No. S-250121
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36

BETWEEN:

KINGSETT MORTGAGE CORPORATION

PETITIONER

AND:

LUMINA ECLIPSE LIMITED PARTNERSHIP
BETA VIEW HOMES LTD.
LUMINA ECLIPSE GP LTD.
and
D-THIND DEVELOPMENT BETA LTD.

RESPONDENTS

BOOK OF AUTHORITIES (APPLICANTS)

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June 15, 2026 at 10:00 a.m., Vancouver
Time estimate: 4 days
To be heard before Justice Masuhara
Book of Authorities provided by the Applicants

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RESPONDENTS

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Agreements void for non-compliance

23 (1) Subject to subsection (2), a purchase agreement in relation to a development unit is not enforceable against the purchaser by a developer who has breached any provision of Part 2 *[Marketing and Holding Deposits]*.

(2) A purchase agreement in relation to a development unit is enforceable against the purchaser if either of the following applies to each of the developer's breaches of Part 2:

(a) the breach involves a disclosure statement that does not comply with the Act or the regulations, but there is no misrepresentation in the disclosure statement concerning a material fact that was or would have been reasonably relevant to the purchaser in deciding to enter into the purchase agreement;

(b) the breach involves a disclosure statement that includes a misrepresentation concerning a material fact, but the developer was not aware of the misrepresentation at the time the purchaser and the developer entered into the purchase agreement and the misrepresentation is corrected in an amendment to the disclosure statement to which both of the following apply:

(i) the amendment is filed with the superintendent no later than 30 days after the developer becomes aware of the misrepresentation and the amendment is provided to the purchaser within a reasonable time after filing, as required by section 16 (1) (b) *[non-compliant disclosure statements]*;

(ii) the amendment is filed with the superintendent and provided to the purchaser no later than 14 days before the date on which the purchase agreement requires the developer to transfer to the purchaser title or the other interest for which the purchaser has contracted.

Early marketing with permission

10 (1) Despite sections 4 to 9 *[subdivision lots and bare land strata lots to shared interests in land outside B.C.]*, a developer may market a development unit if the developer has obtained both

(a) approval in principle to construct or otherwise create the development unit from the appropriate municipal or other government authority, and

(b) the superintendent's permission to begin marketing.

(2) In relation to a permission given under subsection (1) (b), the superintendent may

(a) attach conditions to the permission, and

(b) at any time, revoke the permission.

(3) The superintendent may publish, in accordance with the regulations, a policy statement setting out circumstances in which permission will be deemed to be granted under subsection (1) (b) to developers who are described by the circumstances set out in the notice.

(4) If the superintendent publishes a policy statement under subsection (3), a developer who is described by the circumstances set out in the policy statement

(a) is deemed to have the superintendent's permission under subsection (1) (b), and

(b) must comply with the terms and conditions, if any, that are stated in the policy statement.

Filing disclosure statements

14 (1) A developer must not market a development unit unless the developer has

(a) prepared a disclosure statement respecting the development property in which the development unit is located, and

(b) filed with the superintendent

(i) the disclosure statement described under paragraph (a), and

(ii) any records required by the superintendent under subsection (3).

(2) A disclosure statement must

(a) be in the form and include the content required by the superintendent,

(b) without misrepresentation, plainly disclose all material facts,

(c) set out the substance of a purchaser's rights to rescission as provided under section 21 *[rights of rescission]*, and

(d) be signed as required by the regulations.

(3) A developer must provide to the superintendent any records the superintendent requires to support any statement contained in the disclosure statement filed under subsection (1).

(4) Without limiting section 16 *[non-compliant disclosure statements]*, if a developer markets development units in phases, the developer, before marketing each successive phase, must file with the superintendent an amendment to a disclosure statement submitted in respect of the previous phase.

(4.1) Despite subsection (4), a developer who markets development units in a successive phase of a strata plan that is the subject of a Phased Strata Plan Declaration under the *Strata Property Act* need not file an amendment to a disclosure statement if both of the following apply:

(a) the developer files a phase disclosure statement under section 15.1 *[phase disclosure statements]* before marketing development units in the successive phase;

(b) the developer does not market any development units in any previous phase of the development property.

(5) On a person's payment of the prescribed fee, the superintendent must

(a) permit the person to inspect, at the superintendent's office and during regular business hours, a disclosure statement filed under this section, and

(b) provide a copy of a disclosure statement filed under this section, or a copy of part of it, to a person who requests it.

Providing disclosure statements to purchasers

15 (1) A developer must not enter into a purchase agreement with a purchaser for the sale or lease of a development unit unless

(a) a copy of the disclosure statement prepared in respect of the development property in which the development unit is located has been provided to the purchaser,

(b) the purchaser has been afforded reasonable opportunity to read the disclosure statement, and

(c) the developer has obtained a written statement from the purchaser acknowledging that the purchaser had an opportunity to read the disclosure statement.

(2) A developer must

(b) in every other case, the content of the first disclosure statement in relation to the development property filed by the developer as modified by any subsequently filed amendment to the first filed disclosure statement.

(3) Despite any provision in this Act or the regulations, but subject to subsection (4), if a developer provides a consolidated disclosure statement to a new purchaser, the developer need not provide to the new purchaser

(a) the first disclosure statement filed in relation to the development property by the developer,

(b) the phase disclosure statement in a case where the consolidated disclosure statement is in relation to a phase of a development property with respect to which a phase disclosure statement has been filed,

(c) any amendments to a disclosure statement filed prior to or at the same time as the filing of the consolidated disclosure statement, or

(d) any consolidated disclosure statement previously filed in relation to the development property.

(4) A new purchaser who receives a consolidated disclosure statement may request in writing a copy of any disclosure statement referred to in subsection (3) (a), (b), (c) or (d), and the developer must provide to the new purchaser, without charge, a copy of the disclosure statement no later than 30 days after receipt of the request.

Non-compliant disclosure statements

16 (1) If a developer becomes aware that a disclosure statement does not comply with the Act or regulations, or contains a misrepresentation, the developer must immediately

(a) file with the superintendent, as applicable under subsection (2) or (3),

(i) a new disclosure statement, or

(ii) an amendment to the disclosure statement that clearly identifies and corrects the failure to comply or the misrepresentation, and

(b) within a reasonable time after filing a new disclosure statement or an amendment under paragraph (a), provide a copy of the disclosure statement or amendment to each purchaser

(i) who is entitled, at any time, under section 15 *[providing disclosure statements to purchasers]* to receive the disclosure statement, and

(ii) who has not yet received title, or the other interest for which the purchaser has contracted, to the development unit in the development property that is the subject of the disclosure statement.

(2) A developer must file a new disclosure statement under subsection (1) (a) (i) if the failure to comply or misrepresentation referred to in that subsection

(a) is respecting a matter set out in paragraph (b) or (c) of the definition of "material fact" in section 1 *[definitions]*,

(b) is respecting a matter set out in paragraph (d) of the definition of "material fact" in section 1, and the regulation prescribing the matter specifies that a new disclosure statement must be filed if subsection (1) of this section applies, or

(c) is of such a substantial nature that the superintendent gives notice to the developer that a new disclosure statement must be filed.

(3) A developer must file an amendment to the disclosure statement under subsection (1) (a) (ii) in any case to which subsection (2) does not apply.

(4) A developer who is required to file a new disclosure statement or an amendment under subsection (1) must not market a development unit in the development property that is the subject of the new disclosure statement or amendment

(a) until the developer has complied with subsection (1) (a), or

(b) unless permitted by the superintendent.

Superintendent under no duty

17 The superintendent is not under any duty to determine any of the following:

(a) the merits of any statement contained in a disclosure statement;

(b) whether a disclosure statement contains a misrepresentation;

(c) whether a disclosure statement filed with the superintendent, or the information contained in it, meets the requirements of this Act and the regulations.

Division 5 — Deposits

Handling deposits

18 (1) A developer who receives a deposit from a purchaser in relation to a development unit must promptly place the deposit with a brokerage, lawyer, notary public or prescribed person who must hold the deposit as trustee in a trust account in a savings institution in British Columbia.

(2) A trustee under subsection (1) holds the deposit for the developer and the purchaser and not as an agent for either of them and must not release the deposit from trust except as follows:

(a) if the money was paid into the trust account in error;

(b) to the purchaser with the written consent of the purchaser and the developer;

(c) in accordance with subsection (3) or (4);

(d) in accordance with section 19 *[developer use of deposit]* of this Act;

(e) in accordance with section 21 *[rights of rescission]* of this Act;

(f) in accordance with section 32 *[unclaimed money held in trust]* of the *Real Estate Services Act*;

(g) in accordance with section 33 *[payment of trust funds into court]* of the *Real Estate Services Act*;

(h) in accordance with a court order;

(i) in accordance with the regulations under this Act.

(3) A trustee under subsection (1) must release the deposit to the developer if the developer certifies in writing that

(a) the purchaser who paid the deposit has no right to rescission under section 21 *[rights of rescission]*,

(b) if required, the subdivision plan, strata plan or other plan has been deposited in the appropriate land title office,

(c) the approvals required for the lawful occupation of the development unit have been obtained, and

"deposit" means money paid by a purchaser to a developer in relation to a development unit before the purchaser acquires title or any other interest in the development unit;

"developer" means a person who, directly or indirectly, owns, leases or has a right to acquire or dispose of development property, unless the person is, or is in a class of persons which is, excluded by regulation;

"development property" means any of the following:

(a) 5 or more subdivision lots in a subdivision, unless each lot is 64.7 ha or more in size;

(b) 5 or more bare land strata lots in a bare land strata plan;

(c) 5 or more strata lots in a stratified building;

(d) 2 or more cooperative interests in a cooperative association;

(e) 5 or more time share interests in a time share plan;

(f) 2 or more shared interests in land in the same parcel or parcels of land;

(g) 5 or more leasehold units in a residential leasehold complex;

"development unit" means any of the following in a development property:

(a) a subdivision lot;

(b) a bare land strata lot;

(c) a strata lot;

(d) a cooperative interest;

(e) a time share interest;

(f) a shared interest in land;

(g) a leasehold unit;

"director" means

(a) in the case of a corporation as defined in the *Business Corporations Act*, a director as defined in that Act, and

(b) in the case of a partnership or other entity,

(i) a person who holds the title of director, and

(ii) a person who, by whatever name designated, performs the functions of a director of a corporation;

"disclosure statement" means a statement that discloses material facts about a development property, prepared in accordance with section 14 (2) *[filing disclosure statements]*, and includes a consolidated disclosure statement, a phase disclosure statement and an amendment made to a disclosure statement;

"market" means

(a) to sell or lease,

(b) to offer to sell or lease, and

(c) to engage in any transaction or other activity that will or is likely to lead to a sale or lease;

"material fact" means, in relation to a development unit or development property, any of the following:

(a) a fact, or a proposal to do something, that affects, or could reasonably be expected to affect, the value, price, or use of the development unit or development property;

(b) the identity of the developer;

(c) the appointment, in respect of the developer, of a receiver, liquidator or trustee in bankruptcy, or other similar person acting under the authority of a court;

(d) any other prescribed matter;

"misrepresentation" means

(a) a false or misleading statement of a material fact, or

(b) an omission to state a material fact;

"purchase agreement" means a contract of purchase and sale or a contract to lease;

"purchaser" means

(a) a purchaser, from a developer, of a development unit,

(b) a lessee, from a developer, of a development unit, and

(c) a prospective purchaser or lessee, from a developer, of a development unit;

4.3 Existing Encumbrances and Legal Notations

List and describe briefly all encumbrances and legal notations registered against title to the development property or a development unit. Explain the arrangements by which financial charges will be removed from title. Attach a copy of any encumbrance that significantly restricts use or occupation of any strata lot as an Exhibit.

NOTE: *Ordinarily, general encumbrances, such as easements for the supply of water, electricity, telephone or other services, do not significantly restrict the use or occupation of strata lots. Consequently, it is only necessary to provide a brief description of such encumbrances. In contrast, encumbrances such as restrictive covenants that impose age, use or occupancy restrictions are significant. Accordingly, in addition to providing a brief description, a copy of the encumbrance should be attached as an Exhibit. It is permissible to attach a copy of the relevant pages of the encumbrance if the encumbrance is lengthy.*

4.4 Proposed Encumbrances

List and describe briefly all encumbrances that the developer proposes to register against title to the development property or a development unit. Attach a copy of any encumbrance that will significantly restrict use or occupation of any strata lot as an Exhibit.

NOTE: *See previous NOTE.*

4.5 Outstanding or Contingent Litigation or Liabilities

Describe any outstanding or contingent litigation or liabilities in respect of the development property or against the developer that may affect the strata corporation or strata lot owners.

4.6 Environmental Matters

Disclose all material facts related to flooding, the condition of soil and subsoil or other environmental matters affecting the development property.

5 Construction and Warranties

5.1 Construction Dates

For the purposes of this section:

“commencement of construction” means the date of commencement of excavation in respect of construction of an improvement that will become part of a development unit within the development property, and where there is no excavation it means the date of commencement of construction of an improvement that will become part of a development unit within the development property;

“completion of construction” means the first date that a development unit within the development property may be lawfully occupied, even if such occupancy has been authorized on a provisional or conditional basis; and

“estimated date range” means a date range, not exceeding three months, for the commencement of construction or the completion of construction.

State either the actual date of commencement of construction if it has already occurred or an estimated date range of commencement of construction if it has not already occurred.

State either the actual date of completion of construction if it has already occurred or an estimated date range of completion of construction if it has not already occurred.

5.2 Warranties

Describe any construction or equipment warranties.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *299 Burrard Residential Limited Partnership v. Essalat,* 2012 BCCA 271

Date: 20120621
Docket: CA039297

Between:

299 Burrard Residential Limited Partnership

Respondent
(Plaintiff)

And

Soroor Essalat

Appellant
(Defendant)

Before: The Honourable Mr. Justice Donald
The Honourable Madam Justice Kirkpatrick
The Honourable Mr. Justice Hinkson

On appeal from: Supreme Court of British Columbia, July 26, 2011
(*299 Burrard Residential Limited Partnership v. Essalat*, 2011 BCSC 996, Docket S102499)

Counsel for the Appellant:	B. G. Baynham, Q.C. and J. E. Shragge
Counsel for the Respondent:	S. D. Coblin and C. Ellett
Place and Date of Hearing:	Vancouver, British Columbia May 14, 2012
Place and Date of Judgment:	Vancouver, British Columbia June 21, 2012

Written Reasons by:
The Honourable Mr. Justice Donald

Concurred in by:
The Honourable Madam Justice Kirkpatrick
The Honourable Mr. Justice Hinkson

Reasons for Judgment of the Honourable Mr. Justice Donald:

[1] Judgment for the full deposit on a luxury condominium in Vancouver, $1,136,000, was granted to the respondent developer: 2011 BCSC 996.

[2] The purchaser appeals on the ground that the trial judge wrongly interpreted and applied the disclosure requirements in the *Real Estate Development Marketing Act*, S.B.C. 2004, c. 41 (hereafter *REDMA*) which in s. 23 renders an agreement to purchase a development unit unenforceable if the requirements in Part 2 of the *Act* are breached.

[3] *REDMA* requires the filing of a Disclosure Statement with the Superintendent of Real Estate, setting out commencement and completion dates of the development, as well as delivery of the Statement to a purchaser or a prospective purchaser. Here, the problem is with the completion date.

[4] When the appellant entered into an agreement to buy the unit in August 2007, the respondent had known since March of that year that completion would be later than September 2009, the date given in the Disclosure Statement. The respondent did not subsequently amend the Statement to revise the date.

[5] The judge, drawing on the reasoning in *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23, [2011] 2 S.C.R. 175, found that, in the circumstances of this case where the appellant received informal notice that completion would be later than that originally estimated, the Statement was not "false or misleading" within the meaning of *REDMA*. Consequently, he held that the agreement to purchase was enforceable, notwithstanding the incorrect completion date in the Statement.

[6] In my respectful opinion, the judge erred in using *Sharbern* to interpret the phrase "false or misleading" when the phrase is clearly defined in *REDMA* and in considering the individual circumstances of the case contrary to this Court's decision in *Chameleon Talent Inc. v. Sandcastle Holdings Ltd.*, 2010 BCCA 300. In

Chameleon, the Court rejected the notion that informal notice of a change in completion date was a relevant consideration and held that *REDMA* required formal amendment to the statement, otherwise the purchase agreement was unenforceable.

Factual Background

[7] The judge provided this chronology of events:

> [5] The Purchase Agreement was signed long before the Unit was built. The plaintiff was able to enter into the Purchase Agreement pursuant to the *Real Estate Development Marketing Act*, S.B.C. c. 41 [*REDMA*]. In accordance with the requirements of *REDMA*, the plaintiff filed a disclosure statement (the "Disclosure Statement") on May 12, 2006 and the first and only amendment thereto on December 6, 2006. As I will elaborate on later in these reasons, Ms. Essalat was given a copy of both the Disclosure Statement and the amendment on August 12, 2007, prior to signing the Purchase Agreement.
>
> [6] On August 12, 2007, Ms. Essalat signed an offer to purchase the Unit. The price was $5,680,000 plus G.S.T. of $339,948, making the total amount payable $6,019,948.
>
> [7] On August 13, 2007 the plaintiff formally accepted the offer, which then became the Purchase Agreement.
>
> [8] The Purchase Agreement called for Ms. Essalat to pay a total deposit of $1,136,000 in five instalments on the dates set out in an addendum executed at the same time as the Purchase Agreement. Ms. Essalat paid an instalment of $100,000 on account of the deposit on August 12 and a further instalment of $184,000 on November 19, 2007, but made no further payments.
>
> [9] On April 4, 2008 the parties executed a further addendum to the Purchase Agreement postponing the dates on which the remaining instalments of the deposit were to be paid, but as stated above, Ms. Essalat did not make any of these payments.
>
> [10] On November 26, 2009 the plaintiff gave notice to Ms. Essalat pursuant to the Purchase Agreement that the closing date for the purchase of the Unit would be January 18, 2010.
>
> [11] On January 13, 2010 the closing date was postponed by the plaintiff to a date of which Ms. Essalat would be notified before January 18, 2010, as permitted in the Purchase Agreement.
>
> [12] On January 15, 2010 the plaintiff gave notice that the closing date would be January 27, 2010. On January 25, 2010 the City of Vancouver issued an occupancy permit for the Unit.

> [13] Ms. Essalat refused to close the purchase of the Unit on the stipulated closing date of January 27, 2010.
>
> [14] The plaintiff then began these proceedings seeking forfeiture of the full deposit that Ms. Essalat had agreed to pay. Counsel for both parties are agreed that if the Purchase Agreement is found to be enforceable against Ms. Essalat, the plaintiff is entitled to judgment for the full amount of the agreed deposit in full satisfaction of all claims against Ms. Essalat.

[8] Additional and dispositive facts going to informal notice are set out in the conclusory part of the judge's reasons:

> [82] On the evidence before me I conclude that by March 2007 the plaintiff had sufficient information in its hands to conclude that final completion of the project would probably occur in November or December 2009. This appears to be the effect of a construction schedule dated March 12, 2007. It is also consistent with what Mr. Feizi [the appellant's spouse] says he was told by Ms. Kai [the respondent's sales agent] in August 2007 when the Purchase Agreement was signed. This anticipated completion date appears to have been consistent throughout the period from March, 2007 to September 25, 2009. On that date the plaintiff issued a newsletter stating that the anticipated completion date was expected to be December 2009.

[9] The judge's view of the circumstances, as appreciated in light of *Sharbern*, immediately followed:

> [83] Given these findings can it be said that the statement contained in the Disclosure Statement was false or misleading? In the circumstances of this case I do not think so. I think that the facts of this case are distinguishable from those of *Chameleon Talent* and *Maguire* [*Maguire v. Revelstoke Mountain Resort Limited Partnership*, 2010 BCSC 1618] in certain important respects.
>
> [84] The most important distinguishing circumstance is that in this case there is no evidence that the delay that was experienced was in any way unusual or arose from anything other than the normal construction delays that a person would reasonably expect to be encountered in a construction project of this scale. I also note that the expected delay from September 2009 to December 2009 represented an increase of less than 10% of the original anticipated construction duration of 38 months.

Issues

[10] The appellant alleges the following errors:

> [1.] The trial judge erred in law by failing to follow the analytical approach that this court set out in *Chameleon Talent Inc. v. Sandcastle Holdings Ltd.*, 2010 BCCA 300, to assess whether the erroneous

> construction completion date disclosed by the Respondent was a "misrepresentation". As a consequence, the trial judge wrongly determined that section 16(1)(a)(ii) of the *REDMA* had no application in the present circumstances and, therefore, the Respondent had been under no obligation to issue an amendment to the disclosure statement that clearly identified and corrected the completion date.
>
> [2.] The trial judge further erred in law by applying the common law test for materiality, formerly used to assess an alleged "material false statement" under section 75(2)(b) of the *Real Estate Act*, R.S.B.C. 1996, c. 397 [rep. 2004, c. 42, s. 146], instead of applying the statutory test for "misrepresentation" as set out in section 1 of the *REDMA*, i.e., "a false or misleading statement of a material fact".

[11] A subsidiary issue is the question of what constitutes a reasonable margin of error in estimating completion dates.

Relevant Enactments

[12] The scheme under *REDMA* provides that a developer prepare and file a Disclosure Statement with the Superintendent:

> 14 (1) A developer must not market a development unit unless the developer has
>
> (a) prepared a disclosure statement respecting the development property in which the development unit is located, and
>
> (b) filed with the superintendent
>
> (i) the disclosure statement described under paragraph (a), and
>
> (ii) any records required by the superintendent under subsection (3).
>
> (2) A disclosure statement must
>
> (a) be in the form and include the content required by the superintendent,
>
> (b) without misrepresentation, plainly disclose all material facts, ...

[13] A developer must file an amendment to the Statement "immediately" after becoming aware that the Statement contains a misrepresentation:

> 16 (1) If a developer becomes aware that a disclosure statement does not comply with the Act or regulations, or contains a misrepresentation, the developer must immediately

> (a) file with the superintendent, as applicable under subsection (2) or (3),
>
> (i) a new disclosure statement, or
> (ii) an amendment to the disclosure statement that clearly identifies and corrects the failure to comply or the misrepresentation, and
>
> (b) within a reasonable time after filing a new disclosure statement or an amendment under paragraph (a), provide a copy of the disclosure statement or amendment to each purchaser
>
> (i) who is entitled, at any time, under section 15 [*providing disclosure statements to purchasers*] to receive the disclosure statement, and
> (ii) who has not yet received title, or the other interest for which the purchaser has contracted, to the development unit in the development property that is the subject of the disclosure statement.

[14] The term “misrepresentation” is defined in s. 1:

> “misrepresentation” means
>
> (a) a false or misleading statement of a material fact, or
>
> (b) an omission to state a material fact;

[15] The phrase “material fact” is also defined in s. 1:

> “material fact” means, in relation to a development unit or development property, any of the following:
>
> (a) a fact, or a proposal to do something, that affects, or could reasonably be expected to affect, the value, price, or use of the development unit or development property;
>
> (b) the identity of the developer;
>
> (c) the appointment, in respect of the developer, of a receiver, liquidator or trustee in bankruptcy, or other similar person acting under the authority of a court;
>
> (d) any other prescribed matter;

[16] The Superintendent published a Policy Statement setting out the form and content of the Disclosure Statement as contemplated in s. 14(2)(a) which contains the following relevant passages:

> 3. Form and Content of the Disclosure Statement
>
> Form 1 sets out the form and content required under section 14 of the Act for disclosure statements filed in relation to strata lots contained in

a stratified building. **The information contained in each disclosure statement must be set out in the order contained in Form 1. If a section does not apply to a particular development property, the section must state "not applicable".** Sections and subsections may be added by a developer, as required, to meet the developer's obligation to disclose plainly all material facts.

NOTE: *If a change occurs that would have the effect of rendering a statement false or misleading or that brings into being a fact or proposal which should have been disclosed if the fact or proposal had existed at the time of filing, section 16 of the Act requires developers to file an amendment to the disclosure statement. If the change is in respect of the identity of the developer or the appointment of a receiver, liquidator, trustee in bankruptcy or other person, in respect of the original developer, then the new developer, who has the right to acquire or dispose of the development property, must file its own new disclosure statement.*

* * *

[From Form 1:]

5 Construction and Warranties

5.1 Construction Dates

State the actual or estimated dates of commencement and completion of construction.

[17] *Sharbern* dealt with s. 75 of the *Real Estate Act*, R.S.B.C. 1996, c. 397, the predecessor legislation of *REDMA*. The *Act* required the filing of a prospectus for the sale of certain interests in a real estate development. Section 75 provided a right of action to compensate for losses due to "any material false statement" in the prospectus:

75 (1) In this section, "prospectus" includes every statement and report and summary of report required to be filed with the prospectus under this Part.

(2) If a prospectus has been accepted for filing by the superintendent under this Part,

(a) ...

(b) if any material false statement is contained in the prospectus,

(i) every person who is a director of the developer at the time of the issue of the prospectus,
(ii) every person who, having authorized the naming, is named in the prospectus as a director of the developer,
(iii) every person who is a developer, and
(iv) every person who has authorized the issue of the prospectus

> is liable to compensate all persons who have purchased the subdivided land, shared interests in land or time share interests for any loss or damage those persons may have sustained, ...

[18] The *Real Estate Act* did not define "material false statement".

Discussion

[19] *Sharbern* was decided after *Chameleon*. The trial judge in the present case considered himself bound by *Sharbern*'s analysis of what constitutes a material false statement. He wrote:

> [87] I have also concluded that *Sharbern* requires me to take into account all surrounding circumstances in determining whether there has been a misrepresentation in this case. The fourth consideration set out in paragraph 61 of *Sharbern* makes it clear that I must consider the total mix of information made available to purchasers. In this case Mr. Feizi, who was agreed to be Ms. Essalat's agent for all purposes, confirmed that he was informed prior to the Purchase Agreement being executed that a December completion was likely. In cross examination he conceded that he had no complaint about the date on which the Unit was completed and ready for occupancy. In addition, when the plaintiff sent out a newsletter to all purchasers informing them of the December completion date, no complaints were received from any purchaser.

[20] The judge failed to recognize that in *Sharbern* the Supreme Court of Canada had to formulate a test for the key phrase in the absence of a statutory definition, whereas in *REDMA* the Legislature expressly covered both materiality and falsity in the definition section. *Sharbern* was not a binding precedent.

[21] Moreover, this Court, in *Chameleon*, negated the relevance of individual circumstances on the logic that a misrepresentation of a material fact refers not to the state of mind of the purchaser but to the nature of the Disclosure Statement. Mr. Justice Lowry, writing for the Court, put it this way in *Chameleon*:

> [12] As indicated, a "material fact" is a defined term: a fact, or a proposal to do something, that affects or could reasonably be expected to affect the price, value, or use of a unit. Under the *Act*, a disclosure statement must plainly disclose all material facts. It must be in the prescribed form which specifically requires disclosure of the actual or estimated construction commencement and completion dates. Quite apart from what the principals of Chameleon may have known, the dates fell within the definition of material facts. They had to be disclosed as they initially were in the statement filed in

> June 2006. They did not become any less material by virtue of anything any one or more purchasers or prospective purchasers may have known. The requirements imposed on a developer under the *Act* to file and deliver disclosure statements, and amendments to such, disclosing material facts cannot turn on the knowledge possessed by any given purchaser or prospective purchaser.

[22] On the rule of *stare decisis*, the judge was bound to follow this decision.

[23] Neither is there any room for argument that an incorrect completion date is not material because of the short time span, here roughly four months, between the estimated and actual dates. Apart from a true *de minimis non curat lex* situation (the law does not concern itself about trifles), which this is not, such an argument was rejected in *Chameleon*:

> [10] It contends the estimated construction commencement and completion dates were not proven to be material facts. Speaking objectively, the judge said a reasonable person would conclude the value or the price of the unit would be affected by a construction delay of several months. The developer says Chameleon adduced no evidence that would support that finding, but common sense dictates that not only the value and price of a condominium unit will be affected by its availability for occupancy (whether by an owner or a lessee) but also the use to which it can be put. The commencement and completion of construction is critical to a unit being used at all. Some delays in the construction of condominium projects may be expected, but it seems to me substantial delays of many months, here extending to a year, will generally be material to purchasers and prospective purchasers in respect of the price to be paid for, the value there may be in, and the use of a condominium unit that is being purchased.

[24] The judgment under appeal also fails to give effect to the language in s. 16(1) of *REDMA* obliging the developer to file an amendment <u>immediately</u> when it becomes aware that the Statement is incorrect on a material fact. As the judge found, the respondent knew in March 2007 that the September 2009 completion date was wrong. Informal updates and newsletters do not satisfy the *Act*.

[25] I agree with the appellant's contention that *REDMA* balances the rigour of the disclosure regime as a consumer protection measure against the flexibility in giving the developer an open opportunity to amend the Statement as often as it is necessary to adjust to unforeseen circumstances. However, the strictness of the filing regime must be maintained in order for the protection to be meaningful to the

consumer. Were there not a filing requirement, disclosure disputes would have to be decided on different versions of who said what to whom. An individualized approach could also lead to inconsistent results for purchasers within the same development, some released from the agreement to purchase, some not, depending on their respective states of mind.

[26] For these reasons, I would allow the appeal, set aside the judgment and dismiss the action. The appellant is entitled to return of the deposit plus accrued interest.

[27] There remains the invitation to give guidance on the appropriate margin for error in estimating the completion date of a development. I would decline the invitation. The Legislature has delegated administrative authority, including rule-making power as to the form and content of Disclosure Statements, to the Superintendent. *REDMA* says what it says and it would not be appropriate in my view to offer an opinion as to what circumstances might lead to a relaxation of a strict regime. Perhaps enough litigation has been fought over the word “estimate” in the Policy Statement that a different approach might be contemplated, but that is for the Superintendent.

“The Honourable Mr. Justice Donald”

I agree:

“The Honourable Madam Justice Kirkpatrick”

I agree:

“The Honourable Mr. Justice Hinkson”

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Pinto v. Revelstoke Mountain Resort Limited Partnership,* 2010 BCSC 422

Date: 20100330
Docket: S094287
Registry: Vancouver

Between:

Marc Pinto

Plaintiff

And

Revelstoke Mountain Resort Limited Partnership

Defendant

- and -

Docket: S094288
Registry: Vancouver

Between:

Yohai Borenstein

Plaintiff

And

Revelstoke Mountain Resort Limited Partnership

Defendant

Before: The Honourable Mr. Justice N. Smith

Reasons for Judgment

Counsel for the Plaintiffs:	A. P. Morrison
Counsel for the Defendant:	G. R. Johnson
Place and Date of Hearing:	Vancouver, B.C. March 3, 2010
Place and Date of Judgment:	Vancouver, B.C. March 30, 2010

[1] The plaintiffs each agreed to buy a unit in a strata title residential building that was not yet under construction. Two years later, they refused to complete the transactions and demanded return of their deposits, saying the developer had not complied with disclosure requirements under the *Real Estate Development Marketing Act*, S.B.C. 2004, c. 41 [*Act*].

[2] The *Act* requires a developer to file a disclosure statement with the superintendent of real estate before marketing units and to provide copies of the disclosure statement to potential purchasers. It also requires the developer to file amendments to the disclosure statement as necessary and to provide copies of those amendments to purchasers who have not yet received title to their units.

[3] The plaintiffs say the defendant developer produced a disclosure statement only after it had began marketing units to them and subsequently failed to provide them with copies of amendments. On a summary trial application pursuant to Rule 18A of the *Rules of Court*, they seek a declaration that the contracts of purchase and sale are unenforceable and an order for return of their deposits.

[4] Although their statements of claim include allegations of breach of contract and misrepresentation, the plaintiffs have given no evidence on this application to suggest that they were misled or that they would have acted differently if they had received the required documents at the appropriate time. They say the *Act* gives them an absolute right to cancel the transaction when the developer fails to comply with the disclosure requirements. If the plaintiffs are successful on this application, their counsel says it will be unnecessary to proceed to trial on the breach of contract or misrepresentation issues.

Background

[5] The strata units at issue are part of a ski resort development. On February 27, 2007, each plaintiff signed a “preferred purchaser reservation agreement”. That agreement, which in each case was accompanied by a $7,500 deposit, referred to an upcoming “selection day” and stated that the developer would allocate “selection

times" on that day. At the allocated selection time, the "preferred purchaser" would have the right to enter into contracts of purchase and sale for up to two strata lots, selecting from those available "after other preferred purchasers with prior selection times have had the opportunity to purchase strata lots". The agreement also stated that:

> ...the number of selection times assigned may exceed the number of available strata lots and the assignment to the preferred purchaser of a selection time does not guarantee that the preferred purchaser will have an opportunity to purchase a strata lot or that any strata lots will be available at the preferred purchaser's assigned selection time.

[6] The preferred purchaser had a right to terminate the agreement for any reason at any time on or before the selection day. A purchaser who terminated the agreement or who did not receive a unit on the selection day was entitled to the return of the $7,500 deposit.

[7] When the plaintiffs signed the reservation agreement, the developer had not yet filed the disclosure statement required by the *Act*. That 147-page document was filed with the superintendent on March 12, 2007. Each plaintiff received a copy of the disclosure statement later in the month and, on March 31, 2007, each plaintiff entered into an agreement of purchase and sale for one unit.

[8] The plaintiff, Marc Pinto, agreed to pay $614,000 for his unit and provided deposits totalling $122,800. The plaintiff, Yohai Borenstein, agreed to a purchase price of $439,000 and paid deposits of $87,800. Those deposits include amounts paid both on and after March 31, 2007, as well as the $7,500 deposits that were provided at the time of the reservation agreements.

[9] Between April 2, 2007, and February 5, 2009, the developer filed seven amendments to the disclosure statement. The plaintiffs say they received the first two amendments, but not the next four, which were filed on various dates in 2008. They say they became aware they had not received those amendments when they received the seventh amendment in February 2009. At about the same time, they

also received a “consolidated disclosure statement”, which presumably incorporated all of the amendments.

[10] In a letter to the developer dated February 13, 2009, Mr. Pinto provided notice of rescission and demanded the return of his deposit. Mr. Borenstein sent a similar letter on February 15, 2009. On March 3, 2009, each plaintiff received a letter from the developer stating that they had been previously notified of a February 26, 2009 completion date and that, as a result of their failure to complete their purchases on that date, the developer was terminating the contracts and retaining their deposits.

The Legislation

[11] The *Act* is consumer protection legislation and one of its central objectives is to ensure that material facts are provided to purchasers when developments are being marketed to them: *Dwane v. Bastion Coast Homes*, 2009 BCSC 726 at para. 69.

[12] The requirement to produce a disclosure statement is contained in s. 14 of the *Act*, which reads in part:

> 14 (1) A developer must not market a development unit unless the developer has
>
> (a) prepared a disclosure statement respecting the development property in which the development unit is located, and
>
> (b) filed with the superintendent
>
> (i) the disclosure statement described under paragraph (a), and
>
> (ii) any records required by the superintendent under subsection (3).
>
> (2) A disclosure statement must
>
> (a) be in the form and include the content required by the superintendent,
>
> (b) without misrepresentation, plainly disclose all material facts,
>
> (c) set out the substance of a purchaser's rights to rescission as provided under section 21 [*rights of rescission*], and
>
> (d) be signed as required by the regulations.

[13] The *Act*'s definition of a "development unit" includes a strata lot, such as those at issue here, and the definition of "development property" includes a building with five or more strata lots. "Market" is defined as:

> "market" means
>
> (a) to sell or lease,
>
> (b) to offer to sell or lease, and
>
> (c) to engage in any transaction or other activity that will or is likely to lead to a sale or lease;

[14] The requirement to deliver a disclosure statement to a purchaser is set out in s. 15(1), which reads:

> 15 (1) A developer must not enter into a purchase agreement with a purchaser for the sale or lease of a development unit unless
>
> (a) a copy of the disclosure statement prepared in respect of the development property in which the development unit is located has been provided to the purchaser,
>
> (b) the purchaser has been afforded reasonable opportunity to read the disclosure statement, and
>
> (c) the developer has obtained a written statement from the purchaser acknowledging that the purchaser had an opportunity to read the disclosure statement.

[15] Purchasers who do not receive disclosure statements have a statutory right of rescission under s. 21(3), which reads:

> 21(3) Regardless of whether title, or the other interest for which a purchaser has contracted, to a development unit has been transferred, if a purchaser is entitled to a disclosure statement in respect of a development property under this Act and does not receive the disclosure statement, the purchaser may rescind, at any time, a purchase agreement of a development unit in that development property by serving a written notice of rescission on the developer.

[16] A "disclosure statement" is defined in the *Act* to include any amendments made to a disclosure statement. Such amendments must be filed when a developer becomes aware that a disclosure statement contains a misrepresentation or does not comply with the *Act* or regulations. In some circumstances, an amendment is insufficient and the developer must file a complete new disclosure statement. Those circumstances are set out in ss. 16(2) and (3) which read:

> (2) A developer must file a new disclosure statement under subsection (1) (a) (i) if the failure to comply or misrepresentation referred to in that subsection
>
> > (a) is respecting a matter set out in paragraph (b) or (c) of the definition of "material fact" in section 1 [*definitions*],
> >
> > (b) is respecting a matter set out in paragraph (d) of the definition of "material fact" in section 1, and the regulation prescribing the matter specifies that a new disclosure statement must be filed if subsection (1) of this section applies, or
> >
> > (c) is of such a substantial nature that the superintendent gives notice to the developer that a new disclosure statement must be filed.
>
> (3) A developer must file an amendment to the disclosure statement under subsection (1) (a) (ii) in any case to which subsection (2) does not apply.

[17] The definition of “material fact” referred to in s. 16(2) reads:

> "material fact" means, in relation to a development unit or development property, any of the following:
>
> > (a) a fact, or a proposal to do something, that affects, or could reasonably be expected to affect, the value, price, or use of the development unit or development property;
> >
> > (b) the identity of the developer;
> >
> > (c) the appointment, in respect of the developer, of a receiver, liquidator or trustee in bankruptcy, or other similar person acting under the authority of a court;
> >
> > (d) any other prescribed matter[.]

[18] Section 16(1)(b) requires the developer to provide copies of new disclosure statements or amendments to purchasers who have not yet received title. This must be done “within a reasonable time after filing a new disclosure statement or an amendment.”

[19] Although amendments and new disclosure statements must both be delivered to purchasers, the two forms of correction give rise to different rights. A purchaser who receives a new disclosure statement has a statutory right to rescind the purchase agreement; a purchaser who receives an amendment does not. Sections 21(1) and (2) read:

> 21 (1) A purchaser does not have a right of rescission under this section
>
> > (a) if the purchaser is not entitled to receive a disclosure statement under this Act, or

> (b) as a result of receiving an amendment to a disclosure statement in respect of a development property, including an amendment described in section 16 (1) (a) (ii) [*non-compliant disclosure statements*], unless the purchaser has not previously received any disclosure statement in respect of that development property.
>
> (2) Regardless of whether title, or the other interest for which a purchaser has contracted, to a development unit has been transferred, a purchaser of the development unit may rescind the purchase agreement by serving written notice of the rescission on the developer within 7 days after the later of
>
> (a) the date that the purchase agreement was made, and
>
> (b) the date that the developer obtained, under section 15 (1) (c) [providing disclosure statements to purchasers], a written statement from the purchaser acknowledging that the purchaser had an opportunity to read
>
> (i) the disclosure statement provided under that section, or
>
> (ii) a new disclosure statement, if any, described in section 16 (1) (a) (i) [*non-compliant disclosure statements*].

[20] In addition to the statutory right of rescission in the circumstances set out in s. 21, the *Act* provides in s. 23 that no purchase agreement is enforceable against a purchaser by a developer who has breached certain provisions of the *Act*, including those relating to disclosure statements. Developers who do not comply with the *Act* are also subject to penalties that may be imposed by the superintendent, including orders to cease marketing units and monetary penalties up to $50,000.

Appropriateness of Rule 18A Determination

[21] On this application, the plaintiffs seek a determination that the purchase agreements are unenforceable or that they are entitled to rescind those agreements. In the circumstances of this case, there is no practical difference between those two statutory remedies, each of which entitles the plaintiffs to the return of their deposits. The plaintiffs do not seek a determination of their common law claims based on misrepresentation and breach of contract. I must therefore consider whether it is appropriate to decide a single issue under Rule 18A.

[22] Although the Rule specifically allows a party to apply for judgment “either on an issue or generally”, this Court and the Court of Appeal have repeatedly said that great caution should be exercised before deciding a single issue in isolation. Some

of the authorities were referred to in *Dwane*, which involved a claim for statutory rescission under the *Act*. The Court found that it was an appropriate case to decide the single issue under Rule 18A.

[23] In this case, the other issues raised by the statements of claim are alternative, rather than additional claims. The damages sought for breach of contract and/or misrepresentation are in an amount equal to the deposits that the plaintiffs seek to recover in the statutory claim. There are no counterclaims or third party proceedings. The facts necessary to decide if the plaintiffs are entitled to the statutory remedies are all before the court, are not in disputed, and are not intertwined with other issues. I therefore find it is appropriate to proceed under Rule 18A.

Discussion

[24] The plaintiffs allege two breaches of the *Act*, either one of which entitles them to have the purchase agreements declared unenforceable or to rescind them. They allege that the developer:

a) marketed units before filing a disclosure statement; and

b) failed to provide copies of some of the amendments to the disclosure statement.

[25] The first allegation raises issues of whether the reservation agreement constituted marketing of units, as opposed to general marketing of the development, and, if so, whether that breach of the *Act* was cured by providing the plaintiffs with the disclosure statement before they entered into purchase agreements. I do not need to decide those issues because I find the plaintiffs are entitled to succeed on the basis of their second allegation.

[26] A disclosure statement must be amended or replaced when the developer becomes aware it contains a misrepresentation or does not comply with the *Act* and its regulations. The misrepresentation or non-compliance will often be created by a change in circumstances or change in plans during the course of development and

construction. The legislature has defined certain categories of changes that are deemed so important they require a new disclosure statement, the delivery of which triggers a statutory right of rescission. These include some, but not all, of the matters the *Act* defines as material facts.

[27] Other changes may be dealt with by amendments, which do not trigger the statutory right of rescission; that does not necessarily mean such changes are unimportant. An amendment is sufficient to deal with changes referred to in paragraph (a) of the definition of material fact, which includes matters affecting "the value, price or use" of the property. Although there is no statutory right of rescission, the information in an amendment may, depending on the circumstances, give the purchaser a common law right of rescission or a claim for damages.

[28] The ability of the purchaser to exercise such rights depends, of course, on the purchaser being made aware of the existence and significance of any amendments. That is why the *Act* requires that the purchaser receive an amendment and requires the document to "clearly identify and correct" the misrepresentation or non-compliance.

[29] In *Dwane*, a disclosure statement had been amended three times before the plaintiff entered into an agreement of purchase and sale. The plaintiff received the original disclosure statement, but not the amendments. When he later visited the partially completed unit, the plaintiff said he discovered that some features were not as had been represented to him. Although the amendments, which he subsequently learned about, had nothing to do with the subject of the alleged misrepresentations, the plaintiff was able to rescind the agreement. The Court said:

> [72] The right of rescission under s. 21(3) is provided to any purchaser who was entitled to a disclosure statement, but did not receive it. Section 1 defines "disclosure statement" to include "any amendment to a disclosure statement". There is nothing in the wording of the legislation, or in the overall scheme of the *REDM Act*, that is inconsistent with a reading of the words "disclosure statement" in s. 21(3) as including amendments.
>
> …
>
> [74] If a disclosure statement has already been amended by the time a purchaser signs a contract, the purchaser should know that fact and know

> what the amendments are, for the simple reason that the purchaser is entitled to know what it is that he or she is purchasing. To require developers to provide copies of existing amendments along with the disclosure statement is not to impose an onerous burden on them, and is consistent with the legislative objective of consumer protection. It is also consistent with that objective to provide a remedy for purchasers, in the form of a right of rescission, where developers have failed to meet their disclosure obligations.

[30] In this case, the amendments came into existence after the plaintiffs entered into an agreement for purchase and sale, but there is nothing in the *Act* to make that a relevant distinction. The requirement to provide a purchaser with amendments continues until title is passed. Just as a purchaser is entitled to know what he or she is purchasing at the outset, he or she is entitled to know of any changes to what he or she is purchasing.

[31] *Dwane* confirmed that, by definition, a failure to deliver amendments is, for the purpose of the rescission right in s. 21(3), no different than a failure deliver the complete disclosure statement. In any case, the failure to deliver an amendment is in itself a breach of the *Act*, which makes the contract unenforceable by operation of s. 23.

[32] Nothing in the *Act* requires a purchaser who does not receive an amendment to demonstrate that the receipt of the amendment would have led to a different course of action. The right of rescission or the right to resist enforcement of the purchase agreement arises automatically on the developer's non-compliance with the *Act*. That, too, is consistent with the purpose of such consumer protection legislation.

[33] In *Hi Hotel Limited Partnership v. Holiday Hospitality Franchising Inc*., 2008 ABCA 276, the Alberta Court of Appeal considered the effect of non-compliance with that province's franchise legislation. The plaintiff received a required disclosure document before entering into a franchise agreement, but the document was not dated and signed as required by the legislation. Although that omission was of no importance to the plaintiff, the plaintiff was still able to exercise a statutory right of rescission after operating the franchise for almost a year.

[34] Although a right of rescission at common law requires the plaintiff to have relied on the misrepresentation, the Court said that requirement is not relevant to a statutory right of rescission:

> [50] Whether signature or dating is mere form, and of no real importance, is not a common-law question to be decided by the courts. It is part of a statute, and not a cryptic one either.

[35] The Court also said the plaintiff's motives for seeking rescission were similarly irrelevant:

> [108] The appellant franchisor also suggests that the respondent franchisee simply rescinded because it was financially advantageous to do so. With respect, that is no answer. That is the inevitable result of any legislation to protect consumers or investors. Rarely does such legislation automatically nullify a sale or investment, and so it gives the consumer or investor an election whether to get out of the transaction. Only a malcontent or crank would do so if the transaction was profitable for him or her. The person whose shares go up will not complain that he or she did not get a prospectus.
>
> [109] That cannot be a reason to refuse to enforce the legislation. To give protective legislation effect only where the transaction made a profit, would virtually repeal the legislation and make it useless.

[36] The uncontradicted evidence of the plaintiffs in this case is that they did not receive four of the seven amendments that were filed. At the time the plaintiffs became aware that those four amendments existed, three of them had been filed about a year earlier and another had been filed about three months earlier.

[37] The *Act* does not set a specific time within which a developer who files an amendment must provide it to the purchaser. Section 16(1)(b) merely says it must be provided "within a reasonable time" after filing. Although the importance, or lack of importance, of a particular amendment to a purchaser is not relevant to the existence of the purchaser's statutory right, it may be relevant to defining a reasonable time for delivery of the document in the circumstances of a particular case. In some cases, a specific amendment might be of so little consequence to a reasonable purchaser that receipt of the amendment at any time prior to completion might be sufficient even if the amendment had been filed many months earlier.

[38] But even if that is correct, it is of no assistance to the defendant in this case because the evidence is that the plaintiffs did not receive the amendments. It is not sufficient that the amendments may have been incorporated into a "consolidated disclosure statement" that the plaintiffs received. There is no provision in the *Act* for such a consolidated document and s. 16 says that an amendment must clearly identify and correct the defect. Neither the clear language nor the general purpose of the *Act* is complied with if the existence and nature of an amendment is not clearly drawn to the purchaser's attention. The purchaser should not be expected to make a line-by-line comparison of two lengthy documents in order to identify any amendments that might have been made.

[39] Accordingly, the plaintiffs are entitled to the declaration they seek. The contracts of purchase and sale are unenforceable and the plaintiffs' deposits must be returned.

"N. Smith J."

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Pinto v. Revelstoke Mountain Resort Limited Partnership,* 2011 BCCA 210

Date: 20110426
Dockets: CA038082, CA038086

Docket: CA038082

Between:

Marc Pinto

Respondent
(Plaintiff)

And

Revelstoke Mountain Resort Limited Partnership

Appellant
(Defendant)

Docket: CA038086

Between:

Yohai Borenstein

Respondent
(Plaintiff)

And

Revelstoke Mountain Resort Limited Partnership

Appellant
(Defendant)

Before: The Honourable Madam Justice Saunders
The Honourable Mr. Justice Frankel
The Honourable Madam Justice Bennett

On appeal from: Supreme Court of British Columbia, March 30, 2010
(*Pinto v. Revelstoke Mountain Resort Limited Partnership*, 2010 BCSC 422, S094287 and S094288)

Counsel for the Appellant: M.A. Clemens, Q.C.

Counsel for the Respondent: A.P. Morrison

Place and Date of Hearing:	Vancouver, British Columbia November 16, 2010
Place and Date of Judgment:	Vancouver, British Columbia April 26, 2011

Written Reasons by:
The Honourable Madam Justice Bennett

Concurred in by:
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Frankel

Reasons for Judgment of the Honourable Madam Justice Bennett:

Overview

[1] This is an appeal from a summary trial where the central issue was whether a developer breached s. 16 of the *Real Estate Development Marketing Act*, S.B.C. 2004, c. 41 [*REDMA*], thereby rendering two contracts of purchase and sale unenforceable, by failing to deliver copies of four amendments to the initial disclosure statement to two purchasers.

[2] The appellant, Revelstoke Mountain Partnership ("Revelstoke"), submits that the court below erred in failing to consider whether the amendments in question were required to be made pursuant to s. 16, deciding in effect that the failure to deliver any amendment to a disclosure statement, no matter how inconsequential, within the specified time, constitutes a breach of s. 16. Revelstoke also argues, in the alternative, that any breaches of s. 16 were remedied by its eventual delivery of a "Consolidated Disclosure Statement" which contained the text of all amendments to the original disclosure statement.

[3] The respondents, Marc Pinto and Yohai Borenstein, submit that Revelstoke should be precluded from arguing that it was not required to deliver a copy of the amendments at issue as Revelstoke did not plead this defence or argue it at trial. Alternatively, the respondents argue that Revelstoke was required to deliver the amendments at issue to them in a timely fashion, and submit that Revelstoke's delivery of the unfiled "Consolidated Disclosure Statement" did not remedy its contraventions of the *REDMA.*

[4] I have concluded that the appeal should be dismissed.

Factual Background

[5] The respondents are individual purchasers of two strata property units in a real estate development known as Nelsen Lodge located in Revelstoke, British

Columbia. They purchased their units pursuant to separate but very similar contracts of purchase and sale dated March 31, 2007 (the "Contracts of Purchase and Sale"). Revelstoke was the vendor in each of the Contracts of Purchase and Sale.

[6] Mr. Pinto paid a deposit of $122,800 to secure the purchase of Unit 514. Mr. Borenstein paid a deposit of $87,800 to secure the purchase of Unit 506.

[7] On or about March 12, 2007, Revelstoke filed a disclosure statement (the "Disclosure Statement") with the Superintendant of Real Estate. The respondents received copies of the Disclosure Statement for their review prior to entering into the Contracts of Purchase and Sale.

[8] Between April 2, 2007, and February 5, 2009, Revelstoke filed seven amendments to the Disclosure Statement. Both of the respondents received the first two amendments, but not the next four, which were filed on various dates in 2008. A summary of the content of the four amendments that were not provided to the respondents is set out below:

(a) Amendment 3 advised that the developer had obtained a building permit for Phase 3 and completed the subdivision for the development site. It also advised of a covenant in favour of the City.

(b) Amendment 4 advised of and made ancillary amendments consequent on the developer's decision to offer residential lots for sale in Phase 2. It advised that the estimated date of commencement of construction of Phase 2 was April 1, 2008, and that the estimated date of completion of construction of Phase 2 was November 30, 2009.

(c) Amendment 5 advised that the developer had decided to increase the number of strata units it intended to build and amended the Disclosure Statement to renumber the strata lots in the development. Amendment 5 also changed the construction phases of the development. Originally, Phase 1 was to consist of Buildings 1, 4, and 5; Phase 2

was to consist of Building 2; and Phase 3 was to consist of Building 3. Following Amendment 5, Phase 1 consisted of Building 1; Phase 2 consisted of Building 3; and Phase 3 consisted of Buildings 2, 4, and 5. It should be noted that almost all of the development's recreation facilities were to be housed in Building 2, the construction of which was moved from Phase 2 to Phase 3. Despite these changes, the estimated dates for commencement and completion of construction of Phases 1 and 2 remained the same. Amendment 5 advised that the estimated date of commencement of construction of Phase 3 was May 1, 2008, and the estimated date of completion of construction of Phase 3 was December 31, 2009. The amendment also advised of changes in the constitution of the board of directors of the general partner.

(d) Amendment 6 amended the Disclosure Statement to provide for five phases of construction instead of three: Phase 1 consisted of Building 1, Phase 2 consisted of Building 3, Phase 3 consisted of Building 2, Phase 4 consisted of Building 4, and Phase 5 consisted of Building 5. It also amended the estimated dates for the commencement and the completion of construction. The estimated date for completion of construction of Phase 1 changed from December 31, 2008 to February 28, 2009. The estimated date for completion of construction of Phase 2 changed from November 30, 2009 to October 31, 2009. The estimated date for the completion of construction of Phase 3 remained the same. Amendment 6 further updated the identity of certain directors and officers of the general partner.

[9] The respondents say they became aware that they had not received Amendments 3 to 6 on receiving the seventh amendment in early February 2009. Around the same time, Revelstoke provided the respondents with a "Consolidated Disclosure Statement" which included the text of all amendments effected by the seven amendments to the original Disclosure Statement without highlighting the changes. The respondents became aware of three of the amendments about a year

after they were filed and another about three months after it was filed. The respondents never received the amendments, except as contained in the "Consolidated Disclosure Statement".

[10] In a letter to Revelstoke dated February 13, 2009, Mr. Pinto provided notice of rescission and demanded the return of his deposit. Mr. Borenstein sent a similar letter on February 15, 2009.

[11] On March 3, 2009, each of the respondents received a letter from Revelstoke stating that they had previously been notified of a February 26, 2009 completion date, and that, as a result of their failure to complete their purchases on that date, Revelstoke was terminating the Contracts of Purchase and Sale and keeping the their deposits.

[12] On June 5, 2009 and June 17, 2009, Mr. Pinto and Mr. Borenstein commenced separate actions in the Supreme Court of British Columbia, each seeking, *inter alia*:

(a) Orders rescinding their respective Contracts of Purchase and Sale;

(b) Declarations that Revelstoke had contravened the provisions of the *REDMA*;

(c) A declaration that their respective Contracts of Purchase and Sale were unenforceable; and

(d) Orders requiring Revelstoke to return their deposits, together with interest and costs.

[13] Mr. Pinto and Mr. Borenstein's claims were heard together by summary trial. At the summary trial, they argued that the Contracts of Purchase and Sale were unenforceable as Revelstoke had breached the *REDMA* by marketing units before filing a disclosure statement, and by failing to provide copies of amendments to the Disclosure Statement to them within the time required by s. 16 of the *REDMA.* The respondents did not pursue their alternative claims alleging statutory and common

law rights of rescission, breach of contract, and misrepresentation at the summary trial.

The Summary Trial Judge's Findings

[14] The learned summary trial judge held that it was unnecessary for him to decide whether the units were marketed before the filing of the disclosure statement and dealt only with the allegation that Revelstoke had failed to deliver copies of certain amendments in a timely way, as there were no facts in dispute with respect to that issue. He allowed the respondents' actions, holding that the Contracts of Purchase and Sale were unenforceable due to Revelstoke's breach of s. 16(1) of the *REDMA*, and ordering the return of the respondents' deposits. In his conclusion, he said this:

> [37] The *Act* does not set a specific time within which a developer who files an amendment must provide it to the purchaser. Section 16(1)(b) merely says it must be provided "within a reasonable time" after filing. Although the importance, or lack of importance, of a particular amendment to a purchaser is not relevant to the existence of the purchaser's statutory right, it may be relevant to defining a reasonable time for delivery of the document in the circumstances of a particular case. In some cases, a specific amendment might be of so little consequence to a reasonable purchaser that receipt of the amendment at any time prior to completion might be sufficient even if the amendment had been filed many months earlier.

[15] He also concluded that the provision of the "Consolidated Disclosure Statement", which included the amendments, to the respondents was insufficient. He said this at para. 38:

> [38] But even if that is correct, it is of no assistance to the defendant in this case because the evidence is that the plaintiffs did not receive the amendments. It is not sufficient that the amendments may have been incorporated into a "consolidated disclosure statement" that the plaintiffs received. There is no provision in the *Act* for such a consolidated document and s. 16 says that an amendment must clearly identify and correct the defect. Neither the clear language nor the general purpose of the *Act* is complied with if the existence and nature of an amendment is not clearly drawn to the purchaser's attention. The purchaser should not be expected to make a line-by-line comparison of two lengthy documents in order to identify any amendments that might have been made.

[16] There were no arguments before the summary trial judge as to whether Amendments 3 to 6 were required to be delivered under s. 16 of the *REDMA*.

The Legislation

[17] The *REDMA* is consumer protection legislation. One of its central objectives is to ensure that material facts are provided to purchasers when developments are being marketed to them: *Dwane v. Bastion Coast Homes*, 2009 BCSC 726 at para. 69. Consumer protection legislation is to be interpreted generously in favour of the consumer: *Seidel v. TELUS Communications Inc.,* 2011 SCC 15 at para. 37.

[18] Section 14 of the *REDMA* requires a developer to provide a prospective purchaser with a disclosure statement:

> 14 (1) A developer must not market a development unit unless the developer has
>
> (a) prepared a disclosure statement respecting the development property in which the development unit is located, and
>
> (b) filed with the superintendent
>
> (i) the disclosure statement described under paragraph (a), and
>
> (ii) any records required by the superintendent under subsection (3).
>
> (2) A disclosure statement must
>
> (a) be in the form and include the content required by the superintendent,
>
> (b) without misrepresentation, plainly disclose all material facts,
>
> (c) set out the substance of a purchaser's rights to rescission as provided under section 21 [*rights of rescission*], and
>
> (d) be signed as required by the regulations.

[19] The Superintendent of Real Estate has issued a policy statement addressing the form and content of disclosure statements required under s. 14(2)(a) of the *REDMA* ("Policy Statement 1"). Paragraph 3 of Policy Statement 1 states:

> Form 1 sets out the form and content required under section 14 of the Act for disclosure statements filed in relation to strata lots contained in a stratified building. **The information contained in each disclosure statement must be set out in the order contained in Form 1. If a section does not apply to a particular development property, the section must state "not**

> **applicable".** Sections and subsections may be added by a developer, as required, to meet the developer's obligation to disclose plainly all material facts.
>
> *NOTE: If a change occurs that would have the effect of rendering a statement false or misleading or that brings into being a fact or proposal which should have been disclosed if the fact or proposal had existed at the time of filing, section 16 of the Act requires developers to file an amendment to the disclosure statement. If the change is in respect of the identity of the developer or the appointment of a receiver, liquidator, trustee in bankruptcy or other person, in respect of the original developer, then the new developer, who has the right to acquire or dispose of the development property, must file its own new disclosure statement.*
>
> [Emphasis in original.]

Revelstoke and the respondents disagree as to whether Policy Statement 1 has statutory effect. Given my conclusions, it is not necessary to decide this question.

[20] The definition of "disclosure statement" includes "any amendment made to a disclosure statement". A developer who becomes aware that a disclosure statement contains a misrepresentation or does not comply with the *Act* or regulations is required to file an amendment. In some circumstances, an amendment is insufficient and the developer must file a new disclosure statement. Those circumstances are set out in ss. 16(2) and (3):

> (2) A developer must file a new disclosure statement under subsection (1) (a) (i) if the failure to comply or misrepresentation referred to in that subsection
>
> > (a) is respecting a matter set out in paragraph (b) or (c) of the definition of "material fact" in section 1 [*definitions*],
> >
> > (b) is respecting a matter set out in paragraph (d) of the definition of "material fact" in section 1, and the regulation prescribing the matter specifies that a new disclosure statement must be filed if subsection (1) of this section applies, or
> >
> > (c) is of such a substantial nature that the superintendent gives notice to the developer that a new disclosure statement must be filed.
>
> (3) A developer must file an amendment to the disclosure statement under subsection (1) (a) (ii) in any case to which subsection (2) does not apply.

[21] "Misrepresentation" is defined as "a false or misleading statement of a material fact" or "an omission to state a material fact". The definition of "material fact" referred to in s. 16(2) reads:

> "material fact" means, in relation to a development unit or development property, any of the following:
>
> > (a) a fact, or a proposal to do something, that affects, or could reasonably be expected to affect, the value, price, or use of the development unit or development property;
> >
> > (b) the identity of the developer;
> >
> > (c) the appointment, in respect of the developer, of a receiver, liquidator or trustee in bankruptcy, or other similar person acting under the authority of a court;
> >
> > (d) any other prescribed matter[.]

[22] Section 16(1)(b) requires developers to provide copies of new disclosure statements or amendments to purchasers who have not yet received title. Delivery must be completed "within a reasonable time after filing a new disclosure statement or an amendment under [s. 16(1)(a)]".

[23] An issue arose during the course of submissions regarding whether an Exhibit appended to the Disclosure Statement or Amendment formed part of the Statement or Amendment. The important changes found in the Amendments appear in the Amended Statement itself; therefore it is not necessary to refer to the Exhibits when deciding the issues in this case.

[24] Section 23 provides that a purchase agreement is not enforceable against a purchaser by a developer who has breached certain provisions of the *Act*, including those relating to disclosure statements.

Analysis

I. Raising new issues on appeal

[25] I will begin my analysis by considering whether Revelstoke should be precluded from raising the issue of whether Amendments 3 to 6 were required to be made pursuant to s. 16 of the *REDMA* in the present appeal. As noted above, Revelstoke did not raise this issue in its pleadings or its arguments at trial.

[26] It is well-established that an issue not raised at trial and presented for the first time on appeal ought to be "most jealously scrutinized": *Hodgkinson v. Hodgkinson*,

2006 BCCA 158 at para. 21; *Baker v. British Columbia Insurance Company* (1993), 76 B.C.L.R. (2d) 367 at para. 15 (C.A.). An appellate court will only permit a new issue to be entertained "where the interests of justice require it and where the court has a sufficient evidentiary record and findings of fact to do so": *Wasauksing First Nation v. Wasausink Lands Inc.* (2004), 43 B.L.R. (3d) 244 at para. 102 (O.C.A.); cited with approval by the Supreme Court of Canada in *Quan v. Cusson*, 2009 SCC 62.

[27] As noted by Prowse J.A. in *O'Bryan v. O'Bryan* (1997), 97 B.C.A.C. 62 at para. 24 (C.A.), "the prohibition against permitting one party to raise a new issue on appeal for which the evidentiary groundwork was not fully laid in the trial court is primarily to prevent prejudice to the party against whom the issue is raised." A new ground is more likely to be entertained "where it raises an issue of law alone than where it requires leading evidence either in the appeal court or at a new trial": *Emmett v. Arbutus Bay Estates Ltd.* (1994), 48 B.C.A.C. 26 at para. 9 (C.A.).

[28] The authorities suggest that an appellate court should be particularly wary when considering whether to permit a new issue to be raised on an appeal from a summary trial. See, for example, *Orange Julius Canada Ltd. v. Surrey (City of)*, 2000 BCCA 467, where this Court (*per* Mr. Justice Finch, as he then was) declined to hear the appellants' argument with respect to an implied contract of indemnity on an appeal from a summary trial procedure:

> [70] In my respectful view, the Court should decline to hear or adjudicate upon this issue. The appellants did not plead an implied contract of indemnity in the third party notices issued against Laing or its employees, and no evidence of such an implied contract was adduced before the learned summary trial judge. Further, no submissions respecting this issue were made to the learned summary trial judge. Consequently, the respondents on this appeal are not able to make a full answer and defence to the allegation. The Court is asked to decide the issue on the hypothesis that the appellants' allegations of fact are well founded and cannot be contradicted.
>
> [71] To allow the appellants to advance this argument now would undermine the efficacy of the summary trial procedure. In *Baker v. B.C. Insurance Co.* (1993), 76 B.C.L.R. (2d) 367 (C.A.) Madam Justice Rowles said at 373:
>
> > [22] The trial proceeded under Rule 18A. The issues were defined by the pleadings. Had the point the defendant now wishes to argue been pleaded, it is impossible to say what additional evidence would have

> been put before the court, or what conclusions the trial judge would have reached on that evidence or where the trial judge would have placed this case within the law. See *Gaines v. Patio Pools Ltd.* (1984), 51 B.C.L.R. 121 (C.A.), at 124. To allow the defendant's argument to be made for the first time in this Court would, in my view, invite an injustice and, as well, undermine the efficacy of Rule 18A.

[29] In my respectful view, Revelstoke should not be permitted to argue that Amendments 3 to 6 were not required to be made under s. 16 of the *REDMA* for the first time on appeal. I reach that conclusion for the reasons stated in the case law noted above.

[30] However, since the factual record is complete, the merits were fully argued, and an aspect of Revelstoke's argument that may be important to the practice can be dealt with expeditiously, I would add the following. Even if Revelstoke is correct that it was only required to deliver amendments that were required to be made pursuant to s. 16, I am of the view that Revelstoke was required to deliver, at a minimum, Amendment 5, which related to building additional strata units and changing the completion dates for the recreational facilities. Both of these changes fall within the definition of a "material fact" as defined in s. 16(2)(a) in that both changes may affect the "value, price or use of the development unit or development property". In *Chameleon Talent Inc. v. Sandcastle Holdings Ltd.*, 2010 BCCA 300 at para. 10, this Court held that substantial delays of many months in the construction of a condominium project will generally be "material to purchasers and prospective purchasers in respect of the price to be paid for, the value there may be in, and the use of a condominium unit that is being purchased."

[31] Revelstoke submits that this Court should permit it to argue that the amendments were not "required to be made" in this appeal as to do otherwise would leave a precedent which is wrong in law. While I am of the view that the interests of justice do not require that Revelstoke be permitted to raise this issue for the first time on appeal, my conclusions in this case should not preclude this issue from being raised in another case before the Supreme Court.

II. The "Consolidated Disclosure Statement"

[32] Revelstoke submits that its delivery of the "Consolidated Disclosure Statement" remedied any breach that it may have committed with respect to the *REDMA.* I respectfully disagree. In my view, the "Consolidated Disclosure Statement" fails on a number of bases to be sufficient service or to "cure" Revelstoke's failure to provide the amendments.

[33] First, as the trial judge noted at para. 38, above, amendments must clearly identify and correct the defect (s. 16(1)(a)(ii)). In my view, the *REDMA*'s clear language and general purpose (i.e., to ensure that material facts are provided to purchasers when developments are being marketed to them) support the conclusion that the "Consolidated Disclosure Statement", which requires purchasers to make a line-by-line comparison of two lengthy documents in order to locate any amendments, is not sufficient.

[34] Furthermore, the "Consolidated Disclosure Statement" was not filed with the Superintendant of Real Estate as required by s. 16(1)(a).

[35] Finally, the "Consolidated Disclosure Statement" was not provided within a "reasonable time" as required by s. 16(1)(b). Amendment 5 (which, as noted above, clearly dealt with material facts) was filed a year before the respondents received the "Consolidated Disclosure Statement".

[36] Disclosure of material facts within a reasonable time is fundamental to the consumer protection scheme developed by the Legislature. This did not occur and the respondents are entitled to rescind their contracts pursuant to the *REDMA.*

Disposition

[37] I would dismiss the appeal.

"The Honourable Madam Justice Bennett"

I **agree:**

"The Honourable Madam Justice Saunders"

I agree:

"The Honourable Mr. Justice Frankel"

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Jaspaul S. Sandhu Enterprises Ltd. v. Penner,* 2012 BCSC 856

Date: 20120608
Docket: S063298
Registry: Vancouver

Between:

Jaspaul S. Sandhu Enterprises Ltd.

Plaintiff

And:

Peter Penner, Patricia Eva Penner, Gregory Holdings Ltd., Amex-Fraseridge Realty, Fraseridge Realty Ltd., carrying on business under the name of Amex-Fraseridge Realty and the said Fraseridge Realty Ltd.

Defendants

Before: The Honourable Mr. Justice Grauer

Reasons for Judgment

Counsel for the Plaintiff:	Kenneth J. Learn
Counsel for the Defendants:	Paul E. Jaffe
Place and Date of Hearing:	Vancouver, B.C. May 8, 2012
Place and Date of Judgment:	Vancouver, B.C. June 8, 2012

INTRODUCTION

[1] The plaintiff refused to complete the purchase of seven strata lots in a development of nine units on Fraser Highway in Langley, B.C., which it had agreed to buy under a contract for purchase and sale it entered into with the defendants on May 11, 2005.

[2] The plaintiff now seeks judgment by way of summary trial for the return of the deposit it paid in the amount of $25,000, together with special damages in the form of solicitor's fees and expenses incurred with respect to the failed transaction. It is not pursuing allegations of fraud.

[3] The defendants concede some irregularities in the closing documentation, but maintain that these were not sufficient to warrant termination as they did not interfere with the transfer of marketable title. Accordingly, they maintain that the plaintiff was in breach of its obligation to complete the transaction, and the deposit should be released to the defendants.

BACKGROUND

[4] Because the property consisted of seven strata units, it constituted a Development Unit within the meaning of the *Real Estate Development Marketing Act*, S.B.C. 2004, c. 41. Accordingly, it could not be marketed and sold unless a disclosure statement had first been prepared, filed and delivered to the prospective purchaser. That was done in this case.

[5] The disclosure statement included a budget, setting out the estimated operating expenses, and the monthly assessment for each of the nine units. The assessment showed the unit entitlement for each unit, that unit's pro rata share based upon its entitlement, and the estimated monthly assessment attributable to each unit in accordance with its pro rata share. All of this was in accordance with the requirements of section 99 of the *Strata Property Act,* S.B.C. 1998, c. 43.

[6] The disclosure statement further indicated that the developer did not intend to cause the strata corporation to enter into a management agreement.

[7] On or about May 20, 2005, the plaintiff removed its subject clauses, which dealt with environmental reports and the status of existing leases. It is tendered the deposit of $25,000 at that point.

[8] The closing date, originally May 30, 2005, was extended by agreement to June 30, 2005. The contract provided that:

> Time will be of the essence hereof, and unless the balance of the cash payment is paid and such agreement to pay the balance as may be necessary is entered into on or before the Completion Date, the Seller may, at the Seller's option, terminate this contract, and, in such event, the amount paid by the Buyer will be absolutely forfeited to the Seller...on account of damages without prejudice to the Seller's other remedies.

[9] On June 18, 2005, the plaintiff retained a conveyancing solicitor who proceeded to investigate title and prepare the necessary conveyancing documents. On June 24, 2005, that solicitor wrote to the defendants' notary public stating that a number of problems remained with the transaction:

> From what I can determine looking at the titles, a strata plan was created in 1999.
>
> The Condominium Act [*sic*] requires that budgets be established and contingency reserve funds be set up.
>
> Strata fees are usually charged based upon the unit entitlement and are prorated according to the formula based on unit entitlement of each unit as a proportion of the total number of units of entitlement. Accordingly, the following information should be available:
>
> 1) budget since 1999;
>
> 2) financial statements since 1999.
>
> Please provide them.
>
> There should be a bank account for the strata corporation which should have funds in it. If this is managed by the vendor,
>
> 1) I need a copy of an agreement of Mr. Penner with the strata council for managing the property;
>
> 2) when does the agreement terminate;
>
> 3) what funds are held for the strata Corporation and who will they be turned over to?

> I had received information on strata fees indicating that the strata fees for lots 2, 3, 4 and 5 are $911.00, strata 9 is $1,000.00. These numbers bear no relationship to the unit entitlement and this indicates that the strata property is not being managed in accordance with the legislation [emphasis original].
>
> I've also been told that there are no strata fees for unit 6 and 7 and this would be incorrect in accordance with the legislation, the owner would have to pay strata fees on these units even though they were not leased out.
>
> It may be that the expenses were simply determined and the expenses were shared in accordance with some formula that was agreed between the current owners, but this arrangement cannot or should not continue.

[10] On June 27, 2005, the solicitor delivered a letter to the notary enclosing the preliminary transfer documents for completion and return. In accordance with the *Strata Property Act*, these documents included a Form B Information Certificate and Form F Certificate of Payment for each strata lot being conveyed. By section 256(1) of that *Act*, a Form F Certificate of Payment must accompany any conveyance of title to a strata lot before the Registrar will accept it for registration. The solicitor stated:

> I am enclosing documents, some of which is [*sic*] in draft form. I am unable to complete them until I receive the following information:
> 1) Proper information on strata fees.
> 2) Information on the builder's lien

[11] The enclosures for completion, execution and return by the vendors included:

> 1) the original and 1 copy of 7 transfers
> 2) 7 Form F (condominium act [*sic*]) to be signed by 2 owners, one should not be a vendor of the property
> 3) 7 Form B (condominium act [*sic*])
> 4) the original and 1 copy of the Sellers' Statement of Adjustments (draft)
> a) awaiting information on strata fees
> b) awaiting information on Builder's Lien
> 5) tenants' estoppel certificate
> ...
>
> Please return the following:
>
> 1) the original and one copy of the Transfer Forms
> 2) one copy of the Sellers' Statement of Adjustments
> 3) if a power of attorney is used in connection with any transfer documents, a copy of the power of attorney
> 4) 7- Form F (Strata Property Act) **signed by the owner of the other unit in the duplex** as required by the Land Titles Office [emphasis original]

5) 7- Form B (Strata Property Act)
6) tenants' estoppel certificate
...

[12] When the documents were returned by the notary on June 30, there was a problem with the Form B and Form F certificates. The Form F Certificates of Payment certified that all strata fees had been paid in full. But was that correct? The Form B Information Certificates stated that the strata fees for three of the lots were $0. This suggested that the strata fees were not being prorated as required by the *Strata Property Act*, and as indicated in the disclosure statement's budget. It could follow that the other strata lots had paid more than their prorated share, giving rise to a potential claim, and that the Certificates of Payment were inaccurate insofar as those three lots were concerned.

[13] The problem with the strata fees can be illustrated by the following table:

Lot	*Unit entitlement*	*Strata fees per disclosure statement*	*Strata fees per disclosure statement (sale lots)*	*Strata fees per Form Bs*
*1	47	171.67		
2	47	171.67	171.67	255.08
3	38	138.80	138.80	209.53
4	42	153.41	153.41	219.44
5	42	153.41	153.41	227.75
6	70	255.68	255.68	0.00
7	122	445.62	445.62	0.00
*8	58	211.85		
9	150	547.89	547.89	0.00
Total	616	2,250.00	1,866.48	911.80

*Lots 1 and 8 were not included in the sale

[14] There was another problem with the Information Certificates. The clause setting out the amount in the contingency reserve fund for each unit was either left blank, or filled in with "$0".

[15] A further problem related to how the certificates were signed. The forms provided for signature by either two council members, or the strata manager “if authorized by the strata corporation”. All purported to be signed by the defendant Peter Penner as strata manager, yet the disclosure statement indicated that there was no management contract, and no copy of any contract between Mr. Penner and the strata Council had been provided in response to the solicitor's request.

[16] These discrepancies caused the plaintiff's solicitor some concern. The defendants argue that he was simply looking for loopholes that might enable him to extract his client from a transaction about which it was no longer enthusiastic. Motive, however, is irrelevant. If the plaintiff was entitled in law to refuse to complete, it matters not why it decided to do so. If it was not so entitled, the purist of motives will be of no avail.

[17] After reviewing the returned documents, the solicitor responded to the notary:

> I reviewed the documents faxed to me June 30, 2005 and there appear to be a number of problems:
>
> 1) I cannot comment on the adequacy of the signature of the vendor as strata manager as I have never been provided with a copy of the management contract.
>
> ...
>
> 4) the tenant's estoppel certificates have not been signed by the tenant but rather by the vendor. They therefore do not act as estoppel certificates and cannot be relied on by the purchaser;
>
> ...
>
> 7) some of the Form B information certificates suggest that there is no strata fee payable for the strata lot. This is patently incorrect;
>
> As mentioned earlier today, from conversations with you, I am of the understanding that there were no proper budgets kept for the strata corporation, that owners were charged on the basis of occupancy rather than on the usual basis (nothing was charged to owners for strata fees if the owners did not have tenants living in the property). On this basis, owners of the properties other than Mr. Penner may have a claim against Mr. Penner and the strata corporation for reimbursement for overpayment of strata fees. In addition, Mr. Penner may be liable to the strata corporation for the amount that should be held in the contingency reserve fund.
>
> This issue has never been resolved and is the greatest problem with the closing of this transaction.
>
> Accordingly the purchaser will not complete the purchase.

[18] On the next business day, July 4, 2005, the plaintiff's solicitor faxed the defendants' notary, stating:

> As indicated in my June 30, 2005 faxed to you at 3:28 (2:28 standard time) primarily because of problems with the management of the strata corporation (the fact that strata fees were not being charged or collected on a proper basis) and for other reasons, Jaspaul S. Sandhu Enterprises declined to complete the transaction.
>
> Jaspaul S. Sandhu Enterprises Ltd. is entitled to terminate the agreement because of non performance on the part of the vendors and elects to do so while retaining its right to claim damages. It is willing to enter into without prejudice negotiations to complete the purchase provided that the issues raised in the correspondence are addressed.

[19] Although the defendants provided redrafted Form Bs and the parties negotiated further, they were unable to resolve the impasse. The redrafted Form Bs no longer showed fees of $0 for lots 6, 7 and 9, but still led to the conclusion that the strata fees had not been prorated among the lots in accordance with their unit entitlement, as required by section 99 of the *Strata Property Act.* Once again, they were signed by Mr. Penner as "Strata Manager, if authorized by strata corporation", without any evidence of such authority.

DISCUSSION

[20] As this matter was argued before me, the question of which party is entitled to the deposit turns solely on whether the purchaser was justified in refusing to complete because of the deficiencies arising from the Form F Certificates of Payment and the Form B Information Certificates. Did those deficiencies amount to non-performance on the part of the vendors?

[21] The plaintiff submits that it was justified in refusing to complete on the well-established ground that the defendant vendors failed to provide marketable title. This is because, the plaintiff asserts, some of the documents that had to be tendered for registration, being the vendors' Form F Certificates of Payment, were void instruments. They were void for two reasons. The first was that the information they purported to certify was incorrect. They certified that no payments were owing, which could not be the case given the discrepancy between the unit entitlements

and the unit assessments. The second was that they were not signed by a duly authorized representative of the strata corporation. Instead of being signed by two members of the strata council, they were signed by Mr. Penner as strata manager. But there was no contract between him and the strata council engaging him as manager, and the disclosure statement represented that the strata council did not intend to enter into any management agreement.

[22] The defendants argue that these "technical difficulties" with the Form F Certificates of Payment in no way interfered with marketable title and did not constitute breaches of a condition fundamental to the contract that would allow the plaintiff to repudiate it. They argue that the certificates were in registrable form since they purported to be signed by the strata manager. Mr. Penner, they say, was known to all to be the *de facto* manager albeit was there was no management contract formally appointing him such. The discrepancies relating to the assessments, they submit, were not material. "Everyone knew" that nothing was owed, and if any liability were to have arisen, the plaintiff's remedy would have been in damages, not termination.

[23] There is no doubt that the documents reviewed by the plaintiff's solicitor gave rise to concern on his part about whether the strata corporation had been managed in accordance with the statutory requirements. But that is not necessarily the vendors' problem, and nothing in the evidence, including the terms of the contract between the parties, made it the vendors' obligation to produce Form F Certificates of Payment in registrable form. By section 115(1) of the *Strata Property Act*, a strata corporation is obliged to provide such a certificate in the prescribed form on request of an owner or purchaser.

[24] The difficulty in this case is that the vendors were a developer-owner, and hence, the *de facto* strata corporation.

[25] The information supplied by the vendors *qua* developer when their notary returned the documents confirmed the concerns raised by the plaintiff's solicitor a week before. The strata corporation, consisting of nine units of which the plaintiff

was purchasing seven, had not been managed in accordance with the statutory requirements, particularly concerning such matters as budgets, the apportionment of strata fees, and the accumulation of the contingency reserve fund. All of this was made apparent by the discrepancies between the budget set out in the disclosure statement and the information contained in the Form B Information Certificates, the combination of which made nonsense of the Form F Certificates of Payment, the registration of which was required to transfer title.

[26] The plaintiff submits that it would have been quite wrong to advance for registration documents (the Form Fs) which it had every reason to believe were incorrect and not properly signed, even if they appeared to be in registrable form. I agree. The Form F documents were defective. In my view, to expect a purchaser in the position of the plaintiff to complete in these circumstances, and seek its remedy in damages, is asking more than the law requires. The problem, however, was not a failure by the vendors to provide marketable title. The failure was on the part of the strata corporation, and normally, the remedy would be to seek corrected documentation from the strata corporation (not the vendor). If a registrable Form F could not be obtained in time for closing, then presumably, time being of the essence, the contract would be frustrated, and the deposit returned to the purchaser. There would not have been a repudiation by the vendor.

[27] In this case, the vendors, being also the developer, were in a position to ensure that the right documentation was available. They offered, however, no explanation for these deficiencies, which it was certainly within their power to avoid, explain or correct. There was no evidence from which I could conclude that the plaintiff's concerns were ill-founded. I am left with the inescapable impression that the defendants did not have their tackle sufficiently in order to require the closing of this transaction. They were never able to respond to what I consider to be the legitimate concerns raised by the plaintiff's solicitor. It follows, I find, that whatever the motive of the plaintiff may have been, it was entitled to refuse to complete when it proved impossible to obtain forms needed to proceed with registration that were

consistent with the requirements of the applicable legislation. If the plaintiff wanted out, the defendants gave them a way.

[28] Ordinarily, shortcomings in the manner in which a strata corporation had been managed would not put the purchaser of the strata unit in a position to refuse to complete unless they could be tied to the vendor's contractual obligations, or caused the contract to be frustrated. Where the vendor is also the developer, and those shortcomings result in a deficiency in the closing documentation over which the purchaser has no control, the situation also constitutes an exception, more akin to the latter than the former.

[29] It follows that in the unusual circumstances of this case, the deposit and any accrued interest must be returned to the plaintiff.

[30] The plaintiff seeks, in addition, an award of damages in the amount of $1,188.72, representing the legal fees and disbursements it paid to its solicitor for the failed transaction. In my view, where no contractual term entitles the plaintiff to such relief, and the circumstances make the cause of the failure more akin to frustration than repudiation, neither party has a call on the other: see *Norfolk v. Aikens* (1989), 41 B.C.L.R. (2d) 145, 64 D.L.R. (4th) 1 (C.A.). Accordingly, the plaintiff has failed to establish any proper basis for such an award and I dismiss that aspect of the plaintiff's claim.

[31] Ordinarily, the plaintiff would be entitled to its costs, assuming that the amount to be returned in fact exceeds $25,000 with accrued interest. The defendants have, however, requested an opportunity to make submissions on costs, and they may make the appropriate arrangements with the registry if they still wish to do so.

"GRAUER, J."

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Chameleon Talent Inc. v. Sandcastle Holdings Ltd.,* 2009 BCSC 1670

Date: 20091002
Docket: S095639
Registry: Vancouver

Between:

Chameleon Talent Inc.

Plaintiff

And

Sandcastle Holdings Ltd.

Defendant

Before: The Honourable Mr. Justice Rice

Oral Reasons for Judgment

Counsel for the Plaintiff:	A.P. Morrison
Counsel for the Defendant:	A.C. Akelaitis
Place and Date of Trial/Hearing:	Vancouver, B.C. October 2, 2009
Place and Date of Judgment:	Vancouver, B.C. October 2, 2009

INTRODUCTION

[1] THE COURT: This is an application by the plaintiff for summary judgement pursuant to Rule 18A of the *Rules of Court*, B.C. Reg. 221/90 [*Supreme Court Rules*]. The plaintiff seeks a declaration that a contract of purchase and sale of a condominium unit dated July 11, 2007 is unenforceable. The application is grounded on alleged misrepresentations and contraventions by the defendant of the *Real Estate Development Marketing Act*, S.B.C. 2004, c. 41 [*REDMA*]. The plaintiff also seeks an order for return of its deposit.

PURCHASE OF THE CONDO UNIT

[2] The condominium unit is part of a development in Parksville, B.C. called the Residences at The Beach Club (the “Project”). It consists of three buildings, with interconnected underground parking and a residential component including an eight-storey tower of strata title residential units.

[3] The defendant began marketing and selling the residential units, taking care to prepare and deliver to all purchasers of those units a disclosure statement dated June 27, 2006, as required by *REDMA*.

[4] The plaintiff is a company controlled by Sharon Ahamed. She with her husband, Fareed Ahamed, visited the project centre in Parksville on or about July 3, 2007 and met with two real estate agents of Sandcastle, Terry Chalmers and Ernie Tysowski. Shortly afterwards the Ahameds made an offer to purchase a yet to be constructed unit in the project, unit 402. At the time they received the offer, the agents purportedly gave the Ahameds a disclosure statement and an amended disclosure statement as required by *REDMA*.

[5] Subsequently, at the request of the Ahameds, the parties agreed to cancel the contract of purchase of unit 402 and to substitute a more expensive penthouse in the project. On November 14, 2007, the parties formally took the procedural steps necessary to cancel their unit 402 purchase agreement and to substitute the

penthouse unit as the property purchased. With the signing of that agreement the plaintiff duly paid the defendant the required deposit, which sits in trust and now totals $239,980.

APPROPRIATENESS OF RULE 18A FOR RESOLUTION OF THIS APPLICATION

[6] Ms. Akelaitis contended that the matter was too contentious on the facts for summary hearing, and that she would require time to cross examine the deponents on one of two affidavits filed late by the plaintiff. Mr. Morrison for the plaintiff responded by saying that his client did not want the application to be delayed any further and that he would withdraw the two affidavits. I accepted and the application was heard without them. I deferred ruling on the appropriateness issue pending the hearing on the merits as well. It turned out to be the best way. In the end, I found that the application was appropriate for Rule 18A.

[7] The significance of proceeding without the two additional affidavits became apparent when the parties argued whether proof of a material fact called for a subjective rather than an objective test based on what a reasonable person in the position of the purchaser would expect. I will return to that question later.

REDMA

[8] *REDMA* is primarily consumer protection legislation. It requires the filing and delivery of disclosure statements to inform buyers of material facts and risks about unfinished condominium units like the residential units in the Project, and it confers various powers of supervision upon the Superintendent of Real Estate (the "Superintendent"), including the power to prescribe the form and content of disclosure statements. Part II of *REDMA* contains *inter alia* the following provisions respecting marketing of development units.

[9] Section14 provides that a developer must not market a development unit unless the developer has prepared and filed a disclosure statement. The section states specifically that the disclosure statement must:

> (a) be in a form and include the content required by the superintendant;
>
> (b) without misrepresentation, plainly disclose all material facts;
>
> (c) set out the substance of a purchaser's rights to rescission as provided under section 21, and
>
> (d) be signed as required by the regulations.

[10] Section 15, provides that a developer may not enter into a purchase agreement with a purchaser of a unit unless a disclosure statement is delivered to the purchaser, the purchaser has been provided a reasonable opportunity to read the statement, and the developer has obtained a written statement from the purchaser acknowledging the receipt of such an opportunity.

[11] Section 16 requires that a developer who becomes aware that a disclosure statement does not comply with the act or regulations, or contains a misrepresentation, must file immediately a new disclosure statement or an amendment to the disclosure statement that clearly identifies and corrects the failure to comply or the misrepresentation. The developer must also deliver a copy of the amended statement to each purchaser within a reasonable time after it has filed the amendment. The developer must then cease marketing the unit until he or she is in compliance again.

[12] *REDMA* defines “material fact” as follows:

> "material fact" means, in relation to a development unit or development property, any of the following:
>
> (a) a fact, or a proposal to do something, that affects, or could reasonably be expected to affect, the value, price, or use of the development unit or development property;
>
> (b) the identity of the developer;
>
> (c) the appointment, in respect of the developer, of a receiver, liquidator or trustee in bankruptcy, or other similar person acting under the authority of a court;
>
> (d) any other prescribed matter.

[13] The Superintendent determines the requirements for disclosure statements by issuing policy statements. Policy Statement Number 1 states on its face page in bold letters: “The onus is strictly on the developer to disclose all material facts including a fact or proposal that could reasonably be expected to affect the value, price or use of the development property or the development unit.”

[14] Section 21 provides the purchaser with a right of rescission, in certain circumstances, but none of them apply in this case.

[15] Section 22 provides that a purchaser who receives a disclosure statement is deemed in any event to have relied on the misrepresentations and may sue a developer for misrepresentations and breaches of Part 2 of *REDMA*, and these words are repeated substantially on the first page of the disclosure statement.

[16] Section 23 provides that, “A promise or an agreement to purchase or lease a development unit is not enforceable against a purchaser by a developer who has breached any provision of Part 2 [Marketing and Holding Deposits].”

DISCLOSURE STATEMENT

[17] The prescribed form of disclosure statement at the time of the purchase in this case required the developer to disclose in paragraph 5.1, the actual or estimated dates of commencement and completion of construction of the unit. The disclosure statement filed June 27, 2006 stated in para. 5.1 the following:

> Commencement of construction (estimated): November, 2006
>
> Completion of construction of the residential tower (estimated): November, 2008
>
> Completion of construction of the commercial buildings (estimated): November, 2009.

[18] Paragraph 6.1 of the disclosure statement says that the developer must disclose the facts that establish that the developer has met the preliminary requirements for approvals for several aspects of construction requiring inspection or review. The defendant’s disclosure on that point was the following:

> The project has been approved by an approving officer of the City of Parksville, and a development permit issued on June 21, 2006.
>
> A building permit will be issued prior to commencement of construction, following which the developer will file an amendment to this disclosure statement. The estimated date of issue is November 30, 2006.

[19] The defendant did not in fact receive the building permit referred to in paragraph 6.1 of the disclosure statement until April 23, 2007 and because of that delay, the construction did not commence until five months after the "estimated" start time of November 2006. On May 2, 2007, with its permit finally in hand, the defendant filed an amendment to its disclosure statement. It contained a revision in para. 6.1 which simply announced that a "building permit was issued by the City of Parksville on April 23, 2007." Nothing regarding the time of completion was changed.

[20] The defendant says firstly that a reasonable purchaser would appreciate that a building permit would be needed before construction could commence, and that disclosure of the fact that a building permit was obtained, was signal enough to the reader that in fact the construction had commenced.

[21] In my opinion, the reference simply to the date of issuance of a building permit was a non compliance with Part II and accordingly a breach but it was arguably not of itself a material breach. The more difficult question is as to the effect of the word, "estimated".

[22] Presumably the Superintendent sought in using the word "estimated" in the prescribed form of disclosure statement to allow to some measure of elasticity for delays. The question then is whether and to what extent the use of it changes the intended meanings of the words that it modifies.

[23] The prescribed form of statement referred to estimated dates, but the developer in this case, probably to create a broader latitude for its estimates, referred to estimated months, not dates.

THE SCOPE OF THE WORD "ESTIMATED"

[24] Further, says the defendant, the delays, and for instance, the initial delay of nearly five months after November 2006, did not necessitate any change to para. 5.1 because of the broad definition of the word "estimated" in the absence of words giving it a meaning that is narrower. "Estimated" by itself is an open-ended word, tending practically to be limitless.

[25] The plaintiff counters that that might have been a reasonable interpretation if the purchaser had been informed in some way at the outset of the degree of uncertainty that had to be accommodated. But there was no evidence of this.

[26] The contract of purchase and sale contained a provision which stated as follows:

> Seller shall select and give fourteen (14) day's notice to Buyer of a date for closing which shall be no more than thirty (30) days after the issuance of an Occupancy Permit for the unit being purchased. If closing has not occurred by November 30th, 2009, at the option of either party this Agreement shall become null and void and all deposit monies and interest if any shall be refunded to the Buyer."

[27] From this, one might suppose that because the purchase agreement is incorporated into the disclosure statement that the uncertainty is cured. However, there is no stated permission in *REDMA* or in the Superintendent's policy statements that allows for terms of the purchase agreement to be incorporated into the disclosure statement by reference. At any rate, common sense would dictate that a reasonably prudent buyer would not likely mean to allow for another year's delay after the stated completion date.

[28] The tenor of the words themselves in paragraphs 5.1 and 6.1 of the disclosure statement is to tell the buyer to expect a commencement date in November 2006, or within a reasonable time afterwards, say another month or two, but not five. To take this approach of implying terms is risky business. The nature and shape of the transaction must allow for such an inference in a way that does not

invent new terms. A reasonable purchaser would not be led to expect a longer period of uncertainty in my view.

[29] However, if I am wrong and the word “estimated” creates an irresolvable indefinite time for commencement and completion, that term being an essential one, I would find that the agreement was void for uncertainty. I would find the developer in breach of *REDMA*, also taking into account my earlier remarks about the ultimate date of November 30, 2009, provided in the contract of purchase and sale. I also take into account the general spirit in which disclosure statements are expected to protect the consumer.

[30] Specifically there were breaches of the disclosure statement when the defendant failed to amend it at least by November 2006 or thereabouts in order to report the delay in commencement of construction. I consider the amendment of May 2, 2007, to be inadequate and misleading for not saying explicitly that construction was delayed and failing to re-estimate the completion date when it was or ought to have been known that a November 2008 completion date was unlikely. At least by November 2008, a new completion date, estimated or otherwise, should have been substituted. There was a further breach and material misrepresentation in estimating and not immediately amending the disclosure statement when November 2008 passed with a year more to go.

MATERIAL MISREPRESENTATION

[31] Section 1 of *REDMA* defines material fact broadly to include “a proposal to do something”. That is sufficient to treat errors and omissions of estimates as material misrepresentations whereas, more precisely defined, misrepresentations can be limited in their reference to matters of fact. As regards amendments, once November 30, 2006 passed without commencement of construction, the defendant had to immediately amend to replace November 2006 with a new estimated commencement date. The plaintiff conceded that the amendment of May 2, 2007 corrects effectively the misrepresented time for commencement of construction by stating that the building permit was issued on April 23, 2007, but I disagree. I say

that such a statement is non-compliant and misleading. It does not answer the question and the inference does not follow logically.

[32] On February 8, 2008, a builder's lien was registered by Virtuoso Concrete Finishing Ltd. against the units to the project. It was a lien for about $8,000 filed by mistake, and very soon after, that is, by March 11, 2008, it was removed.

[33] I reject the plaintiff's argument that this amounted to a material change. The amount was insignificant in the context of everything else. Further, it was a mistake that was corrected before any problem resulted, and there is no evidence that it affected the plaintiff adversely in any way.

[34] However, the project was not completed by November 2008 and neither before nor after that date until October 2009 did the defendant at any time file or deliver an amendment, as it surely should have. Mr. Morrison, for the plaintiff, submits that as a result the disclosure statement became non-compliant with the requirements of *REDMA*, and materially misleading.

[35] However, Ms. Akelaitis, on behalf of the defendant, in conceding that no amended statement was filed other than the one that I have mentioned, maintains that effectively the disclosure was made by virtue of the developer's circulation of construction updates explaining the delays as the project proceeded. In its initial construction update in July 2008, the following was stated:

> Delays in receiving the building permit and the need for extensive groundwork caused delayed construction however we now anticipate completion in the Fall of 2009.

[36] Ms. Akelaitis submits that this information should suffice or even be treated itself as amendments to the disclosure statement as between the parties.

[37] The plaintiff, on the contrary argues that the defendant knew or ought to have known in April 2007 when it received its building permit that there would be a delay and that the first amendment to the disclosure statement was therefore a misrepresentation. The plaintiff also argues that *REDMA* does not countenance any

substitutes for disclosure statements and amendments have to be in the prescribed forms. At any rate, nothing operates to excuse the developer from the misrepresentations already made by it. I agree and I also agree with the plaintiff's first point that implicit in the statement is that the defendant knew or ought to have known in April 2007 when it received its building permit that there would be delay, so the initial statement is a misrepresentation.

[38] In fact, the unit was not completed in November of 2008 and is not completed to this date, although it is expected to complete very shortly, that is, within the next month.

[39] After this proceeding was commenced, July 30, 2009, the defendant, on August 10, 2009, delivered a second amendment to the disclosure statement correcting the information in the disclosure statement and stating that the estimated completion date of the residential tower is changed to October 2009. That alleged true fact does not expunge the previous misrepresentations made to the Plaintiff by the defendant.

[40] The project was not completed by November 2008 and neither before nor after that date did the defendant at any time before August 2009 file or deliver an amendment correcting the information in the disclosure statement. Mr. Morrison submits that as a result the disclosure statement became non-compliant with the requirements of *REDMA*.

PURCHASER'S MOTIVE

[41] Ms. Akelaitis, for the defendant, informed the Court that Mr. Ahamed contacted the defendant and advised that his business partners had run into financial troubles and did not have adequate funds to complete the purchase of the penthouse unit and inquired whether the defendant would consider a return to the original agreement, that is, to exchange the penthouse for a smaller unit like the original unit 402, and shortly thereafter the defendant advised Mr. Ahamed that it would not agree to cancel the agreement on the penthouse.

[42] Ms. Akelaitis points out that no actual proof of inconvenience, harm or damage of any kind resulting from the construction delay has been proven by the purchaser. The only evidence is that the purchaser is supposed to have said it is no longer able to finance the purchase or wishes to change its mind about the obligation it has entered into. There is nothing about the closing date that matters; it is only whether the plaintiff should pay for what the defendant is ready to deliver, and there is no suggestion that the plaintiff will receive anything less than that which was agreed to. From the very beginning with the interim agreement attached and forming part of the disclosure statement, the purchaser was aware that if the transaction was delayed until as late as November 2009, the purchaser would have the option to cancel the agreement altogether.

[43] I have a few difficulties with that argument. First of all, the requirement to state a date for commencement and a date for completion of construction implies an actual date, not a period of one month, or more. While I agree the specific dates for completion should perhaps not have to be strictly binding and might in some cases be greeted by a court as inflexible, the word “estimated” if taken to apply without limitation, that is, to allow for an indefinite delay, would destroy the intention of the legislation.

[44] Mr. Morrison is right that *REDMA* requires clear information for the protection of the buyer, and with the exception of very few circumstances, I cannot think of any when the date of occupancy, or the construction completion date would not be a material fact, either for a purchaser’s personal use or for the purpose of resale.

[45] Secondly, I do not accept that the developer actually believed that the completion date would be delayed as long as it turned out. “Estimated” connotes more than a guess or a wild guess. I infer from the circumstances that the defendants expected to complete at or near the date that they estimated. In my opinion the circumstances provide a basis for deeming the completion date to be within a range reasonable to the minds of the parties – a day in November 2008 most probably. I see no reason to accept that the developer had any disclosed

reason to anticipate any longer period of time. I would not accept that the parties intended an elasticity allowing the developer to delay until the ultimate deadline of November 30, 2009.

[46] *REDMA* clearly implies that in the case of material changes to the information provided, a notice must be provided in the form of an amended disclosure statement and filed immediately. The form and content of the disclosure statement is provided in the Superintendent's Policy Statement Number 1. It is a prescribed matter. Section 14 of *REDMA* requires that a developer prepare a disclosure statement in the form and the content required by the Superintendent and I must judge this application in light of whether the plaintiff complied with *REDMA*. In that regard see *Dwane v. Bastion Coast Homes Ltd.*, 2009 BCSC 726.

[47] The defendant also refers to *Jameson House Properties Ltd. (Re)*, 2009 BCCA 339, *Bigleaf Ventures Ltd. v. Marine Drive Properties Ltd.*, 2009 BCSC 633, and *Dureau v. Kempe-West Enterprises Ltd.*, [1989] B.C.J. No. 2123. And the defendant points out that *REDMA* is an act more vigorously protective of the consumer than its predecessor, the *Real Estate Act*, R.S.B.C. 1979, c. 356, which was the Act at issue in *Dureau*. For instance, the *Real Estate Act* only required amendments to disclosure statements to be delivered to new purchasers who signed their agreements after a material misrepresentation.

SUBJECTIVE OR OBJECTIVE TEST?

[48] As to whether the term "material fact" in *REDMA* ought to be defined subjectively or objectively, the legislation being new, there are few authorities on which one may rely directly. The defendant submitted for the purpose of analogy the decision of Russel J. in *Bigleaf*, who at para. 38 adopted this quote from p. 11 (QL) of *Dureau*:

> I adopt the meaning given to the words "material fact" in the ***Securities Act*** as appropriate to the meaning of "material" in section 59 of the ***Real Estate Act***. There are differences in the legislation, but the definition is one which, in my view, accords with common sense. In other words, the word "material" is not specifically directed towards the loss that would be suffered if the material fact were found to be false, but rather to the effect which the material

> fact has, or is deemed to have, on the purchaser's willingness to buy, and for what price. In other words, you look at the effect which the material fact would have on the purchaser's willingness to buy for the price offered, and if the statement is such that it could reasonably affect his judgment whether to buy, and for what price, that is material for the purpose of this section.

[49] The Court of Appeal in *Jameson* also mentioned at para. 43 that an objective test must be applied to determine whether a fact is material namely, would a reasonable person would conclude that the fact in issue would affect "the value, price, or use of the development unit?" In this case, a reasonable person would certainly conclude that a construction delay of several months would affect the value or price of the unit.

[50] I am of the opinion, therefore, that the defendant failed to comply with *REDMA* by failing to immediately file and deliver an amendment correcting a false and misleading statement in the original disclosure statement relating to the completion date, which is, in this case, a function of the date for completion of construction and a material fact.

[51] Accordingly, the plaintiff is entitled to a declaration, pursuant to s. 23 of *REDMA*, that the contract for purchase and sale is unenforceable; as well as an order requiring the defendant to return to the plaintiff the deposit paid on the purchase price and I so order.

[52] Any questions? Any submissions?

[53] MR. MORRISON: Mr. Lord, I just want the check the motion, but I believe there would be an order for interest as well. The statement of claim sets out a claim for interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79, and I would simply seek an order that interest be paid from the date that the deposit was made based on the -- whatever the rate is in the *Court Order Interest Act*. And my second submission is on costs, and I would simply ask for costs at scale B.

[54] MS. AKELAITIS: I have no submissions on either of those.

[55] THE COURT: Okay. Take that order.

[56] MR. MORRISON: Thank you, Your Honour.

[57] THE COURT: Anything else?

[58] MR. MORRISON: No.

"Rice J."

_____

The Honourable Mr. Justice Rice

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Chameleon Talent Inc. v. Sandcastle Holdings Ltd.,* 2010 BCCA 300

Date: 20100609
Docket: CA037553

Between:

Chameleon Talent Inc.

Respondent
(Plaintiff)

And

Sandcastle Holdings Ltd.

Appellant
(Defendant)

Before: The Honourable Mr. Justice K. Smith
The Honourable Mr. Justice Lowry
The Honourable Madam Justice Bennett

On appeal from: Supreme Court of British Columbia, October 2, 2009
(*Chameleon Talent Inc. v. Sandcastle Holdings Ltd.*, 2009 BCSC 1670, Docket S095639)

Oral Reasons for Judgment

Counsel for the Appellant:	R.G. Ward, Q.C. A.C. Akelaitis
Counsel for the Respondent:	A.P. Morrison
Place and Date of Hearing:	Vancouver, British Columbia June 9, 2010
Place and Date of Judgment:	Vancouver, British Columbia June 9, 2010

[1] **LOWRY J.A.:** The question is whether the developer of a condominium project breached the provisions of legislation prescribing disclosure requirements and rendered an agreement for the purchase of one of the units in the project unenforceable. The appeal is taken from an order made on a summary trial answering the question in the affirmative for reasons given orally October 2, 2009.

[2] In July 2007, the principals of Chameleon Talent Inc. entered into an agreement (later assigned to Chameleon) to purchase a yet-to-be-constructed condominium unit in a residential complex from the developer, Sandcastle Holdings Ltd., and gave a deposit of $239,980.00. Prior to so doing, they were given a disclosure statement filed in June 2006 with the Superintendent of Real Estate in compliance with the *Real Estate Development Marketing Act*, S.B.C. 2004, c. 41. They were also given an amendment to the disclosure statement filed in May 2007. In the statement, the commencement and completion of construction were disclosed as:

> 5.1 Construction Dates
>
> | | |
> |---|---|
> | Commencement of construction (estimated): | November 2006 |
> | Completion of construction of the residential tower (estimated): | November 2008 |

[3] In clause 6.1, the statement provided a building permit would be issued prior to the commencement of construction and that an amendment would then be filed. The permit was not issued until April 2007. In the amendment to the statement that was then filed, clause 6.1 was amended accordingly but no mention was made of the construction commencement or completion dates. Clause 5.1 was not amended.

[4] Construction commenced soon after the building permit was received. During the course of construction, the principals of Chameleon fell into financial difficulties which jeopardized their being able to complete the purchase of the unit. In July 2009, Chameleon commenced this action seeking a declaration that, pursuant to s. 23 of the *Act*, the purchase agreement was not enforceable because the developer had misrepresented the construction dates and breached the provisions

of the *Act* governing disclosure statements. Construction had not been completed by the time of the trial in October 2009.

[5] Under the *Act* (ss. 14 and 15), the developer was required to file, and give to a purchaser or a prospective purchaser, a statement in the form prescribed by the Superintendent that, without misrepresentation, plainly disclosed all material facts respecting the property in which the unit was to be located. A "material fact" is defined in part as "a fact, or a proposal to do something, that affects, or could reasonably be expected to affect, the value, price, or use of the development unit or property", and a "misrepresentation" means "a false or misleading statement of a material fact, or an omission to state a material fact" (s. 1). The prescribed form required the developer to "state the actual or estimated dates of commencement and completion of construction".

[6] Where a developer becomes aware that a disclosure statement does not comply with the *Act* or contains a misrepresentation, the developer must immediately file an amendment to the statement filed that clearly identifies and corrects the failure to comply, or the misrepresentation, and provide such to a purchaser or a prospective purchaser within a reasonable time. No development unit that is the subject of the amendment is to be marketed until the amendment is filed (s. 16). An agreement to purchase a development unit is not enforceable by a developer who has breached these provisions of the *Act* (s. 23).

[7] The developer pleaded that, while the construction did not commence in November 2006 and would not complete by November 2008, there had been no misrepresentation and that the construction commencement and completion dates were not material facts. It alleged that, in any event, Chameleon (or its principals) was aware of both the construction commencement and completion dates when the purchase agreement was executed.

[8] The judge found that, by failing to immediately file and deliver to Chameleon an amendment to the statement filed in June 2006 when it became aware or ought to have known the construction and commencement dates were not as indicated,

the developer had misrepresented what fell within the defined meaning of material facts. He determined the developer's breach of the *Act* rendered it without a defence.

[9] The developer maintains the judge erred.

[10] It contends the estimated construction commencement and completion dates were not proven to be material facts. Speaking objectively, the judge said a reasonable person would conclude the value or the price of the unit would be affected by a construction delay of several months. The developer says Chameleon adduced no evidence that would support that finding, but common sense dictates that not only the value and price of a condominium unit will be affected by its availability for occupancy (whether by an owner or a lessee) but also the use to which it can be put. The commencement and completion of construction is critical to a unit being used at all. Some delays in the construction of condominium projects may be expected, but it seems to me substantial delays of many months, here extending to a year, will generally be material to purchasers and prospective purchasers in respect of the price to be paid for, the value there may be in, and the use of a condominium unit that is being purchased.

[11] The developer maintains the knowledge the principals of Chameleon had concerning the construction commencement and completion dates is determinative of whether such are material facts. It says they knew November 2006 and November 2008 were merely estimates, construction could not commence until after the building certificate was issued in April 2007, and, commencing in July 2008, they were given updates on the building schedule. But, in my view, whatever knowledge they may have had is beside the point.

[12] As indicated, a "material fact" is a defined term: a fact, or a proposal to do something, that affects or could reasonably be expected to affect the price, value, or use of a unit. Under the *Act*, a disclosure statement must plainly disclose all material facts. It must be in the prescribed form which specifically requires disclosure of the actual or estimated construction commencement and completion dates. Quite apart

from what the principals of Chameleon may have known, the dates fell within the definition of material facts. They had to be disclosed as they initially were in the statement filed in June 2006. They did not become any less material by virtue of anything any one or more purchasers or prospective purchasers may have known. The requirements imposed on a developer under the *Act* to file and deliver disclosure statements, and amendments to such, disclosing material facts cannot turn on the knowledge possessed by any given purchaser or prospective purchaser.

[13] The developer then contends there was no misrepresentation concerning the construction commencement and completion dates because, as set out in its factum:

> (a) The date for commencement of construction was an estimate only and there is no suggestion that this estimate was false;
>
> (b) The Disclosure Statement made it clear that whatever the estimated date for commencement of construction, construction would not commence until a building permit was issued;
>
> (c) The Amended Disclosure Statement made it clear that the building permit for the Residences was issued April 23, 2007 and therefore construction did not commence until after that date;
>
> (d) [One of Chameleon's principals] was aware that construction of the Residences could not have commenced before the issuance of the building permit;
>
> (e) The date for completion of construction was an estimate only and there is no suggestion that this estimate was false; and
>
> (f) The Disclosure Statement anticipated construction delays and indeed specifically provided for a closing date up to November 30, 2009 with a possible extension of 60 days, beyond which there would be a right of rescission.

[14] The reference to the disclosure statement providing for a closing date of "up to November 30, 2009" refers to a blank form of sale agreement attached as Schedule G to the disclosure statement. The form contained the following statement:

> Seller shall select and give fourteen (14) days' notice to Buyer of a date for closing, which shall be no more than thirty (30) days after the issuance of an Occupancy Permit for the unit being purchased. If closing has not occurred by November 30, 2009 however, at the option of either party, this Agreement shall become null and void and all deposit monies and interest, if any, shall be refunded to the Buyer. Provided however this date shall be extended by the number of days, to a maximum of sixty (60), lost to construction due to causes beyond the reasonable control of the Seller except lack of finances

> but including without limitation, strikes, unavailability of labour or materials, damage to or destruction of improvements or facilities.

[15] The developer says that, in the circumstances, the only material fact set out in the statement filed in June 2006 which changed requiring that an amendment of the statement be filed was the date of the issuance of the building permit and that it complied in filing the amending statement in May 2007.

[16] Again, in my view, the developer's contention misses the point which is one of statutory non-compliance. The developer stated in June 2006 the construction commencement and completion dates were estimated to be November 2006 and November 2008 respectively. By November 2006, it knew the estimated commencement date was wrong, and by the time the building permit was issued in April 2007, it must, as the judge found, have known the estimated completion date was also wrong. (It adduced no evidence to the contrary.) The dates stated in clause 5.1 were no longer what the Superintendent's policy required and the June 2006 statement no longer complied with the *Act*. The developer was, in the words of the *Act*, required to immediately file and, in a reasonable time, provide to a purchaser or prospective purchaser, an amendment to the statement clearly identifying and correcting the failure to comply with the *Act.*

[17] That was not done. The developer's failure to disclose that construction did not commence in November 2006 and was not estimated to complete in November 2008 by amending clause 5.1 of the statement filed in June 2006 constituted a "misrepresentation" as defined: a false or misleading statement of a material fact, or an omission to state a material fact. I agree with the judge:

> [30] Specifically there were breaches of the disclosure statement when the defendant failed to amend it at least by November 2006 or thereabouts in order to report the delay in commencement of construction. I consider the amendment of May 2, 2007, to be inadequate and misleading for not saying explicitly that construction was delayed and failing to re-estimate the completion date when it was or ought to have been known that a November 2008 completion date was unlikely. …

[18] I am unable to see how the amendment of clause 6.1 regarding the date of the issuance of the building permit could be said to have been all the developer was required to amend to address the non-compliance with the Act the construction commencement and completion dates stated in the June 2006 statement constituted when the amending statement made no reference to clause 5.1 or those dates whatsoever. By the same token, I do not consider the reference to an ultimate completion date in November 2009 in a blank draft of the Chameleon purchase agreement to go any distance to obviate the statutory requirement that the developer file and deliver an amendment to the June 2006 statement identifying and correcting the construction dates stated in clause 5.1.

[19] Under the *Act*, the developer was precluded from entering into the agreement for the purchase and sale of Chameleon's unit in July 2007. Further, its non-compliance with the *Act* rendered the agreement unenforceable.

[20] It follows that I would dismiss the appeal.

[21] **K. SMITH J.A.**: I agree.

[22] **BENNETT J.A.**: I agree.

[23] **K. SMITH J.A.**: The appeal is dismissed.

"The Honourable Mr. Justice Lowry"

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Riegel v. Revelstoke Mountain Resort Limited Partnership et al.,*** 2012 BCSC 3

Date: 20120104
Docket: 12636
Registry: Salmon Arm

Between:

Ross Riegel

Plaintiff

And:

Revelstoke Mountain Resort Limited Partnership, by its general partner Revelstoke Mountain Resort Inc., and Revelstoke Mountain Resort Inc. and Max Wright Real Estate Corporation dba Southeby's International Realty Canada

Defendants

Docket: 12314
Registry: Salmon Arm

Between:

Daniel Ward and Leanne Anderson

Plaintiff

And:

Revelstoke Mountain Resort Limited Partnership, by its general partner Revelstoke Mountain Resort Inc., and Revelstoke Mountain Resort Inc.

Defendants

Before: The Honourable Mr. Justice Groves

Reasons for Judgment
In Chambers

Counsel for the Plaintiffs:	Andrew Morrison Agent for Robert Lundberg
Counsel for the Defendants:	Rodney Chorneyko Agent for Scott Griffin
Place and Date of Hearing:	Revelstoke, B.C. November 21, 2011
Place and Date of Judgment:	Revelstoke, B.C. January 4, 2012

[1] On the 21st of November 2011 while sitting in Revelstoke, British Columbia, I heard two applications in the above-noted actions, the first being an application by the defendants to adjourn the hearing of summary trial, which application to adjourn was dismissed, and the second being the actual summary trial application under Rule 97 of the *Rules of Court*.

[2] As noted, the adjournment application was dismissed. Summary judgment was granted to the plaintiffs in each action with full Reasons to follow. These are those Reasons. Additionally, as I noted in granting judgment on the 21st of November 2011, these reasons are based on the persuasive oral and written argument of the plaintiffs. Of additional note, the defendant did not make additional representation at the summary judgment application over and above these made on the adjournment application.

[3] In March 2007, the plaintiffs in these two actions entered into contracts of purchase and sale with the defendant Revelstoke Mountain Resort Limited Partnership ("Revelstoke LP") to purchase units in something called the Nelsen Lodge Development. The plaintiff Ross Riegel ("Riegel") paid a deposit for Unit 26 of $155,800. Daniel Ward ("Ward") and Leanne Anderson ("Anderson") paid a deposit of $159,800 for the purchase of Unit 38. These were presale units, units in a condominium development not yet built. The provisions under the *Real Estate Development Marketing Act*, S.B.C. 2004, c. 41, ("REDMA") apply to the contracts.

[4] The plaintiffs had received a disclosure statement dated March 12, 2007. Shortly after signing the interim agreements and paying the deposits, it is conceded that the plaintiffs receive a first amendment which was filed on April 12, 2007 and it is also conceded that they received an second amendment disclosure statement dated November 16, 2007.

[5] That being said, subsequent amendments to this disclosure statement were filed being a third, fourth, fifth and sixth amendments and the plaintiffs did not

receive these amended disclosure statements. The dates for the amendments were January 15, 2008, January 28, 2008, February 8, 2008, and October 28, 2008.

[6] There was apparently a seventh amended disclosure statement which was dated February 3, 2009 and the plaintiffs did receive that amended disclosure statement. It is the plaintiffs' evidence that when they received the seventh amended disclosure statement they realized that they did not receive the third, fourth, fifth and sixth amendments.

[7] On the 15th of April 2009, the plaintiffs delivered letters to Revelstoke LP exercising what they viewed as their right to rescission by virtue of Revelstoke LP's failure to abide by the provisions of REDMA, failure to deliver the amended disclosure statements in a timely way. The plaintiffs requested a return of their deposits and Revelstoke LP refused. The plaintiffs advised the court that after their request, Revelstoke LP delivered certificates to Sotheby's, the real estate company holding the deposits, falsely stating that the plaintiffs had not delivered further deposits when due, causing Sotheby's to pay the deposits held to Revelstoke LP as liquidated damages, something the contracts of Purchase and Sale provided for. This alleged false representation is of a particular concern to the plaintiffs, as the payment of their deposits to Revelstoke LP meant they have no security for the funds they advanced as deposits.

[8] Revelstoke LP is a limited partnership. It appears to be a limited partnership created for the purposes of this development, and the plaintiffs attest to this development being close to completion. They attest to the deposits being inappropriately obtained from Sotheby's as a result of false representations by Revelstoke LP to Sotheby's.

[9] The plaintiffs argue convincingly, specifically in regards to an adjournment application, that if the matter was adjourned, there was the real possibility of them not being able to obtain their deposits back. The deposit funds are substantial and based on that concern as well as other concerns which will become apparent in these Reasons, the application for an adjournment of summary trial was dismissed.

[10] The other issue at play in regards to the adjournment of this matter is the issue of previous representations to the court on an earlier summary judgment application. Though I dealt with this in my reasons on the adjournment application on the 21st of November 2011, some detail is required for these reasons.

[11] These plaintiffs are clearly not the only parties that had a dispute with Revelstoke LP in regards to this development and the return of their deposits. There was an earlier case of *Pinto v. Revelstoke Mountain Resort Limited Partnership*, 2010 BCSC 422, before Mr. Justice N. Smith of this court which had apparently identical facts, save and except as to the deposit amount in the name of the plaintiff. The arguments about REDMA and its provisions and the consequences of what appears to be conceded, Revelstoke LP's failure to provide amendments to disclosure statements in a timely way, were argued before Mr. Justice N. Smith and Mr. Justice N. Smith granted judgment for Pinto against Revelstoke LP for the return of Pinto's deposit. The matter was subsequently heard in the Court of Appeal, *Pinto v. Revelstoke Mountain Resort Limited Partnership*, 2011 BCCA 210. The Court of Appeal upheld the decision of Mr. Justice N. Smith.

[12] The *Pinto* case is of great significance to this matter before me. That is particularly of note as a result of a previous application for summary judgment heard by my brother Mr. Justice Powers on July 5, 2010. At that point, Revelstoke LP was represented by Murray Clemens, Q.C. and the plaintiffs were represented by Mr. Robert Lundberg of Revelstoke.

[13] In July 2010, the *Pinto* decision, the decision of Mr. Justice N. Smith had been resolved at trial but the Court of Appeal decision was pending. (The Court of Appeal matter was argued in November 2010 and as noted earlier, decision was rendered in April 2011). On behalf of Revelstoke LP, this defendant, their then counsel made a number of representations to the court before Mr. Justice Powers, the net effect of that persuasive representation was that the application for summary judgment was adjourned pending the Court of Appeal decision in *Pinto*. Mr. Clemens on behalf of Revelstoke LP represented to the court that the upholding

of *Pinto* in the Court of Appeal would be, to use the tennis term, a "kill shot" that would decide this present litigation. Justice Powers noted at page 29 of the transcript from July 5, 2010 as follows:

> Well, if I heard you so far, Mr. Clemens, maybe this is the first step. If your client loses on the appeal, if Justice Nathan Smith's decision is upheld in *Pinto*, then you agree that Mr. Lundberg's clients are entitled to judgment.

[14] Mr. Clemens' response to that statement by Mr. Justice Powers, "I am done here, yes". Further on, Mr. Justice Powers says the following, "So the Court of Appeal will decide these three cases when it decides *Pinto*". Mr. Clemens' comments at that time were "it will". (Of note, before Mr. Justice Powers were these two cases and another one not currently before me, that is the reference to "these three cases").

[15] Mr. Chorneyko on behalf of new counsel for Revelstoke LP, Mr. Scott Griffin, stated two things to the court. First off, he indicated that in support of his adjournment application, that the defendants wish to explore with their former counsel, Mr. Clemens what he meant by his representations to the court. I pointed out to Mr. Chorneyko that Mr. Griffin appears to have been retained since July 2011 and that there are no issues of solicitor-client privilege between a client and his solicitor so Revelstoke LP has had the months of July, August, September and October to make those inquiries but appears not to have done so.

[16] Additionally, Mr. Chorneyko argued that the defendants were arguing estoppel on the grounds that one of these current plaintiffs was the general contractor on this project and the other plaintiffs were involved in the development business in the Revelstoke area.

[17] In my view, that estoppel argument is without merit when one considers s. 21(3) of REDMA which provides that a purchaser has a right to rescission when a purchaser does not receive a disclosure statement that he or she is entitled to receive. Additionally, I determined that the case of *Chameleon Talent Inc. v. Sandcastle Holdings Ltd.*, 2010 BCCA 300, dealt with that argument completely.

[18] Turning to the application for judgment, the plaintiffs in this action sought judgment on an issue in which there is no factual dispute. I am satisfied that this is an appropriate case in which judgment can be granted under Rule 9-7.

[19] The defendants failed to deliver four amendments to the disclosure statement that REDMA requires them to disclose. The plaintiffs argued that Revelstoke LP contravenes s. 16(1)(b) of REDMA by failing to deliver these amendments to the plaintiffs in a timely way.

[20] REDMA, it should be noted, is a substantial departure from its predecessor, *The Real Estate Act*. REDMA imposes obligations to deliver amendments to existing purchasers within a reasonable time. REDMA requires developers to prepare and file disclosure statements setting out all material facts related to the development and the sale of units. REDMA defines the terms "material facts" broadly and requires developers to file amended disclosure statements when material facts change or when a developer becomes aware of false or misleading statements, or when there are omissions of material facts in a statement of disclosure or any prior amendment.

[21] REDMA is clearly legislation which has consumer protection as its basis. As the Court of Appeal opined at para. 17 of the *Pinto* decision:

> The *REDMA* is consumer protection legislation. One of its central objectives is to ensure that material facts are provided to purchasers when developments are being marketed to them… Consumer protection legislation is to be interpreted generously in favour of the consumer.

[22] REDMA provides that the developer has a continuing obligation, even after the presale of the unit, to ensure that the information in the current disclosure statement is accurate. Section 16(1) of REDMA as noted earlier requires a developer to deliver an amended copy to each purchaser within a reasonable time after it has filed the amendment. The remedies in REDMA include a right of rescission, as noted in s. 21(3), if a purchaser does not receive the amended disclosure statement that he or she is entitled to receive.

[23] The undisputed facts here are that Revelstoke LP has contravened REDMA by failing to deliver multiple amendments to the plaintiffs within a reasonable time after they were filed. As noted earlier, the Court of Appeal in *Pinto*, on virtual identical facts, found that there had a breach of REDMA and required Revelstoke LP to return the deposits.

[24] I am satisfied that the amendments which were not disclosed do in fact contain material facts, they include changes to strata fees, they include the construction of an additional units, they note changes to estimated completion dates of some phases, and particularly they note the location of, and new completion dates for the recreational facilities, all of which could reasonably expected to affect the value of the units. In *Pinto*, the Court of Appeal has conclusively determined that at minimum, amendment five contains material facts and it is clear in this case that amendment five was not delivered to these purchasers.

[25] I am satisfied that these purchasers have proven on the materials before me that they had a right to rescission as a result of the actions of Revelstoke LP. I conclude that Revelstoke LP has contravened REDMA. The plaintiffs are granted their order seeking rescission of their contract of purchase of sale, a declaration that their contract of purchase of sale is unenforceable and an order requiring Revelstoke LP to refund the deposits.

[26] The plaintiffs will each have their costs on Scale B.

The Honourable Mr. Justice Groves

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Riegel v. Paraskevopoulos,*
2013 BCSC 335

Date: 20130304
Docket: SS12319
Registry: Salmon Arm

Between:

Rosswell Allyn Riegel and Suzanne Tarnow Riegel

Plaintiffs

And

John Paraskevopoulos and Jennifer Huisman

Defendants

Before: The Honourable Mr. Justice Meiklem
in Chambers

Reasons for Judgment

Counsel for the Plaintiff:	R. Lundberg
Counsel for the Defendants:	T. Brown
Place and Date of Hearing:	Salmon Arm, B.C. January 23, 2013
Place and Date of Judgment:	Salmon Arm, B.C. March 4, 2013

[1] This was a summary trial hearing initiated by the defendants under Rule 9-7 of the *Supreme Court Civil Rules* to determine the enforceability of a contract dated March 27, 2008 for the purchase of a commercial strata unit in Revelstoke, British Columbia, and for the return of the deposit held by the plaintiffs' solicitor in trust.

[2] There are two grounds on which the defendants base their application. The first is that the contract is unenforceable due to the plaintiff sellers' alleged non-compliance with the stringent provisions of the *Real Estate Development Marketing Act* [SBC 2004] c. 41 [*REDMA*] regarding providing buyers with amendments to disclosure statements.

[3] The second ground is that, following an anticipatory breach by the purchasers, the sellers elected to treat the contract as alive, but failed to perform their obligations under the contract, thus disentitling themselves from retaining the deposit.

[4] The parties agree that the narrow issues are suitable for determination summarily, and that the essential facts are not disputed.

[5] Section 23 of the *REDMA* provides:

> **23** A promise or an agreement to purchase or lease a development unit is not enforceable against a purchaser by a developer who has breached any provision of Part 2 *[Marketing and Holding Deposits]*.

[6] The parties agree that the strata unit is in a mixed residential and commercial development and is subject to the *REDMA*.

[7] The facts alleged by the defendants are set out succinctly in the notice of application as follows:

> 1. The Defendants were provided with a Disclosure Statement on March 18, 2008 and entered into a Contract of Purchase and Sale with the Plaintiffs dated March 27, 2008 (the "Contract") for the purchase of a commercial strata unit in Revelstoke, British Columbia (the "Unit"), for the purpose of operating a coffee shop style restaurant.

2. The Plaintiffs agreed to build and prepare the Unit for the Defendants and agreed that the Unit would be fit for the purpose of operating a coffee shop style restaurant.

3. The Defendants paid a deposit in the amount of $45,000.00 to Robert Lundberg Law Corp. in Trust pursuant to the Contract (the "Deposit").

4. The Plaintiffs, through their lawyer, made amendments to the Disclosure Statement and forwarded the First Amendments to Disclosure Statement to the Financial Institutions Commission ("FICOM") and to the Defendants.

5. The First Amendments to Disclosure Statement was deemed deficient by FICOM and the Plaintiffs were instructed by FICOM that further amendments to the Disclosure Statement would be required if the First Amendments to Disclosure Statement had been distributed, which it was, as a copy had been delivered to the Defendants.

6. The First Amendments to Disclosure Statement was amended by the Plaintiffs, through their lawyer, and the corrected pages were forwarded to FICOM for insertion into the First Amendments to Disclosure Statement.

7. The Defendants were never provided with the First Amendments to Disclosure Statement with the corrected pages that were forwarded to FICOM.

8. The Defendants, through their lawyer, elected to rescind the Contract as they were entitled to do under the *Real Estate Development Marketing Act* and demanded the return of their deposit from the Plaintiff.

9. The Plaintiffs did not accept the rescission of the Contract and have refused and/or neglected to return the deposit to the Defendants.

[8] It is worth noting that the assertion that the defendants were entitled to rescind under the *REDMA* is not an established fact and that issue is not the subject of this application.

[9] It is also necessary to clarify that the events set out in paragraphs 5 to 7 of the recited facts occurred after the defendants provided notice of rescission.

[10] The election to rescind mentioned in paragraph 8 of these recited facts was communicated by a letter to the plaintiffs from the defendants' solicitor dated April 23, 2009, and was "based on the changes to the Disclosure Statement", and not on the failure to provide the first amendments to the disclosure statement and the corrected pages, as one might mistakenly infer from the order of the recited facts. A second letter, dated April 30, 2009, was addressed to Mr. Lundberg, the plaintiffs'

solicitor, and expanded on the changes mentioned in the first letter. Mr. Lundberg had communicated the plaintiffs' non-acceptance of the rescission.

[11] Did the plaintiffs breach any provision of Part 2 of the *REDMA* so as to entitle the defendants to a declaration of unenforceability and an order returning the deposit to them? The specific provision of Part 2 of the *REDMA* alleged to have been breached is s. 16(1), which provides:

> **16** (1) If a developer becomes aware that a disclosure statement does not comply with the Act or regulations, or contains a misrepresentation, the developer must immediately
>
> (a) file with the superintendent, as applicable under subsection (2) or (3),
>
> (i) a new disclosure statement, or
>
> (ii) an amendment to the disclosure statement that clearly identifies and corrects the failure to comply or the misrepresentation, and
>
> (b) within a reasonable time after filing a new disclosure statement or an amendment under paragraph (a), provide a copy of the disclosure statement or amendment to each purchaser
>
> (i) who is entitled, at any time, under section 15 *[providing disclosure statements to purchasers]* to receive the disclosure statement, and
>
> (ii) who has not yet received title, or the other interest for which the purchaser has contracted, to the development unit in the development property that is the subject of the disclosure statement.

[12] I will review the chronology of the relevant filings and distributions.

[13] The defendants received the first amendments to disclosure statement through their real estate agent as attachments to e-mails dated April 20, 2009 and April 22, 2009. The agent described them as "final disclosure statement" and "updated disclosure statement".

[14] Financial Institutions Commission ("FICOM") received delivery of the amendments on April 20, 2009 and advised Mr. Lundberg by letter dated May 8, 2009 of the need to correct two deficiencies to comply with the *REDMA*, namely, to remove all references to the *Real Estate Act*, and to amend one section to remove the reference that the Form W is subject to the approval of the Superintendent of

Real Estate. FICOM also stated in that letter that if the amendment had not been distributed to or discussed with potential purchasers, a letter to that effect, together with the corrected pages could be forwarded. Alternatively, if there had been distribution or discussion, a further amendment and a $200 filing fee were required.

[15] It does not appear that Mr. Lundberg forwarded a letter confirming no distribution, nor does subsequent correspondence make any reference to a further amended disclosure statement and another $200 fee, but FICOM's letter of May 25, 2009 confirms the receipt of revised pages and says that they had been placed in the disclosure statement amendment originally filed on April 20, 2009. FICOM's May 25, 2009 letter advised Mr. Lundberg:

> Please ensure that the corrected pages are included in the copies of the Disclosure Statement Amendment that are distributed to prospective purchasers.

[16] The defendants suggest that the failure to forward the requested letter confirming that there had been no distribution should have necessitated the filing of a full amendment of the disclosure statement rather than the incorporation of corrected pages. There is no evidence to assist the court in determining if, or why, FICOM accepted corrected pages only without the requested letter, so I cannot conclude that the *REDMA* was breached in that particular way.

[17] The plaintiffs did not distribute the corrected pages, or a copy of the amended disclosure statement "after filing" with FICOM, to the defendants. Suzanne Riegel's first affidavit, sworn December 19, 2012, sets out the plaintiff's actions, in paragraph 14:

> 14. In response to paragraph 21 of the affidavit, no further amendments were provided to the Defendants after April 23, 2009 as they supplied the Plaintiffs with their rescission. The Defendants received a letter from the Plaintiff's lawyer stating they did not have the right to rescind and that they must follow through with the closing or lose their deposit. A second letter was sent to the Plaintiffs confirming they did not intend to complete the sale on April 30, 2009, attached hereto is a copy of that letter and marked as Exhibit "E". The notice from FICOM that changes were to be made to the Amendments received on April 20, 2009 was not received until after May 8, 2009 which is when we first became aware of the issue.

[18] In my view, it is clear that the plaintiffs did not comply with s.16 (1) of the *REDMA*, because they did not provide a copy of the amendment to the purchaser within a reasonable time after its filing, or at all. If the corrected pages had been provided within a reasonable time, together with confirmation of the accuracy of the balance of the copy of the amended disclosure statement that had been provided to the purchasers contemporaneously with its filing on April 20, 2009, I may have considered the *REDMA* complied with, but that was not the case.

[19] This is not a case that involves a determination of the materiality of change in a development plan or whether the original disclosure statement needed amending to correct a misrepresentation. The recent cases such as *Bosa Properties (Esprit 2) Inc. v. Kim,* 2012 BCSC 1013, cited by the plaintiffs, which deal with materiality are not apposite. The plaintiffs prepared an amendment because they knew or were advised that one was required. They simply did not provide the defendants with a copy of it after filing; their reasoning appears to be that they were relieved of their statutory obligation to do so once the defendants gave notice of rescission.

[20] The changes that FICOM required may or may not have been significant to these defendants or other purchasers, but as the law stands, a developer is not excused from strict compliance with the statutory disclosure requirements simply because the amendments appear to be insignificant to the developer. In *Pinto v. Revelstoke Mountain Resort Limited Partnership,* 2010 BCSC 422, in a paragraph quoted in the Court of Appeal decision, 2011 BCCA 210, the summary trial judge said:

> [37] The *Act* does not set a specific time within which a developer who files an amendment must provide it to the purchaser. Section 16(1)(b) merely says it must be provided "within a reasonable time" after filing. Although the importance, or lack of importance, of a particular amendment to a purchaser is not relevant to the existence of the purchaser's statutory right, it may be relevant to defining a reasonable time for delivery of the document in the circumstances of a particular case. In some cases, a specific amendment might be of so little consequence to a reasonable purchaser that receipt of the amendment at any time prior to completion might

> be sufficient even if the amendment had been filed many months earlier. [Emphasis added]

[21] In this case, the closing date was imminent (although not yet known with precision, as I will explain later), and immediate delivery of the amendment would have been necessary.

[22] I must consider whether the defendants' notice of rescission relieved the plaintiffs of the statutory obligation to provide further amendments to the disclosure statements. Having taken the position that they would hold the defendants to the contract, the plaintiffs were bound to do everything required to be done to fulfill the sellers' obligations under the contract, which included fulfilling their statutory obligations under the *REDMA*.

[23] Applying the decisions in the *Pinto* case, and interpreting the *REDMA* generously in favour of the consumer, as I am bound to do, I find that a breach of s.16(1) occurred, and applying s. 23, I find that the subject contract became unenforceable. The defendants are entitled to a declaration to that effect and to an order returning their deposit.

[24] Turning to the alternative grounds for the application, the defendants rely on *Homestar Industrial Properties Ltd. v. Philps* (1992), 72 B.C.L.R. (2d) 69, which applies *Norfolk v. Aikens* (1989), 41 B.C.L.R. (2d) 145, in support of the argument that, having given notice to the defendants that their anticipatory breach was not accepted, and that they were expecting the defendants to complete, the plaintiffs were bound to fulfill their own contractual obligations to be ready to complete the sale. It is submitted that they failed to do so and cannot, therefore, retain the deposit.

[25] The completion date of the purchase and sale was January 23, 2009. However, an addendum, on the seventh page of the contract, set out the following provision as paragraph 27:

> 27. The Buyer's obligation to complete is subject to:
>
> > [a] The sale will be completed 30 days following completion of the subdivision of the property tentatively set for on or before

> December 24, 2008. The Seller will use its best efforts to apply for the subdivision as specified.
>
> [b] If for any reason the subdivision has not been completed by December 24, 2008, the Agreement shall automatically renew for one year extensions, until December 24, 2009, when this agreement shall finally terminate and be of no further effect.
>
> The above conditions precedent, 27 [a] through [b] inclusive are for the exclusive benefit of the buyer.

[26] The original completion date of January 23, 2009 was not met, and the subdivision was still not completed as of April 30, 2009, when the defendants' second notice of rescission occurred. The plaintiffs, as the developers, would have known precisely when the strata subdivision was completed. Provision of that information to the purchasers or the purchaser's agent was an implied duty under the contract if it was to be completed, because the closing date was defined as 30 days following subdivision completion, yet that did not happen. The evidence on this application does not reveal when the subdivision was actually completed, and plaintiff's counsel guessed that it was probably mid-June, 2009. The writ of summons and statement of claim commenced this action on June 2, 2009, claiming specific performance and alternatively damages.

[27] The plaintiffs sold the property to other buyers with a closing effective July 31, 2009, without any notice to the defendants that it was for sale or that it had been sold. The execution dates on the transfer to the new buyers were July 16 and July 29.

[28] It is clear on the facts that the notice of rescission was an anticipatory breach rather than an actual breach of contract by the defendants. A new completion date was never determined according to the definition in the contract, so an actual breach did not occur and could not occur until a completion date was established.

[29] In *Homestar*, at para. 29, the court discussed the legal consequences of an actual breach and an anticipatory breach in the following words:

> ... The legal results are quite different: where there is an actual breach the injured party has a choice of remedies and his election may be made in the court room. In the case of an anticipatory breach, if the innocent party elects

> to keep the contract in being, no cause of action arises until there is an actual breach. If the innocent party wishes to crystallize his rights before the time for performance and elects to accept an anticipatory repudiation as putting an end to the contract he must so notify the other party and thereupon his rights to damages arise.

[30] The plaintiffs' election presumably changed at some point between their commencement of the action and the time they agreed to sell the unit to another party, but they did not notify the defendants of that. I conclude that the defendants are entitled to the return of the deposit on this alternative ground as well.

[31] Costs follow the event on the scale of ordinary difficulty.

"I.C. Meiklem J.

MEIKLEM J.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Watson v. Havaday Developments Inc.,* 2011 BCSC 505

Date: 20110421
Docket: 4179
Registry: Golden

Between:

George Watson and Rick Fleming

Plaintiffs

And

Havaday Developments Inc.

Defendant

Before: The Honourable Mr. Justice Melnick

Reasons for Judgment

Counsel for the Plaintiffs:	B. Fairley
Counsel for the Defendant:	K. Ducey
Place and Date of Hearing:	Golden, B.C. and Cranbrook, B.C. January 31, 2011 and March 21, 2011
Place and Date of Judgment:	Cranbrook, B.C. April 21, 2011

[1] This is an application for summary judgment by the plaintiffs, George Watson ("Mr. Watson") and Rick Fleming ("Mr. Fleming"). The plaintiffs seek the return of deposits they paid to the defendant, Havaday Developments Inc. ("Havaday"), on account of residential condominium units being developed by Havaday. They claim that Havaday is in breach of its disclosure requirements under the *Real Estate Development Marketing Act,* S.B.C. 2004, c. 41 ("*REDMA*"). Havaday rejects this. Its position is that the deposits should be forfeited to it because the plaintiffs failed to complete their purchasers' contracts.

I. BACKGROUND

[2] Havaday is the developer of a golf course and residential housing project in Cranbrook. Part of the development includes Boulder Creek Villas ("Boulder Creek"), a condominium project of largely duplex and some stand-alone units. On November 4, 2007, Mr. Watson and Mr. Fleming each entered into a contract for the purchase of a stand-alone strata-titled unit in Boulder Creek. Mr. Watson paid a deposit of $77,876.75 and Mr. Fleming paid a deposit of $66,567. These deposits were equal to 10% of the total purchase prices including certain extras. Each deposit was paid in two instalments as part of each deposit related to contracts for extras.

[3] Boulder Creek was in the planning stages when the plaintiffs entered into the purchasers' contracts with Havaday. Construction had not started. Thus, the sales were governed by the *REDMA*.

[4] Pursuant to the *REDMA*, the plaintiffs were each provided with a disclosure statement at the time of entering into their contracts. The disclosure statement was a consolidation of the original disclosure statement and a first amendment. Counsel for the plaintiffs took umbrage with that, submitting that the *REDMA* dictated they be given an original disclosure statement and the amendment so they would be aware of what changes were in the amendment. There is no force to that argument, in my view. The consolidated disclosure statement the plaintiffs each received disclosed the current state of affairs at the time they purchased. The history of any changes

was of no importance to them. But, clearly, future changes would be, which is why the *REDMA* obliged Havaday to file and serve upon them any amendments that were incorporated into the disclosure statement after the point at which those changes became relevant to them, i.e. after the date they signed agreements to purchase their strata properties.

[5] The agreement to purchase that Mr. Watson entered into on November 4, 2007, provided for a purchase price of $669,000, on which he paid a deposit of $66,900. Mr. Watson entered into a second contract with Havaday dated October 1, 2008, for certain extras, or “finishing options”, in the amount of $109,767.50, on which he paid a deposit of $10,976.75. The “consolidated disclosure statement” he received was stated to be a consolidation of the original statement dated September 21, 2007, as amended dated November 1, 2007. Both the original and amended statement had been filed with the Superintendent of Real Estate. The disclosure statement provided that construction was expected to start in November 2007 and completed in November 2008. Both dates were stated to be estimates. A building permit had not yet been issued. The disclosure statement stated that, once the permit had been issued, an amendment to the disclosure statement would be filed with the Superintendent of Real Estate and a copy “...issued to each purchaser”.

[6] Although the purchase agreement provided a mechanism for determining the completion date, it listed August 30, 2009, as the “outside date” for completion. The vendor had the option to extend this date for 120 days. Certain other conditions also applied.

[7] Mr. Fleming’s contract of purchase was essentially identical, except that the purchase price of his strata lot was $619,000, on which his deposit was $61,900; his contract for finishing options was dated October 24, 2008, and was for $46,670 with a deposit of $4,667; and a second purchaser, Shirley Fleming, also signed the contract for the finishing options.

[8] When Mr. Watson and Mr. Fleming entered into the contracts to purchase their strata lots, the project was defined as a 43 unit development to be constructed

in a single phase. Boulder Creek was to be part of a much larger planned community and the plaintiffs' units were to front on a golf course (the first of two courses to be eventually constructed). Certain other amenities were also to be provided. However, as sometimes happens with projects of this kind, not everything went as envisioned in November 2007.

[9] Havaday filed an amendment to the disclosure statement dated June 25, 2008, with the Superintendent of Real Estate. The plaintiffs acknowledge that they received it and no issue arises from it.

[10] However, on January 20, 2009, Havaday filed a further amendment with the Superintendent of Real Estate. It contained some housekeeping changes, such as a change in the address of Havaday's registered office. It also contained what the plaintiffs contend were material changes to the disclosure statement, namely that Boulder Creek would now proceed in two phases, not one; the first phase, of which the plaintiffs' units were to be a part, was to consist of 28 units; a planned community park was no longer included in the first phase; and, further, phase one was to be completed by September 30, 2009.

[11] The original disclosure statement clearly stated that if there was to be a change in the outside date of August 30, 2009, an amendment would be filed to disclose the change and it would be issued to each purchaser. Further, s. 16(1)(b) of the *REDMA* provides that when such an amendment is filed, each purchaser must be provided with a copy of it within a reasonable time after filing.

[12] Both Mr. Watson and Mr. Fleming maintain that they were never provided with a copy of the January 20, 2009, amendment.

[13] Havaday, through its director, Jay Savage ("Mr. Savage"), says that the plaintiffs were provided with copies of the amendment by email. Mr. Savage does not say that he sent the copies or who did. No copy of the email transmission or any acknowledgment or receipt by the plaintiffs is provided. Mr. Savage says that it was the practice of Havaday to communicate with all buyers by email. Ms. Ducey,

counsel for Havaday, also points to a letter dated December 28, 2009, written by Mr. Fairley, counsel for the plaintiffs, to the then solicitors for Havaday, giving reasons why the plaintiffs were not going to complete. Those reasons included that the January 2009 amendment was never delivered to the plaintiffs. However, counsel for Havaday suggested it must have been or how else would Mr. Fairley have been aware of it? From any number of sources, I suppose, one of which could be that the plaintiffs, or one of them, received it in a reasonable time after January 20, 2009.

[14] Apparently, one or two more amendments to the disclosure statement were filed by Havaday, which the plaintiffs also deny receiving, but they do not appear to be relying on that.

[15] In any event, construction continued and in June 2009, Havaday registered a rent charge against the lands of which the plaintiffs' units formed a part. The plaintiffs complain that they should have received notice of the full details of this rent charge by way of an amendment to the disclosure statement.

[16] As it turned out, occupancy permits were issued for the plaintiffs' units in July 2009. On August 5, 2009, Havaday gave notice to each of them that their units were finished and ready to be transferred to them; that is, in advance of August 30, 2009, the originally estimated outside date. However, on August 11, 2009, Mr. Fairley wrote to Havaday indicating that the plaintiffs were not then prepared to close due to a number of deficiencies that had not, in the view of the plaintiffs, been addressed.

[17] Subsequently, by a letter dated August 18, 2009, Havaday notified Mr. Watson that the outside date was now December 28, 2009. Mr. Fleming was likely aware of that notice as well because neither Havaday nor either of the plaintiffs made any move toward completing the two purchases until December 16, 2009. On that date, Havaday gave notice to both Mr. Watson and Mr. Fleming that they expected them to close on December 28, 2009. The plaintiffs refused. The plaintiffs add that they were never provided with an amendment to the disclosure statement changing the outside date to December 28, 2009.

[18] In refusing to complete on December 28, 2009, counsel for the plaintiffs, in the letter dated August 11, 2009, provided a list of reasons:

> 1. The development was always represented to our client to be a golf course development, and Exhibit A to the disclosure statement clearly lays out that our client's strata lot would be located within an eighteen hole golf course. Our client's unit was specifically to be located adjacent to the golf course fairways. No such golf course exists and there is no assurance that one will ever be built;
>
> 2. The development was represented as in integrated neighbourhood with amenities. While the disclosure statement is not completely precise on which amenities would go in at which time, the fact is that there are no amenities whatsoever in place and the development is nothing more than some scattered houses spread over a large disturbed construction area.
>
> 3. The disclosure statement amendment filed in January of 2009 which converted the development to a phased project was never delivered to our client. Instead of an integrated community the development now consists of less than 20 finished units scattered throughout the proposed development area;
>
> 4. The disclosure statement represented that a park, green spaces, and landscaping would be in place on completion and there are none;
>
> 5. There is no completed driveway to the residence;
>
> 6. The entire project appears to be in foreclosure, and accordingly there is no likelihood whatsoever that the development will ever be completed as represented in the disclosure statement.
>
> 7. There does not appear to be a "developer" in place, or if there is, it is not the one named in the disclosure statement. Our clients have had no response from the named developer, to whom we have written to as long ago as September, with inquiries as to the state of the development. No assurances have been provided from the developer as to the completion of the development, in fact there has been no communication whatsoever. It appears that such work as is being done is being co-ordinated by Realty Investments Corporation or Investit Financial Inc., neither of which companies are named anywhere in the disclosure statement. Under these circumstances it is evident that the lenders will simply recoup their loans and the further development of the project will be at an end, or at least be substantially deferred.

[19] In fact, the property on which the 18 hole golf course is located was sold by Havaday to another company. It was not completed on December 28, 2009. At the time the plaintiffs refused to complete, only nine or ten holes were finished. It is scheduled to open in June 2011. The statements made as to the extent of the "amenities" and green spaces, landscaping, etc. then in place were substantially

correct. So, too, was the statement with respect to the driveway(s). No paving had been done although, apparently, funds had been set aside for this purpose to be done when weather permitted.

[20] In fact, on December 28, 2009, Havaday was in financial difficulty. Its lenders had assumed direction for the project although, technically, Havaday was still the developer. In that sense, there was nothing that Havaday was bound to disclose with respect to its identity. Of course, it would be bound to disclose if a trustee in bankruptcy had been appointed with respect to its affairs. If this has happened, I did not find any evidence to suggest it occurred on or before December 28, 2009.

II. DISCUSSION

[21] The plaintiffs advanced a number of reasons why they should not be required to complete their purchases, which one might characterize as firing a bucket of grapeshot over the deck of Havaday. However, the Court of Appeal has provided the plaintiffs with a potential cannonball with which to hit Havaday below the waterline of its defence. In *Chameleon Talent Inc. v. Sandcastle Holdings Ltd*, 2010 BCCA 300, which dealt with a developer's duty of disclosure, the Court of Appeal decided that a failure to modify construction dates in an amendment to a disclosure statement is fatal.

[22] First, let me step back and refer to the recent decision of Mr. Justice Masuhara in *Ulansky v. Waterscape Homes Limited Partnership*, 2011 BCSC 83. At paras. 45-51, he helpfully summarized the law respecting a developer's duty to disclose, including references to *Chameleon*, as follows:

> *(a) Duty of Disclosure*
>
> [45] Pursuant to section 14 of *REDMA*, a developer who intends to market a development must prepare and file a disclosure statement. A disclosure statement is defined in s. 1 of *REDMA*:
>
> > "disclosure statement" means a statement that discloses material facts about a development property, prepared in accordance with section 14(2) [*filing disclosure statements*], and includes any amendment made to a disclosure statement;

[46] The requirements of a disclosure statement under the *REDMA* are set out in s. 14 as follows:

> **Filing disclosure statements**
>
> 14 (1) A developer must not market a development unit unless the developer has
>
> > (a) prepared a disclosure statement respecting the development property in which the development unit is located, and
> >
> > (b) filed with the superintendent
> >
> > > (i) the disclosure statement described under paragraph (a), and
> > >
> > > (ii) any records required by the superintendent under subsection (3).
>
> (2) A disclosure statement must
>
> > (a) be in the form and include the content required by the superintendent,
> >
> > (b) without misrepresentation, plainly disclose all material facts,
> >
> > (c) set out the substance of a purchaser's rights to rescission as provided under section 21 *[rights of rescission]*, and
> >
> > (d) be signed as required by the regulations.

[47] The form and content required in a disclosure statement under *REDMA* is provided in the Superintendant's Policy Statement 1, entitled "Disclosure Statement Requirements for Development Property Consisting of Five or More Strata Lots" (the "Policy Statement"). With respect to disclosure obligations under "permitted uses", the Policy Statement requires as follows:

> **2.2 Permitted use**
>
> Describe the zoning applicable to the development property and the permitted use of all strata lots in the development. State whether any strata lot may be used for commercial or other purposes not ancillary to residential purposes.

[48] Section 23 of *REDMA* provides that, in the event of a breach of any provision of Part 2, which includes s. 14 regarding disclosure statements, any agreement to purchase a development unit is unenforceable:

> **Agreements void for non-compliance**
>
> 23 A promise or an agreement to purchase or lease a development unit is not enforceable against a purchaser by a developer who has breached any provision of Part 2 *[Marketing and Holding Deposits]*.

(b) <u>What is a material fact?</u>

[49] The terms "material fact" and "misrepresentation" are defined in section 1 of *REDMA:*

"material fact" means, in relation to a development unit or development property, any of the following:

> (a) a fact, or a proposal to do something, that affects, or could reasonably be expected to affect, the value, price, or use of the development unit or development property;...

"misrepresentation" means

> (a) a false or misleading statement of a material fact, or
>
> (b) an omission to state a material fact;

[50] The case law has further elaborated on what is required in terms of disclosure of material facts. In *Chameleon Talent Inc. v. Sandcastle Holdings Ltd.*, 2009 BCSC 1670, the court set out the following test:

> 48 As to whether the term "material fact" in *REDMA* ought to be defined subjectively or objectively, the legislation being new, there are few authorities on which one may rely directly. The defendant submitted for the purpose of analogy the decision of Russell J. in *Bigleaf* [*Ventures Ltd. v. Marine Drive Properties Ltd.*, 2009 BCSC 633], who at para. 38 adopted this quote from p. 11 of *Dureau* [*v. Kempe-West Enterprises Ltd*., [1989] B.C.J. No. 2123]:
>
> > I adopt the meaning given to the words "material fact" in the *Securities Act* as appropriate to the meaning of "material" in section 59 of the *Real Estate Act*. There are differences in the legislation, but the definition is one which, in my view, accords with common sense. In other words, the word "material" is not specifically directed towards the loss that would be suffered if the material fact were found to be false, but rather to the effect which the material fact has, or is deemed to have, on the purchaser's willingness to buy, and for what price. In other words, you look at the effect which the material fact would have on the purchaser's willingness to buy for the price offered, and if the statement is such that it could reasonably affect his judgment whether to buy, and for what price, that is material for the purpose of this section.
>
> 49 The Court of Appeal in *Jameson* [*House Properties Ltd. (Re)*, 2009 BCCA 339] also mentioned at para. 43 that an objective test must be applied to determine whether a fact is material namely, would a reasonable person would conclude that the fact in issue would affect "the value, price, or use of the development unit?"...

[51] The Court of Appeal affirmed the summary trial judgment in 2010 BCCA 300, and added as follows:

> As indicated, a "material fact" is a defined term: a fact, or a proposal to do something, that affects or could reasonably be expected to affect the price, value, or use of a unit. Under the *Act*, a disclosure statement must plainly disclose all material facts. ... The requirements imposed on a developer under the *Act* to file and deliver disclosure statements, and amendments to such, disclosing material facts

> cannot turn on the knowledge possessed by any given purchaser or prospective purchaser.
>
> [Emphasis by Masuhara J.]

[23] Counsel for Havaday referred to the 1992 decision of the Ontario Court of Appeal in *Abdool v. Somerset Place Developments of Georgetown Limited, (*1992) 58 O.A.C. 176, 96 D.L.R. (4th) 449. The Ontario Court of Appeal found that the onus of demonstrating that a disclosure statement fails to comply with the requirements of s. 52 of the *Condominium Act,* R.S.O. 1980, c. 84, is on the purchaser. This section is set out at para. 20 of *Abdool*. It is similar to ss. 14, 15 and 16 of the *REDMA*. The Ontario legislation provides for circumstances in which a purchaser of a strata property may rescind the contract. The Ontario Court of Appeal found that the exceptional nature of the rescission remedy requires that a purchaser satisfy an exacting test of materiality.

[24] It is not necessary for me to analyze *Abdool* in detail because it is clear to me from the analysis of Madam Justice Fitzpatrick in *Maguire v. Revelstoke Mountain Resort Ltd. Partnership*, 2010 BCSC 1618 (which refers extensively to *Abdool*), and of our Court of Appeal in *Chameleon* and *Jameson House Properties Ltd., Re*, 2009 BCCA 339, that:

> 1. a substantial delay of many months in a completion date is, in British Columbia, material;
>
> 2. a change in a project from a single phase to two phases is material;
>
> 3. a change in ownership, or control, or of the directors of the developer does not ordinarily mean that the identity of the developer has changed;
>
> 4. a change in the developer's financing may or may not be material; and
>
> 5. a developer is obliged to provide each purchaser with all amendments to its disclosure statement until closing.

[25] I find that it is probable that Havaday did not provide the plaintiffs with any amendments to its (consolidated) disclosure statement other than that of June 25, 2008. Ms. Ducey, on behalf of Havaday, suggested that there should be a trial because the evidence on this point is in conflict. But, in one sense, the acceptable evidence is not in conflict. Each of the plaintiffs states from his own knowledge that he did not receive these amendments. The evidence of Mr. Savage is essentially hearsay. There is no suggestion that he sent emails to the plaintiffs with the amendments. He simply says that Havaday did so because that was its practice. He gives no source for his belief. Even if his evidence is acceptable for consideration in a summary trial, I am satisfied, on a balance of probabilities, that Havaday did not send any amendments to the plaintiffs after that of June 2008. Therefore, there was a clear failure on the part of Havaday to comply with the requirements of the *REDMA* to provide copies of these amendments to Mr. Watson and Mr. Fleming.

[26] I find, as well, that the changes noted in the amendment of January 20, 2009, respecting the change from a one phase to a two phase development, and the extension of the outside completion date, were, in all the circumstances, material. They were changes that could well have affected the price, value and use of the plaintiffs' units. Thus, Havaday was obliged to provide notice of that information to the plaintiffs in a formal way, i.e. in an amendment.

[27] I am satisfied that the identity of Havaday, as developers, did not change so as to require a new disclosure statement.

[28] While, as noted earlier, the plaintiffs raised any number of arguments as to why they were not required to complete their contracts on December 28, 2009, I find that they succeed on the argument that the January 20, 2009, amendment contained changes material to their contracts and that Havaday never provided this amendment to them in breach of its disclosure requirements under the *REDMA*. Thus, Havaday cannot enforce its contracts of purchase and sale with Mr. Watson and Mr. Fleming.

III. CONCLUSION

[29] The contracts between Havaday and the plaintiffs, Mr. Watson and Mr. Fleming, are unenforceable by Havaday. The plaintiffs are entitled to the return of their deposits and any interest that has accrued on those deposits while being held in trust. There is liberty to apply to speak to the question of interest if there is any disagreement on the amount(s) payable. I could not find any provision in the contracts that specified any rate of interest.

[30] The plaintiffs are entitled to one set of costs on Scale B.

"Melnick, J."

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Mazarei v. Icon Omega Developments Ltd.*, 2012 BCSC 673

Date: 20120510
Docket: S104271
Registry: Vancouver

Between

Farzad Mazarei and Sima Alinaghizadeh

Plaintiffs

And

Icon Omega Developments Ltd.

Defendant

- AND -

No. S104272
Vancouver Registry

Between

Abbas Fariboz Mazarei and Faraz Mazarei

Plaintiffs

And

Icon Omega Developments Ltd.

Defendant

- AND -

No. S104273
Vancouver Registry

Between

Yahoo Enterprises Inc. and Sadru Dahya

Plaintiffs

And

Icon Omega Developments Ltd.

Defendant

- AND -

No. S104796
Vancouver Registry

Between

Nader Navidi-Kashani

Plaintiff

And

Icon Omega Developments Ltd.

Defendant

No. S105069
Vancouver Registry

Between

Behnaz Goudarzi and Amin Khajehnouri

Plaintiffs

And

Icon Omega Developments Ltd.

Defendant

- AND -

No. S105122
Vancouver Registry

Between

Rudolf Herzog and Brigitte Reichert

Plaintiffs

And

Icon Omega Developments Ltd.

Defendant

Before: The Honourable Madam Justice Stromberg-Stein

Reasons for Judgment

Counsel for the Plaintiffs:	Wesley J. McMillan
Counsel for the Defendant:	Gordon R. Johnson Matthew G. Swanson
Counsel for the Attorney General for British Columbia:	Karen A. Horsman
Place and Date of Hearing:	Vancouver, B.C. March 15-16, 2012
Place and Date of Judgment:	Vancouver, B.C. May 10, 2012

I. BACKGROUND

[1] The six actions against the defendant developer, Icon Omega Developments Ltd. ("Icon"), relate to a multi-phase condominium development in Edmonton, Alberta (the "Development"). Prior to completion of the Development, the plaintiffs signed contracts for the purchase of condominium units and provided deposits, which are held by Icon's solicitors, Ogilvie LLP. The plaintiffs allege Icon marketed the Development in British Columbia without complying with the disclosure requirements in the *Real Estate Development Marketing Act*, S.B.C. 2004, c. 41 ("*REDMA*"), a statutory scheme governing the marketing of real estate developments in British Columbia even where the real estate developments are not located in British Columbia. Relying on remedies provided by *REDMA*, the plaintiffs seek to rescind their contracts, or a determination that the contracts are unenforceable, and a return of their deposits.

[2] Icon maintains it did not market the Development in British Columbia and therefore *REDMA* has no application. Alternatively, if Icon did market the Development in British Columbia, *REDMA* is *ultra vires* the Legislative Assembly of British Columbia insofar as it applies to the marketing of property located outside of British Columbia.

[3] Icon applied to have the six actions struck on the basis that this Court does not have territorial competence in respect of these claims: *Mazarei v. Icon Omega Developments Ltd.*, 2011 BCSC 259. Mr. Justice Harris disagreed, commenting that the issue is whether the developer marketed the Development in British Columbia in non-compliance with *REDMA*.

[4] The common bond between all but one of the plaintiffs is that they are friends or relatives of Azita Nouri, a licensed realtor in British Columbia. Ms. Nouri circulated word of the Development, billing it as a profitable investment to this select group who placed their trust in Ms. Nouri without a modicum of due diligence.

[5] I make a general attribution at the outset to indicate that I have adopted portions of counsels' very helpful submissions, at times without specific attribution.

II. ISSUES

1. Did Icon market the Development in British Columbia?

2. If yes, is *REDMA*, insofar as it applies to the marketing in British Columbia of property located outside of British Columbia, *ultra vires* the Legislative Assembly of British Columbia?

III. FACTS

[6] The parties agree it is proper to determine these actions by summary judgment. The factual basis is gleaned from a number of affidavits. The parties indicate there are some differences between the recollections of the key witnesses, Mehdi Nasseri and Azita Nouri, but any such discrepancies are insignificant.

[7] Reza Mostashari provided an affidavit as president and one of two directors of Icon. Icon was incorporated pursuant to the laws of Alberta for the sole purpose of zoning and developing the Development in Alberta. Icon's place of business is in Edmonton where its essential management functions were conducted. Icon is not registered extra-provincially. In particular, Icon does not have a place of business, registered address or agent in British Columbia.

[8] Icon advertised units for sale in the Development primarily through print advertisements placed in publications distributed in and around Edmonton, as well as on the Icon website and at Icon's sales office located near the Development. ReMax (Edmonton) Real Estate Ltd. was Icon's selling agent for the condominium units in the Development; Terrie Reekie was the sales agent and sales were conducted from Edmonton.

[9] The first phase of construction for the first of two multi-unit high-rise condominium buildings began in 2006. The second phase of construction for the

second building began in 2007. The plaintiffs' contracts are for the purchase of units in the second building.

[10] Mehdi Nasseri, an investor in Icon and the second director of Icon, deposed he was not involved in the day-to-day management of Icon, but tried to keep generally aware of the project. He was not involved in the construction, pricing or marketing of the units. When, on the rare occasion, someone asked him about the project, he would tell them what he knew, such as its location and the fact it was the tallest residential building in the city. He would say he was a silent partner and would refer the person to the sales or management team in Edmonton for any follow up.

[11] Mr. Nasseri recalled that Ms. Nouri, who had acted as Mr. Nasseri's buying agent for the purchase of a condominium in Vancouver, asked him about the Icon project. He believed she was already aware of the Development and knew purchasers in the first phase of the project. Mr. Nasseri told Ms. Nouri he was a silent partner with no decision-making power and no active role. He possibly described the deposit structure and indicated the prices were good in Edmonton's growing economy. He did not know details of the project, including pricing, and told her that this would have to come from the company. He believes he told her the second phase of the Development was not yet for sale and may have referred her to Icon's website for project information. He understood Ms. Nouri's interest was as a potential purchaser. She did not mention other potential buyers. He thought he was dealing with her as a casual friend and experienced participant in the real estate market.

[12] Later, at Ms. Nouri's request, he sent her some pricing information, still believing she was the prospective purchaser. Only then did Ms. Nouri not only confirm her personal interest as a purchaser, but also indicated she was representing other buyers and she asked that specific units be held for her customers. Mr. Nasseri put her in direct contact with the Alberta sales team.

[13] In a second affidavit, Mr. Nasseri deposed that his initial discussions with Ms. Nouri took place at a social gathering at the home of a mutual friend, at which Ms. Nouri's husband was present. He understood the couple were both involved in the real estate industry. Whenever they met at social events they talked real estate. Mr. Nouri asked Mr. Nasseri to inform him if Icon had any additional projects. Mr. Nouri indicated he and Ms. Nouri were interested in investing in the Edmonton market. Mr. Nasseri told Mr. and Mrs. Nouri he was a silent partner with no decision-making power and no involvement in the day-to-day operations. He said his partner made the decisions about the project and all sales and sales administration was done through ReMax (Edmonton). When the Nouris asked for pricing, he told them he did not know it. He told them because they were friends he would obtain pricing information and forward it to them. He felt this was something friends would do for each other. As a result he obtained the pricing information for them.

[14] Around February 7, 2007, Ms. Nouri called Mr. Nasseri in Edmonton. She told Mr. Nasseri she had talked to friends about her decision to purchase a unit in the Development, and her friends expressed interest in purchasing Icon units for investment purposes and wanted to reserve units or enter into contracts. While discussing the additional purchasers with Mr. Nasseri on the phone, Ms. Nouri raised the idea of earning a commission or referral fee, which Mr. Nasseri agreed would be appropriate.

[15] Mr. Nasseri deposed that he did not ask Ms. Nouri to advertise the Development on behalf of Icon. He did not ask Ms. Nouri to find purchasers and he did not authorize Ms. Nouri to offer to sell, or to sell, units in the Development on behalf of Icon. However, on February 20, 2007, Mr. Nasseri e-mailed Ms. Nouri indicating some units had come available and asked if she had any strong prospects.

[16] Azita Nouri deposed she is a licensed realtor in British Columbia. She first met Mr. Nasseri when she acted for him and his wife in the purchase of a Vancouver

condominium. When she ran into him at social events their conversation typically related to real estate. She would occasionally show him pre-sale opportunities in Vancouver and he would tell her about his projects in Edmonton.

[17] In 2007 she ran into Mr. Nasseri at a social function in Vancouver where he told her about the Development. He explained the deposit structure required to purchase an Icon unit. He described the location of the Development and told her that the location and pricing were very good because of Edmonton's growing economy. He said he could arrange an opportunity for her and her friends and associates to purchase units. Ms. Nouri was interested. Mr. Nasseri gave her the Icon website address and e-mailed her a price list.

[18] In February 2007 she discussed the purchase of a unit for her and her family with Mr. Nasseri. Further, she discussed a commission or fee for each unit sold as a result of her efforts.

[19] Ms. Nouri deposed that Mr. Nasseri told her that Icon sales were going to open to the public at the end of February, and she could sell to her clients before that date. She approached friends and family members about the opportunity to purchase Icon units. Ms. Nouri told them she thought it was a good opportunity but explained she was not a licensed realtor in Alberta and had no knowledge of the Alberta real estate market.

[20] Mr. Nasseri e-mailed her an updated price list on February 7, 2007. She confirmed she would be paid a commission for each unit sold. On February 8, 2007, Ms. Nouri e-mailed Mr. Nasseri a list of her clients and the units they wanted to purchase. On the same date, she was copied on an e-mail from Mr. Nasseri to Terrie Reekie, the sales agent in Edmonton. Ms. Reekie sent her contracts for each client, pre-signed by the developer and dated February 20, 2007, a disclosure statement, a dual agency consent and other documents. The dual agency consent was required because Ms. Nouri was not a licensed realtor in Alberta and could not act as the buying agent.

[21] In her second affidavit, Ms. Nouri clarified aspects of the discussions she had with Mr. Nasseri. Her discussions with Mr. Nasseri took place over a period of time. She recalled having coffee with Mr. Nasseri in December 2006. Her husband was present and they exchanged information about what real estate projects each was involved with at the time. Mr. Nasseri spoke of his involvement with a strata project in Edmonton, indicating the first phase was sold out and it was in the second phase. Her husband indicated an interest in making a personal investment and asked Mr. Nasseri to provide the information. Mr. Nasseri provided the website address.

[22] In January 2007 she next saw Mr. Nasseri at a house party hosted by a mutual friend. They continued the conversation about the Edmonton project. Ms. Nouri said some of her close friends and relatives might also be interested in investing in the Development. It was after this conversation that Mr. Nasseri sent the price list and the description of available units.

[23] Following further conversation on February 7, 2007, during which the topic of a referral fee was discussed, Mr. Nasseri sent an up-to-date price list. Ms. Nouri cannot recall who raised the idea of a referral fee for each contract signed. Ms. Nouri had given the information about the project to her relatives and friends before this conversation.

[24] Ms. Nouri deposed that the persons referred to in her February 8, 2007 e-mail were either close friends or relatives of herself or her husband. Sharareh Ojagh is a real estate agent and the business partner of Ms. Nouri and her husband; Behnaz Goudarzi is a cousin of Ms. Nouri's husband and a close friend; Nick Nouri is her brother-in-law; Sanaz Farkhad is her daughter; Farzad Mazarei and Sima Alinaghizadeh are her husband's distant relatives and close friends; Rudolf Herzog is the husband of Behnaz Goudarzi; and Abbas Farborz Mazarei is the brother of Farzad Mazarei. Only Nader Khashani, who heard about the project from Ms. Nouri's fitness trainer, and contacted her directly, is not a friend or relative.

[25] Attached to the affidavits of Mr. Nasseri and Ms. Nouri are the e-mail exchanges between Mr. Nasseri and Ms. Nouri. In the February 7, 2007 e-mail,

Mr. Nasseri references a telephone conversation they had a few minutes before. He includes a new price list. He indicates the old price list is for her and family, for the 12th floor only, and he indicates, "I still would like to sell as many as you can so you can make commission as well, but anyone else outside the family would have to be at the new prices." He said that for the 26th floor, everyone must pay the new price. He added, "Please do not forget to add your $5000 commission for prices under $500,000 and $7000 for prices over $500,000. The commission is added to these prices."

[26] Ms. Nouri sent an e-mail on February 8, 2007, listing "our clients" and the units and unit prices. Of the clients listed to purchase seven units, two are not plaintiffs. Ms. Nouri indicated she was going to e-mail the new prices to clients overseas and she would let Mr. Nasseri know if they were interested. She inquired when she would receive the contracts and to whom, when and how the deposits should be payable. She said she really appreciated Mr. Nasseri's help and hoped to do more business in the near future.

[27] In response, Mr. Nasseri copied Ms. Nouri on an e-mail to Terrie Reekie on February 8, 2007, with Ms. Nouri's February 7 list of clients. In that e-mail, Mr. Nasseri identified Ms. Nouri as "(our ReMax Realtor) in Vancouver" and asked Ms. Reekie to contact Ms. Nouri and provide her with all the information she required. He indicated contracts and disclosures should go to Ms. Nouri so she could get the signatures, and he set out the deposit structure. By e-mail to Ms. Nouri the same date, Mr. Nasseri confirmed the sale of a unit at the listed price, with her commission added on, plus GST.

[28] By e-mail dated February 20, 2008, Mr. Nasseri notified Ms. Nouri that some units had "come back" and provided a list. He said, "I can not guarantee that if you call, the unit that you call for will not be on hold. But I'll do my best. If you have any strong prospects that you know, call me please."

[29] Farzad Mazarei, a senior software analyst, swore an affidavit and answered interrogatories about the purchase of an Icon unit with his wife, Sima Alinaghizadeh,

a notary public. He and his wife occasionally met for coffee with Ms. Nouri and her husband. On one occasion, Ms. Nouri told them about the Development. She said she had spoken to the developer, who approached her through a friend, who would permit her to sell Icon units at 25% below market value before they went on sale to the public in February 2007. She indicated the developer limited selection to two floors and a few other units. She said she had already sold most of the units to close clients, friends and family and that she was going to purchase a unit. She said there were only three units available to choose from. She described the location of the Development, said the price was very good, and told them of the deposit requirements. She provided information about the website, a price list and floor plans.

[30] As a result of the conversation with Ms. Nouri, Mr. Mazarei and Ms. Alinaghizadeh decided to purchase a unit because it seemed like a good investment opportunity. During the meeting with Ms. Nouri, Mr. Mazarei called his brother, Abbas Fariborz Mazarei, in Iran and repeated what Ms. Nouri told him and provided Ms. Nouri's telephone number.

[31] Ms. Nouri did not have a contract to sign at the time. She did not express that she was acting on behalf of Icon. She asked Mr. Mazarei and Ms. Alinaghizadeh to sign a dual agency agreement with ReMax Alberta. On March 2, 2007, he and his wife went to Ms. Nouri's office, signed a contract that had been pre-signed by the developer and dated February 20, 2007, and gave Ms. Nouri a cheque deposit.

[32] Abbas Fariborz Mazarei is a businessman in Iran. In February 2007 his brother, Farzad Mazarei, called at around 4:30 a.m. to say he and his wife were meeting with Azita Nouri about an opportunity to purchase a unit in Edmonton at 25% below market value prior to the public sale. This was the first Abbas Mazarei had heard of the Icon project. He took Ms. Nouri's telephone number and went back to sleep. By the time he woke up, Ms. Nouri had already e-mailed the price list and floor plans for Icon. He spoke to Ms. Nouri and selected a unit. He arranged for her to send the contract for his and his son's signature and arranged for his son to pay

the deposit. Mr. Mazarei's son, Faraz Mazarei, was an engineering student in Ottawa who was visiting Iran at the time. He deposed that his father made the decision to share ownership of the unit in the Development and all he did was sign what his father told him to sign.

[33] In answer to interrogatories, Mr. Abbas Mazarei said he and his son were in Iran when he learned of the Development. His brother called from British Columbia to tell him Icon was a good investment opportunity and that the developer had allocated two floors in the Development for sale in Vancouver at lower than market price. He had two phone conversations and an e-mail exchange with Ms. Nouri, whom he believed was in British Columbia. She told him about the Development and urged him to purchase a unit. She told him it was a good opportunity, most of the units sold quickly, and she urged him to act quickly. He would not have made the decision to purchase an Icon unit had Ms. Nouri not persuaded him. Based on what she told him he believed it was a good investment. Ms. Nouri did not expressly state she was acting for Icon. He signed a dual agency agreement.

[34] Sharareh Ojagh, a realtor and business partner of Ms. Nouri and her husband, is the principal of Yahoo Enterprises Inc. She learned of the Development from Ms. Nouri who told her about a conversation she had with a developer at a party. Ms. Nouri told Ms. Ojagh the developer would permit Ms. Nouri to sell units in the Development at 25% below market value before they went on sale to the public. Ms. Nouri said the location and price were very good and described the deposit structure. Based on the fact Ms. Nouri was buying a unit for herself and her daughter, Ms. Ojagh was interested in buying a unit. She called Sadru Dahya, someone she had previously bought, renovated and sold a property with, and told him what she had learned from Ms. Nouri. They decided to buy a unit together. They were asked to sign a dual agency agreement. The contract they signed with Ms. Nouri had Ms. Ojagh's and Mr. Dahya's name written on it and was pre-signed by the developer and dated February 20, 2007. Later Yahoo Enterprises Inc. replaced Ms. Ojagh as one of the purchasers on the contract.

[35] Nader Navidi-Kashani is a businessperson. He deposed he was contacted by Ms. Nouri in early February 2007 about a development project in Alberta. Ms. Nouri said she had spoken to the developer who would permit her to sell units in the Development at 25% below market value before they went on sale to the public. Ms. Nouri described the location and price as very good and explained the deposit structure. Mr. Navidi-Kashani met with Ms. Nouri on March 5, 2007, and she showed him brochures and a price list. In Ms. Nouri's opinion it was a good investment. The list price of the unit selected had increased by $5,000. Ms. Nouri said she would try to convince the developer to sell for the lower price. Ms. Nouri "whited out" another contract and filled in Nadar Navidi-Kashani's information and took a deposit cheque. Ms. Nouri called later to say the contract was accepted by the developer.

[36] Behnaz Goudarzi is a businesswoman married to Rudolf Herzog. They were contacted by their relative, Ms. Nouri, who told them about the opportunity to buy a unit in the Development at 25% below market value before the public sale. Ms. Nouri said the location and pricing were very good and she showed them a price list and floor plan. They wanted more time to think. Mr. Herzog discussed the opportunity with his sister, Brigitte Reichert.

[37] Rudolf Herzog and Brigitte Reichert met Ms. Nouri again and she repeated what she had said in the earlier meeting with Mr. Herzog and Ms. Goudarzi and showed them the price list and floor plans. Ms. Nouri called a few days later to say units in the Development were selling quickly and they needed to make a decision in two days. They purchased two units: one unit was in the names of Behnaz Goudarzi and her son, Amin Khajehnouri; the other unit was in the names of Rudolf Herzog and Brigitte Reichert. They signed the contracts at Ms. Nouri's office on March 6, 2007, and paid the deposits. The contracts had been signed and dated by the developer.

IV. DID ICON MARKET THE DEVELOPMENT IN BRITISH COLUMBIA?

[38] *REDMA* “applies to a developer who markets, in British Columbia, a development unit”: s. 2(1). *REDMA* “applies regardless of whether the development unit being marketed is located in British Columbia or not”: s. 2(2)(a). *REDMA* applies to all development properties that are marketed in British Columbia. *REDMA* regulates the marketing within British Columbia of development properties located inside and outside British Columbia.

[39] The definition of marketing is found in s. 1 of *REDMA*:

> "market" means
>
> (a) to sell or lease,
>
> (b) to offer to sell or lease, and
>
> (c) to engage in any transaction or other activity that will or is likely to lead to a sale or lease;

[40] There is a factual dispute between the parties about whether Icon “marketed” the Development in British Columbia within the meaning of *REDMA,* thus engaging the protections of the legislation for the plaintiffs. Specifically, the issue is did Icon sell or offer to sell units in the Development or engage in any transaction or other activity that will or is likely to lead to a sale. What is meant by the concept of “market”, as defined by *REDMA*, has not been previously considered by the courts.

[41] Section 3 of *REDMA* sets out four general requirements which a developer must meet before marketing a development project in British Columbia. Relevant in this case, and described in ss. 14-17, is that the developer must file a disclosure statement of material facts about a development property with the Superintendent of Real Estate before marketing begins, and later provide this disclosure statement to a purchaser before he or she enters into a purchase agreement. A developer is required to make further disclosure as material facts change or new material facts arise. Where a developer fails to provide a disclosure statement prior to entering into a purchase agreement, s. 21(3) of *REDMA* allows the purchaser to rescind the

agreement at any time. Further, s. 23 provides that a developer may not enforce a purchase agreement against the purchaser.

[42] The intent of *REDMA* is to "maintain and enhance consumer protection": British Columbia, Legislative Assembly, *Report of Debates (Hansard)* Vol. 25, No. 5, May 6, 2004, at 10914. Consistent with this legislative purpose, the British Columbia Court of Appeal held in *Pinto v. Revelstoke Mountain Resort Limited Partnership*, 2011 BCCA 210 at para. 17, that *REDMA* is consumer protection legislation:

> The *REDMA* is consumer protection legislation. One of its central objectives is to ensure that material facts are provided to purchasers when developments are being marketed to them: *Dwane v. Bastion Coast Homes*, 2009 BCSC 726 at para. 69. Consumer protection legislation is to be interpreted generously in favour of the consumer: *Seidel v. TELUS Communications Inc.*, 2011 SCC at para. 37.

A. Positions of the Parties

Plaintiffs

[43] Counsel for the plaintiffs maintains the analysis of the concept of marketing in *REDMA* must be viewed through the lens of consumer protection and "interpreted generously in favour of consumers" as described in *Seidel v. TELUS Communications Inc.*, at para. 37. Further, in determining the scope of the marketing activity that will trigger application of *REDMA,* regard should be had to *Richard v. Time Inc.*, 2012 SCC 8 at para. 43, where the Court commented *caveat emptor* ("let the buyer beware"), has been replaced by *caveat venditor* ("let the seller beware") in merchant-consumer relations. The plaintiffs assert *REDMA* imposes *caveat venditor* on developers who fail to comply with their *REDMA* disclosure obligations.

[44] The plaintiffs argue they are all British Columbia residents or have connections to British Columbia. All of them learned of the Development from Azita Nouri or through someone who had learned of the Development through Ms. Nouri. The plaintiffs maintain Ms. Nouri was critical to the sale of units to the plaintiffs

because had it not been for Ms. Nouri providing the pricing information and availability of units to the plaintiffs, none of the plaintiffs would have entered into a contract to purchase a unit in the Development.

[45] At paragraph 45 of their argument, counsel for the plaintiffs point to the following activities of Mr. Nasseri on behalf of the defendant as being evidence of marketing. They say he:

> (a) sent price lists to Ms. Nouri in British Columbia;
>
> (b) sent brochures to Ms. Nouri in British Columbia;
>
> (c) encouraged Ms. Nouri to make sales in order that she could earn commissions;
>
> (d) inquired as to whether she had "strong prospects";
>
> (e) delivered pre-signed and pre-dated contracts to British Columbia for execution; and
>
> (f) set aside units for the plaintiffs notwithstanding that they were not yet available to the general public.

[46] Counsel submits Icon's activities in its dealings with Ms. Nouri were clearly designed to, and did, lead to sales. They placed the defendant's product into the stream of commerce in British Columbia. As a result, the defendant offered to sell units in British Columbia and engaged in a "transaction or activity that will or is likely to lead to a sale or lease," thereby marketing the Development in British Columbia.

Defendant

[47] Counsel for the defendant notes the Superintendant of Real Estate of British Columbia has indicated in a Policy Statement that it is the Superintendant's view that marketing includes letters of intent, priority lists, reservation agreements, conversion rights and rights of first refusal: *BC Real Estate Development Practice Manual,* "Development Marketing" (Vancouver: The Continuing Legal Education Society of British Columbia, 2011). It is the position of the defendant that the concept of marketing in the context of *REDMA* includes some or all of the following activities, which are designed to lead to the sale of a unit:

(a) a marketing office near the location of the project with significant signage to attract attention;

(b) brochures, sometimes sent to selected residences and usually available within the sales office;

(c) artists renderings of the building and its surroundings;

(d) a scale model of the building, sometimes in the context of its neighborhood;

(e) large panels showing various floor plans;

(f) a display suite designed as a model for one of the proposed suites, often nicely furnished to demonstrate what the final living space will look like;

(g) a website hosting images of some or all of the above and perhaps other "image" advertising; and

(h) mass market advertising through newspapers and radio.

[48] The defendant argues the evidence establishes that during social interactions between Ms. Nouri and Mr. Nasseri, they engaged in social chit chat about real estate projects each was involved with. Both were experienced participants in the real estate market. Ms. Nouri seemed to know about the Icon project. Ms. Nouri expressed interest as a potential purchaser. Mr. Nasseri told her he was a silent partner with no decision-making power. He did not know project or pricing details and referred her to the website for more information. Later he sent her pricing information as a friend.

[49] Subsequently, it was Ms. Nouri who indicated she knew of other potential buyers. Mr. Nasseri had not asked her to seek other buyers. Ms. Nouri had already approached the plaintiffs about purchasing Icon units before she asked if she could earn a commission or referral fee. Mr. Nasseri agreed she should be paid a commission but said it had to be added on to the developer's purchase price. Ms. Nouri asked Mr. Nasseri to hold specific units for her clients and Mr. Nasseri put her in contact with the Alberta sales team.

[50] All of the plaintiffs were within a small discrete group connected to Ms. Nouri. The defendant points out that some of the plaintiffs had no direct contact with Ms. Nouri but heard about the project through others: Sadru Dahya heard of the Development from Sherry Ojagh; Brigitte Reichert heard of it from Rudolf Herzog;

and Nader Navidi-Kashani heard of it from a personal trainer. Abbas Fariborz and Faraz Mazarei were in Iran when they heard of Icon through Farzad Mazarei.

[51] The defendant maintains in speaking to the plaintiffs about the Development, Ms. Nouri was not acting on behalf of Icon; Mr. Nasseri did not ask Ms. Nouri to advertise the Icon project on behalf of Icon; he did not ask Ms. Nouri to find people who would be willing to reserve or purchase units at the Icon project; Mr. Nasseri did not authorize Ms. Nouri to offer to sell, or to sell, units in the Icon project on behalf of Icon; and all sales and sales administration for Icon was handled by a real estate agent at ReMax (Edmonton) where the Development was actively marketed.

[52] It is the position of the defendant that the proper approach is to adopt a flexible interpretation of marketing focused on the level of activity in British Columbia. The defendant submits *REDMA* captures developers' activities which are substantive, significant and substantially connected to British Columbia, and not merely incidentally connected to British Columbia. The defendant submits that to interpret *REDMA* this way avoids an interpretation that acts as a "trip wire" for out-of-province developers and which would produce "draconian impacts of *REDMA* worldwide".

B. Analysis on Marketing

[53] After examining the evidence and submissions of the parties, I find that the activities undertaken by Mr. Nasseri with respect to Ms. Nouri and the Development consisted of marketing in the context of *REDMA*.

[54] The definition of marketing in *REDMA* is very broad. It is not limited to any particular type or form of act. In the context of this case, the definition includes "to engage in any transaction or other activity that will or is likely to lead to a sale". This definition is based on a causal relationship between an activity and the end result of a sale; the activity itself is not limited to brochures, or a marketing office, or any other of the marketing techniques or devices suggested by the defendant. The legislature could have limited the definition of marketing but it did not do so.

[55] Mr. Nasseri is one of two directors of Icon. Although he claims to be a silent partner, and not involved in the day-to-day operations of the company, he made significant efforts to promote the sale of the Development units. He arranged for pricing lists, brochures, and pre-signed contracts to be sent to Ms. Nouri; he inquired about the progress of and prospect of future sales; and he agreed Ms. Nouri was entitled to a fee for unit sales as an incentive to sell.

[56] Others within Icon knew about Mr. Nasseri's activities. Icon's ReMax agent in Edmonton was aware of the arrangement and the communications between Mr. Nasseri and Ms. Nouri. Mr. Nasseri referred to Ms. Nouri as "our ReMax realtor in Vancouver" in one e-mail to Ms. Reekie. Neither Ms. Reekie nor Ms. Nouri appeared to be aware of the impact of *REDMA* and neither warned Icon of the consequences of marketing in British Columbia without complying with the developer's disclosure obligations.

[57] Although she is not a party to these actions, I find it at best negligent, and at worst dishonest, that Ms. Nouri, being a licensed realtor in British Columbia who would surely know about *REDMA*, did not ensure compliance by the developer with the requirements of *REDMA* when she acted at the behest of Icon in selling the Development units in British Columbia. The significance, if any, of the fact that it was Ms. Nouri who initiated contact with Mr. Nasseri about purchasing units in the Development, or that it was Ms. Nouri who marketed the Development in British Columbia, appears not to matter. *REDMA* addresses the conduct of the developer who markets a development in British Columbia.

[58] Importantly, Mr. Nasseri agreed Ms. Nouri could sell units in the Development in British Columbia. The plaintiffs would not have known of or purchased the Icon units but for the urging of Ms. Nouri, who was incentivized by Mr. Nasseri. Ms. Nouri stood to receive a commission, or a referral fee, for every buyer she brought in to buy an Icon unit. The actions of Mr. Nasseri and Ms. Nouri were the sole cause of these purchases.

C. Conclusion on Marketing

[59] The definition of marketing in *REDMA* is very broad and encompasses the activities in this case. What happened went beyond social chit chat amongst real estate friends. One of the directors of the company, through a series of verbal and e-mail exchanges, contracted with Ms. Nouri to promote Icon's project in British Columbia. In fact, this relationship between Mr. Nasseri and Ms. Nouri was, somewhat surprisingly, the sole reason the plaintiffs knew about and decided to purchase the Icon units. Considering the definition of marketing in *REDMA*, which includes, "to engage in any transaction or other activity that will or is likely to lead to a sale or lease", and that the impugned activity in this case was the *only* cause of the sales, it is inescapable that Icon marketed the Development in British Columbia, as defined in *REDMA*.

[60] Notwithstanding the fact it was only Ms. Nouri's family and friends who bought units through Ms. Nouri (except for the plaintiff referred to Ms. Nouri by her personal trainer), what occurred falls within the definition of marketing in *REDMA*. The fact the plaintiffs were all savvy business people anticipating a 25% discount on a real estate investment in advance of the public does not make a difference in determining the activity constitutes marketing in the context of *REDMA*.

V. IS *REDMA*, INSOFAR AS IT APPLIES TO THE MARKETING IN BRITISH COLUMBIA OF PROPERTY LOCATED OUTSIDE OF BRITISH COLUMBIA, *ULTRA VIRES* THE LEGISLATIVE ASSEMBLY OF BRITISH COLUMBIA?

[61] Pursuant to s. 8 of the *Constitutional Question Act*, R.S.B.C. 1996, c. 68, notice of a constitutional question was served on the Attorney General of British Columbia. Particulars of the alleged constitutional defect are described in the notice as follows:

> The British Columbia *Real Estate Development Marketing Act* , SBC 2004, c 41 ("*REDMA*") is *ultra vires* the legislative assembly of British Columbia insofar as *REDMA*, and, in particular, sections 1, 2, 3, 14, 15, 21 and 23 of that Act, purport to apply to and affect (a) the marketing of pre-construction condominium development units located outside of British Columbia (the

> "Extraprovincial Land") and (b) the enforceability of contracts of purchase and sale for Extraprovincial Land on the basis that such matters are outside the territorial jurisdiction of the legislative assembly of British Columbia.

[62] The constitutional question relates to the validity of *REDMA* rather than *REDMA*'s inapplicability in the factual circumstances of the plaintiffs' claims.

A. Positions of the Parties

Defendant

[63] The defendant submits that the pith and substance of *REDMA*, the marketing of real estate developments and resulting real estate contracts, is intangible. Therefore, *REDMA* must have a meaningful connection to the enacting province and must pay respect to the legislative sovereignty of other territories: *British Columbia v. Imperial Tobacco Canada Ltd*., 2005 SCC 49 at para. 36.

[64] The defendant argues that for *REDMA* to be constitutionally valid, the extra-territorial effects of the legislation should be read down by interpreting the definition of "marketing" as applying to developers' activities which are substantive and significant, and which are substantially and not merely incidentally connected to British Columbia.

Plaintiffs

[65] The plaintiffs argue that the pith and substance of *REDMA*, viewed either as tangible or intangible, is consumer protection legislation achieved through the regulation of marketing in British Columbia. Consumer protection has been held to be a valid provincial interest under s. 92(13) of *The Constitution Act, 1867* and provincial legislation that regulates marketing and trade within the province is valid even if it incidentally affects contracts entered into in another jurisdiction.

[66] The plaintiffs cite *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297, for the proposition that where the pith and substance of the provincial enactment is in relation to matters which fall within the field of provincial

legislative competence, incidental or consequential effects on extra-provincial rights will not render the enactment *ultra vires*. Since *REDMA* regulates the marketing of developments in British Columbia, and not contracts entered into in relation to developments outside of the province, it is constitutionally valid.

Attorney General of British Columbia

[67] While the position of the defendant is that *REDMA* is *ultra vires* the provincial legislature because it applies to development property and enforceability of contracts in relation to property outside provincial boundaries, the focus of the defendant's challenge is on the territorial limits of provincial legislative competence. However, the defendant appears to concede that *REDMA* falls within a provincial head of power, property and civil rights, and that it is valid in most of its applications. Counsel for the Attorney General maintains the defendant has posed the wrong constitutional question concerning the constitutional validity of *REDMA*. The proper constitutional question is whether the statute is *ultra vires* the provincial legislature because it is inapplicable in the factual circumstances of the plaintiffs' claims.

B. The Law

[68] Mr. Justice Major discussed the relevant factors when considering extra-territorial effects of legislation in *British Columbia v. Imperial Tobacco Canada Ltd*., 2005 SCC 49, at paras. 26-31:

> 26 Section 92 of the *Constitution Act, 1867* is the primary source of provincial legislatures' authority to legislate. Provincial legislation must therefore respect the limitations, territorial and otherwise, on provincial legislative competence found in s. 92. The opening words of s. 92 — "In each Province" — represent a blanket territorial limitation on provincial powers. That limitation is echoed in a similar phrase that qualifies a number of the heads of power in s. 92: "in the Province".
>
> 27 The territorial limitations on provincial legislative competence reflect the requirements of order and fairness underlying Canadian federal arrangements and discussed by this Court in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, at pp. 1102-3, *Hunt v. T&N plc*, [1993] 4 S.C.R. 289, at pp. 324-25, and *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, [2003] 2 S.C.R.

> 63, 2003 SCC 40, at para. 56. They serve to ensure that provincial legislation both has a meaningful connection to the province enacting it, and pays respect to "the sovereignty of the other provinces within their respective legislative spheres": *Unifund*, at para. 51. See also, generally, R. E. Sullivan, "Interpreting the Territorial Limitations on the Provinces" (1985), 7 *Sup. Ct. L. Rev.* 511.
>
> 28 Where the validity of provincial legislation is challenged on the basis that it violates territorial limitations on provincial legislative competence, the analysis centres on the pith and substance of the legislation. If its pith and substance is in relation to matters falling within the field of provincial legislative competence, the legislation is valid. Incidental or ancillary extra-provincial aspects of such legislation are irrelevant to its validity. See *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297 ("*Churchill Falls*"), at p. 332, and *Global Securities Corp. v. British Columbia (Securities Commission)*, [2000] 1 S.C.R. 494, 2000 SCC 21, at para. 24.
>
> 29 In determining the pith and substance of legislation, the court identifies its essential character or dominant feature: see *Global Securities Corp.*, at para. 22, and *Reference re Firearms Act (Can.)*, [2000] 1 S.C.R. 783, 2000 SCC 31, at para. 16. This may be done through reference to both the purpose and effect of the legislation: see *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146, 2002 SCC 31, at para. 53. See also *Fédération des producteurs de volailles du Québec v. Pelland*, [2005] 1 S.C.R. 292, 2005 SCC 20, at para. 20.
>
> 30 Where the pith and substance of legislation relates to a tangible matter — i.e., something with an intrinsic and observable physical presence — the question of whether it respects the territorial limitations in s. 92 is easy to answer. One need only look to the location of the matter. If it is in the province, the limitations have been respected, and the legislation is valid. If it is outside the province, the limitations have been violated, and the legislation is invalid.
>
> 31 Where legislation's pith and substance relates to an intangible matter, the characterization is more complicated. That is the case here.

[69] Mr. Justice Major explained the characterization is more complicated where the pith and substance relates to an intangible matter because of the issue of determining whether the cause of action is "in the Province". Referring to *Reference re Upper Churchill Water Rights Reversion Act* and *Unifund Assurance Co. v. Insurance Corp. of British Columbia,* 2003 SCC 40, Major J. commented at para. 36:

> From the foregoing it can be seen that several analytical steps may be required to determine whether provincial legislation in pith and substance respects territorial limits on provincial legislative competence. The first step is to determine the pith and substance, or dominant feature, of the impugned legislation, and to identify a provincial head of power under which it might fall. Assuming a suitable head of power can be found, the second step is to determine whether the pith and substance respects the territorial limitations on that head of power — i.e., whether it is in the province. If the pith and substance is tangible, whether it is in the province is simply a question of its physical location. If the pith and substance is intangible, the court must look to the relationships among the enacting territory, the subject matter of the legislation and the persons made subject to it, in order to determine whether the legislation, if allowed to stand, would respect the dual purposes of the territorial limitations in s. 92 (namely, to ensure that provincial legislation has a meaningful connection to the enacting province and pays respect to the legislative sovereignty of other territories). If it would, the pith and substance of the legislation should be regarded as situated in the province.

[70] The distinction between constitutional validity and constitutional applicability was the subject of discussion in *British Columbia v. Imperial Tobacco,* 2006 BCCA 398 (*Imperial Tobacco (BCCA)*) at paras. 46-47:

> [46] The second issue before us is whether certain provisions of the Act are constitutionally inapplicable to some or all of the defendants located outside the province. The Act was previously found to be constitutionally valid, but constitutional inapplicability is distinct from constitutional invalidity.
>
> [47] Professor Hogg in *Constitutional Law of Canada*, loose-leaf ed. (Scarborough: Carswell, 1997-) has described the distinction between constitutional validity and applicability as follows, at 15-25:
>
> > First, it may be argued that the law is invalid, because the matter of the law (or its pith and substance) comes within a class of subjects that is outside the jurisdiction of the enacting legislative body…
> >
> > A second way of attacking a law that purports to apply to a matter outside the jurisdiction of the enacting body is to acknowledge that the law is valid in most of its applications, but to argue that the law should be interpreted so as not to apply to the matter that is outside the jurisdiction of the enacting body. If this argument succeeds, the law is not held to be invalid, but simply inapplicable to the extra-jurisdictional matter…(emphasis in the original)

[71] Where the essence of the challenge to legislation is constitutional *applicability* rather than constitutional *validity*, Mr. Justice Binnie set out propositions which should be considered in *Unifund*, at para. 56:

> Consideration of constitutional *applicability* can conveniently be organized around the following propositions:
>
> 1. The territorial limits on the scope of provincial legislative authority prevent the application of the law of a province to matters not sufficiently connected to it;
>
> 2. What constitutes a "sufficient" connection depends on the relationship among the enacting jurisdiction, the subject matter of the legislation and the individual or entity sought to be regulated by it;
>
> 3. The applicability of an otherwise competent provincial legislation to out-of-province defendants is conditioned by the requirements of order and fairness that underlie our federal arrangements;
>
> 4. The principles of order and fairness, being purposive, are applied flexibly according to the subject matter of the legislation.

C. Analysis

[72] I agree with counsel for the Attorney General that the defendant's challenge to *REDMA* is, in fact, that it is constitutionally *inapplicable* in the circumstances of this case. There is no dispute *REDMA* is, in pith and substance, legislation aimed at regulating real estate marketing activity in British Columbia for the protection of consumers. There is no dispute the regulation of marketing activities for the protection of consumers falls within "Property and Civil Rights in the Province" under s. 92(13) of the *Constitution Act*. As such, *REDMA* is valid provincial legislation.

[73] There is no dispute territorial limits prevent the reach of *REDMA* to matters not sufficiently connected to British Columbia. The defendant challenges the territorial limits of *REDMA* to prevent the application of an otherwise valid provincial statute to the plaintiffs' circumstances here. Thus, the issue is one of constitutional *applicability*. This Court must determine whether there is a sufficient connection between British Columbia and the conduct of marketing out-of-province real estate projects in British Columbia which *REDMA* seeks to regulate.

[74] The focus of the constitutional question is whether there is sufficient connection between British Columbia and the marketing activity alleged by the plaintiffs in the six actions to permit the application of *REDMA* on the facts, giving consideration to the requirements of order and fairness that underlie our federal arrangements.

[75] As noted by the Court of Appeal in *Torudag v. British Columbia (Securities Commission)*, 2011 BCCA 458, at para. 19, the test for determining a court's territorial competence captures the same concept as a challenge to constitutional applicability; that is, whether there is a state of facts demonstrating that the circumstances are suitable for a court to assume jurisdiction. However, while satisfying the test for territorial competence of a court captures the same concept as a challenge to constitutional applicability, the former does not always determine the latter. As Mr. Justice Binnie said in *Unifund* at para. 58, a "real and substantial connection" sufficient to permit the court of a province to take jurisdiction over a dispute may not be sufficient for the law of that province to regulate the outcome.

[76] Further, at para. 65, Binnie J. said "different degrees of connection to the enacting province may be required according to the subject matter of the dispute". Here, the subject matter of the dispute is consumer protection legislation, which has been interpreted generously by the courts in favour of the consumer.

[77] The role of consumer protection is similar, though perhaps not analogous, to the role of the Securities Commission in protecting the investing public. In *Torudag*, this role was found to be important in deciding that the Securities Commission had jurisdiction over an out-of-province defendant. The Court of Appeal stated, at paras. 26-27:

> In my opinion, the more significant circumstances that constitute a real and substantial connection to this jurisdiction and which permitted the Commission to properly take jurisdiction over the appellant are the regulatory functions of the Commission concerning the Exchange and the fact that Icon was a reporting issuer in British Columbia.
>
> The Commission has the responsibility to regulate the activities of the Exchange to provide protection to the investing public. This responsibility

> includes the duty to ensure "a level playing field" for investors in exchange traded companies. Allowing the misuse of insider information to skew fairness in the trading arena is inimical to the operation of a fair and orderly market in securities.

Similarly, the requisite degree of connection for *REDMA*, therefore, ensures "a level playing field" for real estate investors in out-of-province developments.

[78] It is important to keep in mind that the principle of order and fairness, which is considered in determining whether a province has sufficient connection to the conduct it is regulating, is not considered with regard to whether the impugned legislation is substantively fair; the question is whether the province's regulation of the conduct, and its effect on other jurisdictions, is line with the principle of order and fairness on which our federal system relies: *Imperial Tobacco (BCCA)*, para. 87.

[79] It is not only the view of the enacting legislature that must be considered, but the collective interest of the federation as a whole in order and fairness: *Unifund*, para. 74.

[80] The purpose of order and fairness is to ensure that the court (or, in this case, the legislature) is not arbitrarily taking jurisdiction over a matter to which there is no substantial connection: *Imperial Tobacco (BCCA)*, para. 90.

[81] In considering the application of *REDMA*, the defendant sets out, at para. 50 of its submission, some factors it considers relevant in this case:

> (a) **Initiation of contact** – here the initial contact resulted from a British Columbia resident asking questions about an Alberta development. This was not a case where the foreign developer initiated contact.
>
> (b) **Narrow group receiving communications** – all communications from the developer were directed to the discrete and small group of individuals closely connect to Ms. Nouri. There was no effort to reach out to large or undefined groups. To the extent that any information about the Alberta property reached outside of the group of Ms. Nouri's immediate friends and family, that was an accident and not at the initiation of the developer.
>
> (c) **"Social" nature of discussions** – the initial discussions were social in nature and not business or sales oriented.

> (d) **Communications outside of developer's official sales channels** – the developer had traditional marketing efforts underway in Alberta with a sales office, advertising and an agent all active in the Edmonton area. The relevant connection here was initiated though an unofficial channel without the knowledge or approval of the president of Icon (who was otherwise directing all sales efforts).
>
> (e) **Subsequent steps initiated by requests from British Columbia** – to the extent that there were communications which were more "official" and followed after the informal social discussions, those communications from the developer and its agent were responding to requests and questions from British Columbia.
>
> (f) **One Purchase agreement between Alberta and Iran** - one group of purchasers/plaintiffs were not receiving any information in British Columbia, they were receiving all information and taking all steps from Iran regarding the purchase of the Alberta property.
>
> (g) **Absence of solicitation from outside of the province** - taken as a whole, the context was that the Alberta developer did not make a conscious decision to solicit sales in British Columbia. Instead, certain British Columbia residents chose to solicit a buying opportunity in Alberta.

[82] In concluding that *REDMA* is constitutionally applicable in the circumstances of the plaintiffs, I endorse para. 36 of the Attorney General's submission where counsel addresses part of the defendant's argument:

> …many of the concerns that the defendant raises with respect to the application of *REDMA* to the facts of the present cases are irrelevant to the extra-territorial challenge. The defendant highlights the fact that some of the discussions which are said to constitute marketing took place in a social setting; there was a narrow group who received the communications; some of the communication was initiated by the purchasers and not solicited by the developer; the communication occurred outside of official sales challenges etc. [Defendant's Submission, paragraph 50] These are all arguments that go to the question of whether "marketing" within the meaning of *REDMA* occurred; they have nothing to do with the defendant's status as an extra-provincial company or the fact that the development was located in Alberta. They are arguments that might equally be asserted by a British Columbia defendant alleged to have marketed a development located in British Columbia.

[83] The arguments advanced by the defendant take issue with the breadth of the definition of marketing in *REDMA* and its effect on developers. However, a developer who does not want to be subject to *REDMA* simply does not have to enter the British Columbia marketplace. Consumer protection legislation like *REDMA* is not rendered inoperable because of a developer's lack of foresight. The defendant

posed a number of hypothetical marketing situations that could be captured by *REDMA*, to show potential problems with *REDMA*'s effect on other jurisdictions. However, it would not be appropriate for this Court to engage in an analysis of circumstances not before this Court; the only live issue in dispute in this summary trial is the constitutional applicability of *REDMA* in the circumstances of the plaintiffs' six actions.

[84] There are several important factors that lead me to conclude that there is a sufficient connection between British Columbia and the conduct at issue, making *REDMA* constitutionally applicable in the circumstances.

[85] First, the prior determination by Harris J. that this Court has jurisdiction over this dispute is an important, though not determinative factor in finding that there is a substantial connection between British Columbia and the conduct at issue.

[86] Second, in determining whether there was a sufficient relationship between the conduct and the enacting jurisdiction in these circumstances, the case of *R. v. Thomas Equipment Ltd.,* [1979] 2 S.C.R. 529, is a helpful comparison, although no constitutional question was raised in that case.

[87] In *Thomas Equipment*, a manufacturer in New Brunswick supplied equipment to a dealer in Alberta, and refused to comply with the dealer's request to buy back the unused equipment when the dealer terminated the agreement, contrary to Alberta legislation. The Supreme Court of Canada found that the manufacturer had entered into the Alberta marketplace, and was subject to Alberta legislation. Mr. Justice Binnie referred to this case in *Unifund* at para. 77:

> Martland J. considered it important that Thomas Equipment had done more than make a "simple contract for the sale of goods" (p. 542) for resale in Alberta. It had hired a local dealer to promote its products and goodwill within the province. Its "relationship" with Alberta was more than just that of an out-of-province vendor. In that sense, Thomas Equipment had itself (in addition to its machinery) entered the Alberta marketplace.

[88] As was the case in *Thomas Equipment*, Icon, through its silent partner and director, Mr. Nasseri, one of only two directors in a company incorporated in Alberta

for the sole purpose of zoning and developing the Icon development in Alberta, had Ms. Nouri promote its development property in British Columbia. This was more than "social chit chat". It was a business relationship where Icon agreed to provide a fee to Ms. Nouri for the buyers she found for the Icon units.

D. Conclusion on Applicability

[89] Icon entered into the marketplace of British Columbia in analogous circumstances to those in *Thomas Equipment*, which distinguishes this case from *Unifund*, where the court found that ICBC was not subject to Ontario insurance legislation for an accident involving an Ontario driver in British Columbia, because it had not entered Ontario's marketplace in the same manner as in *Thomas Equipment*. Mr. Justice Binnie stated at para. 84 of that decision:

> Here, unlike *Thomas Equipment, supra*, [ICBC] had not hired anyone in Ontario to promote its products. It was not in the Ontario marketplace and, in my view, it was not required to "comply with the rules of the [Ontario] game". The decision of the Ontario legislature to impose no-fault benefits on Unifund could not be bootstrapped into legislative jurisdiction to impose a corresponding debt on [ICBC], which...was beyond the territorial jurisdiction of the province.

VI. CONCLUSION

[90] *REDMA* places a burden on the developer who markets its development in British Columbia; that is, it will be subject to the consumer protection legislation contained in *REDMA*. The value of the development units at issue here is in the millions of dollars. It is no excuse that the developer was imprudent in its dealings in British Columbia. *REDMA* does not act as a "trip wire" as suggested by the defendant; but if it is a "trip wire", then it is set in British Columbia, and developers can avoid it by not entering the marketplace.

[91] *REDMA* regulates the real estate development business in British Columbia. The developer's liability arose out of its conduct in British Columbia. Icon rendered itself subject to the regulatory provisions of *REDMA* and the penalties imposed. The statutory obligations of *REDMA* impacted Icon only because it chose to market its

development in British Columbia. It reaped the benefits of selling these properties through Ms. Nouri in British Columbia; it is not unfair that Icon is subject to the duties imposed by the British Columbia legislation as it applies to the Development. Simply put, as in *Thomas Equipment*, Icon entered the market in British Columbia so it is required to comply with the rules of the game.

[92] In my view, perhaps it was never envisioned that *REDMA* would apply in the circumstances of this case - to allow savvy real estate investors buying at a discounted rate before public sales to get out of contracts because the developer failed to strictly comply with the legislation. However, the onus is placed on the developer who markets real estate developments in British Columbia to strictly comply with *REDMA* or bear the burden and consequences from the failure to comply with the legislation. Further, while it may seem too much to hold that the protection of *REDMA* should extend to a contract entered into in Iran, what the legislation captures is marketing in British Columbia, and that is where the marketing occurred with respect to that action, as well as all of the plaintiffs' actions.

[93] The plaintiffs are entitled to rescind their contracts and are entitled to a return of their deposits. The successful plaintiffs are entitled to costs.

"STROMBERG-STEIN J."

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Jameson House Properties Ltd. (Re)*, 2009 BCSC 844

Date: 20090526
Docket: S087978
Registry: Vancouver

In the Matter of the *Companies' Creditors Arrangement Act* R.S.C. 1985, c. C-36, as amended

And:

In the Matter of the *Business Corporations Act*, S.B.C. 2003, c. 57

And:

In the Matter of Jameson House Properties Ltd. and Jameson House Ventures, Ltd.

Petitioners

Before: The Honourable Chief Justice Brenner

Oral Reasons for Judgment

In Chambers

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Counsel for Attorney General of BC	R. Butler

Counsel for Ernst and Young	W.E.J. Skelly
Counsel for R. Fakhari	S. Lal
Place and Date of Hearing:	Vancouver, B.C. May 26, 2009
Place and Date of Judgment:	Vancouver, BC May 26, 2009

THE COURT: This is an application for an order that the pre-sale purchasers, as defined in the consolidated plan of compromise and arrangement filed May 4, 2009 in the ***Companies' Creditors Arrangement Act (CCAA)*** proceeding, are creditors as defined in the plan and that they have claims as defined in the claims process order dated March 9, 2009 with the right to make claims under that order.

[1] This case was filed last fall under the ***CCAA***. The principal asset of the petitioners is a real estate development on Hastings Street known as the Jameson House.

[2] Prior to the filing, there were pre-sale contracts with 76 purchasers in place covering 105 residential units with a total value of $154 million. A number of commercial units in the development have also been sold. The purchasers have put up deposits of just over $19 million. These are being held in trust by a third party the Clark Wilson law firm.

[3] The purchasers' application rests principally upon the assertion that the British Columbia ***Real Estate Development Marketing Act*** ("***REDMA***") provides certain rights and remedies which give them the status of creditors in these proceedings.

[4] The petitioners rely on the terms of the claims process order of March 9 and in particular the definition of "claim" set out in section 2. They also say that the purchasers are not creditors as that term is defined in the ***CCAA*** and ***Bankruptcy and Insolvency Act (BIA)***.

[5] The legislative scheme of ***REDMA*** and it can be summarized as follows.

1. A developer is to provide each purchaser with a final disclosure statement which without misrepresentation plainly discloses all material facts and sets out the purchasers' rights of rescission as provided under section 21.

2. If the developer becomes aware that a disclosure statement contains a misrepresentation, and assuming that the misrepresentation does not fall within section 16(2), the developer must immediately file an amendment to the disclosure statement that identifies and corrects the misrepresentation, and within a reasonable time provide a copy of that amendment to each purchaser.

3. If a purchaser is entitled to a disclosure statement and does not receive one, the purchaser may rescind the purchase agreement at any time.

4. A purchaser does not have a right of rescission as a result of receiving an amendment to a disclosure statement.

5. If a developer files a disclosure statement containing a misrepresentation a purchaser is deemed to have relied on the misrepresentation and has a right of action for damages against the developer.

6. An agreement to purchase is not enforceable against the purchaser by a developer who has breached any provision of Part 2.

[6] ***REDMA*** defines "misrepresentation" as:

> A false or misleading statement of a material fact or an omission to state a material fact.

[7] In the statute, "material fact" is defined as being, at least for the purpose of this application:

> A fact or a proposal to do something that affects or could reasonably be expected to affect the value, price or use of the development unit or development property.

[8] So in summary,

> 1. A purchaser has a right of rescission only if he or she does not receive a disclosure statement, or in the circumstances where the statute requires it, a new disclosure statement.
>
> 2. A purchaser has a right of damages if the developer files a disclosure statement that falsely states or omits a fact that could affect or could reasonably be expected to affect the value, price or use of the unit.
>
> 3. A developer may not enforce an agreement against a purchaser if the developer has breached any part of Part 2.

[9] As I noted at the outset, the deposit monies in this case are being held in trust by Clark Wilson. That is a requirement of the statute. The trust monies can only be released in accordance with ***REDMA***.

[10] One of the provisions of the statute is that the deposit monies may be released on the written consent of both the developer and the purchaser, or alternatively, as may be ordered by the court.

[11] The issue on this application is whether the purchasers of these to-be-built units can establish that they are creditors within the meaning of the ***CCAA***. The claims process order of March 9 was an order made pursuant to that statute.

[12] The claims process order definition of "claim" is in part rather wide. There are only two sentences in paragraph two which contains the definition. The first sentence goes on for 16 lines and contains a very wide definition of the term "claim".

[13] The second sentence of that paragraph is somewhat shorter. It provides:

> Notwithstanding the foregoing, "claim" means any indebtedness, liability or obligation of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the ***BIA.***

[14] It is noteworthy that the second sentence in clause two uses the word "means". It does not use the word "includes" or some other language which might denote a wider definition. It seems to me that the language in clause two in the last four lines are clearly intended to restrict the term "claim" to:

> A debt provable in bankruptcy within the meaning of the ***BIA*** as set out in section 12(1) of the ***CCAA***.

[15] The ***CCAA*** in section 12(1) provides that:

> "Claim" means any indebtedness, liability or obligation of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the ***BIA***.

[16] The ***BIA*** provides in section 2:

> "Claim provable in bankruptcy", "provable claim" or "claim provable" includes any claim or liability provable in proceedings under this Act by a creditor.

[17] Section 121(1) provides:

> All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

[18] The debt or liability must be due by the bankrupt to the person seeking to prove the claim. See Houlden, Morawetz, and Sarra, ***The 2009 Annotated Bankruptcy and Insolvency Act***. (Toronto: Thomson Carswell, 2008) at G28(4).

[19] ***BIA*** does contain a separate regime for claims for the return of property owned by a party other than the debtor but in the possession of the debtor. Section 81(1) provides:

> Where a person claims any property, or interest therein, in the possession of a bankrupt at the time of the bankruptcy, he shall file with the trustee a proof of claim verified by affidavit giving the grounds on which the claim is based and sufficient particulars to enable the property to be identified.

[20] There is also a requirement under section 121(1) of the ***BIA*** that a claim must not be too remote or speculative. The courts must weigh such claims against the object of the statute to allow a debtor to make reasonable arrangements with its creditors and to emerge from its financial difficulties and carry on its business.

[21] There are a number of claims underlying the purchasers contention that they are entitled to creditor status. The first is their claim for rescission. All of the purchasers did receive a disclosure statement initially as required by ***REDMA***. The question is whether a new disclosure statement was required under the provisions of that statute, and if so, whether that would have created a fresh right of rescission.

[22] A reading of section 16, together with the definition of "material fact" in ***REDMA***, leads me to conclude that there are three circumstances in which a new disclosure statement is required to be delivered.

[23] The first is if there has been a failure to comply or misrepresentation of such a substantial nature that the superintendent gives notice to the developer that a new disclosure statement must be filed. The second is if the identity of the developer changes. The third is if there has been an appointment in respect of the developer of a receiver, liquidator or trustee in bankruptcy, or other similar person acting under the authority of a court.

[24] With respect to notice from the superintendent, no such notice has to date been issued with respect to the identity of the developer. The identity of the developer has continued to be the same, albeit there has been clearly a degree of restructuring to accommodate the involvement of Bosa Bros. But I cannot say on what is before me that the identity of the developer has changed.

[25] No receiver, liquidator or trustee in bankruptcy has been appointed. The court appointed monitor in this case is in a materially different position from those parties. Unlike a receiver, liquidator or trustee, the monitor has no control over the management of the business. That remains in the hands of the petitioners. In my view this is similar to the change of developer identity provision. In either circumstance if management control changes a new disclosure statement is required. That has not occurred here.

[26] Accordingly, I conclude that on the material before me none of those three events have occurred which would trigger the requirement for a new disclosure statement.

[27] Next there is a claim for damages for misrepresentation. This principally relates to the financing. On April 3, 2007, the petitioners did deliver an amendment to the disclosure statement. The amendment stated that:

> The Developer has received a firm commitment for construction financing from HSBC Bank Canada, United Overseas Bank Limited and WestLB AG, Toronto Branch, with an additional commitment for construction financing from Anthracite Capital, Inc., which financing will be secured by the registration of financial encumbrances against title to the Lands. The Developer has satisfied all pre-sale conditions under such construction financing commitments

[28] The purchasers contend that this was in fact a misrepresentation. They say that this filing is the most obvious evidence of that. What was represented as a “firm commitment” turned out not to be so when one of the principal financiers of this project backed out.

[29] The letters of commitment that the petitioners received from the various financial institutions are attached to an affidavit of Nelam Raju. Those letters are in the customary form. They essentially confirm in writing that they are committing up to a maximum amount of funding in respect of the project. Their commitments are subject to various due diligence steps that they advise they will be taking.

[30] In the amendment to the disclosure statement the petitioners used the phrase "a firm commitment". They did not use language such as "a binding contract", "a firm and binding contract", "an agreement." In my view the language chosen was

intended to reflect both the practice in the industry and the content of the letters received. The content of these letters from the various financial institutions was consistent with the language that the petitioners chose to use in the amendment to the disclosure statement.

[31] The next issue is the question of enforceability. Section 23 of ***REDMA*** provides that an agreement with a purchaser is unenforceable if the petitioner has breached a provision of Part 2. The Court of Appeal in ***Chambers v. Pennyfarthing Development Corp.*** *(1985), 20 D.L.R. (4th) 488, 64 B.C.L.R. 145* described these these types of contracts as unenforceable as opposed to void or avoidable.

[32] The argument of the purchasers is that the petitioners were required to provide a further amended disclosure statement. They failed to do so and that constituted a breach of section 16 of ***REDMA***.

[33] In my view that could well be a live issue. However I note that notwithstanding the failure of the financing arrangements, the petitioners continued work on the project until November 12, 2008, just two days before these proceedings were filed. That at least raises a question as to whether an amended statement was in fact required.

[34] The petitioners say that in April 2007, they had access to sufficient financing for the construction of the project and the source of the financing was disclosed. Ultimately they say that nothing that did occur would have affected or could reasonably be expected to affect the value and price for use of the property. They also say that the principals of the petitioners held an honest belief until just before

the filing that they would have access to sufficient construction funding, and they were therefore not aware of any misrepresentation in the amendment.

[35] However even if a further amendment ought to have been delivered under the terms of the statute, and assuming a breach by the petitioners, does that create a cause of action for the purchasers?

[36] Counsel for the petitioners relies on two Supreme Court of Canada decisions, ***R. v. Saskatchewan Wheat Pool*** (1983) 1 S.C.R. 205; ***Holland v. Saskatchewan***, 2008 SCC 42, for the proposition that there is no right to bring an action for breach of a statute absent an express provision in the statute. They say that ***REDMA*** contains no such provision.

[37] In my view what ***REDMA*** does provide in s. 23 is a defence to enforcement of the purchase agreements by the petitioners; it does not give a right of action for damages. It is a statutory shield, not a sword.

[38] If the purchasers have a right to sue for the return of their deposits that does not make them creditors for the purposes of these proceedings. Those claims would be claims for the return of specific property; i.e., the deposits that they lodged with Clark Wilson. Their claims would not be for claims in debt or in damages. On that basis they would fall under section 81 of the ***BIA*** and not section 121.

[39] For that reason they would not be debts provable in bankruptcy as required by section 12(1) of the ***CCAA***.

[40] Accordingly, I conclude that the purchasers are not creditors as defined in the plan and are not entitled to make a claim under that order in respect of the deposits.

[41] There is one remaining issue and that is with respect to the potential for a damages claim of some type, depending on future events. One might see claims for delayed possession for example. But at this stage that is difficult to either identify or quantify. These claims might simply be too speculative. But the potential nonetheless exists and hence I would urge the parties to give that some consideration.

[42] Accordingly I would dismiss the purchasers' application.

"The Honourable Chief Justice Brenner"

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Jameson House Properties Ltd. (Re)*,
2009 BCSC 964

Date: 20090611
Docket: S087978
Registry: Vancouver

In the Matter of the ***Companies' Creditors Arrangement Act***,

R.S.C. 1985, c. C-36, as amended

And

In The Matter of the ***Business Corporations Act***,

S.B.C. 2002, c. 57

And

In The Matter of Jameson House Properties Ltd. and
Jameson House Ventures Ltd.

Petitioners

Before: The Honourable Chief Justice Donald I. Brenner

Oral Reasons for Judgment

In Chambers

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Counsel for Quest Capital Corp.:	Shelley C. Fitzpatrick
Counsel for The Monitor:	William E.J. Skelly Benjamin La Borie
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Alavi, M. Javaherian, R. Lemon, R. Mozafar, R. Agah, B. Goldstein, N. Goldstein, R. Strul, E. Mok, D. Becker, R. Ledingham, T. Suleman, Z. Suleman, K. Sefiddashti:	
Counsel for Her Majesty The Queen in Right of British Columbia as represented by the Superintendent of Real Estate:	Stephanie Jackson
Counsel for EllisDon Corporation:	Clive Bird
Counsel for Rahim Fakhari:	Kimberly S. Campbell
Counsel for the Attorney General of BC:	Richard Butler
Counsel for K. Seffidashti, E.K. Lee and David Parry:	George F. Gregory
Place and Dates of Hearing:	Vancouver, BC June 5, 8 and 11, 2009
Place and Date of Judgment:	Vancouver, BC June 11, 2009

[1] **THE COURT:** This is an application to approve the final order in this ***Companies' Creditors Arrangement Act***, R.S. 1985, c. C-36 ("***CCAA***") proceeding.

[2] The Petitioners are developing a mixed residential and commercial property on Hastings Street in Vancouver. After certain of their financing arrangements fell through last year they filed for protection and were granted a first day order under the ***CCAA*** on November 14, 2008. Pursuant to the meeting process order approved by the Court on May 4, a meeting of Creditors was convened on May 28, 2009. In the result the plan of arrangement was approved by the general Creditors, 97 percent in number and 96.8 percent of value; 100 percent of the secured Creditors approved the plan. The Petitioners applied at the sanction hearing for a final order in the terms of the approved plan of arrangement.

[3] Opposing this application are the Presale Purchasers of residential units in this development. I earlier directed that copies of the relevant material including the claims process order and the plan of arrangement be sent to the purchasers. This was done by the Monitor. On an earlier application I ruled that the purchasers were not Creditors within the meaning of the plan and hence they were not entitled to vote at the Creditors meeting. However, approximately 25 of the 75 purchasers attended the sanction hearing as well as earlier hearings through counsel and opposed the granting of the final order.

[4] The purchasers object to paragraphs 14 and 15 of the final order which would remove their rescission rights based upon events that occurred prior to this hearing.

They also oppose the application to extend the December 31, 2010 completion date for a total of 85 working days as set out in paragraph 16 of the proposed order.

[5] There are broadly three issues on this application:

1. Do the purchasers have any rights of rescission or damages? Has anything to date rendered the presale contracts unenforceable?

2. If the purchasers have any of these rights, does the Court have the authority under the ***CCAA*** and, if so, should the Court exercise its discretion to preclude the purchasers from exercising these rights?

3. Should the completion date be extended?

[6] In my ruling on May 27 I found that the purchasers were not Creditors as defined in the plan of arrangement and hence not entitled to vote at the meeting of Creditors. In reaching that conclusion, I considered and rejected their submission that the ***Real Estate Development and Marketing Act***, S.B.C. 2004, c.41 ("***REDMA***") provided certain rights and remedies to them and that by virtue of the conduct of the Petitioners, they had claims for rescission and/or damages that would give them claims against the Petitioners and hence the status of Creditors.

[7] A right of rescission arises under ***REDMA*** if a new disclosure statement is required.

[8] In my Reasons on May 27 I outlined the three circumstances in which the statute requires the delivery of a new disclosure statement:

1. if there has been a failure to comply with the terms of an existing disclosure statement or a misrepresentation of such a substantial nature that the superintendent gives notice to the developer that a new disclosure statement must be filed;
2. if the identity of the developer changes; or
3. if in respect of the developer a receiver, liquidator or trustee in bankruptcy or other similar person acting under authority of a court is appointed.

[9] To date, the superintendent has made no determination as to whether in the superintendent's opinion a new disclosure statement is required.

[10] Has the identity of the developer changed? At financial close Bosa will acquire 50 percent of the equity, 100 percent of the voting shares and will appoint two of the three directors in the petitioners. The term "identity" in the statute has not been judicially considered. The Petitioners say that the identity of the developer when the project started was Jameson House and that the identity after it is completed will be Jameson House. While the directors and shareholdings will change, the identity of the developer will remain the same. The law has long recognized the corporation as a body separate from its shareholders (***Salomon v. Salomon*** [1897] AC 22). Strictly speaking, this is so in the case at bar.

[11] But all parties agree that ***REDMA*** is consumer protection legislation. As is submitted by the purchasers, a change in the identity of the shareholders of the corporate developer could be a material fact since it might affect the value, price or

use of a development. That change could be so substantial in nature that the superintendent could order a new disclosure statement pursuant to s. 16(2). As noted above no such termination has as yet been made by the superintendent.

[12] In this case, Bosa, a highly experienced developer, is joining this project. Its involvement includes Axiom Builders, a Bosa affiliate which is completing the parkade and will issue a fixed price contract for the remaining construction hard costs of no more than $82 million. In addition Bosa and its affiliates will provide various guarantees of the senior construction loan of $75 million. They will join with the TD Bank for 50 percent of the senior construction loan. They will provide a subordinated construction loan of approximately $12 million, and they are committed to providing any additional equity or funding required to complete the project.

[13] In the context of ***REDMA*** as consumer protection legislation, in my view the involvement of Bosa will strengthen the existing developer Jameson House. It will increase the likelihood that the project will be completed as contracted for by Jameson House and the purchasers.

[14] In this case, no receiver or trustee has been appointed. A court-appointed Monitor is materially different from a trustee, liquidator or receiver. The latter takes control of the enterprise. A Monitor has no control, and the Monitor's function is limited to overseeing the operations of the debtor and reporting to the court and interested parties. With the court appointment of a Monitor no change of control occurs.

[15] As I noted in my May 27 Reasons, the superintendent has not as yet made a s. 16(2) determination as to whether a new disclosure statement is required. When he does and depending on the decision he comes to, the parties advise that they may well return to the court.

[16] In my view, the critical issue in this case is whether the failure of the Petitioners' financing arrangements which triggered the ***CCAA*** filing meant that the financing representation in the April 3, 2007 amended disclosure statement was a misrepresentation. The amendment stated as follows:

> The developer has received a firm commitment for construction financing from HSBC, Bank of Canada, United Overseas Bank Limited and West LBAG Toronto branch with an additional commitment for construction financing from Anthracite Capital Inc. which financing will be secured by the registration of financial encumbrances against title to the Lands. The developer has satisfied all presale conditions under such construction financing commitments.

[17] The purchasers say that this amendment was a misrepresentation. They say that the financing was not in fact a firm commitment since it fell away, leading to the ***CCAA*** filing. In my Reasons on May 27 I observed that the commitment letters for the project financing were in the customary form. The arrangements were in fact firm subject only to the usual due diligence and documentation steps required.

[18] The purchasers also say that when the financing fell away due to the deteriorating conditions in the credit market, the representation as to financing in the amended disclosure statement was no longer true, and that under s.16 of ***REDMA*** the Petitioners were required to but failed to file either a new or further amended disclosure statement. However, the purchasers would have a right of rescission only

if a new disclosure statement was required. For this, the misrepresentation caused by the change in circumstances has to be in respect of a material fact. Material fact is defined in ***REDMA*** as a fact that "affects, or could reasonably be expected to affect, the value, price or use of the development unit or property." It is not clear that the failure of the financing was such a material fact. The developer was able to continue work on the project until November 12, 2008. The principals of the developer held an honest belief, until just prior to the filing that they would have access to sufficient construction financing.

[19] More significantly, if this restructuring is approved by the Court and if it succeeds, the purchasers will be entitled to receive precisely what it was they contracted for. If the Petitioners fail to deliver, the purchasers will have their full right of recourse under the terms of the agreements of purchase and sale. This being the case, it is difficult to see that the value, price or use of the development unit or property has so far been affected.

[20] Basically there are two diametrically opposed views of this case. The purchasers say that the Petitioners want to hold them to the terms of the purchase contracts while at the same time completing the project at today's much reduced construction cost and to pocket the extra profits. They say that to the extent that these costs are today lower than they were when they signed their contracts, the Petitioners will gain a windfall at the expense of the purchasers. The Petitioners' view is that this restructuring will have the effect of delivering to the purchasers precisely what they contracted and bargained for. They say the restructuring will also provide a substantial recovery for the secured and unsecured Creditors who

almost unanimously support the plan. In addition it will provide significant economic benefit to the suppliers of both materials and labour as this project is completed. The Petitioners will take on considerable risk going forward. Costs may well change in the opposite direction and start increasing. Some presale purchasers may fail to complete. The project might not be completed by the deadline.

[21] Counsel expressed the concern that I exercise caution on this summary application when interpreting ***REDMA*** as it is a relatively new statute. Accordingly, I will only conclude on this summary application that I am not convinced on the basis of the material before me that the provisions of ***REDMA*** would confer on the purchasers a right to rescind the presale contracts. The parties continue to be bound by the terms.

[22] Assuming that the order sought is in conflict with the provincial ***REDMA*** statute, and I am not certain that is the case, should the provincial law be overridden by application of the federal ***CCAA*** by virtue of the paramountcy doctrine? To put it another way, can or should the court override the rights that the non-creditor purchasers may have under the provincial law? In ***Norcen Energy Resources v. Oakwood Petroleum Limited*** (1988), 63 Alta. L.R. (2d) 361, 72 C.B.R. (N.S.) 1 at 10, Mr. Justice Forsyth of the Alberta Court of Queen's Bench stated:

> If promoting the continuance of insolvent companies is constitutionally valid as insolvency legislation it follows that a stay which happens to affect some non Creditors in pursuit of that end is valid.

[23] In this case, the evidence regarding the importance of the ***REDMA*** relief is as follows:

1. The Petitioners will not be able to continue in business without the involvement of the Bosa related entities and the obtaining of certain financing.
2. In turn, both Bosa's involvement and the financing are contingent on the Court granting ***REDMA*** relief.
3. It is a condition of the plan of arrangement that this relief be granted.

[24] It is clear that the relief from ***REDMA*** that is sought is directed squarely towards the successful restructuring of this enterprise. This is a fundamental purpose of the ***CCAA***. Without the relief the arrangement proposed by the Petitioners and voted in favour of by close to 100% of the Creditors, in number and value, will fail. All of the unsecured Creditors and all but one of the secured Creditors will recover nothing. Set against that is, if this plan is approved, the purchasers will receive precisely what they bargained for. The Petitioners will continue to be bound by all of the terms of the sales agreements and the purchasers will retain all of their remedies in the event of any future breaches on the part of the Petitioners.

[25] In ***Pacific National Lease Holding Corporation v. Sun Life Trust*** [1995] 10 W.W.R. 714, 62 B.C.A.C. 151 the Court of Appeal considered an appeal from this Court involving an issue as to whether the Supreme Court could allow for the payment of solicitors' fees and disbursements in connection with the taxation of the solicitors' accounts as part of the restructuring cost of the debtor company. Mr. Justice Cumming for the court stated at paragraph 26:

> The jurisprudence which deals with the ***C.C.A.A.*** establishes two propositions: (a) first, this legislation is to be broadly interpreted so as to give a Supreme Court justice exercising jurisdiction a good deal of power and flexibility; and, (b) the ***C.C.A.A.*** will prevail should a conflict arise between this statute and another federal or provincial statute.

In his judgment Mr. Justice Cumming referred to the earlier ***Chef Ready*** decision (***Hong Kong Bank of Canada v. Chef Ready Foods Ltd.*** (1990), 4 C.B.R. (3d) 311 (B.C.C.A.), 51 B.C.L.R. (2d) 84) where the court determined that in the event of a conflict between the ***CCAA*** and another federal statute, the broad scope of the ***CCAA*** prevails. That principle in ***Pacific National Leasing*** was held to extend also to provincial legislation.

[26] In ***Clear Creek Contracting Limited and Skeena Cellulose***, 2003 BCCA 344, 184 B.C.A.C. 54 Madam Justice Newbury considered the case in which the court's powers pursuant to the provisions of the ***CCAA*** conflict with either federal or provincial legislation. She referred to Mr. Justice LoVecchio's decision in ***Re Sulphur Corp. of Canada***, 2002 ABQB 682, 35 C.B.R. (4th) 304. In that case he concluded that he had the jurisdiction under the ***CCAA*** to grant DIP financing in priority over registered builders' liens as provided under the BC ***Builders' Lien Act***, S.B.C. 97, c.45.

[27] The next question is whether the ***CCAA*** enables the Court to grant the ***REDMA*** relief. That relief, if it is to be found, is contained in s. 11 of the statute. It provides as follows:

> 11. (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person

> interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

Subsection 4 provides:

> A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose.

The section then goes on to outline the powers of the court to stay, restrain and prohibit either the continuation or the initiation of proceedings against the debtor filing company.

[28] Section 11 was interpreted by the Alberta Court of Appeal in ***Luscar Limited v. Smoky River Coal Limited***,1999 ABCA 179, 175 D.L.R. (4th) 703. At paragraph 50 Madam Justice Hunt observed that the language of s. 11 is very broad, allowing the court to make an order "on such terms as it may impose" and empowering the court to stay "all proceedings taken or that might be taken", restraining "further proceedings in any action, suit or proceeding" and prohibiting "the commencement of or proceeding with any other action, suit or proceeding." The Court of Appeal held that the language of the ***CCAA*** was sufficient to give the ***CCAA*** judge in that case the authority to permanently affect the contractual rights of a non-creditor, saying that this interpretation is supported by the legislative objectives underlying the ***CCAA***. In ***Luscar***, the issue was whether an arbitration could proceed and the court held that the ***CCAA*** judge was empowered to restrain that. While the issue in that case was procedural in nature, it seems to me that the language used by the Alberta Court of Appeal would apply equally to substantive matters of substance. In particular, at para. 51 Madam Justice Hunt held that these words were sufficient to

give the ***CCAA*** judge in the case the authority to permanently affect the contractual rates of a non-creditor.

[29] In coming to its decision, the Court of Appeal referred to a number of earlier decisions where third party rights had been affected by a stay order. It reviewed the ***Norcen*** decision earlier referred to and ***Re. T Eaton Company*** (1997) 46 C.B.R. (3d) 293 and ***Re Dylex*** (1995), 31 C.B.R. (3d) 106. The latter cases each involved the permanent impairment of third party lessors' contractual rights.

[30] This was also recognized in ***Clear Creek*** by Madam Justice Newbury at para. 37 where she stated at para. 37:

> In the exercise of their "broad discretion" under the ***CCAA***, it has now become common for courts to sanction the indefinite, or even permanent, affecting of contractual rights.

[31] In ***Re. Doman Industries Ltd.*** (2003) BCSC 376 at paragraph 15, Mr. Justice Tysoe was quoted with approval the Reasons of Mr. Justice Spence in ***Re Playdium Enterprises Corp.*** (2001), 31 CBR (4th) 309. In that decision, Mr. Justice Spence observed that in interpreting s. 11(4) the court is to take into account the remedial nature of the ***CCAA***. Mr. Justice Tysoe agreed with his statement. He also expressed the view in para. 15 that:

> (T)he court has similar jurisdiction to grant a permanent stay surviving the restructuring of the debtor company in respect of events of default or breaches occurring prior to the restructuring.

[32] In ***Norcen***, the court observed that while non Creditors would not have the right to vote at the Creditors meeting when the plan was considered, non Creditors are clearly entitled to attend the sanction hearing and make submissions when the debtor company comes to court for approval of its plan. That is what happened in the case at bar.

[33] In this case I conclude that if ***REDMA*** relief is required, the Court should exercise its discretion and grant it. In doing that, the Court has to consider or be guided by two fundamental concepts, fairness and reasonableness. In ***Clear Creek***, Madam Justice Newbury quoted with approval the decision in ***Re Canadian Airlines Corporation***, [2000] 10 W.W.R. 269. At para. 94, the Alberta Court of Queen's Bench of Queen's Bench referred to Blair J's decision in ***Olympia and York Dev. Ltd. V. Royal Trust Co.*** (1993), 12 O.R. (3d) 500, in which he pointed out that fairness and reasonableness are the two keynote concepts that underscore the philosophy and workings of the ***CCAA.***

[34] If the Petitioners breached the statute by failing to file an amended disclosure statement because of the change in financial circumstances, I note that an amended disclosure statement will be filed at financial close. If a new disclosure statement was required because of an identity change, I would also grant ***REDMA*** relief because of the financial strength and construction expertise of Bosa. In my view Bosa's involvement in this project will, if anything, increase the prospect that this development will be completed in accordance with the terms of the presale contracts.

[35] The Petitioners also apply to extend the December 31, 2010 completion date in the presale contracts on account of construction delays. Clause 3.1 provides:

> If the vendor is delayed from completing the construction of the strata lots or obtaining an occupancy certificate or from depositing the strata plan for registration in the Land Title Office as a result of fire, explosion or accident or other cause, act or omission of any governmental authority, strike, walkout, inability to obtain or delay in attaining labour, material or equipment, flood, adverse site, or conditions, act of God, delay or failure by carriers or contractors, unavailability of supplies or materials, breakage or other casualty, climactic conditions, interference of the purchaser or any other event beyond the control of the vendor other than lack of money then the date set forth in section 2.3 will be extended for a period equivalent to such period of delay.

[36] The purchasers say that the delay claims ought not to be decided summarily. They say that they should be decided in the usual way after the project has been completed and after a trial on full evidence. That may well be the customary way of determining delay claims. In the case at bar we do not have that luxury.

[37] This restructuring is contingent on having the delay claims assessed on the available evidence today so that a decision can be made as to whether this restructuring succeeds or fails. Since the delay claims are now all retrospective, I see no difficulty in assessing them now and making the determination sought.

[38] I note that there has been no challenge to the facts supporting the delay claims, and no applications have been made to cross-examine on any of the affidavit evidence.

[39] The delay claims fall into four categories. The first is for delays encountered in completing the retention truss for the heritage building; two, delays associated

with completing the east foundation wall; three, delays resulting from rocks encountered during excavation, and finally delays in the removal of the EllisDon crane.

[40] With respect to the heritage retention and associated issues, a number of events and obstructions delayed EllisDon, the original contractor, from completing this part of the project on schedule. There was a delay encountered during the caisson drilling. Another delay arose from utility coordination. Delays were encountered during alterations to the mezzanine floor of the heritage structure. As a result of these circumstances, EllisDon issued Request for Change Order 002 seeking recognition of a 25 working day delay in the construction schedule. The project manager Stantec considered the request to be reasonable and it recommended a change order to the owner to allow a delay in the construction timetable of 25 working days. This was was accepted by the owner.

[41] With respect to the neighbouring east wall foundation, after EllisDon started excavating they found that there was some shotcrete encroaching into the project property from the foundation of the building on the east side of the project. A delay of 10 working days for the remedial work was sought. The project manager agreed and recommended the change order to the owner.

[42] The third category was rock encountered during the excavation. This generated a 43 working day delay request. The rock slowed the excavation process. A request for change order had been filed by the contractor at the time construction ceased and was being considered by Stantec. The evidence shows

that Stantec would have recommended that the owners accept that extension as a reasonable reflection of the delay actually experienced by the contractor.

[43] The final delay claim was for the replacement of the EllisDon crane with the Axiom crane. Because of the City requirements as to when these cranes can be moved about on the City streets, these events generated a further delay of some seven working days.

[44] In my judgment the evidence supports these delay claims and I would accordingly extend the completion date in the presale contracts of December 31, 2010 by the period sought to May 4, 2011.

[45] Finally I want to comment on the role of the Monitor in the role in these proceedings. There was at least some suggestion that adequate notice or information about this proceeding was not provided by the Monitor to the presale purchasers. The Monitor in this case at bar is a highly experienced insolvency professional. Throughout this case and in the discharge of his duties as an officer of this court, I am satisfied that he took all appropriate and reasonable steps to not only communicate information to stakeholders, but also where he considered it appropriate, to explain the proceedings and their consequences, especially for the presale purchasers. Accordingly, I would expressly reject any criticism even if only implied of the Monitor's role in these proceedings.

[46] In conclusion the application of the Petitioners will be allowed.

[47] Are there any submissions with respect to the wording of the order or any language issues in the order that counsel want to address?

[48] MR. SANDRELLI: My Lord, I can only comment that I haven't appropriated all the various changes that have been requested from the various parties that have responded to me with respect to the form of draft order, and that would be my only comment in my submission. You will probably be hearing from others that it should go –

[49] THE COURT: Are there any other – is the form of order - any particular submissions?

[50] MR. CLEMENS: I have no submissions on the form of order.

[51] THE COURT: All right, the order will go. Mr. Sandrelli, you have a copy for me to sign?

[52] MR. SANDRELLI: I could – five more.

[53] THE COURT: Yes.

[54] MR. CLEMENS: My Lord, at the outset of your Reasons you said you were going to deal with the issue of unenforceability and that would be s. 23, but unless I missed something, I don't believe that you addressed that matter. Are the Reasons as they stand or is there going to be something said about that?

[55] THE COURT: The Reasons are as they stand.

[56] MR. CLEMENS: Thank you.

[57] THE COURT: Thank you, Mr. Clemens.

”D. Brenner, CJSC”
The Honourable Chief Justice Brenner

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Jameson House Properties Ltd. (Re),*
2009 BCCA 339

Date: 20090717
Docket: CA037221

In the Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

and

In the Matter of the *Business Corporations Act*, S.B.C., 2002, c. 57

and

In the Matter of Jameson House Properties Ltd. And Jameson House Ventures Ltd.

Between:

Peyman Ashkenani, Diana Becker, Behzad Ershad (aka Kevin Ershad), Nausser Fathollahi, Mark Khademi (aka Mohsen Khademi), Robert Ledingham, David Polinski, Ali Sodagar, Tasleem Suleman, Zuyl Suleman, Ali Sarrafzadeh, Mehdi Sarrafzadeh, Taymour Yeganeh, Arash Alavi, Marjan Javaherian, Robert Lemon, Roshanak Mozafar, Ravin Agah, Burton Goldstein, Nora Goldstein, Roni Strul, Eddie Mok, Mansoor Tashakor and Kaveh Sefiddashti

Appellants
(Respondents)

And

Jameson House Properties Ltd., Jameson House Ventures Ltd., and Ernst & Young Inc., in its capacity as Court Appointed Monitor

Respondents
(Petitioners)

Before: The Honourable Madam Justice Saunders
The Honourable Madam Justice Levine
The Honourable Mr. Justice Groberman

On appeal from: Supreme Court of B.C.,*Jameson House Properties Ltd. (Re)*, May 26, 2009 and June 11, 2009, S087978

Oral Reasons for Judgment

Counsel for the Appellants:	M.A. Clemens, Q.C.
Counsel for the Respondents:	D.A. Goult, J.R. Sandrelli & J. Schultz
Counsel for the Court Appointed Monitor:	W.E.J. Skelly
Counsel for the Attorney General of British Columbia:	R. Butler
Place and Date of Hearing:	Vancouver, British Columbia July 13, 2009
Place and Date of Judgment:	Vancouver, British Columbia July 17, 2009

[1] **LEVINE J.A.:** This is an appeal from two orders by Brenner CJSC in proceedings under the *Companies Creditors' Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*").

[2] The appellants are "pre-sale purchasers" of residential condominium units in a development currently under construction on West Hastings Street in Vancouver known as "Jameson House". The pre-sale of units in the development was subject to the provisions of the *Real Estate Marketing and Development Act*, S.B.C. 2004, c. 41, ("*REDMA*"), under which the respondent developers (which I will refer to in these reasons for judgment as the "Developer") had certain disclosure obligations, and the appellants certain remedial rights.

[3] On October 28, 2008, the financing for the development fell away, and on November 14, 2008, the Developer sought and obtained an "initial order" providing for protection from creditors and restructuring under the *CCAA*.

[4] The appellants made an application to be declared creditors in the *CCAA* proceedings with the right to make claims and vote on the plan of compromise and arrangement (the "Plan") proposed by the Developer. On May 26, 2009, Brenner CJSC dismissed this application (the "creditor judgment"), in reasons for judgment indexed as *Jameson House Properties (Re)*, 2009 BCSC 844.

[5] On June 11, 2009, the Chief Justice made a final order approving the Plan (the "Final Order"), in reasons for judgment indexed as *Jameson House Properties (Re),* 2009 BCSC 964. The Final Order included terms declaring the pre-sale agreements in full force and effect, and denying the appellants any right to terminate, rescind, or repudiate their pre-sale contracts, or to take the position they are not enforceable by reason of any matter arising before the implementation date of the Plan (July 31, 2009). He made further declarations that the pre-sale agreements are "valid, binding, and enforceable", there are no existing rights of rescission, and no steps taken in the *CCAA* proceedings up to the date of the Order, nor the issuance of shares in the capital of the Developer to Bosa Properties Inc. (at

the implementation date) result in the change in the identity of the developer or require the filing of a new disclosure statement pursuant to *REDMA*. He also declared that the Developer had been delayed from completing the construction of the project for 85 working days, and extended the stipulated completion date of the pre-sale agreements by an equivalent period.

[6] The appellants claim that the Chief Justice erred in concluding that they were not creditors; in declaring that the pre-sale agreements are "valid, binding and enforceable", and there exist no rights of rescission; in finding that the identity of the developer will not change; and in extending the completion date of the pre-sale agreements by 85 working days. They argue that not only did the Chief Justice err in making these orders, but that he did not have the jurisdiction under the *CCAA* or within the *CCAA* proceedings to make the latter three orders.

[7] The application for leave to appeal and the appeal from the orders of May 26 and June 11, 2009 were heard together and leave to appeal was granted on July 13, 2009.

[8] It is my opinion that the Chief Justice did not err in concluding that the appellants were not creditors, or in making the declaratory orders as to the rights of the appellants under *REDMA* and with respect to the completion date under the pre-sale agreement. The result of these orders is that there were no statutory or contractual rights that were overridden by the Final Order, and it is not necessary to decide whether the Chief Justice had the jurisdiction to do so. It follows that I would dismiss the appeal.

REDMA

[9] The crux of the appellants' argument is that they have certain remedial rights under *REDMA*, which are sufficient to give them status as creditors in the *CCAA* proceedings, and which cannot be overridden by orders under the *CCAA*.

[10] The relevant provisions of *REDMA* are the requirements in Part 2 for a "developer" to file and provide a "disclosure statement" to a purchaser of a

"development unit" (ss. 1 (definitions), 3, 14, 15), and the "remedies" of purchasers set out in Part 3.

[11] In this case, the Developer filed an initial disclosure statement and an amended disclosure statement, and provided them to the pre-sale purchasers in accordance with *REDMA*. These disclosure statements provided information concerning the financing of the development.

[12] Section 16 of *REDMA* requires a developer to file and provide a new disclosure statement or an amended disclosure statement in certain circumstances.

[13] A new disclosure statement is required where, among other matters, the identity of the developer changes (s. 16(2)(a)). If a new disclosure statement is required but is not filed and provided, the purchaser is entitled to rescind the purchase agreement at any time (s. 21(3)).

[14] The appellants take the position that the Plan contemplates the change of the identity of the developer, requiring the Developer to file a new disclosure statement, and their failure to do so gave the appellants rights of rescission.

[15] Section 16(3) requires the developer to file and provide an amendment to a disclosure statement where the developer becomes aware that a disclosure statement (including an amended disclosure statement) contains a misrepresentation of a material fact, defined as "a fact...that affects, or could reasonably be expected to affect, the value, price, or use of the development unit..." (s. 1).

[16] If a developer has breached any provision of Part 2 (in this case, the requirements under s. 16 to file a new or amended disclosure statement), s. 23 provides that "an agreement to purchase...a development unit is not enforceable against a purchaser by [the] developer". This Court decided in *Chambers v. Pennyfarthing Development Corp.* (1985), 64 B.C.L.R. 145 (C.A.) that under the predecessor to s. 23 (s. 62 of the *Real Estate Act*, R.S.B.C. 1979, c. 356) a

purchaser was entitled to recover money paid when an agreement was rendered unenforceable.

[17] The appellants take the position that the Developer was required to file and provide an amended disclosure statement when the financing fell away in October 2008, and that the failure to do so was a breach of Part 2 of *REDMA*, giving the appellants the right to a declaration that the pre-sale agreements are unenforceable and the return of their deposits. The deposits are held in trust by a law firm, in accordance with the requirements of *REDMA* (s. 18(1)).

[18] Thus, the appellants' argued that they had claims for rescission (because the developers failed to file a new disclosure statement required on the change of the identity of the developer) and for a declaration that the pre-sale agreements were unenforceable and they were entitled to the return of their deposits (because the developers failed to file an amended disclosure statement when the financing fell away). They claimed that these rights qualified them as "creditors" under the *CCAA*, and that they could not be overridden by orders under the *CCAA*. Thus, to determine these issues, the Chief Justice had to determine whether the appellants had the rights they claimed, and if so, the effect on the *CCAA* proceedings.

[19] For completeness, I note that in *Dwane v. Bastion Coast Homes Ltd.*, 2009 BCSC 726, C.L. Smith J. decided that the right of rescission under s. 21(3) of *REDMA* applies to new and amended disclosure statements, requiring a developer to provide both to a new purchaser. As I understand the appellants' arguments on this appeal, however, they do not claim any right of rescission under s. 21(3) for the alleged failure of the Developer to file an amended disclosure statement, but claim only unenforceability of their pre-sale agreements under s. 23.

[20] I note further that s. 22 of *REDMA* provides that a purchaser has a right of action for damages against a developer and others for a misrepresentation in a disclosure statement. This remedy was considered by the Chief Justice in his reasons for judgment on both applications, but the appellants did not raise it on the appeal.

Purchasers' Rights under REDMA

[21] Both the creditor judgment and the Final Order (other than with respect to the delay in construction) turned on the interpretation and application of *REDMA*. Although the appellants argue that the Chief Justice did not have the jurisdiction to make declaratory orders under the *CCAA* with respect to their rights under *REDMA*, their appeal of necessity turns on the conclusions of the Chief Justice concerning the application of *REDMA*. Therefore I will deal first with the questions of whether the Plan will result in a change in the identity of the developer, requiring that the Developer file a new disclosure statement, and whether the falling away of the financing in October 2008 was a "material fact", requiring that the Developer file an amended disclosure statement.

Identity of the Developer

[22] Under REDMA, "'developer' means a person who, directly or indirectly, owns, leases or has a right to acquire or dispose of development property" (s. 1).

[23] The disclosure statement for the project described the Developer as follows:

> **1. THE DEVELOPER**
>
> **1.1 Particulars of Formation**
>
> Jameson House Ventures Ltd. Is the registered owner of the Lands (as hereinafter defined) and is a company incorporated under the laws of the Province of British Columbia on December 3, 2005 under Incorporation No. 0732026. Jameson House Properties Ltd. Is the beneficial owner of the lands, and is a company incorporated under the laws of the Province of British Columbia on February 18, 2003 under Incorporation No. 0664208. (Jameson House Ventures Ltd. and Jameson House Properties Ltd., hereinafter collectively and individually called the "Developer").
>
> **1.2 Purpose and Assets**
>
> Each Developer was incorporated specifically for the purpose of developing the Development (as defined herein).
>
> **1.3 Registered and Records Office Address**
>
> The address of the registered and records office for each Developer is:
>
> 800-885 West Georgia Street
> Vancouver, British Columbia, V6C 3H1

> **1.4 Directors**
>
> The directors of each Developer are:
>
> Anthony James Pappajohn;
> Thomas James Pappajohn; and
> John George James Pappajohn.

[24] As part of the Plan, the Developer entered into a financing agreement with Bosa Properties Inc. ("Bosa), under which Jameson House Properties Ltd. ("Jameson Properties") (the shares of which are held by James Holdings Ltd.) continues to be the developer of the Jameson House project, but the corporate structure of Jameson Properties will change as follows:

> The Jameson respondents will issue new shares such that:
>
> - Bosa will hold 100% of the voting shares in each of the Jameson respondents.
> - Bosa will hold 50% of the equity shares in each of the Jameson respondents, and James Holdings Ltd., which previously owned 100%, will hold the other 50% of the equity shares.
>
> The directors of each of the Jameson respondents will consist of two representatives of Bosa and one representative of James Holdings Ltd.

[25] The Chief Justice concluded that the change in the corporate ownership and control of the developer will not be a change in its identity. He said (June 11 at para. 10):

> Has the identity of the developer changed? At financial close Bosa will acquire 50 percent of the equity, 100 percent of the voting shares and will appoint two of the three directors in the petitioners. The term "identity" in the statute has not been judicially considered. The Petitioners say that the identity of the developer when the project started was Jameson House and that the identity after it is completed will be Jameson House. While the directors and shareholdings will change, the identity of the developer will remain the same. The law has long recognized the corporation as a body separate from its shareholders (*Salomon v. Salomon* [1897] AC 22). Strictly speaking, this is so in the case at bar.

[26] I agree with the Chief Justice. There is nothing in *REDMA* that suggests that the Legislature intended that the "identity of the developer" changes if corporate ownership and control change.

[27] The definition of “developer” in *REDMA* refers to the owner of the “development property”. That will not change as a result of the change in ownership and control on the implementation of the agreement with Bosa. The description of the developer in the original disclosure statement (which complied with the requirements of *REDMA*: see *REDMA*, Policy Statement 1, Disclosure Statement Requirements for Development Property Consisting of Five or More Strata Lots, Form 1) included no reference to ownership or control (except to name the directors). *REDMA* does not require disclosure on a change in ownership or control of the developer.

[28] Had the Legislature intended that a new disclosure statement was required on the change of ownership and control of the developer, it could have expressly provided that in *REDMA*. The use of the phrase “identity” of the developer, the definition of “developer”, and the information required to be disclosed concerning the developer all lead to the conclusion that “identity” is not a reference to the shareholders or directors of a corporation, but to the existence of a corporation as a separate legal entity.

[29] Thus, the Developer will not be required to file a new disclosure statement as a result of the corporate restructuring, and the appellants will have no right of rescission.

[30] I would not accede to this ground of appeal.

Material Fact

[31] In April 2007 the Developer filed an amendment to the disclosure statement to amend s. 6.2 of the original disclosure statement. Section 6.2 stated that: “The Developer has received a firm commitment for construction financing from HSBC Bank Canada...”.

[32] The appellants say that when the financing fell away on October 28, 2008, this statement became a misrepresentation, and the Developer was required to file a further amendment to the disclosure statement.

[33] As previously noted, s. 16(3) of *REDMA* requires an amended disclosure statement to be filed when the developer becomes aware of a misrepresentation of a "material fact", defined for this purpose as "a fact...that affects, or could reasonably be expected to affect, the value, price, or use of the development unit".

[34] If an amended disclosure statement was required but not filed, then the appellants were entitled to take the position that the pre-sale agreements were not enforceable, and claim the return of their deposits.

[35] Thus, the question that the Chief Justice characterized as the "critical issue in this case" (June 11 at para. 16) was "whether the failure of the [Developer's] financing arrangements which triggered the *CCAA* filing meant that the financing representation in the April 3, 2007 amended disclosure statement was a misrepresentation" of a "material fact".

[36] The Chief Justice concluded (at para. 18) that "[i]t is not clear that the failure of the financing was such a material fact." He said (at paras. 18 and 19):

> ...The developer was able to continue work on the project until November 12, 2008. The principals of the developer held an honest belief, until just prior to the filing that they would have access to sufficient construction financing.
>
> More significantly, if this restructuring is approved by the Court and if it succeeds, the purchasers will be entitled to receive precisely what it was they contracted for. If the Petitioners fail to deliver, the purchasers will have their full right of recourse under the terms of the agreements of purchase and sale. This being the case, it is difficult to see that the value, price or use of the development unit or property has so far been affected.

[37] The Chief Justice noted (at para. 20) that "there are two diametrically opposed views of this case". He described the appellants' view that the Developer sought to benefit from lower construction costs at the expense of the purchasers, while the Developers' position was that the effect of the restructuring would be to provide the purchasers exactly what they had bargained for.

[38] Both points of view reflect the value of the units when completed. This is consistent with the definition of "material fact" in *REDMA*, which references the "value, price, or use of the development unit". A "development unit" is defined, in

this case as “a strata lot”, which is in turn defined as “a strata lot as defined in the *Strata Property Act* in a stratified building”. A “strata lot” is defined in the *Strata Property Act*, S.B.C. 1998, c. 43, s. 1, as “a lot shown on a strata plan”. The original disclosure statement states that the strata lots in the development will be “created on the filing in the Land Title Office of the strata plan which subdivides Air Space Parcel 1 into 131 strata lots”, and that “the Developer intends to subdivide [the proposed Airspace Parcel 1] from the Lands”. These plans are not filed until construction is completed. Thus, these definitions and information lead to the conclusion that the “development unit” means the completed unit, and that the “value, price, or use” relevant to a “material fact” is the “value, price, or use” of the completed unit.

[39] Under *REDMA*, the financing of a residential construction project in which units are pre-sold to purchasers is of great importance: see *REDMA*, Policy Statement 6, Adequate Arrangements – Utilities and Services (effective January 1, 2005, amended effective January 30, 2008). It may be said to be counter-intuitive to conclude that it is not a material fact.

[40] However, the question here is whether the failure of the financing is a “material fact” within the meaning of *REDMA*. It is on that basis that the Legislature has “drawn the line” with respect to disclosure: see the comments of the Supreme Court of Canada in *Kerr v. Danier Leather Inc.*, 2007 SCC 44, 286 D.L.R. (4th) 601 at para. 32, with reference to the application of disclosure requirements of the Ontario *Securities Act*:

> The *Securities Act* is remedial legislation and is to be given a broad interpretation: *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557. It protects investors from the risks of an unregulated market, and by its assurance of fair dealing and by the promotion of the integrity and efficiency of capital markets it enhances the pool of capital available to entrepreneurs. The Act supplants the "buyer beware" mind set of the common law with compelled disclosure of relevant information. At the same time, in compelling disclosure, the Act recognizes the burden it places on issuers and in Part XV sets the limits on what is required to be disclosed. The problem for the appellants is that when a prospectus is accurate at the time of filing, s. 57(1) of the Act limits the obligation of post-filing disclosure to notice of a "material change", which the Act defines in s. 1 in relevant part as

> a change in the business, operations or capital of the issuer that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the issuer ... .
>
> An issuer has no similar express obligation to amend a prospectus or to publicize and file a report for the modification of material *facts* occurring after a receipt for a prospectus is obtained. That is where the legislature has drawn the line.

[41] On the basis of the definition of "material fact" in *REDMA*, and with no evidence to the contrary, I find that it was open to the Chief Justice to find as a fact that the failure of the original financing on October 28, 2008 was not a "material fact".

[42] The time frame during which an amended disclosure statement would have been required was short: between October 28, 2008 and November 14, 2008 (when the *CCAA* proceedings commenced, and all such requirements were effectively stayed by the initial order). While s. 16(1) of *REDMA* requires that "[i]f a developer becomes aware that a disclosure statement...contains a misrepresentation, the developer must immediately" file an amended disclosure statement, in a commercial context "immediately" would arguably be construed to allow a reasonable time for compliance, or, as occurred in this case, to seek alternative financing.

[43] Here, the Developer continued construction on the development for a further two weeks, which was a factor the Chief Justice considered in determining whether the failure of financing was a material fact (i.e. "affects, or could reasonably be expected to affect, the value, price, or use of the development unit") as supporting the Developer's belief that sufficient alternative financing would be obtained. Applying an objective test, that factor could lead a reasonable person to conclude, at that time, that the value, price, or use of the completed unit would not be affected by the failure of financing.

[44] Two days following the cessation of construction, the Developer commenced the *CCAA* proceedings. Implementation of the Plan will provide the purchasers with at least what they had contracted for, and, in the opinion of the Chief Justice,

perhaps greater assurance that the obligations of the Developer under the pre-sale agreements will be met.

[45] In these particular circumstances, and on the evidence before the Court, I am of the view that the failure of the financing on October 28, 2008 did not trigger a requirement that the Developer file an amendment to the disclosure statement, and the appellants have no right to claim that the pre-sale agreements are unenforceable or to return of their deposit.

[46] I would not accede to this ground of appeal.

Were the Appellants Creditors?

[47] The appellants claimed they were creditors under the Plan on the basis that they were entitled to rights and remedies under *REDMA*. In the creditor judgment, the Chief Justice considered the relevant provisions of *REDMA*, the definitions of "claim" in the "claims process order" made in the *CCAA* proceedings and in s. 12(1) of the *CCAA*, and ss. 81(1) and 121(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, C. B-3 ("*BIA*")**.** He concluded that a "claim" within the meaning of these provisions was "a debt or liability...provable in proceedings under [the *BIA*]" within the meaning of s. 121(1) of the *BIA*, that must be owed by the bankrupt to the person seeking to prove the claim, and noted that s. 81(1) of the *BIA* contains a separate regime for return of property (May 26 at paras. 18-20).

[48] The only potential claim of the appellants was under s. 23 of *REDMA*, which he described as "a defence to enforcement of the purchase agreements". A right to sue for return of their deposits would not be a claim in debt or damages, but an action against the trustee for the return of specific property. That would not be a "debt provable in bankruptcy". Thus, the appellants were not creditors.

[49] The appellants take issue with the findings of the Chief Justice as to their rights under *REDMA*. They say that they had a right to sue the developers for the return of their deposits, which, according to the reasoning of the Alberta Court of

Appeal in *Luscar Ltd. v. Smoky River Coal Ltd.*, 1999 ABCA 179, 175 D.L.R. (4th) 703, was sufficient to qualify them as creditors.

[50] I have concluded that the appellants had no rights of rescission or to return of their deposits because their pre-sale agreements were unenforceable, under *REDMA*. Thus, there is no basis for them to claim that they were creditors.

[51] While my further comments are *obiter*, I would add that if the appellants had the right to a declaration that their agreements were unenforceable and they were entitled to the return of their deposits, *Luscar* would not support an argument that they were creditors. Their only monetary (or property) claim would be against the trustee holding the deposits, not the "bankrupt" Developer, and there is no basis for a non-monetary claim for a declaration of unenforceability to be characterized as a "debt or liability...provable in bankruptcy".

[52] I would not accede to this ground of appeal.

Construction Delay

[53] On the application for the Final Order, the Developer sought an order extending the completion date of the pre-sale agreements because of construction delays. The Plan was contingent on the extension. The Chief Justice determined that there were delays of 85 working days, and extended the completion date of the pre-sale agreements by the same amount of time, from December 31, 2010 to May 4, 2011.

[54] Section 2.3 of the pre-sale agreement provides that if the development is not completed by December 31, 2010, the purchasers may cancel their agreements:

> If by December 31, 2010, (or if a later date results from the application of Section 3.1 hereof, then by such later date), the Occupancy Permit has not been issued and the Strata Plan has not been deposited for registration in the Land Title Office, the Purchaser or the Vendor shall have the right to cancel this Agreement....If the Vendor or Purchaser exercise the said right, the Deposit and any interest accrued thereon will be paid to the Purchaser...

[55] Section 3.1 of the pre-sale agreement provides for an extension of the completion date if the Developer is delayed from completing the construction of the development by "*force majeure*" events beyond its control, other than lack of money:

> If the vendor is delayed from completing the construction of the strata lots or obtaining an occupancy certificate or from depositing the strata plan for registration in the Land Title Office as a result of fire, explosion or accident or other cause, act or omission of any governmental authority, strike, walkout, inability to obtain or delay in attaining labour, material or equipment, flood, adverse site, or conditions, act of God, delay or failure by carriers or contractors, unavailability of supplies or materials, breakage or other casualty, climactic conditions, interference of the purchaser or any other event beyond the control of the vendor other than lack of money then the date set forth in section 2.3 will be extended for a period equivalent to such period of delay.

[56] The appellants do not take issue with the facts supporting the delay claims, and do not argue that any of the delay claimed was attributable to lack of money. Rather, their argument is that the completion date under the pre-sale agreements should not have been extended in advance of December 31, 2010, when it could be determined whether any extension was actually necessary.

[57] The Chief Justice acknowledged (June 11 at para. 35) that the "customary way of determining delay claims" is after the project has been completed, but because "[i]n the case at bar, we do not have that luxury", he proceeded to decide them and order the extension.

[58] Whether the extension could be ordered in advance of the completion date of December 31, 2010 is a matter of contractual interpretation. The appellants argue that the opening words of s. 3.1 prohibit an anticipatory finding of delay.

[59] I do not agree. There is nothing in s. 3.1 that restricts a finding of fact that "[t]he Vendor is delayed from completing the construction of the strata lots". If such a finding is made, the closing words of s. 3.1 provide that: "then, the date set forth in section 2.3 will be extended for a period equivalent to such period of delay".

[60] The Chief Justice made no error in extending the completion date.

[61] I would not accede to this ground of appeal.

Jurisdiction under the CCAA

[62] I have concluded that the appellants had no rights under *REDMA* to rescind their pre-sale agreements, or to take the position that the agreements were unenforceable. Thus it is not necessary to address the Chief Justice's reasons for finding that the scope of his discretion under the *CCAA* extended to overriding any such rights. Given the urgency to decide this appeal, consideration of that question by this Court will await another day.

[63] The appellants raise a narrower question, however. That is whether the specific terms of the Final Order reflect the scope of the court's jurisdiction under the *CCAA*.

[64] The specific terms of the Final Order as they relate to the appellants are paragraphs 14-16:

> THIS COURT ORDERS AND DECLARES THAT:
> ...
>
> 14. Effective as of the Plan Implementation Date, all agreements to which the Petitioners are a party including all Pre-Sale Agreements with Pre-Sale Purchasers, and which were not terminated or rejected by the Petitioners in accordance with the Initial Order prior to the Creditors' Meeting, are in full force and effect notwithstanding the CCAA proceedings, the Plan and its attendant compromises, and no party to such an agreement shall be entitled, either pursuant to statute or common law, to terminate, rescind or repudiate its obligations under such agreement or take the position in any proceedings that such agreement is not enforceable, by reason of or in connection with any matter, fact or circumstance arising prior to the Plan Implementation Date, including without limitation the commencement of the CCAA Proceedings, the implementation of the Plan or the compromises, arrangements, transactions, discharges, releases or injunctions effected pursuant to the Plan or this Order.
>
> 15. As of the date of this Order, each Pre-Sale Agreement with a Pre-Sale Purchaser (collectively, the "Pre-Sale Agrements") are valid, binding and enforceable agreements as between the Petitioners and the respective Pre-Sale Purchasers, there are, as of the date of this Order, no existing rights of rescission in respect of the Pre-Sale Agreements and neither the filing of the CCAA Proceedings, the appointment of the Monitor and the compromises, arrangements, releases, discharges, injunctions and results provided for in the Plan of Compromise and Arrangement, nor any fact, step taken or not

> take, event or occurrence which took place before or which has happened during these proceedings, up to the date of this Order, nor the issuance of shares in the capital of each of the Petitioners to Bosa Properties Inc. ("Bosa") or its affiliates contemplated therein nor the terms and conditions of the Project Agreement dated March 1, 2009, entered into between the Petitioners, Bosa, Bosa Properties (J.H.) Inc., Bosa Properties (J.H. MGR) Inc. and James Holdings Ltd. as they define the proposed relationships between the parties thereto:
>
> (a) result in a change in the identity of the developer for the purpose of the Real Estate Development Marketing Act, SBC 2004, c. 41 ("REDMA"); or
>
> (b) require the filing of a new disclosure statement for the Jameson House Project pursuant to section 16 of REDMA or otherwise.
>
> 16. As of the date of this Order, the Petitioners have been delayed from completing the construction of the Project for a period of 85 working days due to events beyond the control of the Petitioners (other than lack of money) and, accordingly, the December 31, 2010 dates stipulated in section 2.3 of each of the Pre-Sale Agreements with residential Pre-Sale Purchasers have been extended by an equivalent period, to May 4, 2011.

[65] As I understand the appellant's arguments, they say that s. 11(4) of the *CCAA*, which authorizes the court to make orders "staying, restraining, and prohibiting" proceedings, does not authorize the court to make declaratory orders as to the substantive rights of the parties. They argue that the decisions on their rights under *REDMA* should only have been made in separate proceedings.

[66] There is no merit to this argument. As noted, the Chief Justice was required to determine the appellants' statutory and contractual rights to decide the issues the appellants raised on their application for creditor status and on the application for the Final Order. His conclusions resulted in the declaratory orders reflected in the Final Order.

[67] The court has the authority to make declaratory orders: see *Canada v. Solosky*, [1980] 1 S.C.R. 821 at 830-833. The appellants have raised no argument that would limit the court's jurisdiction to do so in the context of a *CCAA* proceeding, or that would require a separate proceeding.

[68] I would not accede to the appellant's arguments that the Chief Justice could not include declaratory orders in the Final Order.

Summary and Conclusion

[69] The identity of the developer will not change on the implementation of the corporate restructuring of the Developer, and the appellants will therefore have no right to rescind the pre-sale agreements under s. 21 of *REDMA*.

[70] The failure of the financing in October 2008, in the circumstances of this case, was not a “material fact” that required the Developer to file and provide an amendment to the disclosure statement. The appellants therefore have no right to take the position that the pre-sale agreements are not enforceable under s. 23 of *REDMA*.

[71] Because the appellants have no rights of rescission or to claim their agreements are unenforceable, they are not creditors for the purposes of the *CCAA* proceedings.

[72] The Chief Justice made no error in extending the completion date of the construction of the units under the pre-sale agreements.

[73] The declaratory terms of the Final Order do not exceed the scope of s. 11(4) of the *CCAA*.

[74] It is not necessary to decide whether the scope of the discretion of a court in *CCAA* proceedings extends to making orders that override statutory rights under *REDMA*.

[75] I would dismiss the appeal.

[76] **SAUNDERS J.A.:** I agree.

[77] **GROBERMAN J.A.:** I agree

[78] **SAUNDERS J.A.:** The appeal is dismissed.

"The Honourable Madam Justice Levine"

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Meslin v. Lee,*
2011 BCSC 1208

Date: 20110907
Docket: S103261
Registry: Vancouver

Between:

Dominic Milosz Meslin

Plaintiff

And

Thomas Edwin Lee and Monika Boldak

Defendants

Before: The Honourable Madam Justice Gray

Reasons for Judgment
In Chambers

The Plaintiff, Dominic Meslin:	In person
Counsel for the Defendants:	W.J. McMillan
Place and Date of Hearing:	Vancouver, B.C. April 1 and 5, 2011
Place and Date of Judgment:	Vancouver, B.C. September 7, 2011

INTRODUCTION

[1] This lawsuit relates to a contract of purchase and sale ("Purchase Contract") of a condominium unit in Vancouver, B.C. ("Condo") which did not complete. Mr. Meslin agreed to sell the Condo, and the defendants ("Buyers") agreed to purchase it, with a completion date of May 31, 2010. The defendants provided a deposit of $20,000 ("Deposit"). The Buyers allege that Mr. Meslin falsely represented that there was no relevant engineer's report, and that they properly rescinded the Purchase Contract on that basis on the completion date.

[2] The Buyers brought an application under the summary trial rule 9-7 (formerly Rule 18A) for an order dismissing Mr. Meslin's claim, declaring that they rescinded the Purchase Contract, ordering that the Deposit plus interest be returned to them, and ordering Mr. Meslin to pay them damages of about $6,000. Mr. Meslin brought a cross-application, also under Rule 9-7, seeking a declaration that the Buyers breached and repudiated the Purchase Contract, an order that the Deposit be paid to him, and an order that the defendants pay him damages of about $88,000.

[3] The parties agreed that the issue of damages would not be addressed at this stage, and that if the parties cannot agree following the decision on liability, damages will be subject to a separate hearing.

[4] The cross-applications proceeded to a two-day hearing on the basis of affidavits. During argument on the second hearing day, Mr. Meslin sought to cross-examine Mr. Lee. This application was dismissed.

ISSUES

[5] The issues are as follows:

a) Is the RDH Report (defined below) an "engineer's report"?

b) Did Mr. Meslin fraudulently or innocently or negligently misrepresent that there was no engineer's report?

c) What is the effect of the Buyers' acknowledgement in the Purchase Contract that they received all copies of any Engineers' Reports concerning the Strata Corporation?

d) If Mr. Meslin fraudulently or innocently or negligently misrepresented that there was no engineer's report, what is the remedy?

FACTS

[6] The civic address of the Condo is 308-3788 West 8th Avenue, Vancouver, B.C. The Condo is one of 40 units in a building known as "La Mirada". I will refer to the strata corporation for La Mirada as the "Strata Corporation". Mr. Meslin was registered owner of the Condo from at least March 2010 until August 30, 2010. Mr. Meslin is a lawyer who practises real estate conveyancing.

[7] The Buyers, Mr. Lee and Ms. Boldak, are a married couple.

[8] The minutes of the council for the Strata Corporation include the following regarding a meeting on July 28, 2009:

> ... 4. Special General Meeting Date and CHOA Meeting: The Strata Council and the property manager discussed holding a Special General Meeting to discuss expenditure to have the building assessed and then using that assessment to develop a 25 year capital plan for the building. The Strata first discussed a number of companies to present to the owners for the assessment. The range of pricing for a building envelope condition assessment is from $5,000.00 to $7,000.00 but given the level of detail the Strata expects to get from the report the Strata Council feels that trust and reputation is very important. The company to be presented to the owners is BC Building Science, they are members of the BC Building Envelope Council and are a Condominium Homeowner's Association (CHOA) recommended contractor. Additionally, their quote of $5,000.00 came in at the lower range. ...
>
> The Strata Council will also be presenting the owners with a mechanical engineering assessment quote to look at the piping at the building. This does not mean that the Strata intends to immediately do more repiping but they are looking to plan for future replacement whether that be in 2, 5 or 10 years. The goal is to come up with an overall plan so owners can anticipate their yearly expenses with some confidence and the building can be kept up in excellent condition. ...

[9] The Strata Corporation invited owners to a presentation on September 16, 2009 by Mr. Gioventu, executive director of the Condominium Homeowners Association of B.C. ("CHOA"). Mr. Meslin attended the meeting. At the meeting, Mr. Gioventu summarized the current requirements that B.C. strata corporations must meet with respect to saving for repairs and replacements, and stated that by merely meeting those requirements, many strata corporations will not have enough money to address the normal problems that will arise as their buildings age. He explained the concept of a contingency reserve fund study, and discussed the difference between a contingency reserve fund study and an engineering report.

[10] Mr. Gioventu said that preparation of an engineering report required invasive testing, such as removing siding and drilling test holes to examine walls. He explained that such a report must be prepared by an engineer, and is appropriate when the strata corporation suspects a problem and requires the report in anticipation of remedial work.

[11] Mr. Gioventu said that a contingency reserve fund study is a financial planning tool used before specific problems are known or suspected to create an appropriate budget to deal with the inevitable failure of building components as they reach the end of their life expectancy. He said that it can be prepared by an accountant, an engineer or other qualified individuals.

[12] The minutes of the council for the Strata Corporation include the following regarding a meeting on November 1, 2009, under the heading "Business Arising":

> 1. Council met briefly to plan for the upcoming SGM. It was agreed to have all Council members speak to owners to address any concerns, respond to any questions that owners may have regarding the meeting. ...
>
> A copy of the proposal from RDH Building Engineering Ltd. (that Council has selected) will be left in the common room for review by owners.

[13] The owners of La Mirada resolved at a special general meeting on November 17, 2009 to spend $8,500 for a contingency reserve fund study. The council chose RDH Building Engineering Ltd. ("RDH") to prepare the reserve fund study.

[14] The minutes of the Special General Meeting of the Strata Corporation held on November 17, 2009 include the following under the heading “RESOLUTION #1 - Expenditure from the Contingency Reserve Fund”:

> **Preamble**: The [Strata Corporation] is over 20 years old and some of the building envelope components are due to pass their intended life span in the next 5 to 10 years. The purpose of completing a contingency reserve fund study is for the strata to gain professional knowledge as to what is currently going on in the building envelope and mechanical systems. The second phase will be to take the knowledge gained from this assessment and develop a 25 year Capital Plan for the complex that encompasses all the building systems. This will allow the Strata to become proactive in the planning of projects and allow the proper notice for owners with regards to the repairs and upgrades that will be needed at the building.
>
> The following resolution has been proposed:
>
> > BE IT RESOLVED by a ¾ vote that THE OWNERS, [Strata Corporation] expend an amount, not exceeding $8,500.00 for the purpose of completing a Contingency Reserve Fund Study of the complex. The expenditure shall be funded as follows:
> >
> > > The Strata Corporation ... intends to raise $8,500.00 by way of expenditure from the Contingency Reserve Fund effective upon the passing of this resolution.
> >
> > ***End of Resolution #1***
>
> The Council President briefly outlined the scope of work that RDH the consulting engineering firm would perform. It was noted the proposal contains both a depreciation report and a maintenance plan for the building. It was also noted there was some concern with a few owners that this report should be within the scope of work of RE/MAX as the managing agent of the property. It was explained that RE/MAX agents are not qualified to provide this report under the new Strata Property Act Legislation. Additionally, the expertise provided in this report is far greater than the current managing agents can provide and will allow the Strata to implement a working capital plan as well as a yearly maintenance plan for the building. There was also some concern from the owners that by receiving this report the Strata would be legally obligated to proceed with its recommendations. It was noted to the owners this report is just a guideline and the Strata can receive a second opinion on any item if it chooses or reprioritize the items in the report if they are not deemed significant to the ownership.
>
> After a lengthy conversation the Council President read the resolution and called for the vote. The motion was moved ... seconded ... and carried. ...

[15] The minutes of the council for the Strata Corporation include the following regarding a meeting on December 8, 2009, under the heading “Business Arising”:

> 2. RDH Contingency Reserve Audit: The Strata has begun working with RDH Engineering to help them assess the building. RDH will be assessing

> the Strata building components over the coming weeks and be evaluating the past maintenance at the building. The Strata will be working with RDH to provide the report before the Annual General Meeting for the 2010 year.

[16] The minutes of the council for the Strata Corporation include the following regarding a meeting on February 2, 2010, under the heading “Business Arising”:

> 2. Engineering Assessment: The Strata Council will be reviewing the Contingency Reserve Fund Study with RDH Engineering on February 9, 2010. The report will be presented to owners at the 2010 Annual General Meeting (AGM). If any owner would like a copy of the report extra will be brought to the AGM meeting.

[17] The Strata Corporation had an annual general meeting on March 3, 2010. The documents presented in evidence include two different excerpts from the minutes. One includes this entry:

> 1. Report by RDH: RDH presented an executive summary of the Contingency Reserve Fund Audit to the owners in attendance. An executive summary was handed out and the full report will be posted on the Strata’s website. Note: this report was presented from 6:30 pm to 7:00 pm.

[18] The other copy of excerpts from the minutes has a different title. Instead of the title “Report by RDH,” it has the title “REPORT BY RDH BUILDING ENGENERING [SIC] LTD”. The part of item 1 after the colon is the same.

[19] The parties were unable to explain this discrepancy between the two versions of the minutes. It is possible that the copy of the March 3, 2010 minutes originally provided to the Buyers referred to “RDH”, and did not refer to it as an engineering firm.

[20] In March, 2010, Mr. Meslin retained Mr. Richardson of RE/MAX Select Properties as the listing agent for the sale of the Condo. The listing price was $388,000.

[21] Mr. Meslin signed a Property Disclosure Statement dated March 20, 2010 (“PDS”). This is on a standard form of the Real Estate Board of Greater Vancouver and the British Columbia Real Estate Association for strata title properties. It states “the following is a statement made by the seller concerning the [Condo]”. It includes the following:

> THE SELLER IS RESPONSIBLE for the accuracy of the answers on this property disclosure statement and where uncertain should reply "Do Not Know." This property disclosure statement constitutes a representation under any Contract of Purchase and Sale if so agreed, in writing, by the seller and the buyer.

[22] The PDS continues with a number of questions. Item EE states "Are the following documents available?" There are then 7 listed items, one of which is "Engineer's Report and/or Building Envelope Analysis". Beside that item, the box marked "no" has been ticked.

[23] The PDS includes this statement:

> The seller states that the information provided is true, based on the seller's current actual knowledge as of the date on page 1. Any important changes to this information made known to the seller will be disclosed by the seller to the buyer prior to closing. The seller acknowledges receipt of a copy of this disclosure statement and agrees that a copy may be given to a prospective buyer.

[24] Mr. Meslin signed the PDS.

[25] Mr. Meslin deposed that he told Mr. Richardson that the Strata Corporation had hired RDH to prepare a reserve fund study but that this was not yet available, and, in any event, it was not an engineering report or building envelope analysis.

[26] In March and April 2010, the defendants were looking at condominiums to purchase. Their realtor was Steven Toth of Macdonald Realty Ltd. Mr. Lee deposed that he and his wife wanted a condominium that they could live in for more than 10 years and that would not have significant maintenance costs.

[27] The minutes of the council for the Strata Corporation include the following regarding a meeting on April 2, 2010, under the heading "Business Arising":

> 2. Contingency Reserve Fund Study: The Strata Council discussed the findings of the Reserve Fund study with the property manager. RDH is finalizing the study and it will be posted on the Strata website and some paper copies will be available by the mail boxes. The Council identified 5 main areas of attention for a detailed 5 year capital plan. They are:
>
> - Repiping the recirculation line
> - Replacing the flat and sloped roofs

- Interior decorating
- Elevators
- Balcony Membrane Replacement

> It was noted that some of these items may be addressed in the operating budget of the Strata. Specifically, repiping the recirculation line may be able to be completed this way. The Strata has already replaced 2 of the recirculation lines in the complex and may be able to budget for replacing 2 of these a year over the next seven years. This will be addressed further at the next meeting. Additionally the Strata discussed the suggested cost of elevator repairs in the report. It was noted this seems high based on initial research and it was decided this item be tabled until more research is done on the subject. The Strata will now begin getting quotes on the balconies and the roof to assess the real time cost and assist in developing more accurate 5 year plan for the ownership to review. It is the Council's intention to develop a plan by the summer of 2010 and have an information meeting with the ownership to review the plan.

[28] RDH's report ("RDH Report") is dated April 5, 2010. It is entitled "Reserve Fund Study and Maintenance Plan" and is stamped by an engineer. A hard copy was made available on request, so that all owners could review it. It is addressed to the owners of the Strata Corporation care of RE/MAX Property Management. The covering letter is signed by Mr. Molholm, who is described as "MASC Building Science Engineer (EIT)". The Report is 241 pages in length.

[29] The Executive Summary includes the following:

> RDH Building Engineering Ltd. ("RDH") was retained by the Owners ... in late-November 2009 to prepare a Reserve Study and Maintenance Plan for various capital components ... of the [La Mirada]. ...
>
> 5. Asset Renewal Forecast
>
> ... the majority of the renewal costs are estimated to occur within the enclosure system. The enclosure system includes assets such as the roofs, walls and window, which are essential elements for protecting the building structure and for serving as an environmental separator between the exterior and interior spaces. The distribution of costs at La Mirada is typical for residential low-rise buildings in the Lower Mainland constructed in the early 1990s.
>
> ...
>
> 6. Funding Models
>
> ...
>
> Based on the status quo funding model, the owners would continue to make an annual allocation of approximately $40,000 to the reserve fund.

> Unfortunately this is inadequate and will result in the owners having to raise approximately $400,000 by special assessment over the next five years.
>
> Figure 6.A.2 graphically illustrates the size of the special assessments that result from this funding level (in the years 2014 and beyond).

[30] The graph shows about $2.8 million in 2020.

[31] The section entitled “Disclosures & Limiting Conditions” includes the following:

> The Study is intended as a reserve study and a maintenance & renewal plan. It is not intended as a condition assessment.

[32] The RDH Report refers not only to the building envelope, but also to electrical systems, mechanical systems, elevator systems, fire safety systems, interior finishes, and sitework.

[33] Mr. Meslin told Mr. Richardson that the RDH Report had been completed and a copy was available for viewing in the La Mirada common room.

[34] On April 6, 2010, Mr. Richardson held a realtor’s viewing of the Condo. On April 10 and 11, 2010, Mr. Richardson held afternoon open house viewings of the Condo. Mr. Richardson telephoned Mr. Meslin during the open houses and told Mr. Meslin that a number of people viewing the Condo asked to see the RDH Report. Mr. Meslin reminded Mr. Richardson that there was a copy in the La Mirada common room. Later, Mr. Richardson advised Mr. Meslin that some people who reviewed the RDH Report decided not to make offers to purchase the Condo.

[35] The Buyers attended both of the open house viewings. During one of the visits, they asked Mr. Richardson if there was an engineer’s report. He told them there was “something” available in the common room. They went to the common room but were unable to find anything relating to the Condo. They returned and asked Mr. Richardson again if there was an engineer’s report. Mr. Richardson made a phone call and then told them that everything would be posted on his website.

[36] Mr. Lee reviewed the minutes of the Strata Corporation and saw the reference to the RDH report. He asked Mr. Toth to inquire about the RDH report.

Mr. Toth sent an email to Mr. Richardson asking for a copy of an engineer's report. Mr. Richardson responded that he did not see or know of an engineer's report. On April 11, 2010, Mr. Toth advised Mr. Lee that Mr. Richardson said there was no mention of an engineer's report in the Strata Corporation's meeting minutes.

[37] On April 12, 2010, Mr. Richardson's office sent Mr. Toth an email saying "there is no Engineers report for this property I have confirmed that with the property management company this morning".

[38] Mr. Lee checked Mr. Richardson's website again following the open houses and before making the offer to purchase. The RDH Report was not posted to Mr. Richardson's website, although other documents were posted, such as meeting minutes, bylaws, and the floor plan.

[39] Mr. Lee deposed that he and his wife were reassured by the responses from Mr. Richardson that there was no engineering report, and decided to make an offer to purchase the Condo. At the time, they were living in rental accommodation and their lease expired on April 30, 2010.

[40] The Buyers signed a written offer to purchase the Condo. The Buyers offered to pay $431,000, and listed a number of conditions precedent, including a clause that the agreement was subject to the Buyers receiving and approving "a copy of any engineers' or other consultants' reports". The proposed completion and possession dates were May 1, 2010.

[41] Mr. Meslin asked Mr. Richardson to ask Mr. Toth if the Buyers would increase their price, remove their subjects, move the completion date to May 31, 2010, and move the possession date to June 2010.

[42] Mr. Lee deposed that he told Mr. Richardson that his lease expired on April 30, 2010, and that he was concerned about finding accommodation for the month of May. Mr. Lee deposed that Mr. Richardson said he was a landlord with many properties and would find them a place to stay for the month of May.

[43] The Buyers agreed to change their offer as requested by Mr. Meslin. Their amended offer provided that the purchase price would be $440,000, the completion date May 31, 2010, possession date June 5, 2010, and that there would be no conditions precedent. Mr. Meslin accepted that amended offer, and I term the accepted offer the "Purchase Contract".

[44] The Purchase Contract includes the following terms:

> 2. DEPOSIT: A deposit of $20,000 which will form part of the Purchase Price, will be paid on the following terms: within 24 hours of offer acceptance by way of bank draft. All monies paid pursuant to this section (Deposit) will be delivered in trust to Macdonald Realty Ltd. and held in trust in accordance with the provisions of the Real Estate Services Act. ...
>
> ...
>
> 18. REPRESENTATIONS AND WARRANTIES: There are no representations, warranties, guarantees, promises or agreements other than those set out in this Contract and the representations contained in the Property Disclosure Statement if incorporated into and forming part of this Contract, all of which will survive the completion of the sale.
>
> ...
>
> The Buyer's [*sic*] acknowledge receipt and acceptance of the following documents:
>
> ...
>
> 3) All copies of any Engineers' and/or Consultants' Reports concerning the Strata Corporation, ...
>
> ...
>
> 5) The Seller's Property Disclosure Statement.
>
> The Buyer's [*sic*] have decided not to have an Inspection done on the Property. ...
>
> The attached Property Disclosure Statement dated March 20, 2010 is incorporated into and forms part of this contract.

[45] The Buyers signed the PDS. Above the place for the buyer's signature is the following:

> The buyer acknowledges that the buyer has received, read and understood a signed copy of this property disclosure statement from the seller or the seller's brokerage on the 12 day of April yr. 2010. The prudent buyer will use this property disclosure statement as the starting point for the buyer's own inquiries. The buyer is urged to carefully inspect the Development and, if desired, to have the Development inspected by a licensed inspection service of the buyer's choice.

[46] Mr. Lee deposed that he noticed that the PDS indicated there was no engineer's report, and that he and his wife were satisfied with the PDS and signed the offer.

[47] Mr. Lee deposed that Mr. Richardson did not return numerous telephone calls and email messages and did not assist Mr. Lee and his wife to find accommodation for the month of May. Mr. Meslin's fiancée corresponded by email with Ms. Boldak in an effort to assist the Buyers to find alternate accommodation, and regarding items like use of storage, and whether Mr. Meslin would leave behind drapes and a wall-mounted television.

[48] On April 16, 2010, Mr. Lee entered into an agreement to rent an apartment for the period April 30 to June 6, 2010 at $1,700 per month. Subsequently, the term of the lease was extended to July 1, 2010.

[49] On April 22, 2010, the Condo Corporation posted the RDH Report on its website.

[50] The Buyers rented a moving truck on April 30 to move from their existing home to the temporary rental apartment. The invoice was not attached to the copy of Mr. Lee's affidavit in the Application Record.

[51] Mr. Lee deposed that his wife told him that she saw listings for buildings near La Mirada which referred to having engineer's reports. Mr. Lee deposed that, because he had lost trust in Mr. Richardson regarding accommodation for May and because similar properties had engineer's reports, he began to question whether Mr. Richardson had been honest about whether there was an engineer's report. Mr. Lee deposed that he reviewed the strata council minutes again, and noticed the reference in the March 3, 2010 minutes. He deposed that he had previously assumed that it was not a reference to an engineer's report and was not of any importance, but he decided he wanted to see the "Contingency Reserve Fund Audit".

[52] On May 29, 2010, Mr. Lee emailed Mr. Toth. His email states “I know this is last minute but I want to see the engineering report referred to below. Please find out the website where it is located or get an email copy from [Mr. Richardson or Mr. Meslin.] I asked for it several times earlier. It is suspicious that the report has not been made available by [Mr. Richardson]. I assume there is no problem and the report will reflect this”.

[53] On May 30, 2010, based on information provided to him by Mr. Toth, Mr. Lee accessed the website for the Strata Corporation and saw the RDH Report. He deposed that if he and his wife had been told of the engineering report they would have read it. He refers to the RDH Report’s statement that, based on the current funding model for the strata, special assessments of over $400,000 over the next five years will be required and a further special assessment of almost $3 million will be required in 2020. Mr. Lee deposed that, based on this information, he and his wife would not have made an offer to purchase the Condo.

[54] Mr. Meslin was ready, willing and able to complete the sale of the Condo on May 31, 2010.

[55] On May 31, 2010, Mr. Watts, notary for the Buyers, sent a letter to Mr. Meslin stating that the purchasers “hereby provide notice of rescission” of the Purchase Contract. The letter refers to Mr. Meslin’s indication on the PDS that an “Engineer’s Report and/or Building Envelope Analysis” was not available, and stated that it is the Buyers’ position that Mr. Meslin fraudulently or innocently misrepresented the availability and existence of an engineer’s report, and that as a result, they were entitled to rescind the Purchase Contract.

[56] Mr. Meslin received Mr. Watts’ letter less than one hour before the 4 p.m. filing deadline for completion at the land title office. Mr. Meslin had a purchase completing the next day for which he needed the sale proceeds from the Condo. If the Buyers had completed the purchase of the Condo on May 31, 2010, Mr. Meslin would have had $60,000 more than he needed to complete his purchase.

[57] Because the Buyers did not complete the purchase, Mr. Meslin borrowed $130,000 from a bank (“Emergency Loan”) to enable him to complete his purchase.

[58] Mr. Meslin commenced this lawsuit on June 2, 2010.

[59] Mr. Meslin deposed that he declined legal work during the busiest time of his year because of the stress related to owning two properties and all the steps related to selling the Condo again. He estimated that he lost about $22,000 in income from his legal practise.

[60] On or after June 2, 2010, the Buyers paid Mr. Watts $750.98 in respect of his notary fees for preparation to purchase the Condo, advising about rescinding the Purchase Contract, and corresponding with Mr. Meslin about the rescission.

[61] On or after June 17, 2010, the Buyers paid $181.31 in storage fees. This was in respect of storing belongings that did not fit in their rental accommodation in May and June. They rented a moving truck to put these items into storage. Mr. Lee paid $51.15 for this rental.

[62] After July 1, 2010, the Buyers moved into different rental accommodation. They removed the items from storage when they moved into their current apartment. They paid $47.39 for the rental of a moving truck.

[63] The Buyers have decided to continue to rent for the time being.

[64] Mr. Meslin re-listed the Condo for sale. The listing information includes the statement that a “Reserve Plan Study and Maintenance Plan is available”, and gives information about how to access the document on the internet.

[65] Mr. Meslin sold the Condo for $400,000 on August 30, 2010. He had paid $1,591.61 in interest on the Emergency Loan for the period June 1, 2010 to August 30, 2010. He paid $16,240 for real estate commission in respect of the sale which completed on August 30, 2010.

[66] Mr. Meslin incurred costs in owning the Condo for the three months from June 1, 2010 to August 30, 2010. He paid $40 for insurance. He paid the Bank of Montreal three monthly payments of $1,345.22 each, but it is not clear whether any of those payments reduced the principal owing. He paid three strata fee payments of $321.66 each.

ANALYSIS

a. Is the RDH Report (defined below) an "engineer's report"?

[67] Mr. Meslin argued that the RDH Report is not an "engineer's report". He argued that an engineer's report is one which requires invasive testing, such as removing siding and drilling test holes to examine walls. He referred to a number of resources which discuss engineer's reports.

[68] Mr. Meslin referred to a posting by the Canada Mortgage and Housing Corporation regarding "leaky condos" which assumed that engineering reports associated with condominiums in the coastal climate area are investigations of the building envelope. Mr. Meslin referred to the Real Estate Board of Greater Vancouver discussion of property disclosure statements as a form that asks a property owner to disclose "defects" to a buyer. However, the property disclosure statement form asks many questions which do not address defects, such as whether there are pet restrictions. Mr. Meslin referred to the website of the Financial Institutions Commission of B.C. which says that a depreciation report is another name for reserve fund study.

[69] The PDS does not refer to any definition of "engineer's report", such as in legislation or on any websites. It refers to "Engineer's Report and/or Building Envelope Analysis", suggesting that it includes engineer's reports which are not building envelope analyses. The document is designed to ensure that a potential purchaser is well-informed about the property to be purchased.

[70] In this case, the RDH Report was prepared by an engineering firm. It was stamped by an engineer. It discussed matters relevant to the Condo, including the

present state of components of La Miranda, and the cost of maintenance, repair and replacement work. There is no reason to depart from the ordinary meaning of the words used in the PDS form. Using the ordinary meaning of the words is consistent with the PDS being a source of information for purchasers, no matter how sophisticated they may be about real estate. The RDH Report was an "engineer's report" as referred to in the PDS.

b. Did Mr. Meslin fraudulently or innocently or negligently misrepresent that there was no engineer's report?

[71] The Purchase Contract provided that the PDS was incorporated into and forms part of the Purchase Contract. The Purchase Contract also provides that there are no representations other than those representations set out in the contract and the PDS is incorporated into the contract, and the representations will survive completion of the sale. A clause stating that the only representations are as set out in the contract is sometimes referred to as an "entire agreement clause".

[72] Because Mr. Meslin made representations, the proper legal analysis relates to those representations, and the law relating to *caveat emptor* and patent and latent defects does not apply.

[73] The PDS provides that "any important changes to this information made known to the seller will be disclosed by the seller to the buyer prior to closing".

[74] The existence of the RDH Report was an "important" change, because it was completely contrary to the representation in the PDS. In addition, the substance of the RDH Report includes matters of interest both to owners and to potential purchasers of units in La Mirada.

[75] Mr. Meslin argued that the RDH Report was not important, because it did not suggest that the Condo was defective, but instead simply set out what might be the future cost of maintenance of a building of that type and age.

[76] The PDS does not limit the seller to disclosure of “defects” or of engineer’s reports which discuss defects. If it would be objectively reasonable for a purchaser to consider an engineer’s report in connection with a potential purchase, it was “important”. Here, the RDH Report contained information of interest to a potential purchaser. While a sophisticated purchaser may have known that a building of such a vintage would likely face similar maintenance costs, a potential purchaser would be entitled to consider the information in the RDH Report. A potential purchaser might conclude that he or she did not want to buy a unit in a building of that vintage.

[77] Mr. Meslin did not seek to hide the RDH Report from the Buyers or any potential purchasers. He understood that it was in the common room during the open houses, and that Mr. Richardson told potential purchasers that they could find it there. It is not clear why the Buyers were unable to find the RDH Report. Perhaps other potential purchasers were reviewing it at the time they looked for it.

[78] Mr. Meslin’s representation in the PDS, which is part of the Purchase Contract, was that there was no relevant engineer’s report. That representation was false.

[79] The law provides for different remedies depending on whether a misrepresentation was fraudulent, negligent, or innocent.

i. Fraudulent Misrepresentation

[80] The Buyers argued that the misrepresentation was fraudulent, on the basis that Mr. Meslin either knew it was false, or made the representation recklessly, not knowing if it was true or false.

[81] The Buyers argued that it was not necessary to establish that Mr. Meslin’s motive was dishonest, and that recklessness would be sufficient.

[82] However, to establish a fraudulent misrepresentation on the basis of recklessness, the person making the misrepresentation must be so reckless that he or she does not care whether he or she is speaking the truth. See G.H.L. Fridman,

The Law of Torts in Canada, vol. 2 (Toronto: Carswell, 1990, at 123-124). The person making the representation must lack honest belief in the truth of what he or she is stating. See also para. 97 of *415703 B.C. Ltd v. JEL Investments Ltd.*, 2010 BCSC 202, as follows:

> [97] In order to successfully defend the claim on the contract or obtain rescission, the defendants must prove that there was a fraudulent misrepresentation. Bauman J.A. (now C.J.S.C.) summarized the requirements to establish a fraudulent misrepresentation inducing a contract in *Catalyst Pulp and Paper Sales Inc. v. Universal Paper Export Co.*, 2009 BCCA 307 at paras 55-60:
>
> > [55] Counsel for UPE cited G.H.L. Fridman, *Law of Contract in Canada*, 4th ed. (Scarborough: Carswell, 1999) at 309-310, where the learned author described a case of fraudulent misrepresentation as consisting of four elements:
> >
> > (a) the wrongdoer must make a representation of fact to the victim;
> >
> > (b) the representation must be false in fact;
> >
> > (c) the party making the representation must have either known it was false or made it recklessly without knowing whether it was true or false; and
> >
> > (d) the victim must have been induced by the representation to enter into the contract.
> >
> > [56] Catalyst submits that the focus on finding an inducement to enter into the contract presents a too narrow view of the reliance aspect needed to found the tort of fraudulent misrepresentation. I agree. Fridman himself speaks to this in his text, *The Law of Torts in Canada*, 2nd ed. (Toronto: Carswell, 2002) at 749-751, where the learned author discusses the elements of the tort of deceit or fraudulent misrepresentation.
> >
> > [57] On the intent to deceive element, the learned author states:
> >
> > > The false statement must be made with the intent that the plaintiff, to whom it is made, should act upon it. It must be intended to deceive the person to whom it is made, in other words to cause that person to believe in the truth of the statement and act accordingly. Clearly if the defendant does not know his statement is false then he cannot have the requisite intent to deceive.
> >
> > [58] On the reliance element:
> >
> > > Before a defendant can be liable for deceit it must be established, as a matter of fact, that the plaintiff relied on the defendant's misrepresentation. Such reliance was proved to have occurred in *Dixon v. Deacon Morgan McEwan Easson*, where the plaintiff purchased the shares as a result of reading

> the press release containing the inaccurate financial statements about the company.
>
> Although in general it is for the plaintiff to prove the requisite reliance, it would seem that once the plaintiff establishes that the defendant made a misrepresentation calculated to induce the plaintiff to act to his detriment and loss consistent with the plaintiff's having acted on the misrepresentation, the onus then shifts to the defendant to prove that the plaintiff did not in fact rely on the misrepresentation in issue.
>
> [footnote references omitted]
>
> [59] The thrust of the reliance ingredient is the resulting action by the plaintiff to his or her detriment: see also J.G. Fleming, *The Law of Torts*, 9th ed. (Sydney: LBC Information Services, 1998) at 694-695. This point is also made in G.S. Bower, Turner & K.R. Handley, *Actionable Misrepresentation*, 4th ed. (Butterworths: London, 2000) at 87:
>
> > [140] Entry into a contract with the representor or a third person is the most common alteration of position. ...

[83] Here, Mr. Meslin honestly believed that the RDH Report was not an "engineer's report" as described in the PDS. He was wrong. However, he did not have any intention to deceive. He had a basis for his belief, based on what he had heard from Mr. Gioventu. As a result, Mr. Meslin's misrepresentation was not fraudulent.

[84] The Buyers argued in the alternative that the misrepresentation was both innocent and negligent.

ii. Innocent Misrepresentation

[85] In *Kingu v. Walmar Ventures Ltd*. (1986), 10 B.C.L.R. (2d) 15 at 20-21(C.A.), McLachlin J.A. (as she then was) set out the following in respect of when a party may rescind a contract for innocent misrepresentation:

> ...Rescission ... may be obtained for innocent (non-fraudulent) misrepresentation only in cases where the plaintiff establishes the following requirements.
>
> (a) A positive misrepresentation must have been made by the defendant. ...
>
> (b) The representation must have been of an existing fact ...

> (c) The representation must have been made with the intention that the plaintiff should act on it...
>
> (d) The representation must have induced the plaintiff to enter into the contract ...
>
> (e) The plaintiff must have acted promptly after learning of the misrepresentation to disaffirm the contract ...
>
> (f) No innocent third parties must have acquired rights for value with respect to the contract property ...
>
> (g) It must be possible to restore the parties substantially to their pre-contract position ...
>
> (h) An executed contract for the sale of an interest in land will not be rescinded unless fraud is shown ...

[86] Here, Mr. Meslin made a positive representation in the PDS that there was no engineer's report. That was a representation of an existing fact. Mr. Meslin made it in the PDS which was provided to the Buyers and Mr. Meslin intended that prospective buyers including the Buyers would act on the PDS.

[87] Mr. Meslin argued that the Buyers did not reasonably rely on the absence of an engineer's report. He referred to *Sask v. Brooke*, 2000 BSCS 1745. That case involved the sale of a condominium which leaked. The seller answered certain questions regarding the seller's unit, but did not refer to other properties in the condominium corporation. Leakage problems were discussed in the minutes of the Strata Corporation council. Collver J. wrote as follows in para. 23:

> … In light of their concurrent provision of minutes from strata council meetings where leakage problems were discussed, the sellers' disclosure obligations were fulfilled in a manner that should have alerted a prudent purchaser to the need to make further inquiries.

[88] In other words, in *Sask* the buyers did not reasonably rely on the PDS as showing an absence of leaks, when the leaks were disclosed in the minutes of the Strata Corporation's council.

[89] The Buyers deposed that they would not have entered into the Purchase Contract if they had seen the RDH Report. That is evidence given with the benefit of hindsight. However, the parties chose to proceed under the summary trial rule 9-7,

and Mr. Meslin's application during the hearing to cross-examine Mr. Lee was dismissed.

[90] In addition, Mr. Lee's evidence is plausible. The estimate about the future costs of about $400,000 over the next five years would be $10,000 per unit (assuming equal unit size), and $2.8 million in 2020 would be about $70,000 per unit. It is plausible that, on realizing the potential maintenance costs for a building of that vintage, the Buyers would have chosen not to buy. In fact, they had not bought any property at the time of the affidavits.

[91] Mr. Meslin argued that the information provided to the Buyers in the Strata Corporation minutes should have alerted the Buyers to the existence of the RDH Report, and that their failure to pursue the matter demonstrates that they did not rely on the absence of any engineer's reports.

[92] Even a careful review of the excerpts from the minutes described above (of July 28, 2009, November 1, 2009, November 17, 2009, December 8, 2009, February 2, 2010, March 3, 2010, and April 2, 2010) does not reveal the opinion in the RDH Report that there was a potential for future special assessments of $400,000 over the following five years and about $2.8 million in 2020.

[93] The July 28, 2009 minutes refer to a building envelope condition assessment by B.C. Building Science, and to a mechanical engineering assessment quote to look at building piping. The November 1 and 17 and December 8, 2009 minutes all refer to "RDH Engineering Ltd." The November 17 minutes refer to RDH Building Engineering Ltd. doing a contingency reserve study, and to gaining knowledge about what is currently going on in the building envelope and mechanical system. The December 8 minutes refer to the RDH Contingency Reserve Audit, and to helping them "assess" the building components and to evaluating the past maintenance at the building. The April 2 minutes refer to a review of the Reserve Fund study that RDH is finalizing.

[94] An owner in La Mirada, such as Mr. Meslin, might understand that the later references were all to the same thing, which was a report by RDH Engineering which is a Reserve Fund Study and Maintenance Plan. However, to an independent person reviewing the minutes, the minutes do not clearly disclose what is meant by a "contingency reserve study" or "contingency reserve audit" or "Reserve Fund study", or in fact whether that is being conducted by RDH Engineering or by another RDH entity which is not an engineering firm.

[95] The Buyers were concerned about obtaining any engineer's report. This is evident from their questions at the open house and the email correspondence which preceded the Purchase Contract.

[96] I accept the Buyer's evidence that Mr. Meslin's representation that there was no engineer's report induced the Buyers to enter into the Purchase Contract, and that they would not have entered into the Purchase Contract if they had seen the RDH Report first.

[97] It appears that the Buyers first saw the RDH Report when they accessed the website on May 30, 2010. They took steps the next day to rescind the Purchase Contract. That was sufficiently promptly after learning that the representation that there was no engineer's report was false.

[98] Mr. Meslin sold the Condo to another party in August 2010, effectively accepting the rescission of the Purchase Contract. No innocent third parties acquired rights to the Condo in the sense referred to in *Kingu*. It is possible to restore the parties substantially to their pre-contract position. The Buyers can recover their deposit, and Mr. Meslin, who retained his interest in the Condo until he sold it, can retain the sale proceeds.

[99] This is not a case involving an executed contract for sale of an interest in land.

[100] As a result, the Buyers have established their claim for innocent misrepresentation.

iii. Negligent Misrepresentation

[101] In *Queen v. Cognos,* [1993] 1 S.C.R. 87, the Supreme Court of Canada was unanimous as to the result of the appeal, although three sets of reasons were issued. Iacobucci J.'s statement of the tort of negligent misrepresentation, however, was not disputed. It is as follows (at 110):

> The required elements for a successful *Hedley Byrne* claim have been stated in many authorities, sometimes in varying forms. The decisions of this Court cited above suggest five general requirements: (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 misrepresentation; (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. In the case at bar, the trial judge found that all elements were present and allowed the appellant's claim.

[102] The availability of a remedy for negligent misrepresentation arising in relation to a contract with an "entire agreement clause" has been the subject of conflicting decisions. Levine, J.A., discussed and analysed them in *No. 2002 Taurus Ventures Ltd. v. Intrawest Corp.,* 2007 BCCA 228 at paras. 36-60. She concluded that in that case the entire agreement clause in a contract for the purchase and sale of a property in Whistler excluded the claim in tort for negligent misrepresentation.

[103] In this case, both Mr. Meslin and the Buyers were represented by their own real estate agents, and were essentially on an equal footing in negotiating the Purchase Contract. Both Mr. Meslin and the Buyers read the PDS before entering into the Purchase Contract. The misrepresentation was not independent of or outside the scope of the Purchase Contract, as would be the case with a collateral contract.

[104] In the circumstances of this case, the entire agreement clause (clause 18 of the Purchase Contract) excludes the Buyers from claiming in tort for negligent misrepresentation. The Purchase Contract was clearly intended to govern the relationship between the parties, and it would not accord with commercial reality to

disregard the entire agreement clause and permit the Buyers to claim for the tort of negligent misrepresentation.

[105] As discussed in *Bank of Montreal v. Murphy* (1985), [1986] 6 W.W.R. 610, 6 B.C.L.R. (2d) 169, and *S-244 Holdings Ltd. v. Seymour Building Systems Ltd.*, [1994] 8 W.W.R. 185, 93 B.C.L.R. (2d) 34 (C.A.), there are some cases in which the remedy of rescission does not do justice between the parties, and the court may fashion a different remedy. However, this is not one of the unusual cases in which the remedy of rescission does not do justice between the parties.

3. What is the effect of the Buyers' acknowledgement in the Purchase Contract that they received all copies of any Engineers' Reports concerning the Strata Corporation?

[106] In the Purchase Contract, the Buyers acknowledged receipt and acceptance of a list of documents, including "all copies of any Engineers' and/or Consultants' Reports concerning the Strata Corporation".

[107] However, the Buyers could not know whether the documents constituted all the applicable reports. The statement in the Purchase Contract can only mean that the Buyers thought they had received all such documents. The evidence here showed they did not.

[108] As a result, the Buyers' acknowledgment that they received all copies of any engineers' reports is of no effect.

4. If Mr. Meslin fraudulently or innocently or negligently misrepresented that there was no engineer's report, what is the remedy?

[109] As set out in *Kingu*, the remedy for innocent misrepresentation is rescission. Damages are not available for innocent misrepresentation.

SUMMARY

[110] This is an unfortunate case which arose through misunderstandings. Mr. Meslin believed that the RDH Report was not an engineer's report, but he also thought that his realtor, Mr. Richardson, had made it available to potential purchasers. The Buyers specifically and repeatedly inquired about an engineer's report, but were not provided with the RDH Report. Mr. Richardson did not provide evidence, but it may be that he did not understand that the RDH Report was prepared by engineers. The Buyers did not specifically request the "RDH Report" or the "Reserve Study and Maintenance Plan" prior to signing the Purchase Contract, and Mr. Richardson may have assumed that the Buyers were looking for a different report. The Buyers may not have been interested in a "Reserve Study and Maintenance Plan" if it had not been prepared by engineers.

[111] However, properly construing the PDS, the RDH Report was an "engineer's report". The Buyers reasonably relied on the absence of such a report. They would not have entered into the Purchase Contract if they had seen the RDH Report first.

[112] As a result, Mr. Meslin innocently misrepresented that there was no engineer's report, and the Buyers were entitled to rescind the Purchase Contract. They did so in a timely way.

[113] The Purchase Contract was rescinded. The Buyers are entitled to a declaration to that effect, and to an order that they recover the Deposit plus interest. The Buyers' additional claim for damages for negligent misrepresentation is dismissed. Mr. Meslin's claim is dismissed.

[114] If the parties are unable to resolve the question of costs, they should apply through the registry for a further hearing before me.

"Gray J."

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Palcic v. Sadek,*
2012 BCSC 1651

Date: 20121107
Docket: S076102
Registry: Vancouver

Between:

Branko Palcic
and Branko Palcic Consulting Ltd.

Plaintiffs

And:

Emil Sadek

Defendant

And:

Branko Palcic
and Branko Palcic Consulting Ltd.

Defendants by Counterclaim

Before: The Honourable Madam Justice Maisonville

Reasons for Judgment

Counsel for Plaintiffs:	A.A. MacDonald
Counsel for Defendant:	J. Christiansen
Appearing on Own Behalf:	Emil Sadek
Place and Date of Trial:	Prince George, B.C. December 5-9, 2011, and March 26-29, 2012 Vancouver, B.C. April 10, 13 and June 5, 2012
Place and Date of Judgment:	Vancouver, B.C. November 7, 2012

I. INTRODUCTION

[1] The plaintiffs, Dr. Branko Palcic (referred to in these reasons as the "plaintiff") and his wholly owned company, Branko Palcic Consulting Ltd. ("BPC"), bring this action against the defendant, Emil Sadek. The plaintiff and defendant, along with the defendant's brother, Werner Sadek, were involved in a venture to develop certain properties in Alberta. The parties had unresolved differences and the plaintiff eventually sought a buy-out by the defendant of his interest in a numbered Alberta Company, 1096922 Ltd. (the "Alberta Company") which had been incorporated during the venture. The defendant agreed. The shares in the Alberta Company were to be sold for $3,000 and the debt owed to the plaintiff was to be sold for $300,000.

[2] At the time of the buy-out, Emil Sadek signed a promissory note in favour of the plaintiff for $270,000, having already paid $30,000 to Dr. Palcic. The defendant, after having paid a small amount for principal and several interest-only payments totalling $27,600, defaulted on the promissory note. The plaintiff now sues for the balance owing, together with compound interest, pursuant to the promissory note. The plaintiff also claims damages for breach of the buy-out agreement.

[3] The defendant argues that the promissory note fails for want of consideration. Alternatively, the defendant says that the plaintiff misrepresented the debts that were owed to him by the Alberta Company and that there was breach of a contractual warranty. He seeks rescission of the agreement in respect of the $270,000; rescission of the promissory note; a declaration that nothing is owed on the promissory note; and a return of monies already paid. He also advances a counterclaim for damages.

II. BACKGROUND

[4] I note at the outset that almost all of the Exhibits I refer to in these reasons were tendered by document agreement at the outset of trial. The terms of the document agreement between counsel included that the documents could be entered as exhibits at trial and:

> ... would be *prima facie* proof that:
>
> (a) a copy of a document is a true copy of the contents of the documents of the original document;
>
> (b) it was written or created or is effective from the date it bears on its face;
>
> (c) where on its face or by its content or nature it was intended to be delivered to another person (e.g., a transmittal slip) that it was so delivered in the normal course of business, whether by post, fax, telex, or physical delivery;
>
> (d) where on its face, it purports to have been written or created by or under the instructions of the person who signed it, or purported to authorize its creation that it was so written created or authorized; and
>
> (e) where it purports on its face to have been received on a particular date or at a particular time that it was so received.

[5] During the course of the trial, the defendant was at first represented by counsel (Mr. Christiansen) but later came to be self-represented, although Mr. Christiansen assisted at one time during the ongoing trial and later assisted the defendant in drafting his closing argument.

[6] English is a second language for both the plaintiff, Dr. Palcic, and the defendant, Emil Sadek.

[7] It is also to be noted that in the original filed response of the defendant, he disputed the venue of this proceeding; however in his pleadings, specifically in his counterclaim, the defendant agreed to have all issues stemming from the Alberta action heard and determined in the B.C. Supreme Court. The Alberta action refers to an earlier claim in the dispute between the parties which was filed in the Queen's Bench of Alberta. This jurisdictional issue was, accordingly, not argued at trial by the parties, having accepted the jurisdiction of this Court.

[8] Branko Palcic Consulting Ltd. is an entity used by Dr. Palcic on occasion to conduct his business affairs. It is wholly owned by Dr. Palcic and he is the sole director. I recognize that this is a distinct legal entity from Dr. Palcic, but I am treating them as one for the purposes of these reasons for ease of reading, as nothing turns on this distinction.

[9] The plaintiff and the defendant are both immigrants to Canada from Slovenia. They became close friends a number of years ago, in 1973, when they met through the Slovenian Society, where they shared their interests in chess and various outdoor activities. During the course of their close friendship, the two began to engage in business ventures. One such venture was in Fort Nelson, B.C., held by a British Columbia numbered company 503696 B.C. Ltd. owned by the parties, where they were the co-owners of a truck stop and Husky gas station and restaurant called the 5th Wheel Truck Stop ("Fifth Wheel"), which was operated by the defendant. The defendant continues to reside in Fort Nelson.

[10] The plaintiff is a respected researcher in the field of cancer research and had, prior to these proceedings, held the post of honourary consul for Slovenia in Vancouver, British Columbia. He has a number of advanced degrees in his field, including a doctorate. In addition to his work at the Cancer Control Agency, he has held professorship positions with the University of British Columbia. The defendant admired the plaintiff for his many accomplishments and for his business acumen. Accordingly, when his brother Werner Sadek approached him with a business proposition in 2002, it was without hesitation that the defendant contacted the plaintiff to see if he would be interested in participating.

[11] Werner Sadek owned a property (referred to as "Property A" in these proceedings) located near the city limits of Calgary. He and his wife had acquired this property in the early 1990s. He contacted his brother about properties adjacent to his. It was hoped that the City of Calgary would extend the city limits, to incorporate the properties in question, and rezone them from farmland to lots. At such time, it was believed that the properties could be subdivided and sold at a profit. Werner Sadek, an estimator in the construction business, had been approached by one of his neighbours, Mr. Gojko Trutina, who wished to sell his land to him.

[12] The defendant in turn contacted the plaintiff, Dr. Palcic, about the prospective purchase. Both the plaintiff and the defendant saw it as a very promising business

opportunity. Werner Sadek did not have funds to purchase the property himself and the plaintiff ultimately advanced monies to enable the property to be purchased. Mr. Trutina's property was referred to as "Property B" in the course of this proceeding. Property B became the subject of a written agreement between the plaintiff, the defendant and Werner Sadek, in which it was agreed that the plaintiff would initially buy the property by means of an agreement for sale, but he would later sell the property at cost plus any interest on the monies to the Sadeks and himself, whereby the interest rate would not exceed the prime rate plus two percent. That agreement was dated February 21, 2002 and did not address any other matters between the three. The property was transferred into the name of the defendant in 2003, but on the basis that it was held for the three of them and that the proceeds of sale of the property were to be jointly distributed.

[13] Another larger piece of property was located adjacent to the properties owned by Werner Sadek's neighbour, Bill Nield. When Mr. Nield offered it to Werner Sadek for sale, it was decided between the three that they would acquire it. It came to be known as Property C.

[14] By 2003, the three, Dr. Palcic, Emil Sadek and Werner Sadek, owned three properties: 670 73rd Street SW, Calgary, Alberta (Property A owned by Werner Sadek and Emilia Sadek since 1991); 650, 73rd Street, Calgary, Alberta (Property B held by the defendant transferred in January 2003); and 655 73rd Street SW, Calgary, Alberta ("Property C" held by Werner Sadek and Emilia Sadek purchased in November 2002).

[15] There is some disagreement as to exactly how much of a role each of the three played in the ownership and development of each of the properties. The plaintiff says that there was a joint venture to develop all three, whereas the defendant says that only Property C was the subject of the joint venture. The defendant stresses that, in the case of Property A, Werner Sadek and his wife Emilia Sadek had owned and resided on that property themselves since 1991 and that the plaintiff played no role in its acquisition. There was certainly at least one link

between the three properties. In 2003, a mortgage was registered against all three properties and used to fund the development. As there was much debate at trial concerning whether certain activities should be defined as part of a "joint venture" or not, and as a partnership also has a legal meaning, I shall hereinafter refer to the plan to develop the three properties as the joint development project (or "JDP"), and to the parties and Werner Sadek together as the joint development project partners (or "JDP partners"), terms which carry no legal meaning.

[16] Nonetheless, the acquisition of Properties B and C, I find, was funded largely by the plaintiff and the defendant, with the plaintiff providing the bulk of the funds.

[17] Property A was never the subject of a written agreement.

[18] It is clear from the evidence at trial that the plaintiff was far more sophisticated in business and financial matters than were the Sadek brothers.

III. THE AGREEMENT

[19] The plaintiff naturally wanted to be reimbursed once the properties were developed and sold, and documents were drawn up by the plaintiff to govern the repayment of the parties' investments. Dr. Palcic personally drafted two agreements in respect of each of Property B and Property C. The parties to the agreement related to Property B were to be the plaintiff, the defendant, and Werner Sadek. The agreement relating to Property C also had a fourth party; Werner Sadek's wife Emilia Sadek in addition to the parties and Werner Sadek.

[20] The documents on Properties B and C were signed by the plaintiff and defendant and dated July 7, 2003. The two documents were similar. Dr. Palcic argues these documents form the foundation for a finding of a joint venture between the parties.

[21] Key aspects of the agreement for the purposes of this matter are set out in the agreement as follows:

[22] The first agreement in respect of Property B provides:

> It was agreed that this property will be re-zoned and developed into 3 single detached lots and that these will be sold at the end or during this development at an agreed price between MR. EMIL SADEK and MR. WERNER SADEK and DR. BRANKO PALCIC.
>
> This Agreement provides the legal basis for the distribution of the funds between MR. EMIL SADEK and MR. WERNER SADEK AND DR. BRANKO PALCIC when the property will be sold again to a third party.

[23] The second agreement to govern Property C sets out:

> It was also agreed that this property will be re-zoned and developed into single detached lots or the Property will be sold at the end or during this development at an agreed price between Mr. Werner Sadek, Mr. Emil Sadek and Dr. Branko Palcic.
>
> This Agreement provides the legal basis for the distribution of the funds between MR. EMIL SADEK AND MRS. EMILA [sic] SADEK and MR. EMIL SADEK AND DR. BRANKO PALCIC when the property will be sold to a third party.

[24] Each of the Agreements had a clause setting out the following:

> All monies loaned by MR. EMIL SADEK AND DR. BRANKO PALCIC to purchase of the Property, as well as all monies loaned by MR. EMIL SADEK AND DR. BRANKO PALCIC towards all costs of mortgage payments, development costs, any other expenses will be accounted for and will be returned to the lenders with 18% interest per annum.

[25] The plaintiff testified that because each party lived in a different city, the contracts were to be signed by each party separately, notarized, then sent to Mr. Brian Lester, who later became the lawyer for the Alberta Company. However, no versions of these agreements signed by Werner Sadek or Emilia Sadek were placed into evidence.

[26] The plaintiff, Dr. Palcic, himself drafted these agreements.

[27] Werner Sadek in his testimony stated he did not sign the agreements. He cited the 18% interest provision as his chief reason for not signing the contracts, saying that he did not want to be liable for interest until the properties had been

profitably sold. He feared that the contract would create an immediate interest liability for him.

[28] Werner Sadek was reluctant to sign an agreement that would make payable by him interest at so high a rate, especially since the timing and scope of such a liability was unclear to him (the parties at trial disagreed as to the agreement's construction, a matter which I will return to later). The plaintiff, in argument, asked the court to conclude that it was likely that there was in a fact a copy signed by Werner Sadek with Brian Lester, the company's lawyer. In his evidence, Dr. Palcic advanced numerous reasons for not producing a signed copy, including that the lawyer's secretary had passed away. Had the document been signed, the plaintiff would most likely have had a copy and produced it. The parties themselves, did not resolve the issue of these partially signed agreements at the time and continued with their development plans.

[29] On January 7, 2004, Property B was subdivided into three lots which were all still held by the defendant on behalf of the JDP. Property C was acquired by Werner and Emilia Sadek from Bill Nield on May 11, 2002. Land Title documents show Property C was transferred to the Alberta Company on April 16, 2004.

[30] In March 2004 the three men incorporated 1096922 Alberta Ltd. (the "Alberta Company"). They were all directors and each also owned a one-third equity interest in the newly formed company. A meeting of the Alberta Company held June 29, 2004 reflected in draft minutes set out that Werner Sadek was to be the President, the defendant was to be Vice President, and the plaintiff was to be Secretary. Once incorporated as noted, on April 16, 2004 title to Property C was transferred to the Alberta Company.

[31] There is disagreement between the parties as to precisely why the Alberta Company was formed and what assets and liabilities it held. The plaintiff takes the position that the Alberta Company was created in order to subsume all assets, liabilities and contractual obligations between the parties that were related to the development of all three properties, including the property already owned by Werner

Sadek and his wife. The defendant takes the position that the purpose of the Alberta Company was much more limited and that it only holds assets or liabilities that were explicitly transferred to it.

[32] In evidence at the trial was the agreement dated March 10, 2004 between Werner Sadek and Emilia Sadek and the Alberta Company dealing with Property C:

> It is hereby agreed that 1096922 Alberta Ltd., with the record office at 16, 2439 – 54th Avenue SW, Calgary, Alberta, has purchased the house and property of Werner and Emilia Sadek at 655 - 73 Street SW, Calgary, Alberta, legal description Block 2, Plan 7810199 (hereinafter defined as "Property") for the total price of $1,410,000 (one million four hundred and ten thousand Canadian dollars).
>
> The Company will assume all liabilities such as mortgages, outstanding invoices, etc. as of March 15, 2004.
>
> It is also agreed the Sadeks would stay in the house, free of charge, till [sic] July 31, 2006 provided that they pay all utilities and other fees associated with the property.

It is signed by the plaintiff, the defendant and Werner Sadek as directors of the Alberta Company, and by Werner Sadek and Emilia Sadek as individuals. It was hoped that Property C would be included in the development scheme for the three properties as a whole.

[33] As is often the case when three friends engage in a joint business project, the three did not foresee their relationship's deterioration and as a result, appear to have not planned for that contingency. The Alberta Company was not always run as a company between parties at arm's length would have been. The accounting records are not always as clear as they could be, and there are various spreadsheets which the plaintiff at least claims are a type of quasi-accounting record. The fact that no expert accounting evidence was properly tendered by either the plaintiff or the defendant only serves to muddy the waters further.

[34] By the end of 2005, the three lots comprising Property B were eventually sold off and the proceeds of sale were distributed. The plaintiff was not happy with the decisions surrounding the distribution of the proceeds of sales. Disagreements arose on the accounting and over how the mortgage and sales proceeds should be

apportioned. The plaintiff wanted the interest calculation to be 18% interest in a particular way and would send to Werner Sadek spreadsheets that he felt accurately reflected the interest he was owed. Werner Sadek protested, sending to the plaintiff an email dated February 6, 2006 stating:

> Branko,
>
> We cannot work on two or more different sets of spreadsheets and tables. You have to disregard yours. Please advise any changes, corrections, etc. on my spreadsheets and tables. Do NOT send me any more yours. [sic]
>
> Werner Sadek

This email exemplifies communication between Werner Sadek and Dr. Palcic regarding the spreadsheets.

[35] Ultimately, although there were payouts to all three JDP partners, the plaintiff wished to be bought out and part company with the Sadek brothers.

[36] Dr. Palcic submits there is an agreement, referred to in these proceedings as the buy-out, whereby Emil Sadek agreed to buy his interest in the Alberta Company and his outstanding debts, with interest owed to him, that he says he put toward this venture. He further submits that the Alberta Company had been transferred all his debt owed to him, even though the March 10, 2004 agreement only transferred Property C. He also argues that while that amount, by his calculation, exceeds $300,000, he agreed to take $300,000.

[37] It was eventually agreed that the defendant would buy-out the plaintiff's equity interest in the Alberta Company. Precisely what else was being purchased is now in dispute. In his closing submissions, the plaintiff says that the buy-out consisted of him selling his "entire interest in the Joint Venture" to the Defendant in return for a payment of $300,000, which the defendant paid with a $30,000 cash payment in addition to providing Branko Palcic Consulting Ltd. with a promissory note. There was a separate agreement whereby Dr. Palcic would resign as a Director of the Alberta Company and sell all of his shares in exchange for a payment of $3,000. The defendant argues that the buy-out constituted only the buying out of the

plaintiff's interest in the Alberta Company, and not the buying out of some broader interest in the JDP.

IV. BUY-OUT AGREEMENT

[38] The plaintiff says the buy-out is reflected in three documents:

1. the Share Purchase Agreement dated April 2006 whereby the defendant was to pay the plaintiff $3,000 for his shares in the company (this document was prepared by Brian Lester);

2. a covenant and indemnity agreement ("Covenant and Indemnity Agreement") dated April 14, 2006 by the plaintiff and by the defendant, whereby Dr. Palcic "warranted" to Emil Sadek that his Shareholder Loan with the company was $300,000 (this document was prepared by Jan Christiansen);

3. a promissory note dated April 13, 2006 and signed by Emil Sadek, to Dr. Palcic for $270,000 (the amount of $30,000 was paid by Emil Sadek before the parties signed) – a draft of the promissory note was prepared by Brian Lester.

[39] The plaintiff says the Covenant and Indemnity Agreement and the promissory note reflect that the defendant was buying a debt owed to him. And as noted while the debt was, according to his evidence, an amount higher than this, he agreed to settle for a lesser amount of $300,000. He testified he was owed over $300,000 by the JDP and thus the Alberta Company, which he argues assumed all he was owed. He argues further that the properties are linked and there is accordingly evidence of a joint venture that comprised of all three properties. The theory of the plaintiff, as I understand it, is that because the properties are linked and some proceeds of the sale of Property B went into Property C, then any interest owed to the plaintiff pursuant to the agreements of July 7, 2004 was transferred to Property C (and accordingly the Alberta Company) and thus is owed to him by the Alberta Company. He argues, consequently, the debt, characterized in the Covenant and Indemnity

Agreement as a Shareholder Loan, is captured in the buy-out agreement. The 18% interest clause in the agreements of July 2004 accounts for a large portion of the money purportedly owing to the plaintiff.

[40] The plaintiff agreed in his evidence that he was paid back $240,000 in principal by November 30, 2004. He argues he is owed more.

[41] The plaintiff was asked in cross-examination if he declared on his income tax returns the interest he claims he was earning. Dr. Palcic's answer was he did not know – he relied on his accountant. Those income tax returns were not produced. In final argument, the defendant's submission was that Dr. Palcic received back all his principal. The plaintiff responded that while some of the principal was returned to him, he was still owed $144,578.29 in principal.

[42] At some time during the negotiation time of the buy-out, the plaintiff realized that the liabilities of the company were not in fact reflected in the Alberta Company's books. He contacted the company accountant, Glen Gryzko, requesting that he put the Shareholder Loans he says were owed to him on the Alberta Company's books. In that email of April 6, 2006, also sent to Emil Sadek, Dr. Palcic attached his accounting for Property C. There was attached a spreadsheet "BP paid directly for Bill's land" interest of 15.3% was claimed as was $75,615 in principal, and $59,669.75 in interest. Also listed was "BP's Shareholder's loan" to [the Alberta Company] interest 18% $66,000 owing in capital and $17,627.06 in interest. Lastly a spreadsheet "BP to Werner Sadek" was included to pay for Bill's land; $53,266 in capital and $27,212.60 in interest at 18% is claimed.

[43] In an email to the company lawyer dated March 28, 2006, copied to the defendant, the plaintiff wrote:

> Brian:
>
> The following is the break down of the loans that I extended for the land development in Calgary (all as of March 31, 2006) for the overall total of $300,000:
>
> 1. $22,634.80 loan to 1096922 Alberta Ltd. by Branko Palcic Consulting Ltd. (BPC)

2. $77,828.55 shareholder's loan to 1096922 Alberta Ltd. by Branko Palcic (BP)
3. $199,536.65 loan to pay bills directly and indirectly (via Werner Sadek) by Branko Palcic Consulting Ltd. (BPC)

[44] He then described in the email how the defendant is buying his loans and stated:

> We talked to Mr. Gritzko [sic] and he will enter #1. and #2. amounts in the books of 1096922 Alberta Ltd. For the other loan in #3 above you suggested to create a Debt Instrument (? I am not sure that I got it right here) and to register it on the land title owned by 1096922 Alberta Ltd.

This email was sent to the defendant in Fort Nelson.

[45] Glen Gryzko, the accountant, testified that he was indeed contacted by Dr. Palcic but he refused to put on the Alberta Company books the Shareholder Loans. He stated he would not put on the company books anything that did not relate to the assets of the Alberta Company. There is no evidence before the Court that he responded to Dr. Palcic's email. He was not accepted as an expert witness, no statement having been tendered in time. He did, however, testify to what he did. Accordingly, the exact amount of any Shareholder Loans owing to Dr. Palcic or lack of debt was not in evidence. The Financial Statements of the company, however, were in evidence, and I find they disclose no Shareholder Loan approximating $300,000 owing to the plaintiff.

[46] The plaintiff sought to argue that since the accounting opinion had been ruled inadmissible that the factual underpinnings and evidence, including the Financial Statements of the company was also inadmissible, or should be accorded little weight or reliability. I do not agree. If the evidence in a case is not present to form an expert foundation for an opinion, then little can be accorded to the opinion. The reverse, however, does not follow – just because an expert opinion is inadmissible does not render other facts in the trial inadmissible, particularly facts for which no expert evidence would be required.

[47] After making the cash payments of $3,000 for the shares and $30,000 for the down payment on the purchase of the loan, the defendant also began making payments pursuant to the promissory note. After making eight interest-only payments of $27,000, the defendant stopped paying Dr. Palcic on the promissory note. He advised him he was not going to pay any more. He told the Court that he ceased paying in April 2008, when he learned the Shareholder Loan was not in the amount he thought.

V. POSITIONS OF THE PARTIES

[48] The plaintiff claims on the promissory note for $270,000 plus interest calculated at 12% per annum from April 13, 2006 to date. Alternatively, he claims for damages arising from what he says is the defendant's default and breach of the obligations in the "Buy-Out Agreement for the amounts owing pursuant to the Promissory Note".

[49] The plaintiff argues that after a negotiation period running from early March until mid-April, 2006, the parties agreed on a buy-out agreement as follows: the plaintiff would resign as a director of the Alberta Company; he would also sell his entire interest in what he says was the joint venture (meaning the debt he argues was owed to him) to the defendant, in exchange for $30,000 in cash and the $270,000 to be paid, backed by the promissory note; the plaintiff would also sell all his shares in the Alberta Company to the defendant for an additional payment of $3,000 cash ("Share Purchase Agreement"). The plaintiff signed a Covenant and Indemnity Agreement agreeing that he would indemnify the defendant for any negative tax consequences with respect to the debt purchase.

[50] The Plaintiff says that all terms of this buy-out agreement were complied with by both parties, with the exception that the defendant defaulted on the promissory note. Pursuant to provisions of the *Bills of Exchange Act*, R.S.C. 1985, C. B-4, the plaintiff argues promissory notes are presumed to import a consideration. Further, Dr. Palcic argues, there was ample consideration passing to the defendant in that he received the plaintiff's entire interest in the joint venture. The plaintiff finally argues

that there was no fraud or misrepresentation that would entitle the defendant either to rescind any agreement or to collect damages. The promissory note, it is argued, is consequently enforceable and Dr. Palcic is entitled to the full amount owing of $270,000, plus interest.

[51] The plaintiff states that, since the promissory note was subject to an interest rate of 12%, the defendant owes him $520,613.62 as calculated to the end of June 2012.

[52] The defendant argues that the promissory note fails for want of consideration. The defendant argues the Share Purchase Agreement is separate from the promissory note. This submission is based on the wording of the Share Purchase Agreement which states "outside the terms of this agreement, [Emil] Sadek has also agreed to repay loans to [Branko] Palcic and his personal consulting company totalling $300,000.00". He argues that the plaintiff represented to him that he was owed $300,000 by the Alberta Company when no such debt or loan existed to the plaintiff's credit. The defendant says that this misrepresentation entitles him to rescind the agreement, the promissory note fails for a lack of consideration. Finally the defendant argues that the Covenant and Indemnity Agreement provides a contractual warranty that the balance owed to the plaintiff by the Alberta Company was $300,000, and that he is entitled to damages as a result of this not being the case on the basis of fraudulent misrepresentation. He also seeks damages arising from Dr. Palcic filing caveats on the properties.

VI. ISSUES

[53] The issues that I must decide in order to determine this action are as follows:

(1) Was there a debt owed to the plaintiff by the JDP partners at the time of the buy-out?

(2) What, if any, debt was owed to the plaintiff by the Alberta Company and did the Alberta Company assume any debts of the JDP partners?

(3) Was the contract involving the promissory note only for debts held by the Alberta Company or for other debts as well?

(4) Does the contract for the promissory note fail for a total failure of consideration?

(5) Was there a misrepresentation on the part of the plaintiff which induced the defendant to enter into the contract for the promissory note?

(6) Does the Covenant and Indemnity Agreement constitute a contractual warranty and provide for damages?

(7) Counterclaim – should damages be awarded in respect of the filing of the caveat?

VII. KEY FACTUAL FINDINGS INCIDENTAL TO THE ISSUES

[54] Werner Sadek testified and I find that the reason for that *inter alia* mortgage financing, as it was referred to, incorporating all three properties, was that without the inclusion of Property A, Werner and Emilia Sadek's residence, the funds were not going to be advanced by the lender who wanted that additional property as security. The defendant in cross-examination similarly testified that Property A had to be included in the mortgage. He stated with respect to that mortgage on Property A that "Werner Sadek and Emilia Sadek had to give their property for collateral". No agreement at all was ever written in respect of Property A.

[55] I find as a fact that neither Werner Sadek nor Emilia Sadek signed either of the documents the parties dated June 7, 2003 that the plaintiff says form the foundation of the "joint venture".

[56] I accept the testimony of Werner Sadek that he never signed the documents as a result of the 18% interest provisions. While the defendant signed, he testified (which accords in part with the written agreements) that interest was only payable after the properties sold "if there will be enough money".

[57] I find as a fact from the agreement of March 10, 2004 that it is clear that only Property C was ever owned by the Alberta Company. The plaintiff endeavoured to document every matter between the parties and did so even if the others would not sign. It was conceded that no documents exist which purport to transfer Property B or its liabilities to the Alberta Company. It was argued, however, that the spread sheets and the calculations are evidence that Property B assets and liabilities were assumed by the company. I do not agree.

[58] I find that negotiations commenced in March 2006 for the buy-out of the plaintiff.

[59] The Financial Statements of the Alberta Company and Notes to the Financial Statement are in evidence before this Court through the document agreement to which both the plaintiff and the defendant agreed. That those are evidence and some indication of the amount in the Shareholder Loan I find to be accepted by the plaintiff in argument. Dr. Palcic asserts, in defence to the counterclaim brought by the defendant, that there could be no actual misrepresentation at all, as the financial records and books were available for all to reference before the parties agreed to sign the promissory note and the sale agreement of the plaintiff's shares, and before the Covenant and Indemnity Agreement was signed by the plaintiff. A look at the financial documents discloses no Shareholder Loan in the amount stated. The Year End notes as at February 28, 2006 show at opening there was an amount of $41,232.42 changing to $95,583.35 at year end, disclosing there was $95,583.35 owing to the shareholders at year end. For the Year End February 28, 2006, the notes to the CAD Financial Statements disclosed two key transfers to Dr. Palcic, the first for $8,000 on March 31, 2005, $37,005 on October 27, 2005 and $160,005 on October 27, 2005. The plaintiff confirmed in his testimony that he had received these amounts, the first to help a tax debt.

[60] I find the only reliable financial evidence of the amount owing to the shareholders by the Alberta Company are the Financial Statements and the Notes for the Financial Statements. These were in evidence before the court. The plaintiff

objected to the accountant's evidence of the amount of the Shareholder Loan following the buy-out date. This opinion contained in a letter counsel sought to tender as expert evidence. No notice was properly made. I do not find, however, that expert opinion is necessary to find that a debt owing by the company would be a company liability. That a debt is a liability, I find, is an obvious fact for which no expert evidence is required. On the Financial Statements and Notes to the Financial Statements before the court in evidence there was no amount near $300,000 (or over) owing by the company for Shareholder Loans as at the time the parties signed the promissory note.

[61] Of import, I note again the email of the plaintiff to the company's lawyer stating that the amount he felt was owing to him was yet to be put on the company's books by the accountant, i.e. the amount was not as at the date of that email (March 28, 2006) and reflected as a company liability owing to the plaintiff. I find nothing was ever put in the company's books by the accountant, Mr. Gryzko, in response to that email.

[62] The plaintiff has argued that it was decided between the parties that Werner Sadek would be the bookkeeper. In evidence, however, were the notes of the meeting of the Directors taken by the plaintiff. In those notes of the meeting of the Alberta Company dated June 29, 2004, it was decided amongst the three that Emilia Sadek would be the bookkeeper for a salary of $2,000 a month.

[63] As a consequence of numerous small and larger details not matching up with the evidence that has been tendered before the court, where the evidence of Werner Sadek and the defendant differed from the evidence of the plaintiff on any contractual arrangement and subject matters and terms, I prefer the evidence of the defendant and Werner Sadek.

VIII. ANALYSIS

(1) Was there a debt owed to the plaintiff by the JDP partners at the time of the buy-out?

[64] This case illustrates the hazards of entering into business arrangements without the aid of lawyers in contractual drafting and also of continuing a business relationship underpinned by partially signed or unsigned agreements. There can be no doubt that the parties did intend to create a business relationship of some kind, be it formal or informal, whereby they pooled resources and expertise and sought to jointly develop assets in the hopes of realizing a profit. It is clear that there was substantial agreement with respect to some of the terms of this agreement; for example, it was agreed which properties were to be developed and that the profits were to be shared equally. However, it is equally clear with respect to other terms, most notably the 18% interest provision, that there was much disagreement.

[65] The plaintiff argues that the fact that Werner Sadek prepared the documents with 18% interest supports a finding there was an agreement for 18% interest among the three. I accept, however, Werner Sadek's evidence that he only prepared the spreadsheets incorporating 18% to keep the plaintiff "happy". Werner Sadek testified:

> It is very simple ... interest rate cannot be paid until the property is developed, until we get paid, until shareholders get their money back, and on the profit we would someday agree on interest paid, and maybe there would be 18%.

[66] The plaintiff submits that the arrangement entered into by the three is what is known as a joint venture. A joint venture is a somewhat amorphous concept, not subject to the more rigid definitional boundaries of a partnership or a corporation.

[67] In *Canlan Investment Corp. v. Gettling*, [1996] B.C.J. No. 1803, [1996] B.C.W.L.D. 2149 (affirmed by the Court of Appeal [1997] B.C.J. No. 1647; 37 B.C.L.R. (3d) 140) [*Canlan*], Tysoe J., as he then was, at para. 59, examined the definition of joint venture:

> In addition to the fact that there was no binding agreement between the parties, there is a question of whether the parties actually intended to enter

into a joint venture despite their use of the terms "joint venture", "venture" and "joint venture partners". A definition of the term "joint venture" from Williston on Contracts was quoted at p. 706 of the Graham case:

> In summary, then, a working definition of joint venture based on the actual judicial decisions may be thus formulated: A joint venture is an association of persons, natural or corporate, who agree by contract to engage in some common, usually ad hoc undertaking for joint profit by combining their respective resources, without however, forming a partnership in the legal sense (of creating that status) or corporation; their agreement also provides for a community of interest among the joint venturers each of whom is both principal and agent as to the others within the scope of the venture over which each venturer exercises some degree of control.

[68] The B.C. Court of Appeal in *Canlan* noted, at para. 31:

> *Besides the requirement that a joint venture must have a contractual basis,* the courts have laid down certain additional requisites deemed essential for the existence of a joint venture. Although its existence depends on the facts and circumstances of each particular case, and while no definite rules have been promulgated which will apply generally to all situations, the decisions are in substantial agreement that the following factors must be present:
>
> (a) A contribution by the parties of money, property, effort, knowledge, skill or other asset to a common undertaking;
>
> (b) A joint property interest in the subject matter of the venture;
>
> (c) A right of mutual control or management of the enterprise;
>
> (d) Expectation of profit, or the presence of "adventure," as it is sometimes called;
>
> (e) A right to participate in the profits;
>
> (f) Most usually, limitation of the objective to a single undertaking or ad hoc enterprise.
>
> [Emphasis in original.]

[69] These indicia, requisite for a finding of a joint venture, seem to be present in the case at bar in one way or another, though not always entirely (for instance the Sadek brothers say Property A was never part of the Agreement). For the terms of a joint venture to be contractually enforceable, it follows that there must be a contractual basis to the agreement with defined subject matter. In *Canlan*, Mr. Justice Goldie for the Court of Appeal continued (at paras. 33-35):

> A recent judgment of the Prince Edward Island Supreme Court - Appeal Division in *UAP Inc. v. Oak Tree Auto Centre, Inc.*, [(May 13, 1997), Doc.

> AD-0535 (P.E.I.C.A.)], illustrates the readiness of the courts to find a contractual relationship where the business venture has become operational before the formal agreement had been executed. In *UAP* the enterprise thus engaged in followed in detail the terms of the unexecuted agreement proposed for the regulation of its affairs. In this circumstance the Court said:
>
> > While it is not the role of the Court to create a contract for the parties, it is the role of the Court to do justice between them. This will entail a complete examination of all the circumstances surrounding their relationship, and if it can reasonably be concluded the parties intended to agree, the Court should find a contract. Of importance in the examination of all the circumstances, including what may have been written between the parties in the course of their negotiations, is a consideration of whether the parties may have failed to agree on essential terms of their agreement. If they did fail to agree on an essential term, their agreement could be found to lack certainty and a contract should not be found. See: Fridman, *The Law of Contracts* (3d) Carswell, 1994: *Canada Square Corp. Ltd. v. Versafood Services Ltd. et al.* (1982) 130 D.L.R. (3d) 205 (Ont. C.A.) at pp. 214-218.
>
> ...
>
> While a joint venture may take many forms and may be described in many ways, I am of the view that for legal consequences to arise as between the co-adventurers on the ground their association has become a joint venture there must be a contractual underpinning of some description.
>
> [Emphasis added]

[70] Thus, it is trite to point out that labelling something a joint venture does nothing to alter the fundamental tenets of contract law. In order for a contractual obligation to be enforceable, there must be a contractual underpinning of some description and there must be agreement on essential terms.

[71] In the case at bar, however, there are evidentiary concerns to finding a contract. While there was manifestation of an agreement to develop Property B and later Property C, I find there was no such agreement existing in respect of Property A.

[72] In *Peterco Holdings Ltd. v. Calverton Holdings Ltd.*, [1999] B.C.J. No. 55, 85 A.C.W.S. (3d) 134 (B.C.S.C.) [*Peterco*], the court examined a joint venture agreement between three parties, as in the present case. In *Peterco*, the court went on to find that contractual terms of the joint venture were clear and binding, first offering the following discussion of contractual vagueness at paras. 224-225:

> As to the question of vagueness, while certain of the provisions in the arrangement undoubtedly call for construction - e.g. what does "net profit" mean? - that fact does not mean that the agreement is unenforceable. Nor did I understand the defendants to really go that far in argument.
>
> Professor Fridman states in his text *The Law of Contract in Canada*, 2d ed. (Toronto: Carswell, 1986) at pages 18, 19 and 20:
>
> > (b) Clear intent
> >
> > The Court cannot make for the parties a bargain which they themselves did not make in proper time. 17 This means in the first instance, that if a contract is not clearly created by the parties' language or conduct, the court cannot construct one. 18 It is for the parties to use such language or employ such conduct as will make plain that they intended to contract. 19 ...
> >
> > It is different, however, where the language is not unambiguous, but on the contrary is vague and uncertain. Lacking evidence of any clear contractual intent, either generally or specifically with respect to a particular alleged obligation, the courts will not declare that a contract exists, whether in a general way or in relation to the precise obligation. 21 The latter is the more usual result to follow, although courts have stated that terms which are uncertain, and therefore not enforceable, may be excised from the contract, if the rest of the agreement is capable of being enforced. 22 Generally, uncertainty about some specific obligation will suffice to make impossible the conclusion that there is a contract in effect between the parties. The test would seem to be whether the term or terms in question relate to essential aspects of the alleged contract. 23 Examples of this are the failure of parties to settle the purchase price for goods, 24 the lack of agreement as to the date of commencement and term of a lease, 25 and the absence of determination of the obligations of the parties with respect to licences and permits. 26 In relation to individual terms and a purported agreement as a whole, the attitude of the courts is to try to find a clear meaning if at all possible. ...

[73] The difficulties here are more substantial than definitions. Two key concerns are the subject matter of the "joint venture" and whether 18% interest was to be payable before the "joint venture" properties were sold. If the joint venture, in fact, includes all three properties, which is the plaintiff's theory, then interest at 18% cannot be payable until all three properties are sold. Logically, the plaintiff cannot argue he is owed 18% because, according to the agreements of July 7, 2003, 18% is only payable when the properties are sold. They had not been sold at the buy-out date of April 2006. The properties were logically all part of a joint venture or not. Because the plaintiff sought and negotiated 18% after only Property B was sold,

I find in all the circumstances that there was no common subject matter to make a finding of a joint venture.

[74] Also, for the joint venture to owe the plaintiff, it would follow that the plaintiff owes himself. He is a one-third partner of the joint venture according to his argument. Instead, however, no debt documents supporting his argument reflect that. The plaintiff argues there was a joint venture as the means of finding that a debt not on the company's books was somehow transferred to the Alberta Company when that company was formed. But the March 10, 2004 agreement makes clear only Property C was transferred to the Alberta Company.

[75] The plaintiff has argued that the debt owing to him is from all monies paid by him in respect of the three properties. He argues there is a joint venture that captures all three properties and thus all payments made. He further argues this debt was subsumed by the Alberta Company and therefore is owed to him by the Alberta Company. Those amounts, according to the plaintiff, are reflected in the spreadsheets as "Paid by Branko Palcic Consulting" (or Branko Palcic) – $3,212.29 principal plus $115,239.74 interest for a total of $118,852.03; "From BP Consulting to Werner Sadek" (or WEEM, a company owned by Werner Sadek which was employed on this venture and by Dr. Palcic on other matters, a company owned by Werner Sadek which was employed on this venture and by Dr. Palcic on other matters) – $60,366 principal; no interest calculated; and "From BP BPC to the Alberta Company" – $80,600 principal plus $19,296.79 interest for a total of $99,896.79. The comprehensive "Paid by BP or BPC consulting" spreadsheet in evidence shows that of $295,759.55 paid by the plaintiff, $292,147.26 was returned to the plaintiff. As interest comprises such a large portion of the monies the plaintiff says he is owed, this court must additionally determine whether or not there was a binding contract between all or some of the parties to pay 18% interest on their contributions.

[76] The plaintiff's fundamental argument respecting the joint venture is that there were the three properties involved. The defendant denied this in his evidence

saying Property A was never involved. I find that only a few thousand dollars from the proceeds of the sale of Property B were ever applied to that property. Those payments were made by Werner Sadek, not the three men as part of the JDP.

[77] Respecting the interest of 18%, Werner Sadek testified that he did prepare the spreadsheets containing interest that were forwarded to the accountant. He did not however prepare a spreadsheet with the information attached to Dr. Palcic's email wherein he sought the amounts be inserted into the company's books.

[78] The plaintiff referred extensively to the spreadsheets prepared by Werner Sadek and spreadsheets prepared by himself. It was argued that several of the spreadsheets were produced by Werner Sadek as a "final accounting" between the parties before the buy-out. I accept, instead, the evidence of Werner Sadek that he was producing these statements regularly for the parties and, at the insistence of the plaintiff, had included the interest amount of 18%. I accept Werner Sadek's evidence that when he referred to final accounting in the email dated March 13, 2006, he meant "final up to that date". He testified he prepared that particular accounting knowing that Dr. Palcic and his brother were separating from each other in respect of 503696 BC Ltd. ("503"), the Fifth Wheel, but it was not prepared for use in a buy-out in respect of the Alberta Company or any other separation of the defendant and plaintiff's business affairs.

[79] The defendant similarly gave evidence about the documents produced by Werner Sadek, attached to the email of March 13, 2006, saying the summaries were the "latest" and "final and self-explanatory". He stated those documents were not specifically prepared for a buy-out, and rather were part of the routine summaries prepared by his brother.

[80] While Werner Sadek may have prepared the spreadsheets with interest at Dr. Palcic's insistence, I accept his evidence that interest on the JDP was to be payable only if and when the properties were sold and a profit was realized. He was cross-examined on his accounting notes and consistently responded that he did not independently verify the information and was, rather, working from information given

to him. He never agreed to participate in the arrangement for interest payable under other circumstances, however. I accept the testimony of Werner Sadek on why interest calculations appeared in the spreadsheets. The emails of Branko Palcic in which he dictates to Werner Sadek how the bookkeeping is to be performed support Werner Sadek's testimony in this regard. Werner Sadek had expressed his dismay at the two of them working on different spreadsheets in an email entered into evidence and dated February 9, 2006.

[81] The defendant does not agree with the calculations prepared at the direction of the plaintiff. That the ongoing spreadsheets, even in advance of the buy-out on February 9, 2005, were in dispute amongst the three is clear from emails passing between the three:

> Branko, This is a response to your telephone message (strange message about being confused and not understating accounting in progress). Since we're working by different tables and spreadsheet (Total Money Transactions) designed and initiated by you, I am confused by your confusion. Tables and spreadsheet are completed and ready ...we will not talk about interest yet ... No phone calls ... Werner

[82] In evidence was a compendious spreadsheet he called the "Money Distribution Chart". Variations of this evidence are before the Court but it is of note that the "purpose" column, which was supposed to reflect which property the funds were being spent on, varies from document to document. For instance, in the version of the document emailed to the accountant entitled "BP [Branko Palcic] paid directly for Bill's [Nield's] land", reference is "b" for every item in that column, including all amounts from January 2002 to March 2006. The plaintiff testified "b" meant all three properties. The first item is listed as "fly to Calgary". However, at that time Bill Nield had yet to even approach Werner Sadek to ask him if he was interested in buying his property. In cross-examination with respect to certain payments, the plaintiff conceded he erred, for instance, in the Property reference in respect of a payment of $12,903.67. I find that to be an amount that is not unsubstantial. In all, I find the plaintiff's evidence on the financial aspects of this matter to be unreliable.

[83] Werner Sadek made it clear that any communication on the bookkeeping was to be done in writing. It is of note that the email, sent February 9, 2005, was before either party stated the negotiations had been entered into to buy out the plaintiff and supports Werner Sadek's evidence that as bookkeeper he was always in the process of doing the books. I also accept that he was being contacted frequently by the plaintiff who disagreed with his accounting such that Werner Sadek felt compelled to add certain interest charges even though he had not agreed and disagreed with other instances where the plaintiff had added interest. I find that interest at 18% was to be paid to the contributing parties only after the properties were sold and there was a profit.

[84] The plaintiff says the debt owed to him is made up of three groups:

1. what was paid by him to the project;
2. what was paid by him to WEEM;
3. what the plaintiff paid directly to the Alberta Company.

In support of this, the plaintiff produced spreadsheets and his bank statements which indicated certain payments were made.

[85] Respecting the payments to WEEM (Werner Sadek's company) in the evidence before the court, it is clear from the evidence, including the testimony of Dr. Palcic, that he was separately paying Werner Sadek on other non-JDP projects. In the exhibit before the court drafted by the plaintiff (entitled Agreement Between Branko Palcic Consulting Ltd. (BPC) and VEEM [sic] Consulting Ltd. [WEEM]) dated December 31, 2001 that the plaintiff and Werner Sadek had agreements separate and apart from the JDP in which Werner Sadek was being paid by the plaintiff for projects having nothing to do with the JDP or Property C. That document, while unsigned, references projects in Fort Nelson, Chilliwack and Whistler. Werner Sadek testified he worked for Dr. Palcic, although no other specific agreements were tendered before court as they were ruled inadmissible as having not been previously produced. He also testified that the spreadsheet documenting payments to WEEM was a record of payments in respect of Properties B and C. However he testified

that the payments to WEEM were for work he did for Branko Palcic Consulting. I accept however that the plaintiff was paying Werner Sadek funds on unrelated projects.

[86] The plaintiff himself agreed in cross-examination he was separately contracting with Werner Sadek. He stated certain of the amounts paid to Werner Sadek "for his working other Properties". As well, the plaintiff was paying Werner Sadek through the company he held with the defendant, on their other business venture, Fifth Wheel. Accordingly, while the plaintiff was undoubtedly paying Werner Sadek or WEEM, it does not follow that such payments were always for the JDP. In his evidence, Dr. Palcic stated in response to a question about the notes he made that Werner Sadek was being paid $7,800 per month: "I think it was 2,500 it was on the contract [with BPC]. This was for his working other properties." Accordingly, when the plaintiff says his principal is reflected *inter alia* in BPC or BP to WEEM, that cannot be the case. There was also evidence before the courts that in order to be able to qualify for a mortgage Werner Sadek had to be shown to be earning a certain level of monthly income: see summary notes of meeting between Werner Sadek Emil Sadek and Branko Palcic dated February 18, 2004 prepared by the plaintiff. It was summarized by the plaintiff that the plaintiff was paying Werner Sadek on contract $7,800 to BP Consulting. I accept that evidence. As noted, Werner Sadek was also being paid by 503, the parties' other venture in Fort Nelson, the Fifth Wheel.

[87] The plaintiff has proceeded at trial on the basis that the agreements establish that debts were owed to him by what he says was the joint venture and that these debts were then transferred to the Alberta Company. I find that there was never a binding contract with respect to interest being paid at 18%.

[88] Firstly, as noted, Werner Sadek and his wife Emilia Sadek did not sign the agreements. It is settled law that a party's signature, or lack thereof, will not necessarily be conclusive evidence of whether or not a binding contract has been entered into. It must consequently be considered whether Werner Sadek intended

to enter into a binding contract with respect to these agreements despite his deliberate failure to sign. Where a party's conduct indicates an intention to be bound, this can sometimes suffice to bind them. In *Prins Greenhouses Ltd. v. Garden Back to Eden Organic Ltd.*, 2010 BCSC 1939, the court stated the following at para. 23:

> The test for determining acceptance by conduct was set out in the Supreme Court of Canada decision of *St. John Tugboat Co. Ltd. v. Irving Refining Ltd.*, [1964] S.C.R. 614 at pages 6 and 7:
>
> > The test of whether conduct, unaccompanied by any verbal or written undertaking, can constitute an acceptance of an offer so as to bind the acceptor to the fulfillment of the contract, is made the subject of comment in *Anson on Contracts*, 21st ed., p. 28 where it is said:
> >
> > > The test of such a contract is an objective and not a subjective one, that is to say, the intention which the law will attribute to a man is always that which his conduct bears when reasonably construed, and not that which was present in his own mind. So if A allows B to work for him under such circumstances that no reasonable man would suppose that B meant to do the work for nothing, A will be liable to pay for it. The doing of the work is the offer; the permission to do it, or the acquiescence in its being done constitutes the acceptance.
> >
> > In this connection reference is frequently made to the following statement contained in the judgment of Lord Blackburn in *Smith v. Hughes* [(1871), L.R. 6 Q.B. 597 at 607], which I adopt as a proper test under the present circumstances:
> >
> > > If, whatever a man's real intention may be he so conducts himself that a reasonable man would believe that he was consenting to the terms proposed by the other party and that other party upon that belief enters into a contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.
> >
> > It must be appreciated that mere failure to disown responsibility to pay compensation for services rendered is not of itself always enough to bind the person who has had the benefit of those services. The circumstances must be such as to give rise to an inference that the alleged acceptor has consented to the work being done on the terms upon which it was offered before a binding contract will be implied.

[89] In the present situation, it is true that all of the parties to the contracts behaved as if some type of agreement was in place. They jointly developed Property B. The financing was provided by the defendant and the plaintiff. Werner Sadek and his wife Emilia Sadek did the bookkeeping.

[90] Where an agreement is unsigned but there is clear agreement on key terms and a clear desire on the part of the parties to participate in a joint venture, a court will give effect to this intention: *UAP Inc. v. Oak Tree Auto Centre Inc.*, [1997] P.E.I.J. No. 49, 149 Nfld. & P.E.I.R. 313 (Appeal Division).

[91] Where an agreement is unsigned, however, and the lack of signature is the result of a deliberate choice rather than a mere oversight, this can be evidence that the agreement does not reflect the intention of the parties. Referring to the Ontario High Court decision in *Re Levine Developments (Israel) Ltd. and the Winding-Up Act (1978)*, 5 B.L.R. 164, MacDonald C.J.T.D., in *Hillcrest Housing Ltd. (Re)*, [1998] P.E.I.J. No. 57, 165 Nfld. & P.E.I.R. 181(Trial Division) stated at para. 47:

> Mr. Justice Anderson made reference to a draft shareholders' agreement, which the petitioners had put forth to establish that the company was in partnership in guise of a corporation. As the draft shareholders' agreement had never been signed, Justice Anderson was not prepared to hold that the agreement confirmed the spirit and intent of the understanding among the shareholders and in fact concluded that because the agreement was never signed, one could only conclude that was so because it did not express the intent of the parties.
>
> [Emphasis added.]

[92] In the present case, I have found as a fact, based on the evidence, that Werner Sadek made a conscious decision not to sign the agreements because of his concerns surrounding the 18% interest term. He testified that he never signed and why this was the case and I accept his evidence. He had agreed to other matters with the plaintiff and signed other documents that the plaintiff produced. I do not accept the suggestion that there was a signed copy somewhere and that the plaintiff simply had not located it.

[93] An agreement requiring interest to be paid out of money accruing to three people jointly must necessarily be agreed to by all three people. The agreements set out the interest between the JDP partners as such:

> It was ... agreed that this property will be re-zoned and developed into single detached lots and that these ... will be sold at the end or during this

> development at an agreed price between Mr. Werner Sadek, Mr. Emil Sadek and Dr. Branko Palcic.
>
> This Agreement provides the legal basis for the distribution of the funds between MR. EMIL SADEK AND MRS. EMILA SADEK and MR. EMIL SADEK AND DR. BRANKO PALCIC when the property will be sold to a third party.

[94] Each of the Agreements had a clause setting out the following:

> All monies loaned by MR. EMIL SADEK AND DR. BRANKO PALCIC to purchase of the Property, as well as all monies loaned by MR. EMIL SADEK AND DR. BRANKO PALCIC towards all costs of mortgage payments, development costs, any other expenses will be accounted for and will be returned to the lenders with 18% interest per annum.

[95] The agreements provide "for the distribution of funds ... when the properties will be [sic] sold". Clearly all parties to whom the funds would normally accrue would have to agree on interest operating as a first charge against such funds. In this case they did not. In my view, the most logical construction of the agreement is as follows: the agreement (a) was to provide for the deduction of interest payments from the total development proceeds before such proceeds were split between the parties, and therefore (b) necessarily required the agreement of all three parties.

[96] Importantly, the plaintiff himself subsequently acknowledged that the agreements were merely drafts. In notes of a meeting on February 19, 2004 between the three JDP partners, which were written by the plaintiff himself and which were submitted as evidence at trial, he stated that:

> Previous draft agreements (between WS & Emilia Sadek and ES/BP and ES and WS/BP) were reviewed and amended such that WS gets $3,000 per month as well as any lease proceeds from Bills property for his work on Bills property, but gets only $1 for his work on 3 lots, during the indicated period of time in his Agreements.
>
> BP will take these drafts Agreements to Gerry Fahey (Lawyer for 503 [a company owned by the plaintiff and defendant]) who will beef them up to legal terms BP will send these documents to both ES and WS for review. WS will take the drafts to Brian Lester to review and edit if required to for WS and Emilia Sadek. At the end of this process, all parties will sign the documents to become binding legal Agreements. This process should be completed by the first week of March, 2004.
>
> [Emphasis added.]

[97] Thus it is clear that the plaintiff himself did not believe there to be a binding contract with respect to 18% interest in early 2004, and was in fact planning to replace “draft agreements” with “binding legal agreements”.

[98] I find that the partially signed agreements relating to 18% interest were only ever intended to be draft agreements and were not intended as binding legal contracts. Terms had been presented, and such terms had been explicitly rejected by Werner Sadek. As such, there was never a binding contract with respect to interest at 18% payable out of the proceeds of sale of any of the JDP projects or payable directly from one JDP partner to another.

[99] I also find that Property A was only peripherally involved. It was already owned by Werner and Emilia Sadek and never documented by the plaintiff, prior to the default of the defendant, as forming an essential part of the agreement between the three men. I accept the evidence of Werner Sadek that the mortgage placed on all three properties was only done so at the insistence of the lender. Werner Sadek testified that, and the position of the defendant was that, only Properties B and C were the subject of possible development. I find that only a few thousand dollars was applied by Werner Sadek to assist in developing Property A. The mortgage obtained on all three properties, I find, was not for the purpose of developing Property A. I accept both Emil and Werner Sadek’s evidence on these points.

(2) What, if any, debt was owed to the plaintiff by the Alberta Company and did the Alberta Company assume any debts of the JDP partners?

[100] Even if there was a debt stemming from the 18% interest accrued on the plaintiff’s initial funding of one of the properties, I would nonetheless find that such a debt was never assumed by the Alberta Company for the following reasons.

[101] The plaintiff argues in his reply submissions that he was owed the following principal amounts (independent of any 18% interest claim) at the time of the buy-out: $3,612.29 (as documented in the “Paid by BP Consulting (or BP)) spreadsheet); $60,366 (from the spreadsheet entitled “From BP Consulting to Werner Sadek (or WEEM)”); and $80,600 (from the spreadsheet entitled “From BP/BPC to Alberta

Ltd.”). This would amount to a total of $144,578. He says these amounts are evidenced in the spreadsheets.

[102] Firstly, as discussed respecting the WEEM payments, I do not find the spreadsheet accurately reflects amounts paid for property development to be added to any amount that Dr. Palcic says he is owed by the Alberta Company. WEEM, as noted, is a company owned by Werner Sadek. It was the testimony of the defendant that the spreadsheets relating to principal owing referred to by the plaintiff were prepared by the plaintiff and not seen by the defendant until trial. It was also the testimony of both the defendant and Werner Sadek that there were other transactions entered into by the plaintiff and Werner Sadek, detailed in part above, through his company WEEM, outside of the scope of this trial, and that certain payments due in respect of those other projects were being falsely counted as money owing pursuant to the JDP that is the subject of this case.

[103] That leaves only the amounts “Paid by BP or BP Consulting”.

[104] Both the defendant and Werner Sadek take the position that the plaintiff had been repaid principal investment.

[105] I find the testimony of Werner Sadek and the defendant to be more believable in this regard, and place little reliance on the Money Distribution Chart prepared by Werner Sadek on the basis of information from the plaintiff, especially in light of Dr. Palcic’s admission in his testimony that he had received in excess of $240,000 back from the JDP by late 2004. The chart prepared by Werner Sadek for “BP or BP Consulting” shows $292,147.26 as being returned to the plaintiff. I find the plaintiff received a return of substantially all of his capital on the examination of the spreadsheet paid by BP or BP Consulting.

[106] Respecting direct payments to the Alberta Company, these are not reflected in the accounting records considered reliable. In any event, it is not necessary for me to determine the precise amount, if any, owed to the plaintiff by the Alberta Company. It is clear however that no amount pursuant to an 18% interest liability

was ever owing from the Alberta Company to the plaintiff. It is also clear that even if I were to accept the plaintiff's evidence with respect to principal amounts owing, it would be far less than $300,000.

[107] The plaintiff submits that any debt that was owed to him was assumed by the Alberta Company when it became the vehicle for what he says was the joint venture. He further argues that some of the proceeds from the sale of the lots of Property B were transferred to the equity in Property C to reduce the mortgage owing on that property. This necessarily meant, according to his argument as I understand it, that the debts owed by the others in relation to the development of Property B, and those relating to the development of Property C, were then held by the Alberta Company.

[108] The plaintiff's claim that some proceeds from the sale of Property B were transferred to Property C and that this shows that debts owing pursuant to Property B were also transferred to the Alberta Company (which owned Property C) is not persuasive. In my view, one does not logically flow from the other. There is little in the way of clear evidence as to exactly where all the money from the sale of Property B went. The parties had funds from two sources: a mortgage had been obtained on Property B to assist in its development. The plaintiff states in argument that $77,142.06 of the $364,000 in mortgage proceeds obtained from the Builder's Capital mortgage, $100,000 of the $305,414.96 from the sale of one of the lots of Property B, and $116,730.83 of the $614,977.95 from the sale of the other two lots were transferred to the Alberta Company. This would amount to total proceeds from the sale of Property B of $1,284,393, of which $293,872.89 was transferred to Property C (based on the plaintiff's figures).

[109] The Money Distribution Chart, he submits, shows the final accurate amounts. I place little reliance on this chart for reasons discussed above as reflecting Property C debt owing to Dr. Palcic.

[110] The plaintiff detailed his financing of the acquisition and development of Property B in his closing written submissions. He lists contributions totalling $184,587 related to Property B. In his cross-examination, the plaintiff admitted that

by November 30, 2004, he had received payments from the JDP of $100,000, $116,947, and $25,000 for a total of $241,947. This means that using the figures supplied in the plaintiff's own argument, his contributions to Property B were less than the total amount that he acknowledged having received back from the JDP in his own testimony. Evidence that some of the proceeds from Property B were put into Property C – evidence that, if believed, would establish only that some but not all of the money which was to be distributed between the parties was in fact transferred to a vehicle jointly owned by the parties – certainly does not prove that such a vehicle also assumed a different debt owed to the plaintiff.

[111] No contract, agreement, document or memorandum of a meeting was ever produced that purported to transfer debts owing to the plaintiff to the Alberta Company. There was the agreement in which Property C was transferred. There was as well the plaintiff's unfilled request to the company's accountant to have reflected in the Alberta Company's books all he felt he was owed. The plaintiff says the fact that monies from the sale of Property B were applied to Property C purposes supports his argument that any debt owing in relation to Property B has shifted over to Property C. I do not find, however, that those payments translate to the Alberta Company holding Property B liabilities. Those payments do support the position that the parties were dealing with both Properties B and C, but that is not the issue. The issue is what was owed by the Alberta Company to the plaintiff.

[112] As noted, Glen Gryzko, the Alberta Company's accountant, testified as to what he did in a limited way. I accept his evidence, however that when the company was incorporated there was discussion about the assets and liabilities that were to be transferred to the company and that debts relating to an 18% interest owed to the plaintiff were not among those items which it was agreed the company would assume. I find that no debts that could be construed as relating to 18% interest were ever transferred to the Alberta Company. He testified that he was asked to put in certain amounts by the plaintiff on the company books, but he testified he did not do so. When asked, as noted, if he would enter something unrelated to Property C

on the books he said "no" as that was the company's only asset. I accept that evidence.

[113] As discussed in the previous section, a joint venture is not a separate legal entity. It is an association of persons bound by a collection of contracts. It is true that in some situations, such a contractual matrix will be wholly contained in a single joint-venture agreement. In such a situation, it would certainly be possible for the parties to sign another contract transferring the assets and liabilities of the joint venture to a corporation. But it does not follow that because a certain debt was part of a joint venture and because a certain company was used by a joint venture, that such a debt would automatically be held by the company. The structure of a joint venture and all transfers within a joint venture must operate by way of contract. Here, there is no evidence of any contract transferring any general JDP debt owing to the plaintiff to the Alberta Company and there is no indication in the company's books of such a debt existing. Accordingly, I find that the Alberta Company did not at the time of the buy-out agreement (or at any other time) owe the plaintiff a debt of roughly $300,000 related to his initial funding of the development of any of the properties.

(3) Was the contract involving the promissory note only for debts held by the Alberta Company or for other debts as well?

[114] The promissory note reads:

> FOR VALUABLE CONSIDERATION RECEIVED, Emil Sadek, of Fort Nelson, B.C. (the debtor) promises to pay to Branko Palcic Consulting Ltd. of Vancouver, British Columbia (the creditor) the sum of TWO HUNDRED AND SEVENTY THOUSAND DOLLARS ($270,000.00)

[115] There was as well an interest clause of 12% per annum, calculated monthly. Interest was to be paid on the first day of every month.

[116] It was signed by the defendant and dated April 13, 2006, at Fort Nelson.

[117] As noted earlier, the defendant paid to the plaintiff $30,000 before this agreement was entered into. He paid eight interest-only payments and one payment of $6,000 on the principal amount before he ceased paying.

[118] There is a written contract called the Share Purchase Agreement for the purchase of the plaintiff's Alberta Company shares in exchange for $3,000 and the plaintiff's resignation as director. In that contract, there is a reference to the $300,000 transaction which reads:

> AND WHEREAS outside the terms of this agreement, Sadek has also agreed to repay loans to Palcic and his personal consulting company totalling $300,000 ...

[119] There is also a Covenant and Indemnity Agreement which similarly provides in reference to a "debt of the [Alberta Company] owed to Palcic":

> Palcic represents and warrants that the balance outstanding on the loan is $300,000.

[120] Therefore, in the two contractual references to what was being purchased for $300,000, it is first stated that the defendant is purchasing loans to the plaintiff totalling $300,000 and it is then stated that the defendant is purchasing a debt owed by the Alberta Company to the plaintiff with an outstanding balance of $300,000. The only way to read these two descriptions so that they are consistent with one another is to understand them both to say that the defendant was purchasing a debt of $300,000 owed by the Alberta Company to Palcic.

[121] In the written documents, there is no mention of the defendant purchasing anything other than the plaintiff's shares in the Alberta Company and the debt owed by the Alberta Company to the plaintiff. The plaintiff points to the "deal sheet" which he sent to the defendant. The deal sheet included the sale of 503 and the Fifth Wheel as well as the JDP/Alberta Company interest. Dr. Palcic stated in that document to Emil Sadek:

> A conditional part for the sale of 503696 BC Ltd., BP shares to ES must return to [the plaintiff] the loan (principal and interest that Branko Palcic and a conditional part for the sale of 503696 BC Ltd., BP shares to Emil Sadek is that Emil Sadek must also buy all 300,000 BP shares of 1096922 Alberta Ltd.

> at the current value of $0.01 per share for the total of $3,000 and Emil Sadek must return to BP and/or his company Branko Palcic Consulting Ltd. (BPC) the loan (principal and interest) that BP and Province of British Columbia paid for the Calgary land developments of total of $300,000 by Emil Sadek paying:
>
> a. $33,000 in trust to BP lawyer on March 31, 2006
>
> b. The residual of the loan of $270,000 must be paid out to BP at the earlier of March 31, 2008 and the date that the land of 41096922 Alberta Ltd. (Parcel identifier: Block 2 Plan 7810199 in Calgary, Alberta) or Emil Sadek shares of 1096922 Alberta Ltd. are sold.
>
> Emil Sadek will give his personal guarantees for the residual of the loan of $270,000.
>
> Every month Emil Sadek will pay to BP the interest on the residual of the loan at 12% interest per annum calculated monthly for that month.
>
> BP and Emil Sadek will sign mutual release of any prior signed, discussed or implied agreements.

[122] The plaintiff submits that the defendant's answers in cross-examination confirm that this reflected the agreement between the parties.

[123] Two separate questions arise. The first is whether there existed a debt of $300,000 (or thereabouts) on the books of the Alberta Company owing to the plaintiff. If such a debt were to exist, there can be no doubt that it would stem in part from the plaintiff's original payments towards one of the Calgary developments. The "deal sheet" or other evidence of the two parties' mutually held beliefs are not dispositive in this regard. After all, the Alberta Company was owned by three, and not just two people, and so the plaintiff and defendant cannot just agree, while discussing the buy-out, that it holds a certain debt that has not been contractually transferred to it. The plaintiff and defendant can believe that it holds a debt, either correctly or mistakenly, but they cannot transform such a belief into reality.

[124] The second question, distinct from the first, is whether or not the defendant was purchasing anything other than what the Alberta Company owed to Dr. Palcic. The answer to the second question must also be no. The references to the debt noted above are clear and even the "deal sheet", which is not in and of itself a binding contract, is not inconsistent with these references (except that on the plaintiff's interpretation, what the Alberta Company owed the plaintiff included debts

related to Property B). The plaintiff asserts that even if there is only a debt for the principal, that he is still owed $3,612.29 for Paid by BP or BPC in respect of $60,366 from BP Consulting to WEEM and $80,600 from BP or BPC to the Alberta Company for a total of $144,578.29. I do not agree. I find that all that was purchased in the transaction was the debt, if any, owed by the Alberta Company to the plaintiff. I reject the plaintiff's contention that something broader was purchased, such as the totality of his interest in a joint venture, unless the totality of his remaining interest in the joint venture was limited to his equity and debt claims against the Alberta Company.

[125] In summary, I find that the plaintiff has not proven that a debt of approximately $300,000 was owed to the plaintiff by any of the JDP partners. Further, I find that no debt of any Property other than Property C was transferred to the Alberta Company. While certain payments may have been made on the payout of Property B to assist with Property C obligations, this does not mean that the Alberta Company formally acquired the obligations of the JDP or Property B separately. What the Alberta Company was acquiring by the Agreement was clear – it was Property C. I find that the buy-out agreement only contemplated a purchase of debt that the plaintiff says were owed to him by the Alberta Company.

[126] Consequently, it must be determined if there was a failure of consideration on the promissory note.

(4) Does the contract for the promissory note fail for a total failure of consideration?

[127] As the plaintiff signed a promissory note, there is a presumption of valuable consideration imported by section 57 of the *Bills of Exchange Act* (see also: *Bank of Nova Scotia v. Bauer*, [1975] B.C.J. No. 958, [1976] 2 W.W.R. 52). Nevertheless, this presumption only applies in the absence of evidence to the contrary.

[128] To examine the issue of consideration, I must return to the buy-out agreement, the Share Purchase Agreement and the Covenant and Indemnity Agreement.

[129] The first point where the parties disagree is on how to conceptualize the contract. It is clear that the plaintiff agreed to sell all of his shares in the Alberta Company in the Share Purchase Agreement for $3,000. Dr. Palcic also agreed to sell any loans owed to him by the Alberta Company in exchange for $300,000. In that regard, in the Covenant and Indemnity Agreement, he warranted the Company owed him $300,000. On the basis Dr. Palcic was owed $300,000, Emil Sadek paid him $30,000 and signed the promissory note for $270,000. The plaintiff characterizes all of this as being one contract, the "buy-out agreement".

[130] The defendant separates the contract for the shares from the contract for the loans, arguing that there were two separate contracts. He argues that the Covenant and Indemnity Agreement in respect of the debt owed was created for the defendant, for the purposes of the debt purchased.

[131] On the issue of consideration there is no question that there was consideration in respect of the contract for the shares. The question is, rather, is there a lack of consideration with respect to the contract for the loans? The law has traditionally been unconcerned with the adequacy of consideration, dating back to cases such as *Bolton v. Madden* (1873), L.R. 9 Q.B. 55 at 56 (Eng. Q.B.). That is to say, as long as a party received something, arguments that the consideration was insufficient would not gain traction with the courts. In this case, the plaintiff says that the defendant received his shares and any loans owed to him by the company, the eventual transaction price was the subject of negotiations, and it is not the court's place to attempt to value the loans to determine the sufficiency of consideration.

[132] I note the case relied upon by the plaintiff, *Krauss v. Luciuk*, [1928] W.W.R. 184, is distinguishable from the case at bar. Here a total failure of consideration is pleaded, not a set-off *pro tanto*.

[133] More recent cases, however, have held that contracts can sometimes be rescinded where there has been a failure of consideration, as opposed to a complete lack of consideration (which would render a contract void *ab initio*). A helpful

summary of the law was given by Bauman J. (as he then was) in *MFC Bancorp Ltd. v. Aqua Plan Inc.*, 2 B.L.R. (3d) 87 (B.C.S.C.), who stated, at para. 13:

> Both parties rely upon various statements from *Halsbury's Laws of England*, 4th ed. (London: Butterworths, 1998). For the defendant, this statement, in particular, is stressed:
>
> (i) In general
>
> > 1128. When money is recoverable. Where the plaintiff pays money to the defendant under an ineffective contract, he may be able to recover that money in restitution. This is the case not only in respect of contracts which are void or ineffective ab initio, because the parties never reached agreement, or by reason of initial impossibility of performance or mistake, or on some other ground, but also to contracts which are valid when made, but which are later avoided for breach or misrepresentation, or by reason of subsequent impossibility or frustration. The cases will be considered in two groups: (1) where there is a claim of total failure of consideration; and (2) where the contract is illegal or void.
> >
> > (ii) Total Failure of Consideration
> >
> > 1129. Effect of total failure. A complete failure of consideration in a contract occurs where one of the contracting parties fails to receive the benefit or valuable consideration which springs from the root, and is the essence, of the contract. The test is whether or not the party claiming total failure of consideration has in fact received any part of the benefit bargained for under the contract or purported contract. Where the plaintiff has paid money in pursuance of a contract but becomes entitled to rescind that contract on the ground of total failure of consideration, he may recover the money. ...
> >
> > [footnotes omitted]
>
> ...
>
> *Halsbury's* deals with what constitutes a total failure of consideration at para. 1130:
>
> > 1130. What constitutes total failure of consideration. It was once thought that the restitutionary remedy only lay where the contract was avoided ab initio. It is now settled, however, that the test is not whether there has ever been a contract, but whether there has ever been any performance of the contract. A claim for total failure of consideration may be brought not only where a contract is void ab initio but also where it is subsequently avoided either because the contract is frustrated or became the other party was in breach of it. But such a claim may not be brought where the contract is merely unenforceable.
> >
> > In determining whether there has been a total failure of consideration, it is always necessary to analyse carefully the nature of the contract and the nature of the essential rights to be conferred on the party

> claiming that there has been a total failure of consideration. A total failure of consideration may occur even though the defendant has incurred a detriment in partly performing his side of the contract, or the plaintiff has received some incidental or illusory benefit from the contract. ...

[134] The foregoing passage was also cited with approval in *Reger v. Savage*, 2007 BCSC 181, 155 A.C.W.S. (3d) 187. Thus, it can be seen that:

> [a] complete failure of consideration in a contract occurs where one of the contracting parties fails to receive the benefit or valuable consideration which springs from the root, and is the essence, of the contract.

[135] The defendant argues that this is precisely what has occurred in the present case. The main benefit that he sought to obtain from the buy-out and promissory note was the purchase of a $300,000 debt owed by the Alberta Company to the plaintiff. However, as all or at least most of this debt does not exist, his position is that he has not received the essence of what he contracted for.

[136] I agree with the defendant's characterization of this issue that there were two separate contracts. The defendant, given that there was not an amount approaching $300,000, obtained no benefit from the contract. The purpose of the entire buy-out was to transfer to the defendant the $300,000 that the plaintiff purported was retained from the Alberta Company. This benefit was not received. The contract for the plaintiff's equity and debt claims constituted two separate contracts. The defendant received what he bargained for respecting the shares but not the debt. The contract was specific as reflected in the document entitled the Covenant and Indemnity Agreement. The parties contracted to sell all of the plaintiff's debt claims against the company, some of which may have been unrelated to the 18% interest provision (although a large percentage of the $300,000 valuation was clearly based on supposed debts owed to the plaintiff related to his initial funding of the properties plus interest).

[137] In an email sent March 27, 2006 to Emil Sadek from Branko Palcic, he stated:

> My calculations show that on that day (March 31, 2006), the following should be returned to:

Loan from	Capital	Interest	Total
503696 BC Ltd.	$134,100.00	$149,564.74	$283,664.74
ES	$70,227.98	$25,060.53	$91,041.69
BP/BPC	$127,956.58	$222,027.55	$349,989.13

[138] The plaintiff in cross-examination said he erred in the interest calculation and that actually $250,000 was owing. It is apparent that no clear amount can be determined owing to the plaintiff of capital given the conflicting evidence of the plaintiff. It is still clear, however, that the capital owing to Dr. Palcic by the company would be far less than $300,000.

[139] Given that I have found that there is no enforceable agreement for the payment of 18%, I find the evidence of the plaintiff that the debt owing to him of $300,000 by the Alberta Company has not been proven on a balance of probabilities.

[140] The defendant states in closing that "[i]f the Alberta Company did not owe Branko [Palcic] money then the promissory note falls entirely. If the Alberta Company owed Branko something, but less than $300,000, then the difference is the measure of damages and that amount can be set off by Emil [Sadek] pursuant to the express terms of the Covenant and Indemnity Agreement". I find on the evidence before me that the plaintiff has failed to prove any damages in this respect.

[141] The defendant says that the Alberta Company did not owe the plaintiff any money and that in fact the Alberta Company is owed money by the plaintiff. As discussed earlier, various accounting documents were tendered in court supported by a complete lack of expert evidence. As well, various spreadsheets of questionable reliability were tendered. Often, there were several versions before the Court. The Court is not in a position to assess the precise value of the smaller debts, if any, owed to Dr. Palcic by the Alberta Company, although it is clear that any debts owed to the plaintiff, stemming from principal still owed, would be far less than $300,000 in value. I find the presumption of consideration imported by the *Bills of Exchange Act* is rebutted. I am satisfied that the defendant has demonstrated that

the Alberta Company did not owe $300,000 to the plaintiff and consequently that he did not receive the benefit he bargained for from the transaction. Therefore the defendant's claim that there was a total failure of consideration is made out.

(5) Was there a misrepresentation on the part of the plaintiff which induced the defendant to enter into the contract for the promissory note?

[142] The defendant claimed damages for fraudulent misrepresentation. In *Meslin v. Lee*, 2011 BCSC 1208, [2011] B.C.J. No. 1694, Gray J. considered the essential requirements for fraudulent misrepresentation to be found, at para. 82:

> ... to establish a fraudulent misrepresentation on the basis of recklessness, the person making the misrepresentation must be so reckless that he or she does not care whether he or she is speaking the truth. See G.H.L. Fridman, *The Law of Torts in Canada*, vol. 2 (Toronto: Carswell, 1990, at 123-124). The person making the representation must lack honest belief in the truth of what he or she is stating. See also para. 97 of 4*15703 B.C. Ltd v. JEL Investments Ltd.*, 2010 BCSC 202, as follows:
>
> > [97] In order to successfully defend the claim on the contract or obtain rescission, the defendants must prove that there was a fraudulent misrepresentation. Bauman J.A. (now C.J.S.C.) summarized the requirements to establish a fraudulent misrepresentation inducing a contract in *Catalyst Pulp and Paper Sales Inc. v. Universal Paper Export Co.*, 2009 BCCA 307 at paras 55-60:
> >
> > > [55] Counsel for UPE cited G.H.L. Fridman, Law of Contract in Canada, 4th ed. (Scarborough: Carswell, 1999) at 309-310, where the learned author described a case of fraudulent misrepresentation as consisting of four elements:
> > >
> > > (a) the wrongdoer must make a representation of fact to the victim;
> > >
> > > (b) the representation must be false in fact;
> > >
> > > (c) the party making the representation must have either known it was false or made it recklessly without knowing whether it was true or false; and
> > >
> > > (d) the victim must have been induced by the representation to enter into the contract.

[143] I am satisfied that the defendant has not established anything fraudulent in the actions of the plaintiff. Negligent misrepresentation was not pleaded or argued. Nor could this court find there to be negligent misrepresentation. There is no "special relationship" between the two parties such that there was a duty of care

owed by the plaintiff to the defendant: see *Queen v. Cognos*, [1993] 1 S.C.R. 87, paras. 33 and 79.

[144] What remains is the possibility of an innocent misrepresentation. A party may still be entitled to rescind a contract where a sufficiently important misrepresentation has induced him or her to enter into the contract.

[145] I accept the defendant's contention that the plaintiff represented to him that he was owed (at various times either approximately or exactly) $300,000 by the Alberta Company and that this debt flowed from the plaintiff's initial funding of the properties and the 18% interest provisions. Clearly the value of the very thing he was purchasing was a material fact. This representation was made repeatedly: orally, through the various spreadsheets sent to the defendant, and explicitly in the Covenant and Indemnity Agreement which was signed on the same date as the promissory note. I am not satisfied that this representation was made fraudulently with the intent to deceive, and I find that the plaintiff sincerely believed that he was owed this money, somehow, by the company. He prepared statements. He emailed the accountant. He discussed the debt with Emil Sadek. Not having believed or known his statement to be false, he cannot have had the intent to deceive. Nevertheless, the factual inaccuracy of his statements renders them innocent misrepresentations.

[146] It has long been the law that damages are unavailable in the case of an innocent misrepresentation (see for example *Jarvis v. Maguire*, [1961] B.C.J. No. 121, 28 D.L.R. (2d) 666 (B.C.C.A.)*, Kowalenko v. Northern Estate Advisers Ltd.* (1961), 28 D.L.R. (2d) 666 (B.C.C.A.) at para. 21). Nevertheless, a party may in certain cases obtain rescission as a remedy in the case of an innocent misrepresentation. The leading case in British Columbia on when an innocent misrepresentation will entitle a party to rescission of a contract is *Kingu v. Walmar Ventures*, [1986] B.C.J. No. 597, 10 B.C.L.R. (2d) 15, where McLachlin J.A. (as she then was), writing for the court, laid out the applicable test at para. 15:

> Rescission may always be obtained for fraudulent misrepresentation which induced the plaintiff to enter into the contract. But it may be obtained for innocent (non-fraudulent) misrepresentation only in cases where the plaintiff establishes the following requirements.
>
> (a) A positive misrepresentation must have been made by the defendant. ...
>
> (b) The representation must have been of an existing fact: ...
>
> (c) The representation must have been made with the intention that the plaintiff should act on it: ...
>
> (d) The representation must have induced the plaintiff to enter into the contract: ...
>
> (e) The plaintiff must have acted promptly after learning of the misrepresentation to disaffirm the contract: ...
>
> (f) No innocent third parties must have acquired rights for value with respect to the contract property: ...
>
> (g) It must be possible to restore the parties substantially to their pre-contract position: ...
>
> (h) An executed contract for the sale of an interest in land will not be rescinded unless fraud is shown: ...
>
> [Citations omitted.]

[147] As discussed previously, requirements (a) a positive misrepresentation of an existing fact, and (b) are made out on the facts before me. A positive misrepresentation was made that the debt existed and was worth approximately $300,000 and it clearly related to an existing fact. Multiple representations were made as to the exact value of the debt, including the explicit representation in the Covenant and Indemnity Agreement that it was worth exactly $300,000. The written and oral representations, I find, were made by Dr. Palcic to Emil Sadek and as a consequence Emil Sadek agreed to buy the debt, said to be around $300,000.

[148] Items (c) and (d) of the requirements for rescission require that the representation was made with the intention that the defendant act on it and that the representation did induce the defendant to act. The plaintiff says there was no misrepresentation and furthermore that the defendant had equal access to the Alberta Company's books and was aware of the same information as the plaintiff, and so could not have reasonably relied on his statements. The defendant after all

had a lawyer for part of the negotiation period, was a director of the Alberta Company, and was the bookkeeper for the JDP, it is argued.

[149] The defendant says that because the plaintiff claimed he was owed $300,000, he agreed to buy his loan. He testified that when he learned that the balance owing was not that amount, that was a representation that was not true. The defendant repeatedly stated what Dr. Palcic told him about the loan was not true. He testified to his understanding: "Mr. Palcic guaranteed by this covenant and agreement that he is owed – that the company 1096922 owes him – 300,000." He was in Fort Nelson working long days at the truck stop, and he testified consequently that he accepted the plaintiff's representations. It was clear, also, that the plaintiff was sending emails relating to the debt – importantly, the email to the accountant, Glen Gryzko, about how to account for the debt he says he was owed which was also sent to Emil Sadek.

[150] It has been clear throughout the course of this trial that the plaintiff is a more sophisticated business person than is the defendant. I find, given all of the testimony at trial, that the defendant admired the business acumen of the plaintiff and was aware of his comparative lack. He would often defer to the plaintiff on matters related to the properties development. In fact Werner Sadek was President of the Alberta Company, whereas the defendant did not even have signing authority on the company's bank account.

[151] In response to a question about the amount of $300,000, the defendant stated:

> At that time, Mr. Palcic come and says but I have $300,000 shareholder loan which company owes me and at that time then I agree, but I make sure that Mr. – Mr. Christiansen when he was representing me for the Fort Nelson did put down that is exactly written that Mr. Palcic has to guarantee that he – that's why I didn't buy his shares, I bought his shares separate with shareholder loan because I didn't know what was share – what kind of loan he has with company because I never deal with that. That's why he signed the amendment agreement – this agreement without me that he guarantees that he has $300,000 owing from the company.

[152] Emil Sadek further testified he told Dr. Palcic, "I will buy shares separate and I will buy your loan separate, but you have to guarantee that that's what it is". I find that the defendant relied upon the plaintiff's statement that the loan was $300,000. It was put to him in cross-examination that he did not rely upon the Covenant and Indemnity Agreement to believe that Branko Palcic had a $300,000 shareholder loan owing to him. He denied that assertion, stating he would not have made any payments had he known otherwise. The promissory note was signed because of the representations in the Covenant and Indemnity Agreement, according to the defendant's testimony. I accept that evidence. As put succinctly by the defendant, "I relied on his word".

[153] The representations were clearly made with the intention that the defendant act upon them. The plaintiff wished to sell debts he believed were owed to him and so his representations that the debts existed and that they were in excess of $300,000 were necessary in order to obtain a $300,000 price. That the defendant did act on the representations is evidenced primarily by the fact that he personally signed a promissory note for $270,000. I find he would not have signed such a note had he not believed himself to be acquiring something of similar value (in this case, the purchase of a debt claim of similar value). Of course, the existence of a representation does not in itself prove reasonable reliance. In this specific case, however, it is clear on all the evidence that the defendant's belief as to the value of the debts owed to the plaintiff did not originate with him (i.e. the defendant). Although the various spreadsheets were circulated and modified by both parties, the plaintiff formatted the spreadsheets and imbedded them with his assumptions (such as the existence of the 18% interest debts). The defendant, I find, put great faith in the "calculations" of his former close friend.

[154] I turn now to whether the Share Purchase Agreement is distinct from the agreement to purchase the loan.

[155] The Share Purchase Agreement states in the recitals:

> AND WHEREAS Palcic and Sadek have agreed that Sadek will buy Palcic's shares and that Palcic shall resign from the company as a director and

> officer; AND WHEREAS outside the terms of this agreement, Sadek has also agreed to repay loans to Palcic and his personal consulting company totalling $300,000.00.
>
> [Emphasis added.]

[156] I construe this Share Purchase Agreement term as underscoring that the two matters are separate. Furthermore the Share Purchase Agreement states:

> This agreement contains the whole of the agreement between the parties pertaining to the matters set forth herein and there are no warranties, conditions, or collateral agreements except as set forth herein.

[157] The defendant similarly testified that the two matters were separate. Accordingly I find that the promissory note is separate from the Share Purchase Agreement.

[158] Respecting the requirements (e) and (f) for rescission of a promissory note set out by McLachlin J., on the basis of innocent misrepresentation, the defendant promptly took steps to disaffirm the contract subsequent to discovering the misrepresentation and no third parties have acted promptly to obtain rights for value with respect to the contract property, satisfying items (e) and (f) respectively. It would be fairly simple to restore the parties to their pre-contract positions, simply by rescinding the promissory note and ordering repaid the money which has already changed hands, satisfying item (g). Item (h) is inapplicable.

[159] The Share Purchase Agreement being separate from the promissory note, it would not be appropriate to order rescission of the Share Purchase Agreement: see O'Sullivan, Elliot & Zakrzewski, *The Law of Rescission* (New York: Oxford University Press, 2008) at 14.22. As part of this Share Purchase Agreement, Palcic resigned as Director and Officer of the company. Rescission of the Share Purchase Agreement would require me to make an order for revesting title and changes to the company registry to give Dr. Palcic the statutory and contractual rights and privileges not only of a shareholder, but also of a Director. A further consideration against rescinding the Share Purchase Agreement is that there was consideration as well for

this agreement. Accordingly the Share Purchase Agreement is not ordered rescinded.

[160] The remedy of rescission would also be available for the lack of consideration of the promissory note. I find additionally that this is an appropriate case for rescission of the promissory note on the basis of innocent misrepresentation.

(6) Does the Covenant and Indemnity Agreement constitute a contractual warranty and provide for damages?

[161] The Covenant and Indemnity Agreement between Branko Palcic and Emil Sadek provides *inter alia*:

> Background
>
> A. Sadek has agreed to purchase shares owned by Palcic in 109622 Alberta Ltd.
>
> B. In connection with the purchase of shares, Sadek has also agreed to purchase a debt of 109622 Alberta Ltd. owed to Palcic (hereinafter referred to as the "Loan") for the amount outstanding on the Loan.
>
> In Consideration of Sadek purchasing the shares and the Loan Palcic covenants and agrees as follows:
>
> 1. Palcic represents and warrants that the balance outstanding on the loan is $300,000.
> 2. If Canada Revenue Agency, or other taxation authority, disputes that the balance of the Loan is $300,000 or makes a finding or assessment that the balance of the Loans less than $300,000 which either imposes and liability for tax or interest or penalties for tax on Sadek or deprives Sadek of a tax advantage which he would have had if the balance on the Loan had been $300,000 then Palcic agrees to:
>
> a. indemnify and save harmless Sadek for any such tax, interest or penalties; and
>
> b. to compensate Sadek for any such loss or tax advantages. ...

[162] Thus it is clear that the plaintiff represented and warranted that the balance of the loan was $300,000. Moreover this warranty was made in consideration for the purchase of the loan, and so it can be conceptualized either as part of one larger agreement with the promissory note or as a collateral warranty to the purchase of the loan.

[163] The plaintiff argues that the $300,000 figure in this representation was simply the buy-out figure agreed upon by the parties during the negotiation period and that the only remedy provided by the Covenant and Indemnity Agreement was the indemnification of tax, interest, or penalties if Canada Revenue Agency found the balance of the loan to be a different amount. I do not accept the first of these suggestions; it is stated explicitly that the balance on the loan is warranted to be $300,000.

[164] It was submitted by the defendant that, if there was nothing but the first clause noted above, it would be clear that he is not entitled to rely on this warranty and that the "addition of further terms does not diminish that effect." It is clear that in some situations, adding further terms to a contract will diminish the effect of earlier terms (for example a later term saying that an earlier term does not apply in a given situation), and the question remains as to whether in the present situation, this is what should be understood. It is a principle of contractual interpretation that contracts should be interpreted in such a way as to give meaning to all clauses. In *Hanna Collision Repair (1984) Ltd. v. Insurance Corp. of British Columbia*, 2009 BCSC 1200, 180 A.C.W.S. (3d) 426, Holmes J. stated the following at para. 17:

> Moreover, words in a contract are presumed to have meaning: *Pass Creek Enterprises Ltd. v. Kootenay Custom Log Sort Ltd.*, 2003 BCCA 580, 188 B.C.A.C. 110. Thus, "[t]he court should strive to give meaning to the agreement and 'reject an interpretation that would render one of its terms ineffective'": *Scanlon v. Castlepoint Development Corp.* (1992), 11 O.R. (3d) 744 at 770 (C.A.) quoting *National Trust Co. v. Mead*, [1990] 2 S.C.R. 410 at 425.

[165] It could be argued that to interpret the first clause as providing for damages in situations unrelated to tax consequences erodes the meaning of the second clause, but it is also true that the second clause could stand alone, and the plaintiff's interpretation renders the first clause somewhat redundant.

[166] I am of the view that the most sensible interpretation is that proposed by the defendant. The first clause provides a broad warranty that the balance on the loan is $300,000. The second clause then clarifies that even if a tax authority assesses

the value to be something else (values for tax purposes are often different than values for the purposes of financial calculations), then the warranty still applies. Furthermore, as I find that this agreement is somewhat ambiguous and that the plaintiff was responsible for the insertion of these terms, I would resolve such ambiguity against him as a result of the *contra proferentem* principle of contractual interpretation.

[167] I would assess the damages as the only amounts proven by the defendant in evidence, being the initial $30,000 he paid towards the total amount.

(7) Counterclaim – Damages for filing the Caveat

[168] The plaintiff filed the caveats on lots 6 and 7 of Property B. In one document he alleged that "By a partnership agreement dated July 16th, 2005, the Caveator became a beneficial owner of the said lands". In cross-examination he agreed that his reason for filing this document was to tie up the property and force the issue with respect to the sale proceeds. When asked in cross-examination about the existence of a partnership agreement he agreed there was none and stated the agreements of July 2007 were not a partnership agreement, but he relied on instead an agreement on the distribution of funds from Property B. I find that the defendant did not sign that agreement which was drafted by the plaintiff which sets out a proposed distribution of funds from lot 6 and 7. It is signed and dated July 20, 2005 by the plaintiff. In the copy before the court, only the plaintiff has signed the document. It is not a partnership agreement.

[169] On July 19, 2005 the day before that agreement was purportedly reached, the defendant had in fact already sent to the company's lawyer a different set of instructions on how the proceeds were to be divided. The difference between the defendant's faxed instructions and the agreement in an amount of $5,000 was to be dealt with. This amount was to be paid out to the defendant before the remainder of the proceeds went to the plaintiff (after paying an amount to Werner Sadek). The plaintiff later explained in a lengthy response that the agreement contained numerous documents. Given the plaintiff's position in this trial, to say there was a

partnership agreement is inconsistent with there being a joint venture agreement. While the plaintiff has asserted, and I find honestly believes, there was an agreement overall between the three parties, I do not find evidence of a partnership agreement. There was no other signed agreement of a partnership or a joint venture. Stating that the agreement on payout for the lots was a partnership agreement is difficult to reconcile against the plaintiff's position I do not accept this evidence.

[170] The defendant has claimed damages for economic loss arising from the filing of the caveat. The defendant testified that there had been some people who were looking at the property but when they learned of the caveat they walked away that was the extent of the evidence. I do not find that any damages have been proven by the defendant in this regard and accordingly dismiss this claim.

IX. CONCLUSION

The contractual arrangement between the plaintiff and the defendant

[171] At the heart of this dispute is a debt supposedly owed to the plaintiff, which was purchased along with a promissory note by the defendant for $300,000. In addition to the debt purchase is the Share Purchase Agreement of April 2006 wherein the defendant bought out the plaintiff's interest in the Alberta Company. That Share Purchase Agreement states "...whereas outside the terms of this agreement, Sadek has also agreed to repay loans to Palcic and his personal consulting company totalling $300,000.00 [emphasis added]." I find therefore that the parties did not intend for the share purchase and the debt purchase to be part and parcel of the same agreement. I find that the share purchase and the debt purchase constitute two separate and distinct contracts.

[172] I find that neither the defendant nor his brother owed 18% interest to the plaintiff in 2006 as there was no agreement entered into by the three as set out above.

[173] I find that no debt owing to the plaintiff based on interest of 18% was transferred at any time to the Alberta Company and that no debts other than those held by the Alberta Company were the subject of the buy-out transaction.

[174] I find that the promissory note fails for a lack of consideration.

[175] I find that there was an innocent misrepresentation by the plaintiff to the defendant, that the Alberta Company had assumed debts comprised in large part by the 18% interest provision and that he was consequently owed approximately $300,000 by the Alberta Company. This representation was false, however, and induced the defendant to enter into a contract for the outstanding debt and sign the promissory note.

[176] I have found no evidence pointing to fraud in the representations made by the plaintiff to the defendant. I find that the plaintiff genuinely believed he was owed approximately $300,000 by the Alberta Company. The defendant claimed damages for breach of contractual warranty. In that regard I award the defendant $30,000. In respect of the economic loss arising from the action of filing caveats, damages were not proven in evidence. Instead, in final argument the defendant focused his relief sought on rescission and return of his monies. Consequently, the defendant's claim to punitive and/or aggravated damages necessarily fails.

[177] I am ordering the promissory note to be rescinded, and the parties to be returned to their pre-contract positions. In addition to $30,000 in damages, I order the return to the defendant of the payments he made to Dr. Palcic of $27,600. I order rescission of the promissory note of $270,000. Accordingly, there will be judgment to the defendant in the amount of $57,600. I award interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79, at the prevailing rates from July 1, 2007.

X. COSTS

[178] In the event that counsel is unable to reach an agreement respecting costs, counsel may within 30 days of the release of this judgment, speak to costs by advising the Registry.

"Maisonville J."
Maisonville J.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Canada (Attorney General) v. Khonsari,* 2017 BCSC 422

Date: 20170123
Docket: S062459
Registry: Vancouver

Between:

Attorney General of Canada
On behalf of Her Majesty the Queen in Right of Canada
as represented by the Minister of National Revenue

Plaintiff

And

Babak Khonsari

Defendant

Before: The Honourable Madam Justice Warren

Oral Reasons for Judgment

Counsel for the Plaintiff:	Ori J. Kowarsky E. Logan (A/S)
Counsel for Defendant:	Alexandra Cocks Jack Ruttle (A/S)
Place and Date of Hearing:	Vancouver, B.C. January 19, 2017
Place and Date of Judgment:	Vancouver, B.C. January 23, 2017

Introduction

[1] This is an action on an earlier judgment of this Court ordering the defendant to pay the plaintiff the sum of $34,881.74. The plaintiff is the federal Crown. The earlier judgment resulted from student loan debt incurred by the defendant roughly 25 years ago. The plaintiff now applies for final judgment in the amount of $53,864.30, comprised of the principal amount of the previous judgment and post-judgment interest accrued to the date this action was commenced, plus interest thereafter.

[2] The Notice of Application expresses two legal bases for the relief sought: first, that the defendant's Response to Civil Claim discloses no defence and should be struck out and judgment should be pronounced in favour the plaintiff pursuant to Rule 9-1(5), and second, in the alternative, that there is no *bona fide* triable issue such that summary judgment should be pronounced in favour the plaintiff pursuant to Rule 9-6. The application was actually argued by both parties, in substance and without objection, as a summary trial application pursuant to Rule 9-7, with little mention of the distinctions existing between applications to strike pleadings, applications for summary judgment and summary trial applications. In the circumstances, I have treated the application as a summary trial application and have decided the issues under Rule 9-7.

Background

[3] Between 1983 and 1991, the defendant obtained a series of student loans pursuant to the *Canada Student Loans Act*, R.S.C. 1985, c. S-23. By 1992 the principal amount outstanding was $23,712 and interest was payable, under the loan agreements, at 11% per year. The defendant has never made any payments.

[4] In 1992, written demands were made for repayment but to no effect. A collection agency was retained in 1993 to assist in the recovery of the debt. This too was unsuccessful.

[5] In late 1994 a demand letter was sent from counsel for the plaintiff to the defendant at 402–1949 Comox Street Vancouver, demanding payment in full. The defendant maintains he did not get this letter but he acknowledges that he was living at that address with his parents at the time.

[6] On April 22, 1996, an action was commenced in this Court (the "First Action"). In an Affidavit of Service made on April 25, 1996, a process server swore that he personally served the defendant with the Writ of Summons and Statement of Claim in the First Action on April 23, 1996 at 207–1949 Comox Street Vancouver. The Affidavit does not set out the process server's means of knowledge concerning the identity of the person he served. The defendant denies being served with the Writ of Summons and Statement of Claim in the First Action although he acknowledges that he was living, with a roommate, at that address at the time.

[7] The defendant did not file a Statement of Defence in the First Action and on May 8, 1996, the plaintiff obtained default judgment (the "First Judgment"). The First Judgment was comprised of the principal amount of $23,712, interest of $10,504.74 and costs of $665, for a total of $34,881.74.

[8] On May 10 1996, the plaintiff's counsel sent a first post-judgment demand letter to the defendant at 402–1949 Comox Street, enclosing a copy of the First Judgment, requesting payment in full, and offering to make suitable repayment arrangements, among other things. The defendant denies receiving this letter. Suite 402–1949 Comox Street was his parents address and, as already mentioned, he acknowledges that he lived with them there until the spring of 1996 when he moved to Suite 207 in the same building where he was residing on May 10, 1996.

[9] Counsel for the plaintiff subsequently obtained a consumer report from Equifax that indicated the defendant's address had changed to 1019 Bute Street. That report specifically referenced the First Judgment. A second post-judgment demand letter was sent to the defendant in January 1999 to the Bute Street address. The defendant denies receiving that letter.

[10] With the assistance of skip tracers or locate agents, counsel for the plaintiff discovered two potential alternative addresses for the defendant. The first was at 306–1949 Comox Street to which a third post-judgment demand letter was sent in July 1999. The second was 1916 Purcell Way in North Vancouver to which a fourth post-judgment demand letter was sent on February 1, 2001. The defendant denies receiving these letters.

[11] Counsel for the plaintiff then discovered an address for the defendant's parents in Burnaby to which a fifth post-judgment demand letter was sent on October 25, 2001. There is no dispute that the defendant's parents resided at that address at the time, but the defendant denies receiving this letter as well.

[12] Between December 2002 and March 2005, counsel for the plaintiff from time to time made unsuccessful efforts to locate the defendant. On February 21, 2005 a sixth post-judgment demand letter was sent to the Burnaby address of the defendant's parents. The defendant denies receiving this letter.

[13] On April 12, 2006, soon before the expiry of the 10-year limitation period applicable to the enforcement of the First Judgment, the plaintiff commenced the current action. Unsuccessful attempts were made by counsel for the plaintiff to serve the Writ of Summons and Statement of Claim in this action at the Burnaby address of the defendant's parents. In an Affidavit of Attempted Service, a process server swore that he spoke to a female occupant at that address who acknowledged that it was the Khonsari residence but claimed that she did not know the defendant.

[14] In April 2007, the plaintiff obtained an order renewing the Writ of Summons and Statement of Claim in this action for a year. Plaintiff's counsel continued with unsuccessful efforts to locate an address for the defendant.

[15] In April 2008, the plaintiff obtained an order renewing the Writ of Summons and Statement of Claim for three months and also obtained an order for substitutional service permitting the plaintiff to serve the defendant by posting the Writ of Summons and Statement of Claim and a copy of the substitutional service order on the main entrance door at his parents' Burnaby address and by sending those documents by regular mail to their address. There is no dispute that service was effected in May 2008 in accordance with the substitutional service order. There is no dispute that at the time, the defendant's parents were residing at the Burnaby address where service was effected. However, the defendant denies becoming aware of this action at that time.

[16] The defendant did not file a statement of defence in this action and, on May 26, 2008, a second default judgment was granted (the "Second Judgment"), this time in the amount of $59,345.10, which was comprised of the face amount of the First Judgment; that is, the $34,881.74, plus post-judgment interest accrued under the *Court Order Interest Act*, R.S.B.C. 1996, c. 79, from the date of the First Judgment and costs.

[17] After obtaining the Second Judgment, plaintiff's counsel sent three post-judgment demand letters to the defendant's parents' Burnaby address. These were sent on May 27, 2008, May 15, 2009 and March 2, 2010.

[18] In April 2010, plaintiff's counsel engaged another locate agent to assist in locating the defendant. In August 2010, a report from the locate agent advised that the defendant was living in Japan with his wife. At that time counsel for the plaintiff closed their collection file and returned it to the Canada Revenue Agency ("CRA"), which was responsible for student loan collection.

[19] Between January 2011 and November 2014, the CRA continued with some collection efforts. In November 2013, the CRA received confirmation from the defendant's employer, Apple Canada, of the defendant's residential address. The residential address the employer provided was the same Burnaby address to which the plaintiff had been sending correspondence and at which substitutional service of the Second Action was effected. Another demand letter was sent to that address on December 23, 2013. There was no response. Ultimately, in September 2014, the plaintiff obtained a Garnishing Order naming Apple as garnishee. The plaintiff was then successful in garnishing the defendant's wages.

[20] None of the letters that were sent to the defendant at the various addresses to which I have referred were returned by Canada Post. However, the defendant maintains that he was unaware of the First Action and this action and that he was unaware of both judgments until his wages were garnished in the fall of 2014. He has deposed that between 1991 and 1993 he was living in Japan; from 1999 to 2000 he was living in Europe; from 2006 to 2008 he was predominantly traveling abroad and when he was in Canada he changed residences on multiple occasions; and between 2009 and 2011 he was living in Japan. There is no evidence

of the defendant taking any step to keep the plaintiff informed as to his whereabouts or to make any inquiry of the plaintiff as to the status of his student loan debt.

[21] About six months prior to learning about the judgments, the defendant and his wife purchased a condominium in Burnaby, in the same building where his parents reside. He has deposed that his parents provided the down payment of approximately $95,000 and that this was a gift to him, his wife, and his then newborn son. In March 2014, when he applied to the Royal Bank for a mortgage to purchase the condominium, the Royal Bank conducted a credit check. He deposed that he was advised by a bank employee that the credit report was "clear", showing "no debts or judgments". He deposed that given the lengthy passage of time since he received the student loans and the limitation period applicable to an action to collect on the student loan debt, he believed that he was no longer required to pay back the loans. He deposed that this belief was confirmed when the credit check conducted by the Royal Bank showed no indication of the debt in question. He also deposed that had he known about the judgments he would not have gone through with the purchase of condominium and instead would have sought advice from a lawyer or a trustee in bankruptcy because he does not have the ability to satisfy the debt without losing the condominium. He earns about $39,000 a year, which he says is barely enough to meet his family's basic living expenses.

[22] The actual credit check that was performed by the Royal Bank is not in evidence. There is no evidence from the bank employee as to what she did to perform the credit check, where she sought the information, or specifically what the results of the credit check were. There is no evidence from the defendant to the effect that he asked the credit agency, either personally or through the bank representative, to make inquiries of the plaintiff concerning the status of the student loan debt.

[23] Upon learning about this action, the defendant applied for an order setting aside the Second Judgment, an order for a permanent stay of the action, or in the alternative an order that the Writ of Summons and Statement of Claim be struck as an abuse of process. Among other things, the defendant submitted that the plaintiff's extended delay in taking steps to enforce the First Judgment amounted to an abuse of process.

[24] The application was heard by Justice Affleck on February 12, 2016. On April 12, 2016, Justice Affleck set aside the Second Judgment and granted the defendant 21 days to file a Response to Civil Claim. He dismissed the balance of the relief sought by the defendant. Among other things, Justice Affleck made the following findings:

- neither action came to the defendant's notice until he became aware of the garnishing proceedings in 2014;
- the plaintiff took various steps to enforce its judgments and its conduct in that regard could not reasonably be described as oppressive or vexatious amounting to abuse of process;
- the plaintiff's efforts to serve the defendant were thwarted but there was no impropriety in the plaintiff's conduct and the plaintiff's inability to serve the defendant was made more difficult by the defendant's frequent and lengthy absences from Canada; and
- there was no evidence the plaintiff deliberately waited until the defendant had purchased an exigible asset before it took execution proceedings but even if it had, there was no basis for criticism because "a judgment creditor has several years to take steps to execute on the judgment and if the judgment debtor acquires an exigible asset in those years the creditor is entitled to pursue its rights".

[25] The defendant then filed a Response to Civil Claim raising two defences. First, the defendant says the plaintiff is precluded from enforcing the First Judgment at all as a result of the application of the doctrine of promissory estoppel. Specifically, the defendant pleads that the plaintiff owed him "a legal duty" to effect service of the first Writ, to take reasonable steps to enforce the First Judgment and to effect service of the second Writ; that the plaintiff's failure to satisfy that duty constituted a representation that the plaintiff did not intend to enforce the First Judgment; that the defendant relied on the representation and changed his position by purchasing the Burnaby condominium; and that it would now be unjust and unfair for the plaintiff to seek to enforce the First Judgment by way of the present action. Second, in the alternative, the defendant says the post-judgment interest accrued on the First

Judgment pursuant to the *Court Order Interest Act*, which his counsel says amounts to $28,012.75, is an extravagant and unconscionable penalty from which he should be relieved pursuant to s. 24 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253.

Issues

[26] The following three issues must be resolved:

1. Is this matter suitable for resolution by way of summary trial?

2. Has the defendant made out the defence of promissory estoppel?

3. If the defence of promissory estoppel does not succeed, should the defendant be granted relief from forfeiture under s. 24 of the *Law and Equity Act*, so as to preclude the plaintiff from recovering the post-judgment interest that has accrued on the First Judgment?

Suitability

[27] The question of whether to proceed with a summary trial is discretionary. Pursuant to Rule 9-7(15), judgment may be granted unless the court is unable, on the whole of the evidence, to find the facts necessary to decide the issues of fact or law, or the court is of the opinion that it would be unjust to decide the issues on the application.

[28] The defendant does not allege that as a result of conflicts in the evidence I am unable to find the facts necessary to decide the issues of fact or law. Rather, the defendant says it would be unjust to decide the issues, at this time, because he has not yet had the opportunity to conduct an examination for discovery of a representative of the plaintiff. The defendant has not delayed in his attempts to conduct discovery. To the contrary, the defendant took steps to secure the presence of a representative of the plaintiff at an examination for discovery but the plaintiff did not agree to make a representative available. This led to an application by the defendant to compel the plaintiff to produce a representative. On November 3, 2016, Master Keighley dismissed that application. He also ordered that examinations for discovery not take place until after January 31, 2017. These orders were

granted in circumstances where it was known that this application was going to be coming on for hearing on January 19, 2017.

[29] The leading case on suitability is *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.), where Chief Justice McEachern emphasized that the summary trial procedure "may not furnish perfect justice in every case" and that "the safeguards furnished by the Rule and the common sense of the chambers judge are sufficient for the attainment of justice in any case likely to be found suitable for this procedure". He also set out several factors to be considered in determining whether it would be unjust to resolve the issues through a summary trial:

> [48] 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.

[30] There are cases where an application for summary trial has been dismissed because the chambers judge found that an issue could be bolstered by discovery that had yet to occur: *Central Mountain Air Ltd. v. Corporation of the City of Prince George*, 2012 BCSC 1221; *Bank of British Columbia v. Anglo-American Cedar Products Ltd.* (1984), 57 B.C.L.R. 350 (S.C.). In *Bank of British Columbia v. Anglo-American Cedar Products Ltd.* Macdonald J. denied an application for summary trial because there was some evidence with "*prima facie* plausibility" that merited further investigation and could possibly bolster the defence through discovery. However, "there is no rule that discovery must always take place before a matter can be dealt with by way of summary trial" and "arguing 'with the aid of the discovery process is something might turn up' is insufficient to defeat a summary trial application": *Tassone v. Cardinal*, 2014 BCCA 149 at para. 38.

[31] The question is whether, in this particular case, it would be unjust to proceed with a summary trial before the defendant has conducted an examination for discovery because it is *prima facie* plausible that the defendant's case could be bolstered by discovery.

[32] The defendant submits a discovery is required to permit him to attempt to bolster the promissory estoppel defence. Specifically, counsel for the defendant said that she seeks to explore the issue of the credit bureau, how credit checks work, the steps the plaintiff normally takes with respect to registering judgments and perhaps debts as well with the credit bureau, the steps that were actually taken in this case, whether someone made a mistake in not registering the judgment with the credit bureau or whether the decision not to register was a deliberate one.

[33] I am not persuaded that the defendant's case could be bolstered by an examination for discovery.

[34] First, the defendant does not need a discovery of the plaintiff in order to obtain evidence with respect to how credit checks work. Among other things, inquiries could be made of the bank representative who conducted the credit check the defendant relies on. In addition, inquiries could be made of the credit agency in question to ascertain how that agency obtained the information it has in respect of the defendant. There is no evidence that any of these steps were taken.

[35] Second, the failure of the plaintiff to register the debt, the judgments or both with a credit agency does not amount to a representation that would ground the defence of promissory estoppel, either on its own or together with any other alleged failures on the plaintiff's part to bring the matter to the defendant's attention. The first element of promissory estoppel requires the defendant to establish that the plaintiff has, by words or conduct, made a representation that was intended to affect its legal relationship with the defendant and to be acted on by the defendant. Even if an examination for discovery provided evidence to the effect that the plaintiff normally registers judgments or debts with the credit bureau but in this case did not, whether as a result of mistake or as a result of a deliberate decision, that would not support a finding that the plaintiff represented the debt was not owed or was no longer enforceable. I have not overlooked the evidence that does exist to the effect that the First Judgment was in fact registered with some kind of credit agency because it turned up on the Equifax consumer report obtained by the plaintiff before the second post-judgment demand letter was sent to the defendant in January 1999 to the

Bute Street address. Nevertheless, even if the plaintiff failed to take some step to keep the First Judgment registered or to register the Second Judgment, that would not in my view assist the defendant because such a failure does not amount to a representation to the defendant at all.

[36] Finally, although this was not entirely clear, defence counsel may have been suggesting that a discovery might furnish evidence of a positive statement by the plaintiff to a credit agency to the effect that the debt was no longer owed. However even that would not, in my view, bolster the defence. I am not persuaded that a representation by the plaintiff to an unrelated third party could be characterized as a representation that the plaintiff intended to affect its legal relationship with the defendant or a representation that the plaintiff intended the defendant to act upon. Again, the defendant has not deposed that he asked the credit agency, either personally or through the bank representative, to make inquiries of the plaintiff concerning the status of the debt.

[37] For these reasons, I am not persuaded that it is *prima facie* plausible that the defendant's case could potentially be bolstered by discovery. Accordingly, it is not unjust to proceed with the summary trial in the absence of affording the defendant the opportunity to conduct an examination for discovery. This conclusion is fortified by a consideration of other factors relevant to the question of whether it would be unjust to proceed. The debt has been outstanding for roughly 25 years. The plaintiff has made efforts to collect on the debt, including sending letters; retaining process servers, skip tracers, locate agents, and counsel; and commencing and prosecuting proceedings in this Court. It is reasonable to infer that the plaintiff has incurred costs as a result. The defendant made no efforts, until the fall of 2014, to keep the plaintiff apprised of his whereabouts or to make any inquiries as to the status of the loans. Putting the plaintiff to further cost and delay in order to afford the defendant the opportunity to conduct a discovery that has no realistic prospect of advancing his case would be inconsistent with the fundamental objective of securing the just, speedy and inexpensive determination of every proceeding on its merits.

[38] I now turn to the substantive defences.

Promissory estoppel

[39] As already mentioned, the defendant says the plaintiff is precluded from enforcing the First Judgment at all as a result of the application of the doctrine of promissory estoppel. Specifically, the defendant pleads that the plaintiff owed him "a legal duty" to effect service of the first Writ, to take reasonable steps to enforce the First Judgment, and to effect service of the second Writ; that the plaintiff's failure to satisfy that duty constituted a representation that the plaintiff did not intend to enforce the First Judgment; that the defendant relied on the representation and changed his position by purchasing the Burnaby condominium; and that it would now be unjust and unfair for the plaintiff to seek to enforce the First Judgment by way of the present action.

[40] The essential elements of promissory estoppel are well settled. The party relying on the doctrine must establish that: first, the owner of the legal right has, by words or conduct, made a representation which was intended to affect their legal relationship and to be acted on; and, second, that the other party, in reliance on this representation, acted on it or in some way changed his or her position: *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50 at para. 13. The doctrine is equitable. As such, it should be applied flexibly, and the court may exercise a wide jurisdiction to apply it in cases in which the assertion of a strict legal right would be unconscionable: *Chriscan Enterprises Ltd. v. St. Pierre*, 2016 BCCA 442.

[41] I have concluded that the first element has not been established in this case.

[42] There is no dispute that there was no positive communication between the plaintiff and the defendant that could constitute a representation of the sort required to establish the first element. Rather, the defendant says the plaintiff, through its conduct, represented to the defendant a lack of intention to enforce either the First or the Second Judgments. The conduct in question was what the defendant characterized as the plaintiff's "insufficient and unsuccessful attempts" to enforce the First and Second Judgments, as well as its failure to register the loan with the credit bureau.

[43] It is accepted that in the context of promissory estoppel, the representation need not be a positive one. Silence or inaction can be considered a representation where a duty is

owed to take steps that if omitted could be detrimentally relied upon: *Nathanson, Schachter & Thompson v. Inmet Mining*, 2009 BCCA 385 at para. 58.

[44] I was provided with no authority for the proposition that a creditor has any kind of duty or obligation to take steps to advise the debtor that the creditor expects the debt to be paid. While I accept that a contractual duty to do so could exist, there is no suggestion that any contractual duty existed in this case. I was similarly provided with no authority for the proposition that a judgment creditor has any kind of a duty or obligation to take steps to advise the judgment debtor that the judgment creditor expects the judgment to be paid, even where the judgment is a default judgment. I am not persuaded that any such duty exists. To the contrary, as stated by Justice Donald for the Court of Appeal in *Walker v. Blades*, 2007 BCCA 436 at para. 54, "In the absence of an agreement, the rule at common law is that the promisor must seek out his promisee ...". This reflects common sense. It would be contrary to public policy to impose a duty on a creditor to take steps to find his debtor or risk being estopped from demanding payment because this would encourage debtors to take steps to evade their creditors.

[45] In any event, I am not persuaded that the plaintiff's actions in seeking to recover on the student loans could be characterized as insufficient in any way. Even if the plaintiff failed to register with the credit bureau or, having registered, failed to maintain the registration, that would not, in my view, amount to insufficient or unreasonable conduct. As I have already outlined, the plaintiff did take significant steps to locate the defendant. These included retaining the services of a collection agency, sending several letters to addresses associated with the defendant none of which was returned, retaining skip tracers and locate agents, and employing process servers. I am not persuaded that there is anything more the plaintiff could have reasonably done, particularly given the amount of the debt and the costs associated with searching for a debtor who has failed to make any payments or take any step to keep the creditor apprised of his whereabouts. In the circumstances of this case, it would not be unfair or unconscionable to permit the plaintiff to enforce its legal rights.

[46] For these reasons, the defendant has failed to establish that the plaintiff has made any representation sufficient to ground the defence of promissory estoppel. In these

circumstances it is not necessary to determine whether the second element, namely detrimental reliance, has been established.

Relief from forfeiture

[47] As already noted, the principal amount of the original debt was $23,712. Contractual interest at 11% was payable under the relevant loan agreements. After the First Judgment was obtained, post-judgment interest pursuant to the *Court Order Interest Act* was payable. The defendant says the post-judgment interest, which his counsel calculates as $28,012.75, is an extravagant and unconscionable penalty from which he should be relieved under s. 24 of the *Law and Equity Act*.

[48] Section 24 of the *Law and Equity Act* provides that "the court may relieve against all penalties and forfeitures, and in granting the relief may impose any terms as to costs, expenses, damages, compensations and all other matters that the court thinks fit". This is a purely discretionary remedy: *Saskatchewan River Bungalows Ltd. v. Maritime Life Insurance Co.*, [1994] 2 S.C.R. 490 at 504. In deciding whether to grant relief, the court should consider whether the sum forfeited is out of all proportion to the loss suffered and whether it is unconscionable, in the traditional equitable sense, which depends upon the circumstances of each case at the time the penalty is sought to be enforced: *British Columbia Development Corporation v. NAB Holdings Ltd.* (1986), 6 B.C.L.R. (2d) 145 (C.A.) at paras. 35–37.

[49] It may be that there is some question about whether a court can relieve against penalties or forfeitures that are statutory in origin, as this one is: see for example *Lexis Holdings Int'l Ltd. v. Insurance Corporation of British Columbia*, 2009 BCSC 344 at paras. 49–51. It is not necessary for me to resolve that question because I have concluded that even if I could relieve the defendant of the obligation to pay post-judgment interest, it would not be appropriate to do so.

[50] The defendant says that it would be extravagant and unconscionable for the plaintiff to enforce its right to post-judgment interest because the large amount of interest accrued was caused by the plaintiff's delay in enforcing its claim; the defendant was not given proper service of either of the actions; the steps the plaintiff took to enforce the judgments were

insufficient and unsuccessful; the defendant did not have actual knowledge that the plaintiff was still pursuing payment until September 2014, some 30 years after he first incurred a student loan; had he known about the judgments he would have considered declaring bankruptcy instead of purchasing the Burnaby condominium; and when he secured his mortgage he was told by the Royal Bank that his credit check was clear. There is a lot of overlap in those submissions. In effect, the defendant says it would be extravagant and unconscionable to permit the plaintiff to recover post-judgment interest because the plaintiff did not do enough to bring either of the actions to the defendant's attention or to enforce its judgments.

[51] For the reasons I have already expressed, I disagree. In my view, the plaintiff took all reasonable steps. The large amount of interest accrued was caused not by the plaintiff but, rather, by the defendant's failure to make any payments at all on a debt he knew he had incurred. Any uncertainty in his mind as to whether his obligation continued over the years resulted as much from his failure to inquire into the status of the debt as any other cause.

Conclusion

[52] The plaintiff is granted judgment in the amount claimed, namely the sum of $34,881.74, being the amount of the First Judgment, and interest calculated as post-judgment interest under the *Court Order Interest Act* to today's date.

[53] Is there any need to address costs?

[54] MR. KOWARSKY: Yes, My Lady. In the application before [Master] Keighley, [Master] Keighley at the end of his order also said that the Attorney General was to get costs in any event at a rate and scale to be determined by the trial judge. I would request that costs for the entire action at the usual rate be awarded to the Attorney General, and that would also take care of the costs under Master Keighley's application.

[55] THE COURT: Master Keighley's.

[56] MS. COCKS: We have no submissions. I accept my friend's position.

[57] THE COURT: The plaintiff shall have its costs at Scale B.

[58] MR. KOWARSKY: Thank you, My Lady.

[59] THE COURT: Thank you, counsel.

"WARREN J."

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Ferrer v. 589557 B.C. Ltd.,*
2020 BCCA 83

Date: 20200305
Docket: CA46156

Between:

Enrique Ferrer and Nelly Ferrer-Timmers

Appellants
(Plaintiffs)

And

589557 B.C. Ltd. doing business as Central Island Homepro Division of 589557 B.C. Ltd. and Rudolph John Brulotte

Respondents
(Defendants/Third Parties)

Before: The Honourable Mr. Justice Groberman
The Honourable Madam Justice MacKenzie
The Honourable Madam Justice Stromberg-Stein

On appeal from: An order of the Supreme Court of British Columbia, dated May 30, 2019 (*Ferrer v. Janik*, 2019 BCSC 1004, Nanaimo Docket S75691).

Oral Reasons for Judgment

Counsel for the Appellants:	G.A. Hooper
Counsel for the Respondents:	N.L. Trevethan E. LeDuc
Place and Date of Hearing:	Vancouver, British Columbia March 5, 2020
Place and Date of Judgment:	Vancouver, British Columbia March 5, 2020

Summary:

The plaintiffs engaged the defendants to perform an inspection of residential property they were purchasing. Their contract limited the inspectors' liability to $551.25. A defect appeared in the residence a few weeks after the plaintiffs took possession and they sued the inspectors, among others. On a summary trial on the issue of whether the clause limiting liability was applicable and enforceable, the judge held for the inspectors. The plaintiffs appealed. Held: Appeal dismissed. Determination of an issue by way of summary trial is available where the case meets established criteria of suitability. It is not helpful to describe such cases as limited to those exhibiting "extraordinary, exceptional, or compelling reasons for severance". The judge made no error in finding that the liability limitation issue was suitable for summary trial. With respect to the applicability of the contractual limitation, the plaintiffs' suggestion that this might be a case involving "gross negligence" is untenable. Gross negligence must be pleaded. In this case, it was not, nor does it fairly arise on the allegations contained in the pleading. There is no public policy basis for refusing to apply the contractual clause limiting liability.

[1] **GROBERMAN J.A.**: This is an appeal from an order of a Supreme Court judge made on a summary trial under Rule 9–7 of the *Supreme Court Civil Rules*. The summary trial concerned only a single issue: whether a limitation of liability clause (the "Limitation Clause") in a home inspection contract was effective to limit the liability of the home inspection company and its inspector (the "Inspection Defendants") to the amount paid for the home inspection. The judge found that the Limitation Clause was effective, and declared that the maximum amount for which the Inspection Defendants could be liable to the plaintiffs was $551.25.

[2] The plaintiffs appeal, contending that the judge erred in a number of respects. While they organize their arguments under somewhat different headings, I would characterize them as being that the judge erred by:

a) embarking on a summary trial of a single issue in a situation where that was inappropriate;
b) finding that the Limitation Clause applied to the claim as pleaded; and
c) holding that the Limitation Clause was enforceable.

[3] In my view, the chambers judge made no reversible error, and for reasons that follow, I would dismiss the appeal.

Background to the Litigation

[4] On August 9, 2014, the plaintiffs entered into a contract to purchase residential property in Parksville. The purchase was subject to them obtaining and approving a home inspection report by August 22, 2014. With the assistance of their real estate agent, they engaged the Inspection Defendants to perform a home inspection. The written contract provided for a fee of $525.00 for the inspection, plus GST of $26.25.

[5] The contract contained provisions limiting the Inspection Defendants' liability, including the Limitation Clause, which reads as follows:

> 2.1 In the event of any errors, omissions, breach of contract, and/or negligence by the Inspector the Client hereby agrees to the following restrictions on their legal rights:
>
> …
>
> d) The Inspector's total liability to the Client for errors, omissions, breaches of contract and/or negligence in any part of the Inspection or Inspection Report shall be limited to the amount of the fee paid for the inspection. For greater clarity this means that if the Client sues the Inspector any damages awarded cannot exceed the cost of the Inspection.

[6] In the contract, the word "Client" refers to the plaintiffs, and the term "Inspector" is defined to include the Inspection Defendants.

[7] On entering into the contract, the plaintiffs' attention was specifically drawn to the Limitation Clause, which they initialed. The judge found that "Mr. Ferrer read and understood the [contract] before he signed it and … Mrs. Ferrer-Timmers deferred to her husband's decision regarding its suitability". There is no suggestion on this appeal that the plaintiffs were unaware, when they entered into the contract, that it contained the Limitation Clause.

[8] The home inspector, Mr. Brulotte, completed his inspection of the home on August 15, 2014, taking 5½ hours to do so. He delivered his report the same day. The report was a positive one. While Mr. Brulotte made a few recommendations for

maintenance to be done on the property, he did not detect any major deficiencies or serious problems.

[9] The plaintiffs accepted the report and paid the invoice. They removed all conditions from the contract of purchase and sale that same day. The purchase of the property closed on September 26, 2014, and the plaintiffs took possession of the property the following day.

[10] On November 22, 2014, the plaintiffs discovered water leaking into the house from a sundeck. They allege that, as a result of deficiencies in the home, they have suffered financial damage in excess of $350,000. They filed a notice of civil claim, seeking compensation from the vendors (who were also the builders of the home), the City of Parksville, and the Inspection Defendants. In a separate action, to be tried at the same time, they have sued the realtors involved in the transaction. The claim against the Inspection Defendants is particularized with a list of alleged "deficiencies and negligent misrepresentations".

[11] In the "Legal Basis" portion of the notice of civil claim, the plaintiffs say the following:

> 1. This is an action in negligence ….
>
> 2. The Plaintiffs rely upon the common law of negligence as against the Defendants …; specifically:
>
> a. the Defendants each owed the Plaintiff a duty of care;
>
> b. the Defendants … breached the standard of care;
>
> c. the breach of the standard of care by the Defendants caused injury to the Plaintiffs; and financial damages of over $350,000; and
>
> d. the acts and/or omissions of the Defendants … were the actual and legal cause of the injury and losses of the Plaintiffs.
>
> 3. The Plaintiffs rely upon the *Negligence Act*, R.S.B.C. 1996, c. 333 against the Defendants ….
>
> 4. The Plaintiffs rely upon the common law of damages against the Defendants ….
>
> …
>
> 7. The Plaintiffs say that Rudolph Brulotte has failed to report numerous visible deficiencies existing at the time of the inspection and negligently

> misrepresented the conditions of the Residence at the time the inspection was carried out.

[12] There is no suggestion in the notice of civil claim that the Inspection Defendants are guilty of anything beyond ordinary negligence. There are no express allegations of fraud, recklessness, or gross negligence, nor are there any allegations against them that would suggest such a characterization of their conduct.

[13] In the response to civil claim, the Inspection Defendants plead the provisions of the contract, including the Limitation Clause. In the Legal Basis portion of the response, they include a statement that "the plaintiffs' damages are limited to the inspection fee". The plaintiffs did not file a reply to the response to civil claim.

The Application and Judgment in the Court Below

[14] The Inspection Defendants filed an application on July 20, 2018, seeking an order that the plaintiffs' maximum recovery against them is limited to the inspection fee. The application set out the terms of the contract, and outlined the argument to the effect that the Limitation Clause was clear and enforceable.

[15] The plaintiffs' response to the application details the history of the real estate and inspection transactions and the events leading to the discovery of damage. The response does not include any suggestion that the Inspection Defendants' conduct lay outside the scope of the Limitation Clause. Instead, it included general assertions that it would be unjust to enforce the Limitation Clause, and contrary to public policy.

[16] After hearing the parties' submissions, the trial judge gave judgment in favour of the Inspection Defendants. She began her reasons by considering whether the issue of the enforceability of the Limitation Clause was suitable for summary trial. Her conclusions are as follows:

> [7] In my view, the issue raised in this application is suitable for summary trial. Unlike the factual and legal issues associated with the substantive claim, the factual and legal questions surrounding the issue presented for summary trial are not complex, and determining the issue will not cause delay in the proceedings. A trial on the substantive issues will likely be prolonged and expensive, but determination of the summary trial issue will not add to the complexity of the dispute. I do not view the summary trial application as

> litigating in slices. The parties would benefit from knowing whether the damages recoverable from the Applicants are limited to the Fee before they proceed to trial, since a finding in the Applicants' favour could impact the overall resolution of the matter. Therefore, I elect to exercise my discretion to determine the issue presented on summary trial.

[17] The judge then turned to the question of whether the Limitation Clause was applicable and enforceable. In doing so, she referenced the following paragraphs from *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)* 2010 SCC 4:

> [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* [*Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426], 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.

[18] On the first issue, the judge found that the allegations of negligence made by the plaintiffs, both in respect of the inspection itself and the completion of the home inspection report, "fall squarely within the scope of the Limitation … Clause."

[19] The judge acknowledged the plaintiffs' argument that the Inspection Defendants might have been guilty of "gross negligence", which conduct would lie beyond the scope of the Limitation Clause. She rejected that suggestion, noting, first, that gross negligence had not been pleaded. She also said that "the inspection was a visual inspection, and … the defects alleged were not observable on visual inspection". It is evident that she found no basis for the suggestion that this was a case involving gross negligence.

[20] On the second issue, the judge found that the contract was not unconscionable when it was entered into. There was no inequality of bargaining power: "[t]he Plaintiffs understood what they bargained for and were on equal footing with the [Inspection Defendants] in entering into the Inspection Contract". The judge also stated that the bargain was "not unfair, let alone substantially unfair" given the nature of the services being provided and the price being paid for them.

[21] With respect to the third issue, the judge found no overriding public policy that would outweigh the very strong public interest in the enforcement of contracts.

Analysis

Was the issue suitable for summary determination?

[22] Rule 9–7 of the *Supreme Court Civil Rules* includes the following provisions:

> **Application**
> (2) A party may apply to the court for judgment under this rule, either on an issue or generally, in any of the following:
>
> (a) an action in which a response to civil claim has been filed;….
>
> **...**
> **Judgment**
> (15) On the hearing of a summary trial application, the court may
>
> (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, ...

[23] On its face, the Rule appears to allow parties considerable freedom to bring particular issues on for summary determination apart from the balance of the litigation. Courts have, however, shown considerable reluctance to opine on particular issues independently of other issues in the litigation.

[24] In *Bacchus Agents (1981) Ltd. v. Philippe Dandurand Wines Limited*, 2002 BCCA 138, Southin J.A., for the Court, said this about the summary trial rule (then Rule 18A):

> [6] This is a useful rule intended to shorten litigation, thereby lessening its cost to the parties and to the public treasury and reducing delays in the process, it being an axiom, at least since Bacon's time, that justice delayed is justice denied.
>
> [7] When, however, as in this case, the rule is invoked to try "an issue" rather than the whole case - what I have often characterized as "litigating in slices" - it may become a hindrance to the "just, speedy and inexpensive determination" of the dispute "on its merits".

[25] In *Coast Foundation v. Currie*, 2003 BCSC 1781, at paras. 13–18, the court considered the circumstances in which summary determination of a discrete issue will be appropriate; this Court cited the decision with approval in *Kaler v. Kaler*, 2013 BCCA 57 at para. 24.

[26] In *Hryniak v. Mauldin*, 2014 SCC 7, the Supreme Court of Canada added its voice to the observation that the summary trial procedure should be accepted as a means of improving access to justice where it provides a fair and just process that is proportionate to the matters being litigated:

> [27] There is growing support for alternative adjudication of disputes and a developing consensus that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern reality and needs to be re-adjusted. A proper balance requires simplified and proportionate procedures for adjudication, and impacts the role of counsel and judges. This balance must recognize that a process can be fair and just, without the expense and delay of a trial, and that alternative models of adjudication are no less legitimate than the conventional trial.
>
> [28] This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible — proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure

[27] In *Greater Vancouver Water District v. Bilfinger Berger AG*, 2015 BCSC 485, the court considered a large number of authorities (most of which emanated from the British Columbia Supreme Court) on when it is appropriate to hive off an issue in

litigation for summary trial. It distilled from the cases a list of factors to be considered:

> [110] In summary, the authorities in BC, including *Hryniak*, make clear that the factors the court must consider on applications to determine by summary trial only part of the issues in the lawsuit are:
>
> a) whether the court can find the facts necessary to decide the issues of fact or law;
>
> b) whether it would be unjust to decide the issues by way of summary trial, considering amongst other things:
>
> i. the implications of determining only some of the issues in the litigation, which requires consideration of such things as:
>
> (1) the potential for duplication or inconsistent findings, which relates to whether the issues are intertwined with issues remaining for trial;
>
> (2) the potential for multiple appeals; and
>
> (3) the novelty of the issues to be determined;
>
> ii. the amount involved;
>
> iii. the complexity of the matter;
>
> iv. its urgency;
>
> v. any prejudice likely to arise by reason of delay; and
>
> vi. the cost of a conventional trial in relation to the amount involved.

[28] This list is a good indication of the factors that are typically of concern when a court is asked to deal with a single issue on a summary trial. I would not, however, suggest that all of these factors will be relevant in every case, and I would discourage a checklist approach to the question.

[29] There is a different line of cases, commencing with *Chun v. Smit*, 2011 BCSC 412, that adopts the test for severance of trial proceedings under Rule 12–5 as the test for the suitability of individual issues for summary determination under Rule 9–7. The test for severance of issues for trial under Rule 12–5 had, in a number of earlier cases, been described as being whether there are “extraordinary, exceptional, or compelling reasons for severance”.

[30] It is not clear to me that the considerations used to determine whether individual issues are suitable for summary determination under Rule 9–7 need to be

identical to those that are used, under Rule 12–5, to determine whether a conventional trial should be bifurcated. Often, the two situations will present quite different contexts, in terms of the efficiency of trial management and the allocation of judicial and litigant resources.

[31] We are concerned, on this appeal, only with the considerations to be applied under Rule 9–7, and nothing that I say should be taken as reflecting on the proper tests or practices under Rule 12–5.

[32] In my view, the "extraordinary, exceptional or compelling reasons" test, at least when applied under Rule 9–7, is a curious one. It is not clear why we should describe the concept using three near-synonyms in a disjunctive test. Nor does the test give us a clear picture of what it is about the reasons for severance that makes them "extraordinary", "exceptional," or "compelling".

[33] The case law under Rule 9–7 and its predecessor, Rule 18A, makes it clear that, absent good reason, courts should not isolate individual issues in a proceeding and decide them separately from the rest of the litigation. If that is all that is meant by the use of the phrase "extraordinary, exceptional or compelling reasons", then it is not objectionable, though I am not convinced that the phrase itself provides much in the way of guidance.

[34] In terms of what constitutes a good reason to decide an individual issue separately in a summary trial, it seems to me that the analytical approach represented by *Currie* and by *Greater Vancouver Water District* is more helpful in setting out the considerations that apply. Using that approach, I am not convinced the trial judge erred in ruling that the Limitation Clause issue was suitable for summary disposition.

[35] The Limitation Clause issue is a relatively straightforward one. It does not involve novel issues, and no unfairness results from determining it in advance of the other issues at trial. Further, disposition of the Limitation Clause issue will greatly

assist the parties in determining what resources should reasonably be devoted to the trial.

[36] While the judge did not specifically mention it, I would observe that one of the most important considerations in determining whether a single issue should be separated out and determined in a summary trial is the question of whether it is intertwined with other issues. In this case, there is very little connection between the Limitation Clause and other issues in the litigation.

[37] The judge stated that she did "not view the summary trial application as litigating in slices". The appellants say that she was wrong in that regard. As I see it, the expression "litigating in slices" is simply a way of describing the disposition of litigation in a sequence of hearings. In that sense, the current proceedings could be described as "litigating in slices", but the description is of no moment. Courts are wary of attempts to split up litigation into independent hearings, but in appropriate cases, they will permit that to occur.

[38] The chambers judge gave brief but cogent reasons for dealing with the Limitation Clause issue separately from other issues. She made no error in proceeding as she did.

Did the Limitation Clause apply?

[39] The plaintiffs contend that the judge erred in finding that the Limitation Clause was applicable in this case.

[40] First, they say that the judge considered the wrong notice of civil claim in her analysis, relying on a version from 2016 instead of the most recently amended version filed in 2019.

[41] It is unfortunate that the judge did not refer to the most recent amended notice of civil claim, but I am unable to agree that her failure to do so represents a material error. The most recent amendments provide some particularization of the claims, and expressly mention "negligent misrepresentation".

[42] The plaintiffs contend that one of the changes in the amended notice of civil claim is particularly important. The amended claim highlights one particular representation by the Inspection Defendants — a statement that the home is covered by a new home warranty. It is alleged that that statement was false, and was based on nothing more than the vendors' representation. I accept that that claim is an important part of the allegations of negligent misrepresentation.

[43] That said, the character of the allegations made in the amended statement of claim remains essentially the same as it was in the 2016 pleading: the claims are for negligent inspection and negligent misrepresentation. Both of those claims are covered by the Limitation Clause.

[44] The plaintiffs also contend that the judge erred in refusing to consider the possibility that an allegation of gross negligence might be found to be outside the scope of the Limitation Clause.

[45] The judge noted that gross negligence was not pleaded in this case. The plaintiffs cite two cases for the proposition that gross negligence need not be pleaded: *Schlosser v. Burns* (1951), 1 W.W.R. (N.S.) 255 (B.C.S.C.) and *Lapshinoff v. Wray*, 2018 BCSC 2315. I am not persuaded that those cases are good authority for that proposition.

[46] In *Schlosser*, the plaintiff sued in respect of the death of her father, who had been a gratuitous passenger in a motor vehicle. A legislative provision stated that no action lay for injuries to a gratuitous passenger unless the vehicle operator had been grossly negligent. The statement of claim alleged that the motor vehicle operator drove in a manner "contrary to" that section of the statute. The judge dismissed an application by the defendant to strike the claim, finding that the reference to the statutory provision constituted clear notice that the plaintiff was making an allegation of gross negligence. After making that finding, the judge added "I am in some doubt as to whether it is necessary to plead gross negligence specifically. Counsel for the plaintiff was unable to support his contention by authority. In the circumstances, it is unnecessary for me to decide the point".

[47] In *Bukmeier v. Creyke* (1998), 19 C.P.C. (4th) 31, [1998] B.C.J. No. 1319, a master was determining whether to strike a statement of claim. The original statement of claim, filed shortly before the expiry of the limitation period, simply alleged negligence. After the expiry of the limitation period, upon having been made aware of a statutory defence, the plaintiff amended the claim to allege gross negligence. The master, purporting to rely on *Schlosser*, held that gross negligence did not have to be pleaded. It is not apparent from the master's reasons whether the original statement of claim contained sufficient particulars to alert the defendant to the fact that gross negligence was being alleged.

[48] In *Bains v. Green*, 2012 BCSC 1733, a judge was considering whether to strike pleadings on the basis that they disclosed no cause of action. Some of the causes of action being pursued required proof of gross negligence, but gross negligence was not explicitly alleged. The judge, relying on *Bukmeier*, accepted that the pleadings should not be struck for failure to specifically allege gross negligence.

[49] To the extent that *Bukmeier* and *Bains* suggest that a pleading of ordinary negligence will suffice in a case that is dependent on proof of gross negligence, the reasoning does not appear to me to be sound. It is notable, however, that both arose in the context of applications to strike pleadings that were capable of amendment. In *Bukmeier*, the deficiency in the pleading had been remedied by the time of the hearing, and the only issue was whether the amendment should be allowed to stand. In *Bains*, the pleading exhibited a number of deficiencies, and required significant amendment, in any event.

[50] In *Lapshinoff v. Wray* (an appeal from which has recently been allowed: 2020 BCCA 31), the trial judge noted that gross negligence *had* been pleaded. He stated, however, in *obiter* that "the amendment to expressly claim gross negligence was not strictly speaking necessary", citing *Bukmeier* and *Bains v. Green*.

[51] In my view, the suggestion that gross negligence need not be pleaded, even where it is a necessary component of the claim, is incorrect. It has always been necessary to plead essential elements of a claim. Now that the notice of civil claim

form requires a party to set out the legal basis for the claim, it is even more apparent that where an allegation of gross negligence is critical, it must be pleaded.

[52] Typically, gross negligence will be pleaded explicitly, but a notice of civil claim or reply that provides unequivocal notice that the plaintiff is alleging gross negligence will be adequate, even if it does not use the words “gross negligence”. That is what occurred in *Scholsser v. Burns*. On the other hand, a pleading that merely alleges negligence, without more, is not adequate notice to a defendant that the plaintiff is alleging gross negligence.

[53] In the case before us, there is nothing in the notice of civil claim that provides notice that the plaintiffs intended to allege that the Inspection Defendants’ conduct amounted to gross negligence. Further, there was no evidence at the summary trial that suggested that anything done by the Inspection Defendants could amount to gross negligence. In the circumstances, the judge was right to find that the Limitation Clause applied to the claim.

Is there an overriding public policy that negates the Limitation Clause?

[54] The plaintiffs argue that the judge erred in finding that the limitation of liability clause is not contrary to public policy.

[55] At trial, they referred to changes to the *Home Inspector Licensing Regulation*, B.C. Reg. 12/2009 that were brought in by B.C. Reg. 70/2016. The 2016 amendment would prohibit the inclusion of a limitation of liability clause like the one in this case. The regulatory change was not retroactive. The judge correctly held that the change in the regulation did not serve to demonstrate an overriding public policy reasons for refusing to enforce the Limitation Clause. The fact that governmental objectives and policies change does not mean that they should retroactively override contractual arrangements. The plaintiffs have not pursued that argument on this appeal.

[56] The plaintiffs do contend that the judge should not have rejected the idea of an overriding public policy in the absence of a “full record”, citing the majority

judgment in *Precision Drilling Canada Limited Partnership v. Yangarra Resources Ltd.*, 2017 ABCA 378. The majority in that case considered that allegations of fraud should not have been rejected on a summary judgment application. A very limited factual record was available to the court, and there had been no opportunity to explore issues of credibility. The majority found that those issues were critical to a determination of the claim, and rejected the idea that it should be determined on a summary judgment application.

[57] In contrast, the proceeding in this case was a summary trial, not an application for summary judgment. The plaintiffs had a full opportunity to develop whatever record was necessary before the chambers judge. More than ten months intervened between the filing of the application and the date on which it was heard. The plaintiffs had conducted their examinations for discovery in advance of the hearing. If they wished to argue that the presence of gross negligence (or some other feature of the case) gave rise to an overriding public policy reason for refusing to apply the Limitation Clause, it was up to them to furnish appropriate evidence and make the argument on the Rule 9–7 application.

Conclusion

[58] In my view the chambers judge made no error in finding that the issue of the applicability and enforceability of the Limitation Clause was appropriately determined on a summary trial. Further, she made no error in finding the Limitation Clause to be both applicable and enforceable.

[59] I would dismiss the appeal.

[60] **MACKENZIE J.A.**: I agree.

[61] **STROMBERG-STEIN J.A.**: I agree.

[62] **GROBERMAN J.A.**: The appeal is dismissed.

"The Honourable Mr. Justice Groberman"

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Rochette v. Bradburn,*
2021 BCSC 1752

Date: 20210902
Docket: S194145
Registry: Victoria

Between:

Sylvie Rochette, Jim Tennant, and Laura Podgorenko

Petitioners

And

Bruce Bradburn, Arthur Roberts, Mary Matchett, and The Owners, Strata Plan 962

Respondents

Before: The Honourable Madam Justice D. MacDonald

Reasons for Judgment

Counsel for the Petitioners:	T. Morley
Counsel for the Respondents Bruce Bradburn, Arthur Roberts, and Marty Matchett:	M. Wehrung
Counsel for the Proposed Respondents Roger McGuire, James Allard, Mark Stevens, and Gerald Hauck:	A. Bookman
No other appearances	
Place and Dates of Hearing:	Victoria, B.C. June 21–24, 2021
Place and Date of Judgment:	Victoria, B.C. September 2, 2021

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Introduction

[1] The application before me concerns a strata property dispute between owners in Strata Plan 962 in Victoria, BC (the "Strata Corporation"). The dispute is between strata plan owners who live full-time in their strata suites and strata plan owners who rent out their suites. There have been ongoing tensions between the two types of owners.

[2] A petition was filed on September 20, 2019 by the petitioners, Sylvia Rochette, Jim Tennant, and Laura Podgorenko, seeking a number of orders against the then-members of the strata council (the "personal respondents"), who subsequently resigned. The personal respondents are Bruce Bradburn, Arthur Roberts, and Mary Matchett. The amended petition, filed on September 25, 2020, alleges breaches of the personal respondents' fiduciary duties owed as members of the strata council and breaches of the *Strata Property Act*, S.B.C. 1998, c. 43.

[3] The personal respondents pleaded the terms of a document they refer to as the "Release" in their February 3, 2021 amended response to the amended petition. They argue the Release, signed on January 29, 2021 between the Strata Corporation and the personal respondents, is a complete answer to the amended petition. The Strata Corporation also pleads the terms of the Release in its March 18, 2021 amended response to the amended petition. The petitioners do not acknowledge the document the personal respondents rely upon is a legally effective "release", but for ease of reference I refer to it as "the Release" in this judgment.

[4] The petitioners filed a March 26, 2021 application seeking to add a number of individuals as respondents to the petition (the "proposed respondents"). The proposed respondents are Roger McGuire, Jim Allard, Mark Stevens, and Gerald Hauck. The petitioners also seek to transfer the petition to the trial list and replace the amended petition with a proposed notice of civil claim.

[5] The personal respondents oppose both orders. The proposed respondents oppose being added as respondents to the petition and say, if they are added, it is premature to transfer the petition to the trial list.

[6] There is a May 7, 2021 cross-application filed by the personal respondents seeking dismissal of the entire petition as it relates to the personal respondents or, alternatively, seeking to strike portions of the petition. The personal respondents specifically seek the following, again relying on the Release:

> The amended petition filed September 25, 2020 be dismissed as against the Personal Respondents and/or the amended petition be further amended to strike out all paragraphs in which damages and/or declaratory relief are sought from the Personal Respondents.

[7] The petitioners strongly disagree that the petition ought to be dismissed, struck, or amended to strike out various paragraphs relating to the personal respondents.

[8] An issue of solicitor client privilege was adjourned generally. The other respondent named in the underlying petition, the Strata Corporation, did not appear before me as it is only responding to the issue of solicitor client privilege.

[9] If I find the petition should be dismissed, there will be no petition to transfer to the trial list. As a result, I address the personal respondents' application first. For the reasons that follow, I dismiss the personal respondents' application and grant the petitioners' application to transfer the petition to the trial list. I dismiss the petitioners' application as it relates to adding the proposed respondents.

Background

[10] The Strata Corporation is located at 1234 Wharf Street in Victoria, BC. It is comprised of common property and 57 strata lots. Of the 57 strata lots, the owners of approximately 31 strata lots participate in a profit-seeking rental pool. The owners of those strata lots are not ordinarily resident in the building. The other strata lots are generally occupied by owners who are ordinarily resident in the building. The owners of strata lots in the rental pool rent their lots through an agreement with the Victoria Regent Waterfront Hotel & Suites (sometimes referred to as "VRH Ltd."). It leases common property for its operations from the Strata Corporation. The common property includes two levels of parking, a "lobby" located on the third (main) floor, an

elevator area, hallways on the third through tenth floors, and a structure located on the eleventh floor.

[11] The petitioners, owners who live in their strata suites, commenced the underlying petition on September 20, 2019. They seek a number of orders, mostly in the nature of declaratory relief. However, they also seek damages against the personal respondents to be paid to the respondent Strata Corporation. The damages sought are to benefit the Strata Corporation, not the petitioners. The personal respondents are owners of strata lots in the Strata Corporation and are members of the rental pool.

[12] Two of the proposed respondents, Jim Allard and Gerald Hauck, each own a strata lot in the Strata Corporation and are members of the rental pool. The other two proposed respondents, Roger McGuire and Mark Stevens, each own a strata lot in the Strata Corporation, but they are not members of the rental pool. All four of the proposed respondents were appointed and served as members of the strata council after the resignation of the personal respondents. The proposed respondents were members of the strata council at the time the Release was signed.

[13] In their application, the petitioners set out the key events that are relevant to both applications. The personal respondents and proposed respondents take issue with a number of these facts. I set them out because they give an indication of the ongoing disputes between the parties, but I do not make any findings of fact:

Date	Event
Feb 23, 2019	The Strata Corporation elects a seven member strata council that includes the petitioners Rochette and Tennant and the respondents Bradburn, Roberts and Matchett.
May 31 - Jun 1, 2019	The Strata Council initiates discussions with VRH Ltd, about expanding the scope of the maintenance services provided by VRH Ltd. The issue that members of council that have a pecuniary interest in VRH Ltd. participating in any negotiations is a conflict of interest is raised.

Jun 1, 2019	The respondents Bradburn and Roberts exchange emails (including Matchett as an addressee) stating “our overriding priority is to obtain control of our Strata Council. All other objectives and ‘battles' right now are secondary” because the Petitioners are out to “destroy the Rental Pool”.
Jun 17, 2019	The Strata Corporation has a Special General Meeting (the “June SGM") in which a resolution was passed removing four members of the strata council: Sylvie Rochette, Jim Tennant, Jeremey Janzen and Leslie Welsh.
Jun 18, 2019	The Strata Council resolves to spend money to receive a legal opinion on the validity of the June SGM (despite no challenge to its validity) and whether the Strata Council can authorize payments to Wilson McCormack for legal services as an emergency expenditure.
Jun 21, 2019	Wilson McCormack provides a legal opinion that the June SGM was valid (at a cost of $4,223.44).
Jun 25, 2019	Wilson McCormack provides a legal opinion that the Strata Council can authorize payments to Wilson McCormack as an emergency expenditure (at a cost of $3,873.52).
Jun 25, 2019	The Civil Resolution Tribunal makes an order declaring portions of the existing rental restriction bylaw (Bylaw 39(1)) unenforceable. It is now clear that owners could rent their strata lots without having to participate in the Rental Pool.
Jun – Sep 2019	The Strata Council retains Wilson McCormack, and expends funds of The Owners Strata Plan 962, to draft a bylaw that would prevent owners from renting their strata lots unless the owner participated in the Rental Pool.
Aug 13, 2019	A demand for a special general meeting, pursuant to section 43 of the Strata Property Act, is delivered to Strata Council. The Strata Council retains Wilson McCormack and expends funds of The Owners Strata Plan 962 to provide an opinion on whether the demand is proper. The opinion is that there is a technical deficiency in the demand and the Strata Council declines to exercise its discretion to call a special general meeting.
Sep 22, 2019	The respondents Bradburn and Roberts [are] informed by Wilson McCormack that because of their interest in the VRH Ltd, they cannot have a role in renewing the Lease agreement between VRH Ltd. and The Owners Strata Plan 962. The Strata Council instructs Wilson McCormack to draft a resolution regarding that lease agreement. The extent and content of those instructions are unknown.

Oct 3, 2019	The Strata Council instructs the property management company to distribute an Amended Notice of Special General Meeting that includes Resolution #1 stating: “The owners by 3/4 vote approve the lease between The Owners, Strata Plan 962 and the Victoria Regent Hotel Ltd. pursuant to ss. 71 and 80(2) of the Strata Property Act on the same terms and conditions upon its expiry for an additional 3-year term commencing February 1, 2020.”
Oct 26, 2019	A special general meeting is chaired by Tony Gioventu, the executive director of the Condominium Home Owner's Association. The owners, by unanimous resolution, provide direction to council that it cannot enter into an agreement with the VRH Ltd. prior to a committee bringing back a negotiated consensus agreement to be voted on by the owners at a subsequent general meeting. There is no vote on Resolution #1.
Nov 1, 2019	The respondent Bradburn, as a member of Strata Council, contracts with a commercial real estate appraiser to prepare a report regarding an appropriate rental rate for the lease of common property of The Owners Strata Plan 962 to VRH Ltd.
Nov 15, 2019	The respondents Bradburn, Roberts, Matchett file a Response to Petition alleging that the “current lease agreement between VRH Ltd. and the Strata Corporation...was renewed for another three-year term by way of a 3/4 vote at a special general meeting of the Strata Corporation on October 26, 2019”.
Nov 28, 2019	The Strata Council calls an “emergency Council meeting to approve obtaining a legal opinion from Strata council in regard to resolution 1 of the Oct. 26 SGM.” The resolution is approved, and the firm Wilson McCormack is retained to provide a legal opinion.
Nov 28, 2019	The firm Wilson McCormack provides a legal opinion incorrectly stating that the Chair determined that Resolution #1 was voted on and approved and that prior to the October SGM “The Strata Corporation and the Rental Pool agreed to extend the term on the same terms and conditions for a further three year term subject only to approval by 3/4 vote of owners”, it concluded that “the Lease has been renewed for a further 3 year term.”
Nov 28, 2019	The respondents Bradburn, Roberts, Matchett provide written notice of resignation effective December 4, 2020 and note that the Strata Corporation will have no council.

Dec 5, 2019	Bruce Bradburn and Arthur Roberts, as representatives of the Victoria Regent Hotel Ltd., decide to sign the "new lease right away" and consider that "when the appraisal comes in, we can offer a good faith proposal to adjust the rental rate and put it up for a majority vote at the AGM, assuming Cora goes along with it".
Jan 25, 2020	The Strata Corporation has an Annual General Meeting and elects a five-person council of Jim Allard, Roger McGuire, Martin Osberg, Gerald Hauck and Mark Stevens.
Feb 1, 2020	The Owners Strata Plan 962 and VRH Ltd, enter into an agreement permitting VRH Ltd. to rent certain common property areas for $10,788.00 per year commencing February 1, 2020 and ending January 31, 2023 (the "Original Rental Agreement"). Bruce Bradburn and Arthur Roberts sign as authorized signatories of VRH Ltd. and Mark Stevens and Roger McGuire sign as authorized signatories on behalf of The Owners Strata Plan 962.
Unknown Date	The Owners Strata Plan 962 and VRH Ltd. rescind the Original Rental Agreement and enter into a different agreement permitting VRH Ltd. to rent certain common property areas for $27,000.00 per year commencing February 1, 2020 and ending January 31, 2023 (the "Revised Rental Agreement"). Earl Wilde and Mark Horne sign as authorized signatories of VRH Ltd. and Mark Stevens and Roger McGuire sign as authorized signatories on behalf [of] The Owners Strata Plan 962. The difference between the rent payable over the term of the Original Rental Agreement and the rent payable over the term of the Revised Rental Agreement is $48,636.00 not including taxes.
Jan 16, 2021	Jim Allard, Mark Stevens, Roger McGuire and Gerald Hauck, acting as Strata Council, pass a resolution to agree to release the respondents Bradburn, Roberts, Matchett for any damages, loss, expense or costs awarded to The Owners Strata Plan 962.
Jan 29, 2021	Roger McGuire signs the Release.
Jan 29, 2021	Roger McGuire and Gerry Hauck resign from Strata Council.

Should the Petition be Dismissed?

Parties' Positions

[14] The personal respondents argue that pursuant to Rule 16-1(18) of the *Supreme Court Civil Rules* [*Rules*], it is not necessary to first convert a petition into an action in order to apply a Rule to a proceeding: *Bacon v. British Columbia*

(Minister of Finance), 2020 BCCA 218 at para. 26, citing *Fern Castle Holdings Corp. v. Stonebridge Village Residence Ltd.*, 2011 BCSC 163 at paras. 7–12*.* The personal respondents rely on Rule 9-5(1)(b) and (c), Rule 9-6, and Rule 9-7 in their application to have the petition dismissed or, alternatively, to strike some of the claims against them*.*

[15] The personal respondents argue that the petitioners, both in their amended petition and in their proposed notice of civil claim, did not seek to have the Release declared invalid. The personal respondents therefore assumed the petitioners accept the Release as valid and made arguments based on this assumption.

[16] The personal respondents argue that the Release answers everything in the petition. The Strata Corporation has unequivocally released the personal respondents from any and all claims the Strata Corporation may have had against them. The Release answers the petitioners' claims and the petition should not continue against the personal respondents. There are no triable issues remaining. To the extent that issues are remaining, they are moot or academic claims which this Court should not entertain.

[17] The personal respondents argue the petitioners are ostensibly making claims on behalf of the Strata Corporation but the Strata Corporation opposes the petition. The Strata Corporation also relies on the Release and takes the position the claims are moot.

[18] The personal respondents argue there was no wrongdoing raised in the pleadings with respect to the Release. The personal respondents were not on the Strata Council when the Release was signed. At the time the Release was executed, the personal respondents did not owe the petitioners, the Strata Corporation, or the proposed respondents a duty of care because they ceased to be members of the strata council on December 4, 2019. Hence, they could not have breached their fiduciary duties under ss. 31 or 32 of the *Strata Property Act*. There is also no evidence of any failure by the Strata Corporation to act in good faith with respect to the Release.

[19] The personal respondents submit that a valid release can and should be enforced summarily. If not, the respondents are deprived of a significant part of the benefit for which they bargained. The personal respondents argue this Court should exercise its discretion and apply Rule 9-5 to strike the petition as it pertains to the personal respondents. Due to the Release, the petition is now unnecessary. All damages pleaded in the petition are for the benefit of the Strata Corporation, a signatory to the Release. Allowing a trial or hearing of the petition to proceed will require additional judicial time if the personal respondents are forced to participate despite the Release. If the Release bars the petitioners' claims against the personal respondents, it will end the claim against the personal respondents and will result in substantial savings of time and expense for all parties.

[20] If I am of the view that the whole, or parts, of the petition should not be struck under Rule 9-5, the personal respondents seek a dismissal of the petitioners' claims against them pursuant to Rule 9-6 or Rule 9-7.

[21] The petitioners argue that there is no evidence before me as to the authenticity of the Release. The petitioners have no ability to determine if the Release is valid.

[22] The petitioners contend the petition cannot be dismissed under Rule 9-5, or decided under Rules 9-6 and 9-7, because no claims in the petition have been asserted by the Strata Corporation, so no claims can be settled by the Release. All the Release does is prevent the Strata Corporation from exercising a potential future legal right because the personal respondents, pursuant to the terms of the Release, have no liability to the Strata Corporation. Since the Strata Corporation has not made any claims, signing the Release is merely a covenant not to sue the personal respondents.

[23] The petitioners argue the Release does not address the concerns raised in the petition. The Release is not signed by the petitioners and it excludes any claim for declaratory relief. The petitioners' claims have not been tried on their merits and the Release is inapplicable as it pertains to them. The quantum of damages and the

apportionment of damages amongst the three personal respondents have not been addressed despite the need to do so under the *Negligence Act,* R.S.B.C. 1996, c. 333. The declaratory relief is not moot, especially since the Release did not contain an admission of liability on the part of the personal respondents.

[24] The petitioners also argue the orders sought are too vague. The personal respondents do not attach what the pleadings would look like if this Court was to strike certain paragraphs of the petition.

[25] The petitioners argue that at the time the Release was signed, the insurer under the policy of insurance for the Strata Corporation had a duty to defend any claims made against both the Strata Corporation and the personal respondents, as former members of the strata council. The petitioners argue that by having the Strata Corporation and the personal respondents sign the Release, the insurer improperly dealt with itself.

[26] In terms of the application for summary judgment, the petitioners argue the cause of action is not bound to fail and the personal respondents have not provided a complete answer through the Release. There are genuine issues for trial.

[27] The usual meaning of a Release is that the action, here the petition, is discontinued. No consent dismissal order has been entered, nor could it be, because consent orders cannot be signed as between two respondents.

Legal Principles

[28] Rule 9-5(1) of the *Rules* provides that at any stage of a proceeding this Court may strike out or amend any part of a petition on a number of grounds. If the issues raised in the petition are academic in nature, the court should decline to determine them. Unnecessary pleadings should be struck: *Village Bay Preservation Society v. Mayne Airfield Inc.* (1982), 136 D.L.R. (3d) 729, [1982] B.C.J. No. 1652 (S.C.) at 732.

[29] Pleadings will be struck if they do not establish a cause of action, do not advance a claim known to law, or are without substance because they are groundless and fanciful: *Dempsey et al. v. Envision Credit Union et al.*, 2006 BCSC 750 at para. 17.

[30] The existence of a binding release is a threshold issue, the resolution of which may make the remaining issues moot: *Isaacs v. Nortel Networks Corp.* (2001), 15 C.C.E.L. (3d) 78 at para. 18, 16 C.P.C. (5th) 69 (Ont. S.C.J.). Difficult questions of law may be decided under this Rule if, on a proper analysis of the law, it is plain and obvious that the claim cannot succeed: *Greater Vancouver Regional District v. British Columbia (Attorney General),* 2009 BCSC 577 at para. 31, aff'd 2011 BCCA 345.

[31] An answering party who has filed a defence may apply under Rule 9-6(4) for judgment dismissing all or part of a claim in the originating pleading. If the court is satisfied the pleadings reveal no genuine issue for trial (with respect to either a defence or a claim), the court must pronounce judgment or dismiss the claim accordingly: *McGregor v. Holyrood Manor*, 2014 BCSC 679 at para. 12, citing *Serup v. Board of Trustees of School District #57* (1989), 54 B.C.L.R. (2d) 258, 57 D.L.R. (4th) 261 (C.A.). As stated in *McGregor*:

> [13] The purpose of an application under Rule 9-6 is to show the case already pleaded by the plaintiff is unsound or that the applicant has a complete answer to it. In such circumstances, there is reason to weigh the plaintiff's pleadings in the scales against the defendants' affidavit evidence of the defendant: *McDaniel* [*v. McDaniel,* 2009 BCCA 53], para. 18.

[32] The test under Rule 9-6 is whether it is manifestly clear on the relevant facts and law that there is no genuine matter to be tried. Rule 9-6(5)(a) is mandatory in that where there is no genuine issue to be tried, the court must dismiss the claim: *Canada (Attorney General) v. Lameman*, 2008 SCC 14.

[33] An application under Rule 9-6 may involve the consideration of evidence. The judge should not weigh evidence, but "may draw inferences that are strongly supported by undisputed facts": *Kerfoot v. Richter,* 2018 BCCA 238 at para. 31.

Where there are disputed facts, the applicant "bears the evidentiary burden of showing that there is no genuine issue to be tried": *Kerfoot* at para. 29.

[34] Issues of mixed fact and law are most appropriately addressed under Rule 9-7: *Foote v. Canada (Attorney General)*, 2012 BCSC 177 at para. 25. A claim may be dismissed pursuant to Rule 9-7(15) which provides:

> On a hearing of a summary trial application, the court may
>
> (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 it would be unjust to decide the issues on the application.
>
> …

[35] Rule 16-1(18) provides the court with authority to apply any of the *Rules* to a petition proceeding: *Edward Chapman, Limited v. FS Property Inc.,* 2021 BCSC 384 at para. 32.

[36] In *Zary v. Canada Mortgage and Housing Corporation,* 2015 BCSC 1145, Justice Skolrood explained the proper approach to the question of suitability for summary trial:

> [31] The critical question facing the court when hearing a summary trial application is whether the court can find the facts necessary to decide the disputed issues. Even where the court can find the necessary facts, it must still consider whether it would be just to decide the matter summarily, by reference to factors such as the amount involved, the complexity of the matter, its urgency, any prejudice that might arise by reason of delay, and the cost of taking the matter forward to a conventional trial: see *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.) and *Gichuru v. Pallai,* 2013 BCCA 60 at paras. 30-31.

[37] In *McGregor* a dismissal was sought pursuant to Rules 9-4, 9-5, and 9-7, on various grounds, including that the plaintiff had executed a binding release of all claims relating to her contract of employment. Given that all matters had been addressed by a previous Labour Relations Board proceeding and release, it was

determined that there were no genuine claims to be tried and the matter was dismissed pursuant to Rule 9-7.

Analysis

[38] The personal respondents contend the Release constitutes a full answer to the petitioners' claim. They argue "the essential facts for the purpose of this application (i.e., the existence and terms of the Release) are not in dispute." That was not evident on the evidence before me. For example, the petitioners argue there is no evidence the Release is authentic.

[39] The terms of the Release provide in part:

> **FOR AND IN CONSIDERATION** of the execution of this Release, the payment to the Respondent Strata of $10,000 by or on behalf of the Personal Respondents and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by the execution of this Release, the Respondent Strata agrees as follows:
>
> **Release**
>
> 1. The Respondent Strata hereby releases, remises and forever discharges the Personal Respondents, and each of them, from any and all liability for damages, loss, expense or costs alleged in the Petition as owing by the Personal Respondents to the Respondent Strata, including any liability under section 33 of the Strata Property Act and those facts and matters that were pleaded or ought to have been pleaded by the Petitioners in the Petition.
>
> ...
>
> **Further Proceedings**
>
> 4. If the Petitioners maintain or continue the Petition, any of the Personal Respondents and the Respondent Strata may produce this Release or a true copy of it in the Petition for any purpose the court may permit, including as a basis for the dismissal of the Petition.
>
> **Dismissal of the Petition**
>
> 5. The Respondent Strata consents to a dismissal of the Petition without costs to the Personal Respondents, if, as or when so agreed by the Petitioners or sought by the Personal Respondents on application in the Petition...
>
> **No Admission of Liability**
>
> 6. The Respondent Strata understands and agrees that the consideration expressed here in is for the compromise of a disputed claim and is not to be construed as an admission of liability by the Personal Respondents, by whom liability is expressly denied.

> **Difference in Facts**
>
> 7. The Respondent Strata acknowledges that the facts in respect of which this Release is made may prove to be other than or different from the facts in that connection now known by the Respondent Strata or believed to be true.
>
> 8. The Respondent Strata expressly accepts and assumes the risk of the facts being different and agrees that all of the terms of this Release shall be in all respects effective and not subject to termination or rescission by any discovery of any difference in the facts…

[40] The Release is signed by Roger McGuire, on behalf of the Strata Corporation. It is not signed by the personal respondents or the petitioners, but it recognizes the existence of the petition and identifies the petitioners and personal respondents within the preamble.

[41] I agree with the personal respondents that Rule 16-1(18) authorizes this Court to exercise its discretion in a wide range of circumstances. I can apply various Rules to petition proceedings, including striking pleadings pursuant to Rule 9-5(1): *McLean v. British Columbia (Attorney General)*, 2018 BCSC 2052 at paras. 48, 74. Nevertheless, I am not persuaded that the petition should be struck pursuant to Rule 9-5, or dismissed pursuant to Rules 9-6 or Rule 9-7 based on the Release.

[42] The burden on the respondents in an application to strike pursuant to Rule 9-5 is high. It must be plain and obvious that the proceeding discloses no reasonable cause of action. I must dismiss the claim if the petition is unnecessary or will cause undue delay based on the signed Release. However, I should only dismiss it if it is plain and obvious the claims must fail.

[43] The personal respondents argue that because the amended petition seeks damages be paid to the Strata Corporation, and the Strata Corporation has been compensated through the Release, the issues are moot. The personal respondents rely on the grounds that the petition is unnecessary as against them and it may add unnecessary time and cost to the hearing of the proceeding. The dismissal of the claims against the personal respondents would allow a trial with the Strata

Corporation to be completed in a significantly shortened amount of time, increasing the prospects of a just, speedy, and inexpensive resolution of the petitioners' claims.

[44] I agree the Release, on its face, releases the personal respondents from any damages owing to the Strata Corporation. But because the Strata Corporation made no claims against the personal respondents, there is an argument that the document is merely a covenant by the Strata Corporation not to seek damages from the personal respondents in the future. Moreover, monetary compensation is not at the core of this dispute. The declaratory orders sought are important to the petitioners. The petitioners seek orders that the personal respondents acted as members of the strata council while in a conflict of interest and acted contrary to their fiduciary duties owed to the Strata Corporation. The petitioners argue the personal respondents placed their personal interests ahead of the interests of the Strata Corporation. The Release does not purport to address these issues.

[45] The petitioners want to alert future owners who might consider voting for the personal respondents if they run for strata council again. The petitioners submit they are attempting to protect the interests of strata owners and it is therefore vital for the governance of the Strata Corporation that the court make the sought-after declarations.

[46] Declaratory relief is only appropriate where the dispute is real and not theoretical: *S.A. v. Metro Vancouver Housing Corp*., 2019 SCC 4. As set out in *Metro Vancouver Housing Corp.*:

> [60]…Declaratory relief is granted by the courts on a discretionary basis, and may be appropriate where (a) the court has jurisdiction to hear the issue, (b) the dispute is real and not theoretical, (c) the party raising the issue has a genuine interest in its resolution, and (d) the responding party has an interest in opposing the declaration being sought…

[47] With respect to Rule 9-5(1)(b) and (c), I do not find the Release establishes that the petition is unnecessary or that it will delay the proceedings. First, even if the petitioners should have denied the validity of the Release in their pleadings, as argued by the personal respondents, before this Court can strike a pleading it must

consider not only the pleading as set out, but also as they may be amended: *Lam v. Ark Platforms Inc*., 2021 BCSC 647 at para. 36.

[48] Second, even if I were to accept the Release as valid and enforceable, it does not appear to be a full answer to the petition. The contractual agreement regarding damages does not dispose of the question of liability or the declarations sought by the petitioners. The Release only affects the personal respondents' liability to contribute to and indemnify the Strata Corporation. I cannot deny the petitioners legal recourse in this summary fashion based on an agreement between the two respondents. An agreement between two respondents regarding indemnification for damages as assessed between them does not defeat all the claims of the petitioners.

[49] While damages are possibly moot, the declaratory relief is alive and the petitioners have a genuine interest in its resolution. I find the issues raised in the petition are not moot or academic in nature. The pleadings are not unnecessary. I decline to strike all or part of the petition pursuant to Rule 9-5.

[50] Rule 9-6(4) permits a party who has filed a defence to apply for summary judgment dismissing all or part of a claim. The purpose of an application under Rule 9-6 is to show the case as pleaded by the plaintiff is unsound or the applicant has a complete answer to it: *McGregor* at paras. 13–15.

[51] Rule 9-6 does not allow for a summary trial. Applications for summary judgment pursuant to Rule 9-6 are based upon the pleadings and affidavit evidence. The case can be dismissed if the respondent adduces evidence that completely answers the petitioners' case. While the Rule allows a limited review of the evidence, the court does not weigh the evidence "beyond determining whether it is incontrovertible": *Beach Estate v. Beach*, 2019 BCCA 277 at para. 49.

[52] The onus is on the personal respondents to establish there is no genuine issue requiring a hearing. The personal respondents must satisfy this Court that there are no triable issues of fact or credibility. If there are issues of fact or

credibility, the application must be dismissed because the petition should be heard on its merits. If I have any doubt, the case should be allowed to proceed.

[53] I have determined that it is unlikely the Release disposes of all issues in the petition. The respondents have not met their burden to establish that it is plain and obvious the petition will fail, particularly as it relates to the declaratory relief. The petition should not be struck or disposed of in this summary manner.

[54] Rule 9-7 does not refer to petitions. However, Rule 16-1(18) permits this Court to apply the summary trial rule to petitions: *J & A Properties Ltd. v. De Angelis,* 2019 BCSC 750 at para. 32. As a result, the summary trial procedures are available in petition proceedings.

[55] The personal respondents argue the issue of proportionality supports the proceeding being determined by summary trial and I agree this is a significant consideration: *Hryniak v. Mauldin,* 2014 SCC 7 at paras. 23–28; *Jones v. Alberni-Clayoquot (Regional District),* 2018 BCSC 216 at para. 28. Rule 9-7, in proper circumstances, facilitates the objective of proportionality. The need for a just, speedy, and inexpensive resolution of proceedings often persuades the court of the suitability of disposition by way of summary trial.

[56] Here, however, there are a number of factual disputes. For example, there are disputes regarding the expenditure of legal fees to draft a new bylaw after part of Bylaw 39(1) (relating to rentals made outside the rental pool) was struck down by the Civil Resolution Tribunal. There is a dispute regarding what happened at the November 2019 Special General Meeting, namely whether Resolution One was voted on and, if so, whether it carried. There is a dispute over the validity of a legal opinion regarding Resolution One and a committee to determine the square footage rental rate for the common property. Another major dispute is the validity of the Release.

[57] Based on the problems with the Release and the other issues articulated above, I am unable to decide the issues on the affidavit evidence before me,

ensuring a fair and just determination on the merits. There are genuine issues of fact and credibility which relate to the underlying issues. I decline to dismiss the petition pursuant to Rule 9-7.

[58] To be clear, I am not making any findings regarding the validity of the Release. I have at this preliminary stage taken the petitioners' concerns seriously and believe the factual findings are best left for a full evidentiary hearing. The trial judge can determine if the substance of the Release can or cannot defeat some or all of the claims of the petitioners.

[59] Given my decision, I need not address the involvement of the insurer, whether the Release is unenforceable as a matter of public policy, or the other issues raised by the petitioners.

Application to Add the Proposed Respondents to the Petition

Parties' Positions

[60] Relying on Rule 6-2(7)(b) and (c), the petitioners seek to add the proposed respondents as parties to the petition on the ground that as members of the new strata council, elected January 25, 2020, they breached their fiduciary duties to the Strata Corporation. They argue the proposed respondents did so in two ways:

i) by renewing the initial common property lease agreement with the hotel, when they knew there was no unanimous resolution carried at the November 2019 Special General Meeting to extend the lease for another three years; and

ii) by signing the Release because, as members of the strata council, they had a duty to protect the Strata Corporation.

[61] The petitioners argue three out of the five members of the new strata council were identified by Mr. Roberts or Mr. Bradburn, both personal respondents, as people willing to work with them and support the rental pool.

[62] The petitioners contend that the proposed respondents were well aware of the pleadings and the ongoing litigation and they breached their duty of good faith to the Strata Corporation when they signed the Release in these circumstances.

[63] The petitioners lastly argue there is a strong and clear connection between the proposed respondents and the remedy sought in the petition. The personal respondents established this connection when they relied upon the Release in answer to the allegations against them. The Release has connected the proposed respondents to the relief sought.

[64] The proposed respondents strongly oppose being added as parties to this matter. They argue the proposed pleadings do not disclose a clear cause of action against them. They argue the amended pleadings rely on s. 31 of the *Strata Property Act* which cannot ground a claim by the petitioners. Strata council members can only be found liable under s. 32 and there is no allegation of a conflict of interest against the proposed respondents. If I find there is a cause of action against the proposed respondents, they argue the claim should be pursued in a separate petition.

[65] The personal respondents also oppose having the proposed respondents added as parties to the petition or the proposed notice of civil claim if I allow the other part of the petitioners' application. The personal respondents argue the conduct of the proposed respondents, while serving on the strata council from January 2020 to January 2021, is not relevant to the current allegations against the personal respondents and the Strata Corporation. Further, adding the proposed respondents to this petition constitutes a significant and unnecessary expansion of this proceeding. Any claim against the proposed respondents must be brought by way of a separate proceeding.

[66] The personal respondents agree with the proposed respondents' submissions that a cause of action as against the proposed respondents is lacking.

Legal Principles

[67] *Letvad v. Fenwick*, 2000 BCCA 630 at para. 21, provides that a person may be added as a party pursuant to Rule 6-2(7) if the applicant satisfies the court that:

> a) there exists a question or issue between a person and the existing party in relation to the subject matter or the relief claimed in the proceeding; and
>
> b) it is just and convenient to do so.

[68] The threshold with respect to the first branch of the test is low: *Wells v. San Industries Ltd.*, 2019 BCSC 1141 at para. 16. In terms of the second branch of the test, the court will consider any delay in seeking to add the individual(s), the reasons for the delay, any prejudice caused by the delay, and the "extent of the connection, if any, between the existing claims and the proposed new cause of action": *Wells* at para. 17.

[69] The court should consider the proposed amendments and any affidavit evidence. However, the court should not weigh the evidence to determine if there is a chance of success. Rather, the court should examine the evidence only to determine if an issue between the parties exists: *Wells* at para. 16.

Analysis

[70] For the following reasons, I find the proposed pleadings do not disclose a cause of action against the proposed respondents. I therefore decline to add them as parties to the proceeding.

[71] The existing allegations in the amended petition focus on the period of February 23, 2019 to January 25, 2020, during which time the personal respondents were members of the strata council. They resigned on December 4, 2019. The proposed respondents did not become members of the strata council until after this period, on January 25, 2020. The timing makes it difficult to say the claim against the proposed respondents is connected with or related to the relief claimed in the amended petition. I appreciate the personal respondents have raised the Release as a defence. However, this does not connect the proposed respondents to the relief sought in the petition. The Release was not signed until January 16, 2021. This

supports the suggestion that if there is a cause of action against the proposed respondents, it should be pleaded in a separate petition or action.

[72] In terms of whether there is a cause of action against them, the proposed respondents rely on *Sahyoun v. Ho*, 2013 BCSC 1143. In *Sahyoun* Justice Voith, as he then was, held a claimant must commit to a cause of action in their pleadings. They must also adequately inform the opposing party of the legal foundation of their claim:

> [18] I emphasize efficiency because a proper notice of civil claim enables a defendant to identify the claim he or she must address and meet. The response filed by a defendant, together with the notice of civil claim and further particulars, if any, will confine the ambit of examinations for discovery and of the issues addressed at the trial itself. Proper pleadings limit the prospect of delay or adjournments. They allow parties to focus their resources on those matters that are of import and to ignore those that are not. They facilitate effective case management and the role of the trier of fact.
>
> [19] A proper notice of civil claim also advances the fairness of pre-trial processes and of the trial. Defendants should not be required to divine the claim(s) being made against them. They should not have to guess what it is they are alleged to have done.
>
> …
>
> [53] At bottom, in a case that involves multiple plaintiffs, multiple defendants and multiple causes of action, it remains necessary for each plaintiff to identify with precision what material facts (not evidence), what causes of action and what relief he or she is advancing against which defendant(s).

[73] Rule 3-7(9) states: “Conclusions of law must not be pleaded unless the material facts supporting them are pleaded.” In *R. v. Imperial Tobacco Canada Ltd.,* 2011 SCC 42, Chief Justice McLachlin emphasized that a claimant must clearly plead the facts relied upon:

> [22] ... It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The claimant may not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. But plead them it must. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted.

[74] The proposed notice of civil claim and alternative proposed further amended petition name the proposed respondents as parties. The legal basis for the claims against them appears to be ss. 31, 32, and 33 of the *Strata Property Act* (though I note the proposed notice of civil claim does not expressly plead the *Strata Property Act* within the "Legal Basis"). Section 31 sets out the standard of conduct for strata council members:

> **Council member's standard of care**
>
> **31** In exercising the powers and performing the duties of the strata corporation, each council member must
>
> (a) act honestly and in good faith with a view to the best interests of the strata corporation, and
>
> (b) exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances.

[75] Section 32 addresses the process for identifying and disclosing conflicts of interest as well as recusal requirements. It provides:

> **Disclosure of conflict of interest**
>
> **32** A council member who has a direct or indirect interest in
>
> (a) a contract or transaction with the strata corporation, or
>
> (b) a matter that is or is to be the subject of consideration by the council, if that interest could result in the creation of a duty or interest that materially conflicts with that council member's duty or interest as a council member,
>
> must
>
> (c) disclose fully and promptly to the council the nature and extent of the interest,
>
> (d) abstain from voting on the contract, transaction or matter, and
>
> (e) leave the council meeting
>
> (i) while the contract, transaction or matter is discussed, unless asked by council to be present to provide information, and
>
> (ii) while the council votes on the contract, transaction or matter.

[76] Section 32 provides that a strata council member must promptly and fully disclose any direct or indirect interest in any contract or transaction with the Strata Corporation if the interest could result in a material conflict of interest. This includes

any matter that is or will be the subject of consideration by the strata council. Section 32 requires that any strata council member who is in a conflict of interest recuse themselves from the portion of a strata council meeting, discussion, or decision that relates to the matter in dispute. The strata council member must abstain from voting on any issue where a conflict of interest is present.

[77] Section 33 addresses the consequences when a council member does not comply with the statutory requirements. It provides:

> **Accountability**
>
> **33** (1) If a council member who has an interest in a contract or transaction fails to comply with section 32, the strata corporation or an owner may apply for an order under subsection (3) of this section to a court having jurisdiction unless, after full disclosure of the nature and extent of the council member's interest in the contract or transaction, the contract or transaction is ratified by a resolution passed by a 3/4 vote at an annual or special general meeting.
>
> (2) For the purposes of the 3/4 vote referred to in subsection (1), a person who has an interest in the contract or transaction is not an eligible voter.
>
> (3) If, on application under subsection (1), the court finds that the contract or transaction was unreasonable or unfair to the strata corporation at the time it was entered into, the court may do one or more of the following:
>
> (a) set aside the contract or transaction if no significant injustice will be caused to third parties;
>
> (b) if the council member has not acted honestly and in good faith, require the council member to compensate the strata corporation or any other person for a loss arising from the contract or transaction, or from the setting aside of the contract or transaction;
>
> (c) require the council member to pay to the strata corporation any profit the council member makes as a consequence of the contract or transaction.

[78] Section 33 sets out the specific and limited circumstances where one owner can sue a member of the strata council. It does not contain language permitting owners to sue other owners who are not on strata council.

[79] The statutory right of the petitioners to bring their claim against the proposed respondents under s. 33 is triggered where there is a basis to allege that a council member failed to declare a conflict of interest or otherwise acted contrary to s. 32: *Dockside Brewing Co. Ltd. v. Strata Plan LMS 3837*, 2007 BCCA 183, leave to

appeal ref'd [2007] S.C.C.A. No. 262. The majority in *Dockside* set this out as follows:

> **Remedy for Breaches of ss. 31 and 32 – s. 33**
>
> [59] Section 33 provides remedies for breaches of ss. 31 and 32. A strata corporation or an owner may apply for an order under s. 33(3) "[i]f a council member who has an interest in a contract or transaction fails to comply with section 32…." Under s. 33(3), the court may make an order, if it "finds that the contract or transaction was unreasonable or unfair to the strata corporation at the time it was entered into…." Under s. 33(3)(b), "if the council member has not acted honestly and in good faith, [the court may] require the council member to compensate the strata corporation or any other person for a loss arising from the contract or transaction…."

[80] Paragraph 59 of *Dockside Brewing Co. Ltd.* is somewhat confusing when it refers to s. 33 providing remedies for s. 31. The same confusion arises in para. 51 which states: "I agree with the chambers judge that in acting as they did, the appellants failed to comply with s. 32, and failed to carry out both their statutory fiduciary duty, under s. 31(a), and their statutory duty of care, under s. 31(b)". Despite these references to s. 31, the statutory language of s. 33 refers only to s. 32. It does not link back to s. 31.

[81] How ss. 31 and 32 interact with s. 33 was explained in *Wong v. AA Property Management Ltd.,* 2013 BCSC 1551. After referring to the discussion of s. 33 of the *Strata Property Act* in *Dockside Brewing Co. Ltd.*, Justice Jenkins explained:

> [33] The Court of Appeal did not provide any additional rights upon owners to commence and maintain an action in this court against current or former council members other than set out in the above paragraph [para. 59 in *Dockside Brewing*].
>
> …
>
> [36] Finally in summation, an owner can sue a council member only in instances where the council member is in breach of the "conflict of interest" sections of section 32 of the Act.
>
> [Emphasis added.]

[82] Justice Jenkins held the right of owners to commence actions against strata council members is limited to what is set out in s. 33 of the *Strata Property Act*. It is limited to relief flowing from breaches of s. 32. This accords with the plain wording of

the *Strata Property Act.* The legislation does not allow another strata owner to sue for violations of s. 31.

[83] The petitioners dispute this interpretation. They argue there is a freestanding right in s. 31 which the proposed respondents have breached. The petitioners rely on the "inherent jurisdiction of this court." I was not taken to any authority suggesting that the inherent jurisdiction of this Court expands upon a right to bring an action based on the *Strata Property Act.* Individual strata owners are not entitled to sue the strata council whenever they disagree with a decision. This Court can only grant remedies for breaches of s. 32: *Wong*. Section 31 simply informs the remedies in s. 33, and articulates the standard of conduct that applies to conflicts of interest under s. 32.

[84] The petitioners do not allege the proposed respondents were acting in a conflict of interest when they were involved in renewing the initial common property lease agreement. Instead, they allege the proposed respondents breached their fiduciary duties to the Strata Corporation. Although not pleaded, the petitioners also argue the proposed respondents had a duty to protect the Strata Corporation which they violated when they signed the Release. They did not explain what direct or indirect interest the proposed respondents had in signing the Release.

[85] Pursuant to the *Strata Property Act*, the only cause of action which can be brought in this Court against a strata council member is for acting in a conflict of interest. An owner can sue a council member for breach of their standard of conduct in the context of a conflict of interest: s. 33. Despite these limitations, the petitioners have not alleged a conflict of interest against the proposed respondents, and there are no facts before me to support a conflict of interest.

[86] I am not prepared to add the proposed respondents as parties to the amended petition because the petitioners have not pointed to a cause of action against them. I am not satisfied it is just and convenient to add the proposed respondents as parties.

[87] That said, the proposed respondents will likely be witnesses at the hearing on the merits regarding the strata council decisions to sign the initial common property lease agreement and to sign the Release. The validity of the Release will likely be a threshold issue at trial: *Isaacs* at para. 18.

Application to Convert to Trial List and Amend Pleadings

Parties' Positions

[88] The petitioners argue that the petition should be converted to a notice of civil claim and transferred to the trial list. The petitioners rely on *British Columbia (Milk Marketing Board) v. Saputo Products Canada G.P./Saputo Produits Laitiers Canada S.E.N.C.*, 2017 BCCA 247 at paras. 42–43 [*Saputo*], for the principle that a petition should be converted if there are *bona fide* triable issues unless the party requesting that the matter be put on the trial list is bound to lose.

[89] The personal respondents argue there are no triable issues remaining due to the Release. Further, they say it is premature because the parties have not exhausted the procedural tools available to them. The matter should not be converted to a trial. The pleadings should not be amended to expand the claims and there is no cause of against the personal respondents with respect to the execution of the Release. They argue there is no connection between the existing claims and the proposed claims.

[90] The proposed respondents similarly take the position that it is premature to transfer this matter to the trial list.

Legal Principles

[91] Petition proceedings are intended to be an efficient way of determining issues that can be decided on the basis of affidavit evidence. At times, however, the parties will need the full benefit of trial procedures, including discoveries. In such cases, a party may apply to convert the matter to an action and put it on the trial list. That a petition addressing *Strata Property Act* provisions can be converted into an action to

obtain these very tools was endorsed in *Southern Interior Construction Association v. Strata Plan KAS 2048*, 2007 BCSC 792.

[92] The burden on the petitioner with respect to the conversion application is low. This burden was articulated in *Saputo* at paras. 44–48. The threshold for transferring the petition to the trial list is whether there is a genuine triable issue. It has been described as similar to the test for summary judgment, and less stringent than the test for summary trial: *Saputo* at paras. 44, 46. Proceedings brought by petition should be referred to the trial list "when there are disputes of fact or law, unless the party requesting the trial is bound to lose": *Levere v. Moore*, 2020 BCSC 1656 at para. 15, citing *Saputo* at para. 43; *Thom v. Revery Architecture Inc.*, 2019 BCSC 2013 at para. 22. A petition should be converted to a trial unless there is no triable issue or the petitioner is "bound to lose": *Saputo* at para. 43.

[93] A triable issue exists if "there is a dispute as to facts or law which raises a reasonable doubt, or which suggests there is a defence that deserves to be tried": *Douglas Lake Cattle Company v. Smith* (1991), 54 B.C.L.R. (2d) 52 at para. 36, 78 D.L.R. (4th) 319 (C.A.). This includes where the resolution of the dispute as to the facts or law requires an assessment of the credibility of witnesses: *2158872 Ontario Ltd. v. The Owners, Strata Plan BCS2647*, 2016 BCSC 946.

[94] In *Beedie (Keefer Street) Holdings Ltd. v. Vancouver (City)*, 2021 BCCA 160, the petitioner, relying upon *Saputo,* sought an order to refer a petition for judicial review of a development permit denial to the trial list. A unanimous Court of Appeal declined to order a trial. Speaking for the court, Justice Newbury noted that *Saputo* did not involve an application for judicial review. She further noted that in judicial reviews the courts play a supervisory role, rather than an adjudicative role, based on the record. She concluded courts will only look beyond the record in rare circumstances. The court should exercise considerable restraint before converting a petition for judicial review into a trial proceeding.

[95] Here, the matter was started by petition because strata property disputes are governed by the *Strata Property Act*, an enactment. It is not a judicial review and the

concerns about the court having a supervisory role, rather than an adjudicative one, do not apply. I therefore distinguish *Beedie* and find the *Saputo* approach applies.

[96] In *Terasen Gas Inc. v. Surrey (City)*, 2009 BCSC 627, Justice Dardi surveyed the leading authorities regarding converting a petition to an action. She subsequently summarized the factors the court is to consider at para. 39:

> (a) the undesirability of multiple proceedings;
>
> (b) the desirability of avoiding unnecessary costs and delay;
>
> (c) whether the particular issues involved require an assessment of the credibility of witnesses;
>
> (d) the need for the court to have a full grasp of all the evidence; and
>
> (e) whether it is in the interests of justice that there be pleadings and discovery in the usual way to resolve the dispute.

[97] The Court of Appeal in *Kerfoot* at paras. 27–31 recently summarized how evidence may be used under the *Saputo* test:

> a) a judge must not weigh evidence;
>
> b) a judge may only consider the evidence to assess whether it establishes a triable issue; and
>
> c) in assessing whether the evidence establishes a triable issue, a judge may draw inferences that are strongly supported by undisputed facts.

Analysis

[98] The allegations before me relate to a number of factual and legal disputes. I have already outlined the factual disputes regarding the passing of Resolution One at the Special General Meeting and the validity of the Release. There is an issue regarding whether the personal respondents, as members of the strata council, acted in a conflict of interest when they made decisions regarding the hotel when

they were directors of the hotel which would benefit from their decisions. There are disputes regarding whether the personal respondents intentionally provided incomplete, inaccurate, or misleading information to legal counsel and whether they should have spent money on a legal opinion at all. There is also an issue of whether the personal respondents should have provided instructions to legal counsel because they were allegedly in a conflict of interest. The factual disputes relate to the material issues. All parties agree cross-examination is required. Master Harper has already ordered cross-examination of the respondents and one personal respondent has been cross-examined.

[99] Based on *Saputo,* I am satisfied there are *bona fide* triable issues for trial. There are relatively complex legal issues and numerous factual disputes. Further, and particularly based on my concerns with the Release, I cannot say the matter is bound to fail.

[100] The many disputed facts will not be easily resolved without access to standard trial procedures, including discoveries. While I appreciate that cross-examination on affidavits was permitted by Master Harper on September 1, 2020, and there has been fulsome document disclosure, this is not the test. The petitioners have met their burden to refer this matter to the trial list because they have established there are *bona fide* triable issues and they are not bound to lose. There are also additional factual disputes since Master Harper's order, particularly the intervening signing of the Release.

[101] I direct that the amended petition be converted to an action and referred to the trial list. By transferring it to the trial list, I do not intend to foreclose the possibility of a summary trial in this proceeding. However, prior to trial the parties will have the benefit of trial procedures such as admissions, notices to admit, examinations for discovery of the parties, and pre-trial examination of non-parties. These tools will assist the parties to efficiently resolve the disputes that are currently outlined in the amended petition.

[102] In terms of amending the pleadings, while the exercise of discretion must be exercised judicially, the Court of Appeal has said there must be some flexibility to pleadings to ensure the pleading can adapt to changing circumstances: *Swiss Reinsurance Company v. Camarin Limited,* 2018 BCCA 122 at para. 23.

[103] In *Stewart v. Stewart*, 2018 BCSC 1266 at para. 14, Justice Abrioux, as he then was, articulated the principles to apply when faced with an application to amend the pleadings:

> (a) amendments should be permitted as necessary to determine the real issues between the parties;
>
> (b) the party seeking leave to file the amendments is not required to adduce evidence of a pleading before trial;
>
> (c) the facts are taken as alleged in proposed amended pleading;
>
> (d) discretion is to be exercised judiciously;
>
> (e) only in the clearest of cases will an amendment be struck as not disclosing a reasonable claim or defence, and if there is any doubt on the facts or the law, the matter should be allowed to proceed to trial; and
>
> (f) disallowance should be a last resort, and the party opposing the amendments must prove actual prejudice, and not just potential prejudice.

[104] I grant leave to the petitioners to file their proposed notice of civil claim. This includes leave to add the claims for punitive damages to the Strata Corporation and special costs of the plaintiffs, as these are connected to the underlying alleged breaches of the personal respondents and their actions throughout the litigation. I see no prejudice or injustice in allowing these amendments and it aligns with the court's generous approach to granting leave for amendments as outlined in *Stewart.* However, all references to the proposed respondents are not permissible and should be removed.

[105] Additionally, leave to amend the pleadings to claim collusion between the original strata council and the new strata council is not permitted. The factual foundation for collusion was not included in the proposed notice of civil claim or the proposed further amended petition. In addition, the "Legal Basis" of the proposed pleadings does not refer to any cause of action or breach of statutory duties relating to collusion. The petitioners have not pointed to any provision in the *Strata Property*

Act allowing them to bring a claim of collusion against the personal respondents who were not on strata council at the time collusion is alleged.

Disposition

[106] I decline to dismiss the petition, or to strike portions of it, pursuant to Rule 9-5, Rule 9-6, or Rule 9-7.

[107] I decline to add the proposed respondents as parties to the proceeding.

[108] I direct that the amended petition be converted to an action and referred to the trial list. The petitioners have leave to amend their pleadings within the parameters set out in paragraphs 104 and 105.

[109] The petitioners are to pay the costs of the proposed respondents. The personal respondents are to pay the costs of the petitioners.

"D. MacDonald J."

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *J & A Properties Ltd. v. De Angelis,* 2019 BCSC 750

Date: 20190514
Docket: S178216
Registry: Vancouver

Between:

J & A Properties Ltd. and Annie Siermy

Petitioners

And

Barbara De Angelis, Maurizio De Angelis a.k.a. Maurice De Angelis, Nick Jack Kochan, B.B.J. Holdings Ltd., 456804 B.C. Ltd., and Vancouver Park Lane Towers Ltd.

Respondents

Before: Master Harper

Reasons for Judgment

Counsel for the Petitioners:	M. Wagner K. Smith
Counsel for the Respondents, Barbara De Angelis, Maurizio De Angelis a.k.a. Maurice De Angelis and B.B.J. Holdings Ltd.:	W.E. Knutson, Q.C.
Counsel for the Respondents, Nick Jack Kochan and 456804 B.C. Ltd.:	D.K. Plunkett
Respondent, Vancouver Park Lane Towers Ltd.:	No appearance
Place and Date of Hearing:	Vancouver, B.C. April 12, 2019
Written submissions filed:	April 16, 2019 (by the petitioners) April 25, 2019 (by the respondents) May 1, 2019 (by the petitioners)
Place and Date of Judgment:	Vancouver, B.C. May 14, 2019

INTRODUCTION

[1] The respondent, Vancouver Park Lane Towers Ltd. ("VPLT"), is a family-run company founded in the mid-1960s which owns and operates valuable real estate in Vancouver.

[2] The shares of VPLT are held as follows:

a) 50% by J & A Properties Ltd. ("J & A") which is controlled by Annie Siermy ("Ms. Siermy");

b) 25% by 456804 B.C. Ltd. ("456") which is controlled by Nick Jack Kochan (Ms. Siermy's brother); and

c) 25% by B.B.J. Holdings Ltd. ("BBJ") which Ms. Siermy believes is owned in whole or in part by Bill Kochan (Ms. Siermy and Nick Kochan's brother), but which is in fact controlled by Barbara De Angelis and Maurizio De Angelis.

[3] There is conflict amongst the family members. I take it the parties communicate with each other only through legal counsel. J & A says that VPLT needs to be broken up in an orderly fashion. J & A commenced this petition proceeding in August, 2017 to achieve that goal. The litigation has proceeded slowly.

[4] Eventually, in October 2018, BBJ proposed that the parties deal with the break-up of VPLT by following the non-litigation process (the "Agreed Process") provided for in Section 6 of the 2005 shareholders agreement. Ms. De Angelis expressed her support for the initiation of the Agreed Process in an affidavit sworn October 9, 2018. J & A accepted the proposal, thus triggering the implementation of the Agreed Process.

[5] A diagram prepared by counsel for J & A illustrating the Agreed Process is attached to these reasons as Schedule "A".

[6] The shareholders agreement provides that “time is of the essence”. The Agreed Process establishes timelines for the accomplishment of certain steps. The contractual term “time is of the essence” applies to those timelines.

[7] Despite being the proponent of the Agreed Process, BBJ did not participate (nor did 456) in stage 1 (being “request to negotiate equitable division of assets – meeting to seek agreement” within 90 days) and stage 2 (being “liquidation starts” within a further 60 days) and did not respond to J & A’s attempts to move things along.

[8] The parties are now in stage 3 (being 30 days to “agree on an independent appraiser”). According to the required timelines, the shareholders ought to have agreed on an independent appraiser by now. At the very least, they ought to have nominated their preferred appraisers and attempted to agree on a single appraiser.

[9] J & A took the position that BBJ and 456 breached the shareholders agreement by failing to comply with the Agreed Process. It is in this context that J & A filed its notice of application seeking orders that BBJ and 456 comply with the Agreed Process. However, by the time the hearing occurred, the orders sought had changed.

THE APPLICATION

[10] The application as originally framed sought an order requiring both BBJ and 456 to state their position on the matters required in stages 1 and 2. The application was then modified (although no new notice of application was filed) to seek orders in two stages: first, that BBJ and 456 provide names of independent appraisers and, second, that if the parties cannot agree on an appraiser, the application resume in judges’ chambers such that the judge would appoint the appraiser from each shareholder’s list.

[11] Just before the hearing of the application, 456 agreed to the appraiser proposed by J & A, being Grover Elliot Real Estate Appraisers (“Grover Elliot”). As a

result, the application was modified yet again, with the support of 456, to seek an order appointing Grover Elliot.

[12] During the course of oral submissions, an argument emerged that J & A and 456 were at liberty to appoint an appraiser of their choice without the consent of BBJ because J & A and 456 collectively hold 75% of the shares. Because this issue had not been raised in the application materials, counsel were invited to make further written submissions.

[13] I have reviewed the written submissions which not only address the "75% issue", but also address in more detail other procedural issues that were not fully canvassed at the oral hearing. I have concluded that there is a preliminary issue that must be determined before the merits of the application can be considered—is the application procedurally flawed such that the application cannot proceed in its present form?

[14] The questions that must be answered on the procedural issue involve the lack of pleading of breach of the shareholders agreement and whether a master has jurisdiction to grant the order sought given the limits on a master's jurisdiction.

a) Lack of Pleading as to Breach of the Shareholders Agreement

[15] In its application response, BBJ argues that the application is improperly brought within the petition proceeding because the orders sought are unrelated to the relief sought in the petition. The alleged breach of the shareholders agreement occurred after the filing of the petition and J & A did not apply to amend the petition to include the new claims arising out of the alleged breach of the shareholders agreement.

[16] Although breach of the shareholders agreement is not pleaded, BBJ had more than adequate notice of the claim J & A was making arising from BBJ's failure to participate in the Agreed Process. I agree with the submission of counsel for J & A that all counsel were cognizant that the application was being brought within the

petition proceeding. Counsel for BBJ, in a letter dated March 18, 2019 in response to the application, stated:

> For present purposes, I will not address the issue of whether *any* of the relief sought in your client's notice of application is properly brought within Ms. Siermy's Petition proceeding. Instead, I will set out my client's position on the matters raised in the application. It may be that some or all of the matters can be resolved. That will impact the necessity of the Respondents filings Response materials. [Emphasis in original.]

[17] In my view, if BBJ truly objected to J & A's choice of procedure, it should have made that argument at the earliest opportunity so that counsel for J & A could consider his position. At the hearing of the application, counsel for J & A expressed his understanding that BBJ accepted that the application was properly before the court and could be heard on its merits. Given BBJ's emphasis on the merits of the application rather than jurisdictional impediments, J & A's impression was not misplaced.

[18] In written submissions delivered after the hearing, counsel for BBJ takes a stronger position and objects to the application being brought without the specific issue of breach of the shareholders agreement being pleaded.

[19] J & A could have applied to amend the petition to include a claim that breach of the shareholders agreement constituted oppression (*Linamar Corporation v. Wescast Industries Inc*. (2004), 1 B.L.R. (4th) 253 (O.N.S.C.)). However, for the purposes of this application, a failure to amend the petition is not fatal given that BBJ was well aware of the grounds for seeking the order appointing the appraiser. I view the lack of specific pleading as a technical non-compliance with the rules.

[20] For these reasons, if lack of pleading breach of the shareholders agreement were the only procedural flaw, I would have no concerns about the application proceeding before me.

[21] However, the issue of whether a master has jurisdiction to make the order sought is more difficult to overcome.

b) Does a master have jurisdiction to make the order sought?

[22] J & A's application, if successful, would require me as a master to make a finding that BBJ has breached the shareholders agreement and, therefore, the appraiser nominated by J & A and 456 should be appointed.

[23] Alternatively, given that 456 and J & A now have 75% of the shareholder votes, the court is asked to appoint Grover Elliot on the basis that 75% of the shareholders are entitled to choose the appraiser under the Agreed Process.

[24] The jurisdictional issue involves an analysis of whether the order sought on either of these two bases is dispositive of an ultimate issue in the litigation. If it is, then a master does not have jurisdiction to make the order.

[25] In its notice of application under "Part 3 – Legal Basis", J & A relies on:

a) *Supreme Court Civil Rules* 1-3 (object of the rules); 10-1(1) (order for the detention or preservation of property and authorization to enter on any land or building); 14-1 (costs); 16-1(18) (the rule about petitions); 22-1 (the rule about chambers proceedings), and

b) the law of contract.

[26] J & A seeks an order that will summarily determine whether BBJ, in failing to participate in the Agreed Process, has breached its duty of honest performance.

[27] In its application response and in counsel's oral submissions, BBJ made no objection to the application being heard by a master. BBJ's application response should have raised a jurisdictional objection if it had one. The lack of protest on jurisdiction and pleadings understandably lulled J & A and its counsel into a false sense of security that the application would be heard on its merits by a master without the necessity of amending the petition or filing a separate notice of civil claim.

[28] In further written submissions, counsel for BBJ does point out that the application is not for summary judgment, thus, could be taken to raising the jurisdictional argument that a master cannot hear an application for summary judgment.

[29] Despite none of the parties squarely raising the issue of jurisdiction and seeming to be acquiescing to a master hearing the application, in my view, the resolution of the dispute between J & A and BBJ as to whether an appraiser should be appointed will be dispositive of a final issue in the petition proceeding, namely, how the break-up of VLPT will occur. If a master made the order sought, it would be without jurisdiction and therefore void.

[30] I have reluctantly reached the conclusion that the application cannot proceed as it is currently framed. I say "reluctantly" because time is of the essence pursuant to the shareholders agreement and because the parties have been in litigation for over two and a half years. J & A's desire to have the appraisal issue resolved in a timely fashion is understandable. Further, proceedings under the *Business Corporations Act*, S.B.C. 2002, c. 57 should be dealt with summarily. It is time to move matters along to a conclusion.

THE PATH FORWARD

[31] The petition should be amended to include claims arising from the alleged breach of the shareholders agreement.

[32] The summary trial rule (Rule 9-7) is incorporated into the rule about petitions (Rule 16-1). Rule 9-7(2) provides that a party may apply to court on an issue. My interpretation of the interplay amongst the rules is that J & A is entitled to set the portion of the petition arising from the claim of breach of the shareholders agreement before a judge in chambers and that J & A may, at that time, apply for the appointment of an appraiser.

[33] In the meantime, and pending the hearing of the issue of the Agreed Process, the appraisal process should get underway. Appraisals are required whether

pursuant to the Agreed Process, as part of the petition litigation, or as part of the arbitration process (should the dispute get that far). It is difficult to conceive of an arbitration that could proceed without appraisals. The appraisals will be the same no matter how it they are used. The petition litigation, as amended, permits J & A and 456 to obtain an appraisal of VPLT's assets pursuant to Rule 11-4. If the appraisal process is blocked, J & A could apply for necessary relief. For instance, pursuant to Rule 7-6(5), the court may order a party to be able to enter onto property.

[34] J & A has proposed that BBJ may participate in the appraisal process. I am not prepared to make any particular orders in this regard. BBJ has opted not to participate in the appraisal process under the Agreed Process. If BBJ changes its position and requests permission from J & A and 456 to join in on the joint retainer of the expert, that is a matter for the parties to address as between themselves.

[35] Because Rule 11-3 contemplates the joint expert being the only expert on that subject in the proceeding and because BBJ is not currently participating in the appraisal process, BBJ should have the right to obtain its own expert report as provided for in Rule 11-4. This is on the assumption that the chambers judge hearing the portion of the petition does not re-characterize the appraisals conducted pursuant to Rule 11-3 as appraisals pursuant to the Agreed Process.

ORDERS

[36] For the foregoing reasons, I make the following orders:

1) J & A is at liberty to file an amended petition setting out the claims arising from the alleged breach of the shareholders agreement. If either of 456 or BBJ does not consent to the wording of the amended petition, J & A may apply for leave before me.

2) J & A and 456 are entitled to obtain appraisals of the assets of VPLT from Grover Elliot or another appraiser of their choice (the "appraiser").

3) The appraiser will be a joint expert as between J & A and 456 pursuant to Rule 11-3.

4) The parties and their agents, employees or associates (collectively "the parties") will do all things reasonably necessary to allow the appraisals to occur. Specifically, the parties must allow the appraiser to have access to the properties for the purpose of conducting the appraisals.

5) Whether the appraisals are characterized as appraisals pursuant to the Agreed Process or expert reports pursuant to Rule 11-3 will be determined by agreement of the parties or order of the court by the judge hearing the petition.

6) The cost of the appraisals will be paid for in the first instance by J & A and 456 equally unless otherwise agreed between J & A and 456. The allocation of cost as between all the parties will ultimately be determined by agreement or on resolution of the litigation (by the chambers judge or the arbitrator as the case may be).

7) If any further applications are required as contemplated by Rule 11(3) or arising from any of the orders I have made, or if any party seeks a case planning conference, I will be seized until further notice. If necessary, I will endeavour to make myself available outside regular court hours.

COSTS

[37] If the parties cannot agree on costs related to this application, arrangements can be made through the registry to appear before me to make submissions.

"Master Harper"

Schedule “A”

October 12, 2018