Court File No. CV-16-11549-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE – COMMERCIAL LIST

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF URBANCORP (WOODBINE) INC. AND URBANCORP (BRIDLEPATH) INC., THE TOWNHOUSES OF HOGG'S HOLLOW INC., KING TOWNS INC., NEWTOWNS AT KINGTOWNS INC. AND DEAJA PARTNER (BAY) INC. (COLLECTIVELY, THE "APPLICANTS")

AND IN THE MATTER OF TCC/URBANCORP (BAY) LIMITED PARTNERSHIP

BRIEF OF AUTHORITIES OF THE MONITOR

(Re: Motion Returnable May 2, 2017)

DAVIES WARD PHILLIPS & VINEBERG LLP
Barristers & Solicitors
155 Wellington Street West
Toronto, ON M5V 3J7

Robin B. Schwill (LSUC #38452I)
Tel: 416.863.5502
Fax: 416.863.0871

Lawyers for the Monitor

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solicitor into thinking it was unnecessary for him to plead s. 88 which, if pleaded, would be a bar to any claim in respect of the prior years. I would therefore allow the appeal and amend the order appealed from so that the declaration therein shall read:

> This court doth declare that the lands and premises of the plaintiff hereinafter described be and they are exempt from all taxes levied for the year 1960 on the assessment made in the year 1959 on the grounds that the said lands and premises were maintained and used by the plaintiff as a seminary of learning for religious, philanthropic or educational purposes, and doth order and adjudge the same accordingly.

The appellant should have its costs of the appeal.

Appeal allowed; order amended.

FEDERAL DISCOUNT CORPORATION LTD. v. ST. PIERRE AND ST. PIERRE

Ontario Court of Appeal, Kelly, J.A. February 2, 1962.

Bills & Notes V A, VI C—Dealer endorsing promissory notes of customers to finance company for discounting—Whether intimate relationship between dealer and finance company such that latter not entitled to claim as holder in due course.

The relationship and pre-arrangements between a dealer selling goods on time-payment plans and the finance company which discounts his customers' promissory notes and conditional sales contracts, which are endorsed or assigned to the finance company by the dealer, may be so close and intimate that, in effect, the finance company and the dealer can be considered as more nearly engaged in one business than as parties engaging in normal commercial transactions, with the result that the finance company cannot claim to be a holder in due course of the promissory notes, with the special privileges enjoyed by a holder in due course, so as to enable it to avoid defences and equities which would otherwise be available to the customer against the dealer and any assignee of his purchase obligations. In the instant case, *held*, that such an intimate relationship existed between a dealer selling home knitting machines, as part of a complicated home knitting scheme, and plaintiff finance company, which made possible the operations of the dealer by buying its customers' instalment obligations, that plaintiff could not be considered as a holder in due course of a promissory note made by defendant customers of the dealer and endorsed over by the latter to plaintiff for discounting. In the result although plaintiff was entitled to succeed against the customers in an action brought on the note the latter were entitled to judgment on a counterclaim with respect to amounts owing them under the home knitting scheme of the dealer.

[*Buffalo Industrial Bank v. De Marzio* (1937), 296 N.Y. Supp. 783; *Commercial Credit Co. v. T. F. Childs* (1940), 128 A.L.R. 726; *Taylor et ux. v. Atlas Security Co.* (1923), 249 S.W. 746, apprvd; *Commodity Discount Ltd. v. Baker*, [1961] O.W.N. 277, distd]

APPEAL from decision of Division Court dismissing action on promissory note. Reversed.

J. D. Arnup, Q.C., for appellant, plaintiff.

D. E. Cooper, for defendants, respondents.

KELLY, J.A.:—In this action tried on December 9, 1960 in the Ninth Division Court of the County of Wentworth, the plaintiff sought to recover from the defendants $273.30, the amount due on a promissory note dated October 8, 1959, signed by the defendants, of which the plaintiff claimed to be the holder in due course. In dismissing the plaintiff's claim the learned trial Judge held that payment could not have been enforced against the defendants by the original payee of the note and that the plaintiff was not a holder in due course.

The chain of events which culminated in the institution of this action began when the female defendant's attention was attracted by a newspaper advertisement inserted by one Pritchard who was a salesman of Fair Isle Knitting (Ontario) Limited and Yarncraft Industries Limited. Both these companies had identical shareholders and officers, occupied the same or adjacent office space and in their operation were associated as will be indicated. Fair Isle Knitting (Ontario) Limited, (hereafter referred to as Fair Isle) which was found by the learned trial Judge to have carried on business both under its own name and under the name of Fair Isle Knitting Company, was engaged in the retail door-to-door sale of hand knitting machines. Yarncraft Industries Limited (hereinafter referred to as Yarncraft) awarded home knitting contracts to purchasers of hand knitting machines from Fair Isle and sold or endeavoured to sell to retail or other outlets the goods knit by the purchasers of hand knitting machines. According to the evidence of Turack, one of the principal shareholders and officers of the two companies, the purpose for which the two companies had been incorporated was that one of them, Fair Isle, would sell knitting machines in conjunction with the giving of home knitting contracts by the other, Yarncraft. Later I will describe in more detail the activities of the female defendant in relation to her home knitting contract. Although the text of the newspaper advertisement referred to was not produced at trial, Pritchard admitted that its purport would lead a person reading it to

believe that she could pay for the hand knitting machine out of the money earned from the sale of knitting done on it.

When Pritchard first visited Mrs. St. Pierre following her answer to the advertisement, she already was the owner of a knitting machine of a make other than that sold by Fair Isle; only by disposing of that knitting machine and purchasing a Fair Isle knitting machine could she become eligible for the home knitting contract which would have produced the earnings she was anxious to have.

In the interval between Pritchard's first and second visits, a matter of only a few days, the female defendant returned to Simpsons-Sears the knitting machine for which she had agreed to pay $130; by the time of Pritchard's second visit she had thus removed the only obstacle between her and the income she was led to believe would flow from her association with the companies Pritchard represented. At the second visit of Pritchard to the St. Pierre home, which took place on October 8, 1958, the document upon which the plaintiff relies, ex. 1, was signed along with a number of other documents, *i.e.*, a Questionnaire, ex. 4, a Conditional Sales Contract, ex. 2, an Application for Home Knitting Contract, ex. 6, a Purchase Order, ex. 5, a Receipt, ex. 7. Exhibits 1 and 2 were signed by the male defendant as well as by the female defendant; the Receipt, ex. 7, was signed by Pritchard on behalf of Fair Isle and he acted as witness to the signatures on, or as a representative of his employers with respect to, the other documents.

The Promissory Note and Conditional Sales Contract follow the form usually employed in instalment purchases, save in two particulars — although the vendor of the machine was Fair Isle Knitting (Ontario) Limited the payee and endorsee of the note was Fair Isle Knitting Company — the words "Federal Discount Corporation Limited" added in para. 10 of the Conditional Sales Contract, by rubber stamp, were not proven to have appeared on the contract when it was signed and in all probability were added subsequently. I do not think that the questions in issue are affected by either of these matters, especially since the plaintiff's counsel has not in his argument before this Court relied upon para. 10 of the Conditional Sales Contract, which purports to exonerate the plaintiff from "any equities existing between Vendor and Purchaser".

The other documents, exs. 4, 5, 6 and 7 are not of the character usually associated with an instalment sale. For that reason I set out in full the text of these exhibits.

Exhibit 4:

QUESTIONNAIRE

(To be completed by Applicant in Applicant's own hand writing after interview with Personnel Representative.)

1. Did you read and did our Representative explain each paragraph of the Home Knitting Application? yes
2. Do you understand that it will take approximately 2 to 4 weeks to process your Application and give you your lessons? yes
3. What price per ounce do you expect to pay for yarn? 35c
4. What price per ounce will you receive for knitting goods? 60c
5. What profit per ounce will you receive for knitted goods? 25c
6. Do you understand that all knitted material must be clean, well made and according to our patterns to be acceptable by us? yes
7. Do you feel that approximately 40 cents to 80 cents per hour is a reasonable amount to earn in your spare hours knitting at home? yes
8. Will you practice faithfully and follow our directions and instructions so that you will become more proficient and so be able to earn more? yes
9. Do you understand that, in order to commence your home knitting program, you will have to purchase approximately $6.00 to $9.00 worth of yarn which will be sent C.O.D.? yes
10. Do you understand that we pay all postage and delivery charges to you and that you are to deliver everything prepaid to us complete within 30 days? yes
11. Do you understand that, when ribbing, cabling, or doing fancy stitches, that some hand work may be necessary? yes
12. Do you understand that it is your obligation to go to our nearest school or teacher's residence for your course of lessons? yes
13. Do you understand that you will receive 5 cents per mile for your travelling expenses to and from our nearest school or teacher's residence and that the cheque you receive for these expenses is to be applied to your final machine payment? yes

DATE Oct. 9th APPLICANT _____

REPRESENTATIVE J. H. Pritchard

Applicant must be given one copy of this Questionnaire. The other copy must be sent to Head Office with the Application.

Exhibit 5:

PURCHASE ORDER

FAIR ISLE KNITTING (ONTARIO) LTD., 129 Spadina Ave., Toronto 2B, Ont.

Date Oct. 8/58

Gentlemen:

I hereby order a Fair Isle Knitting Machine for which I agree to pay Fair Isle Knitting (Ontario) Ltd. or order the following:

$329.00 in full (discount of $36.00 allowed from $365.00)

$100.00 deposit and $21.00 per month for 12 months (total $352.00)

$ 35.00 deposit and $27.50 per month for 12 months (total $365.00)

In consideration of your acceptance of this Purchase Order and my agreement to pay the sums as indicated above you are directed to supply to me the equipment, guarantees, warranties and services outlined below:

1. A complete Fair Isle Knitting Machine and Accessories.
2. An unconditional guarantee on the Fair Isle Knitting Machine under normal household use for a period of one full year. Replacement or repairs of defective machines or parts free of charge when delivered prepaid to our Repair Department.
3. A twenty year warranty that needles and other parts will be available.
4. After all payments shall have been made as indicated above it is agreed that the knitting machine and accessories provided shall become my property with no additional cost.

I further agree to sign a Conditional Sale Contract and an indenture collateral to a promissory note for the protection of Fair Isle Knitting (Ontario) Ltd. or its agents or assignees.

Signature _____

Signature

Address 46 Parkdale N.

City or Town Hamilton Province Ontario

If applicant is under 21 years of age, a parent, guardian or other responsible adult must sign below:

For value received, I, the undersigned, certify that I am an adult and I hereby approve this Purchase Order and guarantee payment for the knitting machine.

Signature _____

Address _____

City or Town _____ Province _____

STATEMENT BY REPRESENTATIVE

I have carefully interviewed this Applicant and hereby accept this Purchase Order on behalf of Fair Isle Knitting (Ontario) Ltd. subject to credit and Company approval. In signing below I declare that I have witnessed the signature or signatures above.

J. H. Pritchard

(Write name in full. Do not print or typewrite.)

Exhibit 6:

APPLICATION FOR HOME KNITTING CONTRACT

Yarncraft Industries Ltd., 129 Spadina Ave., Toronto 2B, Ontario

Date Oct. 8/58

Gentlemen:

Please accept my application for a Home Knitting Contract. In consideration of your acceptance of this application and my agreement to pay two dollars ($2.00) receipt of which is hereby acknowledged, you are directed to supply to me the privileges, lessons, services and features outlined below for a period of two years from date*.

1. You are to supply me on request with sufficient orders I may reasonably be expected to fill in my spare hours at home. I

agree to follow your patterns carefully and to deliver each order in one complete shipment within 30 days. My profit for knitting these orders is to be no less than $4.00 per pound of knitted goods.

2. The privilege to purchase fine quality yarns at a substantial wholesale discount. These yarns may be used for my own purpose if so desired.
3. All necessary instructions in the art of knitting. Direct consultations with your teaching staff who will offer suggestions and give advice on all phases of knitting.
4.* It is agreed that if my work is satisfactory that by mutual agreement this contract may be renewed for an additional period of two years with no additional cost.

I agree to practice faithfully and to follow your instructions and training directions fully and to the best of my ability.

I further understand and agree, that if I am granted a Home Knitting Contract this contract will become a separate business entity and I will in no way be considered to be an employee of your company.

Signature _____

(Write name in full. Do not print or typewrite.)

Address 46 Parkdale N.

City or Town Hamilton County _____

Province Ontario Telephone Number Li. 9-2038

STATEMENT BY PERSONNEL REPRESENTATIVE

I have carefully interviewed the Applicant as to her general qualifications and hereby recommend that this application be accepted by Yarncraft Industries Ltd.

J. H. Pritchard

Signature of Personnel Representative

Exhibit 7:

Official Receipt 13002

FAIR ISLE KNITTING COMPANY
129 Spadina Ave., Toronto 2B, Ontario

Date Oct 8 1958

Received of St. Pierre

Address 46 Parkdale

City Hamilton Zone _____ Province Ont.

the sum of Thirty-five xx/100 Dollars ($35 xx/100)

as partial payment on Home Knitting Contract dated _____ 19__

Balance payable in 12 installments of $27 50/100 each,

1st monthly instalment due Dec 8 19 58

Total Contract $ 330.00 Received by J. H. Pritchard

Personal Representative

In due course after having secured a credit report on the standing of the male defendant, Fair Isle delivered the note

to the plaintiff in accordance with a pre-existing arrangement for the purchase by the plaintiff of notes and conditional sales contracts entered into in respect of the sale and purchase of home knitting machines. The note (ex. 1) was one of 24, each of a like amount, all set out on a sales report (ex. 8) a form furnished by the plaintiff to Fair Isle; the note was, before delivery, endorsed to the plaintiff by the payee. Exhibit 8 indicates that the plaintiff deducted a discount of 14% and a reserve of 25% in accounting to Fair Isle. Payment of the amounts due by the plaintiff to Fair Isle were made in due course. Contemporaneously with the delivery of the note, the Conditional Sales Contract was delivered to the plaintiff, accompanied by an assignment thereof executed by Fair Isle.

On receipt of the note the plaintiff sent to the female defendant an undated letter, ex. 25, reading in part as follows:

> On behalf of Fair Isle Knitting Company we wish to sincerely thank you for your recent purchase. As you are aware from your contract this account has been assigned to our firm. All payments are to be made only direct to our office at 185 Bay Street, Toronto, Ontario, unless otherwise notified by us.

Upon both this letter and the account book, ex. 24, forwarded by the plaintiff to the defendants, the following words have been impressed by rubber stamp:

> Note — Payments must be made when due regardless of amount earned from knitting.

At about the same time the female plaintiff received, in a letter bearing the letterhead and superscription of Yarncraft, ex. 19, an impressive document printed in script type face and liberally decorated with red seals; this document which was introduced as ex. 3 reads as follows:

HOME KNITTING CONTRACT

Number 6829
Date Oct. 28, 1958

Mrs. E. St. Pierre
46 Parkdale N.
Hamilton, Ont.

has been duly approved and accepted as to her general qualifications and is hereby granted the privileges, services and features outlined below for a period of two years from date.

(seal) The privilege to purchase fine quality yarns at a substantial wholesale discount.

(seal) All necessary instructions and patterns

(seal) The privilege to knit garments or knitted material using yarn purchased from us at a profit of 20c to 25c per ounce in accordance with patterns and orders supplied by us.

(seal) On request sufficient orders which could reasonably be completed in spare time at home.

It is expressly understood and agreed that the contract holder is a separate business entity and is at no time to be considered an employee of the Company.

Yarncraft Industries Limited

(seal) (signed) C. Harris
Executive Director

The letter accompanying ex. 3 advised that the first cone of yarn and first pattern would follow in a few days.

Some time prior to December 4, 1958 the female defendant had been given her instructions and on that date received from Fair Isle a cheque for $2 representing the mileage payment referred to in the questionnaire, the cheque being made payable jointly to the female defendant and the plaintiff. The evidence does not directly disclose what became of this cheque but it can be assumed that it reached the plaintiff and that credit for it was given to the female defendant by the entry of January 9, 1959 in the account maintained by the plaintiff under the name of the female defendant.

Prior to the first week in December 1958 the female defendant started sending to Yarncraft garment pieces made on the hand knitting machine from yarns supplied to her, at her expense, by Yarncraft and knit according to patterns and directions furnished along with the yarn. A sample of these directions, ex. 7, is imprinted with the name of "Fair Isle Knitting Company" and no other name appears on it. The practice followed by the female defendant after the receipt of the first yarn for which she apparently paid cash, was to finish as many knitted garment pieces as could be made from the yarn on hand and to send the garment pieces and the unused yarn to Yarncraft; she would be credited at the rate of 60c per ounce for the finished pieces and at the rate of 35c per ounce for the unused yarn; against this credit she would be debited the price of new yarn at 35c per ounce and the net amount indicated as an amount due to her. However, the amounts due to her, save as for one cheque for $31, were not paid to her and she testified that she believes there is due to her for garment pieces and yarn shipped to Yarncraft the sum of $160. She is unable to verify this amount by any intelligible records but there is no evidence to the contrary save her own admission as to yarn she received on March 23, 1959 under circumstances which will be referred to later.

When the first payment fell due under the Conditional Sales Contract the female defendant sent to the plaintiff, on or about December 5, 1958, her cheque for $27.50; on January

8, 1959 her cheque for $27.50 was issued to the plaintiff; credit for the first amount less bank charges appears on the plaintiff's record under date of December 8, 1958; under date of January 9, 1959 credit was given for $29.75, evidently the amount of the defendant's cheque dated January 8, 1960 and the $2 cheque given to her for mileage, both less the usual bank charges.

Since the female defendant (with the exception of one amount of $31 in December 1958 or January 1959) did not receive payment of the amounts which Yarncraft was crediting to her on the receipt of garment pieces and yarn she was shipping regularly, she made no further payments on the purchase-price of the knitting machine. On March 17, 1959 a letter, ex. 13 was addressed to the female defendant by the plaintiff advising her that payment of $21.50 had been received from Yarncraft, being the amount owing her for finished garments sent to Yarncraft and that that amount had been credited to her account. It also called to her attention arrears of $51.60 on her sales contract against which the $21.50 was credited. She was asked to send her cheque for $30, the balance, immediately. This amount of $21.50 had not actually been and apparently never was received by the plaintiff and no credit for it appears on her account. The evidence of Barber, the office manager of the plaintiff, concerning this phase of the matter is enlightening as to the purpose behind the sending of this letter.

> Q. So was this letter, exhibit thirteen, a pure fiction? A. Well they were negotiating for that money. As I understand it they had a list of the money owing to the customers from Yarn-Craft and they were trying to collect this money from Yarn-Craft. Q. But in point of fact they had neither received it nor had they credited it to the account? A. That is correct. Q. And to that extent at least the letter was incorrect? A. Well it was — yes. Q. Well it was what? A. Well they were trying to get the money, let's say, and they hoped to get it at this point. Q. Well? A. It was rather used, I believe as an inducement for the person to catch up their delinquent situation. HIS HONOUR:—Well when you say that, do you mean that it was used to, as a representation to the customer in this case, the St. Pierre, that they could expect their payments? A. Oh yes. We at that time felt that they had just started out in Winnipeg, I believe, with Trans World Machine Company and they had arranged their financing out there, and it was in the winter time, it is difficult to get around for salesmen, and sales were slow anyhow in January, and that period of the year. We felt that Fair-Isle would be coming along with ample sales and they would be able to pay these people the money they owed them at that time. We thought this was only a period where they were short of funds and we would get the money at a later date. Q. Do you mean that you joined with Fair-Isle or with Yarn-Craft, or

with both — A. Well — Q. Just wait until you get my question. A. Yes, sir. Q. Do you mean that you joined with Fair-Isle or Yarn-Craft or both to encourage the customers to make payments on the basis that they could, that they would be receiving in their turn payments from Yarn-Craft or Fair-Isle? A. That is correct, yes. From Yarn-Craft. Q. And this was to induce the customers to make payment under their contract? A. That is correct, yes. Q. Then am I correct in this that your Company, that is the plaintiff Company, Federal, plus Yarn-Craft, plus Fair-Isle joined together in a, in representations to their customers which were not true? A. Well we made the statement that we had received the money when we had not. We felt with the business we had done with Fair-Isle in the past that they would be able to pay these people the money they owed them and the people would in turn be able to pay us for the contract. Q. In this way you hoped to induce people to make their payments? A. To continue with their payments until Fair-Isle got on their feet. Q. And this was to indicate to the customers St. Pierre and others that they could hopefully look forward to receiving payment under their knitting contract? A. That is correct, that is correct. Q. And your Company, Federal, the plaintiff, joined in that inducement? A. Yes.

On March 23, 1959 the female defendant, in company with the male defendant went to the premises occupied by Fair Isle and Yarncraft concerning the amounts due to her but was unable to see any one in authority; having left some finished knitted goods the female defendant took a quantity of wool, some of which she has since worked into a sweater for her own use. Shortly thereafter a circular letter was sent out by Yarncraft advising that it was suspending operations. A copy of this letter was received by the female defendant. After its receipt no further payments were made by the defendants. Obviously no payments were received by them. The machine is still in the possession of the female defendant and she has made some use of it on her own account.

On this appeal the plaintiff contended that it was a holder in due course of the note sued upon; that there was no evidence to support the finding that the plaintiff had at the time of negotiation notice of any defect of title of the payee; that there was no evidence the plaintiff knew anything of the specific transaction opposed to the general conduct of the business of its predecessor in title; and that as between the original parties there was no ground which would entitle the defendants to rescission of the contract of purchase.

The rights which accrue to a holder in due course of a bill of exchange are unique and distinguishable from the rights of an assignee of a contract which does not fall within the description of a bill of exchange. The assignee of a contract, unlike the holder in due course of a bill of exchange,

takes subject to all the equities between the original parties, which have arisen prior to the date of notice of the assignment to the party sought to be charged.

The special privileges enjoyed by a holder in due course of a bill of exchange are quite foreign to the common law and have their origin in the law merchant.

There is little difficulty in appreciating how trade between merchants required that he who put into circulation his engagement to pay a specified sum at a designated time and place knowing that it was the custom of merchants to regard such paper much as we do our paper currency, should be held to the letter of his obligation and be prevented from setting up defences which might derogate from the apparently absolute nature of his obligation.

At first the customs prevailing amongst merchants as to bills of exchange extended only to merchant strangers trafficking with English merchants; later they were extended to inland bills between merchants trafficking with one another within England; then to all persons trafficking and finally to all persons trafficking or not.

Thus in time the particular conditions which were recognized as prevailing amongst merchants became engrafted onto the law generally applicable and came to be looked on as arising from the document itself rather than from the character of the parties dealing with the document. It is significant, however, that the transition did not affect the legal position as to one another of immediate parties and that as between any two immediate parties, maker and payee, or endorser and endorsee, none of the extraordinary conditions otherwise attaching to the bill, serve to affect adversely the rights and obligations existing between them as contracting parties. The document itself becomes irreproachable and affords special protection to its holder only, when at some stage of its passage from payee or acceptor to holder, there has been a *bona fide* transaction of trade with respect to it wherein the transferee took for value and without any notice of circumstances which might give rise to a defence on the part of the maker. Unless the ultimate holder or some earlier holder has acquired the instrument in the course of such a transaction the earlier tainting circumstances survive and the holder seeking to enforce payment of it must, on the merits, meet any defence which would have been available to the maker. Thus it appears that the peculiar immunity which the holding of a bill of exchange brings to the holder in due course arises not from the original nature of the document

itself but from the quality which had been imparted to it by at least some one transfer of it. It follows that the transfer which is alleged to have given such a special character to the bill of exchange should be subject to more than a casual examination and that the true nature of that transaction be discovered.

There can be no doubt that everyday commercial life demands that the integrity of bills of exchange be recognized and that those acquiring them in good faith should not be required unnecessarily to make inquiries to establish their authenticity. Courts quite properly have refused to recognize that constructive notice has any place in the law of negotiable instruments: *London Joint Stock Bank v. Simmonds*, [1892] A.C. 201 at p. 221. Any attempt to weaken the provisions of a valid bill of exchange duly launched into the stream of commercial life, should be avoided. To do so, however, does not require that a prospective purchaser of a bill of exchange who has knowledge of certain circumstances about the seller's business which puts him on inquiry can by avoiding making inquiries or drawing reasonable inferences from the circumstances known to him, improve his position beyond that which it would have been had he made the enquiries he should have made or drawn the inference he should have drawn. This is not charging the holder with constructive notice and does not go beyond the standard of conduct laid down by the House of Lords in *Earl of Sheffield v. London Joint Stock Bank* (1888), 13 App. Cas. 333.

It is not necessary for the support of ordinary commercial transactions that the holder of a bill of exchange should under all circumstances be permitted to shield himself behind the guise of a holder in due course and attempt to separate his character as holder in due course from the debilitating effect of facts and circumstances actually known to him at the time he acquired the bill or which were reasonably inferable from facts and circumstances which were brought to his knowledge.

In the examination of any transfer to decide if it constituted the transferee a holder in due course the plaintiff's actual involvement with the transferor will be a major factor; on this account the whole relationship between the plaintiff and its transferor must be examined and considered.

With the growth of the sale of household and personal goods on the extended payment plan, the promissory note, the conditional sales contract and the finance company have become inseparable parts of the procedure whereby the merchant realizes immediately cash from the extended obligation

of the purchaser from him. The very existence of the seller's business depends on his ability to convert into cash these obligations and the finance company, standing ready and willing to buy them, has become not only an essential part of retail selling on the time payment plan but is in effect a department of the seller's business, exercising a measure of control over the seller's sales by the requirements laid down with regard to the negotiable paper proposed to be purchased.

In the course of this development an attempt has been made to project into the field of household law the law merchant originally designed for dealings between merchants. The fiction has been permitted to flourish that the finance company is a foreign and independent agency. When it does acquire the contracts which it was incorporated to buy and which it arranged to purchase before the contracts actually came into existence it attempts to shield itself behind the protection of the law merchant which can apply only, if at all, to one of the documents constituting the arrangement between the seller and the buyer; at the same time it takes unto itself all the advantages that can be drawn from the transaction out of which the note arose. It is beyond question that the promissory note is included in the documents required to be signed by the purchaser for the express purpose of enabling the finance company to avoid defences which would otherwise be available to the maker against his vendor and any assignee of his purchase obligation.

The plaintiff was in the business of discounting notes: it was its practice and policy where any note had relationship to a conditional sales contract that the conditional sales contract should also be purchased and assigned to it: when a dealer first approached the plaintiff with a view to having the plaintiff discount notes which were to arise from the dealer's sales, the plaintiff investigated the applicant as to its financial stability, moral responsibility and various other aspects which would qualify the applicant to be a dealer "with the plaintiff"; the plaintiff was interested in knowing the possible volume of the business of the dealer as in the words of the witness McGarry, the plaintiff's Credit and Collection Manager, "It's got to be worthwhile before you can go into business with them". It was also well known to the plaintiff that Fair Isle and Yarncraft were companies having the same principals and officers.

The plaintiff was informed of the manner in which Fair Isle intended to conduct its selling campaign for the distribution of home knitting machines and was told by Turack, an

officer of both Fair Isle and Yarncraft, "What we were doing in the other company" (Yarncraft). In fact the form of purchase order, questionnaire, conditional sales contract, and application for home knitting contract which were used in the approach to the female defendant were shown to the plaintiff company at the inception of the dealings between the plaintiff and Fair Isle. The purpose of the incorporation of two distinct companies, Fair Isle Knitting (Ontario) Limited and Yarncraft Industries Limited, was stated by Turack to be that one, Fair Isle, would sell knitting machines in conjunction with the giving of home knitting contract by the other, Yarncraft, and that the operation of Yarncraft and its home knitting contracts was something to facilitate the sale of home knitting machines by Fair Isle.

The plaintiff was fully aware of the general course of operation employed by Fair Isle and Yarncraft in their dealings with the purchasers such as the defendants. The words which were impressed by rubber stamp on exs. 24 and 25, "Note — payments must be made when due, regardless of the amount earned from knitting", proved beyond a shadow of a doubt that the plaintiff knew that the purchasers of home knitting machines would be or at least could have been left with the impression which was in the mind of the female defendant, that is, that the moneys to meet the instalments of purchase-price would be forthcoming from earnings under the home knitting contract.

According to the evidence of Barber, the association of the home knitting contract with the sale of home knitting machine was one of the reasons why the plaintiff dealt with Fair Isle because the plaintiff "felt that if a person could make money, sell their material back to Yarncraft Industries, they would be able to pay for the machine".

The course of dealings between the plaintiff and the officers of Fair Isle indicates a relationship much more intimate than that of endorsee or endorser in a normal commercial transaction. The company selling the home knitting machines in conjunction with the awarding by its associate of home knitting contracts and the plaintiff who made possible the operations of the seller by buying the purchaser's instalment obligation were more nearly engaged in one business, each one in the conduct of its particular phase being useless without the association of the other. To pretend that they were so separate that the transfer of each note constituted an independent commercial transaction not affected by the pre-exist-

ing arrangements between them would, in my view, be to permit the form to prevail over the substance.

My view of the relationship of the plaintiff and its endorser of the note sued upon is reinforced by the evidence as to the arrangement between the plaintiff and Fair Isle, which resulted in the writing of a letter of March 17, 1959, ex. 13. The conduct of the plaintiff and Fair Isle leading up to the despatch of this letter is of itself of such an extraordinary nature as to require no comment other than to say that it indicates a relationship somewhat beyond what would be expected of a financial institution and a merchant dealing in the ordinary course of business. Even granting that the plaintiff did not have actual notice of facts the knowledge of which would have prevented it from becoming a holder in due course, the transfer of the note to it by Fair Isle fell short of being the type of business transaction between two parties, dealing with respect to the note in complete good faith, which would have imparted to the note the power to endow with the character of holder in due course, one becoming a holder with complete knowledge of its history and the complete facts of the relationship between the maker and the payee.

There appear to be no Canadian cases which have held that the business relationship between a dealer and a finance company is an element to be considered in deciding finance company's claim to be a holder in due course; the question has been dealt with by American Courts in this manner and I would adopt the reasoning of the Judges who decided these cases: *Buffalo Industrial Bank v. De Marzio* (1937), 296 N.Y. Supp. 783; *Commercial Credit Co. v. T. F. Childs* (1940), 128 A.L.R. 726; *Taylor et ux. v. Atlas Security Co.* (1923), 249 S.W. 746.

Under the circumstances of this case I can find no error in the conclusion arrived at by the trial Judge, namely, that the plaintiff was not a holder in due course of the promissory note sued upon in this action.

Counsel for the plaintiff referred to *Commodity Discount Ltd. v. Baker* [1961] O.W.N. 277, as authority for his contention that it could be no defence to an action by a holder in due course of a promissory note, that the note was given to the original payee as part of a conditional sales transaction. I have examined the Appeal Book and read the transcript of evidence in the case cited; in it the point at issue was whether the *mere* fact that the promissory note sued upon was part of a contract which had been entered into between the defendant and the payee of the promissory note,

served to disqualify the endorsee of the note as a holder in due course. There was an absence of any evidence as to the relationship between the payee and the finance company and as to knowledge by the plaintiff of the circumstances under which the signature of the promissory note had been procured; the case is distinguishable upon the facts from the case now before this Court.

In view of my conclusion that the plaintiff is not a holder in due course, it falls to be considered whether the learned trial Judge erred in holding that the payee of note sued upon could not have payment from the defendants had it not assigned its rights to the plaintiff.

Those who conceived the scheme which led to Pritchard's activities as a salesman for Fair Isle and Yarncraft intended to achieve a twofold result — to lead prospective purchasers to believe, as actually happened in the case of the defendants, that they were purchasing a revenue-producing machine which could be paid for out of the proceeds of the work to be done on it and marketed by a means of the home knitting contract; and at the same time by the use of documents of an elaborate and confusing nature to secure a document from the purchasers which would accomplish a legal result quite foreign to the impression sought to be created in the purchasers' minds. The method employed displayed sales ability of a high degree and entailed the use of a series of documents which apparently confused even those responsible for their drafting and certainly confused the salesman through whom they were furnished to the defendants. A careful perusal of ex. 7 discloses that it was a blank form of receipt prepared to be given in respect of a full or partial payment on a home knitting contract. Although in the application for home knitting contract, ex. 6, readied by Pritchard for the signature of the female defendant, care was taken to have the application addressed to "Yarncraft Industries Limited", the receipt is headed "Official Receipt Fair Isle Knitting Company". Further the only payment required under the home knitting contract was a nominal one of $2. Pritchard in filling in the blanks in ex. 7 inserted the amount of $35, which was the down payment provided for in the purchase order ex. 5 and the conditional sales contract, ex. 2, both documents tendered in connection with the purchase of the home knitting machine. It is small wonder that the female defendant was unable to appreciate the fine distinction between the allegedly separate legal entities with which she was dealing, when the draftsman of the documents and the salesman who was trained in their use were unable to maintain the necessary

separation which a least was essential to maintain that the right hand, Fair Isle, did not know what the left hand, Yarncraft, was doing and *vice versa*.

I find no difficulty in supporting the finding of the learned trial Judge that the female defendant believed what she was intended to believe, namely, that she was engaged in one transaction; the whole course of the conduct of Fair Isle and Yarncraft was to induce that belief, and it did so induce it.

Counsel for the appellant submitted that on two accounts the defendants were not entitled to rescission: first, that there had been no misrepresentation as to any existing fact, but only a statement as to future conduct; second, that the defendants having made payments and having used the machine, their only remedy lay in damages.

The female defendant by her earlier purchase of the machine she disposed of must be assumed to have wished to be the owner of a home knitting machine. She has admitted that the home knitting machine purchased from Fair Isle is still in her possession and that she has made use of it for the purpose of making knit goods for herself and the members of her family, the claim for rescission must be rejected; the defendants' only remedy would then be a counterclaim as to damages: *Kerr on Fraud and Mistake*, 7th ed., p. 529.

Even if there be accepted as evidence of the measure of damages, the very unsatisfactory testimony of the female defendant concerning the amount due to her for finished knit goods, her estimate would still have to be reduced by the value of the yarn admittedly taken from the premises of Fair Isle and Yarncraft on March 17, 1959. The evidence at trial, though voluminous and dealing at great length with matters of doubtful relevance leaves no sound basis for the assessment of damages. However, I hestitate to prolong further the course of these proceedings. Since the duty and power of the Division Court Judge is to hear and determine in a summary manner all questions of law and fact, and to make such order as appears to him just and agreeable to equity and good conscience, such an order should be made by this Court. I would avoid directing a reference to determine the measure of damages if there be any way in which this can be overcome. There will, therefore, be a reference to the Clerk of the Ninth Division Court of the County of Wentworth to take an account of the amount due the defendant by Fair Isle and Yarncraft for knit goods shipped by the female defendant over and above the value of the yarn obtained by her but only if either party demands it. In default of either party

demanding such a reference within 15 days, the amount of the counterclaim is fixed at $140. In the result the appeal of the plaintiff will be allowed in part, and the judgment below varied to award to the plaintiff its claim of $273.30 with costs as fixed by the learned trial Judge and to allow the defendants' counterclaim at $140, or such amount as shall be fixed on the reference if there shall be one. If there shall be a reference, the costs of the reference will be in the discretion of the referee. As success of the appeal is divided, there will be no costs of the appeal.

Appeal allowed; counterclaim allowed.

RE DIAMOND AND THE ONTARIO MUNICIPAL BOARD

Ontario Court of Appeal, Aylesworth, Schroeder and McGillivray, JJ.A. January 10, 1962.

Contempt of Court II — Municipal Boards — Administrative Law — Power of Municipal Board to commit for contempt—Ontario Municipal Board Act, ss. 33, 37.

Section 33 of the *Ontario Municipal Board Act*, R.S.O. 1960, c. 274, provides that the Board "for all purposes of this Act has all the powers of a court of record". Section 37 of the Act provides that the Board "for the due exercise of its jurisdiction and powers . . . has all such powers, rights and privileges as are vested in the Supreme Court with respect to . . . attendance and examination of witnesses". The Board may thus commit for contempt a witness who refuses to be sworn or, having been sworn, refuses to answer questions put to him, including questions as to his opinion if he is a witness qualified to give an opinion. But for this power the Board could not fulfil its function. However, the Board's power should be construed as equivalent to that of an inferior Court of Record, since such power would adequately meet the real object of the Act. Hence the Board can only commit for contempt committed in its presence.

[*Toronto v. York Tp.*, [1938] 1 D.L.R. 593, 47 C.R.C. 361, [1938] 1 W.W.R. 452, [1938] A.C. 415; *Ex p. Fernandez* (1861), 10 C.B.(N.S.) 3, 142 E.R. 349; *Turcotte* v. *Béique & Whelan* (1891), 7 M.L.R. 263; *Re Singer* (1929), 52 Can. C.C. 243; *Wandsworth Bd. of Works v. United Telephone Co.* (1884), 13 Q.B.D. 904, refd to]

APPLICATION to the Ontario Court of Appeal by the Ontario Municipal Board by way of stated case under s. 93 of the *Ontario Municipal Board Act* for the opinion of the Court concerning the power of the Board to commit for contempt.

E. A. Goodman, Q.C., and *L. H. Schipper*, for A. E. Diamond, appellant; *Hon. R. L. Kellock*, Q.C., for Murray

TAB 2

[Indexed as: **Palcic v. Sadek**]

Branko Palcic and Branko Palcic Consulting Ltd., Plaintiffs and Emil Sadek, Defendant and Branko Palcic and Branko Palcic Consulting Ltd., Defendants by Counterclaim

British Columbia Supreme Court

Docket: Vancouver S076102

2012 BCSC 1651

Maisonville J.

Heard: December 5-9, 2011; March 26-29, 2012; April 10, 13, 2012; June 5, 2012

Judgment: November 7, 2012

Bills of exchange and negotiable instruments — Promissory notes and bank drafts — Consideration — Failure of consideration — Rescission of contract — Plaintiff, defendant, and defendant's brother entered into joint venture to develop property — Plaintiff signed indemnity agreement in which he warranted that company formed by parties owed him $300,000 for his funding of development and interest — Defendant paid plaintiff $3,000 for his shares in company and $30,000 for debt and gave him promissory note for $270,000 — Defendant paid only $27,600 owing on note and plaintiff brought action for balance — Action dismissed — Note was voidable for total failure of consideration — There was no debt owed by company to plaintiff at time of buy-out — Presumption of consideration in s. 57 of Bills of Exchange Act was therefore rebutted — Purchase of plaintiff's shares was separate contract — Defendant was also entitled to rescission on basis of innocent representation by plaintiff in indemnity agreement — Defendant was awarded $57,600 paid to plaintiff in order to return parties to pre-contract position.

Cases considered by *Maisonville J.*:

Bank of Nova Scotia v. Bauer (1975), [1976] 2 W.W.R. 52, 1975 CarswellBC 205, [1975] B.C.J. No. 958 (B.C. C.A.) — referred to

Bolton v. Madden (1873), L.R. 9 Q.B. 55 (Eng. Q.B.) — considered

Canlan Investment Corp. v. Gettling (1996), 1996 CarswellBC 1700, [1996] B.C.J. No. 1803 (B.C. S.C. [In Chambers]) — considered

Canlan Investment Corp. v. Gettling (1997), 10 R.P.R. (3d) 180, 95 B.C.A.C. 16, 154 W.A.C. 16, 37 B.C.L.R. (3d) 140, 1997 CarswellBC 1380, [1998] 2 W.W.R. 431, 36 B.L.R. (2d) 117, [1997] B.C.J. No. 1647 (B.C. C.A.) — referred to

Hanna Collision Repair (1984) Ltd. v. Insurance Corp. of British Columbia (2009), 2009 CarswellBC 2327, 2009 BCSC 1200, [2009] B.C.J. No. 1758 (B.C. S.C.) — considered

Hillcrest Housing Ltd., Re (1998), 165 Nfld. & P.E.I.R. 181, 509 A.P.R. 181, 1998 CarswellPEI 62, [1998] P.E.I.J. No. 57 (P.E.I. T.D.) — considered

Jarvis v. Maguire (1961), 28 D.L.R. (2d) 666, 1961 CarswellBC 75, 35 W.W.R. 289, [1961] B.C.J. No. 121 (B.C. C.A.) — referred to

Kingu v. Walmar Ventures Ltd. (1986), 38 C.C.L.T. 51, 10 B.C.L.R. (2d) 15, 1986 CarswellBC 2, [1986] B.C.J. No. 597 (B.C. C.A.) — followed

Krauss v. Luciuk (1927), [1928] 1 W.W.R. 184, 22 Sask. L.R. 374, [1928] 1 D.L.R. 1132, 1927 CarswellSask 129 (Sask. C.A.) — distinguished

Levine Developments (Israel) Ltd., Re (1978), 1978 CarswellOnt 142, 5 B.L.R. 164, [1978] O.J. No. 1415 (Ont. H.C.) — considered

Meslin v. Lee (2011), 2011 BCSC 1208, 2011 CarswellBC 2384, [2011] B.C.J. No. 1694 (B.C. S.C. [In Chambers]) — considered

MFC Bancorp Ltd. v. Aqua Plan Inc. (1999), 1999 CarswellBC 2846, 2 B.L.R. (3d) 87, [1999] B.C.J. No. 2907 (B.C. S.C.) — considered

Peterco Holdings Ltd. v. Calverton Holdings Ltd. (1999), 1999 CarswellBC 18, [1999] B.C.J. No. 55 (B.C. S.C.) — considered

Prins Greenhouses Ltd. v. Garden Back to Eden Organic Ltd. (2010), 2010 BCSC 1939, 2010 CarswellBC 3763 (B.C. S.C.) — considered

Queen v. Cognos Inc. (1993), 1993 CarswellOnt 801, 1993 CarswellOnt 972, D.T.E. 93T-198, 45 C.C.E.L. 153, 93 C.L.L.C. 14,019, 99 D.L.R. (4th) 626, 60 O.A.C. 1, 14 C.C.L.T. (2d) 113, [1993] 1 S.C.R. 87, 147 N.R. 169, EYB 1993-67486, [1993] S.C.J. No. 3 (S.C.C.) — referred to

Reger v. Savage (2007), 2007 BCSC 181, 2007 CarswellBC 268, [2007] B.C.J. No. 251 (B.C. S.C.) — considered

UAP Inc. v. Oak Tree Auto Centre Inc. (1997), 1997 CarswellPEI 40, [1997] P.E.I.R. 94, 149 Nfld. & P.E.I.R. 313, 467 A.P.R. 313, [1997] P.E.I.J. No. 49 (P.E.I. C.A.) — referred to

Statutes considered:

Bills of Exchange Act, R.S.C. 1985, c. B-4
Generally — referred to
s. 57 — considered

Court Order Interest Act, R.S.B.C. 1996, c. 79
Generally — referred to

ACTION by plaintiffs on promissory note.

A.A. MacDonald, for Plaintiffs
J. Christiansen, for Defendant
Emil Sadek, for himself

Maisonville J.:

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 re-zone 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, cor-

> rections, 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, in-

cluding 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 docu-

ment 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 (B.C. S.C. [In Chambers]) (affirmed by the

Court of Appeal [1997] B.C.J. No. 1647, 37 B.C.L.R. (3d) 140 (B.C. C.A.)) [*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 Investment Corp.* 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 Holdings Ltd.*, 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 (B.C. S.C.), 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 (P.E.I. C.A.) (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 *Levine Developments (Israel) Ltd., Re* (1978), 5 B.L.R. 164 (Ont. H.C.), MacDonald C.J.T.D., in *Hillcrest Housing Ltd., Re*, [1998] P.E.I.J. No. 57, 165 Nfld. & P.E.I.R. 181 (P.E.I. T.D.) 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 com-

pany'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 Com-

pany 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 (B.C. C.A.)). 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 (Eng. Q.B.), at 56 . 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* (1927), [1928] 1 W.W.R. 184 (Sask. C.A.), 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.* (1999), 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 considera-

> tion 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 (B.C. S.C.). 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] B.C.J. No. 1694 (B.C. S.C. [In Chambers]), 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 *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 307at 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 Inc.*, [1993] 1 S.C.R. 87 (S.C.C.), 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.), (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 Ltd.*, [1986] B.C.J. No. 597, 10 B.C.L.R. (2d) 15 (B.C.

C.A.), 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 (B.C. S.C.), 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.

Action dismissed.

TAB 3

CARSWELL

Law of Cheques and Promissory Notes

the law and practice

LAZAR SARNA
B.A., B.C.L., LL.M., LL.D.

Member of the Quebec Bar

VOLUME 1

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Consideration

§ 1. CONSIDERATION - DEFINED

A valuable consideration, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other. The promisee provides something of value while the promisor accepts, whether for his or another's benefit, as the cause of giving the promise, or in practice, signing a note.[1] Consideration to support a cheque does not have to be equivalent to the total amount of the debt due to the payee.[2]

"Value" means valuable consideration.[3]

A party whose signature appears on a bill is, prima facie, deemed to have become a party thereto for value. This means prima facie proof of value having been given is made by the production into the court record of the bill, and proof of the drawer signature: no other extrinsic evidence is necessary.[4]

Under section 54 of the *Bills of Exchange Act,* the presence of consideration is presumed. The onus of proving the lack of consideration is upon the drawer of a bill.[5]

Valuable consideration for a bill may be constituted by any consideration sufficient to support a simple contract or an antecedent debt or liability.

An antecedent debt provides consideration for a note.[6] In one instance where the accommodation party was sued, the court found absence of consideration where the payee on a note had already made an advance to the maker, and did not rely on the credit of the

1 *Misa v. Currie* (1875), L.R. 10 Ex. 153 (Ch. Ex.) cited by *Albert Pearl (Management) Ltd. v. J.D.F. Builders Ltd.* (1974), [1975] 2 S.C.R. 846 (S.C.C.) at p. 860 within an extract from , Falconbridge, *Banking and Bills of Exchange*, (7th. ed. 1969) at page 605.

2 *Albert Pearl (Management) Ltd. v. J.D.F. Builders Ltd.* (1974), [1975] 2 S.C.R. 846 (S.C.C.), citing at p. 11 Falconbridge, Banking and Bills of Exchange (7th ed. 1969) at p. 605; *Glesby v. Mitchell* (1931), [1932] S.C.R. 260 (S.C.C.), at p. 8; *Voce Enterprises Ltd. v. SHE Apparel Inc.*, 2016 BCSC 1080 (B.C. S.C.)

3 *Bills of Exchange Act*, s. 2.

4 *Prince George Hotel Co. v. Richardson*, 1933 CarswellOnt 138 (Ont. C.A.); *Slater v. Laberee* (1905), 9 O.L.R. 545 (Ont. Div. Ct.); *Clarkson v. Roberts* (1930), 66 O.L.R. 102 (Ont. C.A.); *Heintzman v. Young* (1923), 54 O.L.R. 13 (Ont. C.A.).

5 *Luther v. Westcott*, [1933] S.C.R. 251 (S.C.C.) per Lamont J., at p. 256.

6 *Bills of Exchange Act*, s. 53(1)(*b*).

accommodation party. Nor was there here any forbearance or other benefit conferred on the accommodation party.[7]

Where a bill is taken for or on account of a pre-existing debt, the presumption is that it is only conditional payment. If it is dishonoured the debt revives. If it is given in exchange for goods or other securities sold at the time, the transaction amounts to a barter of the bill, with all its risks.[8]

§ 2. PRESUMPTION

A bill as between immediate parties is evidence of money lent or that value has been given for the purposes of establishing a security interest. The fact that a promissory note is taken at the same time that the debtor has granted a security interest is further evidence money or value has been advanced.[9]

§ 3. MUST FLOW TO THE MAKER

Consideration must flow to the maker or promisor of a note. Where the funds advanced upon a note are not paid to the maker, there must be a sufficient link between the advance and the promise to constitute valid consideration flowing to the promisor in order to make the note enforceable.[10]

If funds have not been advanced upon the issue of the note but prior to the requirement that a note be issued, as for example to be used as a guarantee, the promisor would have to establish a "sufficient link" between the prior advance and the issuance of the note the basis of mixed fact and law.[11]

The antecedent debt may arise from the maker's act of embezzlement, which he now wishes to repay through a note.[12]

7 *Mollot v. Monette*, [1981] 2 S.C.R. 133 (S.C.C.).

8 *Dean Capital Corp. v. Geneen Automobiles Ltd.*, 2005 CarswellOnt 2300 (Ont. S.C.J.) citing *McGlynn v. Hastie* (1918), 46 D.L.R. 20 (Ont. C.A.) at p. 51.

9 *Erjo Investments Ltd. v. Michener Allen Auctioneering Ltd.* (2004), 238 D.L.R. (4th) 32, [2005] 3 W.W.R. 55, 241 Sask. R. 228 (Sask. C.A.).

10 *Bank of Montreal v. Khouw* (1984), 56 B.C.L.R. 270 (B.C. C.A.) where the promise had lent funds to a third party and not for the benefit of the promisor.

11 *Caligiuri v. Tumillo* (2003), 38 B.L.R. (3d) 163, [2004] 7 W.W.R. 677 (Man. C.A. [In Chambers]).

12 *Ackworth v. General Accident Assurance Co.* (1961), [1962] O.R. 183 (Ont. C.A.).

§ 4. CONSIDERATION - PAST

"Past consideration" is "good consideration" sufficient to support a note if

(1) the act was done at the request of the promisor;

(2) the parties understood that payment would be made or some other benefit conferred; and

(3) the payment or conferment of the benefit, if it had been promised in advance, was legally recoverable or enforceable.[13]

Colloquially put, old money owed can serve as consideration for the present issuance of a note.[14]

§ 5. FOR BENEFIT OF ANOTHER

So long as consideration flows from the promisee of a note, it does not matter that the consideration so far as it is in reference to one of the debtors, does not flow to the other debtor. The intensity of the relationship between a personal debtor and his controlled company as the other debtor may be sufficient to attribute consideration received by one to the other in support of a note signed by only one of them.[15] Such may be the case where the principal treats the company and its assets as his own, applies the assets as he likes, draws for his own personal use whatever the corporate account would stand, and instructs the company accountant to debit the books in whatever way is beneficial or appropriate.[16]

§ 6. FORBEARANCE AS CONSIDERATION

A promisee's promise to forbear from enforcing a debt is sufficient consideration for a promisor's promise to pay.[17] The act of forbearance may benefit the promisor or a third party.[18] Payment

13 *Wilburn Properties Inc. v. Silver Peak Resources Ltd.*, 2001 BCSC 1084 (B.C. S.C. [In Chambers]) at para. 83.

14 *Kong v. Kong*, 2013 BCSC 2252 (B.C. S.C.), reversed 2014 CarswellBC 3854 (B.C. C.A.).

15 *Albert Pearl (Management) Ltd. v. J.D.F. Builders Ltd.* (1974), [1975] 2 S.C.R. 846 (S.C.C.) citing In *Eisenberg v. Bank of Nova Scotia*, [1965] S.C.R. 681 (S.C.C.) at p. 694: *Therefore, upon a consideration of the above authorities, I have been led to the conclusion that a corporation, when a matter is intra vires of the corporation, cannot be heard to deny a transaction to which all the shareholders have given their assent even when such assent be given in an informal manner or by conduct distinguished from a formal resolution at a duly convened meeting.*

16 *Bonior v. Siery Ltd.*, [1968] N.Z.L.R. 254 (New Zealand S.C.) at p. 260.

17 *Francis v. Allan* (1918), 57 S.C.R. 373 (S.C.C.) at p. 376; and *British Columbia (Attorney General) v. Deeks Sand Gravel Co.*, [1956] S.C.R. 336 (S.C.C.) at p. 343.

18 *Moss v. 158339 Canada Inc.*, 2003 MBCA 101, [2003] M.J. No. 267 (Man. C.A.) at para. 24,

for another party's forbearance with respect to another party's debt constitutes valid consideration. In other words, it does not matter that the drawer is not the debtor of the payee.[19] Courts may infer a promise to forbear from the facts of a case. Whether a forbearance is valid consideration is a question of law and whether the act amounts to a forbearance is a question of fact.[20]

The forbearance or extension of time limited for the balance of payments on a transaction by the giving of a note, is valuable consideration within the meaning of the common law of England under section 9, or under section 52 of the *Bills of Exchange Act*.

In *Ross, Re*,[21] the drawer of a note had pledged $150,000 for the construction and equipment of a university gymnasium. He later promised to contribute $200,000 on the condition that the previous pledge of $150,000 would be included in the subsequent one. Once he paid $100,000, he asked for and received an extension of time for payment of the balance. He therefore issued a promissory note for $100,000 payable three years after date. Without paying, he went bankrupt and the trustee in bankruptcy disallowed the university claim for the amount of the note. It was held on appeal that the agreement of pledge of funds was valid under the law of Quebec, and that the evidence afforded proof of valuable consideration for the making of the note in the form of a natural obligation and forbearance of payment. The *Bills of Exchange Act* did not and was not intended to affect civil liability arising from with the agreement to pay the pledge.

An agreement between the immediate parties to forebear demanding payment on a bill does not render the bill conditional: forbearance constitutes a simple collateral agreement which does not affect the validity of the bill.

For example, a payee sued the maker after death on an alleged promissory note payable one year after date. The note was given in consideration for services rendered on a farm; and the parties agreed to withhold demand for payment until the occurrence of the maker's death. The court found that the acceptance by the payee of the maker's requests amounted to no more than a collateral engagement

Noren Investments Ltd. v. Brownie's Franchises Ltd. (1986), 33 D.L.R. (4th) 359 (B.C. S.C.) at p. 370, affirmed (1987), 37 D.L.R. (4th) 1 (B.C. C.A.), and *Royal Bank v. Kiska* (1967), 63 D.L.R. (2d) 582 (Ont. C.A.) at p. 590.

19 *Albert Pearl (Management) Ltd. v. J.D.F. Builders Ltd.* (1974), [1975] 2 S.C.R. 846 (S.C.C.), citing at p. 11 Falconbridge, Banking and Bills of Exchange (7th ed. 1969) at p. 605; *Glesby v. Mitchell* (1931), [1932] S.C.R. 260 (S.C.C.), at p. 8; *Voce Enterprises Ltd. v. SHE Apparel Inc.*, 2016 BCSC 1080 (B.C. S.C.).

20 *Caligiuri v. Tumillo* (2003), 38 B.L.R. (3d) 163, [2004] 7 W.W.R. 677 (Man. C.A. [In Chambers]).

21 (1931), [1932] S.C.R. 57 (S.C.C.).

not to enforce his rights until the condition had been respected. That did not make the document any the less an unconditional promise in writing by the maker to pay at a fixed time a sum certain in money to the payee. The agreement not to enforce payment while the maker lived was not a condition of the note, which otherwise bore terms importing a present and unqualified obligation. Even if the maker could have been enjoined from enforcing payment in the maker's lifetime, the document was still a valid promissory note.[22]

A promise by the payee to forbear is a good consideration. Actual forbearance at the request, express or implied, of the drawer or maker also constitutes good consideration.[23]

Consideration may consist of a forebearance to sue, or even an extension of credit or payment terms for the benefit of another party. In *Gallagher v. Murphy*,[24] the debtor of royalties for patent use, obtained from another a promissory note to cover the debt payable to the creditor and which the debtor endorsed. The note was delivered to the creditor which accepted it, reserving its rights for payment of the royalties if the note were not paid. After maturity, the creditor transferred the note to a holder for value who sued the maker and endorser. Neither the payee nor holder for value knew that the maker had purchased from the debtor an interest in another patent. The court held the note was valid given the presence of consideration which was not purchase money for a patent right or interest therein. Rather, the consideration was the extension of time to the debtor by the payee for payment of the royalties due by him.

While an extension of time for payment of a debt owing by a third person may be a good consideration from the payee to the maker of a promissory note, a person, unable for the time being to collect from a debtor, may arrange with another to take that other's note for the same amount for his own accommodation, without thereby extending the time for payment by his debtor.[25]

If a drawer of a bill promises the payee, in consideration for the payee's forbearance to sue, to pay the bill "whenever my circumstances may enable me to do so and I may be called upon for that purpose", or "as soon as she possibly could after they got going", the promise is not too vague to be enforced; and the bill was enforceable when the condition of ability to repay is established.[26]

22 *Luther v. Westcott*, [1933] S.C.R. 251 (S.C.C.).

23 *Ross, Re* (1931), [1932] S.C.R. 57 (S.C.C.) where Newcombe J. at p. 67 quoted from Lopes L.J. at page 346 of *Crears v. Hunter* (1887), 19 Q.B.D. 341 (Eng. C.A.).

24 *Gallagher v. Murphy*, [1929] S.C.R. 288 (S.C.C.).

25 *Glesby v. Mitchell* (1931), [1932] S.C.R. 260 (S.C.C.).

26 *Waters v. Earl of Thanet* (1842), 2 Q.B. 757 (Eng. K.B.) cited with approval in *Gould, Re*, [1940] O.R. 250 (Ont. C.A.).

The fact that a cheque is post-dated may create the presumption that it was so to support a forebearance, and hence demonstrate consideration for the cheque.[27]

§ 7. VALUE RECEIVED

The words "value received" inscribed on a note raises the presumption that the maker received consideration[28] or that there is an antecedent debt. The antecedent debt or liability may be found in a prior agreement, the obligations arising from which have not been discharged.

Where payment is in accordance with a promissory note drafted to establish the creditor-debtor relationship of the parties, a juristic reason is established to validate the enrichment of the payee, and which enrichment cannot be considered unjust.[28.1]

§ 8. PARTIAL FAILURE

An agreement which calls for an adjustment following shipment of goods in the event of quantity shortage does not create an inherent equity which affects the rights of a holder for value. Even if there is a partial failure of consideration between the immediate parties to a bill, that failure cannot affect the title of remote parties, such as a party whose endorsement on a note was not given pursuant to any agreement in respect of the immediate parties.

Section 69 of the *Bills of Exchange Act* provides that when an overdue bill is negotiated, it can be negotiated only subject to any defect of title affecting it at its maturity and thenceforward no person who takes it can acquire or give a better title than that which had the person from whom he took it. The endorsee of an overdue bill takes it subject to its equities, meaning the equities of the bill, not the equities of the parties. He takes it subject to a right inherent in a contractual relation represented by the bill.[29]

27 *Albert Pearl (Management) Ltd. v. J.D.F. Builders Ltd.* (1974), [1975] 2 S.C.R. 846 (S.C.C.), citing at p. 11 Falconbridge, *Banking and Bills of Exchange* (7th ed. 1969) at p. 605; *Glesby v. Mitchell* (1931), [1932] S.C.R. 260 (S.C.C.), at p. 8; *Voce Enterprises Ltd. v. SHE Apparel Inc.*, 2016 BCSC 1080 (B.C. S.C.).

28 *Riml v. Greger* (November 22, 1991), Doc. CA012802 (B.C. C.A.) where the agreement dealt with the sale of a part of a business: $7,000.00 downpayment with the balance of $14,000.00 to be paid on a 60% - 40% interest free split of the total monthly gross sales, 60% to be paid to Hubert Riml, until the total balance is paid unless purchaser wishes to pay off balance sooner.

28.1 *Bilin v. Sidhu*, 2017 BCSC 36 (B.C. S.C.); *Ontario (Hydro-Electric Power Commission) v. Brown*, [1960] O.R. 91 (Ont. C.A.).

29 *Scott v. Ashley Colter Ltd.*, [1942] S.C.R. 331 (S.C.C.).

TAB 4

Commercial and Consumer Transactions
Cases, Text and Materials

Third Edition
by Jacob S. Ziegel, Benjamin Geva and R.C.C. Cuming

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Negotiable Instruments and Banking

by Benjamin Geva
Professor of Law
Osgoode Hall Law School
York University, Toronto

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With Much Affection and
Warmest Appreciation to
My Negotiable Instruments
Law Professors
Aharon Barak and Andrew L. Kaufman
(in Jerusalem) *(at Harvard)*

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consistent with the view that it refers to the [instrument] itself. It is not material to the determination of the status of a party whether he acted gratuitously or perhaps received some value in exchange for making his signature." (ii) Has the acceptor signed the banker's acceptance "for the purpose of lending his name to some other person"? According to MacKeigan CJNS in *Smith v. Bank of Montreal* (1976), 72 DLR (3d) 154, at 157 (NSSC App. Div.), for the purposes of s. 54(1), a name is lent "if it is used to support or aid the obtaining of credit by the person to whom it is 'lent.' This necessarily implies that the latter person is himself obligated to the principal creditor in respect of the debt in question. It then follows that the accommodation party will ... become the surety for or guarantor of the person accommodated." (iii) Why doesn't the indemnification obligation of the accommodated party (whose debt is guaranteed) to the accommodation party (the surety) constitute "value" received for the instrument?

In the final analysis, speaking of the "very important money-market activity of Canadian banks [which] accept time bills drawn upon them by their customers payable to the customer or any investment dealer and sold to the public," Crawford and Falconbridge conclude (at 1620) that "[t]hese 'bankers acceptance' are almost always accepted by the bank[s] for the accommodation of their customers."

Parties' Liability on the Instrument and the Basic Transaction

Sometimes, an instrument is taken by a creditor from his debtor merely to evidence the debtor's undertaking under the basic transaction (e.g., sale of goods, loan of money). In such a case, as between the debtor and creditor, the instrument itself does not give rise to any liability on the debtor's part. The basic transaction remains the only effective source of the debtor's liability. The debt is neither discharged nor suspended by the giving of the instrument. The instrument is only intended to serve as evidence of the indebtedness.

Normally, however, an instrument is given by a debtor to his creditor either as collateral security to, or by way of payment of, the indebtedness arising from the basic transaction. There is moreover a presumption in favour of payment.

An instrument given as collateral security does not suspend the creditor's right to sue on the debt. On the contrary, liability on the instrument does not arise until the debtor has breached his liability under the basic transaction. For example, a hirer may secure his rental obligation by giving the creditor a promissory note to be sued on only if the rental payments are not made. The rental obligation is neither suspended nor discharged by the giving of the note.

An instrument given by way of payment either absolutely discharges or suspends the debtor's liability under the basic transaction. Thus, parties are free to agree, explicitly or implicitly, that a bill or note shall operate as absolute payment of the debt for which it is given. In such a case, the giving of the instrument absolutely discharges any liability arising from the debt as if the debt has been paid in cash. However, the presumption is in favour of conditional payment. Accordingly, when an instrument is taken by a creditor in payment of a debt, unless otherwise agreed, the debt is only suspended. Thus the debt cannot be sued upon before the maturity of the instrument. If the instrument is paid, the debt is absolutely discharged. But an instrument may be "dishonoured," i.e., not paid when duly presented upon its maturity. If the instrument is dishonoured, the original indebted-

ness is revived. The creditor can sue either on the instrument (as the holder thereof) or on the debt itself. In the action on the debt, the instrument may be used as evidence.

The difference between absolute and conditional payment may be demonstrated as follows. Suppose a buyer pays for goods by bill or note. Where absolute payment is intended, the giving of the instrument absolutely discharges the buyer's debt arising from the sale contract. Whether the instrument is paid or dishonoured, no liability fastens on the buyer on the basis of the contract for sale. On dishonour, the holder can sue only on the instrument. It is the instrument alone which, upon its dishonour, stands as the source of liability. On the other hand, when a conditional payment is intended, as is normally the case, the giving of the instrument only suspends the buyer's indebtedness on the sale contract. However, the debt revives upon the dishonour of the instrument, in which case the holder is free to sue either on the instrument or on the sales contract (being the basic transaction.) See, in general, A. Barak, "The Uniform Commercial Code-Commercial Paper—An Outsider's View," Part II (1968), 3 *Israel L Rev.* 184, at 215; Chalmers, at 338-44. Can you conceptualize the difference between "collateral security" and "conditional payment?"

The conditional payment principle was confirmed by Sir Nicolas Brown-Wilkinson V-C in *Re Charge Card Services Ltd.*, [1988] 3 All ER 702, at 707 (CA):

> It is common ground that where a debt is "paid" by cheque or bill of exchange, there is a presumption that such payment is conditional on the cheque or bill being honoured. If it is not honoured, the condition is not satisfied and the liability of the purchaser to pay the price remains. Such presumption can be rebutted by showing an express or implied intention that the cheque or bill is taken in total satisfaction of the liability: see *Chitty on Contracts* (25th edn, 1983) para 1436ff, *Sayer v. Wagstaff* (1844) 14 LJ Ch 116, *Re London Birmingham and South Staffordshire Banking Co Ltd.* (1865) 34 Beav 332, 55 ER 663, *Re Romer & Haslam [1893]* 2 QB 286, *Allen v. Royal Bank of Canada* (1925) 95 LJPC 17 and *Bolt and Nut Co (Tipton) Ltd v. Rowlands Nicholls & Co Ltd* [1964] 1 All ER 137, [1964] 2 QB 10.

It is not entirely certain whether the presumption in favour of conditional payment applies when the debtor is not a party to the instrument given to the creditor in payment under the basic transaction. See, for example, Chalmers, at 340 and n. 30. Under Rev. (1990) UCC §3-310, payment by means of an instrument, such as a bank draft or certified cheque, on which a bank is obligated, constitutes an absolute discharge of the underlying debt.

PROBLEM

Lender lent money to Borrower on the security of Borrower's property. As conditional payment under the loan agreement Borrower issued a promissory note payable to Lender. Upon Borrower's default, who is entitled to recover on the loan agreement, to collect payment on the note, and to enforce the security, in each of the following alternative situations.

a) The holder of the note is payee-Lender.
b) The holder of the note is an endorsee to whom payee-Lender properly negotiated the note.

[Concurring judgments were given by Farwell and Kennedy LJ.]

Application dismissed.

NOTES AND QUESTIONS

1) On the basis of *Talbot*, Chalmers and Guest conclude (at 293) that "[w]here ... the plaintiff is the original payee of the instrument, the defendant must prove that the plaintiff received the instrument with notice of fraud etc., with the curious result that in a matter of proof the original payee is in a more favoured position than a person to whom the instrument has been negotiated, since the burden does not shift to him to prove that, subsequent to the fraud etc., value has in good faith been given for the instrument." Thus, where a maker proves fraud, the onus of proof shifts to an endorsee-plaintiff, but not to a payee-plaintiff! Can this distinction be supported by any policy considerations?

2) Was the conclusion in *Talbot* rationalized on the inability of the payee to be a holder in due course, or rather on the interpretation of s. 30(2) of the English BEA, corresponding to s. 57(2) in Canada? Note that the "unless and until" clause in s. 57(2) (Can.) is not identical to the one in Eng. s. 30(2); the former contains seven additional concluding words ("by some other holder in due course") which do not appear in the latter. It is, however, well established that the "unless and until" clause in Canada does not limit the scope of s. 57(2) to the case where an intervening holder in due course is situated between the current holder and the original fraud, illegality or duress, as these additional seven words may suggest. Stated otherwise, whether or not an intervening holder in due course exists, the holder may satisfy the shifted onus of proof under the "unless and until" clause of s. 57(2) (Can.) by proving that he himself is a holder in due course, namely, that he complied with all the requirements of s. 55(1). See Crawford and Falconbridge, at 1468-74. They thus reject *Talbot* and conclude (at 1470) that "[t]here can be no doubt that the payee is a holder; he is specifically made so by the definition in s. 2 of the BEA. Therefore subsection [57(2)] applies in the payee's favour." Do you agree?

Defences Good Against a Holder in Due Course

Real (or absolute) defences do not constitute a defect of title and are also available against a holder in due course. According to Dean Falconbridge, real defences are so called,

> because, at least as regards a particular defendant who is entitled to set them up, they are based upon the nullity of the *res* without regard to the merits or demerits of the plaintiff. They are good defences, so far as the defendant is concerned, even against a holder in due course, and as a general rule, a holder cannot even claim title through the signature of a defendant making out such a defence.

See Crawford and Falconbridge, at 1521-22. The availability of these defences against a holder in due course makes them "absolute." In general, "[w]here a party establishes a real or absolute defence, he is entitled to a declaration that he is under no liability. His statutory engagement is a nullity." *Id.*, at 1523. A non-exhaustive list of such defences is provided for by Crawford and Falconbridge, at 1523. The list includes complete incapacity; forgery;

fraud or illegality of such a nature as renders the expressed obligation of the party a nullity; absence of delivery of a blank or incomplete instrument; material alteration of the instrument that releases the party; and discharge of the instrument by payment in due course, by renunciation at or after maturity, or by intentional and apparent cancellation.

In *Ingham v. Primrose* (1859), 1 CB (NS) 81; 141 ER 745, at 747, Williams J considered it to be "settled law" that a drawer who lost an unissued cheque, or from whom such a cheque had been stolen, is liable to a holder in due course:

> The reason is, that such negotiable instruments have, by the law-merchant, become part of the mercantile currency of country; and, in order that this may not be impeded, it is requisite that innocent holders for value should have a right to enforce payment of them against those who by making them have caused them to be part of such currency.

That is, absence of issue (namely the first delivery of a complete instrument) is not a real defence available against a holder in due course.

Has this rule survived the passage of the Act? See the case that follows.

National Bank of Canada v. Tardivel Associates Inc.
(1993), 15 OR (3d) 188 (Gen. Div.)

McCOMBS J: This is a motion, pursuant to rule 20.04, for summary judgment in favour of the plaintiff against the defendant 631333 Ontario Inc.

The plaintiff alleges that there is no real factual issue for trial, and submits that the only genuine issue is a question of law, which should be determined in favour of the plaintiff pursuant to rule 20.04(4).

The defendant agrees that the only genuine issue for trial is a question of law. He submits that the governing law requires that the plaintiff's motion be dismissed.

THE FACTS

The defendant Tardivel Associates Inc., and Shawn Tardivel, its principal, had bank accounts at the plaintiff's branch at 2 First Canadian Place, Toronto. The defendant, 631333 Ontario Inc., operates a Toronto restaurant and nightclub. Its principals are Nick DiDonato and Pat DiDonato. Shawn Tardivel was a regular patron at the bar/restaurant, and on March 26, 1992, Tardivel told Nick Didonato that if he put up $23,000 he could get in on a "quick flip" of real estate, which would guarantee a substantial profit within four weeks.

Nick DiDonato agreed to the transaction, although later he observed that the deal was "too good to be true," and he "should have known better." He asked Tardivel to provide him with documentation of the deal, and told Pat DiDonato to draw up a cheque for $23,000.

Later that day, Tardivel returned without the requested documents, and when he was briefly left alone in the office, he stole the cheque and left the premises. Shortly thereafter, Pat DiDonato discovered the cheque missing.

Later that day, Tardivel went to the plaintiff's First Canadian Place branch, and deposited the $23,000 cheque in his company account. He then transferred $21,000 of it to

TAB 5

CANADA LAW BOOK

The Law of Banking and Payment in Canada

Bradley Crawford, Q.C.
B. Com., LL.B. (B.C.), LL.M. (London)

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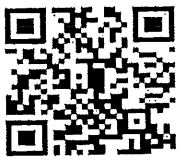

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other in that they are good defences against some parties and not against other parties.

Absolute defences are discussed in §26:30.30, *infra*. Some defects of title are listed in BEA, s. 55(2). They are discussed in general terms in §26:30.40, *infra*, and the defects specifically referred to in BEA, s. 55(2) are considered individually in the sections following §26:30.40. Mere personal defences are not discussed at length in any one section, but see §26:30.40(2), *infra*, and any good text on the law of contracts.

§26:30.30 Real or Absolute Defences

§26:30.30(1) Substantive Content of Defences

It is fundamental to any law of negotiable instruments that there be a distinction between the substance of real, or absolute, defences on the one hand, and defects of title and personal defences on the other. The former are the defences that apply against all persons, no matter whether the holder has or has not had notice of them, whether or not he took for value, whether before or after maturity, and whether or not the instrument is complete and regular in form. Without attempting an exhaustive listing, the following are examples of the absolute defences:

(a) complete incapacity to incur contractual liability by signature of the instrument (see §23:30.20 (corporations); §23:30.30 (infants); §23:30.40 (mental incompetents); §23:30.50 (others));

(b) forgery of the party's signature, or signature by another without his authority, except in so far as he is estopped from denying its validity (see §23:40.40);

(c) fraud or illegality of such a nature as renders the expressed obligation of the party a nullity (see §26:30.40(4)(a), *infra*);

(d) the absence of an effective delivery of a blank or incomplete instrument (see §23:20.60);

(e) material alteration of the instrument that releases the party (see §29:70);

(f) discharge by payment in due course and surrender of the instrument (see §29:20), and renunciation at or after maturity (see §29:50.20), or by intentional and apparent cancellation at any time (see §29:60.10).

There are, no doubt, other absolute defences that have their foundations outside the BEA, such as absolute discharge from bankruptcy. But it has been decided[44.1] after a review of the foregoing list that a cheque issued by a trustee in bankruptcy is not discharged by the operation of s. 81(4) of the *Bankruptcy and Insolvency Act*.[44.2]

[44.1] *Money Stop Ltd. v. Snyder* (2010), 187 A.C.W.S. (3d) 561 (Alta. Q.B.).
[44.2] R.S.C. 1985, c. B-3.

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF URBANCORP (WOODBINE) INC. AND URBANCORP (BRIDLEPATH) INC., ET AL.

COURT FILE NO. CV-16-11549-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE – COMMERCIAL LIST

Proceeding Commenced at Toronto

BRIEF OF AUTHORITIES OF THE MONITOR
(Motion Returnable May 2, 2017)

DAVIES WARD PHILLIPS & VINEBERG LLP
155 Wellington Street West
Toronto, ON M5V 3J7

Robin B. Schwill (LSUC #38452I)
Tel: 416.863.5502
Fax: 416.863.0871

Lawyers for the Monitor

Tor#: 3549974.1