel d’offres *peut* faire naître entre le soumissionnaire et le propriétaire un contrat — le contrat A — dont les conditions sont celles figurant dans le dossier d’appel d’offres. Le contrat peut également comporter des clauses tacites, suivant les principes formulés dans l’arrêt *Société hôtelière Canadien Pacifique Ltée c. Banque de Montréal*, [1987] 1 R.C.S. 711; voir aussi les arrêts *M.J.B. Enterprises Ltd. c. Construction de Défense (1951) Ltée*, [1999] 1 R.C.S. 619, et *Martel Building Ltd. c. Canada*, 2000 CSC 60, [2000] 2 R.C.S. 860. L’élément clé réside toutefois dans l’emploi du mot « peut ». L’existence d’un contrat A et d’un contrat B dépend entièrement des échanges entre les parties. Il ne s’agit pas d’une conception artificielle imposée par les tribunaux, mais d’une description des conséquences juridiques des échanges intervenus entre les parties. Dans l’arrêt *M.J.B.*, la Cour souligne que ce sont les conditions expresses et tacites de l’appel d’offres qui déterminent chaque fois s’il y a ou non un contrat A et, le cas échéant, quelles en sont les conditions. Comme le dit le juge Iacobucci au par. 19 :

L’important [. . .] c’est que la présentation d’une soumission en réponse à un appel d’offres peut donner

rise to contractual obligations, quite apart from the obligations associated with the construction contract to be entered into upon the acceptance of a tender, depending upon whether the parties intend to initiate contractual relations by the submission of a bid. If such a contract arises, its terms are governed by the terms and conditions of the tender call. [Emphasis added.]

### 3. The Trial Judge's Findings Concerning the Existence of Contract A

[18] The question of whether Tercon's submission of a compliant bid gave rise to contractual relations between it and the Province was contested by the Province at trial. The trial judge gave extensive reasons for finding against the Province on this issue. We are told that the Province did not pursue this point in the Court of Appeal but instead premised its submissions on the existence of Contract A. The Province took the same approach in its written submissions in this Court. However, during oral argument, there was some passing reference in response to questions that there was no Contract A. In light of the position taken by the Province on its appeal to the Court of Appeal and in its written submissions in this Court, it is now too late to revisit whether there were contractual duties between Tercon and the Province. Even if it were open to the Province to make this argument now, I can see no error in legal principle or any palpable and overriding error of fact in the trial judge's careful reasons on this point.

[19] The trial judge did not mechanically impose the Contract A/Contract B framework, but considered whether Contract A arose in light of her detailed analysis of the dealings between the parties. That was the right approach. She reviewed in detail the provisions of the RFP which supported her conclusion that there was an intent to create contractual relations upon submission of a compliant bid. She noted, for example, that bids were to be irrevocable for 60 days and that security of \$50,000 had to be paid by all proponents and was to be increased to \$200,000 by the successful proponent. Any revisions to proposals prior to the closing date had to be in writing, properly executed and received before the closing time. The RFP also set

naissance à des obligations contractuelles tout à fait distinctes des obligations découlant du contrat d'entreprise qui doit être conclu dès l'acceptation de la soumission, selon que les parties auront voulu établir des rapports contractuels par la présentation d'une soumission. Advenant la formation d'un tel contrat, ses modalités sont régies par les conditions de l'appel d'offres. [Je souligne.]

### 3. Les conclusions de la juge de première instance concernant l'existence du contrat A

[18] La province a nié au procès que la présentation d'une soumission conforme par Tercon a fait naître un lien contractuel entre elles. La juge du procès motive abondamment sa décision de donner tort à la province sur ce point. Il appert que la province n'aurait pas persisté dans cette voie devant la Cour d'appel, mais aurait plutôt invoqué l'existence d'un contrat A. La province défend la même thèse dans l'argumentation écrite présentée à notre Cour, mais en réponse à des questions posées lors de sa plaidoirie, elle a laissé entendre qu'il n'existait pas de contrat A. Vu la position de la province en Cour d'appel et l'argumentation écrite qu'elle nous a présentée, il est désormais trop tard pour revenir sur la question de l'existence d'obligations contractuelles entre Tercon et la province. Et même s'il était loisible à la province de faire valoir cet argument aujourd'hui, je ne relève pas d'erreur de droit ni d'erreur de fait manifeste et dominante dans les motifs soigneusement rédigés par la juge de première instance sur ce point.

[19] La juge de première instance n'a pas mécaniquement appliqué le modèle du contrat A et du contrat B. Elle s'est plutôt demandé si l'examen détaillé des échanges entre les parties révélait qu'un contrat A en avait résulté. C'est ce qu'il convenait de faire. Elle conclut à l'issue d'un examen minutieux des dispositions de la DP qu'il y avait intention que la présentation d'une soumission conforme crée un lien contractuel. Par exemple, elle relève que les soumissions devaient être irrévocables pendant 60 jours et que chaque soumissionnaire devait verser 50 000 \$ à titre de garantie, montant qui passait à 200 000 \$ si sa proposition était retenue. Toute modification de la proposition avant la date de clôture devait être faite par écrit, porter les

out detailed evaluation criteria and specified that they were to be the only criteria to be used to evaluate proposals. A specific form of alliance agreement was attached. There were detailed provisions about pricing that were fixed and non-negotiable. A proponent was required to accept this form of contract substantially, and security was lost if an agreement was not executed. The Ministry reserved a right to cancel the RFP under s. 2.9 but in such event was obliged to reimburse proponents for costs incurred in preparing their bids up to \$15,000 each. Proponents had to submit a signed proposal form, which established that they offered to execute an agreement substantially in the form included in the RFP package. Further, they acknowledged that the security could be forfeited if they were selected as the preferred proponent and failed to enter into good faith discussions with the Ministry to reach an agreement and sign the alliance agreement.

[20] In summary, as the trial judge found, the RFP set out a specifically defined project, invited proposals from a closed and specific list of eligible proponents, and contemplated that proposals would be evaluated according to specific criteria. Negotiation of the alliance construction contract was required, but the negotiation was constrained and did not go to the fundamental details of either the procurement process or the ultimate contract.

[21] There is, therefore, no basis to interfere with the judge's finding that there was an intent to create contractual obligations upon submission of a compliant bid. I add, however, that the tender call in this case did not give rise to the classic Contract A/Contract B framework in which the bidder submits an irrevocable bid and undertakes to enter into Contract B on those terms if it is accepted. The alliance model process which was used here was more complicated than that and involved good faith negotiations for a Contract B in the form set out in the tender documents. But in my view, this should not distract us from the main question here. We do not have to spell out all of the terms of Contract A, let alone of Contract B, so as to define all of the duties and obligations of both

signatures requises et être reçue avant cette date. La DP donnait en outre le détail des critères d'évaluation, précisant qu'il s'agissait des seuls applicables. L'ébauche d'un accord de partenariat y était jointe. Des dispositions précises et non négociables sur les coûts y étaient prévues. Le soumissionnaire devait adhérer en substance à cette forme de contrat, sinon il perdait le montant de la garantie. À la clause 2.9, le ministère se réservait le droit d'annuler la DP, mais il devait alors rembourser les proposants des frais engagés pour la préparation des propositions, jusqu'à concurrence de 15 000 \$ chacun. Le formulaire de proposition que devait signer le soumissionnaire portait qu'il s'engageait à signer un accord revêtant essentiellement la forme de celui compris dans les documents de la DP. Le proposant reconnaissait en outre que si son offre était retenue, l'omission de négocier de bonne foi avec le ministère en vue de la conclusion d'une entente et de signer l'accord de partenariat pouvait entraîner la perte du dépôt de garantie.

[20] En résumé, comme le conclut la juge, la DP décrivait un projet précis, invitait un certain nombre de proposants admissibles à soumissionner et indiquait que les propositions seraient considérées au regard de critères établis. Il devait y avoir négociation de l'accord de construction en partenariat, mais à l'intérieur de certaines limites et elle ne devait pas porter sur les éléments fondamentaux du processus d'appel d'offres ou du contrat final.

[21] Il n'y a donc pas lieu de modifier la conclusion de la juge selon laquelle il y avait intention de faire en sorte que la présentation d'une soumission conforme fasse naître des obligations contractuelles. J'ajoute cependant que l'appel d'offres considéré en l'espèce ne correspondait pas au modèle classique du contrat A et du contrat B où le soumissionnaire présente une offre irrévocable et s'engage à conclure le contrat B aux mêmes conditions s'il est choisi. Le modèle du partenariat adopté en l'espèce était plus complexe et supposait des négociations de bonne foi en vue de la conclusion du contrat B revêtant la forme indiquée dans les documents de l'appel d'offres. Toutefois, cette particularité ne doit pas nous faire perdre de vue la principale question en litige. Point n'est besoin d'exposer

the bidders and the Province. The question here is much narrower: did contractual obligations arise as a result of Tercon's compliant bid and, if so, was it a term of that contract that the Province would only entertain bids from eligible bidders? The trial judge found offer, acceptance and consideration in the invitation to tender and Tercon's bid. There is no basis, in my respectful view, to challenge that finding even if it were open to the Province to try to do so at this late stage of the litigation.

#### 4. The Trial Judge's Finding Concerning Eligibility

[22] It was not contested at trial that only the six original proponents that qualified through the RFEI process were eligible to bid. This point is not in issue on appeal; the question is what this eligibility requirement means. It will be helpful, therefore, to set out the background about this limited eligibility to bid in this tendering process.

[23] To begin, it is worth repeating that there is no doubt that the Province was contractually bound to accept bids only from eligible bidders. This duty may be implied even absent express stipulation. For example, in *M.J.B.*, the Court found that an implied obligation to accept only compliant bids was necessary to give business efficacy to the tendering process, noting, at para. 41, that a bidder must expend effort and incur expense in preparing its bid and must submit bid security and that it is "obvious" that it makes "little sense" for the bidder to comply with these requirements if the owner "is allowed, in effect, to circumscribe this process and accept a non-compliant bid". But again, whether such a duty should be implied in any given case will depend on the dealings between the parties. Here, however, there is no need to rely on implied terms. The obligation to consider only bids from eligible bidders

toutes les conditions du contrat A, encore moins celles du contrat B, pour circonscrire les obligations respectives du soumissionnaire et de la province. La question qu'il nous faut trancher est beaucoup plus étroite : la présentation d'une soumission conforme par Tercon a-t-elle fait naître des obligations contractuelles et, dans l'affirmative, l'obligation que la province n'examine que les propositions de soumissionnaires admissibles en faisait-elle partie? La juge de première instance estime qu'il y a eu offre, acceptation et contrepartie dans l'appel d'offres et dans la présentation d'une soumission par Tercon. Même si la province pouvait contester cette conclusion à ce stade avancé de l'instance, elle n'aurait à mon avis aucun motif valable de le faire.

#### 4. La conclusion de la juge de première instance sur l'admissibilité

[22] Nulle partie n'a contesté en première instance que seules les six entreprises intéressées initialement, qui s'étaient rendues admissibles en répondant à la DEI, étaient admises à soumissionner. Ce point échappe donc au présent pourvoi. La question est de savoir ce qu'il en est de cette condition d'admissibilité. Le contexte de cette limitation de l'admissibilité au processus d'appel d'offres est donc susceptible de nous éclairer.

[23] D'abord, il convient de répéter qu'il ne fait aucun doute que la province était contractuellement tenue de n'accepter que les propositions de soumissionnaires admissibles. Même en l'absence d'une stipulation expresse, cette obligation peut être inférée. Dans l'arrêt *M.J.B.*, par exemple, notre Cour a statué que l'obligation tacite de n'accepter que les soumissions conformes était nécessaire à l'efficacité commerciale du processus d'appel d'offres, signalant au par. 41 qu'un soumissionnaire doit consacrer efforts et sommes d'argent à la préparation de sa soumission et verser une garantie, de sorte qu'il est « évident » qu'il serait « déraisonnable » qu'il doive satisfaire à ces exigences si le propriétaire « peut, dans les faits, contourner ce processus et accepter une soumission non conforme ». Mais encore une fois, ce sont les échanges entre les parties qui déterminent s'il y a lieu d'inférer l'existence d'une telle



was stated expressly in the tender documents and in the required ministerial approval of the process which they described.

[24] As noted, in early 2000, the Province issued a RFEI based on a design-build model; the contractor would both design and build the highway. The RFEI contemplated that a short list of three qualified contractors, or teams composed of contractors and consultants, would be nominated as proponents. Each was to provide a description of the legal structure of the team and to describe the role of each team member along with the extent of involvement of each team member as a percentage of the total scope of the project and an organization chart showing each team member's role. Any change in team management or key positions required notice in writing to the Province which reserved the right to disqualify the proponent if the change materially and negatively affected the ability of the team to carry out the project.

[25] Expressions of interest ("EOI") were received from six teams including Tercon and Brentwood. The evaluation panel and independent review panel recommended a short list of three proponents with Tercon topping the evaluation. Brentwood was evaluated fifth and was not on the short list. Brentwood was known to lack expertise in drilling and blasting and so its EOI had included an outline of the key team members with that experience. EAC did not participate and had no role in the Brentwood submission. The results of this evaluation were not communicated and the process did not proceed because the Province decided to design the project itself and issue an RFP for an alliance model contract to construct the highway.

[26] It was clear from the outset that only those who had submitted proposals during the RFEI process would be eligible to submit proposals under the RFP. This was specified in the approval of the process by the Minister of Transportation and

obligation. Cependant, en l'espèce, toute inférence est inutile, car l'obligation de considérer seulement les propositions de soumissionnaires admissibles figurait expressément dans le dossier d'appel d'offres et dans l'approbation ministérielle requise du processus qui y était décrit.

[24] Rappelons qu'au début de l'année 2000, la province a lancé une DEI pour un projet où l'entrepreneur était appelé à concevoir une route puis à la construire. Suivant la DEI, le nombre de proposants devait être ramené à trois, qu'il s'agisse d'entrepreneurs ou d'équipes d'entrepreneurs et de consultants, tous qualifiés. Chaque proposant devait préciser la structure juridique de l'équipe, le rôle de chacun de ses membres ainsi que le pourcentage de sa contribution à l'ensemble du projet, et remettre un organigramme indiquant la tâche de chacun. Toute modification touchant la direction de l'équipe ou les postes clés devait être notifiée par écrit à la province, qui se réservait le droit d'écarter le proposant si la modification compromettrait substantiellement l'aptitude à mener le projet à bien.

[25] Six équipes, dont Tercon et Brentwood, ont manifesté leur intérêt. Le comité d'évaluation et le comité de révision indépendant ont recommandé de retenir trois proposants, dont Tercon en tête de liste. Classée cinquième, Brentwood ne figurait pas sur cette liste. Comme elle n'avait pas d'expertise dans les domaines du forage et du dynamitage, Brentwood avait énuméré les membres clés de son équipe dotés de cette expertise. EAC n'a pas participé au processus ni joué de rôle dans la soumission de Brentwood. Les résultats de cette évaluation n'ont pas été communiqués, et la province a mis fin au processus après avoir décidé de se charger elle-même de la conception du projet et de demander des propositions en vue de la mise sur pied d'un partenariat pour la construction de la route.

[26] Il était clair dès le départ que seules les entreprises qui avaient manifesté leur intérêt pourraient présenter une proposition. C'est ce que prévoyait l'approbation du processus donnée par le ministre des Transports et de la Voirie (« ministre ») avant le

Highways (“Minister”) before the RFP was issued. It is worth pausing here to briefly look at the Minister’s role.

[27] Pursuant to s. 23 of the *Ministry of Transportation and Highways Act*, R.S.B.C. 1996, c. 311, the legislation in force at the relevant time, the Minister was required to invite public tenders for road construction unless he or she determined that another process would result in competitively established costs for the work. The section provided:

23 (1) The minister must invite tenders by public advertisement, or if that is impracticable, by public notice, for the construction and repair of all government buildings, highways and public works, except for the following:

- . . .
- (c) if the minister determines that an alternative contracting process will result in competitively established costs for the performance of the work.
  - (2) The minister must cause all tenders received to be opened in public, at a time and place stated in the advertisement or notice.
  - (3) The prices must be made known at the time the tenders are opened.
  - (4) In all cases where the minister believes it is not expedient to let the work to the lowest bidder, the minister must report to and obtain the approval of the Lieutenant Governor in Council before passing by the lowest tender, except if delay would be injurious to the public interest.
- . . .

[28] These provisions make clear that the work in this case had to be awarded by public tender, absent the Minister’s approval of an alternative process, and had to be awarded to the lowest bidder, absent approval of the Lieutenant Governor in Council. As noted, ministerial approval was given for an alternative process under s. 23(1)(c). The Minister issued

lancement de la DP. Il convient de se pencher brièvement sur le rôle du ministre.

[27] Suivant l’article 23 de la loi applicable à l’époque — la *Ministry of Transportation and Highways Act*, R.S.B.C. 1996, ch. 311 —, le ministre devait lancer un appel d’offres pour la construction d’une route, sauf s’il était d’avis qu’un autre moyen permettrait la réalisation des travaux à un coût concurrentiel. L’article prévoyait notamment ce qui suit :

[TRADUCTION]

23 (1) Le ministre procède à un appel d’offres par annonce publique ou, lorsque c’est impossible, par avis public, pour la construction et la réparation d’un immeuble gouvernemental, d’une route ou d’un ouvrage public, sauf dans les cas suivants :

- . . .
- c) il estime qu’un autre processus d’adjudication de marché permettra la réalisation des travaux à un coût concurrentiel.
  - (2) Le ministre veille à ce que toutes les soumissions reçues soient ouvertes en public à la date, à l’heure et à l’endroit indiqués dans l’annonce ou dans l’avis.
  - (3) Les prix doivent être communiqués lors de l’ouverture des soumissions.
  - (4) Lorsqu’il estime qu’il n’est pas opportun d’adjuger le marché au soumissionnaire le moins disant, le ministre en informe le lieutenant-gouverneur en conseil et obtient l’autorisation de ne pas retenir ce soumissionnaire, sauf s’il en résulte un retard préjudiciable à l’intérêt public.
- . . .

[28] Il ressort de ces dispositions qu’à défaut de l’approbation d’un autre processus par le ministre, le marché devait en l’espèce être attribué par voie d’appel d’offres et que, sauf autorisation du lieutenant-gouverneur de choisir un autre adjudicataire, le marché devait être adjugé au soumissionnaire le moins disant. Un autre processus



a notice that, pursuant to that section, he approved the process set out in an attached document and had determined it to be an alternative contracting process that would result in competitively established costs for the performance of the work. The attached document outlined in seven numbered paragraphs the process that had been approved.

[29] The document described the background of the public RFEI (which I have set out earlier), noting that *only those firms identified through the EOI process would be eligible to submit proposals for the work* and that they would receive invitations to do so. The Minister's approval in fact referred to the firms who had been short-listed from the RFEI process as being eligible. If this were taken to refer only to the three proponents identified by the evaluation process of the RFEI, Tercon would be included but Brentwood would not. However, no one has suggested that anything turns on this and it seems clear that ultimately all six of the RFEI proponents — including both Tercon and Brentwood — were intended to be eligible. The ministerial approval then briefly set out the process. Proposals “by short-listed firms” were to be evaluated “using the considerations set out in the RFP”.

[30] It is clear, therefore, that participation in the RFP process approved by the Minister was limited to those who had participated in the RFEI process.

[31] The Province's factum implies that the Minister approved inclusion of the exclusion clause in the RFP. However, there is no evidence of this in the record before the Court. The Minister's approval is before us. It is dated as having been prepared on August 23, 2000 and signed on October 19, 2000, and approves a process outlined in a two-page document attached to it. It says nothing about exclusion of the Province's liability. The RFP, containing the exclusion clause in issue here, is dated January 15, 2001 and was sent out to eligible bidders under cover of a letter of the

d'adjudication a fait l'objet d'une approbation ministérielle conformément à l'al. 23(1)c). Le ministre a donné avis de son approbation, en vertu de cette disposition, du processus décrit dans un document joint en annexe et de sa conclusion qu'il s'agissait d'un processus d'adjudication de marché permettant la réalisation des travaux à un coût concurrentiel. Le document joint en annexe décrivait en sept paragraphes numérotés le processus approuvé.

[29] Ce document faisait état du contexte (mentionné précédemment) de la DEI publique, précisant que *seules les entreprises retenues à l'issue du processus d'expression d'intérêt pourraient présenter une proposition* et seraient invitées à le faire. L'approbation ministérielle visait en fait les entreprises jugées admissibles par suite de la DEI. S'il s'agissait seulement des trois postulants sélectionnés dans le cadre de cette première évaluation, Tercon en faisait partie, mais non Brentwood. Or, nul ne laisse entendre que ce point est décisif à quelque égard, et il semble clair que, finalement, les six entreprises ayant donné suite à la DEI, dont Tercon et Brentwood, étaient tenues pour admissibles. L'approbation ministérielle décrit ensuite brièvement le processus. Les propositions des entreprises présélectionnées devaient être évaluées [TRADUCTION] « en fonction des critères énoncés dans la DP ».

[30] Il ne fait donc aucun doute que la participation au processus de DP approuvé par le ministre était réservée aux entreprises qui avaient répondu à la DEI.

[31] Dans son mémoire, la province laisse entendre que le ministre a approuvé la clause de non-recours figurant dans la DP. Or, selon le dossier de la Cour, aucun élément n'étaye sa prétention. Nous disposons du texte de l'approbation ministérielle. Suivant la date qui y est apposée, elle aurait été rédigée le 23 août 2000 et signée le 19 octobre de la même année. Elle vise le processus énoncé dans le document de deux pages qui y est joint. Aucune mention n'y est faite de la non-responsabilité de la province. La DP, qui renferme la clause de non-recours litigieuse, porte la date du 15 janvier 2001

same date, some three months after the Minister's approval.

[32] The RFP is a lengthy document, containing detailed instructions to proponents, required forms, a time schedule of the work, detailed provisions concerning contract pricing, a draft of the ultimate construction contract and many other things. Most relevant for our purposes are the terms of the instructions to proponents and in particular the eligibility requirements for bidders.

[33] The RFP reiterates in unequivocal terms that eligibility to bid was restricted as set out in the ministerial approval. It also underlines the significance of the identity of the proponent. In s. 1.1, the RFP specifies that only the six teams involved in the RFEI would be eligible. The term "proponent", which refers to a bidder, is defined in s. 8 as "a team that has become eligible to respond to the RFP as described in Section 1.1 of the Instructions to Proponents". Section 2.8(a) of the RFP stipulates that *only* the six proponents qualified through the RFEI process were eligible and that *proposals received from any other party would not be considered*. In short, there were potentially only six participants and "Contract A" could not arise by the submission of a bid from any other party.

[34] The RFP also addressed material changes to the proponent, including changes in the proponent's team members and its financial ability to undertake and complete the work. Section 2.8(b) of the RFP provided in part as follows:

If in the opinion of the Ministry a material change has occurred to the Proponent since its qualification under the RFEI, including if the composition of the Proponent's team members has changed . . . or if, for financial or other reasons, the Proponent's ability to undertake and complete the Work has changed, then the

et elle a été envoyée aux soumissionnaires admissibles avec lettre d'accompagnement datée du même jour quelque trois mois après l'approbation ministérielle.

[32] La DP est un document volumineux renfermant des instructions détaillées à l'intention des proposants, des formulaires à remplir, un calendrier des travaux, des dispositions précises sur la fixation du prix du contrat, une ébauche de l'accord final de construction en partenariat et bien d'autres éléments. Toutefois, ce qui importe le plus pour les besoins du présent pourvoi c'est le libellé des instructions aux proposants et, plus particulièrement, les conditions d'admissibilité des soumissionnaires.

[33] La DP rappelle de manière non équivoque que l'admissibilité à soumissionner est limitée comme le prévoit l'approbation ministérielle. Elle souligne aussi que l'identité du proposant importe. Le paragraphe 1.1 dispose que seules les six équipes ayant répondu à la DEI sont admissibles. L'article 8 prévoit que [TRADUCTION] « proposant » — l'équivalent de « soumissionnaire » — [TRADUCTION] « s'entend d'une équipe admise à répondre à la DP suivant le libellé du par. 1.1 des instructions aux proposants ». L'alinéa 2.8a) de la DP précise que *seuls* les six proposants devenus admissibles en répondant à la DEI peuvent soumissionner et qu'aucune *proposition d'une autre personne ne sera examinée*. En somme, il ne pouvait y avoir que six participants, et le « contrat A » ne pouvait naître de la présentation d'une proposition présentée par une autre personne.

[34] La DP aborde aussi la question de la modification substantielle visant un proposant, notamment en ce qui concerne la composition de son équipe et son aptitude financière à entreprendre les travaux et à les mener à bien. L'alinéa 2.8b) prévoit notamment ce qui suit :

[TRADUCTION] Lorsque de l'avis du ministère, depuis que le proposant est devenu admissible en répondant à la DEI, une modification substantielle le concernant s'est produite, notamment en ce qui a trait à la composition de son équipe [. . .] ou à son aptitude financière ou autre à entreprendre les travaux ou à les mener à bien, il peut

Ministry may request the Proponent to submit further supporting information as the Ministry may request in support of the Proponent's qualification to perform the Work. If in the sole discretion of the Ministry as a result of the changes the Proponent is not sufficiently qualified to perform the Work then the Ministry reserves the right to disqualify that Proponent, and reject its Proposal.

[35] The proponent was to provide an organization chart outlining the proponent's team members, structure and roles. If the team members were different from the RFEI process submission, an explanation was to be provided for the changes: s. 4.2(b)i). A list of subcontractors and suppliers was also to be provided and the Ministry had to be notified of any changes: s. 4.2(c).

[36] The RFP provided proponents with a mechanism to determine whether they remained qualified to submit a proposal. If a proponent was concerned about its eligibility as a result of a material change, it could make a preliminary submission to the Ministry describing the nature of the changes and the Ministry would give a written decision as to whether the proponent was still qualified: s. 2.8(b).

[37] Brentwood tried to take advantage of this process. The trial judge thoroughly outlined this, at paras. 17-23 of her reasons. In brief, Brentwood lacked expertise in drilling and blasting and by the time the RFP was issued, it faced limited local bonding capacity due to commitments to other projects, a shorter construction period, the potential unavailability of subcontractors and limited equipment to perform the work. It in fact considered not bidding at all. Instead, however, it entered into a pre-bidding agreement with EAC that the work would be undertaken by a joint venture of Brentwood and EAC and that upon being awarded the work, they would enter into a joint venture agreement and would share 50/50 the costs, expenses, losses and gains. The trial judge noted that it was common in the industry for contractors to agree to a joint venture on the basis of a pre-bid agreement with the specifics of the joint venture to be worked out once the contract was awarded and that Brentwood and EAC

exiger du proposant d'autres renseignements établissant qu'il est en mesure d'exécuter les travaux. Lorsque, à son seul gré, il estime que la modification fait en sorte que le proposant n'est pas suffisamment apte à exécuter les travaux, le ministère se réserve le droit de l'écarter et de rejeter sa proposition.

[35] Le proposant devait fournir un organigramme indiquant la composition et la structure de son équipe et le rôle de ses membres. Lorsque les membres de son équipe n'étaient pas les mêmes que ceux mentionnés dans sa réponse à la DEI, il devait s'en expliquer : sous-al. 4.2b)i). Une liste de sous-traitants et de fournisseurs devait également être remise, et tout changement qui y était apporté devait être notifié au ministère : al. 4.2c).

[36] La DP prévoyait un mécanisme permettant au proposant de s'assurer qu'il était toujours admissible. Le proposant désireux de savoir si un changement substantiel compromettrait son admissibilité à soumissionner pouvait en communiquer la nature au ministère en vue d'obtenir une décision préalable confirmant ou non qu'il était toujours admissible : al. 2.8b).

[37] Brentwood a tenté de se prévaloir de ce mécanisme, et la juge de première instance relate sa démarche en détail aux par. 17 à 23 de ses motifs. Pour résumer, Brentwood n'avait pas d'expertise en matière de forage et de dynamitage et lorsque la DP a été lancée, le cautionnement qu'elle pouvait offrir était limité par d'autres engagements, la période de construction était écourtée, des sous-traitants pouvaient ne plus être disponibles et le matériel dont elle disposait pour exécuter les travaux était restreint. Elle a d'ailleurs envisagé de ne pas présenter de proposition du tout. Elle a cependant conclu avec EAC une entente préalable à la soumission prévoyant qu'elles réaliseraient les travaux en coentreprise et que, dès l'adjudication du marché, elles concluraient un accord de coentreprise et se répartiraient à parts égales les coûts, les dépenses, les pertes et les bénéfices. La juge signale qu'il est courant dans ce secteur d'activité qu'avant le dépôt d'une soumission, des entrepreneurs conviennent

acted consistently throughout in accordance with this industry standard.

[38] Brentwood sent the Province's project manager, Mr. Tasaka, a preliminary submission as provided for in s. 2.8(b) of the RFP, advising of a material change in its team's structure in that it wished to form a joint venture with EAC. This was done, the trial judge found, because Brentwood thought it would be disqualified if it submitted a proposal as a joint venture without the Ministry's prior approval under this section of the RFP. The Province never responded in writing as it ought to have according to s. 2.8(b).

[39] It seems to have been assumed by everyone that a joint venture of Brentwood and EAC was not eligible because this change would not simply be a change in the composition of the bidder's team, but in effect a new bidder. Without reviewing in detail all of the evidence referred to by the trial judge, it is fair to say that although Brentwood ultimately submitted a proposal in its own name, the proposal in substance was from the Brentwood/EAC joint venture and was evaluated as such. As the trial judge concluded:

The substance of the proposal was as a joint venture and this must have been apparent to all. The [project evaluation panel] approved Brentwood/EAC as joint venturers as the preferred proponent. The [panel] was satisfied that Tercon had the capacity and commitment to do the job but preferred the joint venture submission of Brentwood/EAC. [para. 53]

[40] There was some suggestion by the Province during oral argument that the trial judge had wrongly imposed on it a duty to investigate Brentwood's bid, a duty rejected by the majority of the Court in *Double N Earthmovers Ltd. v. Edmonton (City)*, 2007 SCC 3, [2007] 1 S.C.R. 116. In my view, the trial judge did no such thing. As her detailed findings make clear, the Province: (1) fully understood that the Brentwood bid was in fact on behalf of a joint venture of Brentwood and EAC; (2) thought

de la création d'une coentreprise dont les modalités seront arrêtées dès l'adjudication du contrat. Elle ajoute que Brentwood et EAC ont toujours agi dans le respect de cette pratique établie.

[38] Conformément à l'al. 2.8b) de la DP, Brentwood a fait parvenir au gestionnaire du projet, M. Tasaka, une proposition préliminaire qui signalait la modification substantielle de la structure de son équipe résultant de son intention de former une coentreprise avec EAC. Selon la juge de première instance, Brentwood l'a fait parce qu'elle pensait que sa proposition serait rejetée si elle était présentée au nom d'une coentreprise sans que le ministère n'ait donné son approbation au préalable en application de cette disposition de la DP. La province n'a jamais répondu par écrit comme elle était censée le faire suivant l'al. 2.8b).

[39] Tous les intéressés semblent avoir tenu la coentreprise Brentwood/EAC pour inadmissible du fait que la composition de l'équipe n'était pas simplement modifiée, mais qu'un nouveau soumissionnaire voyait en fait le jour. Sans analyser en détail tous les éléments de preuve mentionnés par la juge de première instance, on peut à juste titre affirmer que même si la proposition de Brentwood a été présentée en son seul nom, elle provenait essentiellement de la coentreprise Brentwood/EAC et elle a été considérée en conséquence. Selon la juge,

[TRADUCTION] [l]a proposition était essentiellement celle d'une coentreprise, ce qui a dû être évident pour tout le monde. Le [comité d'évaluation du projet] a arrêté son choix sur la coentreprise Brentwood/EAC. Il estimait que Tercon avait les moyens et la détermination nécessaires pour réaliser les travaux, mais il a préféré la proposition de Brentwood/EAC. [par. 53]

[40] Dans sa plaidoirie orale, la province a laissé entendre que la juge lui avait imputé à tort l'obligation de vérifier la soumission de Brentwood, ce qui allait à l'encontre de l'avis des juges majoritaires de notre Cour dans l'arrêt *Double N Earthmovers Ltd. c. Edmonton (Ville)*, 2007 CSC 3, [2007] 1 R.C.S. 116. Je ne crois pas que cela ait été le cas. Il ressort des conclusions détaillées de la juge que la province (1) savait pertinemment que la soumission de Brentwood était en fait celle d'une coentreprise

that a bid from that joint venture was not eligible; and (3) took active steps to obscure the reality of the situation. No investigation was required for the Province to know these things and the judge imposed no duty to engage in one.

### 5. The Province's Submissions

[41] I will address the Province's first two points together:

- (i) a joint venture is not a legal person and therefore the Province could not and did not contract with a joint venture; and
- (ii) it did not award the contract to EAC and EAC had no contractual responsibility to the Province for failure to perform the contract.

[42] I cannot accept these submissions. The issue is not, as these arguments assume, whether the Province contracted with a joint venture or whether EAC had contractual obligations to the Province. The issue is whether the Province considered an ineligible bid; the point of substance is whether the bid was from an eligible bidder.

[43] At trial there was no contest that a bid from a joint venture involving an ineligible bidder would be ineligible. The Province's position was that there was no need to look beyond the face of the bid to determine who was bidding: the proposal was in the name of Brentwood and therefore the bid was from a compliant bidder. Respectfully, I see no error in the trial judge's rejection of this position. There was a mountain of evidence to support the judge's conclusions that first, Brentwood's bid, in fact if not in form, was on behalf of a joint venture between itself and EAC; second, the Province knew this and took the position that it could not consider a bid from or award the work to that joint venture; third, the existence of the joint venture was a material consideration in favour of the Brentwood bid during the evaluation process; and finally, that steps were taken by revising and drafting documentation to obfuscate the reality of the situation.

formée avec EAC, (2) qu'elle estimait que la proposition de cette coentreprise était inadmissible et (3) qu'elle s'est activement employée à gommer ce fait. Nulle vérification ne s'imposait à cet égard, et la juge n'a pas imputé d'obligation de vérification à la province.

### 5. La thèse de la province

[41] Je me penche maintenant sur les deux premiers arguments de la province :

- (i) une coentreprise étant dépourvue de la personnalité morale, la province ne pouvait contracter avec elle et elle ne l'a pas fait;
- (ii) elle n'a pas adjugé le marché à EAC, et EAC n'avait envers elle aucune responsabilité en cas d'inexécution du contrat.

[42] Je ne peux faire droit à ces prétentions. Il ne s'agit pas de savoir si la province a contracté avec une coentreprise ou si EAC avait des obligations contractuelles envers elle, mais bien si la province a considéré une proposition inadmissible. Il faut déterminer si la proposition provenait d'un soumissionnaire admissible.

[43] Au procès, nul n'a contesté l'inadmissibilité d'une coentreprise comptant en son sein un soumissionnaire inadmissible. La province affirme qu'elle n'avait pas à se demander si la proposition provenait d'une autre entreprise que celle nommée : la proposition était présentée au nom de Brentwood, un soumissionnaire admissible. Je suis pourtant d'avis que la juge de première instance n'a pas eu tort d'écarter cet argument. Une preuve plus qu'abondante étayait ses conclusions selon lesquelles (1) la soumission de Brentwood, en dépit des apparences, était en fait présentée par la coentreprise avec EAC, (2) la province le savait et estimait qu'elle ne pouvait ni considérer la proposition de cette coentreprise ni adjuger le contrat à celle-ci, (3) l'existence de la coentreprise jouait en faveur de Brentwood dans le cadre du processus d'évaluation des propositions et, enfin, (4) la province s'est employée à masquer cette réalité en révisant et en rédigeant la documentation.



[44] Brentwood was one of the original RFEI proponents and was of course eligible to bid, subject to material changes in the composition of its team. EAC had not submitted a proposal during the RFEI process. It had been involved in advising the Ministry in relation to the project in 1998 and, in the fall of 2000, the Ministry had asked EAC to prepare an internal bid for comparison purposes (although EAC did not do so) as EAC was not entitled to bid on the Project.

[45] As noted earlier, after the RFP was issued, Brentwood and EAC entered into a pre-bidding agreement that provided that the work would be undertaken in the name of Brentwood/Anderson, a joint venture, that the work would be sponsored and managed by the joint venture and that upon being awarded the contract, the parties would enter into a joint venture agreement. Brentwood advised the Ministry in writing that it was forming a joint venture with EAC “to submit a more competitive price”; this fax was in effect a preliminary submission contemplated by s. 2.8(b) of the RFP and was written, as the trial judge found, because Brentwood assumed that it could be disqualified if it submitted a proposal as a joint venture unless prior arrangements had been made. The Province never responded in writing to this preliminary submission, as required by s. 2.8(b). There were, however, discussions with the Province’s project manager, Mr. Tasaka who, the trial judge found, understood that a joint venture from Brentwood and EAC would not be eligible. As the judge put it, the Province’s position appears to have been that the Brentwood/EAC proposal could proceed as long as the submission was in the name of Brentwood.

[46] In the result, EAC was listed in the ultimate submission as a “major member” of the team. The legal relationship with EAC was not specified and EAC was listed as a subcontractor even though, as the trial judge found, their relationship bore no resemblance to a standard subcontractor agreement. The trial judge found as facts — and these findings are not challenged — that Brentwood and EAC always intended between themselves to form a joint venture and to formalize that arrangement once the contract was secured, and further, that the

[44] Comme Brentwood faisait partie des entreprises ayant initialement répondu à la DEI, elle était bien sûr admise à soumissionner, sauf modification substantielle de la composition de son équipe. EAC n’avait pas donné suite à la DEI. En 1998, elle avait conseillé le ministère relativement au projet et, à l’automne 2000, ce dernier lui avait demandé de préparer une soumission interne aux fins de comparaison (ce qu’elle n’a cependant pas fait) puisqu’elle n’était pas admise à soumissionner.

[45] Rappelons qu’après le lancement de la DP, Brentwood et EAC ont conclu un accord préalable à la proposition prévoyant que les travaux seraient entrepris au nom de la coentreprise, que celle-ci les financerait et les gèrerait et qu’un accord de coentreprise interviendrait si le contrat leur était adjugé. Brentwood a informé le ministère par écrit qu’elle formait une coentreprise avec EAC [TRADUCTION] « afin de présenter une soumission plus concurrentielle ». Le document télécopié constituait en fait la proposition préliminaire visée à l’al. 2.8b) de la DP et, suivant la juge de première instance, Brentwood l’avait envoyé parce qu’elle pensait que faute de démarches préalables, la soumission présentée au nom de la coentreprise pouvait être rejetée. La province n’y a jamais donné suite par écrit comme l’exigeait l’al. 2.8b). Cependant, des discussions ont eu lieu avec le gestionnaire du projet, M. Tasaka, qui, selon la juge de première instance, était conscient de l’inadmissibilité d’une coentreprise formée de Brentwood et d’EAC. Comme le dit la juge, la province paraît avoir estimé que la soumission de Brentwood/EAC pouvait être considérée si elle était présentée au nom de Brentwood.

[46] Dans la proposition finale, EAC a donc été qualifiée de [TRADUCTION] « membre important » de l’équipe. Le lien juridique entre Brentwood et EAC n’était pas précisé, et EAC figurait dans la liste des sous-traitants, même si, comme l’indique la juge de première instance, la relation entre les deux parties ne s’apparentait en rien à celle créée par un contrat de sous-traitance. La juge conclut — et nul ne conteste — que Brentwood et EAC ont toujours eu l’intention commune de former une coentreprise et de rendre celle-ci officielle une fois le contrat

role of EAC was purposefully obfuscated in the bid to avoid an apparent conflict with s. 2.8(a) of the RFP.

[47] During the selection process, it became clear that the bid was in reality on behalf of a joint venture. The project evaluation panel (“PEP”) requested better information than provided in the bid about the structure of the business arrangements between Brentwood and EAC. Brentwood responded by disclosing the pre-bid agreement between them to form a 50/50 joint venture if successful. The PEP understood from this that Brentwood and EAC had a similar interest in the risk and reward under the contract and that this helped satisfy them that the “risk/reward” aspect of the alliance contract could be negotiated with them flexibly. The PEP clearly did not consider EAC to be a subcontractor although shown as such in the bid. In its step 6 report, the PEP consistently referred to the proponent as being a joint venture of Brentwood and EAC or as “Brentwood/EAC” and the trial judge found that it was on the basis that they were indeed a joint venture that PEP approved Brentwood/EAC as the preferred proponent. This step 6 report was ultimately revised to refer only to the Brentwood team as the official proponent. The trial judge found as a fact that this revision was made because “it was apparent that a joint venture was not eligible to submit a proposal” (para. 56).

[48] The findings of the trial judge and the record make it clear that it was no mere question of form rather than a matter of substance whether the bidder was Brentwood with other team members or, as it in fact was, the Brentwood/EAC joint venture. As she noted, at para. 121 of her reasons, the whole purpose of the joint venture was to allow submission of a more competitive price than it would have been able to do as a proponent with a team as allowed under s. 2.8(b) of the RFP. The joint venture permitted a 50/50 sharing of risk and reward and co-management of the project while at the same time avoiding the restrictions on subcontracting in the tendering documents. As the judge put it, the bid by the joint venture constituted “material non-compliance” with the tendering contract: “. . .

obtenu et que le rôle d’EAC a été occulté à dessein dans la proposition afin d’éviter toute inobservation apparente de l’al. 2.8a) de la DP.

[47] Il est apparu clairement au cours du processus de sélection que la soumission était en fait présentée au nom d’une coentreprise. Le comité d’évaluation du projet (« CEP ») a demandé plus de précisions sur les liens d’affaires entre Brentwood et EAC. Brentwood a alors révélé l’existence de l’accord préalable prévoyant la formation d’une coentreprise à parts égales si sa soumission était retenue. Le CEP en a déduit que Brentwood et EAC avaient une même participation aux risques et aux bénéfices découlant du marché, ce qui a contribué à le convaincre qu’elles pourraient faire preuve de souplesse dans la négociation du volet « risques/bénéfices » de l’accord de partenariat. Manifestement, le CEP n’a pas considéré EAC comme un sous-traitant même si elle était présentée de la sorte dans la soumission. Dans son rapport de l’étape 6, le CEP renvoie systématiquement à la coentreprise formée de Brentwood et d’EAC ou à « Brentwood/EAC » pour parler du proposant. La juge de première instance conclut que c’est bien parce qu’elles formaient une coentreprise que le CEP a arrêté son choix sur elles. Le rapport a par la suite été modifié de façon que seule l’équipe Brentwood y figure comme proposant officiel. La juge de première instance y voit [TRADUCTION] « l’évidence qu’une coentreprise n’était pas admissible à soumissionner » (par. 56).

[48] Il ressort des conclusions de la juge de première instance et du dossier que la question de savoir si le soumissionnaire était Brentwood avec l’appui des autres membres de l’équipe ou — comme c’était effectivement le cas —, la coentreprise, ne tenait pas seulement à la forme, mais également au fond. La juge indique au par. 121 de ses motifs que la raison d’être de la coentreprise était essentiellement d’arriver à un prix plus concurrentiel que celui qu’aurait pu offrir un proposant appuyé d’une équipe comme le permettait l’al. 2.8b) de la DP. La coentreprise rendait possible le partage à parts égales des risques et des bénéfices ainsi que de la gestion du projet tout en soustrayant le soumissionnaire aux limitations de la sous-traitance prévues dans le dossier d’appel d’offres. Comme

the joint venture with EAC allowed Brentwood to put forward a more competitive price than contemplated under the RFEI proposal. This went to the essence of the tendering process” (para. 126).

[49] The Province suggests that the trial judge’s reasons allow form to triumph over substance. In my view, it is the Province’s position that better deserves that description. It had a bid which it knew to be on behalf of a joint venture, encouraged the bid to proceed and took steps to obfuscate the reality that it was on behalf of a joint venture. Permitting the bid to proceed in this way gave the joint venture a competitive advantage in the bidding process, and the record could not be clearer that the joint venture nature of the bid was one of its attractions during the selection process. The Province nonetheless submits that so long as only the name of Brentwood appears on the bid and ultimate Contract B, all is well. If ever a submission advocated placing form above substance, this is it.

[50] It is true that the Province had legal advice and did not proceed in defiance of it. However, the facts as found by the trial judge about this legal advice hardly advance the Province’s position. The judge found that the Province’s lawyer was not aware of the background relevant to the question of whether the Brentwood bid was eligible, never reviewed the proponent eligibility requirements in the RFP and was not asked to and did not direct his mind to the question of eligibility. As the trial judge put it, the lawyer “appears to have operated on the assumption that Brentwood had been irreversibly selected” (para. 70).

[51] The Brentwood/EAC joint venture having been selected as the preferred proponent, negotiations for the alliance contract ensued. The trial judge found that by this time, all agreed that a joint venture

l’explique la juge, la présentation d’une proposition par une coentreprise constituait une [TRADUCTION] « inexécution importante » du contrat issu de l’appel d’offres : [TRADUCTION] « . . . en formant une coentreprise avec EAC, Brentwood pouvait proposer un prix plus concurrentiel que celui offert en réponse à la DEI, ce qui touchait à l’essence même du processus d’appel d’offres » (par. 126).

[49] La province reproche à la juge de première instance de faire primer la forme sur le fond. À mon avis, c’est plutôt à sa thèse qu’on peut imputer pareille dérive. Elle avait en main une soumission qu’elle savait provenir d’une coentreprise, elle a encouragé sa présentation et elle a pris des mesures pour masquer le fait qu’elle était formulée par une coentreprise. Elle a ainsi conféré un avantage concurrentiel à celle-ci dans le processus d’appel d’offres, et il appert on ne peut plus clairement du dossier que l’existence de la coentreprise a été considérée comme un atout lors du processus de sélection. La province soutient néanmoins qu’il n’y a là rien d’irrégulier dans la mesure où le nom de Brentwood figurait sur la soumission, puis dans le contrat B. S’il est un argument qui fait primer la forme sur le fond, c’est bien celui-là.

[50] Certes, la province avait obtenu un avis juridique et elle n’a pas agi à l’encontre de celui-ci. Or, les faits établis selon la juge de première instance relativement à cet avis juridique n’appuient pas vraiment la prétention de la province. La juge relève que le conseiller juridique de la province ne disposait pas des éléments de contexte nécessaires pour déterminer si la soumission de Brentwood était admissible, il n’a jamais examiné les conditions d’admissibilité à soumissionner énoncées dans la DP et on ne lui a pas demandé de se pencher sur la question de l’admissibilité, ce qu’il n’a pas fait de son propre chef non plus. Comme le dit la juge, le conseiller juridique [TRADUCTION] « paraît avoir supposé au départ que Brentwood avait été irrévocablement retenue » (par. 70).

[51] La proposition de la coentreprise Brentwood/EAC ayant été retenue, les négociations en vue de la conclusion de l’accord de partenariat ont commencé. De l’avis de la juge de première instance,



was not an eligible proponent and the Ministry was taking the position that the contract could not be in the name of the joint venture. Brentwood and EAC executed a revised pre-contract agreement that provided, notwithstanding the letter of intent from the Ministry addressed to Brentwood indicating that the legal relationship between them would be contractor/subcontractor, the contract would be performed and the profits shared equally between them. The work was to be managed by a committee with equal representation, the bond required by the owner was to be provided by both parties and EAC indemnified Brentwood against half of any loss or cost incurred as a result of performance of the work. According to schedule B4 of the RFP, all subcontracts were to be attached to the RFP but no contract between Brentwood and EAC was ever provided or attached to the proposal.

[52] The Province has identified no palpable and overriding error in these many findings of fact by the trial judge. I conclude, therefore, that we must approach the case on the basis of the judge's finding that the bid was in fact, if not in form, submitted by a joint venture of Brentwood and EAC, that the Ministry was well aware of this, that the existence of the joint venture was a material consideration in favour of the bid during the evaluation process and that by bidding as a joint venture, Brentwood was given a competitive advantage in the bidding process.

[53] I reject the Ministry's submissions that all that matters is the form and not the substance of the arrangement. In my view, the trial judge's finding that this bid was in fact on behalf of a joint venture is unassailable.

[54] I turn to the Province's third point:

(iii) there was no term of the RFP that restricted the right of proponents to enter into joint venture agreements with others; this arrangement merely left Brentwood, the original

tous convenaient alors que la coentreprise n'était pas un soumissionnaire admissible, et le ministère estimait que le contrat ne pouvait être conclu avec elle. Brentwood et EAC ont signé un accord préalable modifié stipulant que, malgré la lettre d'intention du ministère adressée à Brentwood et selon laquelle la relation juridique entre les deux entreprises serait celle existant entre un entrepreneur et un sous-traitant, le contrat serait exécuté par les deux entreprises, et les bénéfices partagés entre elles à parts égales. L'accord prévoyait aussi que la gestion des travaux relèverait d'un comité constitué d'un nombre égal de représentants des deux entreprises, que le cautionnement exigé par le propriétaire serait fourni par les deux entreprises et qu'EAC dédommagerait Brentwood de la moitié des pertes ou des coûts découlant de l'exécution des travaux. Suivant l'annexe B4 de la DP, tous les sous-contrats devaient être joints à la proposition, mais nul contrat intervenu entre Brentwood et EAC ne l'avait été.

[52] La province ne relève aucune erreur manifeste et dominante dans ces nombreuses conclusions de fait tirées en première instance. J'estime donc qu'il nous faut trancher en tenant pour acquis, conformément à ces conclusions, que malgré les apparences, le soumissionnaire était en fait la coentreprise formée de Brentwood et d'EAC, le ministère le savait, l'existence de la coentreprise a été considérée comme un atout lors du processus d'évaluation et la présentation d'une proposition par une coentreprise a fait bénéficier Brentwood d'un avantage concurrentiel dans le processus d'appel d'offres.

[53] La prétention du ministère voulant que tout ce qui importe c'est la forme de l'accord, et non sa teneur, ne saurait tenir. Je conviens avec la juge de première instance que la proposition était en fait présentée par une coentreprise. Sa conclusion est inattaquable.

[54] Je passe maintenant au troisième argument de la province :

(iii) aucune disposition de la DP n'empêchait un proposant de conclure un accord de coentreprise; cette mesure permettait seulement à Brentwood, l'un des proposants initiaux, de

proponent in place and allowed it to enhance its ability to perform the work.

[55] This submission addresses the question of whether the joint venture was an eligible bidder. The Province submits that it is, arguing that s. 2.8(b) of the RFP shows that the RFP contemplated that each proponent would be supported by a team, that the composition of the team might change and that the Province under that section retained the right to approve or reject changes in the team of any proponent. I cannot accept these submissions.

[56] Section 2.8 must be read as a whole and in light of the ministerial approval which I have described earlier. Section 2.8(a), consistent with that approval, stipulates that only the six proponents qualified through the RFEI process were eligible to submit responses and that proposals from any other party “shall not be considered”. The word “proponent” is defined in s. 8 as a team that has become eligible to respond to the RFP. The material change provisions in s. 2.8(b) should not be read as negating the express provisions of the RFP and the ministerial approval of the process. When read as a whole, the provisions about material change do not permit the addition of a new entity as occurred here. The process actually followed was not the one specified in the bidding contract and was not authorized by the statute because it was not the one approved by the Minister.

[57] Moreover, even if one were to conclude (and I would not) that this change from the Brentwood team that participated in the RFEI to the Brentwood/EAC joint venture by whom the bid was submitted could fall within the material change provisions of s. 2.8(b), the Province never gave a written decision to permit this change as required by that provision. As the trial judge noted, in fact the Province’s position was that such a bid would not be eligible and its agents took steps to obfuscate the true proponent in the relevant documentation.

[58] The trial judge also found that there was an implied obligation of good faith in the contract and

demeurer en lice et d’accroître sa capacité d’exécuter les travaux.

[55] L’argument soulève la question de savoir si la coentreprise était un soumissionnaire admissible. La province prétend que c’était le cas, car selon elle, il appert de l’al. 2.8b) de la DP que chacun des soumissionnaires bénéficierait de l’appui d’une équipe, que la composition de cette équipe pouvait changer et que la province se réservait le droit d’approuver ou non la modification d’une équipe. Je ne puis adhérer à ce raisonnement.

[56] Il faut considérer l’art. 2.8 dans son ensemble et au vu de l’approbation ministérielle dont il est question précédemment. Conformément à cette approbation, l’al. 2.8a) prévoit que seuls les six proposants tenus pour admissibles à l’issue de la DEI peuvent présenter une proposition et que les propositions présentées par d’autres personnes [TRADUCTION] « ne seront pas examinées ». Suivant l’article 8, [TRADUCTION] « proposant » s’entend d’une équipe admise à répondre à la DP. L’alinéa 2.8b) — relatif aux changements substantiels — ne saurait être interprété de façon à contrecarrer les dispositions expresses de la DP et l’approbation ministérielle du processus. Considérées globalement, les dispositions relatives aux changements substantiels ne permettent pas l’adjonction d’une nouvelle entité comme celle qui a eu lieu en l’espèce. La procédure suivie dans les faits n’a pas été celle prévue dans le dossier d’appel d’offres et, n’ayant pas été approuvée par le ministre, elle n’était pas légalement autorisée.

[57] Qui plus est, à supposer même (et je ne suis pas disposé à le faire) que le passage de l’équipe Brentwood ayant répondu à la DEI à la coentreprise Brentwood/EAC qui a présenté la soumission constituait un changement substantiel pour les besoins de l’al. 2.8b), il reste que la province ne l’a jamais avalisé par écrit comme l’exigeait cette disposition. La juge du procès fait observer que la province jugeait la soumission inadmissible et que ses préposés ont occulté la véritable identité du proposant dans les documents en cause.

[58] La juge de première instance conclut également qu’il y avait une obligation contractuelle

that the Province breached this obligation by failing to treat all bidders equally by changing the terms of eligibility to Brentwood's competitive advantage. This conclusion strongly reinforces the trial judge's decision about eligibility. Rather than repeating her detailed findings, I will simply quote her summary at para. 138:

The whole of [the Province's] conduct leaves me with no doubt that the [Province] breached the duty of fairness to [Tercon] by changing the terms of eligibility to Brentwood's competitive advantage. At best, [the Province] ignored significant information to its [i.e. Tercon's] detriment. At worst, the [Province] covered up its knowledge that the successful proponent was an ineligible joint venture. In the circumstances here, it is not open to the [Province] to say that a joint venture was only proposed. Nor can the [Province] say that it was unaware of the joint venture when it acted deliberately to structure contract B to include EAC as fully responsible within a separate contract with Brentwood, so minimizing the [Province's] risk that the contract would be unenforceable against EAC if arrangements did not work out. . . . The [Province] was . . . prepared to take the risk that unsuccessful bidders would sue; this risk did materialize.

[59] To conclude on this point, I find no fault with the trial judge's conclusion that the bid was in fact submitted on behalf of a joint venture of Brentwood and EAC which was an ineligible bidder under the terms of the RFP. This breached not only the express eligibility provisions of the tender documents, but also the implied duty to act fairly towards all bidders.

## B. *The Exclusion Clause*

### 1. Introduction

[60] As noted, the RFP includes an exclusion clause which reads as follows:

#### 2.10 . . .

Except as expressly and specifically permitted in these Instructions to Proponents, no Proponent shall

tacite d'agir de bonne foi et que la province a manqué à cette obligation en ne traitant pas tous les soumissionnaires sur un pied d'égalité du fait de la modification des conditions d'admissibilité et de l'octroi d'un avantage concurrentiel à Brentwood. Cette conclusion de la juge affermit considérablement celle qu'elle tire au sujet de l'admissibilité. Je m'abstiens de reprendre ses conclusions détaillées, mais j'en cite le résumé (par. 138) :

[TRADUCTION] Au vu de l'ensemble de la conduite [de la province], il ne fait pour moi aucun doute que celle-ci a manqué à son obligation d'équité à l'endroit de [Tercon] lorsqu'elle a modifié les conditions d'admissibilité à l'avantage de Brentwood du point de vue concurrentiel. Au mieux, elle a fait abstraction de renseignements importants au détriment de Tercon. Au pire, elle a dissimulé le fait que le soumissionnaire retenu était une coentreprise inadmissible. Dans ces circonstances, la province ne saurait faire valoir que la formation d'une coentreprise était seulement envisagée. Elle ne peut non plus prétendre avoir ignoré l'existence de la coentreprise alors qu'elle a délibérément conçu le contrat B de façon qu'EAC en accepte les modalités dans un contrat distinct conclu avec Brentwood, réduisant ainsi le risque [pour la province] que le contrat ne puisse être opposable à EAC si les accords projetés tournaient court. [. . .] [La province] était [. . .] prête à courir le risque que les soumissionnaires non retenus la poursuivent : ce risque s'est matérialisé.

[59] Pour clore sur ce point, sa conclusion selon laquelle la soumission était en fait celle d'une coentreprise formée de Brentwood et d'EAC qui n'était pas admise à soumissionner suivant la DP n'est à mon avis entachée d'aucune erreur. L'inobservation qui en découle touche non seulement les conditions d'admissibilité énoncées dans le dossier d'appel d'offres, mais aussi l'obligation tacite d'agir équitablement vis-à-vis de tous les soumissionnaires.

## B. *La clause de non-recours*

### 1. Introduction

[60] Rappelons que la DP renferme une clause de non-recours, dont voici le texte :

[TRADUCTION]

#### 2.10 . . .

Sauf ce que prévoient expressément les présentes instructions, un proposant ne peut exercer aucun

have any claim for compensation of any kind whatsoever, as a result of participating in this RFP, and by submitting a Proposal each Proponent shall be deemed to have agreed that it has no claim. [Emphasis added.]

[61] The trial judge held that as a matter of construction, the clause did not bar recovery for the breaches she had found. The clause, in her view, was ambiguous and, applying the *contra proferentem* principle, she resolved the ambiguity in Tercon's favour. She also found that the Province's breach was fundamental and that it was not fair or reasonable to enforce the exclusion clause in light of the nature of the Province's breach. The Province contends that the judge erred both with respect to the construction of the clause and her application of the doctrine of fundamental breach.

[62] On the issue of fundamental breach in relation to exclusion clauses, my view is that the time has come to lay this doctrine to rest, as Dickson C.J. was inclined to do more than 20 years ago: *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426, at p. 462. I agree with the analytical approach that should be followed when tackling an issue relating to the applicability of an exclusion clause set out by my colleague Binnie J. However, I respectfully do not agree with him on the question of the proper interpretation of the clause in issue here. In my view, the clause does not exclude Tercon's claim for damages, and even if I am wrong about that, the clause is at best ambiguous and should be construed *contra proferentem* as the trial judge held. As a result of my conclusion on the interpretation issue, I do not have to go on to apply the rest of the analytical framework set out by Binnie J.

[63] In my view, the exclusion clause does not cover the Province's breaches in this case. The RFP process put in place by the Province was premised on a closed list of bidders; a contest with an ineligible bidder was not part of the RFP process and was in fact expressly precluded by its terms. A "Contract A" could not arise as a result of submission of a bid from any other party. However, as

recours en indemnisation pour sa participation à la DP, ce qu'il est réputé accepter lorsqu'il présente une soumission. [Je souligne.]

[61] La juge de première instance statue que le libellé de la clause ne fait pas obstacle à l'indemnisation pour les inexécutions relevées. À son avis, la clause est équivoque et, conformément à la règle *contra proferentem*, elle l'interprète en faveur de Tercon. Elle opine en outre que l'inexécution reprochée à la province est fondamentale et qu'il n'est ni juste ni raisonnable de faire respecter la clause de non-recours étant donné la nature de l'inexécution. La province fait valoir que la juge a interprété erronément la clause et qu'elle a eu tort de recourir au principe de l'inexécution fondamentale.

[62] En ce qui concerne son application aux clauses d'exonération, je crois que le temps est venu de donner le coup de grâce au principe de l'inexécution fondamentale comme le juge en chef Dickson y était enclin il y a plus de 20 ans : *Hunter Engineering Co. c. Syncrude Canada Ltée*, [1989] 1 R.C.S. 426, p. 462. Je souscris à la démarche analytique qui s'impose, selon mon collègue le juge Binnie, pour s'attaquer à une question touchant à l'applicabilité d'une clause d'exonération. Malheureusement, je ne puis faire mienne son interprétation de la clause litigieuse en l'espèce. À mon sens, la clause ne fait pas obstacle au recours en dommages-intérêts de Tercon et, même si j'ai tort sur ce point, la clause est au mieux équivoque et doit être interprétée *contra proferentem* comme le préconise la juge de première instance. Vu ma conclusion concernant l'interprétation, je n'ai pas à appliquer les autres volets de la démarche analytique du juge Binnie.

[63] J'estime que la clause de non-recours ne s'applique pas aux inexécutions imputées à la province. Le processus de DP mis en place par celle-ci supposait la participation d'un nombre limité d'entreprises. La mise en concurrence avec un soumissionnaire inadmissible n'en faisait pas partie et elle était même expressément exclue. La présentation d'une proposition par une autre entreprise ne

a result of how the Province proceeded, the very premise of its own RFP process was missing, and the work was awarded to a party who could not be a participant in the RFP process. That is what Tercon is complaining about. Tercon's claim is not barred by the exclusion clause because the clause only applies to claims arising "as a result of participating in [the] RFP", not to claims resulting from the participation of other, ineligible parties. Moreover, the words of this exclusion clause, in my view, are not effective to limit liability for breach of the Province's implied duty of fairness to bidders. I will explain my conclusion by turning first to a brief account of the key legal principles and then to the facts of the case.

## 2. Legal Principles

[64] The key principle of contractual interpretation here is that the words of one provision must not be read in isolation but should be considered in harmony with the rest of the contract and in light of its purposes and commercial context. The approach adopted by the Court in *M.J.B.* is instructive. The Court had to interpret a privilege clause, which is somewhat analogous to the exclusion clause in issue here. The privilege clause provided that the lowest or any tender would not necessarily be accepted, and the issue was whether this barred a claim based on breach of an implied term that the owner would accept only compliant bids. In interpreting the privilege clause, the Court looked at its text in light of the contract as a whole, its purposes and commercial context. As Iacobucci J. said, at para. 44, "the privilege clause is only one term of Contract A and must be read in harmony with the rest of the tender documents. To do otherwise would undermine the rest of the agreement between the parties."

[65] In a similar way, it is necessary in the present case to consider the exclusion clause in the RFP in light of its purposes and commercial context as well as of its overall terms. The question is whether the exclusion of compensation for claims resulting

pouvait faire naître un « contrat A ». La province a donc ignoré le fondement même de sa propre DP et elle a attribué le marché à une entreprise non admise à y prendre part. C'est ce dont Tercon lui fait grief. La clause de non-recours ne fait pas obstacle au recours de Tercon, car elle ne s'applique qu'à l'indemnisation demandée [TRADUCTION] « pour [l]a participation à la DP », et non au recours qui fait suite à la participation d'une autre entreprise, elle inadmissible. De plus, le texte de la clause ne limite pas selon moi la responsabilité de la province pour le manquement à son obligation tacite de faire preuve d'équité à l'égard des soumissionnaires. Je m'explique en exposant brièvement les principes juridiques essentiels, puis en les appliquant aux faits de l'espèce.

## 2. Les principes juridiques

[64] Le principe fondamental d'interprétation applicable en l'espèce veut qu'une clause contractuelle ne doive pas être considérée isolément mais en harmonie avec les autres et à la lumière de son objet et du contexte commercial dans lequel elle s'inscrit. La démarche suivie dans l'arrêt *M.J.B.* est éclairante. La Cour devait y interpréter une clause de réserve qui s'apparentait quelque peu à la clause de non-recours qui nous intéresse. La clause de réserve stipulait que le marché ne serait pas nécessairement attribué au soumissionnaire le moins disant ni même attribué du tout. La question était celle de savoir si elle faisait obstacle à une action en justice pour non-respect de la clause tacite voulant que le propriétaire n'accepte que les soumissions conformes. Pour l'interpréter, la Cour examine son libellé au vu du contrat dans son ensemble, de son objet et de son contexte commercial. Le juge Iacobucci conclut au par. 44 : « ... la clause de réserve n'est qu'une condition du contrat A et elle doit être interprétée de façon à s'harmoniser avec le reste du dossier d'appel d'offres. Agir autrement, ce serait saper le reste de l'entente entre les parties. »

[65] De même, il faut en l'espèce examiner la clause de non-recours de la DP à la lumière de son objet et du contexte commercial dans lequel elle s'inscrit, ainsi que de l'ensemble de ses conditions. Il faut se demander si l'exclusion de toute

from “participating in this RFP”, properly interpreted, excludes liability for the Province having unfairly considered a bid from a bidder who was not supposed to have been participating in the RFP process at all.

### 3. Application to This Case

[66] Having regard to both the text of the clause in its broader context and to the purposes and commercial context of the RFP, my view is that this claim does not fall within the terms of the exclusion clause.

[67] To begin, it is helpful to recall that in interpreting tendering contracts, the Court has been careful to consider the special commercial context of tendering. Effective tendering ultimately depends on the integrity and business efficacy of the tendering process: see, e.g., *Martel*, at para. 88; *M.J.B.*, at para. 41; *Double N Earthmovers*, at para. 106. As Iacobucci and Major JJ. put it in *Martel*, at para. 116, “it is imperative that all bidders be treated on an equal footing . . . Parties should at the very least be confident that their initial bids will not be skewed by some underlying advantage in the drafting of the call for tenders conferred upon only one potential bidder.”

[68] This factor is particularly weighty in the context of public procurement. In that context, in addition to the interests of the parties, there is the need for transparency for the public at large. This consideration is underlined by the statutory provisions which governed the tendering process in this case. Their purpose was to assure transparency and fairness in public tenders. As was said by Orsborn J. (as he then was) in *Cahill (G.J.) & Co. (1979) Ltd. v. Newfoundland and Labrador (Minister of Municipal and Provincial Affairs)*, 2005 NLTD 129, 250 Nfld. & P.E.I.R. 145, at para. 35:

The owner — in this case the government — is in control of the tendering process and may define the

indemnisation pour [TRANSDUCTION] « [I]a participation à la DP », correctement interprétée, soustrait la province à sa responsabilité lorsqu'elle se rend coupable d'iniquité en prenant en considération la proposition d'une entreprise qui n'était pas du tout censée participer à la DP.

### 3. Application à la présente espèce

[66] Compte tenu du libellé de la clause dans son contexte plus général ainsi que de l'objet et du contexte commercial de la DP, j'estime que le recours échappe à la clause de non-recours.

[67] D'abord, il convient de rappeler que pour interpréter le contrat issu de l'appel d'offres, la Cour tient dûment compte du contexte commercial particulier de la demande de propositions. Au final, le caractère fructueux du processus dépend de son intégrité et de son efficacité commerciale : voir, p. ex., les arrêts *Martel*, par. 88; *M.J.B.*, par. 41, et *Double N Earthmovers*, par. 106. Comme l'affirment les juges Iacobucci et Major dans l'arrêt *Martel*, au par. 116 : « Il est [. . .] impératif que tous les soumissionnaires soient traités sur un pied d'égalité [. . .] Un soumissionnaire devrait à tout le moins être assuré que l'évaluation de sa soumission initiale ne sera pas biaisée par quelque avantage sous-entendu dans le dossier d'appel d'offres et dont ne bénéficie qu'un seul soumissionnaire éventuel. »

[68] Ce facteur importe particulièrement dans le contexte de la passation de marchés publics. C'est pourquoi il faut non seulement protéger les intérêts des parties, mais également assurer la transparence du processus vis-à-vis des citoyens en général. Ce souci ressort des dispositions législatives qui régissaient le processus dans la présente affaire et dont l'objectif était d'assurer la transparence et l'équité des appels d'offres. Comme le dit le juge Orsborn (maintenant Juge en chef) dans l'arrêt *Cahill (G.J.) & Co. (1979) Ltd. c. Newfoundland and Labrador (Minister of Municipal and Provincial Affairs)*, 2005 NLTD 129, 250 Nfld. & P.E.I.R. 145, par. 35 :

[TRANSDUCTION] Le propriétaire — en l'occurrence l'État — est maître du processus d'appel d'offres. Il peut



parameters for a compliant bid and a compliant bidder. The corollary to this, of course, is that once the owner — here the government — sets the rules, it must itself play by those rules in assessing the bids and awarding the main contract.

[69] One aspect that is generally seen as contributing to the integrity and business efficacy of the tendering process is the requirement that only compliant bids be considered. As noted earlier, such a requirement has often been implied because, as the Court said in *M.J.B.*, it makes little sense to think that a bidder would comply with the bidding process if the owner could circumscribe it by accepting a non-compliant bid. Respectfully, it seems to me to make even less sense to think that eligible bidders would participate in the RFP if the Province could avoid liability for ignoring an express term concerning eligibility to bid on which the entire RFP was premised and which was mandated by the statutorily approved process.

[70] The closed list of bidders was the foundation of this RFP and there were important competitive advantages to a bidder who could side-step that limitation. Thus, it seems to me that both the integrity and the business efficacy of the tendering process support an interpretation that would allow the exclusion clause to operate compatibly with the eligibility limitations that were at the very root of the RFP.

[71] The same may be said with respect to the implied duty of fairness. As Iacobucci and Major JJ. wrote for the Court in *Martel*, at para. 88, “[i]mplying an obligation to treat all bidders fairly and equally is consistent with the goal of protecting and promoting the integrity of the bidding process.” It seems to me that clear language is necessary to exclude liability for breach of such a basic requirement of the tendering process, particularly in the case of public procurement.

déterminer les paramètres de la conformité d’une soumission et de l’admissibilité d’un soumissionnaire. Il s’en suit évidemment que lorsque le propriétaire — en l’occurrence l’État — établit les règles, il doit les respecter au moment d’évaluer les offres et d’attribuer le contrat principal.

[69] L’exigence que seules soient examinées des soumissions conformes est généralement considérée comme un élément favorisant l’intégrité et l’efficacité commerciale du processus d’appel d’offres. J’ai déjà mentionné que cette exigence est souvent inférée parce que, pour reprendre les propos de la Cour dans l’arrêt *M.J.B.*, il est déraisonnable qu’un soumissionnaire doive se conformer au processus d’appel d’offres si le propriétaire peut le contourner en acceptant une soumission non conforme. J’ajoute qu’il est encore moins concevable qu’un soumissionnaire admissible prenne part à une DP si la province peut échapper à toute responsabilité malgré l’inobservation d’une condition expresse relative à l’admissibilité à soumissionner, une condition qui formait l’assise de la DP en entier et qui bénéficiait de l’approbation ministérielle requise par la loi.

[70] La limitation du nombre de soumissionnaires admissibles constituait l’assise de la DP, et l’entreprise admise à soumissionner malgré cette restriction se voyait conférer un avantage concurrentiel considérable. À mon sens, l’intégrité et l’efficacité commerciale du processus d’appel d’offres commandent donc une interprétation qui permet une application de la clause de non-recours compatible avec la limitation du nombre de soumissionnaires admissibles, laquelle formait l’assise même de la DP.

[71] Il en va de même de l’obligation tacite d’équité. Comme le disent les juges Iacobucci et Major au nom de la Cour dans l’arrêt *Martel*, « [l]’existence présumée d’une obligation de traiter tous les soumissionnaires équitablement et sur un pied d’égalité est compatible avec l’objectif de protéger et de promouvoir l’intégrité du mécanisme d’appel d’offres » (par. 88). J’estime que seul un libellé clair peut écarter la responsabilité consécutive au non-respect d’une exigence aussi fondamentale applicable au processus d’appel d’offres, spécialement lorsqu’il s’agit de passer un marché public.

[72] The proper interpretation of the exclusion clause should also take account of the statutory context which I have reviewed earlier. The restriction on eligibility of bidders was a key element of the alternative process approved by the Minister. It seems unlikely, therefore, that the parties intended through this exclusion clause to effectively gut a key aspect of the approved process. Of course, it is true that the exclusion clause does not bar all remedies, but only claims for compensation. However, the fact remains that as a practical matter, there are unlikely to be other, effective remedies for considering and accepting an ineligible bid and that barring compensation for a breach of that nature in practical terms renders the ministerial approval process virtually meaningless. Whatever administrative law remedies may be available, they are not likely to be effective remedies for awarding a contract to an ineligible bidder. The Province did not submit that injunctive relief would have been an option, and I can, in any event, foresee many practical problems that need not detain us here in seeking such relief in these circumstances.

[73] The Province stresses Tercon's commercial sophistication, in effect arguing that it agreed to the exclusion clause and must accept the consequences. This line of argument, however, has two weaknesses. It assumes the answer to the real question before us which is: what does the exclusion clause mean? The consequences of agreeing to the exclusion clause depend on its construction. In addition, the Province's submission overlooks its own commercial sophistication and the fact that sophisticated parties can draft very clear exclusion and limitation clauses when they are minded to do so. Such clauses contrast starkly with the curious clause which the Province inserted into this RFP. The limitation of liability clause in *Hunter*, for example, provided that "[n]otwithstanding any other provision in this contract or any applicable statutory provisions neither the Seller nor the Buyer shall be liable to the other for special or consequential damages or damages for loss of use arising directly or indirectly from any breach of this contract, fundamental or otherwise" (p. 450). The Court found this to be clear and unambiguous. The limitation clause in issue in *Guarantee Co. of North*

[72] La juste interprétation de la clause de non-recours doit aussi s'appuyer sur le cadre législatif examiné précédemment. L'admissibilité restreinte constituait un élément essentiel de l'autre processus approuvé par le ministre. Il est donc peu probable que les parties aient vraiment voulu, en stipulant la clause de non-recours, supprimer un aspect essentiel de ce processus. La clause ne fait évidemment obstacle qu'aux demandes d'indemnisation. Cependant, il demeure peu probable que l'examen et l'acceptation d'une soumission inadmissible confèrent un autre recours efficace, sans compter que l'exclusion de l'indemnisation du préjudice causé par un tel manquement supprime en fait toute la raison d'être du processus d'approbation ministérielle. Quel que soit le recours possible en droit administratif, il est peu probable qu'il permette d'obtenir réparation pour l'octroi d'un marché à un soumissionnaire inadmissible. La province ne plaide pas qu'une injonction aurait pu être obtenue et, de toute manière, je peux concevoir de nombreuses difficultés d'ordre pratique qui justifient de ne pas s'attarder davantage à cette avenue possible.

[73] La province insiste sur l'expérience commerciale de Tercon. Elle soutient en fait que l'entreprise a convenu de la clause de non-recours et qu'elle doit en accepter les conséquences. L'argument comporte toutefois deux failles. Il préjuge du règlement par la Cour de la véritable question en litige : quelle est la portée de la clause de non-recours? Les conséquences résultant de l'adhésion à cette clause dépendent de son interprétation. En outre, la province passe sous silence sa propre expérience commerciale et le fait que des parties rompues aux usages commerciaux peuvent rédiger des clauses très claires de non-recours ou de responsabilité limitée lorsqu'elles entendent le faire. Ce n'est manifestement pas le cas de la curieuse clause que la province a insérée dans sa DP. À titre d'exemple, la clause de responsabilité limitée visée dans l'arrêt *Hunter* disposait que « [n]onobstant toute autre disposition du présent contrat ou toute disposition législative applicable, ni le vendeur ni l'acheteur n'est tenu de verser à l'autre des dommages-intérêts spéciaux ni des dommages-intérêts pour un préjudice indirect ou encore pour la perte d'usage résultant directement ou indirectement d'une inexécution, fondamentale



*America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, provided that legal proceedings for the recovery of “any loss hereunder shall not be brought . . . after the expiration of 24 months from the discovery of such loss” (para. 5). Once again, the Court found this language clear. The Ontario Court of Appeal similarly found the language of a limitation of liability clause to be clear in *Fraser Jewellers (1982) Ltd. v. Dominion Electric Protection Co.* (1997), 34 O.R. (3d) 1. The clause provided in part that if the defendant “should be found liable for loss, damage or injury due to a failure of service or equipment in any respect, its liability shall be limited to a sum equal to 100% of the annual service charge or \$10,000.00, whichever is less, as the agreed upon damages and not as a penalty, as the exclusive remedy” (p. 4). These, and many other cases which might be referred to, demonstrate that sophisticated parties are capable of drafting clear and comprehensive limitation and exclusion provisions.

[74] I turn to the text of the clause which the Province inserted in its RFP. It addresses claims that result from “participating in this RFP”. As noted, the limitation on who could participate in this RFP was one of its premises. These words must, therefore, be read in light of the limit on who was eligible to participate in this RFP. As noted earlier, both the ministerial approval and the text of the RFP itself were unequivocal: only the six proponents qualified through the earlier RFEI process were eligible and *proposals received from any other party would not be considered*. Thus, central to “participating in this RFP” was participating in a contest among those eligible to participate. A process involving other bidders, as the trial judge found the process followed by the Province to be, is not the process called for by “this RFP” and being part of that other process is not in any meaningful sense “participating in this RFP”.

ou autre, du présent contrat » (p. 450). La Cour a jugé ce texte clair et non équivoque. Dans l'affaire *Guarantee Co. of North America c. Gordon Capital Corp.*, [1999] 3 R.C.S. 423, la clause en litige prévoyait que des procédures judiciaires en vue de l'indemnisation de « tout sinistre visé aux présentes ne doivent pas être engagées [. . .] après l'expiration d'un délai de 24 mois suivant la découverte du sinistre » (par. 5). Là encore, la Cour conclut à la clarté du libellé. Dans l'arrêt *Fraser Jewellers (1982) Ltd. c. Dominion Electric Protection Co.* (1997), 34 O.R. (3d) 1, la Cour d'appel de l'Ontario conclut également au caractère non équivoque de la clause de responsabilité limitée, qui disposait notamment que si la défenderesse [TRADUCTION] « était tenue responsable d'un préjudice consécutif à une défaillance du service ou du matériel, quelle qu'elle soit, elle n'était tenue de verser que la totalité des frais de service annuels ou 10 000 \$, selon le moindre des deux montants, à titre d'indemnité convenue, et non de pénalité, à l'exclusion de toute autre réparation » (p. 4). Ces exemples et bien d'autres que l'on pourrait citer montrent que des parties expérimentées sont en mesure de rédiger des clauses de responsabilité limitée ou de non-recours à la fois claires et exhaustives.

[74] Passons maintenant au texte de la clause insérée au contrat par la province. Il vise les demandes d'indemnisation d'un préjudice découlant de la [TRADUCTION] « participation à la DP ». Rappelons que l'une des assises de la DP était la limitation du nombre d'entreprises admises à y prendre part. Il faut donc interpréter ce texte au regard de cette limitation. Tant l'approbation ministérielle que le texte de la DP elle-même sont clairs : seuls les six proposants s'étant rendus admissibles en répondant à la DEI pouvaient soumissionner, et *aucune proposition d'une autre personne ne serait examinée*. La participation à un concours ouvert aux seules personnes admises à y prendre part était donc au cœur de la « participation à la DP ». Un processus ouvert à d'autres entreprises — ce qui était le cas du processus suivi dans les faits selon la juge de première instance — ne saurait s'entendre de « la DP », et le fait d'y prendre part ne saurait véritablement être considéré comme une « participation à la DP ».

[75] The Province would have us interpret the phrase excluding compensation “as a result of participating in this RFP” to mean that compensation is excluded that results from “submitting a Proposal”. However, that interpretation is not consistent with the wording of the clause as a whole. The clause concludes with the phrase that “by submitting a Proposal each Proponent shall be deemed to have agreed that it has no claim”. If the phrases “participating in this RFP” and “submitting a Proposal” were intended to mean the same thing, it is hard to understand why different words were used in the same short clause to express the same idea. The fact that the Minister had approved a closed list of participants strengthens the usual inference that the use of different words was deliberate so as not to exclude compensation for a departure from that basic eligibility requirement.

[76] This interpretation of the exclusion clause does not rob it of meaning, but makes it compatible with other provisions of the RFP. There is a parallel between this case and the Court’s decision in *M.J.B.* There, the Court found that there was compatibility between the privilege clause and the implied term to accept only compliant bids. Similarly, in this case, there is compatibility between the eligibility requirements of the RFP and the exclusion clause. Not any and every claim based on any and every deviation from the RFP provisions would escape the preclusive effect of the exclusion clause. It is only when the defect in the Province’s adherence to the RFP process is such that it is completely outside that process that the exclusion clause cannot have been intended to operate. What is important here, in my view, is that the RFP in its conception, in its express provisions and in the statutorily required approval it was given, was premised on limiting eligibility to the six proponents in the RFEI process. Competition among others was not at all contemplated and was not part of the RFP process; in fact, the RFP expressly excluded that possibility. In short, limiting eligibility of bidders to those who had responded to the RFEI was the foundation of the whole RFP. As the judge found, acceptance of

[75] La province nous exhorte à conclure que l’énoncé écartant toute indemnisation « pour [l]a participation à la DP » signifie qu’il ne saurait y avoir d’indemnisation d’un préjudice résultant de la [TRADUCTION] « présent[ation d’]une soumission », ce qui pourtant serait incompatible avec le texte de la clause dans son ensemble. Il y est d’ailleurs stipulé à la toute fin que le proposant [TRADUCTION] « est réputé accepter [qu’il ne peut exercer aucun recours en indemnisation] lorsqu’il présente une soumission ». Si la « participation à la DP » et la « présent[ation d’]une soumission » devaient s’entendre de la même chose, on s’expliquerait difficilement que des termes différents soient employés dans la même clause brève pour exprimer la même idée. L’aval donné par le ministre à la limitation du nombre de participants étaye l’interprétation habituelle voulant que l’emploi des termes différents visait délibérément à ne pas écarter l’indemnisation en cas d’inobservation de cette exigence fondamentale liée à l’admissibilité.

[76] Pareille interprétation de la clause de non-recours ne la prive pas de sens, mais assure sa compatibilité avec les autres clauses de la DP. Un parallèle peut être établi entre la présente espèce et l’affaire *M.J.B.*, où la Cour conclut à la compatibilité de la clause de réserve avec la condition tacite que seule une soumission conforme puisse être acceptée. Il y a également compatibilité en l’espèce entre les conditions d’admissibilité de la DP et la clause de non-recours. Toute action intentée pour quelque manquement aux dispositions de la DP n’échappe pas à l’application de la clause de non-recours. Ce n’est que lorsque le non-respect du processus de DP par la province est tel que la démarche suivie est totalement étrangère à ce processus qu’on ne peut conclure que les parties ont voulu l’application de la clause de non-recours. Ce qui importe en l’occurrence selon moi c’est que la DP, au vu de sa conception, de ses dispositions expresses et de son approbation légale, avait pour assise l’admissibilité des seuls six proposants ayant répondu à la DEI. La mise en concurrence avec des tiers n’était pas envisagée et elle ne faisait pas partie du processus; en fait, la DP l’excluait expressément. En bref, l’admissibilité des seuls proposants qui avaient répondu à la DEI était l’assise même la DP.

a bid from an ineligible bidder “attacks the underlying premise of the process” established by the RFP: para. 146. Liability for such an attack is not excluded by a clause limiting compensation resulting from participation in this RFP.

[77] This interpretation is also supported by another provision of the RFP. Under s. 2.9, as mentioned earlier, the Province reserved to itself the right to unilaterally cancel the RFP and the right to propose a new RFP allowing additional bidders. If the exclusion clause were broad enough to exclude compensation for allowing ineligible bidders to participate, there seems to be little purpose in this reservation of the ability to cancel the RFP and issue a new one to a wider circle of bidders. It is also significant that the Province did not reserve to itself the right to accept a bid from an ineligible bidder or to unilaterally change the rules of eligibility. The RFP expressly did exactly the opposite. None of this, in my opinion, supports the view that the exclusion clause should be read as applying to the Province’s conduct in this case.

[78] To hold otherwise seems to me to be inconsistent with the text of the clause read in the context of the RFP as a whole and in light of its purposes and commercial context. In short, I cannot accept the contention that, by agreeing to exclude compensation for participating in this RFP process, the parties could have intended to exclude a damages claim resulting from the Province unfairly permitting a bidder to participate who was not eligible to do so. I cannot conclude that the provision was intended to gut the RFP’s eligibility requirements as to who may participate in it, or to render meaningless the Minister’s statutorily required approval of the alternative process where this was a key element. The provision, as well, was not intended to allow the Province to escape a damages claim for applying different eligibility criteria, to the competitive disadvantage of other bidders and for taking

Comme le dit la juge de première instance, l’acceptation de la proposition d’un soumissionnaire inadmissible [TRADUCTION] « sape l’assise du processus » établi par la DP : par. 146. La clause écartant toute indemnisation pour la participation à la DP ne saurait soustraire une partie à la responsabilité découlant d’une telle atteinte.

[77] Une autre disposition de la DP valide cette interprétation. Comme je le signale précédemment, à la clause 2.9, la province se réserve le droit d’annuler unilatéralement la DP et celui de proposer la tenue d’un nouvel appel d’offres ouvert à d’autres soumissionnaires. Si la clause de non-recours avait une portée suffisamment large pour écarter la responsabilité résultant de l’acceptation de propositions présentées par des soumissionnaires non admissibles, point n’aurait été besoin de prévoir cette faculté de mettre fin à la DP et d’en lancer une nouvelle en élargissant le cercle des soumissionnaires éventuels. Il est aussi révélateur que la province ne se soit pas réservé le droit d’accepter la proposition d’un soumissionnaire inadmissible ou de modifier de son seul chef les règles d’admissibilité. La DP prévoit expressément l’exact contraire. À mon sens, rien de tout cela n’appuie la thèse que la clause de non-recours devrait être interprétée de façon à la rendre applicable au comportement de la province en l’espèce.

[78] Selon moi, conclure le contraire va à l’encontre du texte de la clause interprété eu égard au contexte de la DP dans son ensemble et à la lumière de l’objet et du contexte commercial de celle-ci. En somme, je ne peux faire droit à la prétention selon laquelle, en écartant toute indemnité pour la participation à la DP, les parties ont pu vouloir faire obstacle à tout recours en dommages-intérêts intenté pour l’iniquité dont aurait pu faire preuve la province en permettant à une entreprise de participer à un processus auquel elle n’était pas admise à prendre part. Je ne peux conclure que la clause visait à supprimer les conditions d’admissibilité de la DP, à priver de sa raison d’être l’approbation ministérielle du nouveau processus exigée par la loi, dont les conditions d’admissibilité en question formaient un élément clé, non plus qu’à permettre à la province d’échapper à toute responsabilité après avoir

steps designed to disguise the true state of affairs. I cannot conclude that the parties, through the words found in this exclusion clause, intended to waive compensation for conduct like that of the Province in this case that strikes at the heart of the integrity and business efficacy of the tendering process which it undertook.

[79] If I am wrong about my interpretation of the clause, I would hold, as did the trial judge, that its language is at least ambiguous. If, as the Province contends, the phrase “participating in this RFP” could reasonably mean “submitting a Proposal”, that phrase could also reasonably mean “competing against the other eligible participants”. Any ambiguity in the context of this contract requires that the clause be interpreted against the Province and in favour of Tercon under the principle *contra proferentem*: see, e.g., *Hillis Oil and Sales Ltd. v. Wynn’s Canada, Ltd.*, [1986] 1 S.C.R. 57, at pp. 68-69. Following this approach, the clause would not apply to bar Tercon’s damages claim.

#### V. Disposition

[80] I conclude that the judge did not err in finding that the Province breached the tendering contract or in finding that Tercon’s remedy in damages for that breach was not precluded by the exclusion clause in the contract. I would therefore allow the appeal, set aside the order of the Court of Appeal and restore the judgment of the trial judge. The parties advise that the question of costs has been resolved between them and that therefore no order in relation to costs is required.

The reasons of McLachlin C.J. and Binnie, Abella and Rothstein JJ. were delivered by

[81] BINNIE J. (dissenting) — The important legal issue raised by this appeal is whether, and in what

appliqué des critères d’admissibilité différents défavorisant des soumissionnaires sur le plan concurrentiel et pris des mesures pour dissimuler cette réalité. Je ne puis non plus arriver à la conclusion que les parties ont voulu, en employant le libellé de la clause de non-recours, exclure toute indemnité pour le préjudice infligé par un comportement comme celui reproché à la province en l’espèce, un comportement qui porte directement atteinte à l’intégrité de l’appel d’offres lancé et à son efficacité commerciale.

[79] Si toutefois j’avais tort d’interpréter la clause comme je le fais, je statuerais, à l’instar de la juge de première instance, que son texte est pour le moins équivoque. Si, comme le prétend la province, l’énoncé [TRADUCTION] « participation à la DP » pouvait raisonnablement s’entendre de la « présent[ation d’une] proposition », il pourrait aussi bien équivaloir au fait de « se mesurer aux autres participants admissibles ». Toute ambiguïté dans le cadre du contrat commande que la clause soit interprétée au détriment de la province et en faveur de Tercon suivant la règle *contra proferentem* : voir, p. ex., *Hillis Oil and Sales Ltd. c. Wynn’s Canada, Ltd.*, [1986] 1 R.C.S. 57, p. 68-69. Dès lors, la clause ne ferait pas obstacle au recours en dommages-intérêts de Tercon.

#### V. Dispositif

[80] Je conclus que la juge de première instance n’a pas commis d’erreur en statuant que la province n’avait pas respecté le contrat issu de l’appel d’offres et que la clause de non-recours figurant dans ce contrat ne faisait pas obstacle à l’action en dommages-intérêts intentée par Tercon pour cette inexécution. Je suis donc d’avis d’accueillir le pourvoi, d’annuler l’ordonnance de la Cour d’appel et de rétablir le jugement de première instance. Les parties ayant réglé entre elles la question des dépens, il n’est donc pas nécessaire de rendre d’ordonnance à ce sujet.

Version française des motifs de la juge en chef McLachlin et des juges Binnie, Abella et Rothstein rendus par

[81] LE JUGE BINNIE (dissident) — Le présent pourvoi soulève une question de droit importante,

circumstances, a court will deny a defendant contract breaker the benefit of an exclusion of liability clause to which the innocent party, not being under any sort of disability, has agreed. Traditionally, this has involved consideration of what is known as the doctrine of fundamental breach, a doctrine which Dickson C.J. in *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426, suggested should be laid to rest 21 years ago (p. 462).

[82] On this occasion we should again attempt to shut the coffin on the jargon associated with “fundamental breach”. Categorizing a contract breach as “fundamental” or “immense” or “colossal” is not particularly helpful. Rather, the principle is that a court has no discretion to refuse to enforce a valid and applicable contractual exclusion clause unless the plaintiff (here the appellant Tercon) can point to some paramount consideration of public policy sufficient to override the public interest in freedom of contract and defeat what would otherwise be the contractual rights of the parties. Tercon points to the public interest in the transparency and integrity of the government tendering process (in this case, for a highway construction contract) but in my view such a concern, while important, did not render unenforceable the terms of the contract Tercon agreed to. There is nothing inherently unreasonable about exclusion clauses. Tercon is a large and sophisticated corporation. Unlike my colleague Justice Cromwell, I would hold that the respondent Ministry’s conduct, while in breach of its contractual obligations, fell within the terms of the exclusion clause. In turn, there is no reason why the clause should not be enforced. I would dismiss the appeal.

## I. Overview

[83] This appeal concerns a contract to build a \$35 million road in the remote Nass Valley of British Columbia (the “Kincolith project”). The respondent Ministry accepted a bid from Brentwood

celle de savoir si le tribunal peut refuser à la partie coupable d’inexécution — et dans l’affirmative, à quelles conditions — le bénéfice d’une clause d’exonération de la responsabilité à laquelle a consenti l’autre partie alors qu’elle n’était frappée d’aucune inaptitude. Les tribunaux appelés à se prononcer en la matière s’en sont traditionnellement remis au principe de l’inexécution fondamentale, un principe auquel le juge en chef Dickson proposait d’asséner le coup de grâce il y a 21 ans dans l’arrêt *Hunter Engineering Co. c. Syncrude Canada Ltée*, [1989] 1 R.C.S. 426, p. 462.

[82] Nous devrions saisir l’occasion qui nous est à nouveau donnée d’éliminer le jargon associé à l’« inexécution fondamentale ». Qualifier l’inexécution contractuelle de « fondamentale », « monumentale » ou « phénoménale » n’est pas spécialement utile. En fait, le tribunal n’a pas le pouvoir discrétionnaire de refuser de faire respecter une clause de non-recours valide et applicable, sauf lorsque le demandeur (en l’espèce, l’appelante Tercon) fait valoir une considération d’ordre public prépondérante qui l’emporte sur l’intérêt public lié à la liberté de contracter et qui fait obstacle à ce qui, autrement, constitueraient les droits contractuels des parties. Tercon invoque l’intérêt public lié à la transparence et à l’intégrité du processus gouvernemental d’appel d’offres (visant en l’occurrence la construction d’une route), mais à mon sens, même s’il s’agit d’une condition importante, son inobservation n’a pas rendu inapplicable les clauses du contrat auxquelles Tercon avait consenti. La clause de non-recours n’a rien d’intrinsèquement déraisonnable. Tercon est une grande entreprise dotée d’une vaste expérience. Contrairement à mon collègue le juge Cromwell, j’estime que même s’il n’a pas respecté ses obligations contractuelles, le ministère intimé bénéficie de la clause de non-recours. Il n’y a donc pas de raison de ne pas faire respecter celle-ci. Je suis d’avis de rejeter le pourvoi.

## I. Survol

[83] Le contrat avait pour objet la construction d’une route au coût de 35 millions de dollars dans la vallée isolée de la Nass, en Colombie-Britannique (le « projet Kincolith »). Le ministère intimé a



Enterprises Ltd. that did not comply with the terms of tender. Tercon, as the disappointed finalist in the bidding battle, seeks compensation equivalent to the profit it expected to earn had it been awarded the contract.

[84] Tercon alleged, and the trial judge found, that although the winning bid was submitted in the name of Brentwood (an eligible bidder), Brentwood in fact intended, with the Ministry's knowledge and encouragement, to do the work in a co-venture with an ineligible bidder, Emil Anderson Construction Co. ("EAC"). The respondent Ministry raised a number of defences including the fact that the formal contract was signed in the name of Brentwood alone. This defence was rejected in the courts below. The Ministry's substantial defence in this Court is that even if it failed to abide by the bidding rules, it is nonetheless protected by an exclusion of compensation clause set out clearly in the request for proposals ("RFP"). The clause provided that "no Proponent shall have any claim for compensation of any kind whatsoever, as a result of participating in this RFP" and that "by submitting a Proposal each Proponent shall be deemed to have agreed that it has no claim" (s. 2.10 of the RFP).

[85] The appeal thus brings into conflict the public policy that favours a fair, open and transparent bid process, and the freedom of contract of sophisticated and experienced parties in a commercial environment to craft their own contractual relations. I agree with Tercon that the public interest favours an orderly and fair scheme for tendering in the construction industry, but there is also a public interest in leaving knowledgeable parties free to order their own commercial affairs. In my view, on the facts of this case, the Court should not rewrite — nor should the Court refuse to give effect to — the terms agreed to by the parties.

[86] I accept, as did the courts below, that the respondent Ministry breached the terms of its own RFP when it contracted with Brentwood, knowing the work would be carried out by a co-venture with Brentwood and EAC. The addition of EAC, a

accepté de Brentwood Enterprises Ltd. une soumission qui n'était pas conforme aux conditions de son appel d'offres. Écartée à l'étape ultime du processus, Tercon a réclamé une indemnité équivalant au profit escompté advenant l'obtention du contrat.

[84] Tercon a allégué que même si la soumission retenue avait été présentée au nom de Brentwood, ce soumissionnaire admissible entendait en fait exécuter les travaux en coentreprise avec un soumissionnaire inadmissible, Emil Anderson Construction Co. (« EAC »), au su et avec l'appui du ministère. La juge de première instance lui a donné raison. Le ministère intimé a invoqué divers moyens de défense, dont le fait que Brentwood seule était signataire du contrat intervenu. Ce moyen a été rejeté par les juridictions inférieures. Devant notre Cour, le ministère fait valoir comme moyen de fond qu'en dépit de l'inobservation des règles de l'appel d'offres, il peut se prévaloir de la clause de non-recours en indemnisation que prévoit clairement la demande de propositions (« DP »). Une clause stipule en effet qu'[TRADUCTION] « un proposant ne peut exercer aucun recours en indemnisation pour sa participation à la DP, ce qu'il est réputé accepter lorsqu'il présente une soumission » (clause 2.10 de la DP).

[85] S'opposent donc en l'espèce des considérations d'ordre public privilégiant un appel d'offres équitable, ouvert et transparent et la liberté de personnes compétentes et expérimentées de définir leurs liens contractuels dans un contexte commercial. Je conviens avec Tercon que, dans le secteur de la construction, il est dans l'intérêt public que les appels d'offres se déroulent de manière ordonnée et équitable. Mais il est également dans l'intérêt public que des personnes rompues aux usages d'un domaine conservent la faculté d'organiser leurs propres affaires. Vu les faits de la présente espèce, la Cour ne devrait pas reformuler les conditions arrêtées par les parties ni refuser de leur donner effet.

[86] Je conviens avec les juridictions inférieures que le ministère intimé n'a pas respecté les conditions de sa propre DP en accordant le marché à Brentwood alors qu'il savait que les travaux seraient exécutés en coentreprise avec EAC. L'adjonction

bigger contractor with greater financial resources than Brentwood, created a stronger competitor for Tercon than Brentwood alone. However, I also agree with the B.C. Court of Appeal that the exclusion of compensation clause is clear and unambiguous and that no legal ground or rule of law permits us to override the freedom of the parties to contract (or to decline to contract) with respect to this particular term, or to relieve Tercon against its operation in this case.

## II. The Tendering Process

[87] For almost three decades, the law governing a structured bidding process has been dominated by the concept of Contract A/Contract B initially formulated in *The Queen in right of Ontario v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111. The analysis advanced by Estey J. in that case was that the bidding process, as defined by the terms of the tender call, may create contractual relations (“Contract A”) prior in time and quite independently of the contract that is the actual subject matter of the bid (“Contract B”). Breach of Contract A may, depending on its terms, give rise to contractual remedies for non-performance even if Contract B is never entered into or, as in the present case, it is awarded to a competitor. The result of this legal construct is to provide unsuccessful bidders with a *contractual* remedy against an owner who departs from its own bidding rules. Contract A, however, arises (if at all) as a matter of interpretation. It is not imposed as a rule of law.

[88] In *Ron Engineering*, the result of Estey J.’s analysis was that as a matter of contractual interpretation, the Ontario government was allowed to retain a \$150,000 bid bond put up by Ron Engineering even though the government was told, a little over an hour after the bids were opened, that Ron Engineering had made a \$750,058 error in the calculation of its bid and wished to withdraw it. Estey J. held:

The contractor was not asked to sign a contract which diverged in any way from its tender but simply to sign a

de cet autre entrepreneur à la taille et aux moyens financiers plus grands que ceux de Brentwood a opposé à Tercon un concurrent plus puissant que Brentwood seule. Toutefois, je conviens aussi avec la Cour d’appel de la Colombie-Britannique que la clause de non-recours en indemnisation est claire et non équivoque et qu’aucune règle de droit ou autre fondement juridique ne nous permet de passer outre à la liberté des parties de convenir (ou non) de cette condition ni de soustraire Tercon à son application en l’espèce.

## II. Le processus d’appel d’offres

[87] Depuis près de trois décennies, le modèle du contrat A et du contrat B appliqué pour la première fois dans l’arrêt *La Reine du chef de l’Ontario c. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 R.C.S. 111, prédomine dans le droit applicable en matière d’appel d’offres. Suivant l’analyse du juge Estey dans cet arrêt, le processus défini par les conditions de l’appel d’offres peut faire naître des relations contractuelles (« contrat A ») antérieures au marché projeté (« contrat B ») et tout à fait indépendantes de celui-ci. Le non-respect du contrat A, dépendant de sa teneur, peut donner ouverture à un recours contractuel pour inexécution même si le contrat B ne voit pas le jour et même si, comme en l’espèce, il est octroyé à un concurrent. Cette construction juridique permet au soumissionnaire non retenu d’exercer un recours *contractuel* contre le propriétaire qui ne respecte pas les règles de l’appel d’offres qu’il a lui-même établies. Cependant, l’existence du contrat A relève de l’interprétation, elle n’est pas dictée par une règle de droit.

[88] Dans l’arrêt *Ron Engineering*, le juge Estey conclut que suivant son interprétation du contrat, le gouvernement de l’Ontario pouvait conserver le cautionnement de soumission de 150 000 \$ même s’il avait appris un peu plus d’une heure après l’ouverture des soumissions que Ron Engineering avait commis une erreur de 750 058 \$ dans le calcul du montant offert et qu’elle souhaitait retirer sa soumission. Le juge Estey dit :

On n’a pas demandé à l’entrepreneur de signer un contrat qui différerait en quoi que ce soit de sa soumission, mais

contract in accordance with the instructions to tenderers and in conformity with its own tender. [p. 127]

In other words, harsh as it may have seemed to Ron Engineering, the parties were held to their bargain. The Court was not prepared to substitute “fair and reasonable” terms for what the parties had actually agreed to.

[89] In *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, Contract A included a “privilege” clause which stated that the owner was not obliged to accept the lowest or *any* tender. The Court implied a term, based on the presumed intention of the parties, that notwithstanding the privilege clause, only compliant bids were open to acceptance. While the owner was not obliged to accept the lowest compliant bid, the privilege clause did not, as a matter of contractual interpretation, give the owner “the privilege” of accepting a non-compliant bid. *M.J.B.* stops short of the issue in the present appeal because in that case, there was a breach of Contract A but no clause purporting to exclude liability on the part of the owner to pay compensation in the event of a Contract A violation.

[90] In *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58, [2001] 2 S.C.R. 943, the Court enforced the rules of the bid depository system against a contractor whose bid was based on what turned out to be a mistaken view of its collective bargaining status with the International Brotherhood of Electrical Workers. The Court again affirmed that “[t]he existence and content of Contract A will depend on the facts of the particular case” (para. 36). Ellis-Don sought relief from its bid on the basis of a labour board decision rendered subsequent to its bid that upheld, to its surprise, the bargaining rights of the union. This Court held that no relief was contemplated in the circumstances under Contract A and none was afforded, even though this was a costly result when viewed from the perspective of Ellis-Don.

simplement de signer un contrat conforme aux instructions adressées aux soumissionnaires et à sa propre soumission. [p. 127]

Autrement dit, les parties ne pouvaient revenir sur le marché conclu, aussi draconien que cela ait pu paraître à Ron Engineering. La Cour n’était pas disposée à substituer des conditions « justes et raisonnables » à celles dont les parties avaient convenu.

[89] Dans l’arrêt *M.J.B. Enterprises Ltd. c. Construction de Défense (1951) Ltée*, [1999] 1 R.C.S. 619, le contrat A renfermait une clause « de réserve » portant que le propriétaire n’était tenu d’accepter ni la soumission la plus basse ni *aucune* soumission. Invoquant l’intention présumée des parties, la Cour infère du contrat, malgré la clause de réserve, l’obligation tacite du propriétaire de n’accepter qu’une soumission conforme. Le propriétaire n’était pas tenu d’accepter la soumission conforme la plus basse, mais suivant son interprétation, la clause de réserve ne « réservait » pas au propriétaire le droit d’accepter une soumission non conforme. L’arrêt *M.J.B.* ne tranche pas la question soulevée dans le présent pourvoi, car même s’il y avait eu inexécution du contrat A, aucune clause n’avait pour objet d’écarter l’obligation du propriétaire de verser une indemnité en cas de non-respect du contrat A.

[90] Dans l’arrêt *Naylor Group Inc. c. Ellis-Don Construction Ltd.*, 2001 CSC 58, [2001] 2 R.C.S. 943, la Cour donne effet aux règles régissant le système de soumissions au détriment d’un entrepreneur dont la soumission se fondait sur ce qui s’est révélé être une mauvaise interprétation de l’obligation de négocier collectivement avec la Fraternité internationale des ouvriers en électricité. La Cour y confirme que « [l]’existence et le contenu du contrat A dépendent des faits de chaque affaire » (par. 36). Ellis-Don tentait d’échapper à ses obligations contractuelles en invoquant une décision de la Commission des relations de travail — rendue après le dépôt de sa soumission — qui reconnaissait contre toutes attentes les droits de négociation collective du syndicat. La Cour statue que le contrat A ne prévoyait aucune mesure réparatrice en pareil cas et elle n’en accorde aucune, même si le résultat se révèle coûteux pour Ellis-Don.



[91] In *Martel Building Ltd. v. Canada*, 2000 SCC 60, [2000] 2 S.C.R. 860, citing *M.J.B.*, the Court implied a term in Contract A obligating the owner to be fair and consistent in the assessment of tender bids. On the facts, the disappointed bidder's claim of unfair treatment was rejected.

[92] Finally, in *Double N Earthmovers Ltd. v. Edmonton (City)*, 2007 SCC 3, [2007] 1 S.C.R. 116, the unsuccessful bidder claimed that Edmonton had accepted, in breach of Contract A, a competitor's non-compliant bid to provide heavy equipment of a certain age to move refuse at a waste disposal site. The Court refused to imply a term "requiring an owner to investigate to see if bidders will really do what they promised in their tender" (para. 50). Accepting the existence of a duty of "fairness and equality", the majority nevertheless held that "[t]he best way to make sure that all bids receive the same treatment is for an owner to weigh bids on the basis of what is actually in the bid, not to weigh them on the basis of subsequently discovered information" (para. 52). In other words, the majority's interpretation of the express terms of Contract A was enforced despite Double N Earthmovers' complaint of double dealing by the owner.

[93] On the whole, therefore, while *Ron Engineering* and its progeny have encouraged the establishment of a fair and transparent bidding process, Contract A continues to be based not on some abstract externally imposed rule of law but on the presumed (and occasionally implied) intent of the parties. Only in rare circumstances will the Court relieve a party from the bargain it has made.

[94] As to implied terms, *M.J.B.* emphasized (at para. 29) that the focus is "the intentions of the actual parties". A court, when dealing with a claim to an implied term, "must be careful not to slide

[91] Dans l'arrêt *Martel Building Ltd. c. Canada*, 2000 CSC 60, [2000] 2 R.C.S. 860, s'appuyant sur l'arrêt *M.J.B.*, la Cour conclut que le contrat A obligeait tacitement le propriétaire à évaluer les soumissions de façon équitable et uniforme. Mais au vu des faits, elle rejette la prétention du soumissionnaire éconduit selon laquelle il n'avait pas été traité avec équité.

[92] Enfin, dans l'affaire *Double N Earthmovers Ltd. c. Edmonton (Ville)*, 2007 CSC 3, [2007] 1 R.C.S. 116, à l'issue d'un appel d'offres pour la fourniture de machinerie lourde devant servir au déplacement des déchets dans une décharge, un soumissionnaire non retenu prétendait que la ville d'Edmonton avait contrevenu au contrat A en acceptant une soumission non conforme pour ce qui était de l'année de fabrication des machines. La Cour refuse de conclure à l'obligation tacite du propriétaire « de vérifier si les soumissionnaires respecteront vraiment les engagements qu'ils ont pris dans leur soumission » (par. 50). Les juges majoritaires reconnaissent que le propriétaire est tenu de traiter tous les soumissionnaires « équitablement et sur un pied d'égalité », mais ils estiment néanmoins que « [l]e meilleur moyen pour le propriétaire de s'assurer que toutes les soumissions sont traitées de façon équitable est de les évaluer d'après leur contenu réel et non en fonction des renseignements révélés ultérieurement » (par. 52). Ainsi, il est donné effet à leur interprétation des conditions expresses du contrat A malgré l'allégation de duplicité formulée par Double N Earthmovers contre le propriétaire.

[93] Dans l'ensemble, bien que l'arrêt *Ron Engineering* et ceux rendus dans sa foulée préconisent un processus d'appel d'offres équitable et transparent, l'assise du contrat A demeure l'intention présumée (et parfois inférée) des parties, et non quelque règle de droit abstraite imposée par un tiers. Ce n'est qu'en de rares circonstances que le tribunal relèvera une partie de ses engagements.

[94] Dans l'arrêt *M.J.B.*, la Cour souligne que, pour les conditions implicites, l'accent est mis sur « l'intention des parties elles-mêmes » (par. 29). Le tribunal appelé à statuer sur l'existence alléguée

into determining the intentions of reasonable parties” (emphasis in original). Thus, “if there is evidence of a contrary intention, on the part of either party, an implied term may not be found on this basis”.

[95] Tercon is a large and experienced contractor. As noted by Donald J.A. in the B.C. Court of Appeal, it had earlier “successfully recovered damages from the [Ministry] on a bidding default in a previous case” (2007 BCCA 592, 73 B.C.L.R. (4th) 201, at para. 15). See *Tercon Contractors Ltd. v. British Columbia* (1993), 9 C.L.R. (2d) 197 (B.C.S.C.), aff’d [1994] B.C.J. No. 2658 (QL) (C.A.). Thus Tercon would have been more sensitive than most contractors to the risks posed by an exclusion of compensation clause. It nevertheless chose to bid on the project on the terms proposed by the Ministry.

### III. Tercon’s Claim for Relief From the Exclusionary Clause It Agreed to

[96] In these circumstances, the first question is whether there is either a statutory legal obstacle to, or a principled legal argument against, the freedom of these parties to contract out of the obligation that would otherwise exist for the Ministry to pay compensation for a breach of Contract A. If not, the second question is whether there is any other barrier to the court’s enforcement of the exclusionary clause in the circumstances that occurred. On the first branch, Tercon relies on the *Ministry of Transportation and Highways Act*, R.S.B.C. 1996, c. 311 (“*Transportation Act*” or the “*Act*”). On the second branch, Tercon relies on the doctrine of fundamental breach.

#### A. *The Statutory Argument*

[97] Section 4 of the *Transportation Act* provides that before awarding a highway contract, “the minister must invite tenders in any manner that will make the invitation for tenders reasonably available

d’une condition implicite « doit se garder de chercher à déterminer l’intention de parties raisonnables » (souligné dans l’original). Ainsi, « en présence d’une preuve d’intention contraire de la part de l’une ou l’autre des parties, l’on ne peut conclure à l’existence d’une condition implicite sur ce fondement ».

[95] Tercon est une grande entreprise expérimentée et, comme le fait observer le juge Donald de la Cour d’appel, elle [TRADUCTION] « a déjà obtenu des dommages-intérêts du [ministère] dans une autre affaire d’irrégularité du processus d’appel d’offres » (2007 BCCA 592, 73 B.C.L.R. (4th) 201, par. 15). Voir *Tercon Contractors Ltd. c. British Columbia* (1993), 9 C.L.R. (2d) 197 (C.S.C.-B.), conf. par [1994] B.C.J. No. 2658 (QL) (C.A.). Tercon aurait donc été plus consciente que la plupart des autres entreprises du risque que posait la clause de non-recours en indemnisation. Elle a néanmoins décidé de participer au processus aux conditions proposées par le ministère.

### III. Demande de Tercon visant à la soustraire à l’application de la clause de non-recours à laquelle elle a consenti

[96] Dans ces circonstances, il faut premièrement se demander si un élément législatif ou un argument juridique valable s’oppose à la liberté des parties d’exclure dans leur contrat l’obligation qu’aurait le ministère de verser une indemnité en cas d’inexécution du contrat A. S’il n’y en a pas, il convient deuxièmement de déterminer si, au vu des faits de l’espèce, il existe un autre obstacle à l’application de la clause de non-recours. Pour le premier volet, Tercon invoque la *Ministry of Transportation and Highways Act*, R.S.B.C. 1996, ch. 311 (« *Loi sur les transports* » ou « *Loi* »), pour le second, le principe de l’inexécution fondamentale.

#### A. *L’argument de nature législative*

[97] L’article 4 de la *Loi sur les transports* dispose qu’avant d’accorder un contrat de voirie, [TRADUCTION] « le ministre lance l’appel d’offres de manière à informer raisonnablement le public de

to the public”, but then provides for several exceptions: “The minister need not invite tenders for a project . . . if . . . (c) the minister believes that an alternative contracting process will result in a competitively established cost for the project”. Here the required ministerial authorization was obtained for an “alternative process”. The reason is as follows. As noted by Cromwell J., the Ministry’s original idea was to use a “design-build” model where a single contractor would design and build the highway for a fixed price. The Ministry issued a request for expressions of interest (“RFEI”) which attracted six responses. One was from Tercon. Another was from Brentwood. EAC declined to bid because it did not think the “design-build” concept was appropriate for the job.

[98] On further reflection, the Ministry decided not to pursue the design-build approach. It decided to design the highway itself. The contract would be limited to construction, as EAC had earlier advocated. EAC was not allowed to bid despite the Ministry coming around to its point of view on the proper way to tender the project. The Ministry limited bidding on the new contest to the six respondents to the original RFEI, all of whom had been found capable of performing the contract. But to do so, it needed, and did obtain, the Minister’s s. 4 approval.

[99] A question arose during the hearing of the appeal as to whether the Minister actually approved an “alternative process” that not only restricted eligibility to the six participants in the RFEI process (an advantage to Tercon and the other five participants), but also contained the “no claims” clause excluding compensation for non-observance of its terms (no doubt considered a disadvantage). In its factum, the Ministry states:

In this case, the Minister approved an alternate process under [s. 4(2) of the B.C. *Transportation Act*]. That process was set out in the Instructions to Proponents, which included the No Claim Clause. Having been approved by the Minister, the package (including the No Claim

sa tenue », sauf dans certains cas, notamment lorsque [TRADUCTION] « c) le ministre estime qu’un autre processus d’adjudication de marché permettra la réalisation des travaux à un coût concurrentiel ». En l’espèce, le ministre a approuvé un « autre processus ». La raison en est — comme le signale le juge Cromwell — que le ministère prévoyait initialement qu’un seul entrepreneur se chargerait de la conception et de la construction de la route moyennant un prix fixe. Il a lancé une demande d’expression d’intérêt (« DEI ») et reçu six réponses, dont celles de Tercon et de Brentwood. Estimant que les travaux ne se prêtaient pas au modèle « conception-construction », EAC n’a pas manifesté son intérêt.

[98] Après réflexion, le ministère a renoncé à ce modèle. Il a décidé de concevoir lui-même la route et de ne passer un marché que pour sa construction, comme l’avait préconisé EAC. Cette dernière ne pouvait cependant pas soumissionner même si le ministère s’était rangé à son avis sur les modalités qu’il convenait d’établir pour l’appel d’offres. Le ministère a réservé la participation au nouveau processus aux six entrepreneurs ayant initialement répondu à la DEI, qu’il avait tous jugés aptes à exécuter les travaux. Il devait toutefois obtenir du ministre l’approbation visée à l’art. 4, et il l’a obtenue.

[99] Lors de l’audition du pourvoi, la question s’est posée de savoir si le ministre avait effectivement approuvé un « autre processus » qui non seulement tenait pour admissibles les six participants à la DEI (conférant ainsi un avantage à Tercon et aux cinq autres entreprises), mais renfermait également une clause « écartant tout recours » en indemnisation d’un préjudice découlant du non-respect de ses conditions (assurément perçue comme un élément défavorable). Dans son mémoire, le ministère soutient ce qui suit :

[TRADUCTION] Dans la présente affaire, le ministre a approuvé un autre processus [en application du par. 4(2) de la *Transportation Act* de la Colombie-Britannique]. Ce processus était énoncé dans les instructions aux proposants, qui comprenaient la clause « écartant tout

Clause) complied with section 4 of the *Transportation Act*. [para. 70]

[100] Tercon argued at the hearing of this appeal that as a matter of *law*, Contract A could not have included the exclusion clause because

[t]he policy of the [*Transportation Act*] is to ensure that the Ministry is accountable; to preserve confidence in the integrity of the tendering process. To ensure that is so and that the Minister is accountable, the Ministry must be held liable for its breach of Contract A in considering and accepting a proposal from the joint venture . . . .

**MADAM JUSTICE ABELLA:** Can I just ask you one question. Is it your position, sir, that you can never have -- that a government can never have a no claims clause?

**MR. McLEAN:** Yes. Under this statute because of the policy of the statute. [Transcript, at p. 27]

[101] While it is true that the Act favours “the integrity of the tendering process”, it nowhere prohibits the parties from negotiating a “no claims” clause as part of their commercial agreement, and cannot plausibly be interpreted to have that effect.

[102] In the ordinary world of commerce, as Dickson C.J. commented in *Hunter*, “clauses limiting or excluding liability are negotiated as part of the general contract. As they do with all other contractual terms, the parties bargain for the consequences of deficient performance” (p. 461). Moreover, as Mr. Hall points out, “[t]here are many valid reasons for contracting parties to use exemption clauses, most notably to allocate risks” (G. R. Hall, *Canadian Contractual Interpretation Law* (2007), at p. 243). Tercon, for example, is a sophisticated and experienced contractor and if it decided that it was in its commercial interest to proceed with the bid despite the exclusion of compensation clause, that was its prerogative and nothing in the “policy of the Act” barred the parties’ agreement on that point.

recours ». Avalisé par le ministre, l’ensemble des conditions (dont la clause « écartant tout recours ») était conforme à l’article 4 de la *Transportation Act*. [par. 70]

[100] Tercon a soutenu à l’audience que le contrat A ne pouvait *légalement* comprendre la clause de non-recours, car

[TRADUCTION] [l]a raison d’être de la [*Transportation Act*] est de rendre le ministre responsable de ses actes, de protéger la foi dans l’intégrité du processus d’appel d’offres. C’est pourquoi le ministre doit engager sa responsabilité en cas d’inexécution du contrat A lorsqu’il considère puis accepte la proposition d’une coentreprise . . . .

**MADAME LA JUGE ABELLA :** Puis-je seulement vous poser une question? Allez-vous jusqu’à prétendre, Maître, qu’il ne peut jamais y avoir de clause « écartant tout recours », qu’un gouvernement ne peut jamais stipuler une telle clause?

**MAÎTRE McLEAN :** Oui. Sous le régime de cette loi, à cause de sa raison d’être. [Transcription, p. 27]

[101] Certes la Loi favorise « l’intégrité du processus d’appel d’offres », mais aucune de ses dispositions n’empêche les parties de faire figurer dans leur accord commercial une clause écartant toute indemnisation ni ne peut vraisemblablement être interprétée comme ayant cet effet.

[102] Dans l’arrêt *Hunter*, le juge en chef Dickson fait observer que dans le contexte ordinaire du commerce, « les clauses de limitation ou d’exclusion de responsabilité sont négociées dans le cadre de l’ensemble du contrat. Comme elles le font pour les autres conditions du contrat, les parties négocient les conséquences de l’exécution insuffisante » (p. 461). De plus, Hall fait remarquer que [TRADUCTION] « [b]on nombre de raisons valables justifient les parties contractantes de recourir à une clause exonératrice, le plus souvent pour répartir le risque » (G. R. Hall, *Canadian Contractual Interpretation Law* (2007), p. 243). Tercon est une entreprise avertie et expérimentée, et si elle a jugé commercialement opportun de présenter une soumission malgré la clause de non-recours en indemnisation, c’était sa décision. La « raison d’être de la Loi » ne faisait aucunement obstacle à la convention des parties sur ce point.

[103] To the extent Tercon is now saying that as a matter of *fact* the Minister, in approving the RFP, did not specifically approve the exclusion clause, and that the contract was thus somehow *ultra vires* the Ministry, this is not an issue that was either pleaded or dealt with in the courts below. The details of the ministerial approval process were not developed in the evidence. It is not at all evident that s. 4 *required* the Minister to approve the actual terms of the RFP. It is an administrative law point that Tercon, if so advised, ought to have pursued at pre-trial discovery and in the trial evidence. We have not been directed to any exploration of the matter in the testimony and it is too late in the proceeding for Tercon to explore it now. Accordingly, I proceed on the basis that the exclusion clause did not run afoul of the statutory requirements.

#### B. *The Doctrine of the Fundamental Breach*

[104] The trial judge considered the applicability of the doctrine of fundamental breach. Tercon argued that the Ministry, by reason of its fundamental breach, had forfeited the protection of the exclusion of compensation clause.

[105] The leading case is *Hunter* which also dealt with an exclusion of liability clause. The appellants Hunter Engineering and Allis-Chalmers Canada Ltd. supplied gearboxes used to drive conveyor belts at Syncrude's tar sands operations in Northern Alberta. The gearboxes proved to be defective. At issue was a broad exclusion of warranty clause that limited time for suit and the level of recovery available against Allis-Chalmers (i.e. no recovery beyond the unit price of the defective products). Dickson C.J. observed: "In the face of the contractual provisions, Allis-Chalmers can only be found liable under the doctrine of fundamental breach" (p. 451).

[106] This doctrine was largely the creation of Lord Denning in the 1950s (see, e.g., *Karsales*

[103] Tercon prétend aujourd'hui devant nous que, dans les *faits*, lorsqu'il a approuvé la DP, le ministre n'a pas approuvé la clause de non-recours comme telle, si bien que le contrat était en quelque sorte *ultra vires* du pouvoir du ministère. Or, cette thèse n'a été ni formulée devant les tribunaux inférieurs ni examinée par eux. Le détail du processus d'approbation ministérielle n'a pas été mis en preuve. Il n'est pas du tout évident que l'art. 4 *exigeait* du ministre qu'il approuve les conditions précises de la DP. Il s'agit d'un point de droit administratif que Tercon aurait dû soulever, si elle le souhaitait, à l'interrogatoire préalable ou lors de la présentation de la preuve au procès. La preuve ne nous a pas incités à explorer la question, et il est désormais trop tard pour que Tercon s'engage dans cette voie. Je poursuis donc l'analyse en tenant pour acquis que la clause de non-recours ne dérogeait pas aux exigences légales.

#### B. *La notion d'inexécution fondamentale*

[104] La juge de première instance s'est penchée sur l'applicabilité de cette notion. Tercon soutenait qu'en raison de l'inexécution fondamentale dont il s'était rendu coupable, le ministère n'avait plus droit à la protection découlant de la clause de non-recours en indemnisation.

[105] *Hunter* est l'arrêt de principe en la matière. Une clause d'exonération de la responsabilité y était également en cause. Les appelantes Hunter Engineering et Allis-Chalmers Canada Ltd. fournissaient des boîtes d'engrenage pour les convoyeurs à courroie utilisés par Syncrude pour l'exploitation de sables bitumineux dans le nord de l'Alberta. Le matériel s'est révélé défectueux. L'objet du litige était une clause générale d'exclusion de la garantie limitant le délai de poursuite et plafonnant au prix unitaire du produit défectueux le montant de l'indemnité qu'Allis-Chalmers pouvait être tenue de verser. Le juge en chef Dickson conclut que « [c]ompte tenu des dispositions du contrat, Allis-Chalmers ne peut être tenue responsable qu'aux termes du principe de l'inexécution fondamentale » (p. 451).

[106] Ce principe de droit datant des années 1950 était en grande partie attribuable à lord Denning



(*Harrow Ltd. v. Wallis*, [1956] 1 W.L.R. 936 (C.A.)). It was said to be a rule of law that operated independently of the intention of the parties in circumstances where the defendant had so egregiously breached the contract as to deny the plaintiff substantially the whole of its benefit. In such a case, according to the doctrine, the innocent party was excused from further performance but the defendant could still be held liable for the consequences of its “fundamental” breach even if the parties had excluded liability by clear and express language. See generally S. M. Waddams, *The Law of Contracts* (5th ed. 2005), at para. 478; J. D. McCamus, *The Law of Contracts* (2005), at pp. 765 *et seq.*

[107] The five-judge *Hunter* Court was unanimous in the result and gave effect to the exclusion clause at issue. Dickson C.J. and Wilson J. both emphasized that there is nothing inherently unreasonable about exclusion clauses and that they should be applied unless there is a compelling reason not to give effect to the words selected by the parties. At that point, there was some divergence of opinion.

[108] Dickson C.J. (La Forest J. concurring) observed that the doctrine of fundamental breach had “spawned a host of difficulties” (p. 460), the most obvious being the difficulty in determining whether a particular breach is fundamental. The doctrine obliged the parties to engage in “games of characterization” (p. 460) which distracted from the real question of what agreement the parties themselves intended. Accordingly, in his view, the doctrine should be “laid to rest”. The situations in which the doctrine is invoked could be addressed more directly and effectively through the doctrine of “unconscionability”, as assessed at the time the contract was made:

It is preferable to interpret the terms of the contract, in an attempt to determine exactly what the parties agreed. If on its true construction the contract excludes liability for the kind of breach that occurred, the party in breach will generally be saved from liability. Only where the contract is unconscionable, as might arise from situations of unequal bargaining power between the parties,

(voir, p. ex., *Karsales (Harrow Ltd. c. Wallis*, [1956] 1 W.L.R. 936 (C.A.)). Il devait s'appliquer indépendamment de l'intention des parties lorsque le défendeur avait à ce point manqué à ses obligations contractuelles qu'il avait privé le demandeur de la quasi-totalité du bénéfice censé découler du contrat. Ainsi, le cocontractant innocent était dès lors relevé de ses obligations, et le défendeur pouvait en outre être tenu responsable des conséquences de son inexécution « fondamentale » même si les parties avaient clairement et expressément écarté toute responsabilité. Voir de façon générale S. M. Waddams, *The Law of Contracts* (5<sup>e</sup> éd. 2005), par. 478; J. D. McCamus, *The Law of Contracts* (2005), p. 765 *et suiv.*

[107] Dans l'arrêt *Hunter*, les cinq juges de la Cour s'entendent sur l'issue du pourvoi et donnent effet à la clause d'exclusion. Le juge en chef Dickson et la juge Wilson font tous deux ressortir qu'une telle clause n'est pas intrinsèquement déraisonnable et qu'il faut la faire respecter sauf motif impérieux de ne pas donner effet au libellé employé par les parties. Certaines divergences d'opinions apparaissent ensuite.

[108] Le juge en chef Dickson (avec l'accord du juge La Forest) fait remarquer que le principe de l'inexécution fondamentale a « engendré un grand nombre de difficultés » (p. 460), la plus évidente tenant à la détermination du caractère fondamental de l'inexécution. Les parties devaient en effet se livrer à des « jeux de caractérisation » (p. 460) qui détournaient leur attention de la question véritable, celle de savoir ce dont elles avaient elles-mêmes voulu convenir. Il est donc d'avis de « donner le coup de grâce » au principe, les situations où il est invoqué pouvant être réglées plus directement et plus efficacement sous l'angle de l'« iniquité » considérée au moment de la formation du contrat :

Il est préférable d'interpréter les conditions du contrat dans le but de déterminer exactement ce que les parties ont convenu. Si d'après son interprétation juste, le contrat écarte la responsabilité pour le genre d'inexécution qui s'est produit, la partie fautive sera généralement soustraite à la responsabilité. Ce n'est que lorsque le contrat est inique, comme cela pourrait se produire

should the courts interfere with agreements the parties have freely concluded. [p. 462]

Dickson C.J. explained that “[t]he courts do not blindly enforce harsh or unconscionable bargains” (p. 462), but “there is much to be gained by addressing directly the protection of the weak from overreaching by the strong, rather than relying on the artificial legal doctrine of ‘fundamental breach’” (p. 462). To enforce an exclusion clause in such circumstances could tarnish the institutional integrity of the court. In that respect, it would be contrary to public policy. However, a *valid* exclusion clause would be enforced according to its terms.

[109] Wilson J. (L’Heureux-Dubé J. concurring) disagreed. In her view, the courts retain some residual discretion to refuse to enforce exclusion clauses in cases of fundamental breach where the doctrine of *pre-breach* unconscionability (favoured by Dickson C.J.) did not apply. Importantly, she rejected the imposition of a general standard of reasonableness in the judicial scrutiny of exclusion clauses, affirming that “the courts . . . are quite unsuited to assess the fairness or reasonableness of contractual provisions as the parties negotiated them” (p. 508). Wilson J. considered it more desirable to develop through the common law a *post-breach* analysis seeking a “balance between the obvious desirability of allowing the parties to make their own bargains . . . and the obvious undesirability of having the courts used to enforce bargains in favour of parties who are totally repudiating such bargains themselves” (p. 510).

[110] Wilson J. contemplated a two-stage test, in which the threshold step is the identification of a fundamental breach where “the foundation of the contract has been undermined, where the very thing bargained for has not been provided” (p. 500). Having found a fundamental breach to exist, the exclusion clause would *not* automatically be set

dans le cas où il y a inégalité de pouvoir de négociation entre les parties, que les tribunaux devraient modifier les conventions que les parties ont formées librement. [p. 462]

Le juge en chef Dickson explique que « [l]es tribunaux n’appliquent pas aveuglément les conventions draconiennes ou iniques » (p. 462), mais qu’« il y a beaucoup à gagner à aborder directement la question de la protection des plus faibles contre l’exploitation des plus forts, plutôt que de s’en remettre au principe juridique artificiel de l’“inexécution fondamentale” » (p. 462). Faire respecter une clause de non-recours en pareil cas pourrait porter atteinte à l’intégrité de l’appareil judiciaire. Sous ce rapport, ce serait contraire à l’ordre public. Toutefois, une clause de non-recours *valide* sera appliquée conformément à son libellé.

[109] La juge Wilson (avec l’appui de la juge L’Heureux-Dubé) exprime son désaccord, opinant que les tribunaux doivent continuer d’exercer un certain pouvoir discrétionnaire et refuser d’appliquer une clause d’exclusion en cas d’inexécution fondamentale lorsque le principe de l’iniquité *préalable* à l’inexécution (privilegié par le juge en chef Dickson) ne s’applique pas. Elle s’oppose surtout à ce que l’examen judiciaire d’une clause d’exonération se fasse au regard d’une norme générale de raisonabilité : « . . . les tribunaux [. . .] sont fort mal placés pour déterminer le caractère juste ou raisonnable de dispositions contractuelles négociées par les parties » (p. 508). Elle préconise plutôt une démarche *a posteriori* fondée sur la common law visant à établir « un équilibre entre ce qui est manifestement souhaitable, c’est-à-dire permettre aux parties de conclure leurs propres contrats [. . .] et ce qui est manifestement peu souhaitable, c’est-à-dire recourir aux tribunaux pour faire respecter des contrats en faveur de parties qui elles-mêmes refusent catégoriquement de les exécuter » (p. 510).

[110] La juge Wilson propose un double critère dont le premier volet consiste à déterminer l’existence d’une inexécution fondamentale, à savoir une situation « où le fondement même du contrat a été miné, c’est-à-dire lorsque l’objet même du contrat n’a pas été réalisé » (p. 500). Le tribunal qui conclut à l’existence d’une inexécution fondamentale

aside, but the court should go on to assess whether, having regard to the circumstances of the breach, the party in fundamental breach should escape liability:

Exclusion clauses do not automatically lose their validity in the event of a fundamental breach by virtue of some hard and fast rule of law. They should be given their natural and true construction so that the meaning and effect of the exclusion clause the parties agreed to at the time the contract was entered into is fully understood and appreciated. But, in my view, the court must still decide, having ascertained the parties' intention at the time the contract was made, whether or not to give effect to it in the context of subsequent events such as a fundamental breach committed by the party seeking its enforcement through the courts. . . . [T]he question essentially is: in the circumstances that have happened should the court lend its aid to A to hold B to this clause? [Emphasis added; pp. 510-11.]

[111] Wilson J. reiterated that “as a general rule” courts should give effect to exclusion clauses *even in the case of fundamental breach* (p. 515). Nevertheless, a residual discretion to withhold enforcement exists:

Lord Wilberforce [in *Photo Production Ltd. v. Securicor Transport Ltd.*, [1980] A.C. 827 (H.L.)] may be right that parties of equal bargaining power should be left to live with their bargains regardless of subsequent events. I believe, however, that there is some virtue in a residual power residing in the court to withhold its assistance on policy grounds in appropriate circumstances. [Emphasis added; p. 517.]

Wilson J. made it clear that such circumstances of disavowal would be rare. She acknowledged that an exclusion clause might well be accepted with open eyes by a party “very anxious to get” the contract (p. 509). However, Wilson J. did not elaborate further on what such circumstances might be because she found in *Hunter* itself that no reason existed to refuse the defendant Allis-Chalmers the benefit of the exclusion clause.

[112] The fifth judge, McIntyre J., in a crisp two-paragraph judgment, agreed with the conclusion of

*n'écarter pas* automatiquement la clause d'exclusion, mais il poursuit son examen pour déterminer si l'auteur de l'inexécution fondamentale devrait, compte tenu des circonstances de celle-ci, échapper à sa responsabilité :

Il n'y a aucune règle de droit absolue qui dit que les clauses d'exclusion sont automatiquement frappées d'invalidité en cas d'inexécution fondamentale. Il faut leur donner une interprétation naturelle et juste afin de pouvoir saisir et apprécier parfaitement le sens et l'effet de la clause d'exclusion sur laquelle les parties se sont accordées au moment de la passation du contrat. J'estime toutefois qu'après avoir déterminé l'intention qu'avaient les parties au moment où elles ont conclu le contrat, la cour doit encore décider si elle appliquera ce contrat dans le contexte d'événements subséquents tels qu'une inexécution fondamentale de la part de la partie qui s'adresse aux tribunaux pour le faire respecter. [ . . . ] [L]a question qui se pose est essentiellement celle de savoir si, suite aux faits survenus, la cour devrait prêter son concours à A pour obliger B à respecter cette clause. [Je souligne; p. 510-511.]

[111] La juge Wilson rappelle qu'« en règle générale », les tribunaux doivent faire respecter la clause d'exclusion *même en cas d'inexécution fondamentale* (p. 515), sous réserve de leur pouvoir résiduel d'écarter son application :

Il se peut que [dans *Photo Production Ltd. c. Securicor Transport Ltd.*, [1980] A.C. 827 (H.L.)] lord Wilberforce ait raison d'affirmer qu'on devrait laisser des parties ayant négocié à armes égales vivre avec leurs contrats, quels que soient les événements subséquents. Je crois cependant qu'il y a un certain intérêt à ce que les tribunaux soient revêtus d'un pouvoir résiduel de refuser pour des motifs de principe de prêter leur concours à une partie, lorsque cela est indiqué. [Je souligne; p. 517.]

La juge Wilson précise qu'il sera rarement indiqué d'écarter une clause d'exclusion. Elle ajoute qu'une telle clause peut très bien avoir été acceptée en pleine connaissance de cause par une partie qui « tenait beaucoup à [ . . . ] avoir » le contrat (p. 509). Elle ne précise toutefois pas les circonstances dans lesquelles il conviendrait de l'écarter, car dans *Hunter*, elle ne voit pas de raisons d'empêcher la défenderesse Allis-Chalmers de bénéficier de son application.

[112] Dans un jugement incisif de deux paragraphes, le juge McIntyre, le cinquième à se prononcer,



Wilson J. in respect of the exclusion clause issue but found it “unnecessary to deal further with the concept of fundamental breach in this case” (p. 481).

[113] The law was left in this seemingly bifurcated state until *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423. In that case, the Court breathed some life into the dying doctrine of fundamental breach while nevertheless affirming (once again) that whether or not a “fundamental breach prevents the breaching party from continuing to rely on an exclusion clause is a matter of construction rather than a rule of law” (para. 52). In other words, the question was whether the parties *intended* at the time of contract formation that the exclusion or limitation clause would apply “in circumstances of contractual breach, whether fundamental or otherwise” (para. 63). The Court thus emphasized that what was important was not the label (“fundamental or otherwise”) but the intent of the contracting parties when they made their bargain. “The only limitation placed upon enforcing the contract as written in the event of a fundamental breach”, the Court in *Guarantee Co.* continued,

would be to refuse to enforce an exclusion of liability in circumstances where to do so would be unconscionable, according to Dickson C.J., or [note the disjunctive “or”] unfair, unreasonable or otherwise contrary to public policy, according to Wilson J. [Emphasis added; para. 52.]

(See also para. 64.)

What has given rise to some concern is not the reference to “public policy”, whose role in the enforcement of contracts has never been doubted, but to the more general ideas of “unfair” and “unreasonable”, which seemingly confer on courts a very broad after-the-fact discretion.

[114] The Court’s subsequent observations in *ABB Inc. v. Domtar Inc.*, 2007 SCC 50, [2007] 3 S.C.R. 461, should be seen in that light. *Domtar* was a products liability case arising under the civil

souscrit à la conclusion de la juge Wilson en ce qui concerne la clause d’exclusion, mais il trouve « inutile de s’arrêter davantage à la notion d’inexécution fondamentale en l’espèce » (p. 481).

[113] Cette orientation apparemment bicéphale du droit a valu jusqu’à ce que, dans l’arrêt *Guarantee Co. of North America c. Gordon Capital Corp.*, [1999] 3 R.C.S. 423, la Cour ravive la notion moribonde d’inexécution fondamentale tout en (ré)affirmant que « la question de savoir si l’inexécution fondamentale empêche la partie qui en est l’auteur de continuer d’invoquer une clause d’exclusion est une question d’interprétation plutôt que de règle de droit » (par. 52). En d’autres termes, la question est celle de savoir si les parties ont *voulu*, lors de la formation du contrat, que la clause d’exclusion (prévoyant le délai de prescription) s’applique « à la suite d’une inexécution de contrat, qu’elle soit fondamentale ou autre » (par. 63). La Cour souligne donc que ce n’est pas la qualification qui compte (« fondamentale ou autre »), mais bien l’intention des parties au moment de contracter. Elle ajoute :

En cas d’inexécution fondamentale, la seule restriction à l’exécution du contrat tel que rédigé consisterait à refuser d’appliquer une exonération de responsabilité dans le cas où il serait inique de le faire, selon le juge en chef Dickson, ou [notez l’emploi du *ou* disjonctif] injuste, déraisonnable ou par ailleurs contraire à l’ordre public, selon l[a] juge Wilson. [Je souligne; par. 52.]

(Voir aussi le par. 64.)

La difficulté n’a pas résulté du renvoi à l’« ordre public », une notion dont la pertinence en matière d’exécution des contrats n’a jamais été mise en doute, mais bien des considérations plus générales évoquées par les mots « injuste » et « déraisonnable », qui paraissent ouvrir la voie à l’exercice a posteriori d’un très grand pouvoir judiciaire discrétionnaire.

[114] Les observations subséquentes de la Cour dans l’arrêt *ABB Inc. c. Domtar Inc.*, 2007 CSC 50, [2007] 3 R.C.S. 461, doivent être considérées dans ce contexte. L’arrêt porte sur la responsabilité du

law of Quebec, but the Court observed with respect to the common law:

Once the existence of a fundamental breach has been established, the court must still analyse the limitation of liability clause in light of the general rules of contract interpretation. If the words can reasonably be interpreted in only one way, it will not be open to the court, even on grounds of equity or reasonableness, to declare the clause to be unenforceable since this would amount to rewriting the contract negotiated by the parties. [Emphasis added; para. 84.]

While the *Domtar* Court continued to refer to “fundamental breach”, it notably repudiated any judicial discretion to depart from the terms of a valid contract upon vague notions of “equity or reasonableness”. It did not, however, express any doubt about the residual category mentioned in *Guarantee Co.*, namely a refusal to enforce an exclusion clause on the grounds of public policy.

[115] I agree with Professor Waddams when he writes:

[I]t is surely inevitable that a court must reserve the ultimate power to decide when the values favouring enforceability are outweighed by values that society holds to be more important. [para. 557]

[116] While memorably described as an unruly horse, public policy is nevertheless fundamental to contract law, both to contractual formation and enforcement and (occasionally) to the court’s relief *against* enforcement. As Duff C.J. observed:

It is the duty of the courts to give effect to contracts and testamentary dispositions according to the settled rules and principles of law, since we are under a reign of law; but there are cases in which rules of law cannot have their normal operation because the law itself recognizes some paramount consideration of public policy which over-rides the interest and what otherwise would be the rights and powers of the individual.

(*Re Millar Estate*, [1938] S.C.R. 1, at p. 4)

See generally B. Kain and D. T. Yoshida, “The Doctrine of Public Policy in Canadian Contract

fabricant en droit civil québécois, mais la Cour y signale ce qui suit au sujet de la common law :

Une fois l’inexécution fondamentale constatée, le tribunal doit encore analyser la clause limitative selon les règles générales d’interprétation des contrats. Dans la mesure où les termes sont raisonnablement susceptibles d’une seule interprétation, le tribunal ne pourra déclarer la clause limitative de responsabilité inapplicable, même pour des motifs d’équité ou de raisonabilité, puisque cela reviendrait à réécrire le contrat négocié entre les parties. [Je souligne; par. 84.]

Même si elle renvoie encore à la notion d’« inexécution fondamentale », la Cour exclut nettement tout pouvoir discrétionnaire de passer outre aux conditions d’un contrat valide pour de vagues considérations « d’équité ou de raisonabilité ». Elle ne remet cependant pas en cause le pouvoir résiduel — mentionné dans l’arrêt *Guarantee Co.* — de refuser de donner effet à une clause de non-recours pour des motifs liés à l’ordre public.

[115] Je conviens avec le professeur Waddams de ce qui suit :

[TRADUCTION] [I] est certes incontournable que les tribunaux se réservent le pouvoir suprême de déterminer si des valeurs privilégiées par la société l’emportent sur celles favorables à l’applicabilité. [par. 557]

[116] L’ordre public, qu’on a pourtant mémoralement comparé à un « cheval rétif », joue un rôle fondamental en droit contractuel pour ce qui est de la formation et de l’exécution du contrat, mais aussi (parfois) lorsqu’un tribunal est appelé à déclarer un contrat *non* applicable. Comme l’a signalé le juge en chef Duff :

[TRADUCTION] Dans un système soumis à la règle de droit, il incombe aux tribunaux de donner effet aux stipulations contractuelles et testamentaires suivant les règles et les principes de droit établis. Or, il arrive parfois que l’on ne puisse appliquer ceux-ci normalement parce que le droit lui-même reconnaît une considération d’ordre public prépondérante qui prime les intérêts de l’intéressé et ce qui, autrement, constituerait ses droits.

(*Re Millar Estate*, [1938] R.C.S. 1, p. 4)

Se reporter généralement à B. Kain et D. T. Yoshida, « The Doctrine of Public Policy in Canadian

Law”, in T. L. Archibald and R. S. Echlin, eds., *Annual Review of Civil Litigation, 2007* (2007), 1.

[117] As Duff C.J. recognized, freedom of contract will often, but not always, trump other societal values. The residual power of a court to decline enforcement exists but, in the interest of certainty and stability of contractual relations, it will rarely be exercised. Duff C.J. adopted the view that public policy “should be invoked only in clear cases, in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds” (p. 7). While he was referring to public policy considerations pertaining to the nature of the *entire contract*, I accept that there may be well-accepted public policy considerations that relate directly to the nature of the *breach*, and thus trigger the court’s narrow jurisdiction to give relief against an exclusion clause.

[118] There are cases where the exercise of what Professor Waddams calls the “ultimate power” to refuse to enforce a contract may be justified, even in the commercial context. Freedom of contract, like any freedom, may be abused. Take the case of the milk supplier who adulterates its baby formula with a toxic compound to increase its profitability at the cost of sick or dead babies. In China, such people were shot. In Canada, should the courts give effect to a contractual clause excluding civil liability in such a situation? I do not think so. Then there are the people, also fortunately resident elsewhere, who recklessly sold toxic cooking oil to unsuspecting consumers, creating a public health crisis of enormous magnitude. Should the courts enforce an exclusion clause to eliminate contractual liability for the resulting losses in such circumstances? The answer is no, but the contract breaker’s conduct need not rise to the level of criminality or fraud to justify a finding of abuse.

Contract Law », dans T. L. Archibald et R. S. Echlin, dir., *Annual Review of Civil Litigation, 2007* (2007), 1.

[117] Le juge en chef Duff reconnaît donc que la liberté contractuelle prime souvent les autres valeurs sociétales, mais pas toujours. Le pouvoir résiduel du tribunal d’écarter l’application existe bien, mais la certitude et la stabilité des rapports contractuels commandent de l’exercer rarement. Le juge en chef Duff adopte le point de vue selon lequel l’ordre public [TRADUCTION] « ne doit être invoqué que lorsqu’il est manifeste que le préjudice infligé au public est foncièrement incontestable et ne tient pas seulement aux conclusions bien personnelles de quelques magistrats » (p. 7). Même s’il renvoie à des considérations d’ordre public liées à la nature du *contrat en entier*, je reconnais qu’il peut y avoir des considérations d’ordre public bien établies se rapportant directement à la nature de l’*inexécution* et conférant alors au tribunal le pouvoir limité d’écarter la clause de non-recours.

[118] Il arrive que l’exercice de ce que le professeur Waddams appelle le [TRADUCTION] « pouvoir suprême » de refuser de faire respecter un contrat puisse se justifier, même en contexte commercial. On peut abuser de la liberté contractuelle comme de toute autre liberté. Considérons le cas de fournisseurs de lait qui, pour accroître leur profit, altèrent une formule pour nourrissons en y ajoutant une substance toxique, causant ainsi maladies et décès. En Chine, de tels fournisseurs sont fusillés. Au Canada, les tribunaux devraient-ils en pareil cas faire respecter une clause contractuelle écartant la responsabilité civile? Je ne crois pas. Considérons également le cas de ces gens sans scrupules — résidant heureusement dans un autre pays — qui ont vendu de l’huile de cuisson toxique à des consommateurs qui ne se doutaient de rien, créant ainsi une crise sanitaire publique d’une ampleur considérable. Dans de telles circonstances, nos tribunaux devraient-ils faire respecter une clause de non-recours de façon à écarter la responsabilité contractuelle pour le préjudice ainsi causé? Je ne le crois pas non plus. Cependant, point n’est besoin que l’inexécution contractuelle équivaille à un acte criminel ou à une fraude pour qu’il y ait véritablement abus.

[119] A less extreme example in the commercial context is *Plas-Tex Canada Ltd. v. Dow Chemical of Canada Ltd.*, 2004 ABCA 309, 245 D.L.R. (4th) 650. The Alberta Court of Appeal refused to enforce an exclusion clause where the defendant Dow knowingly supplied defective plastic resin to a customer who used it to fabricate natural gas pipelines. Instead of disclosing its prior knowledge of the defect to the buyer, Dow chose to try to protect itself by relying upon limitation of liability clauses in its sales contracts. After some years, the pipelines began to degrade, with considerable damage to property and risk to human health from leaks and explosions. The court concluded that “a party to a contract will not be permitted to engage in unconscionable conduct secure in the knowledge that no liability can be imposed upon it because of an exclusionary clause” (para. 53). (See also *McCamus*, at p. 774, and *Hall*, at p. 243.) What was demonstrated in *Plas-Tex* was that the defendant Dow was so contemptuous of its contractual obligation and reckless as to the consequences of the breach as to forfeit the assistance of the court. The public policy that favours freedom of contract was outweighed by the public policy that seeks to curb its abuse.

[120] Conduct approaching serious criminality or egregious fraud are but examples of well-accepted and “substantially incontestable” considerations of public policy that may override the countervailing public policy that favours freedom of contract. Where this type of misconduct is reflected in the breach of contract, all of the circumstances should be examined very carefully by the court. Such misconduct may disable the defendant from hiding behind the exclusion clause. But a plaintiff who seeks to avoid the effect of an exclusion clause must identify the overriding public policy that it says outweighs the public interest in the enforcement of the contract. In the present case, for the reasons discussed below, I do not believe Tercon has identified a relevant public policy that fulfills this requirement.

[119] L'affaire *Plas-Tex Canada Ltd. c. Dow Chemical of Canada Ltd.*, 2004 ABCA 309, 245 D.L.R. (4th) 650, constitue un cas d'inexécution contractuelle moins extrême. La Cour d'appel de l'Alberta a refusé d'appliquer une clause de responsabilité limitée au bénéfice de la défenderesse, Dow, qui avait sciemment fourni de la résine plastique défectueuse à un client qui s'en était servi pour la fabrication de conduites de gazoducs. Au lieu de signaler à l'acheteur la défectuosité dont elle connaissait l'existence, Dow avait tenté de se protéger en limitant sa responsabilité dans les contrats de vente. Après quelques années, les gazoducs ont commencé à se fissurer, causant d'importants dommages matériels et compromettant la santé de la population ainsi exposée à un risque grave de fuites et d'explosions. La Cour d'appel a conclu qu'un [TRADUCTION] « contractant ne saurait agir de façon inique avec la certitude qu'il pourra échapper à toute responsabilité grâce à une clause d'exonération » (par. 53). (Voir également *McCamus*, p. 774, et *Hall*, p. 243.) Ainsi, dans cette affaire, la défenderesse Dow a manifesté un tel mépris pour ses obligations contractuelles et fait preuve d'une telle insouciance pour les conséquences du non-respect de celles-ci qu'il était exclu que les tribunaux lui prêtent leur concours. Les considérations d'ordre public visant à réprimer l'abus de la liberté contractuelle l'emportaient sur celles qui privilégient celle-ci.

[120] Le comportement qui se rapproche de l'acte criminel grave ou de la fraude monumentale n'est qu'un exemple de considération d'ordre public bien établie et « foncièrement incontestable » pouvant primer la liberté de contracter, elle aussi d'ordre public. Lorsque l'inexécution du contrat se traduit par des actes répréhensibles de cette nature, le tribunal doit examiner très attentivement les circonstances. De tels actes peuvent empêcher le défendeur de se retrancher derrière la clause de non-recours. Mais le demandeur désireux de se soustraire à l'application d'une telle clause doit faire valoir la considération d'ordre public prépondérante qui, à son avis, l'emporte sur l'intérêt public lié à l'application des contrats. Pour les motifs qui suivent, je ne crois pas que Tercon invoque une considération d'ordre public applicable qui satisfait à cette exigence.

[121] The present state of the law, in summary, requires a series of enquiries to be addressed when a plaintiff seeks to escape the effect of an exclusion clause or other contractual terms to which it had previously agreed.

[122] The first issue, of course, is whether as a matter of interpretation the exclusion clause even *applies* to the circumstances established in evidence. This will depend on the Court's assessment of the intention of the parties as expressed in the contract. If the exclusion clause does not apply, there is obviously no need to proceed further with this analysis. If the exclusion clause applies, the second issue is whether the exclusion clause was unconscionable at the time the contract was made, "as might arise from situations of unequal bargaining power between the parties" (*Hunter*, at p. 462). This second issue has to do with contract formation, not breach.

[123] If the exclusion clause is held to be valid and applicable, the Court may undertake a third enquiry, namely whether the Court should nevertheless refuse to enforce the valid exclusion clause because of the existence of an overriding public policy, proof of which lies on the party seeking to avoid enforcement of the clause, that outweighs the very strong public interest in the enforcement of contracts.

#### IV. Application to the Facts of This Case

[124] I proceed to deal with the issues in the sequence mentioned above.

##### A. *Did the Ministry Breach Contract A?*

[125] The trial judge found that the parties intended to create contractual relations at the bidding stage (i.e. Contract A): 2006 BCSC 499, 53 B.C.L.R. (4th) 138, at para. 88. I agree with that conclusion. If there were no intent to form Contract A, there would be no need to exclude liability for compensation in the event of its breach.

[126] The Ministry argued that Contract A was not breached. It was entitled to enter into Contract B

[121] En résumé, dans l'état actuel du droit, le tribunal doit répondre à plusieurs questions lorsqu'une partie lui demande de la soustraire à l'application d'une clause de non-recours ou d'une autre stipulation contractuelle à laquelle elle a précédemment consenti.

[122] Évidemment, il lui faut d'abord déterminer, par voie d'interprétation, si même la clause de non-recours *s'applique* aux faits mis en preuve, ce qui dépend de l'intention des parties qu'il dégage du contrat. De toute évidence, lorsque la clause ne s'applique pas, point n'est besoin de poursuivre l'examen. Lorsqu'elle s'applique, il doit en deuxième lieu se demander si la clause était inique au moment de la formation du contrat, « comme cela pourrait se produire dans le cas où il y a inégalité de pouvoir de négociation entre les parties » (*Hunter*, p. 462). Cette deuxième considération touche à la formation du contrat, non à l'inexécution.

[123] Lorsque la clause de non-recours est jugée valide et applicable, le tribunal peut se demander dans un troisième temps s'il convient tout de même de refuser de la faire respecter en raison d'une considération d'ordre public prépondérante, dont la preuve incombe à la partie qui veut se soustraire à l'application de la clause, qui l'emporte sur le très grand intérêt public lié à l'application des contrats.

#### IV. Application aux faits de l'espèce

[124] J'examine maintenant les questions en litige dans l'ordre susmentionné.

##### A. *Le ministère a-t-il respecté le contrat A?*

[125] La juge de première instance conclut que les parties ont voulu faire naître un lien contractuel dès le dépôt de la soumission (le contrat A) : 2006 BCSC 499, 53 B.C.L.R. (4th) 138, par. 88. Je suis d'accord. Si les parties n'avaient pas eu l'intention de conclure le contrat A, il n'aurait pas été nécessaire d'écarter toute obligation d'indemnisation en cas d'inexécution.

[126] Le ministère soutient qu'il n'y a pas eu inexécution du contrat A. Il lui était loisible de



with Brentwood and it did so. There was no privity between the Ministry and EAC. The Ministry would have had no direct claim against EAC in the event of deficient performance. I accept as correct that Brentwood, having obtained Contract B, was in a position of considerable flexibility as to how and with whom it carried out the work. Nevertheless, it was open to the trial judge to conclude, as she did, that the RFP process was not conducted by the Ministry with the degree of fairness and transparency that the terms of Contract A entitled Tercon to expect. At the end of an unfair process, she found, Contract B was not awarded to Brentwood (the eligible bidder) but to what amounted to a joint venture consisting of Brentwood and EAC. I therefore proceed with the rest of the analysis on the basis that Contract A was breached.

*B. What Is the Proper Interpretation of the Exclusion of Compensation Clause and Did the Ministry's Conduct Fall Within Its Terms?*

[127] It is at this stage that I part company with my colleague Cromwell J. The exclusion clause is contained in the RFP and provides as follows:

**2.10 . . .**

Except as expressly and specifically permitted in these Instructions to Proponents, no Proponent shall have any claim for compensation of any kind whatsoever, as a result of participating in this RFP, and by submitting a Proposal each Proponent shall be deemed to have agreed that it has no claim.

In my view, “participating in this RFP” began with “submitting a Proposal” for consideration. The RFP process consisted of more than the final selection of the winning bid and Tercon participated in it. Tercon’s bid *was* considered. To deny that such participation occurred on the ground that in the end the Ministry chose a Brentwood joint venture (ineligible) instead of Brentwood itself (eligible) would, I believe, take the Court up the dead end identified by Wilson J. in *Hunter*:

. . . exclusion clauses, like all contractual provisions, should be given their natural and true construction.

conclure le contrat B avec Brentwood, et il l’a fait. Il n’avait pas de lien contractuel avec EAC. Il n’aurait eu aucun recours direct contre EAC en cas d’exécution insuffisante. J’estime qu’après avoir obtenu le contrat B, Brentwood jouissait effectivement d’une grande latitude pour arrêter les modalités d’exécution des travaux et choisir ses partenaires. La juge du procès pouvait néanmoins conclure comme elle le fait que, dans sa DP, le ministère n’a pas agi avec l’équité et la transparence auxquelles Tercon était en droit de s’attendre au vu du libellé du contrat A. Elle conclut qu’au terme d’un processus inéquitable, le contrat B n’a pas été adjugé à Brentwood (le soumissionnaire admissible), mais bien à une coentreprise formée de Brentwood et d’EAC. Je conclus donc qu’il y a eu inexécution du contrat A et je poursuis l’analyse en conséquence.

*B. Quelle est la juste interprétation de la clause de non-recours en indemnisation, et les actes du ministère tombent-ils sous le coup de celle-ci?*

[127] C’est à cette étape que je me dissocie de mon collègue le juge Cromwell. La clause de non-recours figurant dans la DP est libellée comme suit :

[TRADUCTION]

**2.10 . . .**

Sauf ce que prévoient expressément les présentes instructions, un proposant ne peut exercer aucun recours en indemnisation pour sa participation à la DP, ce qu’il est réputé accepter lorsqu’il présente une soumission.

À mon avis, la « participation à la DP » a débuté par la « [présentation d’]une soumission ». Le processus ne se résumait pas au choix final de l’adjudicataire, et Tercon y a participé. La soumission de Tercon *a été* considérée. Selon moi, nier la participation de Tercon au motif que le ministère a finalement choisi la coentreprise inadmissible dont faisait partie Brentwood, et non Brentwood elle-même (qui était admissible), mène la Cour dans l’impasse relevée par la juge Wilson dans l’arrêt *Hunter* :

. . . les clauses d’exclusion, comme toutes les stipulations d’un contrat, doivent recevoir une interprétation

Great uncertainty and needless complications in the drafting of contracts will obviously result if courts give exclusion clauses strained and artificial interpretations in order, indirectly and obliquely, to avoid the impact of what seems to them *ex post facto* to have been an unfair and unreasonable clause. [p. 509]

Professor McCamus expresses a similar thought:

... the law concerning exculpatory clauses is likely to be more rather than less predictable if the underlying concern is openly recognized, as it is in *Hunter*, rather than suppressed and achieved indirectly through the subterfuge of strained interpretation of such terms. [p. 778]

[128] I accept the trial judge's view that the Ministry was at fault in its performance of the RFP, but the conclusion that the process thereby ceased to be the RFP process appears to me, with due respect to colleagues of a different view, to be a "strained and artificial interpretatio[n] in order, indirectly and obliquely, to avoid the impact of what seems to them *ex post facto* to have been an unfair and unreasonable clause".

[129] As a matter of interpretation, I agree with Donald J.A. speaking for the unanimous court below:

The [trial] judge said the word "participating" was ambiguous. With deference, I do not find it so. The sense it conveys is the contractor's involvement in the RFP/contract A stage of the process. I fail to see how "participating" could bear any other meaning. [Emphasis added; para. 16.]

Accordingly, I conclude that on the face of it, the exclusion clause applies to the facts described in the evidence before us.

*C. Was the Claim Excluding Compensation Unconscionable at the Time Contract A Was Made?*

[130] At this point, the focus turns to contract formation. Tercon advances two arguments: firstly, that it suffered from an inequality of bargaining power and secondly, (as mentioned) that the

juste et naturelle. Il est évident que, si les tribunaux donnent aux clauses d'exclusion des interprétations forcées et artificielles afin d'éviter, par des moyens indirects et détournés, les conséquences de ce qui leur semble *ex post facto* avoir été une clause injuste et déraisonnable, il en résultera une grande incertitude et des complications inutiles dans la rédaction de contrats. [p. 509]

Le professeur McCamus va dans le même sens :

[TRADUCTION] ... le droit régissant les clauses d'exonération sera assurément plus prévisible, et non moins, si la considération sous-jacente est ouvertement reconnue, comme elle l'est dans *Hunter*, au lieu d'être occultée et prise en compte indirectement par le moyen détourné de l'interprétation forcée du libellé en cause. [p. 778]

[128] Je conviens avec la juge de première instance que le ministère a été fautif dans la mise en œuvre de la DP. Cependant, en toute déférence pour les tenants de l'avis contraire, sa conclusion selon laquelle le processus a cessé dès lors d'être la DP me paraît être le fruit d'« interprétations forcées et artificielles afin d'éviter, par des moyens indirects et détournés, les conséquences de ce qui leur semble *ex post facto* avoir été une clause injuste et déraisonnable ».

[129] Sur le plan de l'interprétation, je suis d'accord avec le juge Donald qui exprime l'avis unanime de la Cour d'appel :

[TRADUCTION] La juge de première instance dit que le mot « participation » est ambigu. Avec déférence, je ne suis pas d'accord. Il renvoie à la part que prend l'entrepreneur à l'étape du contrat A du processus de DP. Je ne vois pas quel autre sens pourrait avoir ce mot. [Je souligne; par. 16.]

Par conséquent, je conclus qu'à première vue, la clause de non-recours s'applique aux faits établis selon le dossier de la Cour.

*C. La clause de non-recours était-elle inique au moment de la formation du contrat A?*

[130] Pour ce volet, l'accent est mis sur la formation du contrat. Tercon avance deux arguments : premièrement, son pouvoir de négociation était moins grand que celui du ministère et, deuxièmement (je

exclusion clause violates public policy as reflected in the *Transportation Act*.

(1) Unequal Bargaining Power

[131] In *Hunter*, Dickson C.J. stated, at p. 462: “Only where the contract is unconscionable, as might arise from situations of unequal bargaining power between the parties, should the courts interfere with agreements the parties have freely concluded.” Applying that test to the case before him, he concluded:

I have no doubt that unconscionability is not an issue in this case. Both Allis-Chalmers and Syncrude are large and commercially sophisticated companies. Both parties knew or should have known what they were doing and what they had bargained for when they entered into the contract. [p. 464]

While Tercon is not on the same level of power and authority as the Ministry, Tercon is a major contractor and is well able to look after itself in a commercial context. It need not bid if it doesn't like what is proposed. There was no relevant imbalance in bargaining power.

(2) Policy of the *Transportation Act*

[132] As mentioned earlier, Tercon cites and relies upon the policy of the Act which undoubtedly favours the transparency and integrity of the bidding process. I have already discussed my reasons for rejecting Tercon's argument that this “policy” operates as a bar to the ability of the parties to agree on such commonplace commercial terms as in the circumstances they think appropriate. In addition, the exclusion clause is not as draconian as Tercon portrays it. Other remedies for breach of Contract A (specific performance or injunctive relief, for example) were available.

[133] In this case, injunction relief *was* in fact a live possibility. Although Tercon was not briefed on the negotiations with other bidders, the trial judge found that Glenn Walsh, the owner of Tercon, “had seen representatives of EAC with Brentwood following [the Brentwood/EAC interviews with the

le rappelle), la clause de non-recours va à l'encontre de la raison d'être de la *Loi sur les transports*.

(1) Inégalité du pouvoir de négociation

[131] Dans l'arrêt *Hunter*, le juge en chef Dickson affirme à la p. 462 : « Ce n'est que lorsque le contrat est inique, comme cela pourrait se produire dans le cas où il y a inégalité de pouvoir de négociation entre les parties, que les tribunaux devraient modifier les conventions que les parties ont formées librement. » Appliquant ce critère à l'espèce dont la Cour était saisie, il conclut :

Je n'ai aucun doute que l'iniquité n'est pas en cause en l'espèce. Allis-Chalmers et Syncrude sont d'importantes sociétés commerciales ayant une grande expérience des affaires. Les deux parties savaient ou auraient dû savoir ce qu'elles faisaient et ce qu'elles avaient négocié au moment de conclure le contrat. [p. 464]

Tercon n'a ni le pouvoir ni l'autorité du ministère, mais c'est une entreprise importante parfaitement en mesure de défendre ses intérêts commerciaux. Elle n'a pas à donner suite à un appel d'offres dont les conditions ne lui conviennent pas. Il n'y avait pas d'inégalité déterminante du pouvoir de négociation.

(2) Raison d'être de la *Loi sur les transports*

[132] J'ai déjà signalé que Tercon s'en remet à la raison d'être de la Loi, qui favorise indubitablement la transparence et l'intégrité du processus d'appel d'offres. J'ai également fait état des motifs pour lesquels je rejette la thèse de Tercon selon laquelle cette « raison d'être » fait obstacle à la faculté des parties de convenir des conditions commerciales courantes qu'elles jugent indiquées dans les circonstances. En outre, la clause de non-recours n'est pas aussi draconienne que le laisse entendre Tercon. L'inexécution du contrat A donnait ouverture à d'autres recours (dont l'exécution en nature et l'injonction).

[133] En l'espèce, l'injonction *était* effectivement une avenue possible. Bien que Tercon n'ait pas été informée des négociations avec les autres soumissionnaires, la juge de première instance relève que son propriétaire, Glenn Walsh, [TRADUCTION] « avait rencontré des représentants d'EAC et de



Ministry and Bill Swain of Brentwood]”, and when asked whether Tercon was going to sue, Walsh had said “no” without further comment. Had Tercon pushed for more information and sought an injunction (as a matter of private law, not public law), at that stage the exclusion clause would have had no application, but Tercon did not do so. This is not to say that estoppel or waiver applies. Nor is it to say that injunctive relief would be readily available in many bidding situations (although if an injunction had been sought here, the unavailability of the alternative remedy of monetary damages might have assisted Tercon). It is merely to say that the exclusion clause is partial, not exhaustive.

[134] The Kincolith road project presented a serious construction challenge on a tight time frame and within a tight budget. Contract A did not involve a bid for a fixed price contract but for the right to negotiate the bid details once the winning proponent was selected. In such a fluid situation, *all* participants could expect difficulties in the contracting process. Members of the construction bar are nothing if not litigious. In the circumstances, the bidders might reasonably have accepted (however reluctantly) the Ministry’s need for a bidding process that excluded compensation, and adjusted their bids accordingly. The taxpayers of British Columbia were not prepared to pay the contractor’s profit twice over — once to Brentwood/EAC for actually building the road, and now to Tercon, even though in Tercon’s case the “profit” would be gained without Tercon running the risks associated with the performance of Contract B. The Court should not be quick to declare such a clause, negotiated between savvy participants in the construction business, to be “contrary to the Act”.

D. *Assuming the Validity of the Exclusion Clause at the Time the Contract Was Made, Is There Any Overriding Public Policy That Would Justify the Court’s Refusal to Enforce It?*

[135] If the exclusion clause is not invalid from the outset, I do not believe the Ministry’s performance

Brentwood après [les rencontres de Brentwood et d’EAC avec le ministère et Bill Swain, de Brentwood] »; interrogé quant à savoir si Tercon allait poursuivre, M. Walsh avait répondu « non » sans autre commentaire. Si Tercon avait alors tenté d’en savoir plus et sollicité une injonction (en droit privé, et non en droit public), la clause de non-recours ne se serait pas appliquée, mais Tercon ne l’a pas fait. Il n’y a pas pour autant préclusion ou renonciation. Certes, il n’est pas facile d’obtenir une injonction dans bon nombre de processus d’appel d’offres (quoique, en l’espèce, l’impossibilité d’obtenir des dommages-intérêts aurait sans doute joué en faveur de Tercon). Simplement, l’absence de recours est partielle, et non totale.

[134] Le projet de Kincolith, dont le calendrier et le budget étaient serrés, présentait un défi de taille. En décrochant le contrat A, le soumissionnaire n’obtenait pas un marché à prix fixe, mais bien le droit de négocier le détail du contrat de construction. Dans un cadre aussi mouvant, *tous* les participants pouvaient s’attendre à des difficultés lors du processus d’adjudication. Le droit de la construction n’existerait pas sans les litiges. Dans les circonstances, il est raisonnable de penser que les soumissionnaires ont accepté (même avec réticence) que l’appel d’offres du ministère exclue toute indemnisation et qu’ils ont rajusté leurs soumissions en conséquence. Les contribuables de la Colombie-Britannique n’étaient pas disposés à payer deux fois le profit de l’entrepreneur — d’abord à la coentreprise Brentwood/EAC pour la construction effective de la route, puis à Tercon, qui réalisait le « profit » sans avoir couru le risque associé à l’exécution du contrat B. La Cour ne doit pas s’empres- ser de déclarer « contraire à la Loi » une clause de non-recours négociée par des entreprises rompues aux usages du domaine de la construction.

D. *À supposer que la clause de non-recours était valable au moment de la formation du contrat, une considération d’ordre public prépondérante justifie-t-elle le tribunal de refuser de la faire respecter?*

[135] Si la clause de non-recours n’était pas invalide au départ, je ne crois pas que l’exécution du

can be characterized as so aberrant as to forfeit the protection of the contractual exclusion clause on the basis of some overriding public policy. While there is a public interest in a fair and transparent tendering process, it cannot be ratcheted up to defeat the enforcement of Contract A in this case. There *was* an RFP process and Tercon participated in it.

[136] Assertions of ineligible bidders and ineligible bids are the bread and butter of construction litigation. If a claim to defeat the exclusion clause succeeds here on the basis that the owner selected a joint venture consisting of an eligible bidder with an ineligible bidder, so also by a parity of reasoning should an exclusion clause be set aside if the owner accepted a bid ineligible on other grounds. There would be little room left for the exclusion clause to operate. A more sensible and realistic view is that the parties here expected, even if they did not like it, that the exclusion of compensation clause would operate even where the eligibility criteria in respect of the bid (including the bidder) were not complied with.

[137] While the Ministry's conduct was in breach of Contract A, that conduct was not so extreme as to engage some overriding and paramount public interest in curbing contractual abuse as in the *Plas-Tex* case. Brentwood was not an outsider to the RFP process. It was a legitimate competitor. All bidders knew that the road contract (i.e. Contract B) would not be performed by the proponent alone. The work required a large "team" of different trades and personnel to perform. The issue was whether EAC would be on the job as a major sub-contractor (to which Tercon could not have objected) or identified with Brentwood as a joint venture "proponent" with EAC. All bidders were made aware of a certain flexibility with respect to the composition of any proponent's "team". Section 2.8(b) of the RFP provided that if "a material change has occurred to the Proponent since its qualification under the RFEI, including if the composition of the Proponent's team members has changed, . . . the Ministry may

contrat par le ministère s'éloigne à ce point de la norme qu'une considération d'ordre public prépondérante justifie le tribunal d'écarter la protection découlant de la clause contractuelle de non-recours. Il est certes dans l'intérêt public que le processus d'appel d'offres soit équitable et transparent, mais cette considération ne suffit pas à justifier le refus de faire respecter le contrat A en l'espèce. Un processus de DP *s'est* déroulé et Tercon y a participé.

[136] En droit de la construction, les litiges naissent souvent à la suite d'allégations d'inadmissibilité de soumissionnaires et de soumissions. Si, dans la présente affaire, on faisait droit à la demande parce que le propriétaire a choisi une coentreprise formée de deux soumissionnaires dont un était admissible et l'autre non, par souci de cohérence, faudrait-il également écarter la clause de non-recours lorsque le propriétaire accepte une soumission inadmissible sous quelque autre rapport, laissant ainsi peu de place à l'application d'une telle clause? D'un point de vue plus réaliste et rationnel, les parties s'attendaient en l'espèce, même si cette éventualité ne les enchantait guère, à ce que la clause excluant toute indemnisation s'applique advenant même le non-respect des critères d'admissibilité de la soumission (et de son auteur).

[137] Les actes du ministère ont certes contrevenu au contrat A, mais j'estime qu'ils n'étaient pas répréhensibles au point de faire en sorte qu'une considération d'ordre public prépondérante justifie la répression d'un abus contractuel comme dans l'affaire *Plas-Tex*. Brentwood n'était pas étrangère au processus de DP. Il s'agissait d'un concurrent légitime. Tous les soumissionnaires savaient que le proposant retenu n'exécuterait pas seul le contrat de construction routière (le contrat B). Il fallait pouvoir compter sur une « équipe » pluridisciplinaire pour mener le projet à bien. La question était celle de savoir si EAC serait sous-traitant principal (ce à quoi Tercon n'aurait pu s'opposer) ou « proposant » dans le cadre de la coentreprise avec Brentwood. Une certaine latitude était accordée à tous les soumissionnaires pour la constitution de leur « équipe ». L'alinéa 2.8b) de la DP prévoyait en effet que lorsque [TRADUCTION] « depuis que le proposant est devenu admissible en répondant à la

request [further information and] . . . reserves the right to disqualify that Proponent, and reject its Proposal”. Equally, “[i]f a qualified Proponent is concerned that it has undergone a material change, the Proponent can, at its election, make a preliminary submission to the Ministry, in advance of the Closing Date, and before submitting a Proposal. . . . The Ministry will, within three working days of receipt of the preliminary submission give a written decision as to whether the Proponent is still qualified to submit a Proposal.”

[138] The RFP issued on January 15, 2001. The Ministry was informed by Brentwood of a “proposed material change to our team’s structure” in respect of a joint venture with EAC by fax dated January 24, 2001. From the Ministry’s perspective, the change was desirable. EAC was a bigger company, had greater expertise in rock drilling and blasting (a major part of the contract) and a stronger balance sheet. EAC was identified in Brentwood’s amended proposal as a sub-contractor. In the end, the Ministry did not approve the January 14, 2001 request, presumably because it doubted that a change in the “composition of the Proponent’s team’s members” could, according to the terms of the RFP, include a change in the Proponent itself.

[139] The Ministry did obtain legal advice and did not proceed in defiance of it. On March 29, 2001, the Ministry noted in an internal e-mail that a Ministry lawyer (identified in the e-mail) had come to the conclusion that the joint venture was not an eligible proponent but advised that Contract B could lawfully be structured in a way so as to satisfy both Brentwood/EAC’s concerns and avoid litigation from disappointed proponents.

[140] I do not wish to understate the difference between EAC as a sub-contractor and EAC as a joint-venturer. Nor do I discount the trial judge’s condemnation of the Ministry’s lack of fairness

DEI, une modification substantielle le concernant s’est produite, notamment en ce a trait à la composition de son équipe [. . .], [le ministère] peut exiger du proposant d’autres renseignements [. . .] et [il] se réserve le droit de l’écarter et de rejeter sa soumission ». Puis, « le proposant admissible qui estime qu’une modification substantielle le concernant a pu se produire peut à son gré présenter au ministère une soumission préliminaire avant la date de clôture et avant de formuler une proposition. [. . .] Dans les trois jours ouvrables qui suivent la réception de la soumission préliminaire, le ministère lui fait savoir par écrit s’il est toujours admissible. »

[138] La DP a été lancée le 15 janvier 2001. Dans une télécopie datée du 24 janvier 2001, Brentwood a informé le ministère de la [TRADUCTION] « modification substantielle qu’elle se proposait d’apporter à la composition de son équipe » en vue de la formation d’une coentreprise avec EAC. Le ministère voyait le changement d’un bon œil. EAC était une société de plus grande taille, dotée d’une plus grande expertise dans le forage de roches et le dynamitage (ce qui comptait pour une grande partie des travaux) et elle affichait une meilleure santé financière. Elle figurait à titre de sous-traitant dans la proposition modifiée de Brentwood. Finalement, le ministère n’a pas approuvé la modification signalée le 14 janvier 2001, vraisemblablement parce qu’il craignait que la modification de la « composition de [l’]équipe [du proposant] » ne puisse, suivant la DP, englober la modification du proposant lui-même.

[139] Le ministère a obtenu un avis juridique, et il n’a pas agi à l’encontre de celui-ci. Le 29 mars 2001, le ministère signalait dans un courriel interne qu’un avocat du ministère (nommé dans le courriel) avait conclu que la coentreprise n’était pas un proposant admissible, mais que le contrat B pouvait en toute légalité être rédigé de façon à tenir compte des préoccupations de Brentwood et d’EAC et à éviter toute contestation des proposants non retenus.

[140] Je ne veux pas minimiser la différence entre le fait, pour EAC, d’être un sous-traitant ou un coentrepreneur. Je ne mésestime pas non plus les conclusions de la juge de première instance

and transparency in making a Contract B which on its face was at odds with what the trial judge found to be the true state of affairs. Tercon has legitimate reason to complain about the Ministry's conduct. I say only that based on the jurisprudence, the Ministry's misconduct did not rise to the level where public policy would justify the court in depriving the Ministry of the protection of the exclusion of compensation clause freely agreed to by Tercon in the contract.

[141] The construction industry in British Columbia is run by knowledgeable and sophisticated people who bid upon and enter government contracts with eyes wide open. No statute in British Columbia and no principle of the common law override their ability in this case to agree on a tendering process including a limitation or exclusion of remedies for breach of its rules. A contractor who does not think it is in its business interest to bid on the terms offered is free to decline to participate. As Donald J.A. pointed out, if enough contractors refuse to participate, the Ministry would be forced to change its approach. So long as contractors are willing to bid on such terms, I do not think it is the court's job to rescue them from the consequences of their decision to do so. Tercon's loss of anticipated profit is a paper loss. In my view, its claim is barred by the terms of the contract it agreed to.

#### V. Disposition

[142] I would dismiss the appeal without costs.

*Appeal allowed, McLACHLIN C.J. and BINNIE, ABELLA and ROTHSTEIN JJ. dissenting.*

*Solicitors for the appellant: McLean & Armstrong, West Vancouver.*

*Solicitor for the respondent: Attorney General of British Columbia, Victoria.*

selon lesquelles le ministère a fait preuve d'un manque d'équité et de transparence en établissant un contrat B qui ne correspondait manifestement pas à la réalité. Tercon a raison de dénoncer le comportement du ministère. Seulement, au vu de la jurisprudence, l'inconduite n'était pas répréhensible au point que l'ordre public justifie le tribunal de refuser au ministère la protection de la clause de non-recours en indemnisation à laquelle Tercon a librement consenti.

[141] Dans le secteur de la construction de la Colombie-Britannique, des gens compétents dotés d'une grande expérience répondent à des appels d'offres et concluent des contrats avec l'État en toute connaissance de cause. Aucune loi de cette province et aucun principe de common law ne l'emporte en l'espèce sur leur faculté de convenir d'un processus d'appel d'offres, y compris d'une responsabilité limitée ou d'une absence de recours advenant le non-respect des conditions applicables. L'entrepreneur qui estime qu'il n'est pas dans son intérêt commercial de répondre à un appel d'offres aux conditions proposées est libre de s'en abstenir. Comme le fait observer le juge Donald, si un nombre suffisant d'entrepreneurs refusent de soumissionner, le ministère sera bien obligé de modifier sa façon de faire. Tant que des entrepreneurs seront disposés à soumissionner à de telles conditions, je ne crois pas qu'il revienne aux tribunaux de les soustraire aux conséquences de leurs actes. La perte du profit escompté par Tercon est théorique. Selon moi, les conditions du contrat auxquelles elle a consenti font obstacle à sa demande.

#### V. Dispositif

[142] Je suis d'avis de rejeter le pourvoi sans dépens.

*Pourvoi accueilli, la juge en chef McLACHLIN et les juges BINNIE, ABELLA et ROTHSTEIN sont dissidents.*

*Procureurs de l'appelante : McLean & Armstrong, West Vancouver.*

*Procureur de l'intimée : Procureur général de la Colombie-Britannique, Victoria.*

*Solicitor for the intervener: Attorney General  
of Ontario, Toronto.*

*Procureur de l'intervenant : Procureur général  
de l'Ontario, Toronto.*

**TAB 33**

CA017834  
Vancouver Registry

***Court of Appeal for British Columbia***

BETWEEN:

THOMAS PRITCHARD TURNER

PLAINTIFF  
(RESPONDENT)

AND:

VISSCHER HOLDINGS INC.

DEFENDANT  
(RESPONDENT)

Before: The Honourable Mr. Justice Legg  
The Honourable Mr. Justice Finch  
The Honourable Madam Justice Newbury

|                 |                            |
|-----------------|----------------------------|
| D. G. Sanderson | Counsel for the Appellant  |
| A. R. S. Gangji | Counsel for the Respondent |

|                            |                                                 |
|----------------------------|-------------------------------------------------|
| Place and Date of Hearing: | Vancouver, British Columbia<br>January 18, 1996 |
|----------------------------|-------------------------------------------------|

|                             |                                            |
|-----------------------------|--------------------------------------------|
| Place and Date of Judgment: | Vancouver, British Columbia<br>May 7, 1996 |
|-----------------------------|--------------------------------------------|

Written Reasons by:  
The Honourable Mr. Justice Finch

Concurred in by:  
The Honourable Mr. Justice Legg

Dissenting Reasons by:  
The Honourable Madam Justice Newbury (p.8, para. 18)

***Court of Appeal for British Columbia***

Thomas Pritchard Turner

v.

Viisscher Holdings Inc.

**REASONS FOR JUDGMENT OF  
THE HONOURABLE MR. JUSTICE FINCH**

1. I have had the advantage of reading in draft form the reasons for judgment of Madam Justice Newbury. She has concluded (para.22) that the learned trial judge did not err in finding an oral agreement by the defendant to pay the plaintiff a "bonus" of \$180,000. I agree with that conclusion.
2. She has also concluded (para.31) that proof of that bonus agreement was not precluded by the parole evidence rule. That conclusion affirmed the finding of the learned trial judge that the agreement to pay the bonus was not inconsistent with the purchase price clause of the written agreement. I also agree with her conclusion in this regard.
3. However, Newbury J.A. concludes that effect cannot be given to the bonus agreement because of clause 22 in the written contract of 2 October 1989 - the entire agreement clause. She disagrees with



the views of the learned trial judge on this issue, which he expressed as follows:

... Nor do I think the bonus agreement is inconsistent with the entire agreement clause. The agreement with Turner for services was oral, and excluded by necessary implication from the purview of the entire agreement clause. I think the parties by implication also intended the bonus to be paid outside the written agreement with Spindaleer (and Turner and Stobbe as covenantors). It is therefore not inconsistent with the entire agreement clause which must be limited, with the rest of the written agreement, to the asset transfer portion of the total agreement.

4. I have, with respect, come to the conclusion that the learned trial judge was correct, and I will limit these reasons to explaining why I hold that view.
5. The trial judge found that, in all, there were three related agreements entered into by Visscher Holdings Inc. (Visscher). Two of those agreements were with the plaintiff, Thomas Turner personally. The third agreement was with the company Spindaleer Wood Products Ltd., which was owned equally by Turner and his partner Alvin Stobbe. In point of time, the first agreement to be negotiated was for Turner's employment by Visscher as manager of the wood products division of the defendant's business. The learned trial judge found that negotiations for this employment contract were conducted mainly between Turner and Visscher's general manager, Peter Ratzlaff. It appears that all of the terms of the employment contract were settled, but that its formal

adoption by Turner and Visscher was contingent upon completion of the agreement for the sale of assets from Spindaleer to Visscher. Up until that time the employment contract was tentative only.

6. The terms of the employment contract were never reduced to writing, and it is not referred to in the written agreement of 2 October 1989. Nevertheless, both Turner and Visscher treated the employment contract as valid and enforceable. Turner went to work for Visscher as manager of Visscher's wood products division, and he continued in that employment from the fall of 1989 until September 1991. Turner gave Visscher one year's notice at the beginning of 1991 to terminate his employment, but he agreed to leave earlier if asked to do so. He was asked to leave in September 1991, and did so two weeks later.

7. The fact that both parties entered and acted upon an oral contract of employment is a clear indication that clause 22, the "entire agreement clause", was not intended to govern all contractual relations between "the parties".

8. The second agreement in time is the written contract of 2 October 1989 for the sale of assets by Spindaleer to Visscher. Turner and Stobbe signed the agreement as covenantors. Their obligations in that capacity are set out in para. 5.05 of the contract. They were parties to the agreement only as covenantors,

and only for the limited purposes set out in that paragraph. The substance of this 28 page agreement was between Spindaleer and Visscher. In the context of that agreement, the word "parties" in clause 22 ought, in my view, reasonably to be construed as referring to the contracting parties, namely Spindaleer and Visscher, and to Turner and Stobbe only in their contractual roles as covenantors. That the clause was not intended to refer to them generally in their personal capacities is evident from Turner's oral contract of employment with Visscher, referred to above.

9. The third of the three related agreements is, of course, the disputed bonus agreement. It is not apparent to me why it should be considered as collateral to the written contract, as opposed to the contract of employment. The bonus agreement and the employment contract were between identical parties, namely Turner in his personal capacity on the one hand, and Visscher on the other. The asset sale agreement was between different parties, namely Spindaleer as vendor and Visscher as purchaser, with Turner and Stobbe signing in their role as covenantors to the limited extent indicated above.

10. Moreover, just as the asset sale agreement was a precondition to the employment contract, so was the bonus agreement a precondition to the asset sale agreement. If no bonus agreement had been concluded, not only would there have been no asset sale

agreement, there would not have been a contract of employment between Turner and Visscher. The three agreements were all part of a package, but the parties were different.

11. In the end, I think it all comes down to a question of intention. Is it reasonable to infer a mutual intention in Turner and Visscher that the entire agreement clause of the written contract should apply to the oral bonus agreement? I think clearly not. Turner's signature to the contract was in a limited capacity as covenantor. The parties did not consider the clause of any consequence so far as the employment contract was concerned. Moreover, the bonus was a subject of discussion between Turner and representatives of Visscher in the two year period of his employment. The trial judge found that in July 1990 Visscher's general manager, Mr. Ratzlaff, enquired of Turner indirectly as to whether he would agree to a postponed payment of the bonus. Turner agreed. A similar request was made and agreed to in the summer of 1991.

12. In these circumstances, I do not think Visscher can be heard to rely on the entire agreement clause as a bar to the bonus agreement.

13. Turner was induced both before and after the written contract was signed on 2 October 1989 to believe that the oral agreement for

the bonus would be honoured. He acted on Visscher's representations by allowing Spindaleer to enter into the agreement for the sale of assets, by taking up employment with Visscher pursuant to his oral contract for that purpose and by agreeing to defer on two occasions payment of the bonus after he was employed. Turner worked for Visscher on the clear understanding that both oral contracts were valid and binding. Visscher's activities induced Turner into holding that belief. It would be completely inequitable, in my view, to permit Visscher now to raise the entire agreement clause as a defence.

14. For a discussion of the principles at issue here, see *Hughes v. Metropolitan Railway Company* (1877), 2 App. Cas. 439 (H.L.); *Travellers Indemnity Co. of Canada v. Maracle* (1991), 80 D.L.R. (4th) 652 (S.C.C.); *Brikom Investments v. Carr*, [1979] Q.B. 467 (C.A.); and *Bank of Montreal v. Murphy* (1985), 6 B.C.L.R. (2d) 169 (C.A.).

15. I agree with my colleague's comment that courts have generally equated entire agreement clauses with the parole evidence rule (para.36). And I agree that a provision such as clause 22 must have been intended to have a broader effect than the parole evidence rule would have by itself, otherwise the clause would be redundant. However, the circumstances do not lead me to infer an intention between the parties to apply the clause to the oral bonus

agreement in this case. Nor do I consider that such a conclusion would render similar clauses in other contracts meaningless.

16. It is in every case a question of the parties' intention. I am satisfied that the learned trial judge was correct in concluding that the entire agreement clause "... must be limited, with the rest of the written agreement, to the asset transfer portion of the total agreement".

17. I would dismiss the appeal.

"The Honourable Mr. Justice Finch"

I agree: "The Honourable Mr. Justice Legg"

***Thomas Pritchard Turner***

- v. -

***Visscher Holdings Inc.***

***Reasons for Judgment of the Honourable Madam Justice Newbury***

18. The defendant Visscher Holdings Inc. ("Visscher") appeals from a judgment of the Court below upholding Mr. Turner's claim for the payment of \$180,000. The sum was characterized in his Statement of Claim as an "unconditional employee bonus" and was alleged to be payable pursuant to an oral employment agreement made on or about September 21, 1989. In its pleadings, Visscher denied the existence of any oral agreement to pay \$180,000 to Mr. Turner. Further, Visscher relied on the terms of a written agreement (the "Purchase Agreement") between itself as purchaser, Spindaleer Wood Products Ltd. ("Spindaleer") as vendor, and Mr. Turner and Mr. Stobbe (whose holding companies were the shareholders of Spindaleer) as covenantors, pursuant to which Visscher purchased all the assets and business of Spindaleer in 1989. It provided for the payment by Visscher of a purchase price of approximately \$4.2 million to Spindaleer, and made no reference to any bonus payable to Mr. Turner. Visscher argued that the parol evidence rule therefore precluded the enforcement of any oral agreement or term. Last, the Purchase Agreement contained a "four corners" or "entire

agreement" clause that purported to negative the existence of any other representation, warranty or agreement collateral to the written document.

19. The trial judge rejected all three of Visscher's defences. He found that in the course of its negotiations to buy Spindaleer's assets, Visscher had also entered into an oral agreement with Mr. Turner for the payment of \$180,000 to him at a time or times to be determined later, and that the oral agreement was not "inconsistent with the purchase price clause of the written agreement". Therefore, he said, it offended neither the parol evidence rule nor the "entire agreement" clause (Clause 22). Mr. Sanderson on behalf of Visscher argues before us that the trial judge erred in all three findings, although counsel chose not to emphasize the third point in their oral submissions. In my view, however, Clause 22 raises the most difficult issue in this appeal, and constitutes the strongest string to Mr. Sanderson's bow.

### **Existence of Oral Agreement**

20. The trial judge's Reasons reviewed in detail, and hence I will not repeat here, the background of the asset purchase transaction between Spindaleer and Visscher; the roles of Visscher's controller, Mr. Burnett, and its external auditor, Mr. Ramsbottom, in bringing the parties together; Mr. Turner's own



financial goals in entering discussions with Visscher; the negotiations themselves, including in particular a meeting held on September 21, 1989; and post-closing developments culminating in Mr. Turner's departure from Visscher's employment in September 1990. It is apparent from the Reasons for Judgment that there were many gaps or inconsistencies in the evidence of the various witnesses. There was an apparent conflict, for example, between the evidence of Messrs. Ramsbottom and Barnett, on the one hand, and Mr. Ratzlaff, a senior manager in the Visscher organization, on the other, about discussions in the summers of 1990 and 1991 concerning payment of the \$180,000. The court ultimately accepted the evidence of Messrs. Ramsbottom and Barnett over that of Mr. Ratzlaff on the point, and found that the latter had requested that Mr. Turner defer his receipt of the bonus in light of a downturn in the business at that time.

21. The more important difficulties in the evidence concerned the crucial meeting of September 21, 1989. The trial judge summed up the parties' impressions of that meeting as follows:

In summary, the participants left the meeting with three different impressions of the result. Ramsbottom and Turner thought a deal had been concluded which included the payment of \$180,000 to Mr. Turner. Turner was agreeable to the timing of the payment being left indefinite and flexible. The two Visscher brothers left the meeting with the impression that a deal had been agreed which did not include the \$180,000. Messrs. Barnett

and Ratzlaff, the controller and general manager who carried on the negotiations while the Visscher brothers remained silent, thought that no deal had been agreed to at the meeting and a decision would have to be made later on in the Turner proposal.

Construing the parties' behaviour at the meeting objectively, however, the trial judge concluded that Visscher must by its conduct be taken to have agreed to the payment of a bonus of \$180,000 to Mr. Turner:

I am satisfied that the payment of a bonus of \$180,000 to the plaintiff was a clear and unequivocal part of the offer open for Visscher's acceptance at and after the meeting of September 21, 1989. The offer included the services of Mr. Turner for an indefinite period. Aside from the bonus, the terms of employment had been negotiated earlier between Mr. Turner and Mr. Ratzlaff but it was contingent upon an overall deal being struck. Even though no reference was made to Mr. Turner's employment at the meeting, everyone present knew it had to be part of any overall agreement and there was no impediment to adding a bonus to Turner as part of the offer. Subjectively no representative of Visscher accepted the offer at the meeting although collectively they reasonably conveyed to both the plaintiff and Mr. Ramsbottom that the offer had been accepted. That impression was confirmed by the conduct of Visscher following the meeting, both before and after the execution of the written document, the transfer of the Spindaleer assets and the employment of Mr. Turner by Visscher. The intention of the parties must be construed objectively: see Anson's Law of Contract, 25th ed., pp. 298-9, citing *Smith v. Hughes* [1871] L.R. 6 Q.B. 597 @ 607. I conclude that Visscher, by its conduct construed objectively, at and after the meeting of September 21, 1989, agreed to the payment of a

bonus of \$180,000 to the plaintiff at a time or times to be determined later. [Emphasis added]

22. Mr. Sanderson did not attempt to argue that the trial judge had erred in applying an objective standard in determining whether an agreement had been reached. However, he emphasized the finding underlined above that neither of the Visscher principals present at the meeting intended to agree, or thought they had agreed, to the payment of the \$180,000 to Mr. Turner. In his submission, there was no reasonable basis for the court's finding, and there were eight reasons why, on an objective view of the evidence, the trial judge had erred in reaching it. Some of these "reasons" were arguments of law relating to the parol evidence rule and Clause 22 and will be dealt with below; but as far as the factual reasons cited by Mr. Sanderson are concerned, I am not satisfied that the trial judge misconceived the evidence or that he made any "palpable and over-riding error which affected his assessment of the facts." (*per* Ritchie J. in *Stein v. The Ship "Kathy K"* [1976] 2 S.C.R. 802 at 806.) The evidence before the court included Mr. Turner's clearly stating at the September meeting that he would not accept less than \$180,000, and the "nodding of heads and shaking of hands" at the end of the meeting. In my view, it was open to the trial judge to find the facts he did concerning the existence of an oral agreement and we should not interfere with that finding.

23. Nor am I convinced that the court erred in applying the standard of proof that it did, notwithstanding Mr. Sanderson's argument that a higher standard is required to prove a collateral contract. In this regard, he cited a passage from *Heilbut, Symons & Co. v. Buckleton*, [1913] A.C. 30 at 47 which was quoted in *Hawrish v. Bank of Montreal*, [1969] S.C.R. 515 at 520. The passage includes the remark that a collateral contract — i.e., a contract the consideration for which is a promise to enter another, or main, contract — must "from [its] very nature be rare" and must be "proved strictly", and led the Court to state in *obiter* in *Hawrish* that "there must a clear intention to create a binding agreement" where one is alleged to be collateral to another. Although this is obviously correct as a proposition of law, I do not read it as imposing a higher standard of evidentiary proof than the usual civil standard. Rather, the passage is a reminder that there are good policy reasons for regarding claims based on collateral contract with suspicion, where the "sole effect [thereof] . . . is to vary or add to the terms of the principal contract". The same policy reasons are behind the parol evidence rule itself, to which I now turn.

### **The Parol Evidence Rule and Clause 2**

24. Having found that an oral agreement came into existence on an objective view of the parties' conduct, the trial judge

acknowledged that although a tendency to relax the parol evidence rule might have been inferred from the decision of this Court in *Gallen v. Butterly* (1984), 53 B.C.L.R. 38, the more recent judgment in *Ahone v. Holloway et al.* (1988), 30 B.C.L.R. (2d) 368 has restored the earlier rigour exemplified by cases such as *Hawrish, supra*, and *Bauer v. The Bank of Montreal*, [1980] 2 S.C.R. 102. Following these authorities, the trial judge accepted that parol evidence is inadmissible "for the purpose of varying or contradicting the contract" embodied in writing.

25. As in the court below, counsel for Visscher argued strongly before us that if the \$180,000 was payable by Visscher, it was as additional consideration for Spindaleer's assets. Any such agreement was therefore said to contradict Clause 2 of the Purchase Agreement, which stated:

2. PURCHASE PRICE AND ALLOCATION

The purchase price payable by the Purchaser to the Vendor for the Assets shall be the sum of \$4,372,170.00, plus the value of the Inventories, the actual value of the accounts receivable, and the actual construction costs, to the effective date, of the new office and lunch room determined pursuant to Section 3.01 and shall be allocated as follows:

- (a) To the real Property, the sum of \$40,000.00;
- (b) To the buildings and improvements the sum of \$999,000.00;

- (c) To the machinery and Equipment, the sum of \$1,333,170.00.

(The final purchase price came to some \$4.2 million exclusive of any bonus.)

26. In support of this argument, Mr. Sanderson noted various questions and answers from Mr. Turner's testimony, and from that of Mr. Barnett and Mr. Ramsbottom, who were called as witnesses by the plaintiff. Mr. Turner testified, for example, that he had wanted to receive a total of about \$800,000 after tax for his "share of the Spindaleer business" and that according to Mr. Ramsbottom's calculations, the formula price being discussed (and later incorporated as Clause 2) would have left him about \$100,000 short. When "grossed-up" to account for the tax he would have to pay on the bonus, the difference was some \$180,000. Similarly, Mr. Barnett testified that Mr. Turner or Mr. Ramsbottom had "placed a value on [Spindaleer] that was \$180,000 higher than Visscher's value" and that it was their position "that they wanted to be paid \$180,000 more before the sale of assets would go ahead."

27. For his part, Mr. Ramsbottom testified as follows:

Q So in order to make the deal between the parties to sell the Spindaleer operation to Visscher Holdings, we had the approximate \$2.3 million purchase price, correct?

A Just for fixed assets . . . .

Q In addition to that, now what you are telling the Court is that there was another \$180,000 that had to be paid to Mr. Turner?

A Yes.

. . . . .

Q Then really what we are talking about here is the discussion that you say took place at the meeting was how mechanically one could ensure that Mr. Turner was able to get another \$180,000 for the overall sale of the Spindaleer business to Visscher?

A Yes.

Q Now, I have heard and seen the word or the expression "performance bonus." Could you tell me whether or not in terms of a performance bonus whether it was conditional upon any work that Mr. Turner was going to do in the future after that September meeting?

A No.

Q So it had nothing to do with what he did. I mean his employment activities after that, it didn't have anything to do with that?

A No.

Q Whether they were good or bad?

A No.

Q So it wasn't as if after that meeting was going to have to do something to earn it?

A No.

. . . . .

Q     You knew, based on your evidence that you gave to this Court yesterday that in order to make this deal, the deal being the sale of the operation of Spindaleer over to Visscher by the way of assets, in order to make that additional consideration above the appraised values, et cetera, \$180,000 had to be paid?

A     Yes.

. . . . .

Q     . . . you have told this Court that you did not ensure or you did not tell the bank what true [sic] consideration was for the purchase of the assets of Spindaleer. I am speaking now of the extra \$180,000.

A.    Yes.

28.           However, the trial judge rejected as "too narrow" the submission that the bonus must be characterized as payment for Spindaleer's assets. In his judgment:

The transaction as a whole involved the services of Mr. Turner as well as the sale of assets and it was Mr. Turner who decided he would only agree to the transaction if he received an additional \$100,000 net after tax to him personally. His associate, Mr. Stobbe agreed. He thought a bonus to Turner was a reasonable and proper recognition of the value of services, past services to Spindaleer and prospective services to Visscher. Mr. Ramsbottom came up with the concept of the unconditional bonus as an expedient to bridge the gap and, with Mr. Stobbe's concurrence, I see nothing improper in that idea.



Further, in rejecting Visscher's arguments based on the parol evidence rule and Clause 22, he concluded:

I do not think that the agreement to pay the bonus to Mr. Turner is inconsistent with the purchase price clause of the written agreement. The parties were not obliged to characterize that consideration as payment to Spindaleer for its assets. Nor do I think the bonus agreement is inconsistent with the entire agreement clause. The agreement with Turner for services was oral, and excluded by necessary implication from the purview of the entire agreement clause. I think the parties by implication also intended the bonus to be paid outside the written agreement with Spindaleer (and Turner and Stobbe as covenantors). It is therefore not inconsistent with the entire agreement clause which must be limited, with the rest of the written agreement, to the asset transfer portion of the total agreement.

29. It is not entirely clear to me whether the trial judge accepted the dichotomy presented by counsel for Visscher — i.e., that the \$180,000 must be characterized either as additional compensation for Spindaleer's assets, or as an "employment" or "management" bonus payable in respect of Mr. Turner's services. The court's references to past and future services in the passages I have quoted suggest that the latter alternative may have been adopted. Yet it is clear that the prospect of Mr. Turner's employment by Visscher was discussed quite separately from the bonus issue, and that the \$180,000 was payable regardless of whether, for how long and how satisfactorily Mr. Turner performed in his job after the transaction closed on October 10, 1989. In

fact, Mr. Turner had refused Visscher's requests that he sign a fixed-term employment agreement as part of the transaction. Visscher therefore proceeded to close without any assurance that Mr. Turner would continue to work in the business for any significant period thereafter. Regardless of how long he stayed, moreover, he was to be paid \$6,000 per month for his services.

30. In these circumstances, I agree with Mr. Sanderson's argument that the \$180,000 payment was not intended as compensation for Mr. Turner's services or employment. I do not agree, however, that the sum must therefore be characterized as consideration for Spindaleer's assets. (In that event, the line of cases holding that "it is not contradictory to the instrument to prove a larger sum given than the sum expressed in the deed" might have been argued on Mr. Turner's (or Spindaleer's) behalf: see *Clifford v. Turrell* (1845), 14 L.J. Ch. 390 at 395; *Turner v. Forwood*, [1951] 1 All E.R. 746 (C.A.); *Pao On v. Lau Yiu Long*, [1980] A.C. 614 (J.C.P.C.).) For one thing, neither the seller nor the purchaser regarded the payment in that way — otherwise the bonus would have been added into the formula stated in Clause 2. For another thing, the assets were owned by Spindaleer, not by Mr. Turner. The whole point of the "bonus" was that he would receive a particular sum personally in return for his participation, not that Spindaleer would receive any additional \$180,000 in return for its assets. As long as there was no attempt on Mr. Turner's part to gain any unfair or

undisclosed advantage over his partner Mr. Stobbe, I know of no objection to his requiring, as a condition of proceeding, Visscher's promise to pay this sum to him personally. Thus in my view, the evidence supports a third way of characterizing the promise to pay — as an inducement to sign the Purchase Agreement, or in legal terms, a true "collateral contract" of the kind described in *Heilbut, Simons & Co. v. Buckleton*, *supra*.

31. If this is correct, it cannot be said that the oral agreement found by the trial judge varies or contradicts Clause 2 of the Purchase Agreement. The purchase price payable to Spindaleer remained at \$4.2 million; but in consideration of Mr. Turner's entering into that Agreement, Visscher had bound itself to pay the \$180,000 to him personally. I therefore find that the court below was correct in ruling that the collateral agreement did not vary or contradict the statement of the purchase price for Spindaleer's assets in Clause 2 of the written document. It follows that proof of the collateral agreement was not precluded by the parol evidence rule as it applies to Clause 2.

### **The "Entire Agreement" Clause**

32. I turn next to Clause 22, the "entire agreement" clause. It provided as follows:

22. ENTIRE AGREEMENT

This Agreement constitutes the entire Agreement between the parties and there are no representations or warranties, express or implied, statutory or otherwise and no agreements collateral hereto other than as expressly set forth or referred to herein.

The trial judge dealt with this clause only in the passage I have quoted at p. 11 above, and Mr. Sanderson chose not to make any oral submissions in this Court concerning it. In his factum, he cited *Carman Construction Ltd. v. C.P.R. Co.* (1982), 136 D.L.R. (3d) 193, a decision of the Supreme Court of Canada which involved a slightly different type of provision, described by the court as an "exemption clause." In *Carman*, a contractor/excavator had been invited by C.P.R. to bid on a rock excavation contract, which specified that the successful bidder would be taken to have relied only on his own knowledge, and further that bidders were required to acquaint themselves with the location of the proposed work, conditions at the site and all other factors that might affect the tender price. When examining the site, the contractor spoke to an unnamed employee of C.P.R. who volunteered his opinion that the work would involve the removal of about 7,500 cubic yards of overburden. This estimate proved to be substantially optimistic, and after completing the work, the contractor sued for breach of warranty and negligent misrepresentation. The trial judge found that the elements were present to support a claim for breach of warranty of a collateral contract and for negligent misrepresentation, but ruled that C.P.R.

was not liable to the contractor because of the "exemption clause". The Supreme Court of Canada upheld this result, first on the basis that no implied warranty had been given by C.P.R., but also because the existence of the clause "preclude[d] any finding of the existence of a collateral warranty." (at 200). As well, and as a separate basis for dismissing the appeal, such a warranty would, the Court said, have contradicted the express terms of the contract.

33. Mr. Gangji on the other hand cited *Simpson et al. v. Kondra et al.* (1982), 42 B.C.L.R. 13 (B.C.S.C.), which did involve an "entire agreement" clause (described by the court as an "exclusionary clause") in a written "interim agreement" for the purchase of a house. The document stated that there were no representations, warranties, guarantees, promises or agreements other than those contained in the written document. The court found that at the time the real estate agent had presented the offer, the vendors had agreed to provide plans for the house to the purchasers, on the erroneous assumption such plans were easily available. This turned out not to be the case. Subsequently, the purchasers repudiated the contract "for personal reasons". At trial, they sought to rely on the vendors' failure to produce the plans. Spencer J. ruled against them on this issue, saying this:

The exclusionary clause in the interim agreement does not prevent the operation of

such a collateral agreement. The agreement to produce the plans did not modify the agreement for the sale of the property and thus does not fall afoul of the parol evidence rule. Mr. Taylor cited a number of cases for the proposition that there may be an oral term of a contract, collateral to it, provided that it is not contradict or vary the written terms . . . the restrictive clause in the interim agreement, which reads in the usual terms, "There are no representations, warranties, guarantees, promises or agreements other than those contained herein, all of which contained herein will survive the completion of the sale", cannot be construed to exclude this collateral agreement. The exclusionary clause relates only to the sale and purchase of the house and its fixtures and cannot be held to relate to the delivery of the plans. Such exclusive [sic] clauses will be strictly construed so that they have no effect beyond what they are clearly intended to have: see the judgment of Lord Greene M.R. in *Webster v. Higgin*, [1948] 2 All E.R. 127 (C.A.), and in this province *Samoth Financial Corp. Ltd. v. Todd* (1979), 14 B.C.L.R. 266 at 269, where Murray J. cites the authority of *Frontier Finance Ltd. v. Hynes* . . . [1957] O.W.N. 353, 10 D.L.R. (2d) 206 (C.A.) [Emphasis added].

34. *Webster v. Higgin*, cited by Spencer, J., is one of a long line of well-known cases involving "exclusion clauses" in the context of contracts between parties of unequal bargaining power. Such cases have usually centred on the effect of printed forms imposed on unsophisticated buyers essentially "duped" by unscrupulous sellers. (See also *Couchman v. Hill*, [1947] K.B. 554, *Curtis v. Chemical Cleaning and Dyeing Co.*, [1951] 1 K.B. 805, *Harling v. Eddy*, [1951] 2 K.B. 739, *J. Evans & Son (Portsmouth) Ltd. v. Andrea Merzario Ltd.*, [1976] 2 All E.R. 930, and *Brikom Investments Ltd. v. Carr et al*, [1979] Q.B. 467, all cited in the

dissenting judgment of Houlden, J.A. in *Hayward v. Mellick* (1984), 45 O.R. (2d) 110 (Ont. C.A.)). There is also a series of older Canadian decisions in which courts have declined to give effect to true "exemption clauses" in the face of oral warranties on the ground that such provisions cannot be used as "instruments of fraud": see *Long v. Smith* (1911), 23 O.L.R. 121 (Ont. Div. Ct.), *Frontier Finance Ltd. v. Hynes*, [1957] 10 D.L.R. (2d) 206 (Ont. C.A.), and *Ferland v. Keith* (1958), 15 D.L.R. (2d) 472 (Ont. C.A.). (I emphasize that there was no suggestion or finding of fraud on Visscher's part in the instant case and that indeed, as noted earlier, the trial judge appears to have accepted the evidence of the Visscher brothers that they did not intend subjectively to bind their company to pay \$180,000 to Mr. Turner.)

35. But where as here the parties are both commercial entities or where they have in fact negotiated the terms of their agreement with the benefit of legal advice, courts have enforced "entire agreement" and similar provisions on many occasions. In addition to *Carman Construction*, *supra*, I note the decision of the majority of the Ontario Court of Appeal in *Hayward v. Mellick*, *supra*. It involved a negligent misrepresentation made orally concerning the acreage of a farm, and a clause in a written agreement for the sale of the farm which stated that there were no "representations, warranties or conditions, expressed or implied, other than those herein contained . . .". In response to the argument that the

clause did not exclude negligent representations, the majority said it would be "too strained a construction of the disclaimer clause to say that it applies only to representations that are not negligent". Thus the buyer of the farm was precluded from relying on the misrepresentation and was bound by the written contract.

36. The Supreme Court of British Columbia has also given effect to "entire agreement" clauses in the context of negotiated agreements: see, e.g., *Canadian Western Bank v. Shieldings Inc.* (5 December 1994), Vancouver Registry No. C910342, and *Squamish Answering Services (1990) Ltd. v. Squamish Answering Services Ltd.* (29 July 1994) Vancouver Registry No. C905782; see also *Bull HN Information Systems Ltd. v. L.I. Business Solutions Inc.*, [1992] A.J. No. 424, dated May 8th, 1992; *Wilcox Lake Enterprises Inc. v. Norman Starr et al.* (1993), 30 R.P.R. (2d) 75 (Ont. Gen. Div.); and *Lister v. Dunlop Canada Inc.* (1978), 19 O.R. (2d) 380 (H.C.) at 391-3 (not appealed on this point.) In so doing, courts have almost invariably equated such clauses with the parol evidence rule. In *Stan Canada Inc. v. Calibrated Instruments Inc.* (22 December 1994), Commercial Court File No. B196/94 (Ont. Gen. Div.), for example, Spence, J. said this:

The parol evidence rule is that evidence of a prior oral agreement is not admissible to add to, vary or contradict a written contract. . . . in the effort to determine what is the agreement between the parties, the only reasonable way to proceed is, ordinarily, to look to the agreement which is the later in time. If that agreement contains an "entire



agreement" clause as the General Security Agreement does in the present case, that clause is ordinarily conclusive in favour of the terms of the later agreement because it expresses the parties' agreement that they have reduced their agreement to writing in the written text which they have executed . In such circumstances it would ordinarily be improper to take into account any prior agreement between the parties because to do so would be contrary to the mutual intention which the parties have themselves manifested in the written agreement that that agreement should govern their relationship to the exclusion of other previous agreements. This ordinary treatment may not apply, or may be limited in its application, by reason of special circumstances. A prior oral agreement may be given effect to as a collateral agreement, provided that to do so would not add to, vary or contradict the written contract. If the substance of the prior oral agreement was that the parties would enter into a written agreement but that agreement would not be their real agreement and some other agreement would be the real contract between them, the intention reflected in the prior agreement would need to be effectuated. [at para. 10; emphasis added]

The same equation was made by Houlden, J.A. in his dissenting judgment in *Hayward v. Mellick*, *supra*, where at p. 120 he concluded that an "entire agreement" clause in the written agreement before the court was in fact "simply a restatement of the parol evidence rule."

37. Given the rule of construction that a court should strive to give effect to all the terms of an agreement, however, it is at least arguable that a provision such as Clause 22 must be intended

to have a broader effect than the parol evidence rule would have by itself — otherwise, the clause would be redundant. Certainly the wording used here was not limited to "any agreement, representation or warranty that contradicts or varies" the terms of the written agreement — the clause stated that there were no collateral agreements between the parties, whether at variance with the written document or not. In practical terms, the obvious purpose of such a clause is to ensure that parties who have conducted oral negotiations, from which (as this case illustrates) misunderstandings might easily arise, will finally review and by execution confirm in writing the terms they have agreed upon. It is a normal and in my view legitimate expectation in the commercial world that, absent fraud or some other vitiating element, provisions such as Clause 22 will generally be given effect to, so that prior discussions concerning the contract may not prevail over what has been acknowledged in writing to constitute the parties' "entire agreement."

38. In any event, whether one applies the wording of Clause 22 itself — an acknowledgment that no collateral agreements exist — or whether one applies the parol evidence rule to it and therefore disallows proof of the collateral contract because such a result would contradict Clause 22, the conclusion seems inescapable that the collateral oral contract cannot prevail. To rule otherwise would in my view render entire agreement clauses

meaningless and thereby remove an important safeguard used in countless agreements in this province and elsewhere.

39. I would allow the appeal and order that Mr. Turner's claim be dismissed with costs to the appellant.

"The Honourable Madam Justice Newbury"

**TAB 34**

COURT OF APPEAL FOR ONTARIO

CITATION: Whiteside v. Celestica International Inc., 2014 ONCA 420

DATE: 20140523

DOCKET: C56676

Blair, Watt and Lauwers JJ.A.

BETWEEN

Jim Whiteside, Jason Wright, Steve Wilson and 3077187 Canada Ltd.

Plaintiffs (Appellants)

and

Celestica International Inc.

Defendants (Respondents)

Peter N. Mantas, for the appellants

R. Seumas M. Woods and Dustin Kenall, for the respondent

Heard: January 20, 2014

On appeal from the judgment of Justice Paul Lalonde of the Superior Court of Justice, dated January 21, 2013, with reasons reported at 2013 ONSC 323.

**R.A. Blair J.A.:**

**OVERVIEW**

[1] In August 2005, Celestica International Inc. acquired the shares of an Ottawa-based electronics company, CoreSim Inc. Mr. Whiteside was the major shareholder of CoreSim. Roger D'Hollander was the President and CEO of the company, although not a shareholder. Through 3077187 Canada Inc., Mr.

D'Hollander had a separate agreement with Celestica entitling the corporate appellant to receive certain monies that were tied to the purchase price in the CoreSim purchase agreement.

[2] The Share Purchase Agreement between Celestica and the CoreSim shareholders provided that Celestica would pay the shareholders: (i) an initial payment; and (ii) an "Earn-Out Payment" if the CoreSim business met certain performance targets after the acquisition. The Share Purchase Agreement also set out a formula for determining whether those targets were met.

[3] Shortly after acquiring CoreSim, Celestica won a large contract to design a product for a Japanese company, NEC. The project was "run" from CoreSim's old offices in Ottawa and involved some of CoreSim's former staff. The dispute revolves around whether Lalonde J. was correct in refusing to include the revenue from the NEC project in the calculation of the Earn-Out Payment. This, in turn, depends on the interpretation to be given to the term "Total EBIAT" of CoreSim as defined in the Share Purchase Agreement. EBIAT is an acronym for "earnings before interest, amortization and taxes."

[4] Mr. Whiteside and the corporate appellant allege that the trial judge erred in arriving at this conclusion. They assert that the revenue from the NEC project should have been included in the calculation of the Earn-Out Payment and that, had it been, they would have been entitled to their *pro rata* shares of the

maximum Earn-Out Payment of \$1.75 million. In Mr. Whiteside's case, as a 40.4% shareholder, the amount would be \$707,792.23. The corporate appellant was entitled to 15% of the Earn-Out Payment under its Letter Agreement with Celestica – an amount of \$262,000.

[5] The trial judge ruled in favour of Celestica. He concluded that the EBIAT of the NEC Project was not to be included in the calculation of the Total EBIAT for purposes of determining the Earn-Out Payment. He also concluded that, even if it were, the threshold requirements for triggering the Earn-Out Payment had not been met.

[6] Respectfully, in my view, the trial judge erred in two respects in arriving at these conclusions:

(i) his interpretation of the Share Purchase Agreement failed to give effect to the contractual provisions governing the calculation of Earn-Out Payments, when the Shareholder Purchase Agreement is read as a whole and in context, and therefore the NEC Project EBIAT should have been included in the calculation of the Earn-Out Payments; and,

(ii) he made palpable and overriding errors in assessing the evidence of the appellant's expert, Mr.

Clarke, and Celestica's witness, Mr. Tareque, and therefore erred in concluding that the contractual thresholds for triggering entitlement to Earn-Out Payments were not met, even if the NEC Project EBIAT were included in the calculation.

[7] I would therefore allow the appeal, but I would order a new trial on the issue of whether the threshold requirements for triggering the Earn-Out Payment were met. The following are my reasons for arriving at this decision.

## **FACTS**

### **Celestica's Acquisition of CoreSim**

[8] CoreSim was an Ottawa-based high-tech business formed in 2002 by Mr. Whiteside and others. It specialized in providing value engineering and design analysis services to electronic companies, particularly those in the telecommunications and aeronautics sectors. Value engineering involves analyzing the functions of an existing system, product or piece of equipment, with the goal of improving the item's performance, reliability, quality safety, and/or cost. Design analysis involves analyzing a prospective product's design with a view to discovering potential flaws and suggesting improvements to the product in advance, when those changes can be made in a more cost-effective manner.



[9] The CoreSim business was successful. It soon grew to be an operation with some 30 employees under the direction of Mr. Whiteside, as Chief Technology Officer and Chairman of the Board, and Mr. D'Hollander, as President and Chief Executive Officer. Celestica became interested.

[10] Headquartered in Toronto, Celestica operates a global manufacturing network that provides a wide range of services and solutions to original equipment manufacturers in the communications, computing, industrial, and consumer sectors. It saw a fit with the specialized services and intellectual property provided by CoreSim.

[11] In the negotiations that ensued, however, the parties could not agree on the value of CoreSim's specialized services and intellectual property. The end result was a Share Purchase Agreement dated August 5, 2005, in which Celestica acquired the vendors' shares at an initial purchase price of \$1,031,200 plus additional Earn-Out Payments, if the CoreSim business achieved certain specified performance targets over a stretch of three Earn-Out Periods. The Earn-Out Payments were to be based upon the Total EBIAT Amount for the former CoreSim business. The maximum Earn-Out Amount was fixed at \$1,750,000.

[12] This appeal is about how the Earn-Out Payment for the third period is to be determined. Mr. Whiteside says the targets were met and that the shareholders

are entitled to the full additional payment of \$1,750,000. Celestica says the targets were not met, and the appellants are entitled to nothing. Both sides agree that the appellants' entitlement to receive Earn-Out Payments was based upon the former CoreSim business meeting certain specified earnings targets in the years following its acquisition by Celestica. However, for purposes of determining and calculating the Earn-Out Payments, they disagree on the whether those earnings targets were met for the relevant periods.

[13] Roger D'Hollander had been a shareholder of CoreSim but was not a shareholder at the time of the Share Purchase Agreement. His arrangement was incorporated into the Letter Agreement between Celestica and his corporation, the appellant 3077187 Canada Ltd. ("307 Canada") which, in turn, incorporated the provisions of an earlier Letter of Intent. The Letter of Intent pre-dated the Share Purchase Agreement and set out the broad terms of the contemplated agreement. 307 Canada was entitled to receive an initial amount of \$150,000 plus 15% of any Earn-Out Payments made to the shareholders as a performance bonus for Mr. D'Hollander's management services.

[14] After the closing, Celestica maintained the former CoreSim operations in Ottawa, but did so as a part of Celestica's Global Design Services group operating as the Celestica Ottawa site.

### **The NEC Project**

[15] All went well until Celestica won its very profitable contract with NEC.

[16] NEC retained Celestica to design and build a highly-sophisticated telecommunications device which NEC would sell to telecommunications companies in North America. The device was described as a “packet and service aware transport platform” and, although the project was generally known as the NEC Project, it was sometimes called the “PSTP” development project.

[17] The Project came online in 2008 after a great deal of work and negotiations on the part of Mr. Whiteside and other former CoreSim employees, as well as by groups of Celestica designers and engineers in China, India, and New Hampshire. It called for Celestica to design both hardware and software (about 35% and 65%, respectively) for NEC. It is agreed that the hardware portion was “led” by Mr. Whiteside and his team in Ottawa and that some of the hardware used CoreSim’s former proprietary intellectual property. The CoreSim technology did not relate to the software, although the software portion of the Project was also “led” by Ottawa-based employees working in conjunction with a Celestica joint venture partner in India. There seems to be little doubt that the NEC Project was an Ottawa site project.

[18] Celestica made a \$15 million profit on the Project before it was terminated in late 2008 and early 2009 because of the downturn in the global economy.

Whether those profits should have been included in the Total EBIAT of the Ottawa site is the crux of these proceedings.

### **The Share Purchase Agreement**

[19] Central to this appeal is the interpretation to be given to the terms of the Share Purchase Agreement relevant to the Earn-Out Amounts. They are based on the Total EBIAT Amount for the relevant Earn-Out Period.

[20] Here, the relevant Earn-Out Period is the Third Period. Section 2.4(h) of the Share Purchase Agreement provides that if, during that Period, (i) the Total EBIAT Amount is equal to or greater than \$4,500,000, and (ii) the Total EBIAT Amount for the last six calendar months is equal to or greater than \$975,000, each vendor was to receive his or her percentage share of the maximum Earn-Out Amount, less any amounts previously paid.

[21] Section 1.1 defines “Total EBIAT Amount”:

“Total EBIAT Amount” means, for any period, the amount equal to the EBIAT of the Acquired Business for such period, determined in accordance with Section 2.5.

[22] Section 1.1 also defines other terms that matter to the appeal, as outlined below, and s. 2.5 provides for the manner in which the Total EBIAT Amount is to be determined. The relevant provisions of s. 2.5 are as follows:

2.5(a) The Total EBIAT Amount for the First Earn-Out Period, the Second Earn-Out Period, the Third Earn-Out Period or any portion thereof (each, an “**Earn-Out**

**Period”)** shall be *calculated* by the Purchaser *in accordance with GAAP* in a manner consistent with the accounting methods used by the Purchaser in the preparation of its audited financial statements, *as adjusted in accordance with sections 2.5(b), 2.5(c) and 2.6.* [Emphasis added]

(b) [Not applicable]

(c) For the purposes of calculating the Total EBIAT Amount for any Earn-Out Period, the Purchaser shall include (i) all Qualified Overhead (but shall exclude all Non-Qualified Overhead), and (ii) any portion of the EBIAT of the Purchaser or any of its Affiliates for such Earn-Out Period that is attributable exclusively to the provision of NRE Design Services by the Purchaser or such Affiliate (or any business unit of any of the foregoing) using the Unique IP, provided that (x) the Purchaser or such Affiliate was awarded the NRE Design Services due specifically to the Unique IP, and (y) the Unique IP is required for the provision of such NRE Design Services. The portion of the EBIAT of the Purchaser or any Affiliate to be included in any Total EBIAT Amount pursuant to clause (ii) above shall be based on the Purchaser's reasonable estimates, acting in good faith, based on the Purchaser's then current accounting policies, and shall not be subject to dispute by any Vendor pursuant to Section 2.7.

(d) Subject to the provisions hereof and Section 2.7(e), in order to facilitate the determination of the Total EBIAT Amount for any Earn-Out Period pursuant to the terms hereof, until December 31, 2008 the Purchaser shall maintain the financial records of the Acquired Business (or cause such records to be maintained) in a manner so as to permit the Total EBIAT Amounts for any Earn-Out Period to be readily calculated by it.

[23] The terms “Acquired Business” “Business”, “Intellectual Property”, “NRE Design Services”, and “Unique IP” are defined as follows:

**“Acquired Business”** means the Business, as operated by the Purchaser or any of its Affiliates (including the Corporation) after the date hereof;

**“Business”** means the business currently and heretofore carried on by the Corporation consisting of the provision of electronics design services utilizing schematic modeling, board vector capture and simulation, design verification, integrated static timing and signal integrity analysis, EMC/EMI analysis, power integrity analysis combined with the Corporation’s integrated design processes as applied to field programmable gate arrays (FPGAs) and application specific integrated circuits (ASICs), circuit board design and redesign, including electrical architecture, very-high-speed hardware description language (VHDL) and VERILOG coding and test bench simulation, schematic design, component selection and physical design;

**“Intellectual Property”** means all domestic and foreign trade-marks, trade names, business names, patents, inventions (whether patentable or not), copyrights, service marks, brand names, industrial designs, Trade Secrets, urls, domain names and all other industrial or intellectual property owned or used by the Corporation, and all applications therefor and all goodwill in connection therewith, including all licences, registered user agreements and all like rights used by or granted to the Corporation;

**“NRE Design Services”** means the design services that are provided by the Purchaser or any Affiliate of the Purchaser (other than the Acquired Business) using the Unique IP to any of their respective customers, for which the Purchaser or such Affiliate charges its customer on a "non-recurring expense basis", and for which it is not compensated as part of a "gain-sharing" or other profit-sharing arrangement with such customer;

**“Unique IP”** means the proprietary Intellectual Property owned directly by the Business (as it exists on the date

hereof) which neither the Purchaser nor any of its Affiliates uses or has the right to use on the date hereof.

[24] The “Corporation” referred to in these provisions is CoreSim Inc.

[25] Finally, the Share Purchase Agreement contains an “entire agreement” clause, as set out in section 1.6:

This Agreement constitutes the entire agreement between the parties with respect to the subject matter hereof and supersedes all prior agreements, understandings, negotiations and discussions, whether written or oral. There are no conditions, covenants, agreements, representations, warranties or other provisions, express or implied, collateral, statutory or otherwise, relating to the subject matter hereof except as herein provided.

### **307 Canada and the Letter Agreement**

[26] In addition to the Share Purchase Agreement with the CoreSim shareholders, Celestica entered into the Letter Agreement with Mr. D’Hollander, which provided for the performance bonus payments referred to above.

Paragraph 2 of the Letter Agreement sets out Celestica’s commitment:

Consistent with the earn out mechanism identified in the Letter of Intent relating to the purchase of the equity of CoreSim by Celestica, or any subsequent definitive agreements, additional payments will become payable to 3077187 Canada Ltd. as a performance bonus for your management services if and when any earn out payments become payable to the shareholders of CoreSim, calculated as 15% of such earn out payments, and, if payable, will be paid at the time that such earn out payments are made.

[27] The Letter of Intent referred to in this passage was a letter from Celestica to Mr. D'Hollander in his capacity as acting President of CoreSim. Its purpose was to "[outline] the business basis of [Celestica's] offer to acquire all the issued and outstanding shares of CoreSim Inc." The letter listed the "continued participation in the success of the CoreSim operations by way of an earn-out" as one of the benefits to the CoreSim shareholders of the transaction. It went on to outline in considerable detail the proposed earn-out scheme that was ultimately incorporated into the Share Purchase Agreement.

[28] Some excerpts from the Letter of Intent are of interest:

Both earn out payments will be contingent upon achieving performance hurdles consistent with the management forecast [previously] put forward by CoreSim management.

...

The earn-out payments referred to above shall be released upon the successor within Celestica to the CoreSim business achieving, at the CoreSim site ... the earnings before interest, amortization and taxes (calculated on a basis consistent with Canadian generally accepted accounting principles, and using accounting practices to be mutually agreed in the definitive documentation) ("EBIAT") for the appropriate period as presented in the management forecast.... The precise mechanics for making such calculations shall be developed and codified in the definitive documentation for the Transaction based on mutual agreement.

...



If the CoreSim technology or methodology acquired as a part of this transaction is deployed or employed at a Celestica site other than the CoreSim site and EBIAT is earned during the Earn Out Period at such other Celestica locations other than the CoreSim site from NRE related design projects which were awarded to Celestica by the customer due specifically to the unique CoreSim technology or methodology acquired as a part of this transaction and such technology or methodology was required for the completion of such projects, such EBIAT amount shall be counted in the total EBIAT used for the purpose of the earn out calculation above.

[29] The appellants assert that the latter provision is what became the important s. 2.5(c)(ii) of the Share Purchase Agreement outlined above.

### **The Issues**

[30] Three issues raised by the appellants need to be addressed:

- (i) Did the trial judge err in interpreting the Share Purchase Agreement for purposes of determining the correct Total EBIAT Amount to be applied to the Earn-Out calculation?
- (ii) Did the trial judge err in failing to apply the correct agreement with respect to the claim of 307 Canada?
- (iii) Did the trial judge make a palpable and overriding error in determining whether the Total EBIAT Amount met the threshold necessary to trigger the Earn-Out Payment?

[31] The appellants also argued that the trial judge erred in law by accepting the non-expert testimony of Mr. Abu Tareque over that of the expert witness, Mr. David Clarke. In my view, it is not necessary to resolve this legal question in order to determine the outcome of the appeal.

### **The Trial Judge's Reasons**

#### Total EBIAT and the Earn-Out Calculation

[32] The trial judge concluded that the Total EBIAT Amount was to be calculated solely on the basis of s. 2.5(c) of the Share Purchase Agreement because it was that provision “that details how to calculate the EBIAT for the purpose of the Earn-Out Payment”. In that respect, s. 2.5(c)(ii) was the relevant provision.

[33] Unpacking s. 2.5(c)(ii), the trial judge listed the “four requirements” for determining whether EBIAT was eligible for an Earn-Out Payment:

- (i) The EBIAT must be “attributable exclusively to the provision of NRE Design Services”;
- (ii) The charges must be for the use of “the Unique IP”;

- (iii) Celestica must have been “awarded the NRE Design Services due specifically to the Unique IP”; and
- (iv) The Unique IP was “required for the provision of such NRE Design Services”.

[34] After carefully reviewing the evidence, the trial judge concluded that “the NEC project [did] not fit squarely into the earn-out provisions of the agreement”. Although the Project met the first requirement outlined above, it did not meet the second, third or fourth requirement.

#### The 307 Canada Claim

[35] Except to acknowledge it in his recitation of the facts, the trial judge did not address the Letter Agreement between Celestica and 307 Canada or the separate claim of the corporate appellant. The appellants argue that he must therefore have applied the terms of the Share Purchase Agreement in determining the claim of the corporate appellant, and in doing so, he applied the wrong agreement.

#### Whether the Appellants Met the Thresholds Necessary to Trigger the Earn-Out Payments Even if the NEC Project EBIAT were Included in the Total EBIAT Amount

[36] The trial judge answered this question in the negative, too. After reviewing the evidence of the appellants’ Finance Controller for Global Design, Mr.

Tareque, and the evidence of the appellants' expert, Mr. Clarke, he found that the thresholds necessary to trigger an Earn-Out Payment had not been met, even with the total NEC Project EBIAT. Central to this finding was his rejection of the appellants' argument that Celestica had deferred approximately \$2.2 million in NEC Project revenues from the 4<sup>th</sup> Quarter of 2008 (the end of the Third Earn-Out Period) to the 1<sup>st</sup> Quarter of 2009. In doing so, he accepted the evidence of Mr. Tareque over that of Mr. Clarke.

## **ANALYSIS**

[37] Only the first and third of these issues needs to be analyzed further. While the appellants are technically correct that the trial judge failed to deal with the claim of 307 Canada in the context of the Letter Agreement, the reality is that 307 Canada's claim is, in actual terms, derivative of the success of the shareholders' claims under the Share Purchase Agreement. If no Earn-Out Payment is triggered under the latter agreement, the corporate appellant has no claim to its "performance bonus" because the bonus is only payable "if and when any earn out payments become payable to the shareholders of CoreSim, calculated as 15% of such earn out payments": Letter Agreement, at para. 2.

[38] Accordingly, while the Letter Agreement and the Letter of Intent referred to in it may have some relevance to the exercise of interpreting the Share Purchase Agreement, nothing more need be said about it in this context.

## **Standard of Review**

[39] The interpretation of a contract is very much a legal issue. The standard of review is therefore at or towards the correctness end of the standard-of-review spectrum. However, factual findings, on which the interpretation is based, are to be reviewed with deference. Generally, factual findings may only be interfered with in the case of a palpable and overriding error on the part of the trial judge: *Bell Canada v. The Plan Group*, 2009 ONCA 548, 96 O.R. (3d) 81, at paras. 25-33.

[40] Here, the factual findings underpinning the trial judge's interpretation of the Share Purchase Agreement and related documents are not dispositive of the appeal. The findings he made in this respect are supported by the evidence. However, he gave an interpretation of the contract that was too narrow; this was an error in law.

[41] On the second major issue on the appeal – whether the threshold for the Earn-Out Payments had been met even if the NEC Project revenues were included in the Total EBIAT – the trial judge made palpable and overriding errors of fact, in my view, and his decision on that issue cannot stand.

## **Total EBIAT and the Earn-Out Calculation**

[42] The trial judge focused on paragraph 2.5(c) of the Share Purchase Agreement in determining what was to be included in the calculation of the Earn-

Out Amounts. As noted above, he interpreted that provision as setting out “four requirements” that had to be met before revenues could be included in the Total EBIAT Amount.

[43] I begin by observing that the trial judge’s findings of fact – which support his conclusion that those four requirements had not been met – were open to him on the evidence. After reviewing the record, he found (i) that the earnings from the NEC Project were not “attributable exclusively to the provision of NRE Design Services”; (ii) that the charges were not for the use of “the Unique IP”; (iii) that Celestica had not been “awarded the NRE Design Services due specifically to the Unique IP”; and (iv) the Unique IP was not “required for the provision of such NRE Design Services.” There is no palpable or overriding error with respect to these findings.

[44] However, these findings of fact are not determinative of the contractual interpretation exercise and the trial judge erred in treating them as if they were.

[45] The guiding principles relating to the interpretation of a commercial contract have been articulated in a number of authorities in recent years: the text of a written agreement is to be read as a whole, without considering one provision in isolation from the others, and in the context of the circumstances existing at the time the agreement was made: *Dumbrell v. The Regional Group of Companies Inc.*, 2007 ONCA 59, 85 O.R. (3d) 616, *per* Doherty J.A., at para. 53;

*Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, *per* Cromwell J., at para. 64; and *Schneeberg v. Talon International Development Inc.*, 2011 ONCA 687, 343 D.L.R. (4th) 486, *per* Epstein J.A., at paras. 38-42.

[46] The trial judge correctly acknowledged these guiding principles. Respectfully, however, he failed to apply them. He took an approach that concentrated on s. 2.5(c) of the Share Purchase Agreement in isolation, without giving effect to the purchase-price provisions of the Share Purchase Agreement as a whole, and without adequate consideration of the factual matrix underlying the contractual arrangements between Celestica and the appellants. I say this for the following reasons.

[47] The overall scheme for determining the purchase price for the Vendors' shares is set out in Article 2 of the Share Purchase Agreement. For purposes of the appeal, the relevant provisions are those contained in ss. 2.2, 2.3, 2.4, and 2.5.

[48] Section 2.2 defines the purchase price to include a closing date payment of \$1,031,200 (to be divided amongst the shareholders in accordance with s. 2.3), together with “*any additional amounts* (collectively, the “Earn-Out Payments”) *determined to be payable in accordance with Section 2.4 ... to a maximum aggregate addition amount of \$1,750,000*” [Emphasis added.]. Section

2.4 sets out the parameters for paying the additional earn-out amounts for the three Earn-Out Periods (we are only concerned with the Third Earn-Out Period here). Those payments are triggered by the “Total EBIAT Amounts” reaching the thresholds described above.

[49] Section 2.5 is the provision which, as a whole, describes how the Total EBIAT Amounts are to be determined. In this respect, s. 2.5(a) is very important.

To repeat, it says:

The Total EBIAT Amount for the First Earn-Out Period, the Second Earn-Out Period, the Third Earn-Out Period or any portion thereof (each, an “Earn-Out Period”) *shall be calculated by the Purchaser in accordance with GAAP* in a manner consistent with the accounting methods used by the Purchaser in the preparation of its audited financial statements, *as adjusted in accordance with Sections 2.5(b), 2.5(c) and 2.6.* [Emphasis added.]

[50] “Total EBIAT Amount” means “the amount equal to the EBIAT of the Acquired Business ... *determined in accordance with Section 2.5*”: Share Purchase Agreement, s. 1.1 (emphasis added). Significantly, the EBIAT of the Acquired Business is not to be determined in accordance with s. 2.5(c) only, but in accordance with s. 2.5 as a whole.

[51] The trial judge’s focus on the language of s. 2.5(c) alone, without regard to the context of s. 2.5 as a whole, in order to determine how the Total EBIAT Amount was to be calculated, led him mistakenly to miss the subtlety of the mechanism created for that purpose. As the overarching provisions of s. 2.5(a)



make clear, Total EBIAT Amounts are not *calculated* in accordance with s. 2.5(c); they are *calculated ... in accordance with GAAP*, generally, and then *adjusted* for the items referred to in ss. 2.5(b), 2.5(c), and 2.6.

[52] Sections 2.5(b) and 2.6 are not relevant for purposes of the appeal. The former deals with adjustments for bad accounts receivable and for software licensing amortization considerations. The latter pertains to adjustments for various losses.

[53] Section 2.5(c) is relevant, however, because it provides for an adjustment of the Total EBIAT Amount, once calculated, to account for what is in essence the use of CoreSim IP in sites other than the Ottawa site where CoreSim's Unique IP is used exclusively. In addition, s. 2.5(d) is important because "in order to facilitate the determination of the Total EBIAT Amount", Celestica was required to maintain separate financial records for the CoreSim business, as operated by Celestica, "in a manner so as to permit the Total EBIAT Amounts for any Earn-Out Period to be readily calculated by it". No such provision would have been needed if the s. 2.5(c) adjustment were the only "calculation" to be made, because s. 2.5(c) contemplates a self-contained and easily ascertainable item.

[54] To understand the basis for arriving at an Earn-Out Payment, it is necessary to understand the notion of "Total EBIAT Amount" and to what that

notion refers. In my opinion, it is a reference to the EBIAT generated by Celestica's Ottawa site.

[55] The Letter of Intent, cited above, is of some assistance in this regard. It states that "[t]he earn-out payments ... shall be released upon the successor within Celestica to the CoreSim business *achieving, at the CoreSim site*, [the requisite EBIAT amounts]" (emphasis added.). It also distinguishes between "the CoreSim site" and "other Celestica locations" in the provision that appears to have formed the basis for s. 2.5(c) of the Sale Purchase Agreement.

[56] "Total EBIAT Amount" is determined on the basis of "the EBIAT of the Acquired Business". The "Acquired Business" means the former CoreSim business "as operated by [Celestica] or any of its Affiliates". The Ottawa site was that business. As Mr. Tareque, the respondent's witness, explained, there was only one business unit in Ottawa and the Earn-Out calculations were based on the Ottawa site only, until the NEC Project was undertaken:

- A. Let me put it this way, okay? Until we have the NEC project, everything was in order. *There was only one business unit.* Okay? And there's only – the direction from the management was – the earn-out only – *you calculate it based on the Ottawa site only.* There was no NEC. *After NEC comes on board and we won the project and, as the NEC, the Master Agreement was signed, management decided we should track NEC project separately and NEC project, PST project, will not be included in – in our earn-out statement.* [Emphasis added.]

[57] The Third Earn-Out Statement – prepared by Celestica and delivered to Mr. Whiteside after the commencement of these proceedings – confirms this approach and reinforces the “calculation-subject-to-adjustments” paradigm of s. 2.5(a). It shows revenues less expenses to arrive at the “EBIAT Calculation per Agreement” (the Ottawa site EBIAT) and then provides for further “Items for Adjustment at year-end”. Included in those items for adjustment is a line item for “EBIAT incurred at other sites as a result of deploying CoreSim” (i.e., the application of s. 2.5(c)(ii)).

[58] Conduct of the parties to an agreement subsequent to the execution of the agreement is helpful in interpreting the provisions of that agreement where competing interpretations arise. As Laskin J.A. put it, in *Montreal Trust Co. of Canada v. Birmingham Lodge Ltd.*, [1995] 24 O.R. (3d) 97 (C.A.), at p. 108:

Subsequent conduct may be used to interpret a written agreement because “it may be helpful in showing what meaning the parties attached to the document after its execution, and this in turn may suggest that they took the same view at the earlier date”: S.M. Waddams, *The Law of Contracts*, 3d ed. (1993), at para. 323. Often, as Thomson J. wrote in *Bank of Montreal v. University of Saskatchewan* (1953), 9 W.W.R. (N.S.) 193 at p. 199 (Sask. Q.B.): “there is no better way of determining what the parties intended than to look to what they did under it”.

See also *Canadian National Railways v. Canadian Pacific Ltd.* (1979), 95 D.L.R. (3d) 242, at p. 262 (B.C.C.A.), affirmed [1979] 2 S.C.R. 668; and *Arthur*

*Andersen Inc. v. Toronto-Dominion Bank* (1994), 17 O.R. (3d) 363, at p. 372 (C.A.).

[59] The evidence of Mr. Tareque and the Third Earn-Out Statement support the appellants' interpretation of the Share Purchase Agreement. So, too, does the language of the Letter of Intent, which formed part of the factual matrix underlying the signing of the Share Purchase Agreement. So, too, as well, does the fact that several other projects similar to the NEC Project and performed at the Ottawa site – but where the sales lead came from Celestica, not CoreSim – received full EBIAT credit for purposes of calculating the Total EBIAT Amount under s. 2.5. Many of those contracts did not involve the exclusive use of CoreSim's Unique IP and some did not involve any such use (for example, a contract with Nortel known as Nortel s8000). However, all received full EBIAT credit for purposes of the Earn-Out calculation. This confirms that contracts other than those that met the "four requirements" of Section 2.5(c)(ii) were being credited. The only contract that was not included was the one that would have made a difference in calculating the Earn-Out: the NEC Project.

[60] The evidence of Paul Barsley, the Vice-President of Design Services for Celestica and the person responsible for Celestica's Global Design Services at the relevant time, supports the evidence of Mr. Whiteside with respect to the foregoing. At para. 50 of his affidavit sworn on September 14, 2012, Mr. Barsley said:

Mr. Whiteside alleges that Celestica awarded CoreSim's former shareholders 100% credit for other projects similar to NEC where the lead was generated outside of Ottawa. *I agree that there were cases in which projects "owned" by Celestica Ottawa arose from leads generated by other parts of Celestica.* Celestica Ottawa had its own dedicated sales team for design analysis and cost reduction projects. As a result, many of the projects the site owned were projects it won through its own sales efforts. *Other projects came in through the work of the rest of my business development team which promoted value engineering and design analysis services. ... [These types of projects] were assigned to Celestica Ottawa since it had the available project managers and resources needed to carry out the projects. To the extent the earnings generated by the projects met the requirements set out in the Agreement they formed part of the calculation of EBIAT for the purposes of the Earn-Out Calculation. [Emphasis added.]*

[61] Interestingly, Mr. Barsley did not deny Mr. Whiteside's evidence that these other projects received full EBIAT credit. He merely says that "to the extent the earnings generated met the requirements" of the Share Purchase Agreement they were credited. He stated specifically that "[t]he NEC project as a whole was different than those projects because ultimately the work involved with it did not all meet the test in the Agreement".

[62] Whether that is so or not is the nub of the issue, of course.

[63] For the reasons articulated above, I conclude that a proper interpretation of the Share Purchase Agreement results in the profits from the NEC Project being included in the calculation of the EBIAT of the Ottawa site and, therefore, in the

Total EBIAT Amount to be applied in determining the relevant Earn-Out Payments.

**Whether the Appellants Met the Thresholds Necessary to Trigger the Earn-Out Payments Even if the NEC Project were Included in the Total EBIAT Amount**

[64] The trial judge also found that, even if the NEC Project were included in the Total EBIAT Amounts, those earnings were not sufficient to meet the threshold necessary to trigger the Earn-Out Payments. In making this finding, he relied principally on the evidence of Mr. Tareque, which he accepted over that of the appellants' expert, Mr. Clarke.

[65] This issue turned on whether Celestica had understated the NEC Project earning for the 4<sup>th</sup> Quarter of 2008 and deferred those revenues to the 1<sup>st</sup> Quarter of 2009. December 31, 2008 was the last date of the Third Earn-Out Period and therefore earnings after that date were not to be included in the calculation of the Earn-Out Amounts. The appellants alleged that approximately \$2.25 million in earnings were deferred. Mr. Tareque denied there had been any revenue deferral. Mr. Clarke's expert opinion, as expressed in his Original Report, was that the appellants were correct. In his Supplementary Report – prepared following the production of a newly revised NRE Tracker ver. 17 – Mr. Clarke testified that at least \$1 million had been deferred, which was enough to trigger the Earn-Out Payments.

[66] Needless to say, it is within the purview of a trial judge to weigh and assess the evidence and to prefer the testimony of one witness over another in making his or her findings. Absent a palpable and overriding error, a trial judge's findings are entitled to deference and this Court will not interfere with them or substitute its own view of the facts.

[67] Respectfully, however, the trial judge made two palpable and overriding factual errors in assessing the evidence. In addition, he failed to consider an important piece of evidence. These errors significantly affected his review of the evidence and it follows that his findings and conclusions on the threshold issue cannot stand.

#### The Clarke Methodology and the "SAP" Data

[68] First, the trial judge criticized Mr. Clarke's methodology on the basis that he had failed to base his opinion on what is known as the "SAP data" and that he had not reviewed the affidavit of Mr. Tareque before providing his opinion.

[69] The SAP document was an internal Celestica document containing data showing Celestica's actual revenue and expenses.<sup>1</sup> This was in contrast to another internal document, the NRE Tracker document, which everyone agreed was a project management tool containing only projections. Or at least, it

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<sup>1</sup> The SAP document is described in its electronic format as NEC PL HC Ottawa from celine.xls.

contained only projections until the final NRE Tracker document – NRE Tracker ver. 17 (new) – was produced on the eve of trial.

[70] The trial judge was under the impression, erroneously, that Mr. Clarke had not considered the SAP documentation and information in arriving at his opinion. This was an important consideration in his rejection of Mr. Clarke's evidence. At para. 114 of his reasons, the trial judge observed that "[a] serious issue in this case is the fact that in his expert report, Mr. Clarke did not take the SAP document into account" and concluded, at para. 117, that "Mr. Clarke's failure to take the SAP into account in his expert report renders his expert report incomplete".

[71] The finding that Mr. Clarke did not take the data in the SAP document into account is contrary to the evidence.

[72] First, it was on the basis of the SAP records that Mr. Clarke initially opined that the \$2.25 million had been deferred. His Original Report contains the following statements:

#### II - Executive Summary and Conclusions

The CoreSim Shareholders allege that Celestica deferred between \$2.5 million and \$2.7 million in revenues from the 2008 fiscal year to the first two quarters of Celestica's 2009 fiscal year. The effect of the revenue deferral was to reduce the EBIAT such that no further earn-out amount was owed to the CoreSim shareholders.



Our analysis of the revenues and expenditures for the NEC PST project as recorded in the general ledger (*referred to as SAP lines information*) reflected an understatement of revenues in the 2008 fiscal year end of approximately \$2.2 million. The understatement consisted of an under billing for work to the end of fiscal 2008 of approximately \$2.7 million less 2008 accrued revenue of approximately \$0.5 million. [Emphasis added.]

#### IV – Scope of Review

##### *Information Relied Upon*

During the course of this assignment we have reviewed and relied upon the following information:

- i) A copy of the spreadsheet titled “NEC PL HC Ottawa from celine.xls”

#### V – Background

##### *NEC PL HC Ottawa from celine*

The *NEC PL HC Ottawa from celine* (the “NEC PL”) spreadsheet was provided to us. The NEC PL is the internal Celestica accounting record for the PST project. *The spreadsheet includes the detailed SAP (Celestica’s accounting software) accounting output related to Celestica’s GCS Division, which includes all North American design sites, including Ottawa and the NEC PST project.* [Emphasis added.]

The spreadsheet reports quarterly P&Ls for the NEC project for all of Celestica’s sites servicing the NEC contract including NEC Ottawa. In addition, to the P&L, *the spreadsheet contains the detailed SAP lines (or general ledger account details) for PST contract transactions specific to NEC Ottawa. The quarterly P&L account totals for NEC Ottawa can be agreed to the*

*total SAP lines related to that account number in the SAP Line detail for the same quarter. We note that the NEC Project entries start in mind-January 2008. [Emphasis added.]*

[73] Secondly, it is quite clear from Mr. Clarke's testimony at trial – both in chief and in cross-examination – that he did in fact rely on the SAP documents in formulating his opinions. Counsel for Celestica at trial appears to have accepted this and was careful to clarify that Mr. Clarke's opinion was based on two documents:

Q. Your – your report, fair to say is predominantly based on – on two documents: the NRE Tracker ... You're agreeing with that?

A. Yes, I am.

Q. ... and then the – the SAP lines.

A. Yes.

[74] The trial judge placed considerable emphasis on the difference between the NRE Tracker documents (containing projections only) and the SAP documents (containing actual financial data). In his view, Mr. Clarke had not taken the latter into account. The appellant's counsel at trial conceded that, if that were the case, it would undermine Mr. Clarke's opinion. However, the foregoing excerpts from the Original Report and the testimony at trial confirm that that was not the case. The trial judge mistakenly found that it was.

The Failure to Consider Mr. Tareque's Affidavit

[75] Mistaken, too, was the trial judge's conclusion that Mr. Clarke's report could not be said to be "entirely comprehensive" because, among other things, "he did not review ... the affidavit of the defendant's finance controller Mr. Tareque" before preparing it.

[76] However, Mr. Clarke could not have reviewed Mr. Tareque's affidavit at the time he prepared his Original Report because Mr. Tareque's affidavit had not yet been sworn. Mr. Clarke's Supplementary Report – prepared after disclosure by Celestica of the new NRE Tracker ver. 17 – refers specifically to Mr. Tareque's affidavit. Mr. Clarke's testimony at trial confirmed this and, indeed, he was cross-examined at some length about what he had or had not done following receipt of a copy of the affidavit.

NRE Tracker ver.17 (new)

[77] Finally, the trial judge's failure to consider the significance of the revised NRE Tracker ver. 17, on which Mr. Clarke's Supplementary Report was based, significantly undermines his findings on this issue as well. He makes no reference to the new version in this part of his analysis.

[78] Central to the trial judge's finding that the threshold for triggering the Earn-Out Payment had not been met was his view that "Mr. Clarke did not take the SAP document into account" but instead relied on the NRE Tracker ver. 17 which

“[was] a cost projection document only” whereas “the SAP document [was] the document to rely on to find out what happened financially”. For the reasons explained above, the first of these findings is incorrect. The second is as well.

[79] The trial judge appears to have been under the misapprehension that Mr. Tareque’s evidence in his affidavit and at trial established that all of the NRE Tracker documents were projections. However, that is not the case.

[80] It may well be that earlier versions of the NRE Tracker were based on projections to be used as project management tools because they came from the project manager. Whatever may have been the case with earlier versions of the NRE Tracker documents, however, the NRE Tracker ver. 17 (new) was different; on Mr. Tareque’s own evidence, it was prepared by him and it showed *actual* expenses and revenue recognition.

[81] That this is so is clear from Mr. Tareque’s cross-examination on NRE Tracker ver. 17 (new) and on the new information it disclosed:

Q. Okay? Do you recognize this document (NRE Tracker 17 (new))?

A. Yes.

Q. Okay. And the new – the boxes – the bottom three boxes here.

A. Okay.

Q. Okay? *I can tell you they weren't in the previous version of the NRE Tracker version 17.*

A. I think I explained that why – *because the previous versions of the NRE Tracker came from the program officer, not from me.* So the process is we get the NRE Tracker from the program office and then we create at the bottom table so that we can book our accounting entry.

Q. ... *So this is something that you, your team, created, not the project team.*

A. *Bottom part.*

Q. Just the bottom part.

A. Taking their data, the same data, and just summarizing in there *so that we can book accounting entry.*

Q. Okay. So to some degree, you are using the NRE Tracker.

A. We are using NRE Tracker *for recognizing revenue for labour, recognizing revenue for travel, reimbursement – consultant, and to some degree, material.*

Q. And – and the figures that are here, they would be more recent and therefore more accurate than what we would find in version 13.1.

A. Because version 13, December was projected. So...

*Q. And this one now has got figures that were projected then, have now become actual.*

*A. Actual.*

[Emphasis added.]

[82] This was a meaningful admission because it cast the latest NRE Tracker ver. 17 in an entirely different light than the previous versions, which were projections only. NRE Tracker ver. 17 (new) recorded actual financial information, not projections. Given the importance placed by the trial judge on the distinction between relying on documents that were projections only (the previous NRE Tracker documents) and on those that provided actual financial data (the SAP documents), this development – and the fact that NRE Tracker ver. 17 (new) showed understated revenues of a little over \$1 million in the fourth quarter of 2008 – may well have changed his views on the evidence of Mr. Clarke and on the appellant's arguments. In Mr. Clarke's opinion, the application of these additional revenues to the calculation of the Earn-Out Amount would have been sufficient to trigger the Earn-Out Payments.

#### Remedy in Relation to the Threshold Issue

[83] I have concluded that the trial judge's misapprehension of the evidence led him into palpable and overriding error on two of the main factual pillars underlying his acceptance of Mr. Tareque's evidence over that of Mr. Clarke: his finding that Mr. Clarke did not take the SAP documents into account in arriving at

his opinion; and his finding that Mr. Clarke failed to consider the affidavit evidence of Mr. Tareque, Celestica's main witness on this issue. In addition, the trial judge's failure to consider the newest version of NRE Tracker ver. 17 and to recognize its difference from earlier versions and its potential significance for the "deferral-of-revenue" argument may well have affected his assessment of the competing testimonies of Mr. Clarke and Mr. Tareque as well.

[84] At the very least, these errors call into question the trial judge's findings and conclusions in determining whether the threshold for payment of the Earn-Out Amounts had been met. In my opinion, those findings and conclusions must be set aside.

[85] That said, I do not think this Court is in the position to substitute its own view on whether the threshold has been met. It is one thing to conclude that the trial judge's findings on the assessment of the evidence should be set aside. It is quite another thing for an appellate court to speculate on what different findings may have been made or, indeed, whether the findings would ultimately have been different if it cannot be clearly determined on the record. Here, it cannot be determined on the record. Mr. Clarke and Mr. Tareque were each cross-examined effectively by opposing counsel and there may be issues arising with respect to the testimony of each of them, as well as with respect to the calculation of the Total EBIAT itself.

[86] As a result, I would set aside the trial judge's ruling that the threshold necessary to trigger the Earn-Out Payment had not been met, even if the total NEC Project EBIAT were included in the Total EBIAT Amount. And I would order a new trial for the determination of that issue alone.

Choosing Between an Expert and a Non-Expert Witness

[87] In light of the foregoing conclusions it is not necessary to deal with the discrete issues raised by the appellants with respect to whether the trial judge erred in law in favouring the evidence of a non-expert witness over that of an expert witness. The trial judge erred in misapprehending the evidence, as explained above. That error is sufficient to dispose of the appeal.

**DISPOSITION**

[88] For the foregoing reasons, the appeal is allowed, the order of the trial judge is set aside, and judgment is granted:

- (a) declaring that the total NEC Project EBIAT is to be included in the calculation of the Total EBIAT Amounts for purposes of determining the appellant Whiteside's entitlement to Earn-Out Payments and the corporate appellant's entitlement to its contractual percentage of any such Earn-Out Payments;



(b) setting aside the trial judge's finding that, even if the total NEC Project EBIAT were included in the calculation of the Total EBIAT Amounts, the thresholds necessary to trigger the Earn-Out Payments had not been met, and directing a new trial for the determination of that issue; and

(c) declaring that the appellant Whiteside is to be paid his *pro rata* share of any Earn-Out Payments found to be payable under the Share Purchase Agreement, and that the appellant, 307 Canada is to be paid 15% of any such Earn-Out Payments.

[89] We were provided with draft bills of costs by counsel for each party. However, in view of the disposition above – if they are unable to agree – the parties may make brief further submissions as to costs, not to exceed four pages in length, within two weeks of the release of these reasons.

Released: May 23, 2014  
(R.A.B.)

“R.A. Blair J.A.”  
“I agree David Watt J.A.”  
“I agree P. Lauwers J.A.”

Court of Appeal File No.: COA-25-CV-0659

Court File No.: CV-24-00715321-00CL

CONSTANTINE ENTERPRISES INC. -and- MIZRAHI (128 HAZELTON) INC., ET AL

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**ONTARIO COURT OF APPEAL**

Proceeding commenced at TORONTO

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**BOOK OF AUTHORITIES  
OF THE APPELLANT, DAVID BERRY**

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