Tab 16

2011 SKQB 161
Saskatchewan Court of Queen's Bench

Martel v. Mohr

2011 CarswellSask 279, 2011 SKQB 161, [2011] 9 W.W.R. 150, 201 A.C.W.S. (3d) 574, 370 Sask. R. 104, 5 R.P.R. (5th) 278, 86 B.L.R. (4th) 96

Jeremie Michael Anthony Martel, Shylee Martel (Plaintiffs) and Denise Marie Mohr, Terry Douglas Mohr (Defendants)

C.L. Dawson J.

Judgment: April 21, 2011
Docket: Estevan Q.B. 121/07

Counsel: Jonathan Goby for Plaintiffs
John Billesberger for Defendants

Subject: Contracts; Property

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Contracts

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Real property

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Remedies

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Headnote

Real property --- Sale of land — Agreement of purchase and sale — Formation of contract — Requirements for validity — Certainty — Miscellaneous

Parties entered into agreement for purchase and sale of residential property — Before closing, vendors formed impression, erroneously, that parties' lawyers had not been in contact — Vendors took position that delay in delivery of deposit, during time of rise in housing prices, resulted in situation where vendors could not afford to live elsewhere and no longer wished to sell — Vendors also expressed concern about purchasers' ability to obtain financing and intention to go through with purchase — Vendors took position that agreement was null and void — Purchasers brought action for specific performance — Action allowed — Parties had binding contract, rather than agreement to agree — Vendors had committed to terms of contract and it was anxiety as to purchasers' ability to comply with terms of completion of purchase price that was vendors' claimed reason for backing out — There was no legal requirement that contract provide for who would pay for legal fees or transfer fees — Lack of term allowing purchasers to leave some personal property at vendors' residence prior to possession could not be said to be essential term which would negative contractual intention — Clause 8, stating that items sold shall be free of liens or other encumbrances, was not ambiguous for failing to mention land and buildings; clause in fact stated that vendors had to discharge existing mortgage on land — Purchasers sold their home and moved into home of one of their parents, and completed all financing obligations — Vendors looked for property to purchase, and their lawyer wrote at one point that agreement was still binding subject to payment of money by specified date — Conduct of parties pointed only to conclusion that final agreement had been reached.

Real property --- Sale of land — Agreement of purchase and sale — Interpretation of contract — Particular terms — Miscellaneous

Limitation of liability — Parties entered into agreement for purchase and sale of residential property — Agreement contained clause (clause 6) providing that, should seller forfeit any terms, buyer would be entitled to return of deposit, plus interest, and agreement would be null and void — Before closing, vendors formed impression, erroneously, that parties' lawyers had not been in contact — Vendors took position that delay in delivery of deposit, during time of rise in housing prices, resulted in situation where vendors could not afford to live elsewhere and no longer wished to sell — Vendors also expressed concern about purchasers' ability to obtain financing and intention to go through with purchase — Vendors took position that agreement was null and void — Purchasers brought action for specific performance — Action allowed — Vendors' breach was fundamental breach of contract — Limitation of liability clause, to extent vendors' interpretation was applicable, produced grossly unfair advantage to vendors, allowing them to cancel agreement at any time up to date of possession, with almost no liability — Purchasers were not slow in proceeding forward, and deposit was delivered over two and one half months before possession date — It would have been unfair and unreasonable to enforce interpretation of clause 6 suggested by vendors with respect to purchasers — Clause 6 was also ambiguous and could not provide vendors with limitation of liability — Interpretation of "forfeit" in last sentence suggested by vendors would have caused court to ascribe two different meanings to work within same clause — Clause had to be strictly constructed against vendors and, as clause was not clear, ambiguity weighed against vendors.

Contracts --- Construction and interpretation — Resolving ambiguities — Contra proferentem

Limitation of liability — Parties entered into agreement for purchase and sale of residential property — Agreement contained clause (clause 6) providing that, should seller forfeit any terms, buyer would be entitled to return of deposit, plus interest, and agreement would be null and void — Before closing, vendors formed impression, erroneously, that parties' lawyers had not been in contact — Vendors took position that delay in delivery of deposit, during time of rise in housing prices, resulted in situation where vendors could not afford to live elsewhere and no longer wished to sell — Vendors also expressed concern about purchasers' ability to obtain financing and intention to go through with purchase — Vendors took position that agreement was null and void — Purchasers brought action for specific performance — Action allowed — Vendors' breach was fundamental breach of contract — Limitation

of liability clause, to extent vendors' interpretation was applicable, produced grossly unfair advantage to vendors, allowing them to cancel agreement at any time up to date of possession, with almost no liability — Purchasers were not slow in proceeding forward, and deposit was delivered over two and one half months before possession date — It would have been unfair and unreasonable to enforce interpretation of clause 6 suggested by vendors with respect to purchasers — Clause 6 was also ambiguous and could not provide vendors with limitation of liability — Interpretation of "forfeit" in last sentence suggested by vendors would have caused court to ascribe two different meanings to work within same clause — Clause had to be strictly constructed against vendors and, as clause was not clear, ambiguity weighed against vendors.

Remedies --- Specific performance — Availability in particular contracts — Sale of land

Parties entered into agreement for purchase and sale of residential property — Before closing, vendors formed impression, erroneously, that parties' lawyers had not been in contact — Vendors took position that delay in delivery of deposit, during time of rise in housing prices, resulted in situation where vendors could not afford to live elsewhere and no longer wished to sell — Vendors also expressed concern about purchasers' ability to obtain financing and intention to go through with purchase — Vendors took position that agreement was null and void — Purchasers brought action for specific performance — Action allowed — Vendors' breach was fundamental breach of contract — Evidence was that purchasers wanted to purchaser subject property to be closer to family, and that real estate market was such that there were no other homes for sale in area that were suitable — Purchasers had particular attachment to area and lack of availability of suitable homes in area added to uniqueness of subject property — There was never any issue as to purchasers' readiness or willingness to proceed with purchase throughout material time — Only matter that was not completed was insurance on property — Insurance was not term of contract, but rather was one of conditions of financing — Purchasers stated that insurance was not put in place on possession date because of vendors' refusal to complete sale — Purchasers more than met burden of showing that property was unique and that they were ready, willing and able to proceed with purchase.

Table of Authorities

Cases considered by *C.L. Dawson J.*:

Ardekany v. Dominion of Canada General Insurance Co. (1985), 67 B.C.L.R. 162, 1985 CarswellBC 310, [1986] I.L.R. 1-2031, 20 C.C.L.I. 37 (B.C. S.C.) — considered

Atlas Supply Co. of Canada v. Yarmouth Equipment Ltd. (1991), 103 N.S.R. (2d) 1, 282 A.P.R. 1, 37 C.P.R. (3d) 38, 1991 CarswellNS 378 (N.S. C.A.) — considered

Atlas Supply Co. of Canada v. Yarmouth Equipment Ltd. (1991), 108 N.S.R. (2d) 270 (note), 294 A.P.R. 270 (note), 137 N.R. 78 (note), 38 C. & S.D. iv, 1991 CarswellNS 787 (S.C.C.) — referred to

Bawitko Investments Ltd. v. Kernels Popcorn Ltd. (1991), 79 D.L.R. (4th) 97, 53 O.A.C. 314, 1991 CarswellOnt 836 (Ont. C.A.) — considered

Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd. (1997), 221 N.R. 1, 1997 CarswellNfld 207, 1997 CarswellNfld 208, 153 D.L.R. (4th) 385, 490 A.P.R. 269, [1997] 3 S.C.R. 1210, 48 C.C.L.I. (2d) 1, 37 B.L.R. (2d) 1, 158 Nfld. & P.E.I.R. 269, 40 C.C.L.T. (2d) 235, 1999 A.M.C. 108 (S.C.C.) — considered

Buildevco Ltd. v. Monarch Construction Ltd. (1990), 73 O.R. (2d) 627, 1990 CarswellOnt 757 (Ont. H.C.) — referred to

Burkardt v. Gawdun (2004), 14 C.C.L.I. (4th) 163, [2005] 2 W.W.R. 31, 254 Sask. R. 271, 336 W.A.C. 271, 2004 CarswellSask 654, 2004 SKCA 128 (Sask. C.A.) — considered

Calvan Consolidated Oil & Gas Co. v. Manning (1959), [1959] S.C.R. 253, 17 D.L.R. (2d) 1, 1959 CarswellAlta 83 (S.C.C.) — considered

Canada Square Corp. v. Versafood Services Ltd. (1981), 34 O.R. (2d) 250, 15 B.L.R. 89, 130 D.L.R. (3d) 205, 1981 CarswellOnt 124 (Ont. C.A.) — considered

CIT Financial Ltd. v. Weber Construction Ltd. (2003), [2003] 4 W.W.R. 587, 2003 SKCA 13, 2003 CarswellSask 107, 232 Sask. R. 72, 294 W.A.C. 72 (Sask. C.A.) — referred to

Foley v. Classique Coaches Ltd. (1934), 103 L.J.K.B. 550, 151 L.T. 242, [1934] All E.R. Rep. 88, [1934] 2 K.B. 1 (Eng. C.A.) — referred to

Guarantee Co. of North America v. Gordon Capital Corp. (1999), [2000] I.L.R. I-3741, 126 O.A.C. 1, 247 N.R. 97, 49 B.L.R. (2d) 68, [1999] 3 S.C.R. 423, 15 C.C.L.I. (3d) 1, 178 D.L.R. (4th) 1, 1999 CarswellOnt 3171, 1999 CarswellOnt 3172, 39 C.P.C. (4th) 100 (S.C.C.) — considered

Imperial Oil Ltd. v. Young (1998), 1998 CarswellNfld 224, 21 R.P.R. (3d) 65, 167 Nfld. & P.E.I.R. 280, 513 A.P.R. 280 (Nfld. C.A.) — considered

Meeker Log & Timber Ltd. v. "Sea Imp VIII" (The) (1996), 21 B.C.L.R. (3d) 101, 1996 CarswellBC 1465 (B.C. C.A.) — considered

Meeker Log & Timber Ltd. v. "Sea Imp VIII" (The) (1997), (sub nom. *Meeker Log & Timber Ltd. v. Ship Sea Imp VIII)* 208 N.R. 325 (note), (sub nom. *Meeker Log & Timber Ltd. v. Ship Sea Imp VIII)* 145 W.A.C. 92 (note), (sub nom. *Meeker Log & Timber Ltd. v. Ship Sea Imp VIII)* 89 B.C.A.C. 92 (note) (S.C.C.) — referred to

Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co. (2000), 4 C.L.R. (3d) 155, 2000 NSCA 95, 2000 CarswellNS 235, 189 N.S.R. (2d) 1, 590 A.P.R. 1 (N.S. C.A.) — considered

Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co. (2001), 2001 CarswellNS 144, 2001 CarswellNS 145, 270 N.R. 196 (note), 193 N.S.R. (2d) 400 (note), 602 A.P.R. 400 (note) (S.C.C.) — referred to

Plas-Tex Canada Ltd. v. Dow Chemical of Canada Ltd. (2004), 245 D.L.R. (4th) 650, 357 A.R. 139, 334 W.A.C. 139, [2005] 7 W.W.R. 419, 42 Alta. L.R. (4th) 118, 2004 ABCA 309, 2004 CarswellAlta 1290, 27 C.C.L.T. (3d) 18, 4 B.L.R. (4th) 194 (Alta. C.A.) — considered

Popyk v. Western Savings & Loan Assn. (1969), 67 W.W.R. 684, 1969 CarswellAlta 16, 3 D.L.R. (3d) 511 (Alta. C.A.) — considered

R. v. Premier Cutlery Ltd. (1980), 1980 CarswellOnt 750, 55 C.P.R. (2d) 134 (Ont. Prov. Ct.) — considered

Rogers v. Lane Realty Corp. (2005), 2005 SKQB 330, 2005 CarswellSask 509, 265 Sask. R. 261 (Sask. Q.B.) — considered

Romfo v. 1216393 Ontario Inc. (2007), 2007 CarswellBC 2187, [2008] 8 W.W.R. 65, 80 B.C.L.R. (4th) 90, 285 D.L.R. (4th) 512, 2007 BCSC 1375, 60 R.P.R. (4th) 259, 35 B.L.R. (4th) 105 (B.C. S.C.) — considered

SaskPower International Inc. v. UMA/B&V Ltd. (2007), [2007] 6 W.W.R. 277, 2007 SKCA 40, 2007 CarswellSask 165, 293 Sask. R. 66, 397 W.A.C. 66 (Sask. C.A.) — considered

Semelhago v. Paramadevan (1996), 1996 CarswellOnt 2737, 1996 CarswellOnt 2738, 197 N.R. 379, 3 R.P.R. (3d) 1, 28 O.R. (3d) 639 (note), 136 D.L.R. (4th) 1, 91 O.A.C. 379, [1996] 2 S.C.R. 415 (S.C.C.) — referred to

Shelanu Inc. v. Print Three Franchising Corp. (2003), 64 O.R. (3d) 533, 172 O.A.C. 78, 226 D.L.R. (4th) 577, 38 B.L.R. (3d) 42, 2003 CarswellOnt 2038 (Ont. C.A.) — considered

Solway v. Davis Moving & Storage Inc. (2002), 62 O.R. (3d) 522, 222 D.L.R. (4th) 251, 166 O.A.C. 370, 2002 CarswellOnt 4257, 31 B.L.R. (3d) 239 (Ont. C.A.) — considered

Solway v. Davis Moving & Storage Inc. (2003), 2003 CarswellOnt 2018, 2003 CarswellOnt 2019, 189 O.A.C. 200 (note), 320 N.R. 194 (note) (S.C.C.) — referred to

Syncrude Canada Ltd. v. Hunter Engineering Co. (1989), (sub nom. *Hunter Engineering Co. v. Syncrude Can. Ltd.*) 92 N.R. 1, (sub nom. *Hunter Engineering Co. v. Syncrude Can. Ltd.*) [1989] 1 S.C.R. 426, (sub nom. *Hunter Engineering Co. v. Syncrude Can. Ltd.*) [1989] 3 W.W.R. 385, (sub nom. *Hunter Engineering Co. v. Syncrude Can. Ltd.*) 57 D.L.R. (4th) 321, (sub nom. *Hunter Engineering Co. v. Syncrude Can. Ltd.*) 35 B.C.L.R. (2d) 145, 1989 CarswellBC 37, 1989 CarswellBC 703 (S.C.C.) — followed

869163 Ontario Ltd. v. Torrey Springs II Associates Ltd. Partnership (2005), (sub nom. *Peachtree II Associates-Dallas L.P. v. 857486 Ontario Ltd.*) 76 O.R. (3d) 362, 10 B.L.R. (4th) 44, 2005 CarswellOnt 2782, (sub nom. *Peachtree II Associates-Dallas L.P. v. 857486 Ontario Ltd.*) 200 O.A.C. 159, 256 D.L.R. (4th) 490 (Ont. C.A.) — followed

Tariffs considered:

Queen's Bench Rules, Sask. Q.B. Rules
Tariff of Costs, Sched I "B", column 4 — referred to

Words and phrases considered:

forfeit

The first question that must be dealt with is what does the term "forfeit" mean in that last sentence of clause 6 [of the agreement of purchase and sale]. The defendants argue that it is reasonable to read the word "forfeit" as "default" or "breach" in the last sentence of clause 6. The plaintiffs argue that the last sentence of clause 6 is ambiguous and should not be enforced.

The terms "forfeit" and "forfeiture" have been the subject of some degree of judicial consideration, and appear to have a consistent interpretation. When interpreting a contract, a court may use dictionaries to assist in determining the meaning of disputed words (*Buildevco Ltd. v. Monarch Construction Ltd.* (1990), 73 O.R. (2d) 627 (Ont. H.C.)). The word "forfeiture" is defined in *Black's Law Dictionary* as follows:

Forfeiture - *n.* **1.** The divestiture of property without compensation **2.** The loss of a right privilege or property because of a crime, breach of obligation or neglect of duty.

The British Columbia Supreme Court relied on basic dictionary definitions of "forfeiture" in *Ardekany v. Dominion of Canada General Insurance Co.* (1985), 67 B.C.L.R. 162, 20 C.C.L.I. 37 (B.C. S.C.), a case dealing with international trade and customs. The Court said, at paras. 30 and 31:

30 The Shorter Oxford Dictionary defines forfeiture as:

The fact of losing or becoming liable to lose (an estate, goods, life, an office, right, etc.) in consequence of a crime, offence, or breach of engagement.

31 Webster's Third New International Dictionary defines forfeiture as:

The divesting of the ownership of particular property of a person on account of the breach of a legal duty and without any compensation to him.

Similarly, in respect of an international trade and customs issue, the Alberta Court of Appeal in *Popyk v. Western Savings & Loan Assn.* (1969), 67 W.W.R. 684, [1969] A.J. No. 69 (Alta. C.A.), adopted the comment on forfeiture from *Williston on Contracts*, 3rd ed., vol. 5, pg. 640, that:

...the fundamental idea is doubtless that the person subjected to a forfeiture thereby loses property which belonged to him, without adequate return and without any breach of duty on his part commensurate in value with the property lost.

The Ontario Provincial Court adopted the following definition of "forfeit" in *R. v. Premier Cutlery Ltd.* (1980), 55 C.P.R. (2d) 134, [1980] O.J. No. 3913 (Ont. Prov. Ct.), a case involving intellectual property and stated at para. 93:

93 The word "forfeit" can also have various meaning, such as the actual taking away of property on breach of condition, and also the doing or suffering of a thing creates liability such as deprival. *Stroud's Legal Dictionary* at p. 1080, gives a quotation from *R. Levy*, 30 Ch. D 119, in which matter Kay J. said "the word forfeit ... is something lost by the commission of a crime; something paid for the expiation of a crime; a fine; a mullet". There the learned Judge held the verb "to forfeit" is confined to mean, "to lose by some breach of condition; to lose by some offence." ...

The Ontario Court of Appeal in *869163 Ontario Ltd. v. Torrey Springs II Associates Ltd. Partnership* (2005), 76 O.R. (3d) 362, 256 D.L.R. (4th) 490 (Ont. C.A.) ("*Torrey Springs*"), a case involving the enforceability of stipulated remedy clauses, defined forfeiture as follows, at para. 22:

22 ... On the other hand, a forfeiture is a loss, by reason of some specified conduct, of a right, property, or money, often held as security or part payment of the obligation being enforced under the threat of forfeiture. Like promises to pay a penalty, forfeitures often have penal consequences as the right or property forfeited by the defaulting party may bear no relation to the loss suffered by the innocent party.

These descriptions of "forfeit" and "forfeiture" make it clear that to "forfeit" is to give something up or lose something because of a breach or default. A forfeiture is more than simply a breach or default; it implies the further consequence of a breach or default.

The last sentence of clause 6 here states "[s]hould the Seller 'forfeit' any terms of this Agreement...". The legal definition of "forfeit" does not comport with the way in which the defendants suggest the word "forfeit" is used in the last sentence of clause 6. Also problematic with accepting the word "forfeit" as really meaning "breach" in the last sentence of clause 6 is that the parties have used the word "forfeited" correctly (or according to the legal definition)

in clause 6 in the sentence immediately preceding the sentence in issue. Thus, the court is faced with the potential problem of ascribing two different meanings to the same word used in the same clause.

unconscionable, unreasonable, unfair or contrary to public policy

The question then is what is the meaning of unconscionable, unreasonable, unfair or contrary to public policy in the context of limitation of liability clauses? In *Solway v. Davis Moving & Storage Inc.* (2002), 62 O.R. (3d) 522 (Ont. C.A.) (leave to appeal to the Supreme Court of Canada refused (S.C.C.)), the plaintiffs' contracted with a moving company to have their household goods removed from their home, stored briefly and then delivered to their new home. Concerned about the security of the goods because they were rare and valuable artifacts and antiques, the plaintiffs secured from the moving company a representation that the trailer would be locked and parked in its moving yard. The trailer was parked in that fashion except for one night when the lot was being plowed for snow. On that night, the trailer was left unattended on a public street and was stolen. The majority of the Ontario Court of Appeal upheld the trial judge's finding that the facts disentitled the moving company from relying on the limitation of liability clause which have limited the recoverable damages to around $7,000.00. The Court of Appeal said, at para. 20:

[20] In deciding not to enforce the limitation clause, the trial judge appears to have equated the words, "unconscionable" and "unreasonable" as these terms were discussed in *Hunter Engineering*. In our view, on the facts as found by the trial judge, to limit the loss of the plaintiffs to $7,089.60 would, in the words of Dickson C.J.C. be "unconscionable", or in the words of Wilson J. be "unfair or unreasonable". This is one of those cases where relief should be granted.

Another example in which unconscionability was found to avoid enforcement of an limitation of liability clause was in *Atlas Supply Co. of Canada v. Yarmouth Equipment Ltd.* (1991), 103 N.S.R. (2d) 1 (N.S. C.A.) (leave to appeal to the Supreme Court of Canada refused (S.C.C.)). In that case, the Nova Scotia Court of Appeal cited various factors in support of its finding of unconscionability. Those factors included the fact that a franchise agreement had been entered into by a large national company with multi-national connections on the one hand and a small business person with little experience on the other, the fact that the franchisor had given the franchisees financial projections which it knew were unrealistic; and, the fact that other financial rejections which showed the project unviable had not been disclosed. The Court went on to say:

To enforce the exclusionary clause in these circumstances would, in my opinion, produce an unconscionable bargain.

Justice Sherstobitoff, in *Burkardt v. Gawdun*, 2004 SKCA 128, 254 Sask. R. 271 (Sask. C.A.), considered the doctrine of unconscionability and determined that the necessary elements are as follows:

9 The principles which govern the issue of unconscionability are set out by this Court in *Dolter v. Media House Productions Inc.* (2002), 227 Sask.R. 153 as found at p. 154:

1. Significant inequality in bargaining position exists between the parties based on factors such as the relative knowledge and education of the parties, the financial needs of the weaker party, or other circumstances that coerced the weaker party;

2. The stronger party has used its position of power in an unconscionable manner to achieve a material advantage over the weaker party. If it has not, then the bargain should not be interfered with even though it may be viewed as improvident, provided that it does not otherwise offend the third threshold factor hereinafter stated.

3. The bargain arrived at has given the one party a grossly unfair advantage over the other, or otherwise is sufficiently divergent from community standards of commercial morality to warrant it being set aside. Thus, if the bargain is fair the fact the one of the parties was at a material disadvantage because of ignorance, need or other distress is of no moment.

Plas-Tex, *supra*, provides an excellent summary of how the concept of unconscionability (which under the synthesized *Hunter Engineering*, *supra*, test was grouped in *Plas-Tex* with the concepts of unfairness, unreasonableness and being contrary to public policy) is applied in the context of limitation of liability clauses. *Plas-Tex* has held that unconscionability should be used sparingly to avoid a limitation of liability clause, but should be applied in such a way as to preclude a party to a contract from engaging in unconscionable conduct, secure in the knowledge that no liability can be imposed because of an exemption clause.

In the *Plas-Tex* case, the Alberta Court of Appeal found unconscionable conduct disentitling the party protected by the limitation of liability clause from relying upon it to limit its liability. The court found that the defendant, Dow Chemical, knew that its product was defective, before it made the first commercial shipment to the plaintiff, and failed to disclose the knowledge, but rather chose to protect itself from liability by inserting an exemption clause in the contract. The court held that this conduct was unconscionable.

The question to consider here is whether the exemption clause should be set aside as unconscionable, unreasonable, unfair or contrary to public policy. As I have stated, the courts have held that unconscionability should be used sparingly to avoid an exemption clause, but again it should be applied in such a way as to preclude a party to a contract from engaging in unconscionable conduct secure in the knowledge that no liability can be imposed upon because of the exemption clause. Conversely, courts have found no unconscionability where the exemption clause in question was a usual and common one found in commercial documents.

Applying these principles to the case before me, it is difficult to conclude that the defendants were in a position of superior relative knowledge and circumstances to the plaintiffs at the time the contract was entered into. Each party produced a contract which they had intended to use to effect the sale. The defendants' contract was chosen simply because it was much simpler. The parties cannot be said to be in substantially different bargaining positions. The only material advantage that the defendants might have held was that [the vendors/defendants] likely had a better knowledge of the contents of the contract. But this does not appear to be sufficient to satisfy this ground.

The further suggestion that the defendants knew of the exclusion of liability clause and played the plaintiffs for fools is not supportable by the evidence. It involves something of an indictment of the defendants' character which is not warranted on the facts.

The real question, therefore, is whether the enforcement of the clause would be unfair or unreasonable. It is clear that the limitation of liability clause, to the extent that it is capable of being interpreted in the manner in which the defendants advance, would produce a grossly unfair advantage to the defendants, as they would be able to cancel the "Agreement" at any time up until the date of possession with almost no liability for that breach.

All of the circumstances in this case must be looked at. While the vendors argue that the purchasers here were slow in proceeding forward, that is not actually the case. [The purchasers/plaintiffs] did delay for over three weeks in providing the deposit . . . but that deposit was paid and the contract was confirmed by [the vendors]. At the time the deposit was delivered, the possession date was still over two and one-half months in the future. Thereafter, [the purchasers] made no delay and consistently indicated that he was interested in proceeding with the purchase of the property. [One of the purchasers] sold and vacated his home in Oxbow in reliance on the "Agreement". He moved his chattels to his parents' home. He forwarded the sale proceeds of his house sale to his lawyer to use to purchase the [vendors'] property. [The purchasers'] lawyer communicated with [the vendors'] lawyer that [the purchaser] was ready and intent on proceeding with the purchase. [The vendors] decided to terminate the plaintiffs' contract sometime between the end of June and the middle of July, after the [purchasers] had sold their home. I conclude that it would be unfair and unreasonable to enforce the interpretation of clause 6 suggested by the defendants with respect to the plaintiffs. This is one of those cases where relief should be granted.

ACTION by purchasers against vendors for specific performance of agreement for purchase and sale of residential property.

***C.L. Dawson J.*:**

1 The plaintiffs claim against the defendants for breach of contract for the purchase and sale of residential premises and ask the court to order specific performance of the contract.

The Facts

2 The plaintiffs, Jeremie Martel and Shylee Martel, noticed an advertisement in a local paper advertising the defendants, Denise Mohr and Terry Mohr's house for sale in Midale, Saskatchewan. The plaintiffs wanted to move to Midale because Mr. Martel's parents lived in Midale and the plaintiffs wanted to live close to his parents. The house was owned by the defendants, Denise Mohr and Terry Mohr. Denise Mohr and Terry Mohr were separated and Denise Mohr had the authority to sell the house and deal with the property in every way. Any reference to Denise Mohr or the defendant in this judgment is a reference to both defendants.

3 Prior to looking for a new home, Mr. Martel had attended on his bank to determine if he would be eligible for a mortgage and, if so, the amount of the mortgage. Mr. Martel worked in the oil industry and was advised by his banker, Mike Gemeres of the Royal Bank, that he would qualify for a mortgage in the $170,000.00 to $175,000.00 range. Mrs. Martel was not employed and so the qualification for Mr. Martel's mortgage was based solely on Mr. Martel's income.

4 The Martels made an appointment with Denise Mohr to view the house. Mr. Martel, his wife, Shylee, and Mr. Martel's parents attended to view the house in April 2007.

5 When the plaintiffs attended to view the Mohr house and acreage, they found they very much liked the house and thought it was perfect for their family. The house was located on 36 acres within the Town of Midale. The property was unique within Midale.

6 A few days later, on April 15, 2007, the Martels went back and looked at the house for a second time. At the second meeting, the Martels decided to purchase the Mohr property. Ms. Mohr told them that she had had her property appraised and told them the appraised value. The parties negotiated a price and agreed on a purchase price of $174,000.00. Ms. Mohr had some chattels that Mr. Martel was also interested in purchasing, including a tractor. The parties agreed that Mr. Martel could purchase those chattels for $2,000.00. The parties settled on a price of $176,000.00 for everything. The parties agreed to a possession date of August1, 2007. The possession date was chosen to accommodate Ms. Mohr as her son was graduating from Grade 12 and she wanted a possession date which would give her an opportunity to remain in the house until her son graduated.

7 Mr. Martel's father had come along on the second viewing. Mr. Martel's father had obtained a form of house purchase contract off the internet. Ms. Mohr also had a form of an agreement for purchase and sale of residential property. Ms. Mohr had obtained her form of agreement from another individual who had been interested in purchasing her home. Ms. Mohr's form of agreement was much simpler than the one Mr. Martel, Sr. had, and so the parties agreed to use her form. Ms. Mohr testified that she and the Martels read through each clause on the form agreement and added the handwritten portions to the agreement. The handwritten portions on the agreement were all written in Ms. Mohr's handwriting. Ms. Mohr said she read out loud every word of the contract and she, together with Mr. Martel, agreed what to write in the handwritten portions. Ms. Mohr said that Jeremie Martel told her he needed a signed document to take to his bank for mortgage financing.

8 On this second viewing, the parties completed and signed the "Agreement to Purchase/Sell Residential Property" (the "Agreement"). The buyers were recorded as Jay (short for Jeremie) and Shylee Martel. The sellers were recorded as Denise Mohr and Terry Mohr. The "Agreement to Purchase/Sell Residential Property" stated as follows:

AGREEMENT TO PURCHASE/SELL RESIDENTIAL PROPERTY

. . .

1. It is agreed that the Buyers will purchase from the Seller the property located at:

684 College Ave. Midale, Saskatchewan

LSD 10 in Sec. 22-5-11 W2M

For the sum of *One hundred seventy-six thousand* — dollars *($176,000.00)*

2. It is agreed that the property is being purchased in as-is condition.

3. It is agreed that the said price includes the house, garage, all out buildings and property, including all existing mechanical and electrical fixtures and attachments — including furnace, hot water heater, smoke detectors, and all existing attached finishes including floor coverings, cabinets, blinds doors, windows and light fixtures (all in as-is condition). This also includes the fridge, stove, washer, dryer, dishwasher, central air, central vac and attachments and air compressor, riding lawn mower, tractor and access [sic]

~~With the following exceptions:~~ *anything left behind as of August 1 will be [word stroked out] considered belonging to Buyers*

4. It is agreed that the possession date of the above property will be at (time) *12:00* am (pm) on (date) *August 1, 2007*, providing the full amount of the purchase price has been transferred to the Seller's legal representative by that date.

5. It is agreed that Adjustments such as utilities, taxes, mortgage payments and interest, and property insurance will become the Buyers responsibility effective as of possession date.

6. It is agreed that a deposit of *One thousand* - Dollars *($1,000.00)* will be held in trust by the Seller's solicitor and will be credited against the purchase price. It is understood that, should the Buyer fail to execute any terms of this Agreement, or fails to pay any required payment, the deposit shall be forfeited entirely to the Seller and the remainder of this Agreement shall become null and void at the discretion of the Seller. Should the Seller forfeit any terms of this Agreement, the Buyer shall be entitled to the return of their deposit plus interest calculated at a rate of 5% per annum and the remainder of this Agreement shall become null and void.

7. The buyer agrees to pay the Seller interest at the rate of 5% per annum on any portion of the purchase price not received by the Seller's solicitor at the possession date, with interest to be calculated from the possession date until monies are paid in full.

8. The Seller agrees to pay all costs of discharging the existing mortgage and warrants that all items sold under this Agreement shall be free of liens or other encumbrances.

... [handwritten notations indicated in italics]

9 The parties agreed and the document indicated that Mr. Martel would give Ms. Mohr a $1,000.00 deposit. Mr. Martel did not have the $1,000.00 deposit with him on that date, but he was to bring the deposit cheque over to Ms. Mohr or deliver it to Ms. Mohr's lawyer. Mr. Martel testified that he told Ms. Mohr that he was not working in the oil industry at that time, due to road bans, but that once he returned to work and obtained his first paycheck, he would deliver the $1,000.00 deposit. Shylee Martel also testified that Mr. Martel had indicated to Ms. Mohr that they would pay the deposit as soon as Mr. Martel returned to work. Ms. Mohr, on the other hand, testified that Mr. Martel simply told her he did not have a cheque with him, and he never suggested that the deposit would not be delivered forthwith.

Ms. Mohr testified that she indicated to Mr. Martel that she would like him to bring her the deposit within the next couple of days, but if he did not, he should drop the deposit off at her lawyer's office. Ms. Mohr said that she needed the deposit to know that the Martels were serious in purchasing the property. After the "Agreement" was signed, Ms. Mohr said she called Mr. Martel's home two or three times to get the deposit and that Shylee Martel said that she would give her husband the message.

10 After signing the "Agreement" to purchase the Mohr's home, Mr. and Mrs. Martel then sold the home they were living in, which was in Oxbow, Saskatchewan. The possession date for the sale of their home was June 30, 2007. Mr. Martel asked Ms. Mohr if he could bring some of his personal articles to her property and store them in her quonset, prior to the possession date, so that he would not have to move items twice. Ms. Mohr indicated she was agreeable to this, although she later informed Mr. Martel that if he brought the articles to her place and left them on her property prior to the possession date, the articles would not be insured. Mr. Martel decided not to deliver anything to the Mohr property prior to the possession date, but instead took the items to his parents' house for storage.

11 After the parties signed the "Agreement to Purchase/Sell Residential Property", Mr. Martel took the signed document to his bank to formalize his financing. It should be noted that the "Agreement to Purchase/Sell Residential Property" was not conditional on Mr. Martel obtaining financing.

12 A few days after the "Agreement" was signed, Ms. Mohr dropped off a copy of the appraisal of her home for Mr. Martel at Mr. Martel's parents' home.

13 On April 19th, four days after the parties signed the "Agreement", Ms. Mohr's counsel, Mr. Billesberger, wrote to Mr. Martel's counsel, Mr. Goby, indicating that he acted for Ms. Mohr and asking Mr. Goby to forward the $1,000.00 deposit to him.

14 On May 8th, Mr. Billesberger wrote again to Mr. Goby stating that neither he nor Ms. Mohr had received the deposit. Mr. Billesberger asked that Mr. Goby advise by May 10, 2007 whether or not the Martels intended to proceed with the transaction and pay the deposit. The letter went on to indicate that if the deposit was not received by May 10th, Ms. Mohr would be presuming that the Martels were not going to proceed with the sale. That same day, May 8, 2007, Mr. Goby responded to Mr. Billesberger indicating that the Martels did intend to proceed with the purchase. Mr. Goby also wrote that he had received a cheque from Mr. Martel for the deposit, which cheque could be negotiated on Friday, May 11th. Mr. Goby further indicated that it was his intention to forward the $1,000.00 deposit to Mr. Billesberger on May 11th, and he asked Mr. Billesberger to advise him if this was not satisfactory. Mr. Billesberger did not respond to Mr. Goby. On Friday, May 11th, a little over three weeks after Mr. Billesberger's first letter, Mr. Goby delivered the deposit of $1,000.00 to Mr. Billesberger and the deposit was accepted.

15 In May, 2007, Jeremie and Shylee Martel separated. Mr. Martel said that he was upset by the separation, but still planned to buy the house in Midale. Mr. Martel continued to want to have this property in Midale, because it was very close to his parents' home and he knew his parents would be able to assist him with his children. Shylee Martel was supportive of Jeremie Martel buying the home in his own name. Mr. Martel intended to proceed with the sale.

16 Mr. Martel testified that he called Ms. Mohr and advised her that he and Shylee had separated. Mr. Martel told Ms. Mohr that he would like to sign a new agreement, wherein he was named as the sole purchaser of the house. Mr. Martel advised Ms. Mohr that she could keep the $1,000.00 deposit that he had already given her, but he hoped she would transfer the deposit and apply it to the new offer. Mr. Martel said that when he asked Ms. Mohr for a revised agreement, Ms. Mohr did not indicate that she had any problem with that. Mr. Martel did acknowledge that Ms. Mohr expressed concern as to whether or not he was going to proceed with the purchase. Mr. Martel indicated that he told Ms. Mohr not to worry, that he was going ahead with the deal and still buying the house.

17 Ms. Mohr testified that around the end of June, Mr. Martel called her and advised her that he was separated from Shylee. Mr. Martel told her that his lawyer had told him to phone Ms. Mohr and get a new agreement. Ms. Mohr testified that Mr. Martel said to her that she could charge him an extra $1,000.00 deposit for a new agreement. Ms. Mohr said that she replied by telling Mr. Martel that they needed to do this through the lawyers. Ms. Mohr testified that Mr. Martel told her that his wife was going to sign off on the other agreement. Ms. Mohr told Mr. Martel that the lawyers should talk about it.

18 Ms. Mohr acknowledged when Mr. Martel told her that he was separated from his wife he also told her all of his financing was in place and that his financing was no problem. Ms. Mohr testified that she told Mr. Martel, despite his assurance that his financing was in place, that his financing may be a problem. Ms. Mohr said she told Mr. Martel he should speak to his bank about it.

19 Mike Gemeres from the Royal Bank testified that after he determined that Mr. Martel qualified for a mortgage, he referred Mr. Martel to the Royal Bank mortgage specialist to complete the financing. Mr. Gemeres was a personal banker and he indicated that the referral to a mortgage specialist was the normal process. Mr. Gemeres indicated that it was only Mr. Martel who was applying for a mortgage, and it was just Mr. Martel's name on the mortgage application. Mr. Gemeres indicated that Mr. Martel and the mortgage specialist, whose office was in Regina, were having some difficulty contacting each other because they were not in the same city. Mr. Gemeres said that Mr. Martel asked him to assist in making sure that everything was done on time and ensuring that the mortgage was in place by the possession date. Mr. Martel brought his personal information into the local branch, where Mr. Gemeres worked, and Mr. Gemeres sent that information off to Regina to the mortgage specialist. Mr. Gemeres indicated that the separation of Mr. and Mrs. Martel was not a concern to the bank, because the mortgage was based solely on Mr. Martel's income and on the basis that Mr. Martel alone would be making the mortgage payments. Mr. Gemeres testified that there was never any question that Mr. Martel would get financing for the purchase of this house.

20 Ms. Mohr testified that she was of the impression, after this late June conversation with Mr. Martel, that Mr. Martel's lawyer, Mr. Goby, never contacted her lawyer, Mr. Billesberger. Ms. Mohr said she tried three different times in early July to call Mr. Martel on the phone, but she was never able to speak with him. Ms. Mohr's impression that Mr. Goby did not contact Mr. Billesberger after Mr. Martel advised of his separation was not correct as the two lawyers did communicate. On June 27, 2007, Mr. Billesberger wrote to Mr. Goby indicating that Ms. Mohr had advised him that Mr. Martel and Shylee had separated and that Mr. Martel wanted to purchase the property himself and that he wanted a new offer to purchase. Mr. Billesberger asked Mr. Goby to advise him as to whether this was correct.

21 Mr. Goby responded to Mr. Billesberger's June 27, 2007 correspondence, by email, on July 2, 2007. Mr. Goby confirmed Mr. Martel still wanted to purchase the property and indicated he would like to enter into a new offer to purchase, wherein he was the sole purchaser, and confirmed that Mr. Martel would like to have the deposit that he had paid applied to the new offer. Mr. Goby asked Mr Billesberger to confirm whether that was acceptable to Ms. Mohr.

22 On June 30, 2007, the sale of the plaintiffs' home in Oxbow was completed. The sale proceeds were deposited to Mr. Goby's trust account. Shylee and Mr. Martel agreed that the entire proceeds of the sale of their Oxbow home could be used by Mr. Martel for the purchase of the house in Midale from Ms. Mohr. Shylee Martel indicated that she was still supportive of Mr. Martel getting the house, because Mr. Martel needed a good place for the children to live. Shylee Martel acknowledged that while she signed the offer to purchase, she never went to the bank to apply for financing and never read or signed any financing documents. Her understanding was that the financing would be just in Mr. Martel's name.

23 On July 10, 2007, Mr. Billesberger wrote to Mr. Goby as follows (Exhibit P-12):

> July 10, 2007
>
> . . .

Attention: Mr. Jonathan M. Goby

Dear Sir:

RE: Mohr to Martell

Our File: 93-07-2-4

Further to our telephone conversation of July 9, 2007, my client has serious concerns whether your clients have the ability or interest in purchasing her property. If the money is not paid by August 1, 2007, the Agreement is null and void. It would be our wish that the parties mutually agree that the Agreement be null and void at this time and the $1,000.00 deposit be returned to your clients. Please confirm this is acceptable.

Yours truly,

[signature - John J. Billesberger]

. . .

24 On the same date, Mr. Goby responded by email as follows (Exhibit P-13):

. . .

Sent: Tuesday, July 10, 2007 3:26 PM

To: 'Billesberger Law Firm'

Subject: Martel from Mohr

. . .

Re: Martel from Mohr

This is to confirm that my client(s) fully intend to purchase the property. I am advised that financing is approved. My client(s) will require your client to comply with the terms of the signed agreement.

Thank you,

GOBY LAW OFFICE

. . .

25 Mr. Martel's father testified that some time in mid-July, 2007, he and a family member went for a walk in Midale. They went into the Mohr yard to show the family member the property Mr. Martel had purchased. Ms. Mohr came out of the house and asked them what they were doing in her yard. Ms. Mohr told Mr. Martel's father that she had not heard from Mr. Martel and was not going to sell the property to him. She said she had nowhere else to live. She indicated that she had waited for the deposit for so long that by that time, housing in Weyburn had skyrocketed and she could not afford anywhere else to live. She told Mr. Martel's father that the sale was not going to take place. Mr. Martel then became aware of Ms. Mohr's position.

26 Shortly after that incident, Mr. Martel called Ms. Mohr. Ms. Mohr testified she told Mr. Martel that she assumed that he was having problems with the financing, because it had been two weeks since they had spoken and because Mr. Martel's lawyer had not contacted her lawyer. In fact, the parties' lawyers had spoken and corresponded during this period. Ms. Mohr told Mr. Martel that she decided not to rent the house in Weyburn that she had previously arranged

to rent, because she did not think Mr. Martel was going to proceed with the sale. Mr. Martel confirmed to Ms. Mohr that he wanted to proceed with the purchase.

27 On July 12th, Mr. Billesberger wrote to Mr. Goby as follows (Exhibit P-14):

July 12, 2007

Goby Law Office

. . .

Attention: Mr. Jonathan M. Goby

Dear Sir:

RE: Mohr to Martell

Our File: 93-07-2-4

I received your e-mail of July 10, 2007.

Due to the uncertainty of whether your client had the financing and was going to purchase the house, my client held off on finding other accommodations. She has no place to move to. She therefore wants to nullify the Agreement.

I draw to your attention that part of clause 6 of the Agreement which states:

> Should the Seller forfeit any terms of this Agreement, the Buyer shall be entitled to the return of their deposit plus interest calculated at the rate of 5% per annum and the remainder of this Agreement shall become null and void.

As Mrs. Mohr has no intention to carry out the Agreement, I am enclosing my trust cheque in the sum of $1,008.54 for the deposit, plus interest. We now consider the Agreement null and void.

Yours truly,

[signature — John J. Billesberger]

. . .

28 On Monday, July 16, 2007, Mr. Goby responded by letter to Mr. Billesberger as follows (Exhibit P-15):

Monday, July 16, 2007

John J. Billesberger

. . .

RE: Martel from Mohr

Enclosed please find your original trust cheque number 005190 dated July 12, 2007.

My client has never made any suggestion or indication to your client that there was any difficulty with financing. Your client is bound and obligated by the signed agreement. Your client has no legitimate basis upon which to attempt to escape her obligations under the agreement. My client is proceeding to sign his mortgage. My client expects your client to provide a transfer in the usual course. In the event that a transfer is not provided on or before

the possession date set out in the agreement, my client intends to bring a court application for an order transferring the title into his name. If such application is required, my client will also claim court costs plus all expenses and damages incurred as a result of your client's breach of contract.

Thank you,

GOBY LAW OFFICE

. . .

29 On July 30, 2007, Mr. Billesberger responded to Mr. Goby as follows (Exhibit P-16):

July 30, 2007

Goby Law Office

. . .

Attention: Mr. Jonathan M. Goby

Dear Sir:

RE: Mohr to Martell

Our File: 93-07-2-4

I received your letter of July 16, 2007. My client has no intention of selling the property to your client. The wording of the agreement is very clear and I am returning to you my trust cheque dated July 12, 2007 in the sum of $1,008.54.

Yours truly,

[signature - John J. Billesberger]

. . .

30 On July 30, 2007, Mr. Martel signed bank documents for the formal approval of mortgage. Mr. Martel signed the mortgage approval and mortgage documentation on July 31 st at Mr. Goby's office.

31 On Tuesday, July 31 st, Mr. Goby emailed Mr. Billesberger as follows:

From: Goby Law Office [gobylawoffice@sasktel.net

Sent: Tuesday, July 31, 2007 11:25 AM

To: 'Billesberger Law Firm'

Subject: Martel from Mohr- 684 College Avenue, Midale

Tuesday, July 31, 2007

. . .

Re: Martel from Mohr - 684 College Avenue, Midale

This is to confirm that my client has signed his mortgage and I am in a position to confirm trust conditions and provide the balance to close upon receipt of the transfer documents. In the event that the transfer documents are

not received at my office by no later than August 01, 2007, I have instructions from my client to commence a court application for an order for specific performance of the Agreement For Sale and claiming all costs and damages associated with your client's breach of contract.

GOBY LAW OFFICE

. . .

32 Mr. Martel testified that he did not obtain fire insurance on the Mohr property because he was not given possession of the property on August 1, 2007.

Position of The Parties

33 The plaintiffs take the position that the parties have a binding written agreement which has not been revised, amended or cancelled and which has been acknowledged by the defendants. The plaintiffs say that the "Agreement" contains all the essential terms and the defendants are bound to complete and fulfill the "Agreement". The plaintiffs say it is clear from the evidence they never waivered from their intent to purchase the property. The plaintiffs say that there is ample evidence of their intention to complete the purchase, and while they suggested a new contract should be signed, that never happened. The plaintiffs say that it appears that by June 27th, the defendant, Ms. Mohr, had already determined she was not going to proceed with the sale. The plaintiffs also say that while the offer to purchase, or the "Agreement", was in the name of both purchasers, the plaintiffs' intention from the outset was that the financing would be just in Mr. Martel's name, and that it was likely that title may have had to be registered solely in Mr. Martel's name. But, in any event, the plaintiffs say that their separation did not affect the intention of the parties to purchase the property, and the way in which the parties intended to register the property did not affect the obligations of the parties to the binding "Agreement".

34 The plaintiffs' further submission is that clause 6 of the "Agreement" should not allow the defendant to elect not to proceed with the sale. The plaintiffs say the defendants' suggested interpretation of clause 6 would be contrary to the intent of the "Agreement", which is to ensure the sale. The plaintiffs say it is not reasonable to allow the defendants to opt out of the "Agreement". The plaintiffs argue that the *contra proferentum* rule applies to the defendants, That is, as this was the defendants' form of agreement, if the defendants' suggested interpretation of clause 6 is the interpretation to be placed on it, that clause should be severed from the contract and specific performance granted. The plaintiffs argue that the property is unique and the plaintiffs should be granted specific performance. The plaintiffs also take the position that they should be granted the costs of their appraisal of the property filed at the trial, which is the amount of $1,312.50.

35 The position of the defendants is that the parties did not form a binding agreement, but simply made an agreement to agree. The position of the defendants is that many essential terms are missing from the contract, including the condition of financing, when all the parties knew financing would be obtained. The defendants say that other terms missed from the "Agreement" include a clause setting out who would pay the legal and transfer fees, a clause relating to the plaintiffs storing property in advance of the possession date, and a clause which specifically stated that the land and fixtures named be sold free and clear of all encumbrances. The defendants also argue that clause 8 of the contract is ambiguous because it does not indicate that the purchasers would get clear title. The defendants argue there is no enforceable contract. The defendants argue further that the document was simply an agreement to agree because the parties intended they would execute a more formal agreement.

36 The defendants say that if there is an enforceable contract, clause 6 of the "Agreement" entitles them, as vendors, to rescind the "Agreement" at any time, and return the deposit, with interest, to the purchasers. The defendants acknowledge that clause 6 is not the standard clause contained in Saskatchewan realtor "offer to purchase" forms. But, they argue, the parties were free to contract as they wished, and as long as the term is not contrary to public policy, it should be enforced. The defendants indicate that it was their view that the plaintiffs were not going to complete the "Agreement". The defendants note the plaintiffs did not deliver the deposit until May 11th. Thereafter, the plaintiffs separated. The

defendants say the parties entered into the "Agreement" freely and, as the plaintiffs failed to get back to Ms. Mohr to confirm the purchase was proceeding, she was entitled to back out.

37 The defendants say further that if there is a binding agreement, specific performance should not be ordered because the plaintiffs were not ready, willing and able to buy the property on August 1, 2007. The defendants note that no financing approval was given to Shylee Martel, no insurance was in place on the possession date, and it was not clear that the plaintiffs had the balance of the purchase price and were ready, willing and able to pay it on the possession date.

Issues

1. *Was there an agreement between the plaintiff purchasers and defendant vendors, or was it simply an agreement to agree?*

2. *If there was a binding agreement, did the plaintiff abandon the agreement?*

3. *What is the proper construction of clause 6?*

   (a) *What does the term "forfeit" mean and how has it been used in clause 6?*

   (b) *How does clause 6 affect the rights of the purchasers?*

4. *Should specific performance be ordered?*

Analysis

1. Was there an agreement between the plaintiff purchasers and defendant vendors, or was it simply an agreement to agree?

38 The first question to be considered is whether or not there was a binding agreement between the parties, or was the "Agreement to Purchase/Sell Residential Property" simply an agreement to agree. The defendants allege that the "Agreement" was not binding, but was simply an agreement to agree.

39 *Bawitko Investments Ltd. v. Kernels Popcorn Ltd.* (1991), 79 D.L.R. (4th) 97, [1991] O.J. No. 495 (Ont. C.A.), is a leading Canadian decision on agreements to agree. It aptly sets out the issues at p. 104:

> ... when the original contract is incomplete because essential provisions intended to govern the contractual relationship have not been settled or agreed upon; or the contract is too general or uncertain to be valid in itself and is dependent upon the making of a formal contract; or the understanding or intention of the parties, even if there is no uncertainty as to the terms of their agreement, is that their legal obligations are to be deferred until a formal contract has been approved and executed, the original or preliminary agreement cannot constitute an enforceable contract. In other words, in such circumstances the "contract to make a contract" is not a contract at all. ...

40 As *Bawitko* states, there are three separate principles contained within the basic notion that an "agreement to agree" is unenforceable. The first proposition is that there is no enforceable contract where essential terms of the agreement have not been agreed to, but have been left to the parties for future agreement. The second proposition is that there is no enforceable contract where the provisions of what has been agreed to are insufficiently certain. The third proposition is there is no enforceable contract where the parties intend that a preliminary agreement is not to create binding contractual relations until a subsequent formal document is executed. In examining all of the situations, the parties' subsequent conduct is an important factor. Conduct takes on great importance in assessing whether an arrangement goes beyond an unenforceable agreement to become a binding contract. It is clear that the courts have a strong inclination to find a binding contract if the parties acted as if they thought they had one. Subsequent conduct reinforcing a conclusion that there was a binding contract has been relied upon by many courts including decisions in *Calvan Consolidated Oil & Gas Co. v. Manning*, [1959] S.C.R. 253 (S.C.C.); *Canada Square Corp. v. Versafood Services Ltd.* (1981), 34 O.R. (2d) 250 (Ont. C.A.) and *Imperial Oil Ltd. v. Young* (1998), 167 Nfld. & P.E.I.R. 280, 21 R.P.R. (3d) 65 (Nfld. C.A.).

41 An agreement is unenforceable as *Bawitko*, *supra*, stated if "...essential provisions intended to govern the contractual relationship have not been settled or agreed upon". In S. M. Waddams, *The Law of Contracts*, 4th ed. (Toronto:Canada Law Book Inc., 1999) ("*Waddams*"), the author suggests at para. 48 that:

> Where terms other than the price are left open, there is again no rule of thumb. Where fundamental aspects of an agreement appear to the court to be missing, enforcement will be refused. ... perhaps the most useful test is as was stated in a recent Canadian case, whether a further "meeting of minds" is anticipated.. ...

42 A. G. Guest, ed., *Chitty on Contracts*, vol. 1, 25th ed. (London: Sweet & Maxwell, 1983) ("*Chitty on Contracts*") suggests at para. 103 that the term which is missing must be so essential "...as to negative the contractual intention" of the parties. Thus it appears the standard to set aside a contract for want of essential terms is quite high.

43 The defendants here suggest that essential terms of the "Agreement" were incomplete, including the condition of financing, who would pay legal and/or transfer fees, the lack of a provision relating to Mr. Martel's deposit of fixtures prior to possession, and because the contract did not specify that the land and fixtures would be transferred free and clear.

44 I will deal firstly with the defendants' contention that the contract was missing the essential term that the purchase contract was conditional on the plaintiffs obtaining financing. Here, Mr. Martel had obtained a commitment for financing from his bank, prior to looking at the house. He had committed to purchase the Mohr property on April 15, 2007. While Mr. Martel was obtaining financing, the offer to purchase was not conditional on financing. Mr. Martel had already obtained his financing commitment and he did not have to obtain any further confirmation. Further agreement between the parties in relation to financing was not necessary. The business between the buyer and the seller with respect to financing was completed. The seller had committed herself to the terms of the contract and, in fact, it was Ms. Mohr's anxiety as to Mr. Martel's ability to comply with the terms of completion of the purchase price which she claimed caused her to back out of the contract. The contract was not missing an essential term of being conditional on financing.

45 The defendants further contend that the document was simply an agreement to agree because it was missing a term as to who would pay legal and/or transfer fees. The question is whether this is such an essential term as to negative contractual intention. The difference between what is an essential term and a non-essential provision is often difficult to define, and in many situations can only be discerned by an examination of the entire contractual context. Price is almost always an essential term. As well, implied terms can transform what appears to be an omission into an enforceable contract (*Foley v. Classique Coaches Ltd.*, [1934] All E.R. Rep. 88, [1934] 2 K.B. 1 (Eng. C.A.).

46 There is no legal requirement that a contract between two parties for the purchase or sale of residential property provide for who will pay for legal fees or transfer fees. Here, both parties had their own independent lawyers and it would not be essential to the purchase contract to set out that each party would pay for the legal work that their own lawyer undertook on their instruction. That leaves the question of whether the lack of a term setting out who would pay the land titles transfer fees is a missing essential term so as to negative contractual intention. In my view, the payment of the transfer fees is a relatively minor term which cannot meet the standard necessary to set aside the contract for want of an essential term.

47 The defendants also argue that the contract cannot be enforced because the contract did not contain a provision for Mr. Martel to place chattels on Ms. Mohr's property prior to possession which the parties had discussed. The lack of a term allowing Mr. Martel to leave some personal property at the Mohr residence prior to possession cannot be said to be an essential term which would negative contractual intention. The evidence from all the parties was that this discussion was almost collateral to the agreement, but even if not collateral, it was not essential. The evidence indicated that Mr. Martel asked Ms. Mohr if he could leave items on her property prior to possession. Ms. Mohr agreed, but then contacted her insurance agent who advised her that Mr. Martel's property would not be insured. Ms. Mohr communicated that to Mr. Martel and Mr. Martel never did leave the chattels on the property. Certainly, such a term could not be seen to

be fundamental to the contract and certainly this was not essential to the agreement so as to negative a meeting of the minds on the agreement to buy/sell the property.

48 The defendants argue further that this was not a binding agreement because clause 8 of the contract is ambiguous, because it does not indicate that the purchasers would get clear title to the land and premises. Clause 8 states:

> 8. The Seller agrees to pay all costs of discharging the existing mortgage and warrants that all items sold under this Agreement shall be free of liens or other encumbrances.

The defendant argues the terms "items sold under this Agreement" in clause 8 refers only to chattels, and not to the land and buildings. The defendants argue that reference is too general or uncertain and does not set out that the transfer of the land and fixtures was to be free of encumbrances.

49 The Nova Scotia Court of Appeal, in *Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co.*, 2000 NSCA 95, 189 N.S.R. (2d) 1 (N.S. C.A.) at para. 68,) (leave to appeal to the Supreme Court of Canada refused, (2001) (S.C.C.)), stated that it is not enough that a contract contain all essential terms, the terms of the contract must be sufficiently certain. Certain means that the court can give reasonably definite meaning to what the parties have said. The defendants argue that this contract does not specifically state that the land and fixtures would be transferred free and clear, and that this essential provision, which the parties intended to govern the relationship, was not settled or agreed upon.

50 While the defendants make this argument about clause 8, the defendants' suggested interpretation of clause 8 ignores the portion of that clause that states the defendants are required to discharge the existing mortgage on the land. The clause goes on to state that the seller warrants "all items" sold under this Agreement shall be free". The contract refers, in clause 1, to the sale of the property at 684 College Ave., Midale, Sask., and at clause 3, to the sale of a "house, garage, all outbuildings and property ... windows ... fridge, stove ... etc.". All of these, the land, house and chattels, are referenced by the term "all items" in clause 8. On a plain reading of clause 8 of the contract, the defendants' submission that the contract is uncertain must fail. The clause is not ambiguous. It is clear that the plaintiffs were to get clear title to the property, the land, buildings and chattels and that the parties agreed to that.

51 The defendants' arguments above that the contract is incomplete because essential provisions have not been settled or agreed upon or because the contract is uncertain must fail. The contract executed by the parties was not sophisticated, but no essential terms were missing. The contract is not too general or uncertain to be valid. In this instance, it cannot be said that the parties here expressed their intention so unclearly that a court cannot discern what their intentions were.

52 The other issue raised by the defendants relates to the third proposition as set out in *Bawitko*, *supra*. The defendants argue the contract was not binding because the parties intended to execute a subsequent formal legal contract. As stated, the law states there is no enforceable contract if it is the intention of the parties not to be bound until a subsequent formal contract document is executed. The law with respect to a stipulation for the execution of a formal document is laid out in *Chitty on Contracts* at para. 104:

> ... It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored.

53 Ms. Mohr testified that she thought the "Agreement to Purchase/Sell Residential Property" signed by the parties April 15th was just a document for Mr. Martel to take to the bank. She assumed a further agreement would be prepared by lawyers and she did not realize that what everyone was signing on that date would be binding. Ms. Mohr testified that

she thought the parties would enter into a subsequent formal contract drawn up by lawyers. Ms. Mohr testified she said something to this effect to the Martels. She acknowledged she never told Mr. Martel a subsequent contract would, in fact, be executed or needed to be executed. Ms. Mohr acknowledged no further agreement was prepared. The plaintiffs testified they did not think a subsequent agreement would be prepared and executed by the parties and that there was no agreement to do so. There was no evidence the parties agreed that a subsequent more formal contract would be executed before the parties would be bound. The only evidence was that Ms. Mohr assumed this was the case.

54 The written contract between the parties does not mention or suggest that the parties will execute a subsequent formal document. Further, the parties did not agree to execute a more formal or subsequent agreement. The sale was not conditional on a more formal or subsequent agreement being executed. Moreover, neither the defendants' counsel nor plaintiffs' counsel ever discussed or took any steps, at the outset of the transaction, to produce a more formal agreement. Counsel for the defendants, presumably, would have mentioned the necessity of executing a more formal contract in his correspondence of April 19, 2007 when he requested that the plaintiffs' counsel deliver the deposit to his office, if that was the agreement or expectation of the parties. Moreover, as late as July 10, 2007, defendants' counsel took the position that the "Agreement" was still binding and would become null and void if the money was not paid by August 1, 2007. The defendant's own actions belie her position that the parties intended to execute a second more formal legal agreement.

55 Here, the purchasers sold their home in Oxbow and moved out and into Mr. Martel's parents' home. They completed all of the financing obligations in order to complete the purchase of this property. Ms. Mohr looked for other property to purchase, and as late as July 10, 2007, the defendants' counsel wrote that the "Agreement" was still binding and would become null and void if the money was not paid by August 1 st .

56 It is clear from the conduct between the parties, including the correspondence between counsel, that the parties' conduct indicated a belief that they were bound by the terms of the "Agreement" signed April 15, 2007. The parties acted as if the deal were done and an analysis of their subsequent conduct points to no other conclusion than that a final agreement had been reached.

57 I find that the"Agreement to Purchase/Sell Residential Property" was not an agreement to agree; it is a binding contract.

2. If there was a binding agreement, did the plaintiffs abandon the agreement?

58 While on the evidence the issue of abandonment might be raised, it is not necessary for me to deal with the issue of whether the "Agreement" was abandoned by the plaintiffs when Mr. Martel suggested that the parties should prepare a new agreement, after he and Shylee Martel separated. The defendants have not pled abandonment, as is required. Further, counsel on behalf of the defendants specifically acknowledged, at the trial, that the defendants were not relying on abandonment. As such, abandonment is not an issue that I must deal with.

3. What is the proper construction of clause 6?

59 Clause 6 of the "Agreement" reads as follows:

> 6. It is agreed that a deposit of One thousand - Dollars ($1,000.00) will be held in trust by the Seller's solicitor and will be credited against the purchase price. It is understood that, should the Buyer fail to execute any terms of this Agreement, or fails to pay any required payment, **the deposit shall be forfeited** entirely to the Seller and the remainder of this Agreement shall become null and void at the discretion of the Seller. **Should the Seller forfeit any terms of this Agreement, the Buyer shall be entitled to the return of their deposit plus interest calculated at a rate of 5% per annum and the remainder of this Agreement shall become null and void.**
>
> [Emphasis Added]

60 The parties dispute the meaning and effect of the final sentence of clause 6. The defendants suggest that the clause means that if the defendant sellers breach any term of the "Agreement", the "Agreement' is null and void and the buyers are only entitled to return of their deposit, plus interest. The defendants argue that this clause entitles them to end the "Agreement" and the buyers' only remedy is to receive the return of their deposit, plus interest.

61 The plaintiffs argue that clause 6 is ambiguous and as such, the rule of *contra proferentum* applies and the clause should be struck. The plaintiffs argue further that the clause is unconscionable, unfair, unreasonable and that the clause is contrary to public policy and should be struck from the contract.

(a) What does the term "forfeit" mean and how has it been used in clause 6?

62 The first question that must be dealt with is what does the term "forfeit" mean in that last sentence of clause 6. The defendants argue that it is reasonable to read the word "forfeit" as "default" or "breach" in the last sentence of clause 6. The plaintiffs argue that the last sentence of clause 6 is ambiguous and should not be enforced.

63 The terms "forfeit" and "forfeiture" have been the subject of some degree of judicial consideration, and appear to have a consistent interpretation. When interpreting a contract, a court may use dictionaries to assist in determining the meaning of disputed words (*Buildevco Ltd. v. Monarch Construction Ltd.* (1990), 73 O.R. (2d) 627 (Ont. H.C.)). The word "forfeiture" is defined in *Black's Law Dictionary* as follows:

> Forfeiture - *n.* **1.** The divestiture of property without compensation **2.** The loss of a right privilege or property because of a crime, breach of obligation or neglect of duty.

64 The British Columbia Supreme Court relied on basic dictionary definitions of "forfeiture" in *Ardekany v. Dominion of Canada General Insurance Co.* (1985), 67 B.C.L.R. 162, 20 C.C.L.I. 37 (B.C. S.C.), a case dealing with international trade and customs. The Court said, at paras. 30 and 31:

> 30 The Shorter Oxford Dictionary defines forfeiture as:
>
> > The fact of losing or becoming liable to lose (an estate, goods, life, an office, right, etc.) in consequence of a crime, offence, or breach of engagement.
>
> 31 Webster's Third New International Dictionary defines forfeiture as:
>
> > The divesting of the ownership of particular property of a person on account of the breach of a legal duty and without any compensation to him.

65 Similarly, in respect of an international trade and customs issue, the Alberta Court of Appeal in *Popyk v. Western Savings & Loan Assn.* (1969), 67 W.W.R. 684, [1969] A.J. No. 69 (Alta. C.A.), adopted the comment on forfeiture from *Williston on Contracts*, 3rd ed., vol. 5, pg. 640, that:

> ...the fundamental idea is doubtless that the person subjected to a forfeiture thereby loses property which belonged to him, without adequate return and without any breach of duty on his part commensurate in value with the property lost.

66 The Ontario Provincial Court adopted the following definition of "forfeit" in *R. v. Premier Cutlery Ltd.* (1980), 55 C.P.R. (2d) 134, [1980] O.J. No. 3913 (Ont. Prov. Ct.), a case involving intellectual property and stated at para. 93:

> 93 The word "forfeit" can also have various meaning, such as the actual taking away of property on breach of condition, and also the doing or suffering of a thing creates liability such as deprival. *Stroud's Legal Dictionary* at p. 1080, gives a quotation from *R. Levy*, 30 Ch. D 119, in which matter Kay J. said "the word forfeit ... is something lost

> by the commission of a crime; something paid for the expiation of a crime; a fine; a mullet". There the learned Judge held the verb "to forfeit" is confined to mean, "to lose by some breach of condition; to lose by some offence." ...

67 The Ontario Court of Appeal in *869163 Ontario Ltd. v. Torrey Springs II Associates Ltd. Partnership* (2005), 76 O.R. (3d) 362, 256 D.L.R. (4th) 490 (Ont. C.A.) ("*Torrey Springs*"), a case involving the enforceability of stipulated remedy clauses, defined forfeiture as follows, at para. 22:

> 22 ... On the other hand, a forfeiture is a loss, by reason of some specified conduct, of a right, property, or money, often held as security or part payment of the obligation being enforced under the threat of forfeiture. Like promises to pay a penalty, forfeitures often have penal consequences as the right or property forfeited by the defaulting party may bear no relation to the loss suffered by the innocent party.

68 These descriptions of "forfeit" and "forfeiture" make it clear that to "forfeit" is to give something up or lose something because of a breach or default. A forfeiture is more than simply a breach or default; it implies the further consequence of a breach or default.

69 The last sentence of clause 6 here states "[s]hould the Seller 'forfeit' any terms of this Agreement...". The legal definition of "forfeit" does not comport with the way in which the defendants suggest the word "forfeit" is used in the last sentence of clause 6. Also problematic with accepting the word "forfeit" as really meaning "breach" in the last sentence of clause 6 is that the parties have used the word "forfeited" correctly (or according to the legal definition) in clause 6 in the sentence immediately preceding the sentence in issue. Thus, the court is faced with the potential problem of ascribing two different meanings to the same word used in the same clause.

70 At the very least, the use of the word "forfeit" in clause 6 is problematic.

(b) How does clause 6 affect the rights of the purchasers?

71 The first step in determining this question is to consider the nature of the clause.

72 If one considers the whole of clause 6, one recognizes that the first half of the clause deals with the consequences of the buyers' breach of a term or condition of the "Agreement". If the second half of the clause is to be considered the counterpart to the first, as the defendants suggest, the second part of the clause, arguably, deals with what occurs when the seller breaches the "Agreement". The clause does not grant to the seller a positive right to opt out of the "Agreement", but rather the clause, arguably, limits the remedy of the purchasers to the return of their deposit, with interest, in case of a breach by the seller. The clause limits the seller's liability to the buyer for damages, in the event that the seller does breach the "Agreement". In this sense it is an exemption clause or a limitation of liability clause. Another possible interpretation is that the clause sets out the amount of damages the defendants must pay to the plaintiffs if the defendants breach. In this sense, it is a stipulated remedy clause. I will discuss each possible interpretation.

73 Angela Swann, *Canadian Contract Law*. 2nd ed. (Markham, ON: LexisNexis, Canada Inc., 2009) said the following about exemption or limitation of liability clauses at para. 9,78:

> **§9.78** ... an "exemption clause", but it was never clear just what such a clause was ... One definition quoted and relied on by Canadian courts ... was that in *Chitty on Contracts*:
>
> > Exemption clauses may be broadly divided into three categories. First, there are clauses which purport to limit or reduce what would otherwise be the defendant's duty, *i.e.*, the substantive obligations to which he would otherwise be subject under the contract, for example, by excluding express or implied terms, by limiting liability to cases of wilful neglect or fault, or by binding a buyer of land or goods to accept the property sold subject to "faults," "defects" or "errors of description". Secondly, there are clauses which purport to relieve a party in default from the sanctions which would otherwise attach to his breach of contract, such as liability to be sued for breach or to be liable in damages, or which take away from the other party the right to rescind or

> repudiate the agreement. Thirdly, there are clauses which purport to qualify the duty of the party in default fully to indemnify the other party, for example, by limiting the amount of damages recoverable against him, or by providing a time-limit within which claims must be made. ...
>
> [footnotes omitted]

74 The law in respect of interpretation of exemption clauses or limitation of liability clauses has undergone a significant evolution in the past two decades. Limitation of liability clauses were historically treated somewhat differently from other types of contractual provisions. However, a turning point came in 1989 when the Supreme Court of Canada decided *Syncrude Canada Ltd. v. Hunter Engineering Co.*, [1989] 1 S.C.R. 426 (S.C.C.). Since *Hunter Engineering*, three special rules for the interpretation of exemption clauses have emerged, the synthesized *Hunter Engineering* test (which an exemption clause which otherwise would apply will not be enforced if doing so would be unconscionable, unfair, unreasonable or contrary to public policy), a somewhat enhanced application of the *contra proferentum* rule, and a rule that where parts of an exemption clause are so inconsistent as to render unclear what the exemption is to be, the entire clause is invalid. The thrust of the treatment of limitation of liability clauses is that there is nothing inherently unreasonable about such clauses and that accordingly, they should be applied, unless there is a compelling reason (being one of the three listed) not to give effect to the words selected by the parties. Thus, *prima facie*, the limitation of liability/ exemption clauses will be enforced.

75 To return to the *Hunter Engineering* test, two approaches were articulated in *Hunter Engineering*, *supra*, one by Chief Justice Dickson and another by Justice Wilson. In *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 (S.C.C.), the Supreme Court of Canada collapsed the two approaches into one and said the following at paras. 51 and 52:

> 51 As to the appropriate methodology, both Dickson C.J. and Wilson J. noted the existence of two competing views of the consequences of fundamental breach within both Canada and the United Kingdom. The traditional approach was to apply a rule of law whereby the legal effect of a fundamental breach is to bring the contract to an end. The result would be that the breaching party would be unable to rely on any contractual provisions excluding liability pursuant to common law doctrines or statutory regimes, given that the contract was treated as at an end. The alternative approach addressed the consequences of fundamental breach as a matter of construction of the terms of the contract rather than a categorical rule of law. Courts are required to determine whether the contract, properly interpreted, provides that exclusion clauses shall be enforceable in the event of fundamental breach. If, as a matter of contractual interpretation, the parties clearly intended an exclusion clause to continue to apply in the event of fundamental breach, courts were required to enforce the bargain agreed to by the parties, rather than applying a rule of law to rewrite the terms of the contract.
>
> 52 Noting that the contractual interpretation approach was adopted in England ... and in prior jurisprudence ... both Dickson C.J. and Wilson J. affirmed that whether fundamental breach prevents the breaching party from continuing to rely on an exclusion clause is a matter of construction rather than a rule of law. The only limitation placed upon enforcing the contract as written in the event of a fundamental breach would be to refuse to enforce an exclusion of liability in circumstances where to do so would be unconscionable, according to Dickson C.J., or unfair, unreasonable or otherwise contrary to public policy, according to Wilson J.

76 The ratio of *Hunter Engineering*, *supra*, and subsequent cases, is that there is nothing inherently unreasonable about limitation of liability clauses and accordingly, they should be applied, unless there is a compelling reason not to give effect to the words selected by the parties. Thus, the *prima facie* assumption is that limitation of liability/exemption clauses will be enforced (*CIT Financial Ltd. v. Weber Construction Ltd.*, 2003 SKCA 13, 232 Sask. R. 72 (Sask. C.A.) at para. 6).

77 The Alberta Court of Appeal in *Plas-Tex Canada Ltd. v. Dow Chemical of Canada Ltd.*, 2004 ABCA 309, 245 D.L.R. (4th) 650 (Alta. C.A.) said the following about the law respecting limitation of liability clauses, post *Hunter Engineering*, at para. 50:

> 50 ... In *Guarantee, supra* another five member Court appeared to reconcile the two views by concluding that both views in *Hunter* affirmed that the decision as to whether a party is prevented from relying on a limited liability clause is not a matter of law but a matter of construction. Further, the Court found, that the only limitation on enforcing a written contact *[sic]*, in the event of a fundamental breach, would be to refuse to enforce the limitation of liability clause in circumstances where to do so would be either unconscionable, according to Dickson C.J., or unfair, unreasonable, or contrary to public policy, according to Wilson J.

The Alberta Court of Appeal held that unconscionability should be used sparingly to avoid a limitation of liability clause, but should be applied in such a way as to preclude a party to a contract from engaging in unconscionable conduct secure in the knowledge that no liability can be imposed because of an exemption clause.

78 Geoff R. Hall, the author of *Canadian Contractual Interpretation Law* (Markham, ON: LexisNexis Canada Inc., 2007) stated the following about limitation of liability/exemption clauses at p. 243:

> Thus it now appears clear that the synthesized *Hunter Engineering* test is the law in Canada. This test seems to be far closer to the test enunciated by Dickson C.J.C. in *Hunter Engineering* than to the test set out by Wilson J., as it begins with basic contractual interpretation (Dickson C.J.C.'s starting point). This is as it should be. As has been repeatedly noted in this volume, the law of contractual interpretation in Canada is centered on the words chosen by the contracting parties to govern their relationship. There are many valid reasons for contracting parties to use exemption clauses, most notably to allocate risks. The synthesized *Hunter Engineering* test gives effect to the parties' words in most circumstances, while also giving the court the power not to enforce those words in circumstances where exemption clauses are abusive rather than legitimate.

79 As an aside, I do not think it is disputed by the defendants that the breach committed by them is a fundamental one. There can be nothing more fundamental in a contract to convey land than the vendor refusing to convey it (*Romfo v. 1216393 Ontario Inc.*, 2007 BCSC 1375, 35 B.L.R. (4th) 105, 285 D.L.R. (4th) 512 (B.C. S.C.), para. 303).

80 That the failure to deliver possession of the real property constitutes fundamental breach has been set out by Justice Barclay, in *Rogers v. Lane Realty Corp.*, 2005 SKQB 330, 265 Sask. R. 261 (Sask. Q.B.):

> 10 A well established definition of fundamental breach was set out in *Hunter Engineering Co. Inc. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426 (S.C.C.) as a breach of a contract that has the effect of depriving the non-breaching party of "substantially the whole benefit which it was the intention of the parties that he should obtain from the contract."
>
> 11 The Saskatchewan Court of Appeal also examined the issue of fundamental breach in *Murray v. Saskatchewan* (1987), 55 Sask.R. 193. Gerwing J.A. stated at p. 196:
>
> > [12] We are of the view, that in these special circumstances the learned trial judge was justified in finding there to be a fundamental breach of the lease. As noted by Upjohn, J., in *Suisse Atlantique Societe D'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale*, [1966] 2 All E.R. 61 at page 86 describes fundamental breach as follows:
> >
> > > This expression is no more than a convenient shorthand expression for saying that a particular breach or breaches of contract by one party is or are such as to go to the root of the contract which entitles the other party to treat such breach or breaches as a repudiation of the whole contract. Whether such breach or breaches do constitute a fundamental breach depends on the construction of the contract and on all the facts and circumstances of the case ...
>
> 12 Fridman in *The Law of Contract in Canada*, 3d ed. (Scarborough: Thomson, 1994) discusses the law of fundamental breach and states the following at p. 566-567:

> ... One point is clear. Whether a breach is fundamental does not appear to depend upon any express terms of the contract. The determination of a fundamental breach is a teleological question not one that involves construction of the contract in the narrow, literal sense. The concept of fundamental breach seems to transcend the normal issues of contractual interpretation. It involves investigation of the underlying nature and purpose of the contract into which the parties have entered, and the respective benefits designed to be obtained or ensured by the agreement.

The court in Saskatchewan has accepted this line of reasoning in *Fitzpatrick v. Credit Union*, 2003 SKQB 453; (2003), 243 Sask.R. 54 (Sask. Q.B.).

81 It is fair to conclude that in the case before me, the defendants' breach was a fundamental breach of the contract.

82 To return to the analysis of limited liability clauses, if clause 6 is a limitation of liability clause, then under the synthesized *Hunter Engineering*, *supra*, test, even on the defendants' fundamental breach, the limitation of liability clause should be enforced unless it would be unconscionable, unfair, unreasonable or contrary to public policy.

83 The question then is what is the meaning of unconscionable, unreasonable, unfair or contrary to public policy in the context of limitation of liability clauses? In *Solway v. Davis Moving & Storage Inc.* (2002), 62 O.R. (3d) 522 (Ont. C.A.) (leave to appeal to the Supreme Court of Canada refused (S.C.C.)), the plaintiffs' contracted with a moving company to have their household goods removed from their home, stored briefly and then delivered to their new home. Concerned about the security of the goods because they were rare and valuable artifacts and antiques, the plaintiffs secured from the moving company a representation that the trailer would be locked and parked in its moving yard. The trailer was parked in that fashion except for one night when the lot was being plowed for snow. On that night, the trailer was left unattended on a public street and was stolen. The majority of the Ontario Court of Appeal upheld the trial judge's finding that the facts disentitled the moving company from relying on the limitation of liability clause which have limited the recoverable damages to around $7,000.00. The Court of Appeal said, at para. 20:

> [20] In deciding not to enforce the limitation clause, the trial judge appears to have equated the words, "unconscionable" and "unreasonable" as these terms were discussed in *Hunter Engineering*. In our view, on the facts as found by the trial judge, to limit the loss of the plaintiffs to $7,089.60 would, in the words of Dickson C.J.C. be "unconscionable", or in the words of Wilson J. be "unfair or unreasonable". This is one of those cases where relief should be granted.

84 Another example in which unconscionability was found to avoid enforcement of an limitation of liability clause was in *Atlas Supply Co. of Canada v. Yarmouth Equipment Ltd.* (1991), 103 N.S.R. (2d) 1 (N.S. C.A.) (leave to appeal to the Supreme Court of Canada refused (S.C.C.)). In that case, the Nova Scotia Court of Appeal cited various factors in support of its finding of unconscionability. Those factors included the fact that a franchise agreement had been entered into by a large national company with multi-national connections on the one hand and a small business person with little experience on the other, the fact that the franchisor had given the franchisees financial projections which it knew were unrealistic; and, the fact that other financial rejections which showed the project unviable had not been disclosed. The Court went on to say:

> To enforce the exclusionary clause in these circumstances would, in my opinion, produce an unconscionable bargain.

85 Justice Sherstobitoff, in *Burkardt v. Gawdun*, 2004 SKCA 128, 254 Sask. R. 271 (Sask. C.A.), considered the doctrine of unconscionability and determined that the necessary elements are as follows:

> 9 The principles which govern the issue of unconscionability are set out by this Court in *Dolter v. Media House Productions Inc.* (2002), 227 Sask.R. 153 as found at p. 154:

1. Significant inequality in bargaining position exists between the parties based on factors such as the relative knowledge and education of the parties, the financial needs of the weaker party, or other circumstances that coerced the weaker party;

2. The stronger party has used its position of power in an unconscionable manner to achieve a material advantage over the weaker party. If it has not, then the bargain should not be interfered with even though it may be viewed as improvident, provided that it does not otherwise offend the third threshold factor hereinafter stated.

3. The bargain arrived at has given the one party a grossly unfair advantage over the other, or otherwise is sufficiently divergent from community standards of commercial morality to warrant it being set aside. Thus, if the bargain is fair the fact the one of the parties was at a material disadvantage because of ignorance, need or other distress is of no moment.

86 *Plas-Tex*, *supra*, provides an excellent summary of how the concept of unconscionability (which under the synthesized *Hunter Engineering*, *supra*, test was grouped in *Plas-Tex* with the concepts of unfairness, unreasonableness and being contrary to public policy) is applied in the context of limitation of liability clauses. *Plas-Tex* has held that unconscionability should be used sparingly to avoid a limitation of liability clause, but should be applied in such a way as to preclude a party to a contract from engaging in unconscionable conduct, secure in the knowledge that no liability can be imposed because of an exemption clause.

87 In the *Plas-Tex* case, the Alberta Court of Appeal found unconscionable conduct disentitling the party protected by the limitation of liability clause from relying upon it to limit its liability. The court found that the defendant, Dow Chemical, knew that its product was defective, before it made the first commercial shipment to the plaintiff, and failed to disclose the knowledge, but rather chose to protect itself from liability by inserting an exemption clause in the contract. The court held that this conduct was unconscionable.

88 The question to consider here is whether the exemption clause should be set aside as unconscionable, unreasonable, unfair or contrary to public policy. As I have stated, the courts have held that unconscionability should be used sparingly to avoid an exemption clause, but again it should be applied in such a way as to preclude a party to a contract from engaging in unconscionable conduct secure in the knowledge that no liability can be imposed upon because of the exemption clause. Conversely, courts have found no unconscionability where the exemption clause in question was a usual and common one found in commercial documents.

89 Applying these principles to the case before me, it is difficult to conclude that the defendants were in a position of superior relative knowledge and circumstances to the plaintiffs at the time the contract was entered into. Each party produced a contract which they had intended to use to effect the sale. The defendants' contract was chosen simply because it was much simpler. The parties cannot be said to be in substantially different bargaining positions. The only material advantage that the defendants might have held was that Ms. Mohr likely had a better knowledge of the contents of the contract. But this does not appear to be sufficient to satisfy this ground.

90 The further suggestion that the defendants knew of the exclusion of liability clause and played the plaintiffs for fools is not supportable by the evidence. It involves something of an indictment of the defendants' character which is not warranted on the facts.

91 The real question, therefore, is whether the enforcement of the clause would be unfair or unreasonable. It is clear that the limitation of liability clause, to the extent that it is capable of being interpreted in the manner in which the defendants advance, would produce a grossly unfair advantage to the defendants, as they would be able to cancel the "Agreement" at any time up until the date of possession with almost no liability for that breach.

92 All of the circumstances in this case must be looked at. While the vendors argue that the purchasers here were slow in proceeding forward, that is not actually the case. Mr. Martel did delay for over three weeks in providing the deposit to Ms. Mohr's counsel, but that deposit was paid and the contract was confirmed by Ms. Mohr through her counsel. At the time the deposit was delivered, the possession date was still over two and one-half months in the future. Thereafter, Mr. Martel made no delay and consistently indicated that he was interested in proceeding with the purchase of the property. Mr. Martel sold and vacated his home in Oxbow in reliance on the "Agreement". He moved his chattels to his parents' home. He forwarded the sale proceeds of his house sale to his lawyer to use to purchase the Mohr property. Mr. Martel's lawyer communicated with Ms. Mohr's lawyer that Mr. Martel was ready and intent on proceeding with the purchase. Ms. Mohr decided to terminate the plaintiffs' contract sometime between the end of June and the middle of July, after the Martels had sold their home. I conclude that it would be unfair and unreasonable to enforce the interpretation of clause 6 suggested by the defendants with respect to the plaintiffs. This is one of those cases where relief should be granted.

93 As stated earlier, the courts approach limitation of liability clauses differently from other contractual provisions in two ways in addition to the synthesized *Hunter Engineering*, *supra*, test I have just referred to. One is the increased use of the *contra proferentum* rule to construe an exemption clause narrowly and against the interest of the drafter, which is almost inevitably the party protected by the clause. In *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210 (S.C.C.), the Supreme Court of Canada unanimously adopted the statement of Wilson J. in *Hunter Engineering* that "an exclusion clause should be strictly construed against the party seeking to invoke it". In *Shelanu Inc. v. Print Three Franchising Corp.* (2003), 64 O.R. (3d) 533, [2003] O.J. No. 1919 (Ont. C.A.), the Ontario Court of Appeal has said that exclusion clauses must read *contra proferentum* and clear words are necessary for exclusion clauses to apply. The rule specifically applies to exceptions and limitations of liability in contract. Justice Cameron of the Saskatchewan Court of Appeal held in *SaskPower International Inc. v. UMA/B&V Ltd.*, 2007 SKCA 40, 293 Sask. R. 66 (Sask. C.A.) that:

> 42 Indeed, exculpatory clauses limiting or excluding liability fall in general to be strictly construed against the party seeking to invoke them: *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426, per Wilson J. at p. 497; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210, per McLachlin J. at p. 1231 and Iacobucci J. at p. 114. It has been said, and we think correctly so, that clauses of limitation do not invite the same degree of strictness that clauses of exclusion do: *Ailsa Craig Fishing Co. Ltd v. Malvern Fishing Co. Ltd.*, [1983] 1 W.L.R. 964, per Lord Wilberforce at p. 966. Still, clarity remains essential to a limitation clause, and ambiguity weighs against the party seeking to rely on it.

94 The last sentence of clause 6 carries with it considerable ambiguity. The interpretation of "forfeit" in the last sentence suggested by the defendants would cause the court to ascribe two different meanings to the word within the same clause. The clause must be strictly construed against the defendants and, as the clause is not clear, the ambiguity weighs against the defendants. I am of the view that because of the ambiguity, the defendants are not entitled to rely on the limitation of liability.

95 The final remaining special rule in respect of exemption clauses is a rule that inconsistency can render the entire clause invalid. In *Meeker Log & Timber Ltd. v. "Sea Imp VIII" (The)* (1996), 21 B.C.L.R. (3d) 101 (B.C. C.A.), (leave to appeal to the Supreme Court of Canada refused (1997) (S.C.C.)), the British Columbia Court of Appeal held that where individual parts of an exemption clause were so inconsistent that they created a situation in which there was no telling what the parties had agreed, the entire exemption clause was rendered invalid. The courts said a clause relied upon to obtain an exemption from liability that is not clear and unambiguous is no exemption at all. Here, clause 6 is ambiguous and I find it cannot provide the defendants with the limitation of liability.

96 If clause 6 is not a limitation of liability clause, it is arguable that clause 6 is a stipulated remedy clause as I referred to earlier. Parties to a contract may, at the time of contracting, turn their minds to the appropriate remedy in the event of a breach and specify that remedy in their contract. This is referred to as a stipulated remedy clause. While historically the courts were reluctant to enforce stipulated remedy clauses, the law has changed and such a penalty clause is now

enforced, unless the result would be unconscionable at the time of enforcement. As stated by Geoff R. Hall in *Canadian Contractual Interpretation Law*, *supra*, at p. 263:

> ... A penalty clause is now enforced unless the result would be unconscionability at the time of enforcement. Put somewhat more technically, the issue is now approached from the perspective of relief from forfeiture, with the stipulated remedy being considered a forfeiture and with relief being granted if the forfeiture would be unconscionable. ...

97 The case of *Romfo*, *supra*, dealt with circumstances very similar to the one in the present case. In that case, eight plaintiff purchasers entered into agreements to purchase lots from the two corporate defendants (the vendors) in a sub-division to be created in British Columbia. In 2005, shortly before the sub-division was registered, the vendors notified the plaintiff purchasers that they were cancelling the contracts. The plaintiffs sought specific performance or, in the alternative, damages. The central issue for the court was whether the vendor defendants could rely on a clause in the contracts which purported to limit the purchasers' sole remedy to the return of their deposits. The clause at issue was clause 1.2(b)(iii) (the "deposit clause"). The clause provided:

> 1.2 Payment of the Deposit by the Vendor's Solicitor: In respect of the Deposit, the Vendor's solicitor (and for the purposes of this clause, Fraser and Company shall be considered the "Vendor's Solicitor" if it holds the Deposit):
>
> . . .
>
> (b) unless precluded by Court order, shall pay the Deposit:
>
> . . .
>
> **(iii) to the Purchaser as liquidated damages and as the Purchaser's sole remedy without further recourse against the Vendor, if the purchase and sale contemplated by the Agreement is not completed by reason of the Vendor's default hereunder; or**
>
> (iv) subject to clause 7.3 to the Vendor, without prejudice to any other right or remedy of the Vendor, if the purchase and sale contemplated by the Agreement is not completed by reason of the Purchaser's default hereunder.
>
> (emphasis added)

98 The purchaser plaintiffs, in *Romfo*, *supra*, argued that the deposit clause was a penalty clause which should not be enforced; and in the alternative, that the clause was a limitation clause and should not be enforced because of the vendors' fundamental breach of contract. With respect to the type of clause, the trial judge said, starting at para. 231:

> 231 A stipulated remedy clause sets out the amount of damages which the breaching party has to pay to the innocent party. If the sum is a genuine pre-estimate of damages, the clause is a liquidated damage clause and it will be enforced. If the sum is not a pre-estimate of damages, then it will be deemed to be a penalty clause, and not enforced. Generally, the innocent party seeks to enforce the remedy clause and the breaching party seeks to avoid its application.
>
> 232 The situation is reversed here. The vendors have breached the contracts and seek to enforce the deposit clause to limit their liability. The purchasers seek to avoid the clause.
>
> 233 It appears to me that clause 1.2(b)(iii) is a limitation clause. Accordingly, the plaintiffs are left with only two arguments that would avoid the effect of clause 1.2(b)(iii): estoppel or fundamental breach.
>
> 234 If incorrect on this and clause 1.2(b)(iii) should be analyzed as a stipulated remedy clause, then I conclude that it is a penalty. The clause provides the purchasers no damages at all since it merely gives them back their own money. It cannot therefore be a pre-estimate of damages.

99 The *Romfo*, *supra*, case is very similar to the present case, in that there is a reversal of the usual circumstances involving the enforcement of a stipulated remedy clause or a limitation of liability clause. Given the nature of the clause here, it also seems, therefore, that it would be most appropriately interpreted as a limitation clause as I discussed above. However, if it is not a limitation clause, it should be analysed as a stipulated remedy clause.

100 The case of *Torrey Springs*, *supra*, is instructive in respect of stipulated remedy clauses. In that case, the Ontario Court of Appeal dealt with the enforceability of stipulated remedy clauses in two complex commercial agreements. The parties therein entered into agreements to purchase and operate two rental properties. The respondents were passive investors who provided the appellant with promissory notes to secure their obligation to reimburse the appellant for certain fees and advances. The agreements provided that in the event the appellant defaulted on its obligation, the promissory notes were to be deemed paid. An arbitrator found that the appellant was in default and that while the stipulated remedy "could be a penalty" it should nonetheless be enforced. The arbitrator also refused relief from forfeiture. The arbitrator's decision was upheld on appeal by the Court of Appeal. The Ontario Court of Appeal said the following starting at para. 22:

> 22 The courts of common law and equity adopted similar but distinctive rules with respect to stipulated remedy clauses that had penal consequences. The courts of common law dealt with attempts to enforce the payment of penalties while the courts of equity dealt with pleas for relief from penal forfeitures. In the oft-quoted words of Lord Dunedin in *Dunlop Pneumatic Tyre Co. Ltd. v. New Garage & Motor Co. Ltd.*, [1915] A.C. 79 (H.L.) at 86-87, "The essence of a penalty is a payment of money stipulated as in terrorem of the offending party. ..." On the other hand, a forfeiture is the loss, by reason of some specified conduct, of a right, property, or money, often held as security or part payment of the obligation being enforced under the threat of forfeiture. Like promises to pay a penalty, forfeitures often have penal consequences as the right or property forfeited by the defaulting party may bear no relation to the loss suffered by the innocent party.
>
> 23 There is a venerable common law rule to the effect that the courts will not require a party to pay a genuine or true penalty on grounds of public policy. The parallel, but distinctive, equitable rule is to the effect that penal forfeitures will be relieved against where their enforcement would be inequitable and unconscionable.
>
> 24 While both doctrines have the effect of relieving the breaching party of the penal consequences of stipulated remedy clauses, in their traditional formulations they bear significant differences. The common law penalty rule involves an assessment of the stipulated remedy clause only at the time the contract is formed. If the stipulated remedy represents a genuine attempt to estimate the damages the innocent party would suffer in the event of a breach, it will be enforced. On the other hand, again to quote Lord Dunedin from *Dunlop*, *supra*, "[i]t will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could be conceivably be proved to have followed from the breach." Laskin C.J.C. adopted a virtually identical formulation (taken from Snell's *Principles of Equity* (27th ed. 1973) at p. 535) in *H.F. Clarke Ltd. v. Thermidore Corp. Ltd.*, [1976] 1 S.C.R. 319 at 338. Although the common law defined penalties in terms of unconscionability, that assessment is to be made at the time the contract was formed. The common law doctrine did not include any discretion to be exercised in the light of circumstances that may exist at the time of breach.
>
> 25 Equity, on the other hand, considers the enforceability of forfeitures at the time of breach rather than at the time the contract was entered. Equity also looks beyond the question of whether or not the stipulated remedy has penal consequences to consider whether it is unconscionable for the innocent party to retain the right, property, or money forfeited. As explained by Denning L.J. in *Stockloser v. Johnson*, [1954] 1 All E.R. 630 (C.A.) at 638: "Two things are necessary: first, the forfeiture clause must be of a penal nature, in the sense that the sum forfeited must be out of all proportion to the damage; and, secondly, it must be unconscionable for the seller to retain the money."

101 Against this general background and after a further review of the case law, the Court of Appeal in *Torrey Springs*, *supra*, refused to accept the appellant's submission that the arbitrator erred by refusing to strike down the

stipulated remedy clause as an unenforceable remedy. In particular, the Court stated in para. 26 that "...[n]ot all stipulated remedy clauses having penal consequences are unenforceable. In particular, the equitable doctrine of relief from forfeiture enforces such penalty clauses, where they are in the form of a forfeiture, where it is not unconscionable to do so."

102 At para. 34, the Ontario Court of Appeal went on to state:

> 34 This is closely related to the fourth factor, namely, the policy of upholding freedom of contract. Judicial enthusiasm for the refusal to enforce penalty clauses has waned in the face of a rising recognition of the advantages of allowing parties to define for themselves the consequences of breach. As I have already noted, in *Elsley*, *supra*, Dickson J. labeled the penalty clause doctrine as "a blatant interference with freedom of contract," a sentiment echoed by the English Court of Appeal in *Else*. The arguments favouring the enforcement of stipulated remedy clauses on this score are recognized by Fridman, *The Law of Contract in Canada*, 4th ed. (Toronto: Carswell, 1999) at 817 and are especially well put by *Waddams*, *supra*, at para. 8.330:
>
> > It is useful to remember that the jurisdiction to strike down penalty clauses represents an exception to a general principle of freedom of contract. The force of the general principle should not be underestimated. There are strong arguments for enabling parties to set their own value on performance. The power to do so gives flexibility to the contracting process; it enables the promisor to offer an assurance of performance while limiting liability for consequential damages and thereby making the cost of breach predictable. It enables the promisee to avoid the cost of securing compensation by litigation and the risks of undercompensation that may be caused by the legal restrictions on damages, such as remoteness, certainty of proof, mitigation, and failure to recognize intangible losses; it reduces the cost to the parties and to the state of settling a dispute after breach; it enables the promisee to purchase insurance against default from the party in the best position to provide it at the lowest cost. A further point is that the striking down of the clause may represent an injustice to the promisee for the price of performance will have been agreed in the light of all the promisor's obligations, including the promise to pay an agreed sum on breach; if that promise is struck down, the promisee does not receive what has been paid for.
>
> (Footnote omitted.)

103 The *Torrey Springs*, *supra*, case thoroughly discusses the reasons for enforcing such a stipulated remedy clause, and does provide a very useful background in the area. However, the *Torrey Springs* case involved a straight-forward application of such a clause, rather than an almost reversed one, as exists in the present case.

104 In the present circumstances, arguably, the second part of clause 6 purports to set out the amount of damages which the breaching vendors have to pay to the innocent purchasers if the vendors breach the contract. But the damages sum is set out as being the return of the purchasers' deposit plus interest (which amounts to $8.54 in interest). This amount is not a genuine pre-estimate of damages. The clause provides the purchaser, really, with no damages at all, since it merely gives them back their own money plus interest at five per cent, which is not a pre-estimate of the damages. The amount of damage given to the purchasers is unconscionable in comparison to their loss. It is also unconscionable for the vendors to retain the property with no consequence. I conclude that if the portion of the clause in issue a stipulated remedy clause, it is a penalty and that it would be unconscionable to enforce it.

105 I conclude that it would be unconscionable, unfair and unreasonable to enforce the last sentence of clause 6 against the plaintiffs.

4. Should specific performance be ordered?

106 What is the appropriate remedy in these circumstances? *Waddams* discusses specific performance in the context of real property at para. 674:

> The buyer of land, for example, was early held to be entitled to specific performance on the principle that each plot of land was unique. This principle became a general rule that the buyer of land is always entitled to specific performance even though in particular circumstances a monetary remedy might afford adequate compensation. In 1996, however, the Supreme Court of Canada held in *Semelhago v. Paramdevan*, that specific performance was no longer available as a matter of course to a buyer of land: it was necessary for the buyer to demonstrate that the land was unique and that damages were an inadequate remedy. ...
>
> [footnotes omitted]

107 Here, the plaintiffs want the house that they contracted to buy. The plaintiffs did not accept Ms. Mohr's repudiation of the contract. They want specific performance. In determining whether the plaintiffs are entitled to specific performance, there are two issues which need to be addressed: (a) is the property unique such that damages are an inadequate remedy? and (b) were the plaintiffs ready, willing and able to proceed with the purchase?

108 Specific performance cannot be granted absent evidence that the property is unique to the extent that its substitute would not be readily available. (*Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415 (S.C.C.) at para. 22).

109 The appraisal filed by the plaintiffs states at p. 1 of the addendum:

> The subject is located on 36 acres within the corporate limits of the Town of Midale. ...
>
> . . .
>
> The subject property is unique as it is an acreage sized improvement located with the corporate limits of the Town of Midale. ...

110 The plaintiffs' evidence was that they wished to move from Oxbow to Midale to be closer to the plaintiff, Mr. Martel's, family. Mr. Martel specifically sought to purchase property in Midale. The evidence indicated that the real estate market in Midale was such that there were no homes for sale in the area which would be suitable for the plaintiff and his children. The Mohr property was a family home appropriate for Mr. Martel and his two children, in close proximity to his parents, who could provide him with assistance. The plaintiffs had a particular attachment to the area and the lack of availability of suitable homes in Midale also adds to the uniqueness of the property.

111 The defendants did not file any expert reports or present any evidence to counteract the evidence presented by the plaintiffs regarding the uniqueness of this property.

112 The other issue to be considered is whether the plaintiffs were ready, willing and able to complete the transaction throughout the material time. Despite the change in Mr. Martel's marital status, there was never any issue as to his readiness or willingness to proceed with the purchase of the property. While Mr. Martel delayed in delivering the deposit, it was delivered and the contract was affirmed on May 11, 2007, two and one-half months prior to closing. When Mr. Martel informed Ms. Mohr that he had separated from his wife, Mr. Martel indicated and confirmed that it was his intention to proceed with the sale. It was only Ms. Mohr who suggested that perhaps Mr. Martel might not be able to proceed with the purchase because of his financing. Mr. Martel assured Ms. Mohr his financing was in place and he wanted to proceed. Despite the defendant, Ms. Mohr's, expressed doubts as to Mr. Martel's ability to complete the transaction, the evidence is clear that he was quite ready and willing to purchase the property throughout the material time. Mr. Martel had his mortgage financing in place prior to the possession date. Mr. Martel had the balance to close, that is the difference between the mortgage and the amount of the purchase price in his lawyer's trust account prior to possession date. The only matter that was not completed was the insurance on the property. That insurance was not a term of the contract but rather was one of the conditions of the financing. Mr. Martel testified that he did not put insurance in place on the possession date because of Ms. Mohr's refusal to complete the sale.

113 I find that the plaintiffs have more than met their burden of showing that the property is unique and that they were ready, willing and able to proceed with the purchase.

114 I am satisfied the plaintiffs are entitled to specific performance.

Conclusion

115 The plaintiffs shall have a declaration that the "Agreement" between the parties mentioned above is a binding contract in accordance with its terms.

116 The provisions of the "Agreement", concerning the actual sale and purchase of the land, shall be specifically performed and carried into effect. The date of closing, date of adjustments, and any other matters incidental to closing the transaction shall be as at August 1, 2011, unless otherwise agreed between the parties.

117 If the plaintiffs have filed an interest against the subject property with respect to this matter, the interest shall be maintained until the property is registered in the name of the plaintiff(s).

118 In the event the parties need further directions or a further order in regards to the specific performance, either has leave to apply to me for such direction.

119 The defendants shall pay costs to the plaintiffs under double column 4, which costs include the plaintiffs' disbursement for the cost of the appraisal filed in evidence by the plaintiffs.

Action allowed.

Tab 17

1997 CarswellOnt 4804
Ontario Court of Justice, General Division

11 Suntract Holdings Ltd. v. Chassis Service & Hydraulics Ltd.

1997 CarswellOnt 4804, [1997] O.J. No. 5003, 15 R.P.R. (3d) 201, 36 O.R. (3d) 328, 49 O.T.C. 112, 76 A.C.W.S. (3d) 207

11 Suntract Holdings Ltd. and Leon Holdings (1967) Limited, Plaintiff and Chassis Service & Hydraulics Ltd., Defendant and Colliers Macaulay Nicolls (Ontario) Inc., Third Party

Lax J.

Judgment: December 12, 1997
Docket: 96-CU-97650CM, 96-CU-97650CMA

Proceedings: additional reasons at *11 Suntract Holdings Ltd. v. Chassis Service & Hydraulics Ltd.* (January 27, 1998), 96-CU-97650CM, 96-CU-97650CMA (Ont. Gen. Div.); additional reasons at *11 Suntract Holdings Ltd. v. Chassis Service & Hydraulics Ltd.* (February 27, 1998), 96-CU-97650CM, 96-CU-97650CMA (Ont. Gen. Div.)

Counsel: *G. Hall*, for the Plaintiff.
B. Grossman, for the Defendant.
T. Kent, for Third Party.

Subject: Contracts; Property

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Civil practice and procedure

XXII Judgments and orders
XXII.22 Interest on judgments
XXII.22.c Miscellaneous

Civil practice and procedure

XXIV Costs
XXIV.1 General principles

Civil practice and procedure

XXIV Costs
XXIV.14 Taxation or assessment of costs
XXIV.14.a Right to
XXIV.14.a.ii Miscellaneous

Contracts

XIV Remedies for breach
XIV.4 Specific performance
XIV.4.c Availability in particular contracts
XIV.4.c.x Sale of land

Real property

II Registration of real property
II.2 Registration of land
II.2.b Land titles
II.2.b.vi Caveats
II.2.b.vi.C Registration

Real property

IV Real estate agents
IV.9 Rights of agent
IV.9.a Commission
IV.9.a.i Incomplete transactions

Remedies

III Specific performance
III.3 Availability in particular contracts
III.3.j Sale of land

Headnote

Specific performance --- General

Purchaser brought action for specific performance after vendor refused to close on grounds that it could not satisfy purchaser's objection to encumbrances over property — Property's retail land value was diminished by encumbrances which made it less suitable for redevelopment than with vacant possession — Reasonable purchaser would be willing to pay $750,000 for land with knowledge of encumbrances — Order was made for specific performance with abatement of purchase price.

Real property --- Registration of land — Land titles — Caveats — Registration

Vendor brought counterclaim for breach of contract and slander of title — Vendor knew that property was subject to fixture, lease and easement which could not be conveyed, failed to describe same in agreement, and provided out-of-date survey to mislead purchaser — Vendor could not repudiate contract in circumstances, and rescission clause did not apply — Vendor, not purchaser, breached agreement by failing to close — No evidence that purchaser's registration of caution and notice of agreement caused any damages to vendor or prevented vendor selling property.

Annotation

The *11 Suntract* decision is a delightful case. Not only is it a thoroughly reasoned decision, but it is also extremely well written. If one were foolish enough to openly suggest that some judges "get" the art of decision writing, and that some judges simply do not, then *11 Suntract* certainly puts Madame Justice Lax on the map as one of the "getters". The case itself is also quite useful for practitioners, in part because of the great number of issues it raises, and in part because of the relative depth with which each such issue is explored.

11 Suntract will best be remembered as a decision on the "rescission clause" found in most real property purchase contracts. In such rescission clauses, where a purchaser has requisitioned a valid title defect that the vendor cannot or will not remove, then the contract can be rescinded at the option of the vendor. As a consequence, all deposits then to date are refunded to the purchaser and no further action is then available against the vendor. In effect, the modern rescission clause is a contractual codification of the old rule in *Bain v. Fothergill* (1874), L.R. 7 H.L. 158, [1874-80] All E.R. Rep. 83, 43 L.J. Exch. 243 (U.K. H.L.) inserted for the benefit of vendors, largely to avert

claims for damages and to prevent vendors from having to specifically perform with abatements to the purchase price arising from minor (but incurable) defects in title.

The capricious use of rescission clause by vendors to otherwise break honest deals has been well documented in the Canadian courts since as far back as *Mason v. Freedman*, [1958] S.C.R. 483, 14 D.L.R. (2d) 529, and, for the most part, the courts have imposed upon vendors a duty to act "bona fide" and in good faith when answering requisitions (what this annotator is fond of referring to as "supply-side good faith" and distinguishable from the corollary duty on purchasers not to break deals with technically correct but disingenuous requisitions or "demand-side good faith"). *11 Suntract*, however, reminds the practitioner that the supply-side good faith duty is more complicated than simply trying hard to answer title objections as best as possible. Although the general proposition is that there is no duty to act in good faith in the *formation* of a contract (*cf.* the duty to act in good faith in the *performance* of a contract) (see Fromme, "Good Faith in Contract Formation", Chapter 11, *The Six Minute Real Estate Lawyer*, Law Society of Upper Canada, May 22, 1998), *11 Suntract* reaffirms the principle that there remains a duty on the part of vendors, if perhaps not to act in good faith when entering into contracts, then at least not to act recklessly by entering into contracts that the vendor cannot possibly fulfill. Alternatively (and more precisely) put, if a vendor is to enter into contract recklessly, the vendor will not be entitled to rely on the rescission clause for protection after the fact. Madame Justice Lax refers to this oft-forgotten but clearly distinct duty on the part of the vendor as being the "second limitation" against the availability of the rescission clause, and provides a number of case citations in support of the doctrine.

Somewhat as an aside, this annotator queries whether or not the "second limitation" doctrine should also be applied against purchasers. That is, if a purchaser is reckless in entering into an agreement of purchase and sale (e.g., knowing that it could never possibly raise the financing necessary to close), perhaps it too ought to be barred from relying on a "conditional upon financing" clause for relief from the consequences of non-performance. After all, there is jurisprudence dealing with bad faith purchasers relying upon a financing condition where the purchaser has made inadequate efforts to satisfy same (see generally the discussion in *Flack v. Sutherland* (1995), 46 R.P.R. (2d) 1, 59 B.C.A.C. 117, 98 W.A.C. 117 (B.C. C.A.)), but this annotator is unaware of any case where a reckless contracting purchaser has been so punished by the law. Intuitively, however, it hardly seems appropriate to distinguish between the sins of the purchaser and the sins of the vendor.

11 Suntract also speaks well to the doctrine of implied permitted encumbrances. Madame Justice Lax cites *Grossman Holdings Ltd. v. Visplar Holdings Ltd.* (1976), 1 R.P.R. 40 (Ont. H.C.) for the proposition that a purchaser cannot requisition the removal or discharge of a patent encumbrance, the theory being that if the encumbrance was obvious to the purchaser when it made the offer, then the purchaser must have implicitly permitted the encumbrance and bargained for title subject to the obvious encumbrance. In *11 Suntract*, the doctrine of implied permitted encumbrance was argued by the vendor, although Madam Justice Lax refused to characterize the transmission tower as an implied permitted encumbrance, setting a fairly high standard in the process. While the transmission tower certainly would have been as patent to the purchaser as the railroad tracks in *Grossman Holdings Ltd.*, the existence of the tower could have been as consistent with a short term lease or outright ownership by the vendor, as it was to a long term lease in favour of a third party. Accordingly, it was not so obvious a flaw that the purchaser must have been bargaining with it in mind. While hardly a new proposition — Bora Laskin, Q.C. (as he then was) refers to it in his article "Defects of Title and Quality in Contracts for the Sale of Land", Law Society of Upper Canada, Special Lectures (1960) — *11 Suntract* does serve as a useful reminder to practitioners that the implied permitted encumbrance doctrine is yet another possible response to the "difficult" requisition.

Again, while not adding anything substantive to the law, *11 Suntract* is also quite notable for the court's rather dramatic rebuke of the real estate agents involved. Aside from credibility issues determined against the real estate agents at almost every turn, *11 Suntract* has established (or, more appropriately, re-established), a fairly high standard of care required of a typical ICI real estate sales team. Indeed, based on *11 Suntract*, it would seem that a non-negligent real estate agent now assumes the burden of advising on (or at least alerting the vendor to) legal

matters that are, or ought to have been, within the knowledge of the agents. *11 Suntract* also confirms the general rule that agents will bind the principals, even when those agents carry out their duties negligently. Accordingly, the vendor in *11 Suntract* was held to have been reckless in entering into the contract even though the court was satisfied that the vendor itself was relatively innocent and had relied in good faith on its negligent agents to prepare and advise on the contract. In her supplemental reasons in *11 Suntract*, Madame Justice Lax adds insult to injury (actually, injury to insult) by stripping the agents of their *entire* commission for having performed their duties negligently, even though the property was ultimately sold at only a slight abatement, driving home further to agents the consequences of their negligence. (Readers are cautioned to read the supplemental reasons when considering the issue of the commission because the main reasons suggest that the commission was in fact payable on the abated purchase price.)

11 Suntract is also gaining notoriety as part of a growing number of cases stemming from and directly referrable to the Supreme Court of Canada's decision in *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415, 3 R.P.R. (3d) 1, 28 O.R. (3d) 639 (note), 91 O.A.C. 379, although, ironically, *11 Suntract* really does not add a great deal to the specific performance/equitable damage debate engendered by *Semelhago*. The *Semelhago* case will always be known for Mr. Justice Sopinka's remarks, in obiter, concluding (paraphrasing liberally) that specific performance was not invariably the remedy where real property was concerned and that the uniqueness of the property in question was a matter to be determined, not presumed. *11 Suntract* picks up this line of thinking and adds to the law by confirming that, with uniqueness now clearly a provable issue, the burden of such proof rests with the innocent *cum* plaintiff (the burden of proving uniqueness, or the want thereof, had been put into question by the Ontario Court of Appeal's pre-*Semelhago* decision in *Landmark of Thornhill Ltd. v. Jacobson* (1995), 47 R.P.R. (2d) 211, 85 O.A.C. 179, 25 O.R. (3d) 628 (Ont. C.A.) where Madam Justice McKinlay puts the burden of proving lack of uniqueness on the defendant). In *11 Suntract* Madame Justice Lax rejects the *Landmark* analysis using *Semelhago* as the authority and adopting by reference Paul Perrell's excellent analysis on the point (Perell, "The Fate of Specific Performance", *Gravel to Gavel: Recent Developments in Real Estate Litigation*, Law Society of Upper Canada, January 12, 1996, particularly at p. F-18). She has received enthusiastic learned support for her conclusion (see, *e.g.*, Herscowitz, "Specific Performance in Aborted Ontario Real Estate Transactions in the *Aftermath of Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415", Chapter 6, *The Six Minute Real Estate Lawyer*, Law Society of Upper Canada, May 22, 1998 — a good article generally on the recent spate of post-*Semelhago* decisions).

There is a very long and detailed discussion by Madam Justice Lax in *11 Suntract* about the purchaser's development plans for the property and surrounding lands, the purchaser's significant land holdings in the vicinity, and the role of the acquisition in the purchaser's overall development scheme, etc., most of which was probably overkill. These facts in *11 Suntract* made the lands so obviously unique to the purchaser, that there could be virtually no credible argument to the contrary. Practitioners in the post-*Semelhago* era seeking judicial guidance as to what is unique and what is not in the context of real property specific performance will find the facts in *11 Suntract* too extreme to render the decision of practical assistance in demarcating the "grey zone".

The vendor in *11 Suntract* had also pleaded that the carrying costs that the purchaser would have incurred if in fact the deal had closed as scheduled be deducted from any abatement awarded. It is at this juncture that this annotator's honeymoon with *11 Suntract* regrettably ends. The true ratio in *Semelhago*, and one that remains overshadowed by Mr. Justice Sopinka's remarks on the availability of specific performance, was that countervailing adjustments (in *Semelhago*, the profit from the house that the purchaser retained as a result of the abortive purchase) cannot be taken into account in assessing equitable damage awards, in effect, affirming the ratio in the Ontario Court of Appeal's decision in *306793 Ontario Ltd. v. Rimes* (1979), 25 O.R. (2d) 79, 10 R.P.R. 257, 100 D.L.R. (3d) 350 (C.A.) (although in *Rimes*, the countervailing offset deductions in question were carrying costs like those being pleaded by the vendor in *11 Suntract*).

At trial in *Semelhago* [(December 5, 1990), unreported], Madam Justice Corbett reluctantly awarded the purchaser equitable damages in the amount of approximately $120,000, ignoring (reluctantly) all claims for the deduction of

imputed carrying costs and citing *Rimes* as the governing authority. The Court of Appeal in *Semelhago* ((1994), 39 R.P.R. (2d) 215, 19 O.R. (3d) 479, 73 O.A.C. 295 (C.A.)) sidestepped *Rimes* by distinguishing the facts in *Semelhago* from those in *Rimes*, allowing the vendor's appeal and ultimately reducing the $120,000 award by approximately $40,000 to account for various countervailing charges (mostly imputed carrying costs). At the Supreme Court of Canada, Mr. Justice Sopinka dismisses the vendor's further appeal to also take into account incidental capital gains realized by the purchaser as a result of the breach, and expressed his concern about the Court of Appeal's reasoning in allowing the deductions it did, although the Supreme Court did not ultimately alter the $80,000 status quo award resulting from the last appeal. In *11 Suntract* Madam Justice Lax initially concedes that [p. 230]:

[a]lthough this point [the availability of deductions for imputed carrying costs] was not before the Supreme Court of Canada [in *Semelhago*], [the Supreme Court of Canada] expressed reservations about the manner in which the Court of Appeal had distinguished *Rimes* and about the propriety of the deductions.

She then concludes, however, that [p. 230]:

[a]s the Supreme Court of Canada did not elaborate its reservations or pronounce on this issue, I take it that the Court of Appeal decision in *Semelhago* has opened the door to make a deduction for interest, in the appropriate case.

Professor Norman Siebrasse, in "Damages in Lieu of Specific Performance: *Semelhago v. Paramadevan*" (1997) 76 Can. Bar. Rev. 551 at 552-553 (by far the single best case commentary on *Semelhago* to date) is clearly sympathetic to Madam Justice Lax's perception of the state of the law, but falls somewhat short of Madam Justice Lax's confidence, concluding only that the law remains unsettled:

This [Mr. Justice Sopinka's "reservations" about the Court of Appeal's sidestepping of *Rimes*] cannot be interpreted simply as indicating that the Court felt the deductions were inappropriate and that no adjustments at all should have been made to the trial judge's award [i.e. an award consistent with *Rimes* excluding any and all countervailing deductions]...But...it cannot be taken to have specifically approved the calculation of deductions made by the Court of Appeal. Thus the Supreme Court's decision leaves the very important issue of possible deductions entirely open.

(It is regrettable that Professor Siebrasse's case commentary on *Semelhago* was published at about the same time as Madam Justice Lax's decision in *11 Suntract*: it would have been interesting to see how the two might have interacted).

With all due respect to Madam Justice Lax and Professor Siebrasse, however, this annotator submits that is far too aggressive to conclude that, just because the Supreme Court did not openly and conclusively overrule the Court of Appeal on the point, it necessarily follows that the Court of Appeal was right all along with the respect to the availability of countervailing deductions. True, while Mr. Justice Sopinka declined to expressly deal with the issue of carrying cost deductions, that was clearly only because the deduction issue had not been pleaded before him. In fact, there is every indication that had the purchaser cross-appealed to recapture the $40,000 deducted by the Court of Appeal, the Supreme Court would have re-instated the $120,000 trial award. In his own words, Mr. Justice Sopinka concludes [p. 17, 3 R.P.R. (3d) 1]:

The difference between the contract price and the value "given close to trial" as found by the trial judge is $120,000. ... I see no basis for deductions that are not related to the value of the property which was the subject of the contract. To make such deductions would depart from the principle that damages are to be a true equivalent of specific performance.

The whole premise of Mr. Justice Sopinka's reasoning militates against allowing the vendor to deduct carrying costs and other countervailing offsets. Readers are reminded that *Semelhago* dealt with whether or not a purchaser had to deduct from an equitable damages award the value of incidental capital gains realized by the purchaser as a consequence of the vendor's default, and the Supreme Court's decision was a resounding, "no". It simply cannot be credibly extrapolated from Mr. Justice Sopinka's reasons that the Supreme Court would have refused one type

of countervailing offset (capital gains) but allowed a deduction for anothery type of countervailing offset (imputed carrying costs). Of course, one has to sympathize with the apparent disdain for the *Rimes* proscription against deductions. This annotator feels that both *Rimes* and *Semelhago* might have been wrongly decided, but that will be the subject of a future commentary (in the meantime, readers are again directed to the fascinating arguments set forth by Professor Siebrasse in his case commentary, *supra*). Besides, such academic esoterica is the privilege of annotators and professors only, and not that of trial judges governed by *stare decisis* — regrettable as it may be, Madame Justice Corbett was right at trial in *Semelhago*: the Ontario Court General Division is still stuck with *Rimes*.

In the end, Madam Justice Lax's conclusions on point become moot in *11 Suntract*, since she ultimately concludes that, while she has the authority to deduct the carrying costs from an abatement award "in the appropriate case," *11 Suntract* is simply not the appropriate case (largely on the basis that there was no evidence adduced from which to make the quantification). It will be interesting, however, to see if other courts will take advantage of Madam Justice Lax's analysis, and latch onto *11 Suntract* in an attempt to end-run *Rimes*.

Jeffrey W. Lem

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Statutes considered:

Land Titles Act, R.S.O. 1990, c. L.5

s. 132 — considered

ACTION by purchaser for specific performance; COUNTERCLAIM by vendor for breach of contract and slander of title.

***Lax J.*:**

Reasons for Judgment

Overview

1 In the City of North York, at 11 Suntract Road, there is an antenna which sits on an industrial property which is owned by the defendant, Chassis. It is there because some years ago, Chassis leased a small portion of its property to Cantel Inc. for a cellular telephone transmission tower and an equipment shed. At the same time, Chassis granted Cantel an access easement over its land so that Cantel could service its equipment. This was an attractive arrangement for Chassis as the tower did not interfere with its use of the land and the income from the lease defrayed some of its carrying costs. In 1993, Chassis decided to sell its land and for that purpose, it retained the services of a real estate broker and listed its property for sale with Colliers. This was a time of modest activity in the real estate market and there was little interest from purchasers. Then, in July 1994, an unsolicited and unexpected offer arrived at Colliers' office. It was from Alan Winer in trust, who turned out to be the plaintiffs, referred to collectively as Leon. Following five months of negotiations between Mr. Winer, representing Leon, and Mr. Bill Kedney of Chassis who was represented by Colliers' agents, Mr. David Prentice and Mr. Robert Scott, a written Agreement of Purchase and Sale was finalized. Leon is an adjacent land-owner. Its plan was to demolish everything on the land and redevelop 11 Suntract for retail use. Shortly after the Agreement was signed, Leon discovered the lease between Chassis and Cantel. It is for a ten year term from October 1, 1988 with a further ten year term at the option of Cantel. However, the Agreement of Purchase and Sale between Leon and Chassis provides for a title free of encumbrances, vacant possession on closing, and ownership of all fixtures. It makes no reference to the Cantel tower, shed, lease or easement.

2 Following a period of negotiations between Leon, Chassis, Colliers, and their respective solicitors, and shortly before the scheduled closing in December 1995, Chassis terminated the Agreement, taking the position that Leon objected to its title and that it could not satisfy the objection. Leon tendered, but Chassis refused to close. Almost immediately, Leon commenced an action for specific performance. It maintained this position until trial, but at the opening of trial was permitted to add alternative claims for specific performance with an abatement, or damages. Chassis has counterclaimed for damages for breach of contract and slander of title. It claims over against Colliers alleging that its agents did not meet a requisite standard of care in advising the vendor on the transaction. At issue in the main action is Chassis' entitlement to the benefit of the rescission clause in the Agreement of Purchase and Sale and Leon's entitlement to an equitable remedy. In the third party action, Chassis seeks indemnity from Colliers for any liability it may have to Leon and damages for its negligence in the preparation of the Agreement of Purchase and Sale. There are credibility issues to be resolved. These relate to the knowledge which each of the participants had about the Cantel tower and why the Agreement was structured as it was. It is to these issues that I first turn.

Events prior to the Signing of the Agreement

3 It is appropriate in a case such as this to scrutinize with great care the conduct of the parties to the transaction: *Landmark of Thornhill Ltd. v. Jacobson* (1995), 25 O.R. (3d) 628 (Ont. C.A.) at 636. Not only is an equitable remedy sought by the purchaser, but this is a case where a vendor seeks to avoid a contract under a clause which is intended for its relief. The vendor's conduct and reasons for doing so are matters of interest to the Court: *Freedman v. Mason*, [1958] S.C.R. 483 (S.C.C.), at 487. In this case, the conduct and knowledge of the parties are somewhat interwoven. Chassis alleges that Leon ought to have been put on inquiry as to the state of the vendor's title and was only entitled to insist on a conveyance subject to the Cantel tower, lease and easement. It submits that the credibility and good faith of Leon is called into question and that the Court should proceed cautiously in accepting its evidence as to the knowledge it had

about the Cantel tower. I propose to first discuss the evidence relating to the conduct and knowledge of Leon and then to consider similar evidence in regard to Chassis and Colliers. All of this evidence arises in the period prior to the signing of the final agreement in December 1994.

Leon's Conduct

4 Mr. Terry Leon is in charge of real estate matters for the Leon family. His brother, Kevin Leon, is a real estate agent with a company which is a competitor broker to Colliers, and like Colliers, specializes in the purchase and sale of industrial/commercial/investment ("ICI") properties. When Leon turned its attention to the acquisition of 11 Suntract, it did not wish to disclose its identity to the vendor for reasons which should be obvious. Terry Leon contacted his brother who arranged for another real estate agent to obtain information about the property from Colliers. At Kevin Leon's suggestion, Alan Winer was retained to submit the offer and to conduct the negotiations on behalf of Leon. The three individuals on the purchaser's side of the transaction had differing recollections about the preparation of the initial offer and about their discussions with one another concerning 11 Suntract. They were extensively cross-examined in an effort to establish that they engaged in conduct which was deceptive and which concealed the real knowledge they had about the Cantel tower. Although their respective recollections of events differed, I found each to be credible witnesses with imperfect memories rather than untruthful witnesses whose evidence should be given no weight.

5 Kevin Leon testified at trial under subpoena by Chassis. Chassis and Colliers placed a great deal of emphasis on his evidence which established that he had somewhat more involvement in the initial stages of the transaction than either Terry Leon or Alan Winer recalled. Contrary to their evidence, it would appear that the initial offer, which was on a Toronto Real Estate Board standard form, was prepared in Kevin Leon's office and not by Mr. Winer. The suggestion was that there was something sinister or improper for Kevin Leon to have obtained information about the property through another agent, prepared the offer and then arranged for Mr. Winer to "front" the transaction for Leon. I cannot agree. It is an entirely common practice in circumstances such as these and in this particular transaction, was of no consequence. During the five months of negotiations which ensued between Mr. Winer's first offer in July and a concluded Agreement of Purchase and Sale in December, the focus of the transaction was almost exclusively, if not entirely, on price. Mr. Bill Kedney was firm in the price he intended to realize from the sale of his property. That price was intended to reflect, and ultimately did reflect, its higher value as a redevelopment property rather than as industrial land. In any event, Leons' efforts to remain anonymous did not succeed. Mr. Prentice and Mr. Scott each testified that they strongly suspected that Leon was the real purchaser from the moment the Winer offer was received. I therefore reject the suggestion that Leon took unfair advantage of a vulnerable vendor and that Chassis and Colliers were in any way deceived.

Leon's Knowledge

6 There was a great deal of evidence concerning the knowledge which Leon had or ought to have had concerning the Cantel tower, lease and easement. Chassis relies on *Grossman Holdings Ltd. v. Visplar Holdings Ltd.* (1976), 1 R.P.R. 40 (Ont. H.C.) where the Court appeared to place considerable reliance on the existence of a visible defect, in that case, that a rail line crossed the property, to deny the purchaser its remedy. However, it is my view that the *ratio* of this case is expressed in the decision at p. 45:

> The objection to title was not valid since neither the agreement nor the surrounding circumstances show an intention to convey anything other than that tendered on closing.

This statement is consistent with that endorsed by Bora Laskin, Q.C. (as he then was) in his article "Defects of Title and Quality in Contracts for the Sale of Land", Law Society of Upper Canada, Special Lectures, 1960 at p. 391:

> It seems to me a fairly obvious proposition that if a purchaser who has ostensibly bargained for a marketable title in fee simple is obliged to accept a lesser title because of his knowledge of a flaw or because it is obvious that a

flaw exists, it should be only because, as a matter of construction, the Court has found that the bargain was for a title with a flaw.

7 I take this to be a correct statement of the law. Accordingly, I am to consider the Agreement and the surrounding circumstances in order to decide whether Leon bargained for a title with a flaw.

8 The Cantel antenna tower is a very large and obvious structure which sits at the back of the Chassis building in a fenced-in area and it would be difficult not to notice it. A second antenna rises from the top of the Chassis building. Neither antenna is identified by any sign or marking. Although Terry Leon attempted to minimize his awareness of the Cantel antenna, it could not have escaped his attention as it would have been visible to him on his way to and from work each day. Mr. Winer walked the adjacent property at 10 Suntract and noted the tower at the rear of the Chassis property as well as the antenna on the roof of the building. However, he believed that both were used in Chassis' own business to communicate with its trucks. Kevin Leon did not tour or inspect the property, but the documents in his file on 11 Suntract suggest that he received the information package which Mr. Prentice routinely sent to those who inquired about the property. These documents included an out-of-date survey which did not show the easement or leased area and a property summary which, in addition to providing details of acreage, location and price, referred to 'Cantel antenna income'. Kevin Leon believed that he shared this information with his brother and with Mr. Winer. Terry Leon had no recollection of receiving or reviewing the property summary. It was his evidence that he relied on the survey and did not know about Cantel until much later. Mr. Winer was positive that he did not receive the property summary and denied that he had any discussions with Kevin Leon, Chassis or the Colliers' agents about the Cantel tower or lease.

9 It is clear that Mr. Winer never spoke to Mr. Kedney until well after the Agreement was finalized and that Terry Leon never spoke to anyone on the vendor's side of the transaction until shortly before the aborted closing. Their evidence is supported by Alan Winer's letter to Terry Leon of April 20, 1995 in which he writes: "The biggest problem relates to the Cantel lease. *When we did the transaction, there was no mention of the Cantel lease.* After the agreement was executed, I recall being told that it could be terminated on very little notice..." (emphasis added). Although the letter refers only to the "Cantel lease" leaving open whether Mr. Winer and Terry Leon in fact knew that the tower belonged to Cantel, I do not believe that they did. The evidence of Mr. Prentice and Mr. Scott concerning their alleged conversations with Mr. Winer about the tower was uncertain, equivocal and vague. It is my view that whatever conversations they had with him were about price and about learning whom Mr. Winer represented.

10 I accept Mr. Winer's evidence that he thought the antennae were associated with Chassis. In the absence of other knowledge, this was a reasonable assumption. I accept Terry Leon's evidence that he focused on the survey which, regrettably, was out-of-date and did not show the leased area or easement. Kevin Leon's involvement in the purchase of 11 Suntract was preliminary and short-lived. He did not have any discussions with either Mr. Prentice or Mr. Scott about the Cantel tower or lease. His file did not contain any documents regarding the Cantel tower or lease. Accordingly, the only evidence which connects Leon with knowledge of Cantel is the observations made by Terry Leon and Alan Winer of communication towers on a property which used transmission equipment for its own business and the reference to 'Cantel antenna income' on the property summary which Kevin Leon obtained.

11 Notwithstanding the chain of knowledge which Chassis sought to establish through Kevin Leon, it is my view that the evidence goes no further than this. Terry Leon and Alan Winer knew that there were transmission towers on the Chassis property. Kevin Leon knew that there was Cantel antenna income. Even if Kevin Leon's knowledge is attributed to Leon because he briefly acted as its agent in obtaining information and because the form of initial offer was prepared in his office, I do not believe that this ought to have put Leon on inquiry that it was purchasing land that was subject to a long-term lease and access easement which could interfere with its redevelopment plans. Nor do I believe that the mere existence of the tower, in these circumstances, raised a duty to inquire. I do not think that this can be the foundation for the imposition of such an onerous obligation of inquiry on a purchaser of property. This is particularly so in the face of a survey which erroneously represented the state of the title and disclosed nothing about the leased area or easement in favour of Cantel. The Agreement of Purchase and Sale does not assist the position of the vendor. It is singularly silent.

12 The facts in the cases relied on by Chassis regarding the duty of the purchaser to make inquiry are, in my view, quite different from those which are before the Court in this instance. In *Grossman Holdings Ltd.*, *supra*, the property was legally described in the Agreement as "comprising about 93 acres as per attached sketch". The sketch attached showed the rail lines. In *Joydan Development Ltd. v. Hilite Holdings Ltd.* (1972), 31 D.L.R. (3d) 430 (Ont. H.C.), the existence of the easement was specifically mentioned in the Agreement. Similarly, *Bullen v. Wilkinson* (1912), 2 D.L.R. 190 (Ont. C.A.) was a case where the purchaser was found to have knowledge of the title flaw. In each of these cases, if the purchaser had inquired, it would have learned of the true state of affairs of the vendor's title and could have protected itself. Accordingly, the Court was prepared to find that the purchaser bargained for a title with a flaw, either because it knew or could have known of the title which the vendor intended to convey. This is not the case before me.

13 According to Mr. Winer, when the Cantel lease was discovered some months after the Agreement was signed, he inquired of Colliers and was told that it could be terminated on 30 or 60 days' notice. This evidence is consistent with his letter to Terry Leon in April 1995 and is consistent, more or less, with the evidence of Mr. Prentice and Mr. Scott who take the position that, until the written lease came to the light, they understood that it was terminable. I say "more or less" because the Colliers' agents disagree as to exactly when it was terminable. I will come to this evidence, but it is my view that if Leon had inquired about the Cantel tower prior to submitting its offer or before the final Agreement was signed in December 1994, it would have been advised that there was a lease with Cantel which was "short-term". The Agreement provided for a lengthy conditional period prior to closing. In these circumstances, Leon might have made it a specific condition of the Agreement that the lease with Cantel be discharged on or before closing. Or, it might have presented the form of offer it did, relying on the vendor's covenant to discharge "all liens, charges and encumbrances" on or before closing. In either case, Colliers would have permitted Chassis to accept the offer. The point is that Leon would not have been any wiser for its inquiry and could not have protected itself even if it had inquired. In no case would it have learned about the true nature of the Cantel tower, lease and easement until after the Agreement was signed. When it did learn, it made clear that it was not prepared to accept the property subject to the encumbrances and wanted the tower removed. I conclude that both the Agreement and surrounding circumstances demonstrate that Leon did not bargain for a title with a flaw.

The Conduct and Knowledge of Chassis and Colliers

14 Chassis and Colliers knew that the purchaser was buying land for redevelopment. This was evident from the conditions which had been inserted by the purchaser in the Agreement of Purchase and Sale. It should also have been evident from the fact that at no time did Mr. Winer ask to inspect the property. As will become apparent, all of the information concerning the arrangements with Cantel were on the vendor's side of the transaction. In this transaction, it was the vendor and not the purchaser who ought to have been put on inquiry when it was presented with the Winer offer. It ought to have been immediately apparent that it could not conclude an agreement to sell 11 Suntract in the form which had been presented in view of *its* knowledge of the Cantel tower, lease and easement to which no reference was made by the purchaser in the offer it received on July 21, 1994. I turn then to a more detailed consideration of the conduct of those on the vendor's side of the transaction and of the knowledge which they had regarding Cantel.

15 There is no issue between Chassis and Colliers that, from the outset, Bill Kedney disclosed to Colliers that there was a Cantel transmission tower and equipment shed located on the property under which Cantel paid a yearly rent of $15,000 plus hydro and that Cantel had an access right running along the western boundary of the property to its leased area in order to service its equipment. There is also no issue that the terms of this arrangement were reflected in a written lease. At his initial meeting with Mr. Prentice in July 1993, Mr. Kedney toured the property with him and Mr. Prentice was shown the tower, shed and easement. Yet, throughout the five months of negotiations with Alan Winer in 1994, he was never made aware that there was a written lease with Cantel or of its terms. How did this happen? There were essentially two explanations offered by Colliers. First, it is alleged that Mr. Kedney misinformed Mr. Prentice and Mr. Scott about the terms of the lease and that he refused or neglected to provide a copy. Second, it is alleged that Mr. Kedney refused to show the Agreement to his lawyer, although he was advised to do so. Unfortunately, Mr. Kedney died in December 1996, about one year after this litigation was commenced and before it came to trial in late September

1997. He was therefore not in a position to disagree with the evidence of Mr. Prentice and Mr. Scott. But, this does not mean that the Court should accept their evidence. As the Court did not have the benefit of Mr. Kedney's evidence, it is necessary to draw conclusions from the testimony of others about the knowledge he likely had, about the information that he likely provided to his agents and about the advice that they likely gave to him.

16 The picture of Mr. Kedney which emerges from the evidence is a picture of an individual who was silent, stubborn, strong-willed and independent. He had owned Chassis for more than twenty years and had worked for the company since the 1950's, but he had never purchased or sold an industrial property. His ownership of 11 Suntract was by virtue of his acquisition of the Chassis shares in the early 1970's. The Cantel lease was granted in 1988 and was reviewed with him by Chassis' solicitor, Mr. Albert Page. He was familiar with his business, but he was not a sophisticated person, nor was he knowledgeable or experienced in real estate matters. This is borne out, in part, by his choice of an acquaintance, Gordon Roberts of Slightham Real Estate, as the first listing agent for his property in February 1993. Mr. Roberts was a residential real estate agent and had no experience with ICI properties. Although Mr. Roberts' recollections were incomplete, his evidence was straightforward and believable. His evidence was that Bill Kedney was knowledgeable about the property and about the Cantel lease. This was confirmed by Mr. Roberts' recollection of the lease as a lease with an extended term and on-going income. The testimony of Bill Kedney's son, Ronald Kedney, and of the Chassis solicitor, Albert Page, is consistent with this and supports Chassis' contention that Bill Kedney did not misinform the Colliers' agents about the essential terms of the Cantel lease.

17 I come then to the agents' evidence about the lease. Neither Mr. Prentice nor Mr. Scott kept any notes of their conversations with Mr. Kedney, but Mr. Prentice claimed that Mr. Kedney told him at their initial meeting in July 1993 that the lease was "year to year". He understood this to mean that it could be terminated on its anniversary date, although he did not know when that was. Mr. Prentice's recollections of the events prior to the signing of the Agreement ranged from verbatim recall to no recall at all. Not surprisingly, he claimed to have verbatim recall of the single conversation in which Mr. Kedney is alleged to have told him that the lease was "year to year". He denied that it was possible that Mr. Kedney had described the income from the lease as being payable and adjusted 'year to year'. Mr. Scott was not present at that meeting, but believed that the lease was "short-term". He was unclear what that meant and he was vague about how he came to this understanding. But, he did not recall either Bill Kedney or David Prentice describing the lease as "year to year". Neither did Ronald Kedney or Albert Page. Mr. Scott was the agent who mainly dealt with Mr. Winer during the negotiations which led to the final Agreement. He did not claim to have had discussions with Mr. Winer about the lease, but it is evident that if there had been such discussions, he would have described the lease as "short-term" as that was his understanding.

18 When I consider all of the evidence on this point, I come to this conclusion. I think it is unlikely that Mr. Kedney understood all of the legal implications of the Cantel lease and it is possible that he did not know precisely how much time remained in the term. Nevertheless, he knew that there was a written lease with Cantel which was a long-term arrangement, and which, as the Slightham MLS listing stated, produced "steady income". He knew that the Cantel income in July 1993 was $15,000 and was payable and adjusted 'year to year'. He knew that Cantel owned the tower and he knew of its access easement. I find that he made Mr. Prentice aware of all of this in the summer of 1993 and likely at their initial meeting.

19 After the listing agreement was signed in August, Mr. Prentice asked Mr. Kedney to give him all the documents he had. It is probably fair to say that documents were of little interest to Mr. Kedney, but with some prodding, he eventually provided Mr. Prentice with the out-of-date survey, a hand-drawn sketch of the layout of the Chassis building and, significantly, a hand-drawn sketch of the property which showed the Cantel tower and had the notation on it in Mr. Kedney's handwriting, "Cantel tower that picks up $15,000 annually plus hydro *at the moment*". The emphasis is mine, but is further evidence of Mr. Kedney's understanding of the continuing arrangement with Cantel. Although Mr. Prentice routinely sent the out-of-date survey to those who inquired about the property, he did not provide anyone with Mr. Kedney's sketch. Nor did he ever obtain a copy of the lease. It was Mr. Prentice's evidence that he requested a copy of the lease from Mr. Kedney on a number of occasions, but it was never forthcoming. Whether or not it was provided

is in controversy and there is some evidence to suggest that Mr. Kedney may in fact have sent it to Colliers. But, I do not think that this matters very much. Nor do I think that it matters very much if Mr. Kedney misinformed the agents about the terms of the lease, although I do not think that he did. What does matter is that by the time the Winer offer was concluded in December 1994, the Chassis property had been listed with Colliers for almost fifteen months. It is very difficult to understand why in all this time the agents, who purported to be specialists in the sale of ICI properties, failed to obtain a copy of the lease since it would have been relatively easy to do so. Mr. Kedney had a copy, Albert Page had a copy, Cantel had a copy, and Notice of Lease was registered on title. Moreover, Ronald Kedney was one of the Chassis signatories to the Cantel lease and was familiar with its terms. However, he was never asked about it. The point is that Mr. Kedney had never bought or sold land which was subject to a commercial lease, but both Mr. Prentice and Mr. Scott had. They knew or ought to have known of its importance and Mr. Kedney's failure or neglect to provide them with a copy of the lease is no answer to their conduct. This was made overwhelmingly clear from the expert evidence.

20 Both Chassis and Colliers presented expert evidence from experienced and qualified ICI agents. There were few, if any, differences of opinion between them. Both agreed that no reasonable agent would have proceeded as the Colliers' agents did. It was their evidence that whether or not the agent was in possession of an executed lease document, a competent ICI agent would be expected to insert an appropriate provision in the Agreement acknowledging that the vendor was conveying the property subject to the Cantel tower and lease. David Hurst, Chassis' expert, testified that the Agreement ought to have included details of the Cantel lease terms and preferably should have attached a copy of the lease itself. Mr. Hurst said that he would have taken these steps even if there had been discussions with Leon about the Cantel tower. Colliers' expert, Thomas O'Bryan essentially agreed with Mr. Hurst on this point. Mr. O'Bryan testified that every agent would press the vendor's solicitor to provide a copy of the lease if it were not forthcoming from the vendor within a reasonable time, and that any reasonable agent would, at the very least, insert wording into the Agreement to put the purchaser on notice that the property was being conveyed subject to a lease. He was also of the opinion that if a survey omits access rights, as was the case here, it would be preferable to note that omission to the purchaser.

21 The duty of a listing agent to act with reasonable care and skill extends to the review of an offer submitted by the purchaser and includes drawing to the attention of the vendor any provisions which are contrary to the vendor's instructions or which require qualification by reference to any encumbrance of which the vendor has put the agent on notice: *Paul S. Starr & Co. v. Watson*, [1973] 1 O.R. 148 (Ont. C.A.) at 149-150. The duty includes the duty to confirm the accuracy of information provided by the vendor: *Posthumas v. Garner* (1995), 48 R.P.R. (2d) 286 (Ont. Gen. Div.) at 293; *Price v. Malais* (1982), 24 R.P.R. 160 (B.C. S.C.) at 167-168. Colliers did none of these things. Instead, Mr. Prentice disseminated an out-of-date and incomplete survey which did not show the lease or easement; he failed to disseminate a sketch which did show the Cantel tower; he completed an MLS data sheet without noting the existence of the Cantel lease; he permitted Chassis to conclude an agreement covenanting to give vacant possession on closing, mistakenly believing that the vacant possession clause in the Agreement referred to buildings rather than land; he prepared numerous signbacks of the Agreement, but never noted the existence of a lease, nor did he list the Cantel tower as a fixture to be excluded from the Agreement, although he knew that it was not owned by nor being sold by Chassis. He mistakenly believed that the tower "ran with the land", but this understanding is entirely inconsistent with his knowledge that it was not and could not be conveyed by Chassis. Although legal advice would have been available to him and to Mr. Scott to clarify these mistakes, they made no inquiries. Colliers knew that Chassis was selling the property subject to the tower and lease, yet none of the vendors' covenants were qualified to reflect this. In short, the agents structured the agreement and proceeded with the transaction as if the Cantel tower, shed, lease and easement simply did not exist.

22 Colliers is one of four major companies in Toronto which specializes in the purchase and sale of ICI properties. It would appear that Colliers was retained at the expiry of the Slightham listing because Mr. Kedney realized or was advised that the services of a residential real estate agent were inadequate to the task of marketing his property. Mr. Kedney had no personal relationship with Colliers, nor with Mr. Prentice or Mr. Scott. He had every reason to expect to receive professional services which were commensurate with the specialized expertise of an ICI agent. In *Price*, *supra*, a case where the facts are much like those here, McEachern J. observed at p. 167:

> As I have said, she failed to mention or note the easement in the agreement but worse still, she permitted the vendors to covenant that they would deliver clear title, free of encumbrances ... It is a matter of common experience that lay people, like the vendors, will usually sign documents prepared for them by experts. They assume, understandably, that everything is all right, as their advisors would tell them if it wasn't so.

23 In this case, Mr. Kedney reasonably believed that everything was all right. I find nothing of merit in Colliers' argument that Mr. Kedney's alleged refusal to have the Agreement reviewed by his solicitor was the cause of the problem. They cannot take shelter behind this. According to Mr. Scott, the Chassis sale was "quite a standard deal" and I agree. Both he and Mr. Prentice claimed to be experienced in the purchase and sale of ICI properties which were subject to leases. Each had concluded similar transactions without the involvement of lawyers. In any event, I am doubtful that this advice was ever seriously pressed. Mr. Prentice could only recall two occasions when the suggestion was made. As to one occasion, his evidence is contradicted by Ronald Kedney who was present. The only other occasion he could recall was upon receipt of the first Winer offer which was well below the listing price. Mr. Prentice conceded that there was nothing unusual about Mr. Kedney's reluctance to incur the legal expense of having Chassis' solicitor review the offer in light of the sizable gap in price between the parties.

24 I have no doubt that Chassis relied upon Colliers to review and suggest any necessary modifications to the non-monetary terms of the Agreement of Purchase and Sale. But, such modifications as were made revealed a woeful lack of understanding of the fundamental aspects of a real estate transaction. I conclude that Colliers did not do its job with the knowledge and skill and care which an ICI agent of ordinary prudence and ability might be expected to show in similar circumstances. In my view, it fell below the standard of conduct set out in *Charter-York Ltd. v. Hurst* (1978), 2 R.P.R. 272 (Ont. H.C.) at 279 which is to be implied in the contract between Chassis and Colliers and is to be expected from a paid professional agent. There is no doubt that Chassis is bound by the conduct of its agents. I find no merit in Colliers' claim based on contributory negligence. I conclude that if Chassis is found to have suffered losses as a result of the aborted transaction, these were directly caused by the actions and omissions of Mr. Prentice and Mr. Scott, for whom Colliers will be vicariously responsible.

Events after the Agreement was signed

25 As I have said, it was only after the Agreement was finalized, that the existence of a lease with Cantel was discovered by the purchaser as a result of a sub-search of title. Thereafter, Leon, Chassis, Colliers and their respective solicitors engaged in a series of meetings and negotiations in an effort to resolve the "Cantel issue". There was an attempt by Leon to obtain an abatement of the purchase price and an attempt by Chassis to obtain a surrender of the lease, but neither resulted in a successful resolution of the problem. Leon did not proceed with its application for redevelopment and in September 1995, it brought matters to a head. It waived conditions in the Agreement, registered it on title, and paid the second deposit of $75,000. Chassis' response was to extend the time for closing as it was entitled to do under the Agreement.

26 It is contended by Leon that Chassis' acceptance of the second deposit in September 1995 and its extension of the closing, misled Leon into a belief that the Agreement would be performed and gives rise to an estoppel. It is contended by Chassis that Leon's waiver of conditions and payment of the second deposit with knowledge of the terms of the Cantel lease, gives rise to an estoppel. I do not agree with either submission. From the time it learned of the Cantel lease, Leon's consistent position was that it was prepared to close as soon as Chassis had dealt with this and that it expected Chassis to terminate its arrangement or otherwise arrange for the removal of the transmission tower so as to be in a position to deliver on closing what had been promised. Chassis' consistent position was that it was impossible to do this, but would close on the basis of the agreed purchase price and would convey, but subject to Cantels' rights. These uncompromising and ultimately irreconcilable positions never changed as the transaction careened towards an inevitable collision. Both parties kept the Agreement alive, but with a new closing date approaching on December 14, 1995, Leon's solicitor delivered formal requisitions by letters dated November 23, 1995.

27 There are only two categories of requisitions and the distinction between them is not always easy to draw. In general, it is recognized that a matter of conveyance is an encumbrance which the vendor can deal with by virtue of his own interest in or power over the property or by the concurrence of a party which the vendor can compel: *Dai v. Kaness Investment Ltd.* (1979), 24 O.R. (2d) 51 (Ont. H.C.) at 57; *O'Neil v. Arnew* (1976), 16 O.R. (2d) 549 (Ont. H.C.) at 563 and authorities there cited. Leons' requisitions were set out in two separate letters. The 'title' letter dealt with matters such as mortgage discharges, tax arrears, and the like, but assiduously avoided a requisition of a discharge of the Cantel lease. The 'contract and conveyancing' letter requisitioned, *inter alia*, a Bill of Sale for "all of the fixtures and chattels located on the property, including all buildings ... and all towers, antennae and related equipment". It also requisitioned "vacant possession of the property, including the eviction and removal from the property of any and all tenants ... and from Rogers Cantel Inc., a release of any claims it might have to use or occupy any part of the property". Notwithstanding their form, I think it must be evident that the effect of Leons' requisitions was no different than to require a surrender of the lease. In substance, this was a title requisition. Leon was not prepared to accept the vendor's title unless it discharged its obligations to Cantel. The vendor was not in a position to compel Cantel to do this. Chassis' obligations arose as a result of the contractual obligations of the lease, but Cantel had clearly acquired an interest in the Chassis land with an exclusive right to use and occupation of the leased area and an associated access easement until 2008. In view of this, Chassis could not convey the property free of encumbrances as provided for in the Agreement of Purchase and Sale. Its title was defective.

28 On December 13, 1995, Chassis terminated the Agreement. In a brief letter, Chassis' solicitor wrote:

> You have (as I have previously stated) made a requisition which we are unable to satisfy and which you are unwilling to waive. As a result, in accordance with the terms of the Agreement of Purchase and Sale, the Agreement is terminated.

The following day, Leon tendered, but Chassis refused to close. Counsel for Leon advanced several technical arguments that go to the manner in which the requisitions were answered. It was also contended that Chassis' failure to return the deposit money has tainted its ability to rely on the rescission clause. I do not find these arguments persuasive. By the time the requisitions were made and answered, both parties knew and understood the issue which stood between a successful conclusion of the Agreement and an aborted transaction. Leon never requested the return of its deposit, but it would not have accepted it in any event as it intended to keep the Agreement alive. I think a fair reading of the evidence is that both parties would have preferred to have the Agreement close, but on terms which could not be achieved. Leon had not bargained for a title with a flaw and Chassis could only convey a title with a flaw. Was Chassis then, as a matter of law, entitled to rely on the rescission clause and put an end to the agreement?

The Rescission Clause

29 The relevant portion of the rescission clause relied on by Chassis is found in paragraph 12 of the Agreement and states:

> If ... any valid objection to title ... is made in writing to Vendor and which Vendor is unable or unwilling to remove, remedy or satisfy and which Purchaser will not waive, this Agreement notwithstanding any intermediate acts or negotiations in respect of such objections, shall be at an end and all monies theretofore paid shall be returned without interest or deduction and Vendor, Listing Broker shall not be liable for any costs or damages...

The very broad language of rescission clauses, such as the one here, has been qualified by judicial consideration of their purpose and effect in the circumstances of the particular transaction under consideration by the Court. As I noted earlier, a vendor's conduct is carefully scrutinized for the reason so aptly expressed by Middleton J. (as he then was) in *Hurley v. Roy* (1921), 50 O.L.R. 281 (Ont. C.A.) at 285:

> This provision was not intended to make the contract one which the vendor can repudiate at his sweet will. The policy of the Court ought to be in favour of the enforcement of honest bargains, and it should be remembered that,

> when a contract deliberately made is not enforced because of some hardship the agreement may impose on one contracting party, the effect is to transfer the misfortune to the shoulders of the other party, though he is admittedly entirely innocent.

30 In *Louch v. Pape Avenue Land Co.*, [1928] S.C.R. 518 (S.C.C.), the Supreme Court of Canada found a vendor within the protection of a clause similar to the one under consideration here and held that the purpose of the provision is to enable a vendor to insist on receiving the contract price without an abatement, or to withdraw from the agreement. However, this broad and unqualified right was considered by the Ontario Court of Appeal in *Lavine v. Independent Builders Ltd.*, [1932] O.R. 669 (Ont. C.A.). In *Lavine*, the Court noted that *Louch* was based on a series of English cases, particularly *Ashburner v. Sewell*, [1891] 3 Ch. 405 (Eng. Ch. Div.), but went on to discuss what is referred to as a "collateral series" of English cases culminating in *Jackson v. Haden's Contract*, [1906] 1 Ch. 412 (Eng. Ch. Div.). In *Jackson v. Haden's Contract*, the learned Master of the Rolls described the duty imposed on a vendor who seeks to invoke a rescission clause at p. 419:

> Now, what is the element which determines the case? It seems to me to be an element of something on the part of the vendor less than the law requires of him in such cases. It may stop short of fraud, it may be consistent with honesty: but, at the same time, there must be *a falling short* on his part — he must have done less than an ordinarily prudent man, having regard to his relations to another person, when dealing with him, is bound to do; and therefore *where, knowing the exact facts, he had recklessly made a description of them which would mislead another person who did not know as much as himself (even though he thought that person might know as much as himself)*, there is a clear failure of duty on the part of the vendor which fairly disentitles him to say that a clause introduced into the contract for his benefit is introduced to meet such a case as that which has arisen here... (emphasis added).

31 By the time a consideration of rescission clauses reached the Supreme Court of Canada again in *Freedman v. Mason*, *supra*, it would appear that the broad and unqualified right of vendors as expressed in *Louch*, had given way to a more restricted approach which turns on the principles articulated in *Jackson v. Haden's Contract*, the policy objectives stated by Middleton J. in *Hurley*, and adopted by Middleton J.A. in *Lavine*, as "settling the law". These are to be applied to the circumstances of each case.

32 In *Freedman v. Mason*, Judson J. described the limitations on a vendor who seeks to take advantage of a rescission clause at p.486:

> This proviso does not apply to enable a person to repudiate a contract which he himself has brought about ... Nor does it justify a capricious or arbitrary repudiation. I am content to adopt the words of Middleton J. in *Hurley v. Roy* [citation omitted] that the provision, "was not intended to make the contract one which the vendor can repudiate at his sweet will."

And, at p. 487:

> There is a general principle to be deduced from the cases and it is the one I have already stated incidentally. A vendor who seeks to take advantage of the clause must exercise his right reasonably and in good faith and not in a capricious or arbitrary manner. This measure of his duty is the minimum standard that may be expected of him, and there are cases where a cause which might otherwise be valid as justifying rescission will not be available to him if he has acted recklessly in entering into a contract to convey more than he is able.

33 It can be seen that, the limitations on a vendor's conduct are twofold, are independent of one another, and impose on a vendor separate and distinct duties which arise at different times in the transaction; the first being at the time that the Agreement of Purchase and Sale is entered into and the second being after an objection is made to the vendor's title. This is reinforced by the decision of the Privy Council in *Selkirk v. Romar Investments Ltd.*, [1963] 3 All E.R. 994 (Bahamas P.C.) at 999:

> Thus, it has been said that a vendor, in seeking to rescind, must not act arbitrarily, or capriciously, or unreasonably. Much less can he act in bad faith ... Above all, perhaps he must not be guilty of "recklessness" in entering into his contract, a term frequently resorted to in discussions of the legal principle and which their lordships understand to connote *an unacceptable indifference* to the situation of a purchaser who is allowed to enter into a contract with the expectation of obtaining a title which the vendor has no reasonable anticipation of being able to deliver. A vendor who has so acted is not allowed to call off the whole transaction by resorting to the contractual right of rescission (see *Re Jackson and Haden's Contract* and *Baines v. Tweddle*). [citations omitted] (emphasis added).

34 *Freedman v. Mason* and *Selkirk* are illustrations of the second limitation, whereas *Lavine*, *Baines v. Tweddle*, [1959] 1 Ch. 679 (Eng. C.A.) and *Skariah v. Praxl* (1990), 73 O.R. (2d) 1 (Ont. H.C.) illustrate the first. *Freedman v. Mason* has been repeatedly cited for both principles, but the one relevant here is succinctly stated in *Skariah* at p. 20:

> The law appears to be that where a vendor knows of a defect in his title and signs a contract to sell the relevant property, taking a chance that he will be able to remove it, he cannot have the advantage of provisions giving him the power to rescind.

35 It seems to me that an examination of the cases which have considered rescission clauses reveals this. If the vendor has no knowledge of the title defect, or the purchaser does have knowledge of the title defect, whether actual or imputed, a Court is more likely to find that the first limitation does not apply. It will then go on to consider the second limitation in order to decide whether the vendor did all that it could to make good the title before it permits the vendor to repudiate the contract: *Selkirk*, *supra*; *J.C. Bakker & Sons Ltd. v. House* (1979), 8 R.P.R. 24 (Ont. H.C.); *Bullen*, *supra*.

36 In this case, I need only consider the first limitation. I am unable to precisely determine from the evidence whether the vendor, knowing of the title defect, "took a chance" that it could obtain a surrender of the lease or, whether, knowing of the defect, it was advised by its agents to ignore it. In this regard, the Court was hampered by the unavailability of the evidence of Mr. Kedney. There was evidence from the agents that the amendments which were made by them to the provisions of the Agreement relating to easements and rights of way were intended to deal with the Cantel easement and that this was explained to Mr. Kedney and discussed with him. This was not discussed with the purchaser and was understood by the purchaser to refer to the municipal easement, which was the only easement described on the survey. The purchaser accepted these amendments to the Agreement, but they of course, did not deal with the tower or the lease. Nor did they eliminate the need to mention the tower and lease as qualifications to the vendor's covenants with respect to title, fixtures and vacant possession. On Colliers' evidence, the lease was terminable on short notice, and in that sense, it "took a chance" that Chassis could discharge the encumbrances prior to closing. On Chassis' evidence, it knew that the lease was long-term and that it could not convey the tower, lease and easement unless Cantel agreed to surrender the lease or Leon agreed to take the property subject to it. What it did not know was how to reflect this in the Agreement of Purchase of Sale, and for this, it relied on Colliers to advise it. That it was badly advised cannot alter its contractual obligations to Leon.

37 The important feature of either version of the evidence is the knowledge which Chassis and Colliers had of the title defect but which Leon did not have. To borrow the language of *Jackson v. Haden's Contract*, this is a case where knowing that the property was subject to a fixture, lease and easement which could not be conveyed, Chassis failed to describe this in the Agreement and provided an out-of-date survey so as to mislead Leon who did not know as much as Chassis, even though Chassis may have thought that it did, at the time it entered into the Agreement of Purchase and Sale. Whether the test of recklessness is the "unacceptable indifference" described by the Privy Council in *Selkirk* or the "falling short" described by the Master of the Rolls in *Jackson v. Haden's Contract*, it is met in this case and equity will not permit a party to repudiate a contract in these circumstances. The rescission clause cannot apply.

The Remedy

Specific Performance

38 The decision of the Supreme Court of Canada in *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415 (S.C.C.), makes clear that specific performance is not invariably the remedy where real property is concerned. This is discussed by Jeffrey W. Lem in an annotation to the *Semelhago* decision at pp. 3-5, (1996), 3 R.P.R. (3d) 1 where he states at p. 3:

> The test for specific performance has always been the inadequacy of common law damages in the circumstances, and the test of the inadequacy of common law damages involves, *inter alia*, the uniqueness of the property in contest.

His analysis argues that *Semelhago* principally reminds everyone that specific performance is not inevitably the remedy where real property is concerned, but that it will continue to be the usual remedy so long as the test of uniqueness retains a subjective element. The *Semelhago* test is that absent evidence that the property is unique to the extent that its substitute would not be readily available, specific performance should not be granted as a matter of course: [1996] 2 S.C.R. 415 at 429.

39 In *Landmark of Thornhill Ltd.*, *supra*, the Ontario Court of Appeal granted specific performance to the vendor of one of many identical condominium units in a multi-unit building. The decision in *Semelhago* was subsequent to this and it is my view, that the result in *Landmark* could well be different to-day. Of concern here is the finding by the Court of Appeal in *Landmark*, that the onus of proving lack of uniqueness rests with the defaulting party: (1995), 25 O.R. (3d) 628 at 636. The difficulties created by this finding are discussed in an article by Paul Perell, "The Fate of Specific Performance", *Gravel to Gavel*: Recent Developments in Real Estate Litigation, Law Society of Upper Canada, January 12, 1996 at pp. F-16 to F-19, where the author persuasively argues that relieving the non-defaulting party of the burden of proof of uniqueness makes specific performance presumptively available. Although not dealt with explicitly in *Semelhago*, it seems to be implicit in the judgment that uniqueness is a matter to be proved and not presumed. If this is so, the proof should lie with the party seeking the remedy.

40 Leon wants the Chassis land because of events which pre-date this transaction and are unconnected with it. Some years earlier, Leon decided to assemble land in the immediate vicinity of 11 Suntract. The purpose of the land assembly was to build a retail "big box" development. These developments typically have large warehouse outlets which attract a high volume of customers to 'no frills' stores. Leon owns property at 88-102 Gordon Mackay Road and also owns a property at the intersection of Gordon Mackay Road and Suntract Road on which it constructed a retail furniture store and warehouse. In 1990, it acquired a 10 acre property at 10 Suntract Road (the "Blackwood- Hodge" property). Two years later, it entered into an arrangement with Price Costco Canada Inc. ("Costco"), which is a "big box" retailer, whereby Leon would demolish its former head office building at 88-102 Gordon Mackay Road and redevelop the site for Costco. In all, Leon owns about 30 acres of land, tucked into a horseshoe-shaped area, abutting Highway 401 along the northern perimeter and Highway 400 along the western perimeter. These properties are accessed from the southern end of the horseshoe at Black Creek Drive which ends at Jane Street, Gordon Mackay Road which runs west from Jane Street, and Suntract Road which runs north and south from Gordon Mackay Road. The Costco redevelopment received conditional approval from the City of North York in July 1994. However, the conditions imposed by the planning authorities ultimately proved too expensive and too difficult to achieve and the Costco development has not proceeded.

41 From the outset of the Costco redevelopment proposal, the municipal planning authorities were concerned about traffic access. Their preferred solution was to provide a second access from Jane Street at the more northerly end of the horseshoe. Leon believed that fulfilling the conditions which would be attached to a single access plan would be quicker and cheaper than constructing a second access. The Chassis property at 11 Suntract is located between the Blackwood-Hodge property which is to its immediate west, and a property owned by the Metropolitan Toronto Police ("the police property"), which is to its immediate east. The police property is adjacent to Jane Street. These properties abut Highway 401 to the north as does the most westerly property on this line which is owned by Leon and was the proposed Costco site. Leon contends that its successful acquisition of the Chassis property will put it in the position of attempting to acquire or obtain an easement through the police property, thereby providing the 'second access' into the development from Jane Street. Although the Chassis property at 11 Suntract went on the market in February 1993 and Leon was aware of this, it became a more significant acquisition target in the summer of 1994 for the reasons I have outlined.

42 The appraisal evidence establishes that the highest and best use for the Chassis property is as a redevelopment property and that its exposure to both Highway 401 and Highway 400 makes it a prime candidate for a retail development. But, its limitation is and has always been its awkward access. Even retailers as formidable as Leon and its Costco partner found this to be a very difficult obstacle. 11 Suntract has been on the market now for almost five years. Yet, Leon is the only purchaser who has demonstrated sufficient interest to submit an offer. Notwithstanding the collapse of the Costco deal and Leon's contention that the Cantel tower interferes with its development plans, it still wants the land. Apparently, no one else does. I think that this is some indication that the property has limited appeal, except to a limited class of purchaser, and in particular, the purchaser who is before the Court. It cannot be said that this is a situation of a mass-produced property which could be easily exchanged with any other property. Nor, as the appraisal evidence establishes, can it be said that Leon is attempting to capitalize on a bargain price in a rapidly inflating market. The evidence is quite against this. Instead, the evidence is that Leon owns 30 acres of land in the immediate area; that it sought and obtained conditional approval to redevelop other land in close proximity; that both Leon and its development partner were deterred by the cost of meeting the conditions attached to the approval and that Leon now wishes to attempt to develop the totality of its land with an alternative approach which it believes will be cheaper and which will be satisfactory to the planning authorities.

43 Chassis sought to demonstrate that the tower is immaterial to the redevelopment of the property and that Leon's 'second access' proposal is a fanciful one because Leon has taken no steps to determine if it will in fact be able to obtain an easement through the police property. While a consideration of this evidence is pertinent to Leon's claim for abatement and to its alternative claim for damages, I do not think that this addresses the issue of uniqueness. Whether or not Leon's plan can ultimately be achieved and whether or not the tower interferes with its plan are irrelevant considerations on this question. What is relevant is whether or not a substitute property is readily available. Leon's plan may or may not ultimately proceed or succeed. But, it cannot go forward at all without 11 Suntract. I conclude that Leon has established that the property is unique and that damages would be an inadequate remedy for it in the circumstances of this case.

Abatement

44 The statement of Eldon L.C. in *Mortlock v. Buller* (1804), 32 E.R. 857 (Eng. Ch. Div.) is often referred to as establishing the principle, that, in circumstances such as these, the purchaser is entitled to a conveyance of everything the vendor has, but with appropriate compensation. The power to order specific performance with compensation involves the Court in the difficult task of attempting to discern the intention of the parties from an Agreement which did not contemplate what actually transpired. Moreover, the purchaser is at once asking the Court to enforce the bargain that was made and to re-write the bargain that was made. The claim for abatement is an unusual one in the sense that, equity intervenes to make the vendor keep his promise insofar as he can, and then intervenes again to decide what the bargain would have been. Notwithstanding the artificiality of this approach, not to mention the difficulty of valuing a defect or deficiency where a rateable reduction is inappropriate, it is usual for courts to attempt this and to do their best: Robert Sharpe, *Injunctions and Specific Performance*, looseleaf edition, (Toronto: Canada Law Book Inc.) at para. 11.40, f.n.3; see, *Barnes v. Wood* (1869), L.R. 8 Eq. 424 (Eng. V.-C.). It is also usual for courts to be assisted in this task by the evidence of appraisers, who are of course there to help the Court, but whose valuations are often not all that helpful because they are frequently miles apart. This was the situation in *Topfell Ltd. v. Gallery Properties Ltd.*, [1979] 1 W.L.R. 446 (Eng. Ch.). *Topfell* concerned a residential property where vacant possession was promised, but not given. There, as here, both appraisers were credible and experienced. There, as here, the purchaser's appraiser valued the deficiency at a substantial discount of the purchase price while the vendor's appraiser valued the deficiency at nil. This is precisely the situation that I am faced with here. Templeman J. concluded that he had to make up his own mind, but with very little assistance except the minimum and maximum figures. He also thought that the reduction in price should be based on the sort of price that the purchaser might have been willing to pay or the hypothetical reasonable purchaser might have been willing to pay with full knowledge. The difference between this and the price actually agreed is the proper measure of the abatement. I think that this is a reasonable approach which I propose to follow.

45 I begin with what is known from the evidence. The purchase price was $825,000. After Leon learned about the tower and the lease and realized that Chassis would be unlikely to remove it, it sought an abatement of $200,000, which was flatly refused. At that time, it could have put an end to the Agreement and demanded the return of its deposit, but it did not. Instead, a couple of months later, Leon waived conditions and paid the second deposit. I infer from this that Leon was willing to take the land with an abatement of less than $200,000. How much less is the question. Chassis' appraiser estimated the value of the land in December 1994 to be $835,000, with or without the tower. In fact, he thought that the tower modestly enhanced its value in view of the income it produced. Leon's appraiser valued the land at $760,000 without the tower, but concluded that, in view of the long-term nature of the lease, the land would not be redeveloped with the tower. He thought that the likely purchaser would be an industrial user and estimated its value on that basis to be $500,000. I find it to be against common sense and the evidence, that the tower and lease have no impact on this land. On the other hand, I do not accept that the presence of the tower makes it useless for redevelopment.

46 The planning evidence established that it is the policy of the City of North York to exclude transmission towers from density calculations. The tower presently sits on land which is subject to setback requirements and is therefore, on land which cannot be built on. Leon's evidence was that its 'second access' plan contemplates a ring road around the perimeter of the entirety of its land and that the tower will interfere with this. The requirements of the applicable North York by-law suggest that this may not, in fact, be so. With the tower in its present location, it appears that Leon could build to maximum density and also accommodate the ring road. However, to accomplish this within the zoning requirements will result in a very odd-shaped building. There is some evidence that Cantel is willing to re-locate the tower on the land so long as it retains an access easement. Counsel for Leon agreed in argument that in valuing the abatement, I could take into account the greater flexibility which Leon has to re-locate the tower, and thereby minimize its impact, in view of its ownership of 30 acres of adjacent land. This is a flexibility which would not be available to the hypothetical reasonable purchaser and moving the tower will of course involve expense, although the precise amount is not known. Finally, I have some evidence from an actual hypothetical purchaser, Mr. Bill Kooy. Mr. Kooy operates a business nearby but, unlike Leon, had knowledge of the tower, the lease and the antenna income. When the Chassis land was listed for sale, he made inquiries of Mr. Prentice and, for a time, he considered purchasing the property, but was ultimately unable to arrange financing. At the time of his inquiries, Mr. Kooy made some notes which record his "wish price" of $600,000 and the "more realistic price" of $750,000 for 11 Suntract.

47 When I consider all the factors I have mentioned, I conclude that a hypothetical reasonable purchaser would have bought the land either as a retail redevelopment site or for industrial use. If the purchaser was buying for retail redevelopment, such a person would have concluded that the expense of obtaining a surrender of the lease and moving the tower was too great and that it would be better to attempt to redevelop the property with the tower in place. The presence of the tower will result in distortion to the shape of the building, may result in the loss of some parking spaces and, to achieve a building of maximum density, will present a very tight configuration in order to avoid building over the municipal easement on the south portion of the property. The presence of the tower will also interfere with the visibility of the site from the highways, which is one of the positive features of 11 Suntract for retail development. Although it was common ground that the value of 11 Suntract as a redevelopment property would be higher than its value as an industrial property, its retail land value is diminished in this case by the encumbrances on it which make it less suitable for redevelopment than it would be with vacant possession. I conclude that a reasonable purchaser would have been willing to pay $750,000 for the land with knowledge of the tower, lease and easement. Accordingly, Leon will have specific performance with an abatement of the purchase price to this amount. In view of this finding, I do not need to consider the alternative claim for damages.

Adjustments

48 Chassis asks that, in the event that specific performance is awarded, the adjustments include an amount for interest in its favour for the period December 14, 1995 to the date of trial. Until the decision of the Ontario Court of Appeal in *Semelhago v. Paramadevan* (1994), 19 O.R. (3d) 479 (Ont. C.A.), the weight of authority has been against adjusting for interest when the vendor is in default, as is the case here: *306793 Ontario Ltd. v. Rimes* (1979), 25 O.R. (2d) 79 (Ont.

C.A.); *Morgan v. Lucky Dog Ltd.* (1987), 45 R.P.R. 263 (Ont. H.C.). Some commentators have been critical of this, arguing that, in certain circumstances, the failure to deduct interest puts the purchaser in a better position than if the Agreement had been performed by the vendor: John Swan, "Damages, Specific Performance, Inflation and Interest" (1979), 10 R.P.R. 267; Robert Sharpe, *Injunctions and Specific Performance, supra*, at para. 11:340-11:360; J.J. Chapman: "A Stacked Deck: Specific Performance and the Real Estate Transaction" (1994), 16 Adv. Q. p.240 and p.273.

49 The trial judge in *Semelhago* held that she was bound by *Rimes* and declined to make deductions, but the Court of Appeal distinguished *Rimes*, holding that the correct approach was to deduct from the increase in value of the house that was the subject of the transaction ("the new house"), the plaintiff purchasers' carrying costs on the house he would have sold ("the old house") and to deduct notional interest earned on the money which the plaintiff would have used to purchase the new house. Although this point was not before the Supreme Court of Canada, it expressed reservations about the manner in which the Court of Appeal had distinguished *Rimes* and about the propriety of the deductions. As the Supreme Court of Canada did not elaborate its reservations or pronounce on this issue, I take it that the Court of Appeal decision in *Semelhago* has opened the door to make a deduction for interest, in an appropriate case. I have concluded that this is not such a case for the following reasons. First, unlike the trial judge in *Semelhago*, I have no evidence of the carrying costs of the land. I also have no evidence of an amount that would satisfy a reasonable occupation rent. Second, unlike *Semelhago*, where the delay between closing and trial resulted in substantial increases in value to both the old house and the new house, the increase in value to the Chassis land is, according to the vendor's appraiser, less than 10 per cent. His opinion likely overstates the current value of 11 Suntract, as it was based on the Costco redevelopment proceeding. I do not think that it can be said that this is a case of a purchaser realizing a windfall profit by reason of rapid inflation in the value of the land. Nor, is it a case where interest rates have rapidly inflated. The average pre-judgment interest rate during the period between the aborted closing and trial was about 5 per cent. Third, the failure of Chassis to close has delayed Leon in its redevelopment plan. A two year delay in these circumstances could be quite prejudicial to the purchaser. Chassis has also been delayed in its plan to re-locate its business to a smaller property with lower carrying costs and I accept that this could be prejudicial to the vendor. However, neither Leon nor Chassis presented any evidence upon which I could quantify any respective losses resulting from the delay or determine whether the delay has prejudiced Chassis and benefitted Leon or vice versa. I therefore regard this as a neutral factor. I conclude that this is a case where it is appropriate to follow *Rimes* and to leave the vendor with the income from the land, but without the obligation to pay occupation rent and to leave the purchaser with the increase in value to the land, with no deduction for carrying costs or for interest earned on the purchase money. I have also concluded that this is not a case where it is appropriate to direct a reference to the Master. Chassis and Leon are content to have judgment issue on the basis of the evidence presented at trial. I propose to do this, leaving it open to all parties to re-attend before me to settle any details of the judgment which I have may have overlooked and which cannot be agreed.

Counterclaim by Chassis

50 Chassis claims damages for breach of the Agreement and for slander of title. As to the first claim, the entire basis of Chassis' defence of the main action is that it was entitled to invoke the rescission clause. Having found that it was not entitled to do so, it was Chassis and not Leon who breached the Agreement by failing to close. Leon could have rescinded the Agreement, but chose to compel performance and has succeeded. Unless slander of title is made out, there is no basis upon which to award Chassis damages against the purchaser.

51 The claim for slander of title arises from Leon's registration of a Caution and registration of Notice of the Agreement of Purchase and Sale, upon its waiver of conditions in September 1995. The claim is based on s.132 of the *Land Titles Act*, R.S.O. 1990, c. L.5, which precludes the registration of a caution on title "without reasonable cause". The statutory cause of action does not appear to require malice, nor an intention to injure, as does the action at common law: *Captain Developments Ltd. v. Nu-West Group Ltd.* (1982), 37 O.R. (2d) 697 (Ont. H.C.); reversed on another ground (1984), 45 O.R. (2d) 213 (Ont. C.A.), leave to appeal to S.C.C. refused (1984), 4 O.A.C. 78 (S.C.C.).

52 The Agreement of Purchase and Sale unquestionably conveyed to Leon an interest in Chassis' land. There is certainly no evidence of malice. Neither is there evidence that the registration was for the purpose of tying up Chassis'

land. The tenor of Leon's conduct throughout has been to move toward completion and performance. It did not register the Agreement on title when it first learned of the encumbrances. Nor did it do so when its attempts to negotiate an abatement failed. It only did so after it made the Agreement unconditional. In any event, there is a complete lack of evidence that the registration caused any damages to Chassis or prevented Chassis from selling its land. It took less than two years to bring the action to trial and the property has remained on the market during this time. It was David Prentice's evidence that he has received some inquiries about 11 Suntract and that prospects were not deterred by the pending litigation. There is no evidence that any purchaser has come forward wishing to buy 11 Suntract. There is also no evidence that Chassis ever took any concrete steps to find a new location for its business, although more than one year elapsed between the execution of the Agreement and Leon's registration. The counterclaim must fail.

Third Party Action

53 Chassis has claimed and is entitled to its out-of-pocket expenses for legal fees, disbursements and GST arising from the aborted sale in December 1995. These are $9,082.16. The claim for damages is essentially a claim for interest on the purchase price. As well, Chassis makes specific claims for its costs of the third party action and of the main action, each on a solicitor and client basis. Dealing first with interest, I do not think that this claim can succeed for the reasons I have already given in regard to the identical claim by Chassis against Leon. Legal costs may be recoverable as damages from a third party: *Weinstein v. A.E. LePage (Ont.) Ltd.* (1984), 47 O.R. (2d) 126 (Ont. C.A.). However, as counsel have requested the opportunity to make additional submissions on costs, I propose to reserve the entire question of costs for further argument. Whether or not the claim for indemnity can encompass the value of the abatement has troubled me, but I have concluded that it cannot. Chassis was never in a position to convey its land without the Cantel lease. Had Colliers done its job, the Agreement would have been prepared to reflect this. It would have been concluded on the basis of a conveyance, subject to the lease at a price of $750,000, which is the price I have found that Leon or the reasonable hypothetical purchaser would have paid with knowledge of the lease. If the theoretical basis for abating the purchase price is sound, Chassis would never have realized the "agreed" purchase price of $825,000, since the Agreement was predicated on a conveyance which did not exist. Accordingly, there is no loss to be indemnified. Finally, I may have been disposed to find that this is the kind of case in which it would be appropriate to deny the agent its commission. However, Chassis did not make this claim, nor did it advance this point in argument.

Disposition

54 For these reasons, there will be judgment for specific performance of the Agreement, subject to the Cantel tower, lease and easement and, subject to an abatement of the purchase price to $750,000. The date for closing is to be January 30, 1998, or such other date as the solicitors, may in writing agree, with adjustments as of the actual date of closing without taking account of moneys received or expended or occupation rent, and without provision for interest. The deposits paid by the plaintiffs, together with accrued interest, are to be credited to the purchase price. If demanded, real estate commission as provided in the Agreement is payable, except that commission will be payable on the abated purchase price of $750,000. The counterclaim is dismissed. There will be judgment in the third party action for $9,082.16.

55 The issues of pre-judgment interest and costs are reserved and will be dealt with following written submissions. Counsel will exchange and deliver submissions, including any written offers to settle, by January 15, 1998. Reply submissions, if any, are to be delivered by January 23, 1998.

Order accordingly.

Tab 18

1921 CarswellOnt 243
Ontario Court of Appeal

Hurley v. Roy

1921 CarswellOnt 243, 50 O.L.R. 281, 64 D.L.R. 375

Hurley v. Roy

Meredith, C.J.C.P., Riddell, Middleton and Lennox, JJ.

Judgment: April 7, 1921
Docket: None given.

Counsel: *F. D. Davis*, for appellant
E. S. Robertson, for respondent

Subject: Contracts

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Real property

III Sale of land
III.4 Remedies
III.4.c Rescission
III.4.c.i Grounds for rescission
III.4.c.i.H Refusal or inability to close

Real property

III Sale of land
III.4 Remedies
III.4.h Damages
III.4.h.ii Failure to close
III.4.h.ii.B Vendor unable to close

***Riddell, J.*:**

While it is quite clear that a vendor may take advantage of such a condition as is a question in this action, where the quantity he can convey is much less that the amount contracted for *In re Terry and White's Contract*, (1886) 32 Ch. D. 14, he cannot do so if he made the agreement recklessly or with the knowledge of his inability to carry it out: *In re Jackson* and *Haden's Contract*, [1906] 1 Ch. 412; *Merrett v. Schuster*, [1920] 2 Ch. 240.

There is nothing in the present case to indicate an innocent mistake; and I think the defendant cannot take advantage of the condition, but must suffer abatement, conveying all he can.

The agreement to sell itself put an end to the joint tenancy in equity: Williams on Vendor and Purchaser, 2nd ed., vol. 1, p. 572, and cases in note (*z*) — and I am of the opinion that the judgment appealed from is right.

***Middleton, J.*:**

To me it is clear that the judgment is right, and the appeal should be dismissed. The defendant agreed to sell the land, it appears that he only owns half, and his wife half, but she is ready to convey, receiving half the price, so that the defendant can carry out his contract by procuring a conveyance of the whole, and this without submitting to any hardship. As between the vendor and purchaser, the purchaser is not concerned with the domestic difficulties of the vendor, and so long as the vendor can carry out that which he agreed to the purchaser has the right to have the agreement implemented.

The contrary view enables the vendor to play fast and loose. He could make the purchaser accept the conveyance from the wife, as this would give title; yet it is suggested that he may tender it or withhold it at his option. The fact that the vendor may change a joint tenancy to a tenancy in common seems to me quite beside the mark — it is an incident of the nature of the estate; and, if the wife chooses, she can effect the change by conveying her interest.

The provision enabling the vendor to rescind has no application to the facts. The vendor can convey if he allows his wife to have her share of the price. This provision was not intended to make the contract one which the vendor can repudiate at his sweet will. The policy of the Court ought to be in favour of the enforcement of honest bargains, and it should be remembered that, when a contract deliberately made is not enforced because of some hardship the agreement may impose on one contracting party, the effect is to transfer the misfortune to the shoulders of the other party, though he is admittedly entirely innocent.

LENNOX, J., concurred.

***Meredith, C.J.C.P.* (dissenting):**

I find no difficulty in reaching the conclusion that this action should be dismissed, on any one of several grounds: —

First, because the contract is for the defendant to convey to the plaintiff the land in question, his wife joining in the deed to bar her dower. That contract the defendant was always willing to carry out; but the plaintiff was not. He sought a conveyance of substantially a half interest in the land for half the price, and this action is really for that object, to which the judgment appealed against gives effect: and gives effect in the absence of the defendant's wife, who was just as much a party to the contract as the plaintiff or the defendant, and in whose absence no judgment upon that contract can rightly be made. The Courts do sometimes go pretty far in refusing to give effect to a contract which the parties have made: but they have not yet, as far as I am aware, made a different contract for the parties and compelled them to carry it out. It is not material whether a deed such as the contract provides for would or would not convey all the rights of the husband and wife, because neither the vendor nor his wife is seeking to enforce that contract or any other; the defendant very fairly says: "If you do not want what you bargained for, I shall not even ask you to take it:" but I may say that at present I do not see why such a conveyance would not give title to the land: the wife, not only standing by, but actually joining in a conveyance of the fee simple by her husband, should be estopped from claiming afterwards any title to the land other than that which was conveyed.

Second, because the contract does not give a mere right to rescind; but it provides that, in the events which have happened, the contract shall be null and void. The parties might of course waive that provision; but they have not done so.

Third, because, if this were the ordinary case in which the defendant is bound to make a good title, alone: having a right to rescind if unable or unwilling to remove a valid objection to the title: the case would be one in which that right might be exercised. The material facts are these: —

The husband owned the lands: he made a deed of them to himself and his wife as joint tenants. That is a thing which is sometimes clone in these days, and a thing that has given rise to much more litigation than merely this action. Such

a conveyance is sometimes made with the object of saving the expense of a will of a husband and an administration of his estate, if he should die before his wife; sometimes to give another vote to the family in cases in which property qualification is needed; and doubtless sometimes for other reasons; but generally the land is afterwards treated just as before — as if the husband's. When the contract was made, the wife agreed to become a party to it, upon the promise of the husband to pay to her a fixed monthly sum for the separate maintenance of herself and her child: the parties then went all together to the purchaser's solicitor, who drew the agreement in question, which was then signed by all of them. The purchaser's solicitor had previously drawn the deed from the husband to his wife and himself. When the plaintiff demanded a conveyance from the husband and wife jointly, instead of as the contract provided, the wife was willing to join in such a conveyance if she got half the purchase-money: the husband offered to pay her, as he had agreed, the monthly sum, but naturally refused to pay more. I should have thought that in these circumstances a case of a clear kind had been made for rescission under the usual provision for rescission. Why not? Assuredly it was the most needful thing to be provided against; indeed the only thing. His title was good: the only uncertain thing was his wife. If she would not execute the deed when the time came, it meant a law-suit by the purchaser to compel her to join in her husband's deed, and the husband might very reasonably wish to avoid, and provide for the avoidance of, that: the only thing that needed to be provided against: he had had some experience which might have caused him readily to endorse the familiar words, "Changeable as the wind." One has only to look at the strait in which he might be, if he had not made provision against a demand that he might be unable or unwilling to comply with. He contracted to get the whole purchase-money, and made arrangements so that he should: if the judgment stand, he can get only half of it. He agreed to pay his wife so much a month only: if the judgment stand she will get half the price of the land: she may squander it, and the support of his child and possibly his wife may fall back on him — whether legally or only morally is not material so long as the the burden comes to and is borne by him. He loses his right of survivorship, which might sooner or later bring the whole estate back to him, and he gets nothing for it. None of these things were included, or intended to be included, in the contract in question: and that contract only has the Court power to enforce. The trial Judge seems to have quite ignored that, and to have sought to give effect to a verbal contract or rather a contract constructed out of some of the circumstances of the case — mainly those that were unfavourable to the defendant — only. I can find no good reason why the defendant could not rescind, if he had no other answer to this action. And I can find nothing in any of the cases that stands in his way: but I do find everything needful of the opposite character. Let us turn to the cases relied upon by the trial Judge, and take the first one that comes to hand: in the case *In re Jackson and Haden's Contract*, [1906] 1 Ch. 412, these words of Lord Justice Turner, spoken in the case *Duddell v. Simpson* (1866), L.R. 2 Ch. 102, are adopted with approval by the Master of the Rolls (pp. 419, 420): "I think that in a case where the vendor annuls the contract on the ground of unwillingness, he must shew some reasonable ground for unwillingness; thus, for instance, he may shew that if he proceeds to comply with a requisition, he will be involved in expenses far beyond what he ever contemplated, or be involved in litigation and expenses which he never contemplated, and for avoiding which he reserved to himself the power of annulling the contract."

I do not read those words because I deem them a comprehensive, exact statement of the law, but do read them because they are very applicable to this case — treating it as if the agreement in question gave only and expressly a right to rescind: what was contemplated was the carrying out of the agreement actually made, a deed with bar of dower, the husband to pay the monthly sum agreed upon to the wife; that which was demanded was a deed from the husband alone of a half interest in the land, a deed destroying his right of survivorship, and taking away from him and giving to his wife half the purchase-money, all of which under the agreement he was to get. Whether the wife has been instigated by the plaintiff to break her bargain and demand half of the price, or whether they two are only acting in collusion in this entire change of position, or whether there is no collusion between them, makes no substantial difference, the result is the same: but it may be added that, as the plaintiff has now a deed from the wife, and has not made her a party to this action, but in it is seeking a conveyance entirely different from that bargained for, and something that enables her to demand more than she bargained for, there is a good deal of evidence of instigation or collusion. But, however that may be, this case, relied upon to support the judgment appealed against, is distinctly against it.

The next case so relied upon, *In re Deighton and Harris's Contract*, [1898] 1 Ch. 458, is equally as strong an one, if not stronger, in the defendant's favour. These words of the Master of the Rolls are also very appropriate to this case (p. 463): —

> "Amongst other things, there was a difficulty with regard to getting in an outstanding interest in the official receiver in bankruptcy of the estate of one Baker. The purchaser said it was quite plain that it was necessary to get the concurrence of the official receiver because there was some interest outstanding in him. The vendor objected to that, and said it was a mere conveyancing question: that it would be troublesome for him to get that concurrence, that it was not really material, and that, if insisted on, he could not get it. The purchaser still insisted; and the vendor says, 'Very well, I rescind the contract.' Why is he not entitled to rescind under the very wide condition I have read?" He and the other Judges decided that the vendor was; and the only difference between that case and this is that in this case the vendor has much greater reason for refusing to comply with the plaintiff's demands and claims.

And the third case adds to the extraordinary unanimity with which the cases cited against the defendant support him, and it is extraordinary how much they are like this case. In the case of *Nelthorpe v. Holgate*, I Coll. 203, the learned Vice-Chancellor who decided it said that if the vendor had entered into his contract in consequence of any promise or representation on the part of the life-tenant, that she would concur in the sale; or, if at the time of the making of the agreement the purchasers knew that the vendor could not make title without her consent, the case would have been different. This case is essentially the different one.

I am quite unable to perceive any attempt on the defendant's part to "ride off upon a condition to rescind which was obviously not framed with reference to any such case;" but I see, very plainly, an attempt to drive the vendor to perform a contract he never made: one which would be entirely different from that which all three parties entered into: and one which would be. very unjust to him.

I am in favour of allowing the appeal and dismissing the action.

End of Document

Tab 19

Most Negative Treatment: Distinguished
Most Recent Distinguished: Rushville Construction Ltd. v. 572321 Ontario Inc. | 1988 CarswellOnt 1082, 66 O.R. (2d) 146, 12 A.C.W.S. (3d) 42, [1988] O.J. No. 715 | (Ont. H.C., Sep 26, 1988)

1977 CarswellOnt 406
Ontario Supreme Court, High Court of Justice

Great Georgian Realty Group v. Genesis Marketing Organization Ltd.

1977 CarswellOnt 406, [1977] 1 A.C.W.S. 680, 15 O.R. (2d) 701, 1 R.P.R. 168, 76 D.L.R. (3d) 592

GREAT GEORGIAN REALTY GROUP v. GENESIS MARKETING ORGANIZATION LTD.

Reid J.

Heard: November 15-18, 23-26 and December 3, 1976
Judgment: April 19, 1977

Counsel: *P.J. Green*, for plaintiff.
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Subject: Property; Contracts

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Real property

III Sale of land
III.1 Agreement of purchase and sale
III.1.b Interpretation of contract
III.1.b.ii Covenants
III.1.b.ii.B Implied

Headnote
Sale of Land --- Agreement of purchase and sale — Interpretation of contract — Covenants — Implied

Sale of land — Conditions — Servicing of land by certain date — Condition of closing held to be an express or implied covenant of vendor to fulfill the condition — Implied obligation to make reasonable efforts.

The vendor and the purchaser, entered into an agreement of purchase and sale of some 100 acres of land. The agreement, dated 20th April 1973, was stated to be subject to the following conditions to be fulfilled on or before the date of closing, namely,

(i) that the vendor shall have obtained the approval of a plan of subdivision;

(ii) that the vendor shall have entered into an agreement of subdivision with the municipality;

(iii) that the vendor shall have registered a plan of subdivision; and

(iv) that the installation of municipal services required by the subdivision be completed to the extent that building permits would be available. The vendor covenanted to service the lands. The agreement provided that should condition (iv) above not be fulfilled by 19th April 1974 then the transaction of sale shall be terminated. The closing date was the 90th day following notification to the purchaser that condition (iv) above had been fulfilled. Conditions (i), (ii) and (iii) above were fulfilled by 19th April 1974 but the installation of services referred to in condition (iv) above had not. On 19th April 1974 the purchaser tendered but the vendor treated the contract as terminated and sought to return the deposit. The purchaser commenced an action for specific performance with abatement or damage.

Held:

The purchaser was entitled to a judgment for specific performance and abatement of the purchase price to the extent of the costs of completing the missing services. The contract contained an express obligation on the vendor to install services by 19th April 1974, or an implied obligation to that or, at least, an implied obligation to make reasonable efforts to do so. The vendor failed to meet such obligations.

Held further:

Even if the vendor did make reasonable efforts it failed because the date it chose for the completion of the services was a date it chose recklessly and it should not be permitted to terminate the contract on the ground it could not meet that date.

Annotation

The provisions of the agreement of purchase and sale in this case are quite common. Many developers of land, in order to make sure that the development is viable, enter into agreements of sale with builders before the lands are serviced. The agreements normally provide that the vendor is to service the lands and in the event that the lands are not serviced by a stated date the agreement is terminated. If, as the Court held, such agreements give rise to a covenant by the vendor to at least use his best endeavours to complete the servicing by the stated date, great care must be taken in establishing such date in order to avoid liability. The developer-vendor must be knowledgable as to the possible causes of delay and set a realistic date. If the date is not met for some reason which the vendor should have envisioned but did not, then he could be held to have chosen the date recklessly and could not rely on his failure to fulfill the condition in order to terminate the contract and avoid liability. The Court held that condition (iv) above was not a true condition precedent based on the cases cited.

Table of Authorities

Cases considered:

Gilchrist v. Commodore (1931), 40 O.W.N. 577 (C.A.) — *considered*

Hargreaves Tpt. Ltd. v. Lynch, [1969] 1 All E.R. 455, [1969] 1 W.L.R. 215 (C.A.) — *applied*

Hogg v. Wilken (1974), 5 O.R. (2d) 759, 51 D.L.R. (3d) 511 — *considered*

Mason v. Freedman, [1958] S.C.R. 485, 14 D.L.R. (2d) 529 — *considered*

Metro. Trust Co. v. Pressure Concrete Services Ltd., [1973] 3 O.R. 629, 37 D.L.R. (3d) 649, affirmed 9 O.R. (2d) 375, 60 D.L.R. (3d) 431 (C.A.) — *considered*

Selkirk v. Romar Invts. Ltd., [1963] 3 All E.R. 994, [1963] 1 W.L.R. 1415 (P.C.) — *applied*

Turney v. Zhilka, [1959] S.C.R. 578, 18 D.L.R. (2d) 447 — *distinguished*

ACTION by the purchaser under an agreement of purchase and sale of land for specific performance with an abatement or for damages.

***Reid J.*:**

1 This case raises the interesting question whether a party to a contract may terminate it because of something he has not done.

2 Great Georgian is a partnership. Their principal officer in relation to this litigation was Mr. Dominic Maida. The principals of Genesis were Mr. Ross Lloyd Martin and Mr. James Edward Strome.

3 The parties entered into a contract in writing on 20th April 1973. The contract was for the sale by Genesis to Great Georgian of some 100 acres of land. The price was $450,000, payable by way of a deposit of $10,000 and further cash payments and mortgages.

4 The subject land had been under development as a residential subdivision for some time. This was reflected in a condition set out in contract paragraph 2(a). It said:

> The following matter shall be a condition of this agreement:
>
> > (a) on or before the date of closing, TEIGA shall have approved a draft plan of subdivision of the real property substantially in accordance with the draft plan of subdivision of G.V. Kleinfeldt and Associates Limited dated the 19th day of September, 1972.

5 (TEIGA was the Ministry of Treasury, Economics and Inter-Governmental Affairs.)

6 Paragraph 7 said:

> The Vendor covenants that upon the fulfillment of the condition referred to in paragraph two, it shall without delay negotiate and use its best efforts to enter into a subdivision agreement with the Township, and shall install all necessary services required in accordance with the subdivision agreement in order that a building permit shall not be refused by reason only of such services not being completed. The Vendor shall deliver on or before closing evidence of payment of all services required by the subdivision, with the exception of asphalt paving on the roads.

7 Paragraph 5 said:

> The transaction of purchase and sale shall be completed on the 90th day following notification to the Purchaser or his solicitor that services required by the Township of Caledon (the 'Township') pursuant to the subdivision agreement, have been installed, including culverts, but expressly excluding asphalt paving on the roads. The Vendor covenants that it will complete such asphalt [paving] in accordance with the subdivision agreement. In the event that the condition referred to in paragraph two shall not have been fulfilled on or before the 19th day of April, 1974, or in the event that the services hereinbefore referred to (except for asphalt on the roads) shall not have been completed on or before the 19th day of April, 1974, then the transaction of purchase and sale shall be terminated and the Purchaser shall be entitled to the return of its deposit provided that the Purchase [sic] is not in default hereunder, *it being expressly understood that the vendors shall make their best efforts to effect registration of a plan.*

In the event the vendors are unable or unwilling to so do, the purchaser shall be entitled to co-operate with the vendor in registering the plan.

(The italics are mine.)

8 I have underlined the concluding part of paragraph 5 to indicate that it was added to the agreement in handwriting at the request of Great Georgian at the time that the agreement was executed by the parties.

9 The contract in which these passages appeared was a slightly revised version of one prepared by Great Georgian and forwarded to Genesis as, in effect, an offer to purchase. For our purposes the only significant revision was to the "termination" date in paragraph 5. I shall deal further with this date later. It is significant to this litigation. Suffice it to note here that Great Georgian had proposed a termination date of 19th April 1975. This had been altered just before the contract was signed at the insistence of Genesis, to 19th April 1974. The termination date thus was set at one year from the making of the agreement, rather than the two years that the purchaser had proposed.

10 It is apparent that the contract contemplated the occurrence of four events by 19th April 1974. These were:

11 (1) approval of the draft subdivision plan,

12 (2) the making of a subdivision agreement between Genesis and the local municipality (Caledon Township),

13 (3) registration of the plan of subdivision, and,

14 (4) installation of the municipal services called for by the subdivision agreement.

15 In fact, Genesis accomplished the first three of these but not the fourth. No municipal services; neither roads, nor water, sewage nor electrical services had been installed by 19th April 1974.

16 On 19th April 1974 Great Georgian tendered. The propriety of the tender is agreed. Genesis however treated the contract as terminated, sought to return Great Georgian's deposit money, and entertained offers to purchase from others. These offers were substantially above the sale price to Great Georgian.

17 Great Georgian commenced this action in July 1974. It claimed specific performance with an abatement (or damages). The abatement is for the cost of the missing services.

18 There are circumstances in which the law permits a party to a contract to terminate it because of something he has not done and circumstances in which it does not.

19 The principals of Genesis appear to me to have taken the view at some point after the contract was made that there was no obligation on their company to install the services by 19th April 1974. That is an inference I draw from all the evidence, notwithstanding the protestations of the principals of Genesis that they were proceeding with all reasonable speed to fulfil their part of the bargain. In my opinion, their deeds do not match their words, and it is their deeds particularly that I have in mind.

20 That raises the question: Was there an obligation on Genesis to install services by 19th April 1974? If so, 19th April 1974 was not merely a termination date, it was a due date. I think there was such an obligation. Paragraph 7 says, in part:

... and (Vendor) shall install all necessary services required in accordance with the subdivision agreement ...

21 These words are followed by the phrase:

... in order that a building permit shall not be refused by reason only of such services not being completed.

22 The qualifying words relate to an issue — the refusal of a building permit — that could arise only after the contract had been fulfilled. There was no obligation on either party to obtain or furnish a building permit. These words are therefore, in my opinion, merely descriptive.

23 They state a consequence of the failure to install services. That consequence is a justification of the requirement to install services. The qualifying words do not detract from the obligation to install services, they simply justify it. Read with paragraph 5, this amounts, in my opinion, to a positive obligation on Genesis to install services by 19th April 1974.

24 If this interpretation be wrong and no express obligation to install services is created by paragraph 7, I consider that an obligation to install services, or, at the least to use reasonable efforts to do so, was reasonably to be inferred from the contract as a whole.

25 Terms may be inferred from the terms used. Caution is required. The court has no power to create a new contract. Thus, Chitty on Contracts, General Principles (23rd ed.), 1968 p. 697, para. 696:

> **Obvious inference from agreement.**
>
> Even if a particular term is not necessary to give efficacy to the contract, it may nevertheless be implied if it was so obviously a stipulation in the agreement that it was idle to express it by specific words.
>
> In such a case, the court will imply a term where it feels satisfied that failure to mention the matter was due only to the fact that it was felt wholly unnecessary to say what was obvious at the time to all parties concerned.

26 A term may be implied to give the efficacy to a commercial contract that the parties must have intended. The appropriate use of this power in the court and its limitations are set out in 9 Halsbury's Laws of England, (4th ed., 1974) p. 229, para. 355, under the title "Other Terms Implied by the Courts", as follows:

> **Giving efficacy to contract.**
>
> An implied warranty, or, as it has been called, a covenant in law, as distinguished from an express contract or express warranty, is really founded on the presumed intention of the parties, and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, it draws with the object of giving efficacy to the transaction and preventing such failure of consideration as cannot have been within the contemplation of either side; and in all the cases of implied warranties or covenants in law, it will be found that the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that it should have. In business transactions, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended by both parties as businessmen; that is not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances.

27 These statements of law are accompanied by cautionary words. Thus Chitty, supra, says, at para. 697:

> **Where term not implied.**
>
> On the other hand, a term will not be implied merely because the court thinks it would have been reasonable to have inserted it in the contract or because it would make the carrying out of the contract more convenient, nor will it be implied if the contract is effective without the proposed term and it is not obvious that it was the intention of the parties at the time. In the words of Scrutton L.J.: 'A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties, "what will happen in such a case?" they would both have replied: "Of course, so and so will happen; we did not trouble to say that; it is too clear."'

Similarly, Halsbury, supra,

> A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is if it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said to the parties, 'What will happen in such a case', they would both have replied, 'Of course, so and so will happen; we did not trouble to say that; it is too clear'.
>
> The principles laid down in the above words have been approved and applied many times. In every case, however, the question whether an implication ought or ought not to be made will depend on the particular facts; consequently, it is neither possible nor desirable to lay down any hard and fast rules on the subject, and it must be remembered that the construction of one contract will afford but little guidance for the construction of another unless the facts and surrounding circumstances are practically identical.

28 Setting aside, then, any express obligation to install services, let us see what implications arise. In my view there is no room, on the evidence, for an inference that at the time the agreement was made Great Georgian did not contemplate at least reasonable efforts from Genesis or that Genesis did not consider itself bound to make at least reasonable efforts to install the services.

29 If the date, 19th April 1974, meant nothing to either side, it is strange that they argued about it, and changed it at the last moment. As I have observed, that date was moved back from the date of 19th April 1975, to 19th April 1974. This was done at the insistence of Genesis and despite Great Georgian's misgivings. Maida was an experienced builder. He had expressed opposition to the shortening of the period between execution and completion on the ground that it would not allow enough time to Genesis to fulfil its part of the bargain. His doubts were reflected in the contract. At his request the handwritten addition to paragraph 5, noted above, was made.

30 There is no doubt that Great Georgian's reluctance to accept 19th April 1974, instead of 19th April 1975, stemmed from a doubt that Genesis would be able to complete its obligations on time. There is no doubt that Genesis persuaded Great Georgian to accept the earlier date by insisting that it could.

31 There is no doubt that the parties both took for granted, during this dispute, that the contract would impose an obligation on Genesis to fulfil all its obligations, including the installation of services by 19th April 1974. If this were not so there was nothing to argue about.

32 It is thus not reasonable to treat the termination date as of no importance, or even of small importance, to the parties. It appears to have been the only aspect of the contract that was actively negotiated, aside from the usual jockeying over price. The terms of the contract and the circumstances leading to it imply an obligation to install the services by the due date.

33 Similarly, it is hard to make business and the circumstances leading [sic] unless an obligation is implied, if not to install services by 19th April 1974, at least to make reasonable efforts to do so. I cannot accept on this evidence that the parties intended to confer upon Genesis the luxury of being able to stand idly by, doing nothing, until 19th April 1974, with Great Georgian trapped and helpless. I do think that Genesis adopted the view sometime later, having witnessed a rise in price of the land. The contract was not regarded at the time as just so much paper. It is elementary that, in a commercial agreement it will be presumed that the parties intended to create legal relations. This is a presumption that may be rebutted: Cheshire and Fifoot, Law of Contract (9th ed., p. 107). There is nothing in the contract, or in the conduct of the parties at the time of its making, that suggests any other inference than that they both understood that they were entering into a relationship that created a binding obligation on Genesis to install services by 19th April 1974 or at least make reasonable efforts to do so.

34 Since any other inference would make the date meaningless, except as a trap for Georgian, I am convinced that, if the contract does not impose an express obligation, an obligation must be inferred to install services, or make reasonable efforts to do so, by 19th April 1974, in order to give the efficacy to it that I believe the parties intended at the time.

35 If, therefore, it is objected that the words used by the parties in their contract did not create an obligation on Genesis to install services by 19th April 1974, it seems to be a reasonable inference that they assumed one existed, and contracted on that basis.

36 At the very least, in my opinion, an implication must be found that Genesis would make reasonable efforts to install services by the due date. It has been said that "the court will readily imply a promise on the part of each party to do all that is necessary to secure the performance of the contract" (Halsbury, supra, p. 234, para. 359, citing cases), and see Chitty on Contract, General Principles (23rd ed., 1968, p. 316), under heading Implied Terms, para. 698: "The court will also imply that each party is under an obligation to do all that is necessary on his part to secure performance of the contract."

37 In a recent case that is strikingly similar to this one that concept was applied: *Hargreaves Tpt. Ltd. v. Lynch*, [1969] 1 W.L.R. 215, [1969] 1 All E.R. 455 (C.A.). There a contract was made to sell land. Purchaser intended to use it as a transportation depot. A deposit was paid. The balance was payable "on 1st day of April 1966 (providing that the conditions hereinafter mentioned shall be complied with)." The material condition was cl. 9. The material part read:

> The said property is sold subject to the following further conditions: — (a) That the Purchaser shall receive permission from the appropriate planning authority (i) to use the said property as a transport depot ...

38 Prior to the making of this contract the vendor had applied for permission and had reason to expect to receive it, but it had not yet been granted. Purchaser pursued the application. Because of a shift in the political wind the municipality refused. Permission had not been received by April 1966. Purchaser sought to rescind. Vendor resisted on the ground (among others) that purchaser was under an implied obligation to use its best endeavours to secure the permission and that it had failed in this by not appealing the municipality's decision.

39 The court agreed that the contract implied an obligation on the purchaser to this effect. Lord Justice Russell said, at p. 459:

> ... I would entirely agree that it is implicit in the contract that the purchaser would take all reasonable steps by way of attempting to get [permission].

40 (The court disagreed with the contention that purchaser had not taken all reasonable steps.)

41 Did Genesis take reasonable steps to install services? I think not. Shortly after making the agreement, Genesis retained the engineer (von Bulow) who was familiar with the development of the property from the beginning in 1969. He had prepared the "Kleinfeldt" draft plan mentioned in the contract. He had been in charge of engineering and related matters. It is hard to imagine a person in a better position than he to advise on ways to meet the date of 19th April 1974. The principals of Genesis, however, did not even inform him of the existence of the contract, much less the date it contained. It is true they did not instruct him to stall, but equally, they gave him no instructions to move ahead with that date in mind.

42 They simply instructed him to proceed to deal with planning and engineering matters. So far as their instructions to him were concerned, they acted as if no contract existed. He proceeded in a deliberate and careful way to carry out these instructions. He advised on the conditions attached to the draft approval the Minister gave in May and took steps to deal with these in various ways and with obvious competence. Some difficulties flowed from these conditions and some changes had to be made to the plan. These caused delay. But there is no indication that Genesis ever put the date of 19th April 1974 to von Bulow in order to seek his advice on the problem that delay could cause, or reveal to him that a problem could arise.

43 It is true that von Bulow could not have given an opinion at the time Genesis retained him on the time that would be consumed until the installation of services. He made that point several times in his testimony. There were too many variables. The nature of the conditions that the Minister might demand was not known. But the striking thing is that von Bulow was not asked; neither then, nor thereafter. Nor was he ever (he said) given a target date for the installation of services.

44 I have observed that Genesis secured a subdivision agreement with the municipality and registration of the subdivision plan by 31st December 1973. But it seems to me that they did this for their own purposes, in order to avoid the consequences of "regionalization". That deserves a word.

45 The township was being absorbed by the region. As of January 1974, the region would become the municipal approving authority. To have failed to register before January 1974 would have meant filing the plan in the Land Titles Office instead of the Registry Office, and starting over again to obtain municipal approval. To avoid these hazards Genesis gave instructions to meet the deadline of 31st December. Petzold, the surveyor, said he went at a quicker pace in November for this purpose. The principals of Genesis increased their own efforts to settle a subdivision agreement with the municipality. The fact that these efforts were successful indicates to me that Genesis was capable of accelerating the project to suit its own purposes. I do not believe that this was occasioned by any feeling of obligation to Great Georgian. A subdivision agreement, and its consequence, registration before the year end, would stand to its benefit whether the contract with Great Georgian was completed or not.

46 In consequence of registering the plan, Genesis was in a position, at the opening of the year 1974, to wait out the time until 19th April 1974, and then sell to others at a substantial increase. Or so, I believe, its principals believed. The evidence is that Genesis knew, as far back as the fall of 1973, that it might not be able to install electrical services because of Hydro shortages and because of Hydro's refusal to allow winter installations. Genesis was aware it might not be able to install roads by the due date. Mr. Strome conceded that he was aware of this in August 1973, and that they would not be able to close in April. He did not acquaint Great Georgian of this until some time in November. Great Georgian's response was an earnest offer to help. This was refused. Great Georgian asked for an extension of time for closing. This was refused. These refusals were used in my opinion as a basis for extorting more money from Great Georgian. I can hardly take any other view, for Genesis made not the smallest effort to have the services installed. Great Georgian offered to pay more than the contract price to cover the increasing costs of services caused by the prospective delay, but refused to pay the amount Genesis demanded. Much of this is denied by Genesis but it seems to me the inevitable inference from all of the evidence. I do not believe the denials. Genesis acted as if Great Georgian was "on the hook" and would have to pay to get off.

47 I find no evidence that Genesis made any real attempt to meet the date of 19th April 1974. Rather, I find that they were content to proceed at the rate established by the engineer's schedule save when it suited their own selfish purposes. It is elementary, to me, that if after they made the contract they had had any honest intention of installing services by 19th April 1974 they would have informed their engineer, the man who would be principally responsible for meeting it.

48 Similarly, although the principals of Genesis carried on most of the discussion with Hydro concerning the installation of electrical services, they obviously did not inform Hydro of the due date for the installation of electrical services or take any steps to encourage Hydro to help them to meet it. Indeed, their dealings with Hydro did more to retard the installation of Hydro services than accelerate it, and this gave every appearance of being their intention. They approached Hydro shortly after the contract was signed. So dilatory were their efforts that they allowed the first agreement they made with Hydro to lapse through delay and did not manage to sign another until January 1974, even though they were aware of a serious delay in the time in which Hydro could deliver necessary material.

49 And so I find that Genesis did not make reasonable attempts to install services by 19th April 1974. For this reason Genesis was not entitled to terminate the contract.

50 It was submitted that the installation of services was a true condition precedent. The authorities were discussed at length. I do not think that the installation of services was an "external" condition, "which depends entirely on the will of a third party" (*Turney v. Zhilka* (1959), S.C.R. 578, 18 D.L.R. (2d) 447). It may be that other conditions were true conditions precedent. I accept that the approval of the plan of subdivision was. Perhaps the making of a subdivision agreement was as well. But no intransigence on the part of government was ever suggested. There was no undue delay in the giving of approvals. It cannot be argued, on the evidence before me, that the failure of Genesis to install services on time was caused by anything done or not done by third parties.

51 He who would excuse himself by way of such conditions precedent puts his own conduct under the glass. What steps did he take to satisfy the condition and, if need be, the third party? This had been illustrated in many decisions. *Gilchrist v. Commodore* (1931), 40 O.W.N. 577 (C.A.) is one. There it was held that plaintiffs failure to obtain a permit that was a condition precedent to the contract was "wholly owing to his own neglect and default". His claim for return of his deposit was dismissed. Similarly, where a sale agreement was conditional upon vendors obtaining a municipal consent to severance by a specified date, it was held that vendors could not rely on its absence until they had "made and completed a *bona fide* application". In that case, *Hogg v. Wilken* (1974), 5 O.R. (2d) 759 at 761, 51 D.L.R. (3d) 511: Lerner J. said, in a passage apposite here:

> In this contract the only inference to be drawn is that it was the vendor's obligation to make the application. An application for such consent would have to be carried out in good faith to its logical conclusion...

52 The vendors were not permitted to rely on an application they had made but withdrawn before decision. Another illustration is *Metro. Trust Co. v. Pressure Concrete Services Ltd.*, [1973] 3 O.R. 629, 37 D.L.R. (3d) 649, affirmed 9 O.R. (2d) 375, 60 D.L.R. (3d) 431 (C.A.), where, at trial Holland J. reviewed the law and held that a vendor had failed to fulfil an inplied term to use "best efforts" to attain a third party's consent and could therefore escape liability for damages. Still another example is *Mason v. Freedman*, dealt with later.

53 In the English case of *Hargreaves Tpt. v. Lynch*, referred to above, the conduct of a purchaser obliged to seek a licence from a third party was found to be reasonable. For that reason, purchaser was permitted to rely on the absence of the permission.

54 In the case at hand, the condition that Genesis failed to meet was not a true condition precedent. But it might be suggested it depended for its fulfillment upon the fulfillment of foreground true conditions precedent. Thus, Genesis was in the same position as if the installation of services were a true condition precedent. That would not, in my opinion, substantially alter the question. It would merely focus the inquiry into the reasonableness of Genesis's conduct on its consciousness of the due date. Thus the conduct of Genesis in seeking approval of its draft plan and completion of a subdivision agreement raises the question: was it reasonable *in the light of its obligation to install services by 19th April 1974?*

55 I have said enough already to indicate that it was not, in my opinion. There is, on the evidence, nothing to indicate that Genesis made any effort to accelerate the process of obtaining these approvals in order to meet that date. That is so, even when Genesis became aware, as early as the summer and certainly by the fall, of 1973, that its ability to close on the due date was becoming doubtful. Any speeding up of the process for which Genesis should get credit was, in my opinion, as I have already observed, intended to serve other objects.

56 This is not to say that if Genesis had made a reasonable attempt to meet the due date it would have been able to. It might be that it would not. But there is nothing to suggest it must not. It does not seem unreasonable to me to consider that Genesis should have made at least an effort to accelerate the processes of government when it became aware in the summer and fall of 1973 that it might not be able to complete its obligations by April 1974. Even awareness of this prospect, however, did not appear to have any effect.

57 I do not think, therefore, that Genesis can use the existence of true conditions precedent to excuse its failure to install services.

58 There is another factor to be considered. The law is slow to permit people to gain an advantage through their own default. Thus, a person who contracts recklessly may not be permitted to take advantage of a termination or rescission clause.

59 There is some ground on the evidence before me for thinking that even if Genesis had made reasonable efforts to fulfil its obligations it could not have installed the services by the due date. Hydro shortages unknown to Genesis when the contract was signed, and Hydro's policy of refusing to permit the installation of services during the winter months above, might have foredoomed the hope of completion by the due date. It was submitted that it was impossible for Genesis to install services by the due date, because of such things as Hydro shortages, Hydro policies, heavy precipitation, and the policy of the municipality of refusal to allow the commencement of road building before settlement of a subdivision agreement.

60 If the efforts made by Genesis were reasonable in the circumstances contrary to my finding that they were not, the thing that prevented completion was the lack of time. There is not the slightest question that services could easily have been installed by 19th April 1975. There seems little doubt that they could have been installed by the mid-summer of 1974. Thus, the reason that Genesis was unable to meet its obligations may be seen as the shortness of time Genesis allowed itself.

61 Had Genesis made reasonable inquiries before signing the contract its principals might well have concluded that it would be imprudent to allow only a year for the installation of services. Had they been aware, for instance, of Hydro shortages, or Hydro policies, they would, no doubt, have thought that period unrealistic. In 1972 and 1973 Hydro had been experiencing long delays in obtaining materials of the type needed for the services to be installed in the subdivision. These delays were well known in the subdivision industry and were caused by heavy demand. When Hydro was approached by Genesis in May or June of 1973 the delay was in the region of 30 weeks. Genesis finally signed a contract with Hydro in January 1974. (An earlier one had been aborted by a delay on the part of Genesis.) Genesis made a first payment under the contract in March 1974. In the January-March 1974 period the delay was 30 weeks to 10 months.

62 Hydro's policy for the locale of the subdivision was that no underground installations could be made between 15th December and 15th April. There is no suggestion on the evidence that this policy was something new. The principals of Genesis learned these unpleasant facts after getting in touch with Hydro in the early summer of 1973. There is no suggestion that they would not have been similarly enlightened had they enquired in the spring of 1974, *before they signed the contract*. Had they been so informed it is not credible that they would have insisted on 19th April 1974 as the due date. To do so would have been deliberately reckless. Further, to have insisted on that date without such elementary inquiries is, to me, equally reckless.

63 I do not think that a recklessly chosen date can be defended on the ground that reasonable efforts were made to meet it. Genesis changed the date from 1975 back to 1974 on the basis of a feeling it was close to draft plan approval, discussions with the previous owner about how long that might take, and the belief that the 1975 date was too far ahead to permit cost calculations to be established in the light of inflation.

64 Strome gave three reasons for failing to install services on time. The first was the Minister of Housing's delay in consenting to an amendment to the conditions he had set for approval of the draft plan. The second was delay in Hydro's obtaining material and its policy against winter installation. The third was Caledon's policy of not permitting roads to be installed (a) until after a subdivision agreement was signed and (b) during the winter.

65 It is obvious that the basis on which Genesis set the due date was insubstantial and speculative. That in itself could be recklessness. It is obvious as well that the factors that caused Genesis to fail were unknown to Genesis at the time it chose the date of 19th April 1974, *and that Genesis had made no real inquiry into them.*

66 Had Strome or Martin made even the most casual inquiries beforehand they might have learned Hydro's and Caledon's problems and policies. That should have been enough to have given them pause because it meant, on the face of things, they would have to install services before the winter. It should not have been difficult for them to have ascertained some time might be consumed in obtaining ministerial consent, if indeed it was forthcoming, to any change in conditions they might request.

67 They made no such enquiries. When they signed the contract they had no real reason to think they could complete it on time. They signed the contract "blind", as it were, with an almost deliberate blindness.

68 The well-known words of Viscount Radcliffe in *Selkirk v. Romar Invts. Ltd.*, [1963] 3 All E.R. 994 at 999, set out the basic principle:

> It does not appear to their lordships, any more than it did to the learned judge who tried the action, that there is any room for uncertainty as to the nature of the equitable principle that is invoked in these cases. It has frequently been analysed, and frequently applied, by Chancery judges, and, although the epithets that describe the vendor's offending action have shown some variety of expression, they are all related to the same underlying idea, and their variety is only due to the fact that, as each case is decided according to the whole context of its circumstances and the course of conduct of the vendor, one may illustrate more vividly than another some particular aspect of that idea. Thus, it has been said that a vendor, in seeking to rescind, must not act arbitrarily, or capriciously, or unreasonably. Much less can he act in bad faith. He may not use the power of rescission to get out of a sale 'brevi manu', since by so doing he makes a nullity of the whole elaborate and protracted transaction. Above all, perhaps, he must not be guilty of 'recklessness' in entering into his contract, a term frequently resorted to in discussions of the legal principle and which their lordships understand to connote an unacceptable indifference to the situation of a purchaser who is allowed to enter into a contract with the expectation of obtaining a title which the vendor has no reasonable anticipation of being able to deliver. A vendor who has so acted is not allowed to call off the whole transaction by resorting to the contractual right of rescission.

69 The principals of Genesis seemed to claim, somewhat hollowly I thought, that they chose the date through inexperience. But surely it would have been elementary prudence for them to have inquired whether they had any reasonable prospect of meeting it *when it was strongly challenged by Maida*, a man of greater experience then they. Yet they pressed upon Maida a date they appear to have selected virtually at random. So indifferent were they to the reality of the date that they made no evident inquiry of von Bulow or any other person capable of advising on it either before, at the time of, or after making the contract. In this Genesis demonstrated, in my opinion, the "unacceptable indifference" spoken of Viscount Radcliffe.

70 In another case of high authority a vendor who had recklessly agreed to furnish a bar of dower was not permitted to rescind on the ground that he could not get it. Thus, in *Mason v. Freedman*, [1958] S.C.R. 485, 14 D.L.R. (2d) 529, Judson J. said at p. 534:

> When a vendor seeks to avoid a contract under this clause, which is obviously introduced for his relief, his conduct and his reasons for seeking to escape his obligations are matters of interest to the Court. There is a general principle to be deduced from the cases and it is the one I have already stated incidentally. A vendor who seeks to take advantage of the clause must exercise his right reasonably and in good faith and not in a capricious or arbitrary manner. This measure of his duty is the minimum standard that may be expected of him, and there are cases where a cause which might otherwise be valid as justifying rescission will not be available to him if he has acted recklessly in entering into a contract to convey more than he is able.

71 The possibility that Genesis might not have been able to install services even with reasonable efforts do not assist it. Setting a date that foredoomed its efforts left it in a snare of its own making, from which the law will not assist it to escape.

72 There is one other matter that deserves comment. It throws some light on the bona fides of Genesis and its principals.

73 At trial, they sought to demonstrate that to conform with the conditions attached to the Minister's approval of the draft plan would have materially changed that plan. It would no longer be "substantially in accordance" with the Kleinfeldt plan, as required by para. 2(a) of the agreement. Thus, Genesis would not be able to fulfil that condition. It was said on behalf of Genesis at trial that its principals were aware of this on receipt of the draft approval in May 1973.

74 Notwithstanding this awareness, Genesis demanded the payment from Great Georgian that would have been due if condition 2(a) had been fulfilled. They in fact demanded, and received, $30,000 to which they must have known they were not entitled. It is strongly suggested that they used this money to complete their own acquisition of the property. On that, I make no finding.

75 If this was not dishonest it was dishonourable. It casts a significant shadow on the testimony of Martin and Strome. I have already observed that I did not accept Martin's and Strome's protestations that they did their best to fulfil their obligations. In my opinion, their conduct belied them.

76 This was one factor, among a number, that led me to prefer Maida's evidence over that of Strome and Martin where there was a conflict on a material issue. Maida appeared to be reasonably straightforward; Strome and Martin somewhat devious.

Conclusion

77 I hold therefore that the contract contained an express obligation upon Genesis to install services by 19th April 1974, or an implied obligation to that effect, or, at least, an implied obligation to make reasonable efforts to do so. I find that Genesis failed to meet any of these obligations.

78 I hold, as well, that, even if Genesis did make reasonable efforts, it failed because of the date it chose by which services were to be installed was a date Genesis chose recklessly and that it should not be permitted to terminate the contract on the ground that it could not meet that date.

79 Therefore, notwithstanding the able and vigorous defence put up by defendant's counsel, there shall be judgment for plaintiff.

80 The judgment shall be for specific performance and an abatement of the purchase price to the extent of cost of the missing services and a reference to the Master to determine that amount and report. This shall be a reference pursuant to s. 71(1) of the Judicature Act, R.S.O. 1970, c. 228.

81 Plaintiff asks for a direction that the cost of the missing services be determined as of 19th April 1977. I think that on the facts that request is justified. Great Georgian made a number of pleas to Genesis in the hope of salvaging something from the apparently doomed transaction. They offered to extend the time to a year beyond 19th April 1974 to give Genesis time to install services, or to close and themselves install services, setting off the cost against the proposed mortgage back, or to close and allow Genesis to install the services within 9 months of the closing.

82 Genesis rejected these proposals out of hand. It could, if it had wished, have ameliorated the harm it has caused the plaintiff, in the light of rising costs, by accepting any one of them. Had it done so the services could by now have been installed, at a possibly lower cost than might prevail as of the date of this judgment. In these circumstances Genesis can hardly complain about the selection of the date of judgment as the date for the determination of that cost. If plaintiff had asked for specific performance only defendant would have had to install services as of the date of judgment. I accede to plaintiff's request.

83 If further directions to the Master are required, counsel may speak to me.

84 Costs to plaintiff of the action, including those of the reference.

Judgment for the plaintiff.

End of Document

Tab 20

1989 CarswellOnt 2148
Supreme Court of Ontario (High Court of Justice)

Borthwick v. St. James Square Associates Inc.

1989 CarswellOnt 2148, 13 A.C.W.S. (3d) 439

David Borthwick, Evelyn Borthwick Wanda Valleau, Gordon Francis Burnett, Jacqualeen Ola Burnett, Kim Chung, Ian Chung, David Norman Whitley, Sharon Elizabeth Whitley, Joseph Markes, M. Derrick Pirie, David Tri Luong Tran, Rosalie Jeanne Tran, Elizabeth X.Q. Tran, Marilyn Kencher, Yat-Kiu Wong, Dorothy Jean Wong, H. Alan Stewart, Wesley J. Parfitt, Terri Parfitt, Victor D. Knickle, Ruth V. Knickle, Laurie Knickle, Rose Andersson, Anthony Peter Pitt-Jones, Edith Jane Pitt-Jones, J. Brian Simpson, Frederick Roberts, Peter Sheppard, Anthony Tat-Shing Hung, Boris Altshtater, Louise Altshtater, Robert White, Margaret White, Michael John Hartmann, Melanie Sandra Hartmann, John Ceh, Douglas Paulson, Marilyn E. Barker, Ralph Reichert, James Reid Duncan, Gwendolyn M. Acker, Grethe Nielsen, Michael Sabourin and Jens Arne Nielsen, Plaintiffs and St. James Square Associates Inc. and Ronto Development Corporation, Defendants

Van Camp J.

Heard: May 2 - June 1, 1988
Judgment: February 7, 1989
Docket: Toronto 19250/87

Counsel: *M. A. Davis* and *Andrea M. Habas*, for Plaintiffs.
William Dingwall Q.C. and *Thomas S. Kent*, for Defendants.

Subject: Contracts; Property

Headnote

Sale of land --- Condominiums — Agreement of purchase and sale — Time of performance

Sale of land --- Condominiums — Termination

Van Camp J.:

1 This is an action for specific performance of certain agreements of Purchase and Sale. The plaintiffs White have discontinued their action. The claim of the plaintiffs Whitley is for damages for breach of contract in lieu of specific performance.

2 The agreements were for the purchase of 28 of the 65 units in a condominium building to be constructed by the defendants at the Northwest corner of Adelaide and Jarvis streets in the city of Toronto. Attached hereto is the list of the various units to be purchased by each of the plaintiffs and the respective occupancy dates. The latest occupancy date shown is March 31, 1987. The first occupancy of any condominium in the building was given on May 16, 1988. As of May 1988 the first six floors were ready for occupancy and the balance were expected to be ready over the next three to four weeks. There remained to be installed some ceramic tile, carpeting, plumbing fixtures and the clean-up of the site.

3 The major issue is whether the defendants had the right to extend the occupancy date by 180 days and to terminate the agreements after the 180 days. This will require consideration of s. 8(a) of Schedule D of the Agreements of Purchase. These agreements were on standard forms prepared by the defendants. Section 8(a) is as follows:

> (a) In the event that the completion of the Unit is delayed by reason of strikes or lockouts in the constuction or allied trade unions, fire, the elements, riot, war, acts of God, unusual delay by common carriers, shortages of material, reasonably unforseeable or uncontrollable delays by subcontractors and material suppliers in performing their subcontracts or delivering their materials, as the case may be or in the event of damage of any sort to the Unit, or for any other cause over which the Vendor cannot reasonably exercise control, prior to the Date of Interim Occupancy or closing, whichever is the earlier, which is sufficiently substantial to render the Unit uninhabitable, the Vendor shall be permitted an extension or extensions of time not exceeding one hundred and eighty (180) days to enable the Vendor to render the Unit reasonably suitable for human habitation as aforementioned and the date of closing shall be extended accordingly. In the event of a delay beyond the extended period of one hundred and eight (180) days aforesaid the parties may agree to extend the Date of Interim Occupancy or closing whichever is earlier for such further reasonable period of time as may be agreed upon or either party may declare this Agreement null and void by notice to the other party except as to the following consequences:
>
> (i) Monies paid for extras ordered by the Purchaser are non-refundable;
>
> (ii) The Real Property shall revert to and vest in the Vendor and all right, title and interest of the Purchaser shall forthwith cease and determine;
>
> (iii) The Purchaser shall execute such documents and releases as are required by the Vendor or the Mortgagee;
>
> (iv) After compliance by the Purchaser with his obligations under (i), (ii) and (iii) of this sub-paragraph, and the deduction of any monies owing to the Vendor by the Purchaser, the Vendor shall return to the Purchaser the balance of monies paid to it hereunder;
>
> (v) The Vendor shall have no further obligation to the Purchaser hereunder.

4 The date of interim occupancy referred to in s. 8(a) of Schedule "D" is also described in the agreements as the date of closing, namely the date on which occupancy is to be given and the balance of the purchase price is paid.

5 It will also require consideration of what preceded and followed the extension of the occupancy date.

The background to the Agreements

6 The defendant Ronto Development Corporation has been in the business of land development for several years. In the early spring of 1985 it was decided that there would be built on the lands herein owned by the defendant Ronto Development Corporation two towers, a hotel tower to the northeast, a condominium tower to the northwest with a common three floor underground base. The other defendant was incorporated for the development of the project. The parcel of land was a relatively small one acre running about 190 feet westerly from Jarvis street and 165 northerly from Adelaide to Lombard street. At the southeast corner there was the historic Tom Taylor building; adjoining to the west of the lands was another older building which would have to be considered in the planning for the excavation. On the west part of the lands herein there was the Greenjeans building which was to be demolished. There were also to the north of the Tom Taylor building some small buildings which had to be demolished before construction could begin. At the time the offers were signed some demolition had begun.

7 The original application for development review was made in May, 1985. It had been preceded by some informal meetings with the planning department of the city which had indicated that they would support such a project but it

would be conditional on the retaining of the Tom Taylor building and the building of a new three story commercial building on the north side of Adelaide at the western end which would continue the facade of the Tom Taylor building along Adelaide for urban design purposes. The zoning permitted 29 units in the condominium but from early 1985 it had been planned that there would be 65 units. If the Tom Taylor building could have been demolished the 65 units could have been built. The tower to be erected would be the same size and shape whether there were 29 units or 65 units. The number of units permitted would depend on the balance between the commercial space and the residential. The requirement for the commercial building affected this balance. Until August, 1985 the defendants had reason to believe that they might expedite the permits and bypass the procedure for a zoning change by an application for a minor variance to the Committee of Adjustment. However, before the units were sold the defendants had been told on September 26 that the procedure that they intended to use was not acceptable. There was no objection to the 65 units as such but there must be a bylaw to amend the zoning.

8 In light of the preparatory work that had been done it was a reasonable estimate that a period of six months would be required to complete the change in zoning and to obtain the permits. In addition, the defendants had been advised that approval would be given provided that the owner enter into a Heritage Easement Agreement with respect to the Tom Taylor building. On October 22, 1985 the city council had approved the development review application for 29 units.

Occupancy date

9 Marketing of the units began in October by a sign on the building and by ads placed in newspapers. After the first two ads there were 195 persons interested. Appointments were made beginning November 2 for potential purchasers to attend at the office over three weekends. The project was sold out in less than one week.

10 The closing date in each agreement, namely 14 months from the date of the signing of the agreement was set by Cary Solomon, the son of the chairman of Ronto Development Corporation and executive vice-president of the other defendant. He is 33 years of age and has worked in the family companies since university days and was the project manager for this project. In the circumstances in November, 1985 I find that he was reckless in setting an occupancy date within 14 months in light of the information he then had available to him.

11 The zoning bylaw was subsequently enacted on March 24, 1986. With respect to the two Knickle Agreements, Mr. Solomon admitted in cross-examination that he should not have signed the Agreement and if he had read it would not have signed it because at that time, namely March 15, 1986 it was impossible to give occupancy on March 31, 1987 when the work had not even been started.

12 Mr. Solomon said that he took a calculated risk. He is not a detail main so the lack of schedules of completion did not concern him. His approach is not that of a construction man. He knew that some buildings of this size had been erected in 14 months from the time the shovel went in the ground. He spoke to Brocklehurst, who was responsible for construction of all their projects. Neither Brocklehurst nor Silver nor Devine were called as witnesses, though part of Silver's examination for discovery was read in by the plaintiff. Silver was a Vice President of Ronto Development corporation reporting to the president. Silver and Devine had played the major part in obtaining zoning approval. It was Silver's evidence on discovery that he was dismayed when he learned that they had to go for rezoning as it was a longer process, that it would take longer than they had hoped. It was his evidence that they planned to start in February or March, 1986. The project overview made by Mr. Solomon to his own board indicates how he proceeds. It is not so much that he is dishonest as that he does not ask or he does not understand and proceeds on what he wants to happen. The only schedules subsequently prepared and in evidence show that the construction people of the defendants anticipated longer than 14 months for the construction alone, in a very complex project in a small area. Mr. Solomon said that no one expected to close on the closing date and he had always been able to work out an arrangement with the purchasers. He was aggrieved that the plaintiffs were on the whole a sophisticated group of investors who were prepared to join together in order to draw media attention to the delay and to join in one action. He seems to have been almost wilfully blind to all the signs that the 14 month period was no longer suitable. On October 24, 1985 there is the memorandum

from Brocklehurst to him stating that in the project overview documents "the 14 month construction period has not been revised as this was an approximate figure given at a time when it was intended just to renovate the Tom Taylor building".

The period November 1985 to November 1986

13 On November 17, 1986, Cary Solomon, on behalf of the defendants wrote to the purchasers except Sabourin and Nielsen as follows:

> Because of serious and unavoidable circumstances resulting in long delays, it is now impossible to complete your unit for delivery by March 20, 1987. ... The additional cost resulting from delays together with the ever increasing construction costs will place the Project in a substantial deficit position, thus necessitating that we terminate the contract on March 20th next. However, having taken this position we are prepared to enter into a new Agreement with you on substantially the same term as the old Agreement except that the purchase price would be increased 12% and the closing extended to October 31, 1987.

14 This letter was prepared with the advice of his uncle, a solicitor. The letter went to all the plaintiffs except Sabourin and Nielsen. In March 1986 the site specific rezoning bylaw had been passed which permitted 51 units. In October, 1986 on application to the Committee of Adjustment there was granted a variance to permit 65 units. The demolition permit had been received in July, 1985. The permit for the foundation was received on August 15, 1986. That for the superstructure was not received until December 19, 1986. Henderson, the construction superintendent, had reported for work in November, 1985. In his words, the project was dead from December 1, 1985 to March 17, 1986. Henderson decided not to wait for the permits and began the excavations on May 1, 1986.

15 I find that it was reasonable to begin the excavation on the east side. This set the pattern for the work on the foundation so that the work on the east side underneath the hotel tower was always in advance of the work on the west side underneath the condominium tower. As a result the crane on the hotel was working by September 25, 1986, that on the condominium one month later; ground level had been reached on the hotel side by December 5, 1986 but on the condominium only two months later.

16 I find that the excavation work was delayed by 28 days because of the heavy rains and its effect on the clay and another 14.5 days lost for other reasons. No allowance had been made in the estimate of time for bad weather but this was an excessively and unusually rainy season. The evidence was not clear as to why there had been a delay from November to May. There were the problems of assessing how excavation was to be done beside the Taylor building and the building to the west. There is passing reference only to some holdup by reason of the sale of the Taylor building in January, 1986. I accept Mr. Silver's evidence that part of the delay was that commencement of the work did not begin because of the zoning problem. I find that there was an anticipatory breach of the contract by the defendants in November, 1986.

The extension Agreement

17 Objection had been taken by the plaintiffs upon receipt of the November letter. Some of the other purchasers had terminated their Agreements, some had entered into a new Agreement but the plaintiffs demanded specific performance of their Agreements.

18 It is not disputed that the plaintiffs have at all material times been ready, willing and able to perform their obligations under their respective Agreements. In December, 1986 the plaintiffs retained a consultant quantity surveyor, Arthur Hooker, to see if the premises could be completed by August, 1987. He visited the site twice in December and gave his estimate on December 22, 1986 that the west side could reach grade level by January 16, 1987. The tower could be built at the rate of one floor every four days. One week was allowed for bad weather. The developer would have to exert strong control to ensure that no delays occurred because of lack of manpower and materials. Some limited amount of overtime would be required and some premium money might have to be spent. The developer would also have to give the residential component priority over the hotel. Occupancy should be possible at the end of August, 1987 if the slabs were poured at the rate of one per week; five or six weeks would be added to the schedule to bring completion to the

middle of October, 1987. The estimate prepared by Mr. Henderson in the summer of 1986 had shown the excavation to be completed by the end of October, the grade level November 7, 1987, the towers by the end of March 1987 and the brick work by the middle of May, 1987 with completion of all the work by October, 1987. He had made no allowance for bad weather. They were already two months behind this schedule when Mr. Hooker made his estimate in December 1986.

19 By February 16, 1987 after subsequent visits to the site Mr. Hooker was of the opinion that it was unrealistic to think that the condominium tower could be completed on time as little work had been done on it since his last report. The sixth floor of the hotel was being poured on February 10 (five floors in eight weeks). The ground level of the condominium was poured on February 2, 1987. (two floors in eight weeks. The hotel construction was much simpler at that level.) It was his opinion that the cost of the work contemplated by him in December, 1986 would have been $654,000 on a total cost of $4,050,000. (16 percent) to cover the premiums to the subcontractors and overtime. By March 5, 1987 the 10th floor of the hotel was being poured and the second of the condominium.

20 At the end of February, 1987 the defendants sent to the plaintiffs a letter further to their prior letter advising them that the unit would not be completed by the closing date and that the date of closing would be extended for a further period of 180 days, that the purchaser might consider taking advantage of the prior proposal. I find that the letters were sent without any expectation of being able to close within the 180 days and with the intent to terminate the Agreements at the expiry of that time. At the end of 1986 the defendants had noted that there was a rising market. By February, 1987 they were in addition displeased with the publicity that the plaintiffs had drawn to them.

21 In response to the letters extending the time, the plaintiffs advised the defendants that they were not prepared to pay an increased price, that they required assurance that the building would be completed within the 180 days or in the alternative that the vendor inform them that the Agreements would not be terminated.

22 What presents the most puzzling issue in this action is the admission of counsel for all the plaintiffs in the course of submissions that all the plaintiffs agreed to the extension of closing. They were represented by counsel, they had received the reports to February 27, 1987 from Mr. Hooker who had not only visited the site but had examined the permit file and had met on February 3, 1987 with the lawyer for the defendants, with Mr. Solomon and Mr. Brocklehurst and a Mr. Fleming the quantity surveyor of the defendants.

23 In light of their past experience the action herein was commenced on April 27, 1987. The decision in *Kloepfer Wholesale Hardware and Automotive Company Limited and Roy*, (1952) 2 S.C.R. 465 is authority that it is not premature to bring an action for a declaration that an agreement is a binding contract and ought to be specifically enforced.

The period February 27, 1987 to September 30, 1987 (the last of the 180 days)

24 The building of the hotel to the roof was completed on April 13, 1987, the condominium on June 5, 1987. The brick work on the hotel tower began in early May, that on the condominium tower on July 25, 1987 after the brick workhad been completed on the hotel. That on the condominium was finished in about December, 1987.

25 At the end of the 180 days the defendants had sent letters electing to terminate the transaction and agreeing to refund the deposit upon receipt of a release.

26 In the period from the end of October, 1986 to the end of September, 1987 another 16 days had been lost by reason of weather. By the time the brick work started in May, 1987 the construction of the condominium which had been one month behind the hotel at the beginning was now two months behind.

27 Henderson, the construction superintendent, was on the job until April 13, 1987. I found him a credible witness and I accept his evidence that the crew varied at times from 30 to 50 men; at all times a base crew of 12 to 15 worked on the hotel and the remainder on the rest of the project. The pouring of the cement on the ground floor of the condominium required a lot of men as it was very complex. That tower also used a different method of pouring and forming because of its design but in the opinion of Henderson after the first two floors a typical floor could be completed in three days

although they were operating on a four day cycle. The site was extremely cramped for storage and traffic as the work on the towers proceeded. During the time that he was there there was no problem getting the trades that were needed. The work had proceeded inspite of the fact that the various permits were not available. To the end of April, 1987 I find that there was no shortage of men on the job nor any undue preference given to work on the hotel but no steps had been taken for overtime or Saturday work.

28 In April, 1987 the general construction superintendent who was supervising Henderson was brought in to speed up the project. It was his opinion that it was the brick work problem which "killed the job". The time estimate for the brick work was four months. The original estimate had been that the premises would be completed five months after the completion of the brick work. The contract for the brick work scheduled the work to start in January, 1987. If this had been possible both the defendants estimated construction schedule and that of Mr. Hooker would have been met in that the work would have been substantially completed by the end of August and completed by the end of October, 1987. Mr. DiRocco said that the four months allocated would be close, he would be more comfortable with six months. I find that in 1987 there was an unusual scarcity of brick layers and the contractor was behind on all his jobs. When he began work on the hotel in April, 1987 the numbers of men supplied increased slowly from four to nine. He had expected to use eight to nine men per tower and in fact a crew of nine did work on the condominium from August, 1987. In the estimated schedule of the defendants Exhibit 25 it had been expected that the brick work would begin when the tower reached the sixth floor. This would have meant that the brick work could begin in April, 1987 on either the hotel tower which had been completed in April or on the condominium which had reached the sixth floor in April. I find that the contractor for the brick work did not have two crews available. I accept his evidence and counsel agree that with the new procedure used in the forming, the nature of this site made it impossible to do the brick work while the forming on both towers was going on. Once the forming was completed on the hotel the brick work could commence. It could not commence on the condominium at the same time until the forming on it was completed as the passage way was obstructed. The brick work could have begun on the condominium in June but another crew was not available.

29 Because of the demand for workers those on the job did not work as quickly and would not do overtime. The representatives of the defendants had been pressing for more men; following June 5, 1987 some extra men were provided from other projects to speed up the work on the hotel. There had been some problems in unsatisfactory brick but this had not delayed the work more than some two to three days. There had been some delay in the work as on the condominium the project supervisor had asked that the parapet be completed early so that other workmen could begin their work. This made a change in the brick work on the floors beneath with consequent delay. The number of men was governed by the supply of brick that could be stored on the premises. I accept the evidence of Mr. DiRocco that a floor could accommodate not more than eight to nine workers when at times 13 to 14 workers became available while the condominium was being completed. The extra workers were used on the commercial part of the project. If the brick work could have been started in January, 1987 there would have been no shortage of men to delay it.

30 Two questions were left unanswered by the defendants. The brick work could have commenced if there were the forming for only one tower in place. By April 13 the sixth floor of the condominium had been poured and the forming had been completed on the hotel tower although a few weeks would be needed to remove it. I was left unsatisfied as to why on May 1, 1987 the choice was not made to commence the brick work on the condominium tower. There was no evidence before me as to whether there was any commitment to finish the hotel tower at any time and it would seem that discovery had been refused to the plaintiff with respect to the hotel matters. There has been some slight reference from time to time by other than Mr. Solomon of the need for urgency with respect to the hotel (e.g. an early letter to the Planning Department about October, 1985). In the absence of any need to complete the condominium tower at any special time it would have been reasonable to continue with the hotel tower. Mr. Iamnacci, the general construction superintendent said that the hotel had priority because of the electrical system. There was a transformer vault between the two towers, the main electrical room was underneath; in the hotel was an emergency generator room which he had been informed by the stationary engineer had to be on the ground floor of the hotel. The primary fire alarm service was in the hotel and until that panel was in there would be no occupancy allowed in any of the buildings. There was no evidence as to whether this could have been designed otherwise when the condominium had to be completed by a set date.

31 The second question was whether the crew could have been moved from the hotel to begin the brick work on the condominium in June when the forming on the condominium was finished. Implicit in the evidence of Mr. DiRocco is that he was told when they were asking for the second crew that they could not stop the hotel although they were in a hurry to start the condominium.

32 All of these delays could have been foreseen by the defendants.

Summary

33 I find that Solomon for the defendants was negligent to the point of recklessness in fixing an occupancy date that he knew was not possible to attain.

34 Though there was delay of about six weeks because of rain in the summer of 1986 it was the delay of six months in beginning the excavation (a delay the defendants should have reasonably foreseen) that caused the delay in completion of the condominium by the date set in the Agreements.

35 Section 8(a) in these circumstances did not permit the extension of time by the defendants. However, the plaintiffs agreed to that extension.

36 I find that at the time of the extension the defendants intended to terminate the agreement after the expiry of the 180 days. I find that they ought to have known at the time of the extension that they could not complete the premises within the 180 days. Before April, 1987 they did nothing to expedite the completion of the condominium tower. After that date they tried to expedite the brick laying and could not obtain the extra men required but they did not use the men available to expedite the condominium. In any case their delay in completing the tower made it impossible to complete the condominium for occupancy within 180 days.

Submissions of defendants re termination

37 As I understand the submissions of counsel for the defendants it is that one may not look at anything before the time of the extension Agreement; that past delays have been excused; that in effect a new Agreement was made, with both parties fully aware of the situation at that time; that the plaintiffs had affirmed the contract. He submits that in November, 1986 the plaintiffs had three choices,

1. to accept the offer of an open ended contract at a reasonable increased price.

2. to have their money back with interest.

3. to wait and see if the premises would be completed before the contract was terminated.

38 He submits that the defendants need not depend on force majeure either before or after the extension Agreement. That once there was agreement to extend for 180 days either party had the right to terminate at the end thereof; that there was no warranty to complete within that time.

Conclusions

39 It is my opinion that once the plaintiffs agreed to the extension they could not raise the argument that the defendants were estopped from extending the Agreement by reason of their anticipatory breach (estoppel had not been pleaded). However, the circumstances both before and after the extension may be considered in deciding if the defendants had the right to terminate. I accept the submission of the plaintiff that the anticipatory breach with the subsequent delay gave reason to commence the action; that the contract continued in its entirety except for the changed date of occupancy. The right to rescind was lost but all other rights under the contract continued. I agree that there was no express warranty

to complete within the 180 days but the obligation of the defendants under the contract to complete the premises for occupancy on the extended date remained.

40 Section 8(a) says that the extension of time up to 180 days is "to enable the Vendor to render the Unit reasonably suitable for human habitation". That section covered the situation where the vendor had been unable to complete in time for reasons beyond his control and had the additional time to do so. If he had been delayed by some two weeks or up to 180 days he could extend the time to complete. If the initial delay could not be met within 180 days the parties could extend the time or either could terminate. The section was not intended to cover the situation herein.

41 The plaintiffs could have sued for damages in November, 1986 or in February, 1987. They wanted specific performance of the contract and were entitled to it. Their agreement to the extension does not deprive them of that right in the circumstances. In *Selkirk v. Romar Investments Ltd.* (1963) 3 All E.R. 994 the plaintiff had sought a declaration that the vendor was not entitled to rescind because of missing evidence about the title. It was said at p. 999:

> a vendor, in seeking to rescind, must not act arbitrarily, or capriciously, or unreasonably. Much less can he act in bad faith. He may not use the power of rescission to get out of a sale "brevi manu", since by so doing he makes a nullity of the whole elaborate and protracted transaction. Above all, perhaps, he must not be guilty of "recklessness" in entering into his contract, a term frequently resorted to in discussions of the legal principle and which their lordships understand to connote an unacceptable indifference to the situation of a purchaser who is allowed to enter into a contract with the expectation of obtaining a title which the vendor has no reasonable anticipation of being able to deliver. A vendor who has so acted is not allowed to call off the whole transaction by resorting to the contractual right of rescission.

42 See also *Mason v. Freedman*, [1958] S.C.R. 483 at p. 487.

43 I hold that the defendants herein had no right to terminate the Agreement and the plaintiffs are entitled to specific performance. The premises are at such a state of completion and the procedure for registration of the condominium documents will be applicable to all units in the building so that the court will not be required to supervise the specific performance.

The Agreements for units 1204 and 1302 in the names of Nielsen and Sabourin and Jens Arne Nielsen

44 Grethe Nielsen is the wife of Michael Sabourin and the daughter of Jens Arne Nielsen. The Agreement signed by her and her husband is dated November 1, 1985, that in the name of her father is dated November 19, 1985. Both called for occupancy on March 20, 1987. Ms Nielsen was the sales manager of the marketing agent until May, 1986 for the condominiums, her husband received the commission for the sale of the Taylor Building for $1,750,000. She and her husband did not receive the November 17, 1985 letter although her father did and she saw it. All of them received the February notice of extension and agreed to it. No letter of termination was sent to any of these three. In the Fall of 1987 their solicitor wrote asking that there be no termination without reasonable notice and that it would be opposed. On March 18, 1988 the defendants extended the closing date to May 30, 1988 and stated that every effort would be made to have the unit ready for occupancy by that date. On March 24, 1988 the defendants terminated the Agreement. The above three were subsequently added as plaintiffs in this action. Nothing in the above disentitles these plaintiffs to specific performance.

Misrepresentation to the plaintiffs Victor D. Knickle, Ruth V. Knickle, Laurie Knickle and Rose Marie Andersson, units 704 and 902.

45 These Agreements were signed on March 8 and March 15, 1986 for occupancy for March 31, 1987. These units had been sold before to employees of the defendants. The purchasers were told that the offers had been returned as the first purchasers had not been approved for the mortgage. Laurie Knickle acted for all the others in the negotiations. The agreements were signed at home and delivered to the defendants. The deposit cheque was cashed in June, 1986 and the Agreements were returned on August 26, 1986. They were told in May, 1987 that the Notice of November 17, 1986

had been sent in error as the building would be completed in the 180 day extension. No extension notice had been sent in February, 1987 but it was implicitly agreed to. After the action had been commenced these people received a letter from the defendants dated May 31, purporting to extend the time of occupancy to December, 1987 if agreeable but no agreement was reached. In September the defendants terminated the Agreement. The defendants had recognized that these people had paid more than the others per square foot. From a comparison of the others it would seem that they paid $13,000 to $17,000 more. Laurie Knickle had asked to see the prior Agreement but was told that it had been filed away. He was anxious to see if he was obtaining the original price and was assured that it was the same. I find that there was a fraudulent misrepresenatation but was told that the Knickles' were not making any additional claim for damages by reason of the price.

46 They were told that the landscaping would not be completed as a hotel was going to be built subsequently. This was of interest to Laurie Knickle who has an allergy to dust. At the time this was made it was an innocent misrepresentation which did not induce the contract.

47 The closing date in the contract was one that Mr. Solomon would not have signed if he had read it. It had come in some four to five months after the others; it was not included in a group of the others; at the time that he signed it he had to know that it was impossible to complete it in time. There was no evidence that any of these four people acted on these latter representations to their prejudice, nor that they suffered damage thereby. At the time that the representation was made that the condominium would be built ahead of the hotel I find that the persons making the representation thought that the condominium would proceed first.

Collateral Warranty

48 The claim is that the defendants gave a collateral warranty to the plaintiffs that

(a) zoning was available for a 65 unit condominium building.

(b) the condominium building would be constructed in time for the scheduled closing dates.

(c) the condominium building would be built prior to the hotel being erected.

49 At all times the defendants intended to construct a building of 65 units. The initial development review application was for 29 units which the zoning permitted. The municipal officials understood that application would be made for 65 and the only objection was whether it should be through the committee of adjustments of by way of rezoning. Approval subsequently was obtained for the 65 units in October, 1986 but the amended development review application was approved only in April, 1988 when the permits issued to permit occupancy. I find that there was no warranty collateral to the contract that the condominium building would be constructed in time; that was a part of the original contract. I find that in addition to the Knickles', others were told that the condominium would be built before the hotel. Mr. Busch who is the managing director of an international investment realty company represented ten of the purchasers of the units. It seemed to him that the condominium had priority but it was not a major concern. Mr. Markes was told that the condominium would be built first, that it would start on time and there would be no delay as it was the only one approved. He had made detailed inquiries before signing the offer. He planned to live there but was buying in trust for estate purposes so that on closing he could decide what he wanted to do. He had been living with his brother in a jointly owned house and wanted to move out. He was not concerned about the extension of the time for closing but never contemplated that it would be beyond 180 days. His concern was to obtain the premises and to have some knowledge when he could move.

50 Marilyn Barker and her husband Douglas Paulson were the purchasers of unit 1305. They lived nearby and were concerned as to whether the completion date was realistic as their three year lease was near its end. They planned to live in the unit. She was told that all zoning had been approved and when she was concerned about the time she was assured it was a small building and there would be no problem. They had had to renew their lease on a month to month basis as

they had told their lessor that they were leaving. When she was concerned whether there was sufficient time to close she had been told that the condominium was to be built first and the hotel to follow.

51 Mr. Borthwick was told that there would be occupancy of the condominium in the spring of 1987 and a simultaneous development which would put the hotel there in the fall. With the exception of Barker and Paulson I find that the statements were not made fraudulently and that they were not more significant than representations. Waddams in Law of Contracts at p. 479 says:

> What this means is that the statement purporting to be the contractual promise in such a collateral contract must amount to more than a broad general inducement to enter into the main contract or even a representation in the sense in which that word has been discussed earlier. The statement must constitute a definite contractual undertaking, a binding promise meant to be taken seriously by the party to whom it is made and intended to have such effect by the party who made this statement.

52 There is no express evidence as to whether Ms Barker would not have signed the Agreement but there was the statement that the lease was near an end, that the time did not seem long enough and the reassurance that the condominium would be first and that they did have zoning in place. In light of her concern that promise that the condominium would be built before the hotel and that the building would be constructed in time was a binding promise meant to be taken seriously by her and intended to have such effect.

53 However, I am concerned about paragraph 14(b) of Schedule "D" of the Agreement. It is not under a heading that would expressly draw the purchaser's attention to it. It appears under the heading Vendors Covenants Warranty. It begins with the warranty that the vendor is in good standing with the Hudac New Home Warranty Programme, and continues:

> The purchaser agrees to accept such warranty in lieu of any other warranty, or guarantee expressed or implied it being understood and agreed that there is no representation, warranty, guarantee, collateral agreement or condition precedent to, concurrent with, or in any way effecting this Agreement or the Real Property other than expressed herein.

54 Ms Barker is an intelligent woman, president of her own consulting company in sale, marketing and general management. She had read paragraph 8(a) and had questioned the need for it and had been told that it was never used. She did not question paragraph 14(b). In the circumstances herein it seems to me that that clause governs and Ms Barker and Mr. Paulson have no claim by way of collateral contract. However as I will show later they do have a claim in damages for breach of the agreement in the main contract to construct in time.

The use of deposit monies

55 The plaintiffs have failed to prove the allegation in the Statement of Claim that the defendant breached the contract in utilizing "the deposit monies paid by the plaintiffs for the purpose of constructing an adjacent hotel building". There was no evidence that financial resources were used for the construction of the hotel to the detriment of the condominium. The defendant had provided the security for the deposit under the Ontario New Home Warranties Plan (known as Hudac)

Damages

56 David Norman Whitley and his wife Sharon Elizabeth Whitley elected at trial to claim damages in lieu of specific performance. They had been transferred from Hong Kong back to Great Britain. They were the purchasers of unit 305 with some 1030 square feet at a price of $135,000. I accept the valuation of L. Morassutti whose report is filed as Exhibit 23. That valuation at the date of trial was $178,750. I assessed the damages of these plaintiffs at the difference namely $43,750. I have assessed the damages as at the date of trial not as of the date of breach. In *Johnson v. Agnew*, (1979) 2 W.L.R. 367 at p. 400 Lord Wilberforce said:

> The general principle for the assessment of damages is compensatory, i.e. that the innocent party is to be placed, so far as money can do so, in the same position as if the contract had been performed. Where the contract is one of sale, this principle normally leads to assessment of damages as at the date of the breach — a principle recognised and embodied in section 51 of the Sale of Goods Act 1893. But this is not an absolute rule: if to follow it would give rise to injustice, the court has power to fix such other date as may be appropriate in the circumstances.

57 This statement was quoted by MacKinnon A.C.J.O. in *306793 Ontario Ltd. in Trust v. Rimes* (1979), 10 R.P.R. 257 at p. 264: where the court held that the plaintiff had the right to elect to ask for damages at the conclusion of the trial and awarded damages as of the date of trial.

58 Though failure to mitigate was not pleaded it was submitted by counsel for the defendants. The cases referred to are those in which a vendor has failed to try to resell. The purchaser who wishes specific performance is not required to purchase another property. There is evidence that Markes, Jens Nielsen, the Knickles, Paulson and Barker and Acker had some intention of occupying the premises for themselves. The reasonable inference is that the others were investors and the submission is made that they could have invested in other properties. However, in *Kloepfer Wholesale Hardware & Automotive Co. v. Roy*, [1952] 2 S.C.R. 465 Kerwin J. at p. 472 said:

> Finally, as to the suggestion that damages would be sufficient because it is contended that the plaintiff desired to use the property as an investment, it is sufficient to say that generally speaking, specific performance applies to agreements for the sale of lands as a matter of course.

There was no evidence as to what other properties were available that would have mitigated the damages.

59 As to damages in addition to specific performance there is no evidence of any such damages except from Marilyn Barker on behalf of herself and her husband. If they cannot be agreed upon, there will be a reference to the Master at Toronto to determine the damages incurred when occupancy of the premises was not given to them on September 16, 1987.

60 This is not an instance for the award of punitive or exemplary damages.

Registration on title

61 Both the counterclaim and the Statement of Defence raised the question of the registration of the certificate of pending litigation when the action was commenced in April, 1987 and the registration by the Nielsens' of their two Agreements of Purchase on March 31, 1988.

62 Counsel for the defendants said that he was not leading evidence with respect to the counterclaim and was not seriously pursuing it as the problems of registration had been largely circumvented but the counterclaim for damages was not withdrawn. There was not proven to be any damage caused to the defendants from the registration or from the communication to the mortgagee of the registration pursuant to an undertaking given when the order for the certificate was made. I find that no damage was caused to the defendants as the mortgagee continued to advance the funds on the agreement of the plaintiffs who were anxious to have the building completed.

63 Paragraph 13 of the Agreements was the purchasers covenant not to register the Agreement or Notice thereof or any other registration whatsoever against the title until the vendor had received the full amount under the mortgage. In a poorly drawn Agreement under the heading Mortgage in Schedule "D" paragraph 1(f) sets out that in the event of failure to comply with completion of the mortgage application or not be approved or failure "to comply with the Purchaser's obligations contained in the Agreement and all Schedules annexed thereto", the vendor might at its option declare the Agreement null and void. Under paragraph 16(e) the purchaser was to forfeit all monies paid as liquidated damages and not as penalty and the vendor would have no further obligation to the purchaser.

64 There is the further problem raised at trial that the description of the lands in the certificate although prepared with the assistance of a surveyor covers some parts of lands at different levels other than the condominium. The problem arose as some of the plans for the project were one dimensional and others showed strata at different levels. There was no evidence that the certificate has caused any problems in refinancing or otherwise. There is the undertaking of counsel for the plaintiffs that the certificate is on title subject to an undertaking to withdraw it to permit the registration of the condominium declaration. There is the problem whether the plaintiff could get specific performance if there were no such registration. In the circumstances there should be no order for forfeiture.

65 It would not be fair and reasonable in the circumstances that these parts of the Agreement continue to bind the plaintiffs and no such intention could be attributed to the parties. (*Chomedy Aluminium Co. Ltd. v. Belcourt Construction (Ottawa) Ltd. et al.* (1979), 24 O.R. (2d) 1.

66 Although not pleaded there were frequent references by counsel for the defendants to alleged breach of paragraph 6(b)(1) of Schedule "D" of the Agreements. Under the heading of Terms of Interim Occupancy the purchaser was to only use the unit for residential purposes, to be occupied by the purchaser and or his immediate family. There was no evidence that any plaintiff intended to give occupancy to any others during the period to which the paragraph is applicable.

Judgment

67

1. The plaintiffs other than the plaintiffs Whitley and White are entitled to specific performance of their respective Agreements.

2. The plaintiffs Whitley are entitled to payment by the defendants of damages in lieu of specific performance in the amount of $43,750.

3. There will be a reference to the Master at Toronto to determine the damages incurred by the plaintiffs Barker and Paulson when occupancy of the premises was not given on September 16, 1987.

4. The counterclaim herein is dismissed with costs.

68 Counsel may either speak to me or make submissions in writing on the question of costs.

APPENDIX

Name of Purchaser	Unit No.	Purchase Price	Scheduled Occupancy Date
David Borthwick Evelyn Borthwick	1201	$143,900.00	March 20, 1987
Wanda Valleau	203	84,900.00	Feb. 27, 1987
Gordon Francis Burnett Jacqualeen Ola Burnett	204	97,000.00	Feb. 27, 1987
Kim Chung Ian Chung	303	85,900.00	Feb. 27, 1987
David Norman Whitley Sharon Elizabeth Whitley	305	135,000.00	Feb. 27, 1987
Joseph Markes	503	88,900.00	Feb. 27, 1987
M. Derrick Pirie	602	98,900.00	Feb. 27, 1987
David Tri Luong Tran Rosalie Jeanne Tran	501	134,000.00	Feb. 27, 1987
Elizabeth X.Q. Tran	605	147,000.00	Feb. 27, 1987
Marilyn Kencher	702	100,900.00	Feb. 27, 1987
Yat-Kiu Wong Dorothy Jean Wong	801	147,000.00	Feb. 27, 1987

H. Alan Stewart Wesley J. Parfitt Terri Parfitt Victor D. Knickle Ruth V. Knickle Laurie Knickle	802 805	102,900.00 151,000.00	March 6, 1987 Feb. 27, 1987
Rose Andersson Anthony Peter Pitt-Jones Edith Jane Pitt-Jones J. Brian Simpson	902 903	117,900.00 108,000.00	March 31, 1987 Feb. 27, 1987
Frederick Roberts	1002	104,900.00	March 13, 1987
Peter Sheppard	1003	102,900.00	March 13, 1987
Anthony Tat-Shing Hung	1101	150,000.00	Feb. 27, 1987
Boris Altshtater Louise Altshtater	1105	143,900.00	March 13, 1987
Robert White Margaret White	1203	105,900.00	March 20, 1987
Michael John Hartmann Melanie Sandra Hartmann	1301	154,000.00	Feb. 27, 1987
John Ceh Douglas Paulson	1402	113,900.00	March 29, 1987
Marilyn E. Barker	1305	149,900.00	March 29, 1987
Ralph Reichert	404	93,900.00	Feb. 27, 1987
James Reid Duncan	401	124,900.00	Feb. 27, 1987
Gwendolyn M. Acker Grethe Nielsen	201	122,900.00	Feb. 27, 1987
Michael Sabourin	1201	109,900.00	March 20, 1987
Jens Arne Neilsen	1301	109,900.00	March 20, 1987

End of Document

Tab 21

1958 CarswellOnt 73
Supreme Court of Canada

Freedman v. Mason

1958 CarswellOnt 73, [1958] S.C.R. 483, 14 D.L.R. (2d) 529

Franklin Irvine Mason (Defendant), Appellant and Sidney Freedman (Plaintiff), Respondent

Kerwin C.J. and Rand, Cartwright, Martland and Judson JJ.

Judgment: April 30, 1958
Judgment: May 1, 1958
Judgment: June 26, 1958

Proceedings: On appeal from the Court of Appeal for Ontario

Counsel: *F.A. Brewin, Q.C.*, and *L.M. Freeman*, for the defendant, appellant.
John J. Robinette, Q.C., and *S.G.M. Grange*, for the plaintiff, respondent.

Subject: Contracts; Property

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Family law

II Marriage
II.8 Property rights consequent on marriage
II.8.a Dower
II.8.a.i Nature of dower

Family law

II Marriage
II.8 Property rights consequent on marriage
II.8.a Dower
II.8.a.vii Dower consent (bar of dower)
II.8.a.vii.B Effect of lack of consent

Real property

III Sale of land
III.2 Title
III.2.c Conveyance of title
III.2.c.ii Vendor's obligation to convey
III.2.c.ii.F Miscellaneous

Real property

III Sale of land
III.4 Remedies
III.4.c Rescission
III.4.c.i Grounds for rescission
III.4.c.i.C Rescission clause

The judgment of Kerwin C.J. and Rand, Martland and Judson JJ. was delivered by *Judson J.*:

1 The appellant was the owner in fee simple, free of encumbrance, of a farm in the township of Scarborough. He accepted an offer to purchase from the respondent's assigner for the sum of $136,000, of which $20,000 was to be paid in cash and the balance secured by a mortgage. At the time of closing, he asserted that he was unable to secure a bar of dower from his wife, tendered a deed without such a bar and claimed payment in accordance with the terms of the contract. The purchaser refused to close on these terms and also rejected a tender of the return of his deposit. His action for specific performance of the contract was dismissed at the trial but on appeal he was granted specific performance with compensation by providing for payment into court of a sum to be fixed by the Master to serve as security to the purchaser in case the wife's inchoate right to dower should ever become consummate. The vendor now appeals and seeks the restoration of the judgment as given at the trial and the dismissal of the action.

2 The contract contains the usual clause providing for requisitions on title and for the right of the vendor to declare the contract null and void if requisitions which he is "unable or unwilling" to remove are made within a stated time. The appeal turns upon the effect that is to be given to this clause, for in its absence there can be no doubt of the purchaser's right to specific performance with compensation. A vendor who has contracted to convey the legal title in fee simple cannot excuse himself from performance on the ground of inability to secure a necessary bar of dower from his wife. The purchaser cannot be forced to take such a title (*Bowes v. Vaux* [1]), but he has the option of requiring the vendor to convey all the interest that he has, without the bar of dower, but with appropriate provision for the payment into court of a sum of money, out of the purchase-price, as security against the claim for dower. The doctrine of specific performance with compensation against a vendor who had contracted to sell an estate as his own and who had in fact only a partial interest was well settled in England by Lord Eldon's time and is clearly stated in *Mortlock v. Buller* [2]. It was followed in Ontario in *Kendrew v. Shewan* [3], and *VanNorman v. Beaupre* [4], both of them dower cases, where specific performance was granted with an abatement in the purchase-price for lack of a bar of dower. In *Skinner v. Ainsworth* [5], the order in *Wilson v. Williams* [6] was followed and instead of allowing an abatement, the remedy of payment into court as security was adopted. This principle was followed in *Re Woods and Arthur* [7], and by the Court of Appeal in the present case [8]. I will set out the precise form the order should take later.

3 To what extent is the right of the purchaser affected by the proviso just mentioned? In full it reads:

> PROVIDED the title is good and free from all encumbrances except as aforesaid and except as to any registered restrictions or covenants that run with the land providing that such are complied with. The Purchaser is not to call for the production of any title deed, abstract or other evidence of title except such as are in the possession of the Vendor. The Purchaser is to be allowed 15 days from the date of acceptance hereof to examine the title at his own expense. If within that time any valid objection to title is made in writing to the Vendor which the Vendor shall be unable or unwilling to remove and which the Purchaser will not waive this agreement shall, notwithstanding any intermediate acts or negotiations in respect of such objections, be null and void and the deposit shall be returned by the Vendor without interest and he and the Agent shall not be liable for any costs or damages. Save as to any valid objection so made within such time the Purchaser shall be conclusively deemed to have accepted the title of the Vendor to the real property.

4 This proviso does not apply to enable a person to repudiate a contract for a cause which he himself has brought about; *New Zealand Shipping Company, Limited v. Société des Ateliers et Chantiers de France* [9]. Nor does it justify a capricious or arbitrary repudiation. I am content to adopt the words of Middleton J. in *Hurley v. Roy* [10], that the provision "was not intended to make the contract one which the vendor can repudiate at his sweet will". By signing this contract the vendor undertook to deliver a deed containing a bar of dower. He tried to excuse himself by pleading inability to obtain such a bar. His duty was, at the very least, to make a genuine effort to obtain what was necessary to carry out his contract and there can be no doubt in this case that he made no such effort. Immediately after the acceptance of the offer by the husband — and the wife was present when he signed — they both regretted the bargain. They consulted a solicitor the same night and a little later the wife sought independent advice. The evidence of what they said and did is reviewed in detail in the reasons for judgment of the learned Chief Justice of the High Court [11] and of the Court of Appeal [12], and repetition here is unnecessary. The learned Chief Justice concluded that the husband was willing to carry out the contract as far as he could without the concurrence of his wife and that the wife, acting upon independent legal advice, had refused to bar dower as a result of her won conclusion and determination arrived at independently of her husband. The opinion of the Court of Appeal was that husband and wife were acting in concert to secure better terms or to avoid the contract if they could not get them. It seems to me to make no difference which view of their conduct one takes. The plain uncontradicted fact is that the husband made no genuine attempt to obtain a bar of dower. He cannot take advantage of his own default and use the clause to escape his obligation. His duty was, as stated by Esten V.C. in *Kendrew v. Shewan, supra*, at p. 580, "to ascertain, *bona fide*, whether his wife was willing to bar her dower, and to induce her by any reasonable sacrifice on his own part to do so".

5 I do not intend to review in detail the many cases in which the application of the clause has been discussed. The problem has arisen in a variety of situations. A vendor contracts to convey in fee simple and when he has no title to the mineral rights (*In re Jackson and Haden's Contract* [13]); or when he needs the concurrence of his trustee and has contradicted without reasonable assurance that it will be forthcoming (*In re Des Reaux and Setchfield's Contract* [14]); or when he is owner in joint tenancy with his wife (*Hurley v. Roy, supra; Dubensky et al. v. Labadie* [15]); or when there is a representation of ability to give a non-existent right of way, as appurtenant to the lands contracted to be sold (*Lavine v. Independent Builders Ltd.* [16]); or when the vendor is unable to obtain a bar of dower (*Shuter v. Patten* [17]); or where there is a deficiency in the land contracted to be sold (*Bowes v. Vaux, supra*). In all these cases the purchaser was able to obtain specific performance with compensation.

6 When a vendor seeks to avoid a contract under this clause, which is obviously introduced for his relief, his conduct and his reasons for seeking to escape his obligations are matters of interest to the Court. There is a general principle to be deduced from the cases and it is the one I have already stated incidentally. A vendor who seeks to take advantage of the clause must exercise his right reasonably and in good faith and not in a capricious or arbitrary manner. This measure of his duty is the minimum standard that may be expected of him, and there are cases where a cause which might otherwise be valid as justifying rescission will not be available to him if he has acted recklessly in entering into a contract to convey more than he is able.

7 I would not characterize the conduct of the vendor in this case in entering into this contract as reckless, but his attempted rescission was arbitrary and capricious and there was complete and deliberate failure on his part to do what an ordinarily prudent man having regard to his contractual obligations would have done. I doubt whether it is possible to formulate in the abstract and apart from the actual conditions of a case the precise limits within which the clause may enable a vendor to rescind. In *Louch v. Pape Avenue Land Company Limited* [18], where the vendor's right to rescind was upheld, the judge in Weekly Court stated that there was no suggestion of bad faith on the part of the vendor. In *Ashburner v. Sewell* [19], which was followed in the *Louch* case, the existence of a latent right of way unknown to the vendor justified a rescission. The facts of the present case remove it entirely from the scope of these decisions.

8 I would dismiss the appeal with costs. The reference to the Master should provide that in ascertaining the amount to be paid into court, he should not exceed one-third of the purchase-price. The interest on these moneys will be paid to the vendor as long as his wife is alive. If the wife predeceases him, the fund in court is to be paid out to the vendor. If the vendor dies before his wife and the wife then claims her dower in possession, the purchaser will be entitled to the interest on the fund until the death of the wife and then the fund will go to the estate of the vendor.

Cartwright J.:

9 For the reasons given by my brother Judson I agree with his conclusion that a decree of specific performance should be granted on the terms which he proposes, unless the appellant is entitled to treat the agreement as null and void under the proviso which is quoted in full in the reasons of my brother.

10 I agree also that this proviso does not entitle the appellant to repudiate the contract capriciously and that it is a condition of its application that the objection to title which the purchaser will not waive must be one which the vendor is genuinely unable or unwilling to remove. In the case at bar what was relied upon by the appellant was a genuine inability to obtain a bar of dower from his wife; and it is unnecessary to consider in what circumstances the proviso would apply to an objection which a vendor was able but, for sufficient reasons, was unwilling to remove.

11 In my opinion the fact that a wife's inchoate right of dower in lands is outstanding is a matter of title and not a mere matter of conveyance; it was so held by Roach J.A., speaking for the Court of Appeal, in *Ungerman et al. v. Maroni*[20], and the same view is expressed, in the case at bar, by McRuer C.J.H.C.[21] and by MacKay J.A. who delivered the unanimous judgment of the Court of Appeal[22], although the latter was of opinion that, as a matter of construction, the proviso contemplated only such objections to title as would appear in the course of the usual searches made by a purchaser's solicitor.

12 The question to be decided is whether the appellant was, as he alleged, genuinely unable to obtain a bar of dower from his wife. If he was, in my opinion, the appeal should be allowed.

13 The learned Chief Justice of the High Court who had the advantage of seeing and hearing the witnesses has expressly absolved the appellant of the charge of bad faith and, after a careful consideration of the evidence, it is my view that that finding should not be disturbed. It is, however, clear from the appellant's own evidence that from the time when he and his wife first learned from the solicitor, whom they consulted at the wife's suggestion, that she was not compellable to bar her dower, the appellant made no effort to persuade her to do so. The learned Chief Justice has found that the appellant's wife was acting on independent advice in refusing to bar her dower and that "she was the sort of woman who would make up her own mind"; but neither expressly, nor, I think, by necessary implication has he found that a reasonable attempt at persuasion made by the appellant would have been unsuccessful. On all the evidence, I find myself unable to say that the Court of Appeal were wrong in reaching the conclusion that it had not been shown that the appellant was genuinely unable to obtain the bar of dower.

14 For these reasons I concur in the disposition of the appeal proposed by my brother Judson.

Appeal dismissed with costs.

Solicitors of record:
Solicitors for the defendant, appellant: *Freeman, Miller & Draper*, Toronto.
Solicitors for the plaintiff, respondent: *Freedman, Cohl, Murray & Osak*, Toronto.

Footnotes

1 (1918), 43 O.L.R. 521.

2 (1804), 10 Ves. 292 at 315-6, 32 E.R. 857.

3 (1854), 4 Gr. 578.

4 (1856), 5 Gr. 599.

5 (1876), 24 Gr. 148.

6 (1857), 3 Jur. N.S. 810.

7 (1921), 49 O.L.R. 279, 58 D.L.R. 620.

8 [1957] O.R. 441, 9 D.L.R. (2d) 262.

9 [1919] A.C. 1 at 12.

10 (1921), 50 O.L.R. 281 at 285, 64 D.L.R. 375.

11 [1956] O.R. 849, 4 D.L.R. (2d) 576.

12 [1957] O.R. 441, 9 D.L.R. (2d) 262.

13 [1906] 1 Ch. 412.

14 [1926] Ch. 178.

15 [1944] O.R. 500, [1944] 4 D.L.R. 253, varied [1945] O.R. 430, [1945] 3 D.L.R. 262.

16 [1932] O.R. 669, [1932] 4 D.L.R. 569.

17 (1921), 51 O.L.R. 428, 67 D.L.R. 577.

18 [1928] S.C.R. 518, [1928] 3 D.L.R. 620.

19 [1891] 3 Ch. 405.

20 [1956] O.W.N. 650 at 652.

21 [1956] O.R. 849, 4 D.L.R. (2d) 576.

22 [1957] O.R. 441, 9 D.L.R. (2d) 262.

Tab 22

Most Negative Treatment: Distinguished
Most Recent Distinguished: Can Trans Xpress Inc. v. Invoice Payment System Corp. | 2015 ONSC 2227, 2015 CarswellOnt 5016, 3 P.P.S.A.C. (4th) 337, 254 A.C.W.S. (3d) 704 | (Ont. S.C.J., Apr 8, 2015)

2014 SCC 71, 2014 CSC 71
Supreme Court of Canada

Bhasin v. Hrynew

2014 CarswellAlta 2046, 2014 CarswellAlta 2047, 2014 SCC 71, 2014 CSC 71, [2014] 11 W.W.R. 641, [2014] 3 S.C.R. 494, [2014] A.W.L.D. 4738, [2014] A.W.L.D. 4740, [2014] A.W.L.D. 4828, [2014] A.W.L.D. 4829, [2014] S.C.J. No. 71, 20 C.C.E.L. (4th) 1, 245 A.C.W.S. (3d) 832, 27 B.L.R. (5th) 1, 379 D.L.R. (4th) 385, 464 N.R. 254, 4 Alta. L.R. (6th) 219, 584 A.R. 6, 623 W.A.C. 6, J.E. 2014-1992

Harish Bhasin, carrying on business as Bhasin & Associates, Appellant and Larry Hrynew and Heritage Education Funds Inc. (formerly known as Allianz Education Funds Inc., formerly known as Canadian American Financial Corp. (Canada) Limited), Respondents

McLachlin C.J.C., LeBel, Abella, Rothstein, Cromwell, Karakatsanis, Wagner JJ.

Heard: February 12, 2014
Judgment: November 13, 2014
Docket: 35380

Proceedings: reversing in part *Bhasin v. Hrynew* (2013), [2013] 11 W.W.R. 459, 84 Alta. L.R. (5th) 68, 12 B.L.R. (5th) 175, 567 W.A.C. 28, 544 A.R. 28, 2013 CarswellAlta 822, 2013 ABCA 98, 362 D.L.R. (4th) 18, Jean Côté J.A., Marina Paperny J.A., R. Paul Belzil J. (Alta. C.A.); reversing *Bhasin v. Hrynew* (2011), [2012] 9 W.W.R. 728, 96 B.L.R. (4th) 73, 2011 ABQB 637, 2011 CarswellAlta 1905, A.B. Moen J. (Alta. Q.B.)

Counsel: Neil Finkelstein, Brandon Kain, John McCamus, Stephen Moreau, for Appellant
Eli S. Lederman, Jon Laxer, Constanza Pauchulo, for Respondents

Subject: Civil Practice and Procedure; Contracts; Torts

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.
Contracts

IX Performance or breach
IX.4 Obligation to perform
IX.4.d Sufficiency of performance
IX.4.d.i Duty to perform in good faith

Contracts

XIV Remedies for breach
XIV.5 Damages
XIV.5.q Miscellaneous

Torts

III Conspiracy
III.1 Nature and elements of tort
III.1.d Miscellaneous

Torts

IX Inducing breach of contract
IX.1 Elements of tort

Headnote

Contracts --- Performance or breach — Obligation to perform — Sufficiency of performance — Duty to perform in good faith

C Corp. was in business of selling education savings plans to investors, through contracts with enrolment directors — B and H were enrolment directors, and were competitors — Enrolment director's agreement governed relationship between C Corp. and B — C Corp. appointed H as provincial trading officer (PTO) to review its enrolment directors for compliance with securities laws after Alberta Securities Commission raised concerns about compliance issues among C Corp.'s enrolment directors — C Corp. outlined its plans to Commission, and they included B working for H's agency — When B refused to allow H to audit his records, C Corp. threatened to terminate agreement — C Corp. gave notice of non renewal under agreement — At expiry of contract term, B lost value in his business in his assembled workforce — Majority of B's sales agents were successfully solicited by H's agency — B's action against C Corp. and H was allowed — Trial judge found C Corp. was in breach of implied term of good faith, H had intentionally induced breach of contract, and both C Corp. and H were liable for civil conspiracy — Court of Appeal allowed appeal and dismissed B's action — B appealed — Appeal allowed in part — Appeal with respect to C Corp. was allowed, and appeal with respect to H was dismissed — Trial judge did not make reversible error by adjudicating issue of good faith — C Corp. breached agreement when it failed to act honestly with B in exercising non renewal clause — Trial judge's findings amply supported conclusion that C Corp. acted dishonestly with B throughout period leading up to its exercise of non renewal clause, both with respect to its own intentions and with respect to H's role as PTO — Claims against H were rightly dismissed — Court of Appeal was correct in finding that there could be no liability for inducing breach of contract or unlawful means conspiracy.

Contracts --- Remedies for breach — Damages — Miscellaneous

C Corp. was in business of selling education savings plans to investors, through contracts with enrolment directors — B and H were enrolment directors, and were competitors — Enrolment director's agreement governed relationship between C Corp. and B — C Corp. appointed H as provincial trading officer to review its enrolment directors for compliance with securities laws after the Alberta Securities Commission raised concerns about compliance issues among C Corp.s enrolment directors — C Corp. outlined its plans to Commission and they included B working for H's agency — When B refused to allow H to audit his records, C Corp. threatened to terminate agreement — C Corp. gave notice of non renewal under agreement — At expiry of contract term, B lost value in his business in his assembled workforce — Majority of B's sales agents were successfully solicited by H's agency — B's action against C Corp. and H was allowed — Trial judge found C Corp. was in breach of implied term of good faith, H had intentionally induced breach of contract, and both C Corp. and H were liable for civil conspiracy — Court of Appeal allowed appeal and dismissed B's action — B appealed — Appeal allowed in part — Appeal with respect to C Corp. was allowed, and appeal with respect to H was dismissed — Trial judge's assessment of damages was varied to $87,000 plus interest — C Corp. was liable for damages calculated on basis of what B's economic position would have been had C Corp. fulfilled its duty — While trial judge did not assess damages on that basis, given different findings in relation to liability, trial judge made findings that permitted current Court to do so — These findings permitted damages to be assessed on basis that if C Corp. had performed contract honestly, B would have been able to retain value of his business rather than see it, in effect, expropriated and turned over to H — It was clear from findings of trial judge and from record that value of business around time of non renewal was $87,000.

Torts --- Inducing breach of contract — Elements of tort

C Corp. was in business of selling education savings plans to investors, through contracts with enrolment directors — B and H were enrolment directors, and were competitors — Enrolment director's agreement governed relationship between C Corp. and B — C Corp. appointed H as provincial trading officer (PTO) to review its enrolment directors for compliance with securities laws after Alberta Securities Commission raised concerns about compliance issues among C Corp.'s enrolment directors — C Corp. outlined its plans to Commission, and they included B working for H's agency — When B refused to allow H to audit his records, C Corp. threatened to terminate agreement — C Corp. gave notice of non renewal under agreement — At expiry of contract term, B lost value in his business in his assembled workforce — Majority of B's sales agents were successfully solicited by H's agency — B's action against C Corp. and H was allowed — Trial judge found C Corp. was in breach of implied term of good faith, H had intentionally induced breach of contract, and both C Corp. and H were liable for civil conspiracy — Court of Appeal allowed appeal and dismissed B's action — B appealed — Appeal allowed in part — Appeal with respect to C Corp. was allowed, and appeal with respect to H was dismissed — Trial judge did not make reversible error by adjudicating issue of good faith — C Corp. breached agreement when it failed to act honestly with B in exercising non renewal clause — Trial judge's findings amply supported conclusion that C Corp. acted dishonestly with B throughout period leading up to its exercise of non renewal clause, both with respect to its own intentions and with respect to H's role as PTO — Claims against H were rightly dismissed — Court of Appeal was correct in finding that there could be no liability for inducing breach of contract or unlawful means conspiracy.

Torts --- Conspiracy — Nature and elements of tort — Miscellaneous

C Corp. was in business of selling education savings plans to investors, through contracts with enrolment directors — B and H were enrolment directors, and were competitors — Enrolment director's agreement governed relationship between C Corp. and B — C Corp. appointed H as provincial trading officer (PTO) to review its enrolment directors for compliance with securities laws after Alberta Securities Commission raised concerns about compliance issues among C Corp.'s enrolment directors — C Corp. outlined its plans to Commission, and they included B working for H's agency — When B refused to allow H to audit his records, C Corp. threatened to terminate agreement — C Corp. gave notice of non renewal under agreement — At expiry of contract term, B lost value in his business in his assembled workforce — Majority of B's sales agents were successfully solicited by H's agency — B's action against C Corp. and H was allowed — Trial judge found C Corp. was in breach of implied term of good faith, H had intentionally induced breach of contract, and both C Corp. and H were liable for civil conspiracy — Court of Appeal allowed appeal and dismissed B's action — B appealed — Appeal allowed in part — Appeal with respect to C Corp. was allowed, and appeal with respect to H was dismissed — Trial judge did not make reversible error by adjudicating issue of good faith — C Corp. breached agreement when it failed to act honestly with B in exercising non renewal clause — Trial judge's findings amply supported conclusion that C Corp. acted dishonestly with B throughout period leading up to its exercise of non renewal clause, both with respect to its own intentions and with respect to H's role as PTO — Claims against H were rightly dismissed — Court of Appeal was correct in finding that there could be no liability for inducing breach of contract or unlawful means conspiracy.

Contrats --- Exécution ou défaut d'exécution — Obligation d'exécuter — Exécution acceptable — Obligation d'exécuter de bonne foi

Société C oeuvrait dans le domaine de la vente aux investisseurs des régimes enregistrés d'épargne-études par l'intermédiaire de directeurs de souscriptions — B et H étaient des directeurs de souscription et étaient en concurrence l'un contre l'autre — Relation entre la société C et B était régie par une entente relative au directeur des souscriptions — Société C a nommé H au poste d'agent commercial provincial (ACP), chargé de la vérification des activités de ses directeurs des souscriptions au plan du respect de la législation en matière de valeurs mobilières après que la Commission des valeurs mobilières de l'Alberta a soulevé des questions au sujet de la conformité des activités des directeurs des souscriptions de la société C — Société C a présenté ses plans à la Commission selon lesquels il était prévu que B travaillerait pour l'agence de H — Comme B refusait toujours de permettre à H de vérifier ses registres,

la société C a menacé de résilier l'entente — Société C a donné à B un préavis de non-renouvellement conformément à l'entente — À l'échéance du contrat, l'entreprise de B a perdu son effectif, qui constituait la valeur de son entreprise — Majorité de ses représentants des ventes ont été recrutés par l'agence de H — Action déposée par B à l'encontre de la société C et H a été accueillie — Juge de première instance a conclu que la société C avait violé la condition implicite d'agir de bonne foi, que H avait intentionnellement incité à la rupture de contrat et que la société C et H avaient engagé leur responsabilité pour complot civil — Cour d'appel a accueilli l'appel et a rejeté l'action de B — B a formé un pourvoi — Pourvoi accueilli en partie — Pourvoi relatif à la société C accueilli; pourvoi relatif à H rejeté — Juge de première instance n'a pas commis d'erreur donnant lieu à révision lorsqu'elle a tranché la question de la bonne foi — Société C a violé le contrat lorsqu'elle n'a pas agi honnêtement envers B en recourant à la clause de non-renouvellement — Motifs de la juge étayaient amplement la conclusion que la société C n'a pas agi honnêtement envers B pendant la période précédant le recours à la clause de non-renouvellement, en raison de ses propres intentions et du rôle joué par H en sa qualité d'ACP — Demandes contre H ont été à juste titre rejetées — Cour d'appel a eu raison de ne retenir aucune responsabilité pour un délit d'incitation à rupture de contrat ou de complot prévoyant le recours à des moyens illégaux.

Contrats --- Réparation du défaut — Dommages-intérêts — Divers

Société C oeuvrait dans le domaine de la vente aux investisseurs des régimes enregistrés d'épargne-études par l'intermédiaire de directeurs de souscriptions — B et H étaient des directeurs de souscription et étaient en concurrence l'un contre l'autre — Relation entre la société C et B était régie par une entente relative au directeur des souscriptions — Société C a nommé H au poste d'agent commercial provincial, chargé de la vérification des activités de ses directeurs des souscriptions au plan du respect de la législation en matière de valeurs mobilières après que la Commission des valeurs mobilières de l'Alberta a soulevé des questions au sujet de la conformité des activités des directeurs des souscriptions de la société C — Société C a présenté ses plans à la Commission selon lesquels il était prévu que B travaillerait pour l'agence de H — Comme B refusait toujours de permettre à H de vérifier ses registres, la société C a menacé de résilier l'entente — Société C a donné à B un préavis de non-renouvellement conformément à l'entente — À l'échéance du contrat, l'entreprise de B a perdu son effectif, qui constituait la valeur de son entreprise — Majorité de ses représentants des ventes ont été recrutés par l'agence de H — Action déposée par B à l'encontre de la société C et H a été accueillie — Juge de première instance a conclu que la société C avait violé la condition implicite d'agir de bonne foi, que H avait intentionnellement incité à la rupture de contrat et que la société C et H avaient engagé leur responsabilité pour complot civil — Cour d'appel a accueilli l'appel et a rejeté l'action de B — B a formé un pourvoi — Pourvoi accueilli en partie — Pourvoi relatif à la société C accueilli; pourvoi relatif à H rejeté — Appréciation des dommages-intérêts faite par la juge de première instance a été modifiée et fixée à 87 000 $ plus l'intérêt — Société C était responsable de dommages-intérêts calculés en fonction de la situation financière dans laquelle se serait trouvé B si la société C s'était acquittée de son obligation — Bien que la juge de première instance n'ait pas évalué le montant des dommages-intérêts en fonction de ce critère, compte tenu des conclusions différentes qu'elle a tirées en ce qui a trait à la responsabilité, elle a tiré des conclusions qui permettaient à cette Cour de le faire — Ces conclusions permettaient une évaluation des dommages-intérêts fondée sur le fait que, si la société C avait exécuté honnêtement le contrat, B aurait été en mesure de conserver la valeur de son entreprise plutôt que de s'en voir dépossédé au profit de H — Il ressortait clairement des conclusions de la juge de première instance ainsi que du dossier que la valeur de l'entreprise vers la date du non-renouvellement était de 87 000 $.

Délits civils --- Incitation à violer un contrat — Éléments constitutifs du délit

Société C oeuvrait dans le domaine de la vente aux investisseurs des régimes enregistrés d'épargne-études par l'intermédiaire de directeurs de souscriptions — B et H étaient des directeurs de souscription et étaient en concurrence l'un contre l'autre — Relation entre la société C et B était régie par une entente relative au directeur des souscriptions — Société C a nommé H au poste d'agent commercial provincial (ACP), chargé de la vérification des activités de ses directeurs des souscriptions au plan du respect de la législation en matière de valeurs mobilières après que la Commission des valeurs mobilières de l'Alberta a soulevé des questions au sujet de la conformité des activités des directeurs des souscriptions de la société C — Société C a présenté ses plans à la Commission selon lesquels il était

prévu que B travaillerait pour l'agence de H — Comme B refusait toujours de permettre à H de vérifier ses registres, la société C a menacé de résilier l'entente — Société C a donné à B un préavis de non-renouvellement conformément à l'entente — À l'échéance du contrat, l'entreprise de B a perdu son effectif, qui constituait la valeur de son entreprise — Majorité de ses représentants des ventes ont été recrutés par l'agence de H — Action déposée par B à l'encontre de la société C et H a été accueillie — Juge de première instance a conclu que la société C avait violé la condition implicite d'agir de bonne foi, que H avait intentionnellement incité à la rupture de contrat et que la société C et H avaient engagé leur responsabilité pour complot civil — Cour d'appel a accueilli l'appel et a rejeté l'action de B — B a formé un pourvoi — Pourvoi accueilli en partie — Pourvoi relatif à la société C accueilli; pourvoi relatif à H rejeté — Juge de première instance n'a pas commis d'erreur donnant lieu à révision lorsqu'elle a tranché la question de la bonne foi — Société C a violé le contrat lorsqu'elle n'a pas agi honnêtement envers B en recourant à la clause de non-renouvellement — Motifs de la juge étayaient amplement la conclusion que la société C n'a pas agi honnêtement envers B pendant la période précédant le recours à la clause de non-renouvellement, en raison de ses propres intentions et du rôle joué par H en sa qualité d'ACP — Demandes contre H ont été à juste titre rejetées — Cour d'appel a eu raison de ne retenir aucune responsabilité pour un délit d'incitation à rupture de contrat ou de complot prévoyant le recours à des moyens illégaux.

Délits civils --- complot — Nature et éléments constitutifs du délit — Divers

Société C oeuvrait dans le domaine de la vente aux investisseurs des régimes enregistrés d'épargne-études par l'intermédiaire de directeurs de souscriptions — B et H étaient des directeurs de souscription et étaient en concurrence l'un contre l'autre — Relation entre la société C et B était régie par une entente relative au directeur des souscriptions — Société C a nommé H au poste d'agent commercial provincial (ACP), chargé de la vérification des activités de ses directeurs des souscriptions au plan du respect de la législation en matière de valeurs mobilières après que la Commission des valeurs mobilières de l'Alberta a soulevé des questions au sujet de la conformité des activités des directeurs des souscriptions de la société C — Société C a présenté ses plans à la Commission selon lesquels il était prévu que B travaillerait pour l'agence de H — Comme B refusait toujours de permettre à H de vérifier ses registres, la société C a menacé de résilier l'entente — Société C a donné à B un préavis de non-renouvellement conformément à l'entente — À l'échéance du contrat, l'entreprise de B a perdu son effectif, qui constituait la valeur de son entreprise — Majorité de ses représentants des ventes ont été recrutés par l'agence de H — Action déposée par B à l'encontre de la société C et H a été accueillie — Juge de première instance a conclu que la société C avait violé la condition implicite d'agir de bonne foi, que H avait intentionnellement incité à la rupture de contrat et que la société C et H avaient engagé leur responsabilité pour complot civil — Cour d'appel a accueilli l'appel et a rejeté l'action de B — B a formé un pourvoi — Pourvoi accueilli en partie — Pourvoi relatif à la société C accueilli; pourvoi relatif à H rejeté — Juge de première instance n'a pas commis d'erreur donnant lieu à révision lorsqu'elle a tranché la question de la bonne foi — Société C a violé le contrat lorsqu'elle n'a pas agi honnêtement envers B en recourant à la clause de non-renouvellement — Motifs de la juge étayaient amplement la conclusion que la société C n'a pas agi honnêtement envers B pendant la période précédant le recours à la clause de non-renouvellement, en raison de ses propres intentions et du rôle joué par H en sa qualité d'ACP — Demandes contre H ont été à juste titre rejetées — Cour d'appel a eu raison de ne retenir aucune responsabilité pour un délit d'incitation à rupture de contrat ou de complot prévoyant le recours à des moyens illégaux.

C Corp. was in the business of selling education savings plans to investors, through contracts with enrolment directors. B and H were enrolment directors, and were competitors. An enrolment director's agreement governed the relationship between C Corp. and B. C Corp. appointed H as the provincial trading officer (PTO) to review its enrolment directors for compliance with securities laws after the Alberta Securities Commission raised concerns about compliance issues among C Corp.'s enrolment directors. C Corp. outlined its plans to the Commission, and they included B working for H's agency. When B refused to allow H to audit his records, C Corp. threatened to terminate the agreement. C Corp. gave notice of non renewal under the agreement. At the expiry of the contract term, B lost value in his business in his assembled workforce. The majority of B's sales agents were successfully solicited by H's agency.

B's action against C Corp. and H was allowed. The trial judge found C Corp. was in breach of the implied term of good faith, H had intentionally induced breach of contract, and both C Corp. and H were liable for civil conspiracy. The Court of Appeal allowed the appeal and dismissed B's action. B appealed.

Held: The appeal was allowed in part.

Per Cromwell J. (McLachlin C.J.C. and LeBel, Abella, Rothstein, Karakatsanis and Wagner JJ. concurring): The appeal with respect to C Corp. was allowed, and the appeal with respect to H was dismissed. The trial judge's assessment of damages was varied to $87,000 plus interest. The objection to C Corp.'s conduct did not fit within any of the existing situations or relationships in which duties of good faith have been found to exist. It is appropriate to recognize a new common law duty that applies to all contracts as a manifestation of the general organizing principle of good faith, namely a duty of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligations. Under this new general duty of honesty in contractual performance, parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract.

The trial judge did not make a reversible error by adjudicating the issue of good faith. C Corp. breached the agreement when it failed to act honestly with B in exercising the non renewal clause. The trial judge's findings amply supported the conclusion that C Corp. acted dishonestly with B throughout the period leading up to its exercise of the non renewal clause, both with respect to its own intentions and with respect to H's role as PTO. The caims against H were rightly dismissed. The Court of Appeal was correct in finding that there could be no liability for inducing breach of contract or unlawful means conspiracy.

C Corp. was liable for damages calculated on the basis of what B's economic position would have been had C Corp. fulfilled its duty. While the trial judge did not assess damages on that basis, given the different findings in relation to liability, the trial judge made findings that permitted the current Court to do so. These findings permitted damages to be assessed on the basis that if C Corp. had performed the contract honestly, B would have been able to retain the value of his business rather than see it, in effect, expropriated and turned over to H. It was clear from the findings of the trial judge and from the record that the value of the business around the time of non renewal was $87,000.

La société C oeuvrait dans le domaine de la vente aux investisseurs des régimes enregistrés d'épargne-études par l'intermédiaire de directeurs de souscriptions. B et H étaient des directeurs de souscription et étaient en concurrence l'un contre l'autre. La relation entre la société C et B était régie par une entente relative au directeur des souscriptions. La société C a nommé H au poste d'agent commercial provincial (ACP), chargé de la vérification des activités de ses directeurs des souscriptions au plan du respect de la législation en matière de valeurs mobilières après que la Commission des valeurs mobilières de l'Alberta a soulevé des questions au sujet de la conformité des activités des directeurs des souscriptions de la société C. La société C a présenté ses plans à la Commission selon lesquels il était prévu que B travaillerait pour l'agence de H. Comme B refusait toujours de permettre à H de vérifier ses registres, la société C a menacé de résilier l'entente. La société C a donné à B un préavis de non-renouvellement conformément à l'entente. À l'échéance du contrat, l'entreprise de B a perdu son effectif, qui constituait la valeur de son entreprise. La majorité de ses représentants des ventes ont été recrutés par l'agence de H.

L'action déposée par B à l'encontre de la société C et H a été accueillie. La juge de première instance a conclu que la société C avait violé la condition implicite d'agir de bonne foi, que H avait intentionnellement incité à la rupture de contrat et que la société C et H avaient engagé leur responsabilité pour complot civil. La Cour d'appel a accueilli l'appel et a rejeté l'action de B. B a formé un pourvoi.

Arrêt: Le pourvoi a été accueilli en partie.

Cromwell, J. (McLachlin, J.C.C., LeBel, Abella, Rothstein, Karakatsanis, Wagner, JJ., souscrivant à son opinion) : Le pourvoi relatif à la société C a été accueilli, le pourvoi relatif à H a été rejeté. L'appréciation des dommages-intérêts faite par la juge de première instance a été modifiée et fixée à 87 000 $ plus l'intérêt. Le reproche à l'égard de la conduite de la société C ne cadrait dans aucune des situations ou des relations à l'égard desquelles les obligations de bonne foi ont trouvé application. Il convient de reconnaître une nouvelle obligation en common law qui s'applique à tous les contrats en tant que manifestation du principe directeur général de bonne foi, soit une obligation d'exécution honnête qui oblige les parties à faire preuve d'honnêteté l'une envers l'autre dans le cadre de l'exécution de leurs obligations contractuelles. En vertu de cette nouvelle obligation générale d'honnêteté applicable à l'exécution des contrats, les parties ne doivent pas se mentir ni autrement s'induire intentionnellement en erreur au sujet de questions directement liées à l'exécution du contrat.

La juge de première instance n'a pas commis d'erreur donnant lieu à révision lorsqu'elle a tranché la question de la bonne foi. La société C a violé le contrat lorsqu'elle n'a pas agi honnêtement envers B en recourant à la clause de non-renouvellement. Les motifs de la juge étayaient amplement la conclusion que la société C n'a pas agi honnêtement envers B pendant la période précédant le recours à la clause de non-renouvellement, en raison de ses propres intentions et du rôle joué par H en sa qualité d'ACP. Les demandes contre H ont été à juste titre rejetées. La Cour d'appel a eu raison de ne retenir aucune responsabilité pour un délit d'incitation à rupture de contrat ou de complot prévoyant le recours à des moyens illégaux.

La société C était responsable de dommages-intérêts calculés en fonction de la situation financière dans laquelle se serait trouvé B si la société C s'était acquittée de son obligation. Bien que la juge de première instance n'ait pas évalué le montant des dommages-intérêts en fonction de ce critère, compte tenu des conclusions différentes qu'elle a tirées en ce qui a trait à la responsabilité, elle a tiré des conclusions qui permettaient à cette Cour de le faire. Ces conclusions permettaient une évaluation des dommages-intérêts fondée sur le fait que, si la société C avait exécuté honnêtement le contrat, B aurait été en mesure de conserver la valeur de son entreprise plutôt que de s'en voir dépossédé au profit de H. Il ressortait clairement des conclusions de la juge de première instance ainsi que du dossier que la valeur de l'entreprise vers la date du non-renouvellement était de 87 000 $.

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APPEAL by plaintiff from judgment reported at *Bhasin v. Hrynew* (2013), 2013 ABCA 98, 2013 CarswellAlta 822, 544 A.R. 28, 567 W.A.C. 28, 362 D.L.R. (4th) 18, 12 B.L.R. (5th) 175, 84 Alta. L.R. (5th) 68, [2013] 11 W.W.R. 459 (Alta. C.A.), allowing appeal from decision by trial judge allowing plaintiff's action for damages.

POURVOI formé par la partie demanderesse à l'encontre d'un jugement publié à *Bhasin v. Hrynew* (2013), 2013 ABCA 98, 2013 CarswellAlta 822, 544 A.R. 28, 567 W.A.C. 28, 362 D.L.R. (4th) 18, 12 B.L.R. (5th) 175, 84 Alta. L.R. (5th) 68, [2013] 11 W.W.R. 459 (Alta. C.A.), ayant accueilli l'appel interjeté à l'encontre de la décision de la juge de première instance d'accueillir l'action en dommages-intérêts de la partie demanderesse.

***Cromwell J.* (McLachlin C.J.C. and LeBel, Abella, Rothstein, Karakatsanis and Wagner JJ. concurring):**

I. Introduction

1 The key issues on this appeal come down to two, straightforward questions: Does Canadian common law impose a duty on parties to perform their contractual obligations honestly? And, if so, did either of the respondents breach that duty? I would answer both questions in the affirmative. Finding that there is a duty to perform contracts honestly will make the law more certain, more just and more in tune with reasonable commercial expectations. It will also bring a measure of justice to the appellant, Mr. Bhasin, who was misled and lost the value of his business as a result.

II. Facts and Judicial History

Overview and Issues

2 The appellant, Mr. Bhasin, through his business Bhasin & Associates, was an enrollment director for Canadian American Financial Corp. ("Can-Am") beginning in 1989. The relationship between Mr. Bhasin and Can-Am soured in 1999 and ultimately Can-Am decided not to renew the dealership agreement with him. The litigation leading to this appeal ensued.

3 Can-Am markets education savings plans ("ESPs") to investors through retail dealers, known as enrollment directors, such as Mr. Bhasin. It pays the enrollment directors compensation and bonuses for selling ESPs. The enrollment directors are in effect small business owners and the success of their businesses depends on them building a sales force. It took Mr. Bhasin approximately 10 years to build his sales force, but his business thrived and Can-Am gave him numerous awards and prizes recognizing him as one of their top enrollment directors in Canada: 2011 ABQB 637, 544 A.R. 28 (Alta. Q.B.), at paras. 51, 238 and 474.

4 An enrollment director's agreement that took effect in 1998 governed the relationship between Can-Am and Mr. Bhasin. (That Agreement replaced a previous agreement of an indefinite term that had governed their relationship since the outset in 1989.) The Agreement was a commercial dealership agreement, not a franchise agreement. There was no franchise fee and it was not covered by the statutory duty of fair dealing such as that provided for in s. 7 of the *Franchises Act*, R.S.A. 2000, c. F-23.

5 That said, there were some features of the 1998 Agreement that are similar to provisions typically found in franchise agreements. Mr. Bhasin was obliged to sell Can-Am investment products exclusively and owed it a fiduciary duty. Can-Am owned the client lists, was responsible for branding and implemented central policies that applied to all enrollment

directors: see cls. 4.1, 5.2, 5.3 and 4.7. Mr. Bhasin could not sell, transfer, or merge his operation without Can-Am's consent, which was not to be withheld unreasonably: see cls. 4.5 and 11.4.

6 The term of the contract was three years. Clauses 8.3 and 8.4 allowed termination on short notice for misconduct or other cause. Clause 3.3 — the provision at the centre of this case — provided that the contract would automatically renew at the end of the three-year term unless one of the parties gave six months' written notice to the contrary.

7 Mr. Hrynew, one of the respondents and another enrollment director, was a competitor of Mr. Bhasin and there was considerable animosity between them: trial reasons, at para. 461. The trial judge found, in effect, that Mr. Hrynew pressured Can-Am not to renew its Agreement with Mr. Bhasin and that Can-Am dealt dishonestly with Mr. Bhasin and ultimately gave in to that pressure.

8 When Mr. Hrynew moved his agency to Can-Am from one of its competitors many years before the events in question, Can-Am promised him that he would be given consideration for mergers that would take place and he in fact merged with other agencies in Calgary after joining Can-Am: trial reasons, at para. 238. He was in a strong position with Can-Am because he had the largest agency in Alberta and a good working relationship with the Alberta Securities Commission which regulated Can-Am's business: para. 284.

9 Mr. Hrynew wanted to capture Mr. Bhasin's lucrative niche market around which he had built his business: trial reasons, at para. 303. Mr. Hrynew personally approached Mr. Bhasin to propose a merger of their agencies on numerous occasions: para. 238. He also actively encouraged Can-Am to force the merger and made "veiled threats" that he would leave if no merger took place: para. 282; see also paras. 251 and 287. The trial judge found that the proposed "merger" was in effect a hostile takeover of Mr. Bhasin's agency by Mr. Hrynew: para. 240. Mr. Bhasin steadfastly refused to participate in such a merger: para. 247.

10 The Alberta Securities Commission raised concerns about compliance issues among Can-Am's enrollment directors. In late 1999, the Commission required Can-Am to appoint a single provincial trading officer ("PTO") to review its enrollment directors for compliance with securities laws: trial reasons, at paras. 149, 152 and 160. Can-Am appointed Mr. Hrynew to that position in September of that year. The role required him to conduct audits of Can-Am's enrollment directors. Mr. Bhasin and Mr. Hon, another enrollment director, objected to having Mr. Hrynew, a competitor, review their confidential business records: paras. 189-196.

11 Can-Am became worried that the Commission might revoke its licence and, in 1999 and 2000, it had many discussions with the Commission about compliance. During those discussions, it was clear that Can-Am was considering a restructuring of its agencies in Alberta that involved Mr. Bhasin. In June 2000, Can-Am outlined its plans to the Commission and they included Mr. Bhasin working for Mr. Hrynew's agency. The trial judge found that this plan had been formulated before June 2000: trial reasons, at para. 256. None of this was known by Mr. Bhasin: paras. 243-46.

12 In fact, Can-Am repeatedly misled Mr. Bhasin by telling him that Mr. Hrynew, as PTO, was under an obligation to treat the information confidentially and that the Commission had rejected a proposal to have an outside PTO, neither of which was true: trial reasons at para. 195. It also responded equivocally when Mr. Bhasin asked in August 2000 whether the merger was a "done deal": para. 247. When Mr. Bhasin continued to refuse to allow Mr. Hrynew to audit his records, Can-Am threatened to terminate the 1998 Agreement and in May 2001 gave notice of non-renewal under the Agreement: paras. 207-11.

13 At the expiry of the contract term, Mr. Bhasin lost the value in his business in his assembled workforce. The majority of his sales agents were successfully solicited by Mr. Hrynew's agency. Mr. Bhasin was obliged to take less remunerative work with one of Can-Am's competitors.

14 Mr. Bhasin sued Can-Am and Mr. Hrynew. Moen J. in the Alberta Court of Queen's Bench found that it was an implied term of the contract that decisions about whether to renew the contract would be made in good faith. The

court held that the corporate respondent was in breach of the implied term of good faith, Mr. Hrynew had intentionally induced breach of contract, and the respondents were liable for civil conspiracy.

15 The trial judge found that Can-Am acted dishonestly with Mr. Bhasin throughout the events leading up to the non-renewal: it misled him about its intentions with respect to the merger and about the fact that it had already proposed the new structure to the Commission; it did not communicate to him that the decision was already made and final, even though he asked; and it did not communicate with him that it was working closely with Mr. Hrynew to bring about a new corporate structure with Hrynew's being the main agency in Alberta. The trial judge also found that, had Can-Am acted honestly, Mr. Bhasin could have "governed himself accordingly so as to retain the value in his agency": para. 258.

16 The Alberta Court of Appeal allowed the respondents' appeal and dismissed Mr. Bhasin's lawsuit. The court found his pleadings to be insufficient and held that the lower court erred by implying a term of good faith in the context of an unambiguous contract containing an entire agreement clause: *Bhasin v. Hrynew*, 2013 ABCA 98, 84 Alta. L.R. (5th) 68 (Alta. C.A.).

17 The appeal raises four issues:

(a) Did Mr. Bhasin properly plead breach of the duty of good faith?

(b) Did Can-Am owe Mr. Bhasin a duty of good faith? If so, did it breach that duty?

(c) Are the respondents liable for the torts of inducing breach of contract or civil conspiracy?

(d) If there was a breach, what is the appropriate measure of damages?

III. Analysis

A. Did Mr. Bhasin Properly Plead Breach of the Duty of Good Faith?

18 The Court of Appeal held that Mr. Bhasin had not properly pleaded the good faith issue and that the trial judge had therefore erred in considering it. Mr. Bhasin contests this conclusion, while the respondents support it. I agree with Mr. Bhasin.

19 The allegations in the statement of claim clearly put the questions of improper purpose and dishonesty in issue. These facts are sufficient to put Can-Am's good faith in issue. The question of whether this conduct amounted to a breach of the duty of good faith is a legal conclusion that did not need to be pleaded separately. The defendants did not move to strike the pleadings or seek particulars of the allegation of wrongful termination in the statement of claim. Good faith was a live issue that was fully canvassed in a lengthy trial: A.F., at paras. 92-94. Written submissions by both parties at trial referred to the good faith issue and even in his opening at trial, Mr. Bhasin's counsel raised the issue of good faith.

20 The trial judge held that any deficiency in the pleadings did not cause prejudice to the respondents: paras. 23 and 48. This is an assessment she was uniquely positioned to make and her conclusion ought to be treated with deference on appeal. The good faith issue was fully argued in and addressed by the Court of Appeal and has been fully argued on the merits in this Court.

21 In my view, the trial judge did not make a reversible error by adjudicating the issue of good faith and we should address the merits of that issue.

B. Did Can-Am Owe Mr. Bhasin a Duty of Good Faith?

(1) Decisions and Positions of the Parties

(a) Decisions

22 The trial judge accepted Mr. Bhasin's position that there was a duty of good faith in this case and that it had been breached. In brief, her reasoning was as follows.

23 First, the trial judge decided that the 1998 Agreement was a type of agreement which as a matter of law requires good faith performance. She recognized that the 1998 Agreement did not fall within any of the existing categories of contract, such as employment, insurance and franchise agreements, which have been held to require good faith performance. She concluded, however, that the Agreement was analogous to a franchise or employment contract, and so by analogy to these cases, she implied a term of good faith performance as a matter of law. The contract was not balanced from its inception and the relationship placed the enrollment director in a position of inherent and predictable vulnerability: paras. 67-86.

24 Second and in the alternative, the trial judge held that a term of good faith performance should be implied based on the intentions of the parties in order to give business efficacy to the agreement. She concluded that "[w]hen one considers the whole of the relationship ... it is clear that the parties had to operate in good faith and there was a requirement of fairness between them. In other words, good faith was necessary to give business efficacy to the whole 1998 Agreement": para. 101.

25 The 1998 Agreement contained an "entire agreement clause" stating that there were no "agreements, express, implied or statutory, other than expressly set out" in it: cl. 11.2. The trial judge held, however, that this clause did not preclude the implication of a duty of good faith. The parties, she reasoned, cannot rely on exclusion clauses to avoid contractual obligations where there is an imbalance of power and that courts refuse to let parties shelter under entire agreement clauses where it would be unjust or inequitable to do so: paras. 116-18.

26 Turning to the issue of breach, the trial judge found that Can-Am had breached the agreement, first by requiring Mr. Bhasin to submit to an audit by Mr. Hrynew and to provide the latter with access to his business records, and second by exercising the non-renewal clause in a dishonest and misleading manner and for an improper purpose. The non-renewal clause was not intended to permit Can-Am to force a merger of the Bhasin and Hrynew agencies, but that was the purpose for which Can-Am exercised this power: para. 261. The trial judge also found both respondents liable for unlawful means conspiracy and found Mr. Hrynew liable for inducing Can-Am's breach of its contract with Mr. Bhasin.

27 The Court of Appeal reversed and held that there had been no breach of contract. The duty of good faith in employment contracts could not be extended by analogy to other types of contract. In any event, the duty of good faith in the employment context is limited to the manner of termination and does not include reasons for non-renewal: C.A. reasons, at paras. 27 and 31. Nor was this a circumstance in which a term could be implied because it was so obvious it was not thought necessary to mention or was necessary to make the contract work: para. 32. Even if there were an implied duty of good faith in this case, the impugned conduct concerned the non-renewal of a contract, which occurs on expiry, unlike a termination clause: para. 31.

28 Moreover, the Court of Appeal held that a term cannot be implied where it goes against an express term of the contract. Here, the parties did not intend a perpetual contract, since they included a term allowing either party to unilaterally trigger its expiration prior to the end of each three-year term. The trial judge's approach was inconsistent with the non-renewal provision of the contract. The motive for triggering expiration was not restricted under the Agreement. The implication of a term of good faith also violated the entire agreement clause. The court held that the evidence of assurances given by Can-Am as to how the non-renewal power would be exercised fell afoul of the parol evidence rule and should not have been considered. Since the Court of Appeal held there was no breach of contract, the basis for the claims in unlawful means conspiracy and inducing breach of contract also disappeared.

(b) Positions of the Parties

29 Mr. Bhasin advances two related positions on appeal. His broad submission is that the Court should recognize a general duty of good faith in contract. The duty arises where the agreement gives the defendant the power to unilaterally

defeat a legitimate contractual objective of the plaintiff and it does not clearly allow the defendant to exercise its power without regard for that objective: A.F., at para. 51. This duty of good faith prevents conduct which, while consonant with the letter of a contract, exhibits dishonesty, ill will, improper motive or similar departures from reasonable business expectations. Mr. Bhasin contends that common law in Canada is increasingly isolated as other jurisdictions embrace a greater role for good faith in contract law: A.F., at paras. 27-32. The recognition of a general duty of good faith would constitute an incremental advance in the law, given the numerous specific situations that already give rise to a duty of good faith. Mr. Bhasin relies on the findings of the trial judge that the respondents improperly and dishonestly used its non-renewal right to compel Mr. Bhasin to merge with his competitor. Mr. Bhasin contends that the respondents had no legitimate business reason for not renewing the contract. He also says that the entire agreement clause should be construed narrowly, and that express language is needed for such a clause to derogate from a duty of good faith: A.F., at para. 83.

30 Mr. Bhasin's second position, emphasized in oral argument, is that the Court should at least recognize a duty of honest performance of contractual obligations: transcript, at pp. 8, 10 and 24. Mr. Bhasin relies on the trial judge's findings that Can-Am acted dishonestly towards Mr. Bhasin throughout the period leading up to the non-renewal. It repeatedly lied to him about the nature of the organizational changes required by the Alberta Securities Commission, the nature of the audits that were to be carried out by Mr. Hrynew, and was dishonest about its intention to force him out: trial reasons, at paras. 195, 221, 246-47 and 267.

31 Unsurprisingly, the respondents see things very differently. While they accept that good faith plays a role in Canadian contract law, they submit that this role is much more modest than Mr. Bhasin suggests. They say that such a duty arises only in certain classes of contract, such as employment contracts, and in contracts involving discretionary powers: R.F., at para. 52. In the employment context, the duty applies only to the manner in which a contract is terminated. The contract in this case was negotiated between commercial parties to whom the policy considerations underlying employment law doctrine do not apply. Mr. Bhasin is alleging a right to a perpetual, or at least indefinite, contract with the respondents. The contract in this case could not be said to be discretionary, because it provided simply that on six months notice either party could terminate the Agreement. The respondents submit that there is no ambiguity in the wording of the non-renewal clause of the contract and so there is no basis for implying other terms or for relying on extrinsic evidence of the parties' intentions. The entire agreement clause specifically precluded the implication of any terms other than the express terms of the contract.

(2) Analysis

(a) Overview

32 The notion of good faith has deep roots in contract law and permeates many of its rules. Nonetheless, Anglo-Canadian common law has resisted acknowledging any generalized and independent doctrine of good faith performance of contracts. The result is an "unsettled and incoherent body of law" that has developed "piecemeal" and which is "difficult to analyze": Ontario Law Reform Commission ("OLRC"), *Report on Amendment of the Law of Contract* (1987), at p. 169. This approach is out of step with the civil law of Quebec and most jurisdictions in the United States and produces results that are not consistent with the reasonable expectations of commercial parties.

33 In my view, it is time to take two incremental steps in order to make the common law less unsettled and piecemeal, more coherent and more just. The first step is to acknowledge that good faith contractual performance is a general organizing principle of the common law of contract which underpins and informs the various rules in which the common law, in various situations and types of relationships, recognizes obligations of good faith contractual performance. The second is to recognize, as a further manifestation of this organizing principle of good faith, that there is a common law duty which applies to all contracts to act honestly in the performance of contractual obligations.

34 In my view, taking these two steps is perfectly consistent with the Court's responsibility to make incremental changes in the common law when appropriate. Doing so will put in place a duty that is just, that accords with the

reasonable expectations of commercial parties and that is sufficiently precise that it will enhance rather than detract from commercial certainty.

(b) Good Faith as a General Organizing Principle

(i) Background

35 The doctrine of good faith traces its history to Roman law and found acceptance in earlier English contract law. For example, Lord Northington wrote in *Aleyn v. Belchier* (1758), 1 Eden 132, 28 E.R. 634 (Eng. Ch.), at p. 138, cited in *Mills v. Mills* (1938), 60 C.L.R. 150 (Australia H.C.), at p. 185, that "[n]o point is better established than that, a person having a power, must execute it *bona fide* for the end designed, otherwise it is corrupt and void." Similarly, Lord Kenyon wrote in *Mellish v. Motteux* (1792), Peake 156, 170 E.R. 113 (Eng. K.B.), "in contracts of all kinds, it is of the highest importance that courts of law should compel the observance of honesty and good faith": p. 157. In *Carter v. Boehm* (1766), 3 Burr. 1905, 97 E.R. 1162 (Eng. K.B.), at p. 1910, Lord Mansfield stated that good faith is a principle applicable to all contracts: see also *Herbert v. Mercantile Fire Insurance Co.* (1878), 43 U.C.Q.B. 384 (Ont. Q.B.); R. Powell, "Good Faith in Contracts" (1956), 9 Curr. Legal Probs. 16.

36 However, these broad pronouncements have been, for the most part, restricted by subsequent jurisprudence to specific types of contracts and relationships, such as insurance contracts, leaving unclear the role of the broader principle of good faith in the modern Anglo-Canadian law of contracts: *Chitty on Contracts* (31st ed. 2012), at para. 1-039; W. P. Yee, "Protecting Parties' Reasonable Expectations: A General Principle of Good Faith" (2001), 1 *O.U.C.L.J.* 195, at p. 195; E. P. Belobaba, "Good Faith in Canadian Contract Law", in *Special Lectures of the Law Society of Upper Canada 1985 — Commerical Law: Recent Developments and Emerging Trends* (1985), 73, at p. 75. One leading Canadian contracts scholar went so far as to say that the common law has taken a "kind of perverted pride" in the absence of any general notion of good faith, as if accepting that notion "would be admitting to the presence of some kind of embarrassing social disease": J. Swan, "Whither Contracts: A Retrospective and Prospective Overview", in *Special Lectures of the Law Society of Upper Canada 1984 — Law in Transition: Contracts* (1984), 125, at p. 148.

37 This Court has not examined whether there is a general duty of good faith contractual performance. However, there has been an active debate in other courts and among scholars for decades over whether there is, or should be, a general or "stand-alone" duty of good faith in the performance of contracts. Canadian courts have reached different conclusions on this point.

38 Some suggest that there is a general duty of good faith: *Gateway Realty Ltd. v. Arton Holdings Ltd.* (1991), 106 N.S.R. (2d) 180 (N.S. T.D.), aff'd on narrower grounds (1992), 112 N.S.R. (2d) 180 (N.S. C.A.); *McDonald's Restaurants of Canada Ltd. v. British Columbia* (1997), 29 B.C.L.R. (3d) 303 (B.C. C.A.), at para. 99; *Crawford v. New Brunswick (Agricultural Development Board)* (1997), 192 N.B.R. (2d) 68 (N.B. C.A.), at paras. 7-8. They see a broad role for good faith as an implied term in all contracts that establishes minimum standards of acceptable commercial behaviour. As Kelly J. put it in *Gateway Realty*, at para. 38:

> The law requires that parties to a contract exercise their rights under that agreement honestly, fairly and in good faith. This standard is breached when a party acts in a bad faith manner in the performance of its rights and obligations under the contract. "Good faith" conduct is the guide to the manner in which the parties should pursue their mutual contractual objectives. Such conduct is breached when a party acts in "bad faith" — a conduct that is contrary to community standards of honesty, reasonableness or fairness.

39 Other courts are of the view that there exists no such general duty of good faith in all contracts: *Transamerica Life Canada Inc. v. ING Canada Inc.* (2003), 68 O.R. (3d) 457 (Ont. C.A.), at para. 54; *Mesa Operating Ltd. Partnership v. Amoco Canada Resources Ltd.* (1994), 149 A.R. 187 (Alta. C.A.), at paras. 15-19, *per* Kerans J.A., *dubitante*; *Barclays Bank PLC v. Metcalfe & Mansfield Alternative Investments VII Corp.*, 2013 ONCA 494, 365 D.L.R. (4th) 15 (Ont. C.A.), at para. 131; see G. R. Hall, *Canadian Contractual Interpretation Law* (2nd ed. 2012), at pp. 338-46. The detractors of

such a general duty of good faith have accepted a limited role for good faith in certain contexts but have held that it would create commercial uncertainty and undermine freedom of contract to recognize a general duty of good faith that would permit courts to interfere with the express terms of a contract.

40 This Court ought to develop the common law to keep in step with the "dynamic and evolving fabric of our society" where it can do so in an incremental fashion and where the ramifications of the development are "not incapable of assessment": *R. v. Salituro*, [1991] 3 S.C.R. 654 (S.C.C.), at p. 670; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210 (S.C.C.), at para. 93; see also *Watkins v. Olafson*, [1989] 2 S.C.R. 750 (S.C.C.), at pp. 760-64; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 (S.C.C.), at para. 85; *Pepsi-Cola Canada Beverages (West) Ltd. v. R.W.D.S.U., Local 558*, 2002 SCC 8, [2002] 1 S.C.R. 156 (S.C.C.); *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473 (S.C.C.); *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640 (S.C.C.), at para. 46. This is even more appropriate where, as here, what is contemplated is not the reversal of some settled rule, but a development directed to bringing greater certainty and coherence to a complex and troublesome area of the common law.

41 As I see it, the developments that I propose are desirable as a result of several considerations. First, the current Canadian common law is uncertain. Second, the current approach to good faith performance lacks coherence. Third, the current law is out of step with the reasonable expectations of commercial parties, particularly those of at least two major trading partners of common law Canada — Quebec and the United States: see, e.g., Hall, at p. 347. While the developments which I propose will not completely address these problems, they will bring a measure of coherence and predictability to the law and will bring the law closer to what reasonable commercial parties would expect it to be.

(ii) Survey of the Current State of the Common Law

42 Anglo-Canadian common law has developed a number of rules and doctrines that call upon the notion of good faith in contractual dealings; it is a concept that underlies many elements of modern contract law: S. M. Waddams, *The Law of Contracts* (2010), at para. 550; J. D. McCamus *The Law of Contracts* (2nd ed. 2012), at pp. 835-38; OLRC, at p. 165; Belobaba, at pp. 75-76; J. F. O'Connor, *Good Faith in English Law* (1990), at pp. 17-49; J. Steyn, "Contract Law: Fulfilling the Reasonable Expectations of Honest Men" (1997), 113 *Law Q. Rev.* 433. The approach, not unfairly, has been characterized as developing "piecemeal solutions in response to demonstrated problems": *Interfoto Library Ltd. v. Stiletto Visual Programmes Ltd.* (1987), [1989] 1 Q.B. 433 (Eng. C.A.), at p. 439, *per* Bingham L.J. (as he then was). Thus we see, for example, that good faith notions have been applied to particular types of contracts, particular types of contractual provisions and particular contractual relationships. It also underlies doctrines that explicitly deal with fairness in contracts, such as unconscionability, and plays a role in interpreting and implying contractual terms. The difficulty with this "piecemeal" approach, however, is that it often fails to take a consistent or principled approach to similar problems. A brief review of the current landscape of good faith will show the extent to which this is the case.

43 Considerations of good faith are apparent in doctrines that expressly consider the fairness of contractual bargains, such as unconscionability. This doctrine is based on considerations of fairness and preventing one contracting party from taking undue advantage of the other: G. H. L. Fridman, *The Law of Contract in Canada* (6th ed. 2011), at pp. 329-30; E. Peden, "When Common Law Trumps Equity: the Rise of Good Faith and Reasonableness and the Demise of Unconscionability" (2005), 21 *J.C.L.* 226; Belobaba, at p. 86; S. M. Waddams, "Good Faith, Unconscionability and Reasonable Expectations" (1995), 9 J.C.L. 55.

44 Good faith also plays a role in the law of implied terms, particularly with respect to terms implied by law. Terms implied by law redress power imbalances in certain classes of contracts such as employment, landlord-lessee, and insurance contracts: *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299 (S.C.C.), at p. 457, *per* McLachlin J.; see also *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 (S.C.C.), *per* McLachlin J., concurring. The implication of terms plays a functionally similar role in common law contract law to the doctrine of good faith in civil law jurisdictions by filling in gaps in the written agreement of the parties: *Chitty on Contracts*, at para. 1-051. In *Mesa Operating*, the Alberta Court of Appeal implied a term that a power of pooling properties for the purpose of determining

royalty payments be exercised reasonably. The court implied this term in order to give effect to the intentions of the parties rather than as a requirement of good faith, but Kerans J.A. stated that "[t]he rule that governs here can, therefore, be expressed much more narrowly than to speak of good faith, although I suspect it is in reality the sort of thing some judges have in mind when they speak of good faith": para. 22. Many other examples may be found in Waddams, *The Law of Contracts*, at paras. 499-506.

45 Considerations of good faith are also apparent in contract interpretation: *Chitty on Contracts*, at para. 1-050; Hall, at p. 347. The primary object of contractual interpretation is of course to give effect to the intentions of the parties at the time of contract formation. However, considerations of good faith inform this process. Parties may generally be assumed to intend certain minimum standards of conduct. Further, as Lord Reid observed in *L. Schuler A.G. v. Wickman Machine Tool Sales Ltd.* (1973), [1974] A.C. 235 (U.K. H.L.), at p. 251, "[t]he more unreasonable the result the more unlikely it is that the parties can have intended it". As A. Swan and J. Adamski put it, the duty of good faith "is not an externally imposed requirement but inheres in the parties' relation": *Canadian Contract Law* (3rd ed. 2012), at §§ 8.134 to 8.146.

46 Good faith also appears in numerous contexts in a more explicit form. The concept of "good faith" is used in hundreds of statutes across Canada, including statutory duties of good faith and fair dealing in franchise legislation and good faith bargaining in labour law: S. K. O'Byrne, "Good Faith in Contractual Performance: Recent Developments" (1995), 74 *Can. Bar Rev.* 70, at p. 71.

47 There have been many attempts to bring a measure of coherence to this piecemeal accretion of appeals to good faith: see, among many others, McCamus, at pp. 835-68; S. K. O'Byrne, "The Implied Term of Good Faith and Fair Dealing: Recent Developments" (2007), 86 *Can. Bar. Rev.* 193, at pp. 196-204; Waddams, *The Law of Contracts*, at paras. 494-508; R. S. Summers, "'Good Faith' in General Contract Law and the Sales Provisions of the Uniform Commercial Code" (1968), 54 Va. L. Rev. 195; S. J. Burton, "Breach of Contract and the Common Law Duty to Perform in Good Faith" (1980), 94 *Harv. L. Rev.* 369. By way of example, Professor McCamus has identified three broad types of situations in which a duty of good faith performance of some kind has been found to exist: (1) where the parties must cooperate in order to achieve the objects of the contract; (2) where one party exercises a discretionary power under the contract; and (3) where one party seeks to evade contractual duties (pp. 840-56; *CivicLife.com Inc. v. Canada (Attorney General)* (2006), 215 O.A.C. 43 (Ont. C.A.), at paras. 49-50).

48 While these types of cases overlap to some extent, they provide a useful analytical tool to appreciate the current state of the law on the duty of good faith. They also reveal some of the lack of coherence in the current approach. It is often unclear whether a good faith obligation is being imposed as a matter of law, as a matter of implication or as a matter of interpretation. Professor McCamus notes:

> Although the line between the two types of implication is difficult to draw, it may be realistic to assume that implied duties of good faith are likely, on occasion at least, to slide into the category of legal incidents rather than mere presumed intentions. Certainly, it would be difficult to defend the implication of terms on each of the cases considered here on the basis of the traditional business efficiency or officious bystander test. In the control of contractual discretion cases, for example, it may be more realistic to suggest that the implied limitation on the exercise of the discretion is intended to give effect to the "reasonable expectations of the parties." [pp. 865-66]

49 The first type of situation (contracts requiring the cooperation of the parties to achieve the objects of the contract) is reflected in the jurisprudence of this Court. In *Dynamic Transport Ltd. v. O.K. Detailing Ltd.*, [1978] 2 S.C.R. 1072 (S.C.C.), the parties to a real estate transaction failed to specify in the purchase-sale agreement which party was to be responsible for obtaining planning permission for a subdivision of the property. By law, the vendor was the only party capable of obtaining such permission. The Court held that the vendor was under an obligation to use reasonable efforts to secure the permission, or as Dickson J. put it, "[t]he vendor is under a duty to act in good faith and to take all reasonable steps to complete the sale": p. 1084. It is not completely clear whether this duty was imposed as a matter of law or was implied based on the parties' intentions: see p. 1083; see also *Gateway Realty* and *CivicLife.com*.

50 *Mitsui & Co. (Canada) Ltd. v. Royal Bank*, [1995] 2 S.C.R. 187 (S.C.C.), is an example of the second type of situation (exercise of contractual discretion). The lease of a helicopter included an option to buy at the "reasonable fair market value of the helicopter as established by Lessor": para. 2. This Court held, at para. 34, that, "[c]learly, the lessor is not in a position, by virtue of clause 32, to make any offer that it may feel is appropriate. It is contractually bound to act in good faith to determine the reasonable fair market value of the helicopters, which is the price that the parties had initially agreed would be the exercise price of the option." The Court did not discuss the basis for implying the term, but suggested that in the absence of a reasonableness requirement, the option would be a mere agreement to agree and thus would be unenforceable, which means that the implication of the term was necessary to give business efficacy to the agreement.

51 This Court's decision in *Freedman v. Mason*, [1958] S.C.R. 483 (S.C.C.), falls in the third type of situation in which a duty of good faith arises (where a contractual power is used to evade a contractual duty). In that case, the vendor in a real estate transaction regretted the bargain he had made. He then sought to repudiate the contract by failing to convey title in fee simple because he claimed his wife would not provide a bar of dower. The issue was whether he could take advantage of a clause permitting him to repudiate the transaction in the event that he was "unable or unwilling" to remove this defect in title even though he had made no efforts to do so by trying to obtain the bar of dower. Judson J. held that the clause did not "enable a person to repudiate a contract for a cause which he himself has brought about" or permit "a capricious or arbitrary repudiation": p. 486. On the contrary, "[a] vendor who seeks to take advantage of the clause must exercise his right reasonably and in good faith and not in a capricious or arbitrary manner": p. 487.

52 The jurisprudence is not always very clear about the source of the good faith obligations found in these cases. The categories of terms implied as a matter of law, terms implied as a matter of intention and terms arising as a matter of interpretation sometimes are blurred or even ignored, resulting in uncertainty and a lack of coherence at the level of principle.

53 Apart from these types of situations in which a duty of good faith arises, common law Canadian courts have also recognized that there are classes of relationships that call for a duty of good faith to be implied by law.

54 For example, this court confirmed that there is a duty of good faith in the employment context in *Keays v. Honda Canada Inc.*, 2008 SCC 39, [2008] 2 S.C.R. 362 (S.C.C.). Mr. Keays was diagnosed with chronic fatigue syndrome and was frequently absent from work. Honda grew concerned with the frequency of the absences. It ordered Mr. Keays to undergo an examination by a doctor chosen by the employer, required him to provide a doctor's note for any absences, and discouraged him from retaining outside counsel. The majority held that in all employment contracts there was an implied term of good faith governing the manner of termination. In particular, the employer should not engage in conduct that is "unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive" when dismissing an employee: para. 57, citing *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 (S.C.C.), at para. 98. Good faith in this context did not extend to the employer's reasons for terminating the contract of employment because this would undermine the right of an employer to determine the composition of its workforce: *Wallace*, at para. 76.

55 This Court has also affirmed the duty of good faith which requires an insurer to deal with its insured's claim fairly, both with respect to the manner in which it investigates and assesses the claim and to the decision whether or not to pay it: *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, [2006] 2 S.C.R. 3 (S.C.C.), at para. 63, citing *702535 Ontario Inc. v. Non-Marine Underwriters, Lloyd's London, England* (2000), 184 D.L.R. (4th) 687 (Ont. C.A.), at para. 29. The breach of this duty may support an award of punitive damages: *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595 (S.C.C.). This duty of good faith is also reciprocal: the insurer must not act in bad faith when dealing with a claim, which is typically made by someone in a vulnerable situation, and the insured must act in good faith by disclosing facts material to the insurance policy (para. 83, citing *Andrusiw v. Aetna Life Insurance Co. of Canada* (2001), 289 A.R. 1 (Alta. Q.B.), at paras. 84-85, *per* Murray J.).

56 This Court has also recognized that a duty of good faith, in the sense of fair dealing, will generally be implied in fact in the tendering context. When a company tenders a contract, it comes under a duty of fairness in considering the bids submitted under the tendering process, as a result of the expense incurred by parties submitting these bids: *Martel Building Ltd. v. R.*, 2000 SCC 60, [2000] 2 S.C.R. 860 (S.C.C.), at para. 88; see also *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619 (S.C.C.); *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69 (S.C.C.), at paras. 58-59; A. C. McNeely, *Canadian Law of Competitive Bidding and Procurement* (2010), at pp. 245-54.

57 Developments in the United Kingdom and Australia point to enhanced attention to the notion of good faith, mitigated by reluctance to embrace it as a stand-alone doctrine. Good faith in contract performance has received increasing prominence in English law, despite its "traditional ... hostility" to the concept: *Yam Seng Pte Ltd. v. International Trade Corp Ltd.*, [2013] EWHC 111, [2013] 1 All E.R. (Comm) 1321 (Eng. Q.B.), at para. 123, citing E. McKendrick, *Contract Law* (9th ed. 2011), at pp. 221-22; see also *Chitty on Contracts*, at para. 1-039. In *Yam Seng*, Leggatt J. held that a number of specific duties embodying good faith can be implied according to the presumed intentions of the parties according to the traditional approach for implying terms: para. 131. Leggatt J. identified a number of these implied duties, including honesty, fidelity to the parties' bargain, cooperation, and fair dealing: paras. 135-50. Leggatt J. stated that "[a] paradigm example of a general norm which underlies almost all contractual relationships is an expectation of honesty. That expectation is essential to commerce, which depends critically on trust": para. 135; see D. Campbell, "Good Faith and the Ubiquity of the 'Relational' Contract'" (2014), 77 *Mod. L. Rev.* 475. The Court of Appeal considered the *Yam Seng* decision in *Mid Essex Hospital Services NHS Trust v. Compass Group UK and Ireland Ltd.*, [2013] EWCA Civ 200 (Eng. C.A.) (BAILII), where it confirmed that good faith was not a general principle of English law, but that it could be an implied term in certain categories of cases: paras. 105 and 150.

58 Australian courts have also moved towards a greater role for good faith in contract performance: *Cheshire and Fifoot's Law of Contract*, (9th Australian ed. 2008), at 10.43 to 10.47. The duty of good faith in its modern form was recognized by Priestley J.A. in *Renard Constructions (ME) Pty. Ltd. v. Canada (Minister of Public Works)* (1992), 26 N.S.W.L.R. 234 (New South Wales C.A.). There is no generally applicable duty of good faith, but one will be implied into contracts in certain circumstances. The duty of good faith can be implied as a matter of law or as a matter of fact, although the cases are not always clear on the basis on which the term is being implied. Australian courts have taken a broad view of what constitutes good faith: see, e.g., *Burger King Corp. v. Hungry Jacks's Pty Ltd.*, [2001] NSWCA 187 (New South Wales C.A.) (AustLII). The law of good faith performance in Australia is still developing and remains unsettled: E. Peden, "Good faith in the performance of contract law" (2004), 42: 9 *L.S.J.* 64, at p. 64. However, it is clear that the duty of good faith requires adherence to standards of honest conduct: A. Mason, "Contract, Good Faith and Equitable Standards in Fair Dealing" (2000), 116 *Law Q. Rev.* 66, at p. 76; *Burger King*, at paras. 171 and 189.

(iii) The Way Forward

59 This selective survey supports the view that Canadian common law in relation to good faith performance of contracts is piecemeal, unsettled and unclear: Belobaba; O'Byrne, "Good Faith in Contractual Performance", at p. 95; B. J. Reiter, "Good Faith in Contracts" (1983), 17 *Val. U.L. Rev.* 705, at pp. 711-12. It also shows that in Canada, as well as in the United Kingdom and Australia, there is increasing attention to the notion of good faith, particularly in the area of contractual performance. Opponents of any general obligation of good faith prefer the traditional, organic development of solutions to address particular problems as they arise: see, e.g., M. G. Bridge, "Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?" (1984), 9 *Can. Bus. L.J.* 385; D. Clark, "Some Recent Developments in the Canadian Law of Contracts" (1993), 14 *Advocates' Q.* 435, at pp. 436 and 440. However, foreclosing some incremental development of the law at the level of principle would go beyond what prudent caution requires and evidence an almost "perverted pride" — to use Swan's term — in the law's failings.

60 Commercial parties reasonably expect a basic level of honesty and good faith in contractual dealings. While they remain at arm's length and are not subject to the duties of a fiduciary, a basic level of honest conduct is necessary to the

proper functioning of commerce. The growth of longer term, relational contracts that depend on an element of trust and cooperation clearly call for a basic element of honesty in performance, but, even in transactional exchanges, misleading or deceitful conduct will fly in the face of the expectations of the parties: see Swan and Adamski, at §1.24.

61 The fact that commercial parties expect honesty on the part of their contracting partners can also be seen from the fact that it was the American Bar Association's Section of Corporation, Banking and Business Law that urged the adoption of "honesty in fact" in the original drafting of the Uniform Commercial Code ("U.C.C."): E. A. Farnsworth, "Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code" (1963), 30 *U. Chicago L. Rev.* 666, at p. 673. Moreover, empirical research suggests that commercial parties do in fact expect that their contracting parties will conduct themselves in good faith: see, e.g., S. Macaulay, "Non-contractual Relations in Business: A Preliminary Study" (1963), 28 *Am. Soc. Rev.* 55, at p. 58; H. Beale and T. Dugdale, "Contracts Between Businessmen: Planning and the Use of Contractual Remedies" (1975), 2 *Brit. J. Law. & Soc.* 45, at pp. 47-48; S. Macaulay, "An Empirical View of Contract", [1985] *Wis. L. Rev.* 465; V. Goldwasser and T. Ciro, "Standards of Behaviour in Commercial Contracting" (2002), 30 *A.B.L.R.* 369, at pp. 372-77. It is, to say the least, counterintuitive to think that reasonable commercial parties would accept a contract which contained a provision to the effect that they were not obliged to act honestly in performing their contractual obligations.

62 I conclude from this review that enunciating a general organizing principle of good faith and recognizing a duty to perform contracts honestly will help bring certainty and coherence to this area of the law in a way that is consistent with reasonable commercial expectations.

(iv) Towards an Organizing Principle of Good Faith

63 The first step is to recognize that there is an organizing principle of good faith that underlies and manifests itself in various more specific doctrines governing contractual performance. That organizing principle is simply that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily.

64 As the Court has recognized, an organizing principle states in general terms a requirement of justice from which more specific legal doctrines may be derived. An organizing principle therefore is not a free-standing rule, but rather a standard that underpins and is manifested in more specific legal doctrines and may be given different weight in different situations: see, e.g., *R. v. Jones*, [1994] 2 S.C.R. 229 (S.C.C.), at p. 249; *R. v. Hart*, 2014 SCC 52, [2014] 2 S.C.R. 544 (S.C.C.), at para. 124; R. M. Dworkin, "Is Law a System of Rules?", in R. M. Dworkin, ed., *The Philosophy of Law* (1977), 38, at p. 47. It is a standard that helps to understand and develop the law in a coherent and principled way.

65 The organizing principle of good faith exemplifies the notion that, in carrying out his or her own performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner. While "appropriate regard" for the other party's interests will vary depending on the context of the contractual relationship, it does not require acting to serve those interests in all cases. It merely requires that a party not seek to undermine those interests in bad faith. This general principle has strong conceptual differences from the much higher obligations of a fiduciary. Unlike fiduciary duties, good faith performance does not engage duties of loyalty to the other contracting party or a duty to put the interests of the other contracting party first.

66 This organizing principle of good faith manifests itself through the existing doctrines about the types of situations and relationships in which the law requires, in certain respects, honest, candid, forthright or reasonable contractual performance. Generally, claims of good faith will not succeed if they do not fall within these existing doctrines. But we should also recognize that this list is not closed. The application of the organizing principle of good faith to particular situations should be developed where the existing law is found to be wanting and where the development may occur incrementally in a way that is consistent with the structure of the common law of contract and gives due weight to the importance of private ordering and certainty in commercial affairs.

67 This approach is consistent with that taken in the case of unjust enrichment. McLachlin J. (as she then was) outlined the approach in *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762 (S.C.C.), at pp. 786 and 788:

> This case presents the Court with the difficult task of mediating between, if not resolving, the conflicting views of the proper scope of the doctrine of unjust enrichment. It is my conclusion that we must choose a middle path; one which acknowledges the importance of proceeding on general principles but seeks to reconcile the principles with the established categories of recovery ....
>
> . . . . .
>
> The tri-partite principle of general application which this Court has recognized as the basis of the cause of action for unjust enrichment is thus seen to have grown out of the traditional categories of recovery. It is informed by them. It is capable, however, of going beyond them, allowing the law to develop in a flexible way as required to meet changing perceptions of justice.

68 The flexible approach that was taken in *Peel* recognizes that "[a]t the heart of the doctrine of unjust enrichment, whether expressed in terms of the traditional categories of recovery or general principle, lies the notion of restoration of a benefit which justice does not permit one to retain": p. 788. In that case, this Court further developed the law through application of an organizing principle without displacing the existing specific doctrines. This is what I propose to do with regards to the organizing principle of good faith.

69 The approach of recognizing an overarching organizing principle but accepting the existing law as the primary guide to future development is appropriate in the development of the doctrine of good faith. Good faith may be invoked in widely varying contexts and this calls for a highly context-specific understanding of what honesty and reasonableness in performance require so as to give appropriate consideration to the legitimate interests of both contracting parties. For example, the general organizing principle of good faith would likely have different implications in the context of a long-term contract of mutual cooperation than it would in a more transactional exchange: Swan and Adamski, at § 1.24; B. Dixon, "Common law obligations of good faith in Australian commercial contracts — a relational recipe" (2005), 33 *A.B.L.R.* 87.

70 The principle of good faith must be applied in a manner that is consistent with the fundamental commitments of the common law of contract which generally places great weight on the freedom of contracting parties to pursue their individual self-interest. In commerce, a party may sometimes cause loss to another — even intentionally — in the legitimate pursuit of economic self-interest: *Bram Enterprises Ltd. v. A.I. Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177 (S.C.C.), at para. 31. Doing so is not necessarily contrary to good faith and in some cases has actually been encouraged by the courts on the basis of economic efficiency: *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43, [2002] 2 S.C.R. 601 (S.C.C.), at para. 31. The development of the principle of good faith must be clear not to veer into a form of *ad hoc* judicial moralism or "palm tree" justice. In particular, the organizing principle of good faith should not be used as a pretext for scrutinizing the motives of contracting parties.

71 Tying the organizing principle to the existing law mitigates the concern that any general notion of good faith in contract law will undermine certainty in commercial contracts. In my view, this approach strikes the correct balance between predictability and flexibility.

(v) Should There Be a New Duty?

72 In my view, the objection to Can-Am's conduct in this case does not fit within any of the existing situations or relationships in which duties of good faith have been found to exist. The relationship between Can-Am and Mr. Bhasin was not an employment or franchise relationship. Classifying the decision not to renew the contract as a contractual discretion would constitute a significant expansion of the decided cases under that type of situation. After all, a party almost always has some amount of discretion in how to perform a contract. It would also be difficult to say that a duty of good faith should be implied in this case on the basis of the intentions of the parties given the clear terms of an entire

agreement clause in the Agreement. The key question before the Court, therefore, is whether we ought to create a new common law duty under the broad umbrella of the organizing principle of good faith performance of contracts.

73 In my view, we should. I would hold that there is a general duty of honesty in contractual performance. This means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. This does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract; it is a simple requirement not to lie or mislead the other party about one's contractual performance. Recognizing a duty of honest performance flowing directly from the common law organizing principle of good faith is a modest, incremental step. The requirement to act honestly is one of the most widely recognized aspects of the organizing principle of good faith: see Swan and Adamski, at § 8.135; O'Byrne, "Good Faith in Contractual Performance", at p. 78; Belobaba; *Greenberg v. Meffert* (1985), 50 O.R. (2d) 755 (Ont. C.A.), at p. 764; *Gateway Realty*, at para. 38, *per* Kelly J.; *Shelanu Inc. v. Print Three Franchising Corp.* (2003), 64 O.R. (3d) 533 (Ont. C.A.), at para. 69. For example, the duty of honesty was a key component of the good faith requirements which have been recognized in relation to termination of employment contracts: *Wallace*, at para. 98; *Honda Canada*, at para. 58.

74 There is a longstanding debate about whether the duty of good faith arises as a term implied as a matter of fact or a term implied by law: see *Mesa Operating*, at paras. 15-19. I do not have to resolve this debate fully, which, as I reviewed earlier, casts a shadow of uncertainty over a good deal of the jurisprudence. I am at this point concerned only with a new duty of honest performance and, as I see it, this should not be thought of as an implied term, but a general doctrine of contract law that imposes as a contractual duty a minimum standard of honest contractual performance. It operates irrespective of the intentions of the parties, and is to this extent analogous to equitable doctrines which impose limits on the freedom of contract, such as the doctrine of unconscionability.

75 Viewed in this way, the entire agreement clause in cl. 11.2 of the Agreement is not an impediment to the duty arising in this case. Because the duty of honesty in contractual performance is a general doctrine of contract law that applies to all contracts, like unconscionability, the parties are not free to exclude it: see *CivicLife.com*, at para. 52.

76 It is true that the Anglo-Canadian common law of contract has been reluctant to impose mandatory rules not based on the agreement of the parties, because they are thought to interfere with freedom of contract: see *Gateway Realty*, *per* Kelly J.; O'Byrne, "Good Faith in Contractual Performance", at p. 95; Farnsworth, at 677-78. As discussed above, however, the duty of honest performance interferes very little with freedom of contract, since parties will rarely expect that their contracts permit dishonest performance of their obligations.

77 That said, I would not rule out any role for the agreement of the parties in influencing the scope of honest performance in a particular context. The precise content of honest performance will vary with context and the parties should be free in some contexts to relax the requirements of the doctrine so long as they respect its minimum core requirements. The approach I outline here is similar in principle to that in § 1-302(b) of the U.C.C. (2012):

> The obligations of good faith, diligence, reasonableness and care ... may not be disclaimed by agreement. The parties, by agreement, may determine the standards by which the performance of those obligations is to be measured if those standards are not manifestly unreasonable.

78 Certainly, any modification of the duty of honest performance would need to be in express terms. A generically worded entire agreement clause such as cl. 11.2 of the Agreement does not indicate any intention of the parties to depart from the basic tenets of honest performance: see *GEC Marconi Systems Pty Ltd. v. BHP Information Technology Pty Ltd.*, [2003] FCA 50 (Australia C.A.) (AustLII), at para. 922, *per* Finn J.; see also O'Byrne, "Good Faith in Contractual Performance", at p. 96.

79 Two arguments are typically raised against an increased role for a duty of good faith in the law of contract: see Bridge, Clark, and Peden, "When Common Law Triumphs Equity: the Rise of Good Faith and Reasonableness and the Demise of Unconscionability". The first is that "good faith" is an inherently unclear concept that will permit *ad hoc*

judicial moralism to undermine the certainty of commercial transactions. The second is that imposing a duty of good faith is inconsistent with the basic principle of freedom of contract. I do not have to decide here whether or not these points are valid in relation to a broad, generalized duty of good faith. However, they carry no weight in relation to adopting a rule of honest performance.

80 Recognizing a duty of honesty in contract performance poses no risk to commercial certainty in the law of contract. A reasonable commercial person would expect, at least, that the other party to a contract would not be dishonest about his or her performance. The duty is also clear and easy to apply. Moreover, one commentator points out that given the uncertainty that has prevailed in this area, cautious solicitors have long advised clients to take account of the requirements of good faith: W. Grover, "A Solicitor Looks at Good Faith in Commercial Transactions", in *Special Lectures of the Law Society of Upper Canada 1985 — Commercial Law: Recent Developments and Emerging Trends* (1985), 93, at pp. 106-7. A rule of honest performance in my view will promote, not detract from, certainty in commercial dealings.

81 Any interference by the duty of honest performance with freedom of contract is more theoretical than real. It will surely be rare that parties would wish to agree that they may be dishonest with each other in performing their contractual obligations.

82 Those who fear that this modest step would create uncertainty or impede freedom of contract may take comfort from experience of the civil law of Quebec and the common and statute law of many jurisdictions in the United States.

83 The *Civil Code of Québec* recognizes a broad duty of good faith which extends to the formation, performance and termination of a contract and includes the notion of the abuse of contractual rights: see arts. 6, 7 and 1375. While this is not the place to expound in detail on good faith in the Quebec civil law, it is worth noting that good faith is seen as having two main aspects. The first is the subjective aspect, which is concerned with the state of mind of the actor, and addresses conduct that is, for example, malicious or intentional. The second is the objective aspect which is concerned with whether conduct is unacceptable according to the standards of reasonable people. As J.-L. Baudouin and P.-G. Jobin explain, [TRANSLATION] "a person can be in good faith (in the subjective sense), that is, act without malicious intent or without knowledge of certain facts, yet his or her conduct may nevertheless be contrary to the requirements of good faith in that it violates objective standards of conduct that are generally accepted in society": *Les obligations* (7th ed. 2013), by P.-G. Jobin and N. Vézina, at para. 132. The notion of good faith includes (but is not limited to) the requirement of honesty in performing the contract: *ibid.*, at para. 161; *Banque de Montréal c. Ng*, [1989] 2 S.C.R. 429 (S.C.C.), at p. 436.

84 In the United States, § 1-304 of the U.C.C. provides that "[e]very contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement." The U.C.C. has been enacted by legislation in all 50 states. While the provisions of the U.C.C. apply only to commercial contracts, § 205 of the *Restatement (Second) of Contracts* (1981) provides for a general duty of good faith in all contracts. This provision of the *Restatement* has been followed by courts in the vast majority of states. The notion of "good faith" in the *Restatement* substantially followed the definition proposed by Robert Summers in an influential article, where he proposed that "good faith" is best understood as an "excluder" of various categories of bad faith conduct: p. 206; see § 205, comment a. The general definition of "good faith" in the U.C.C. is also quite broad, encompassing honesty and adherence to "reasonable commercial standards": § 1-201(b)(20). This definition was originally limited to "honesty in fact", that is, a duty of honesty in performance, and was only later expanded: A. D. Miller and R. Perry, "Good Faith Performance" (2013), 98 *Iowa L. Rev.* 689, at pp. 719-20. Honesty in performance is also a key component of "good faith" under the *Restatement*: § 205, comments a and d.

85 Experience in Quebec and the United States shows that even very broad conceptions of the duty of good faith have not impeded contractual activity or contractual stability: see, e.g., J. Pineau, "La discrétion judiciaire a-t-elle fait des ravages en matière contractuelle?", in *La réforme du Code civil, cinq ans plus tard* (1998), 141. It is also worth noting that in both the United States and Quebec, judicial developments preceded legislative action in codifying good faith. In the United States, courts had recognized the existence of a general duty of good faith before the promulgation of the U.C.C.: see, e.g., *Kirke La Shelle Co. v. Armstrong Co.* (1933), 263 N.Y. 79 (U.S. N.Y. Ct. App. 1933). Similarly, though

there was no express provision of "good faith" in the *Civil Code of Lower Canada*, the Court implied such a general duty from more specific provisions of the *Code*: see *Banque canadienne nationale c. Soucisse*, [1981] 2 S.C.R. 339 (S.C.C.); *Banque nationale du Canada c. Houle*, [1990] 3 S.C.R. 122 (S.C.C.); *Québec (Commission hydroélectrique) c. Banque de Montréal*, [1992] 2 S.C.R. 554 (S.C.C.). The duty of good faith was subsequently included in the revisions leading to the enactment of the *Civil Code of Québec*.

86 The duty of honest performance that I propose should not be confused with a duty of disclosure or of fiduciary loyalty. A party to a contract has no general duty to subordinate his or her interest to that of the other party. However, contracting parties must be able to rely on a minimum standard of honesty from their contracting partner in relation to performing the contract as a reassurance that if the contract does not work out, they will have a fair opportunity to protect their interests. That said, a dealership agreement is not a contract of utmost good faith (*uberrimae fidei*) such as an insurance contract, which among other things obliges the parties to disclose material facts: *Whiten*. But a clear distinction can be drawn between a failure to disclose a material fact, even a firm intention to end the contractual arrangement, and active dishonesty.

87 This distinction explains the result reached by the court in *United Roasters Inc. v. Colgate-Palmolive Co.*, 649 F.2d 985 (U.S. C.A. 4th Cir. 1981). The terminating party had decided in advance of the required notice period that it was going to terminate the contract. The court held that no disclosure of this intention was required other than what was stipulated in the notice requirement. The court stated:

> ... there is very little to be said in favor of a rule of law that good faith requires one possessing a right of termination to inform the other party promptly of any decision to exercise the right. A tenant under a month-to-month lease may decide in January to vacate the premises at the end of September. It is hardly to be suggested that good faith requires the tenant to inform the landlord of his decision soon after January. Though the landlord may have found earlier notice convenient, formal exercise of the right of termination in August will do. [pp. 989-90]

United Roasters makes it clear that there is no unilateral duty to disclose information relevant to termination. But the situation is quite different, as I see it, when it comes to actively misleading or deceiving the other contracting party in relation to performance of the contract.

88 The duty of honest performance has similarities with the existing law in relation to civil fraud and estoppel, but it is not subsumed by them. Unlike promissory estoppel and estoppel by representation, the contractual duty of honest performance does not require that the defendant intend that his or her representation be relied on and it is not subject to the uncertainty around whether estoppel can be used to found an independent cause of action: *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53 (S.C.C.), at para. 5; *Maracle v. Travelers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50 (S.C.C.); Waddams, *The Law of Contracts*, at paras. 195-203; B. MacDougall, *Estoppel* (2012), at pp. 142-44. As for the tort of civil fraud, breach of the duty of honest contractual performance does not require the defendant to intend that the false statement be relied on and breach of it supports a claim for damages according to the contractual rather than the tortious measure: see, e.g., *Parna v. G. & S. Properties Ltd.* (1970), [1971] S.C.R. 306 (S.C.C.), cited with approval in *Combined Air Mechanical Services Inc. v. Flesch*, 2014 SCC 8, [2014] 1 S.C.R. 126 (S.C.C.), at para. 19.

89 Mr. Bhasin, supported b many judicial and academic authorities, has argued for wholesale adoption of a more expansive duty of good faith in contrast to the modest, incremental change that I propose: A.F., at para. 51; Summers, at p. 206; Belobaba; *Gateway Realty*. In many of its manifestations, good faith requires more than honesty on the part of a contracting party. For example, in *Dynamic Transport*, this Court held that good faith in the context of that contract required a party to take reasonable steps to obtain the planning permission that was a condition precedent to a sale of property. In other cases, the courts have required that discretionary powers not be exercised in a manner that is "capricious" or "arbitrary": *Mason, at p. 487*; *LeMesurier v. Andrus* (1986), 54 O.R. (2d) 1 (Ont. C.A.), at p. 7. In other contexts, this Court has been reluctant to extend the requirements of good faith beyond honesty for fear of causing undue judicial interference in contracts: *Wallace*, at para. 76.

90 It is not necessary in this case to define in general terms the limits of the implications of the organizing principle of good faith. This is because it is unclear to me how any broader duty would assist Mr. Bhasin here. After all, the contract was subject to non-renewal. It is a considerable stretch, as I see it, to turn even a broadly conceived duty of good faith exercise of the non-renewal provision into what is, in effect, a contract of indefinite duration. This in my view is the principal difficulty in the trial judge's reasoning because, in the result, her decision turned a three year contract that was subject to an express provision relating to non-renewal into a contract of roughly nine years' duration. As the Court of Appeal pointed out, in my view correctly, "[t]he parties did not intend or presume a perpetual contract, as they contracted that either party could unilaterally cause it to expire on any third anniversary": para. 32. Even if there were a breach of a broader duty of good faith by forcing the merger, Can-Am's contractual liability would still have to be measured by reference to the least onerous means of performance, which in this case would have meant simply not renewing the contract. Since no damages flow from this breach, it is unnecessary to decide whether reliance on a discretionary power to achieve a purpose extraneous to the contract and which undermined one of its key objectives might call for further development under the organizing principle of good faith contractual performance.

91 I note as well that, even in jurisdictions that embrace a broader role for the duty of good faith, plaintiffs have met with only mixed success in alleging bad faith failure to renew a contract. Some cases have treated non-renewal as equivalent to termination and thus subject to a duty of good faith: *Shell Oil Co. v. Marinello*, 294 A.2d 253 (U.S. N.J. Sup. Ct. 1972), aff'd, 07 A.2d 598 (U.S. N.J. Sup. Ct. 1973); *Atlantic Richfield Co. v. Razumic*, 390 A.2d 736 (U.S. Pa. S.C. 1978), at pp. 741-42. Other courts have seen non-renewal as fundamentally different, especially where the express terms of the contract contemplate the expiry of contractual obligations and leave no room for any sort of duty to renew: *J.H. Westerbeke Corp. v. Onan Corp.*, 580 F. Supp. 1173 (U.S. Dist. Ct. D. Mass. 1984), at p. 1184; *Pitney-Bowes Inc. v. Mestre* (1981), 517 F. Supp. 52 (U.S. Dist. Ct. S.D. Fla. 1981), cert. denied, 464 U.S. 893 (U.S. Sup. Ct. 1983).

92 I conclude that at this point in the development of Canadian common law, adding a general duty of honest contractual performance is an appropriate incremental step, recognizing that the implications of the broader, organizing principle of good faith must be allowed to evolve according to the same incremental judicial approach.

93 A summary of the principles is in order:

(1) There is a general organizing principle of good faith that underlies many facets of contract law.

(2) In general, the particular implications of the broad principle for particular cases are determined by resorting to the body of doctrine that has developed which gives effect to aspects of that principle in particular types of situations and relationships.

(3) It is appropriate to recognize a new common law duty that applies to all contracts as a manifestation of the general organizing principle of good faith: a duty of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligations.

(3) Application

94 The trial judge made a clear finding of fact that Can-Am "acted dishonestly toward Bhasin in exercising the non-renewal clause": para. 261; see also para. 271. There is no basis to interfere with that finding on appeal. It follows that Can-Am breached its duty to perform the Agreement honestly.

95 The immediate dispute in this case centred on the non-renewal clause contained in cl. 3.3 of the 1998 Agreement which Mr. Bhasin entered into in November 1998. It provided that the Agreement was for a three-year term and would be automatically renewed unless one of the parties gave notice to the contrary at least six months before the end of the initial or any renewed term:

> 3.3 The term of this Agreement shall be for a period of three years from the date hereof (the "Initial Term") and thereafter shall be automatically renewed for successive three year periods (a "Renewal Term"), subject to earlier termination as provided for in section 8 hereof, unless either [Can-Am] or the Enrollment Director notifies the other in writing at least six months prior to expiry of the Initial Term or any Renewal Term that the notifying party desires expiry of the Agreement, in which event the Agreement shall expire at the end of such Initial Term or Renewal Term, as applicable.

96 The factual matrix in which the judge made her finding of dishonest performance is complicated and I will only outline it in very broad terms in order to put that finding in context. There were two main interrelated story lines.

97 The first concerns Mr. Hrynew's persistent attempts to take over Mr. Bhasin's market through a merger — in effect a takeover by him of Mr. Bhasin's agency. The second concerns the difficulties, beginning in early April 1999, that Can-Am was having with the Alberta Securities Commission, which regulated its business and its enrollment directors in Alberta. The Commission insisted that Can-Am appoint a full-time employee to be a PTO responsible for compliance with Alberta securities law. Can-Am ultimately appointed Mr. Hrynew, with the result that he would audit his competitor agencies, including Mr. Bhasin's, and therefore have access to their confidential business information. Mr. Bhasin's refusal to allow Mr. Hrynew access to this information led to the final confrontation with Can-Am and its giving notice of non-renewal in May 2001. Can-Am, for its part, wanted to force a merger of the Bhasin agency under the Hrynew agency, effectively giving Mr. Bhasin's business to Mr. Hrynew. It was in the context of this situation that the trial judge made her findings of dishonesty on the part of Can-Am.

98 The trial judge concluded that Can-Am acted dishonestly with Mr. Bhasin throughout the period leading up to its exercise of the non-renewal clause, both with respect to its own intentions and with respect to Mr. Hrynew's role as PTO. Her detailed findings amply support this overall conclusion.

99 By early 2000, Can-Am was considering a significant reorganization of its activities in Alberta; by June of that year, it sent an organizational chart to the Commission showing that Mr. Bhasin's agency was to be merged under Mr. Hrynew's. But it had said nothing of this to Mr. Bhasin: trial reasons, at paras. 167-68. The trial judge found that these representations made by Can-Am to the Commission were clearly false if, as she concluded, they intended to refer to Mr. Bhasin: para. 246. She also found that Can-Am, by June 2000, was fearful that the Commission was going to pull its licence in Alberta and that it was prepared to do whatever it could to forestall that possibility. "However, it was not dealing honestly with [Mr.] Bhasin about the realities of the situation as [it] saw them": para. 246.

100 In August 2000, Mr. Bhasin first heard of Can-Am's merger plans for him during a meeting with Can-Am's regional vice-president. But when questioned about Can-Am's intentions with respect to the merger, the official "equivocated" and did not tell him the truth that from Can-Am's perspective this was a "done deal". The trial judge concluded that the official was "not honest with [Mr.] Bhasin" at that meeting: para. 247.

101 When Mr. Bhasin complained about Mr. Hrynew's conflict of interest in being both auditor and competitor, Can-Am in effect blamed the Commission, claiming that the Commission had rejected its proposal to appoint a third party PTO. This was not truthful. Can-Am failed to mention that it had proposed to appoint a non-resident of Alberta who was clearly not qualified according to the Commission's criteria or that it had decided to appoint Mr. Hrynew even though he did not meet the Commission's criteria either: trial reasons, at paras. 195 and 221. It also misrepresented — repeatedly — to Mr. Bhasin that Mr. Hrynew was bound by duties of confidentiality and segregation of activities in the course of an audit, when in fact there was no such requirement. Can-Am did not even finalize its PTO contract with Mr. Hrynew until March 2001 and, notwithstanding its assurances to Mr. Bhasin, it failed to include such a provision in the contract: paras. 190-221. As the trial judge found, Can-Am "could not possibly have missed this honestly in the PTO agreement, given that [Mr. Bhasin's] very protests about [Mr.] Hrynew's appointment as PTO were about confidentiality and segregation of activities": para. 221. The judge also found that Can-Am repeated these "lies" about Mr. Hrynew's

supposed obligations of confidentiality even after the PTO agreement, without these protections, had been signed: para. 204.

102 Can-Am pushed on with the requirement that Mr. Hrynew audit Mr. Bhasin's agency as if it were required to do so by the Commission even though it had arranged to have one of its employees conduct the audit of Mr. Hrynew's agency: trial reasons, at para. 198.

103 As the trial judge found, this dishonesty on the part of Can-Am was directly and intimately connected to Can-Am's performance of the Agreement with Mr. Bhasin and its exercise of the non-renewal provision. I conclude that Can-Am breached the 1998 Agreement when it failed to act honestly with Mr. Bhasin in exercising the non-renewal clause.

C. Liability for Civil Conspiracy and Inducing Breach of Contract

104 In light of this conclusion, I agree with the Court of Appeal's rejection of Mr. Bhasin's claims based on the torts of inducing breach of contract and unlawful means conspiracy.

105 The trial judge specifically found that Mr. Hrynew did not encourage Can-Am to act dishonestly in its dealings with Mr. Bhasin and that Can-Am's dishonest conduct was not fairly attributable to Mr. Hrynew: paras. 271 and 287. It follows that Mr. Hrynew did not induce Can-Am's breach of its contractual duty of honest performance.

106 The trial judge dismissed the claim for conspiracy to injure and there is no basis to interfere with that finding. However, the trial judge held the respondents liable for unlawful means conspiracy, with the unlawful means being the breach of contract and inducing breach of contract: para. 326. Because, in light of my conclusions, the only relevant breach of contract in this case is the breach of the duty of honest performance and there was no inducement of breach of contract, the only relevant unlawful means pertained to Can-Am alone and not Mr. Hrynew. Accordingly, there can be no liability for civil conspiracy: see *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460, 106 O.R. (3d) 427 (Ont. C.A.), at para. 43.

107 I therefore agree with the result reached by the Court of Appeal that there could be no liability for inducing breach of contract or unlawful means conspiracy: para. 36. It follows that the claims against Mr. Hrynew were rightly dismissed.

D. What Is the Appropriate Measure of Damages?

108 I have concluded that Can-Am's breach of contract consisted of its failure to be honest with Mr. Bhasin about its contractual performance and, in particular, with respect to its settled intentions with respect to renewal. It is therefore liable for damages calculated on the basis of what Mr. Bhasin's economic position would have been had Can-Am fulfilled that duty. While the trial judge did not assess damages on that basis given her different findings in relation to liability, she made findings that permit this Court to do so.

109 The trial judge specifically held that but for Can-Am's dishonesty, Mr. Bhasin could have acted so as to "retain the value in his agency": paras. 258-59. In reaching this conclusion, the trial judge was well aware of the difficulties that Mr. Bhasin would have in selling his business given the "almost absolute controls" that Can-Am had on enrollment directors and that it owned the "book of business": para. 402. She also heard evidence and made findings about what the value of the business was, taking these limitations into account. These findings, in my view, permit us to assess damages on the basis that if Can-Am had performed the contract honestly, Mr. Bhasin would have been able to retain the value of his business rather than see it, in effect, expropriated and turned over to Mr. Hrynew.

110 It is clear from the findings of the trial judge and from the record that the value of the business around the time of non-renewal was $87,000. The defendant's expert at trial valued Mr. Bhasin's business as of 2001 (the time of non-renewal) as approximately $87,000. While there is some confusion in the record about the date of evaluation and the relevance of discount rates, I am persuaded that the trial judge found that the business was worth $87,000 at the time that the Agreement expired and that she made this finding fully alive to the difficulties standing in the way of a sale

of the business given the contractual arrangements between Can-Am and its enrollment directors: see, e.g., para. 451. In addition, we have had no suggestion in argument that this figure should be reassessed. In fact, the defendants, as appellants before the Court of Appeal, submitted to that court that if damages were payable, they should be assessed at the value of the business at the time of the expiry of the Agreement and noted that the trial judge had accepted the evidence of their expert witness, Mr. Bailey, that the value was $87,000.

111 I conclude therefore that Mr. Bhasin is entitled to damages in the amount of $87,000.

IV. Disposition

112 I would allow the appeal with respect to Can-Am and dismiss the appeal with respect to Mr. Hrynew. I would vary the trial judge's assessment of damages to $87,000 plus interest. Mr. Bhasin should have his costs throughout as against Can-Am. There should be no costs at any level in favour of or against Mr. Hrynew.

Appeal allowed in part.

Pourvoi accueilli en partie.

End of Document

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF URBANCORP (WOODBINE) INC. OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF URBANCORP (BRIDLEPATH) INC. OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

Court File No.: 31-2114843
Court File No.: 31-2114850

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 TORONTO MANAGEMENT INC., URBANCORP (ST. CLAIR VILLAGE) INC., URBANCORP (PATRICIA) INC., URBANCORP (MALLOW) INC., URBANCORP (LAWRENCE) INC., URBANCORP DOWNSVIEW PARK DEVELOPMENT INC., URBANCORP (952 QUEEN WEST) INC., KING RESIDENTIAL INC., URBANCORP 60 ST. CLAIR INC., HIGH RES. INC., BRIDGE ON KING INC. (collectively, the "Applicants") AND THE AFFILIATED ENTITIES IN SCHEDULE "A" HERETO

Court File No. CV-16-11389-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

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