Court File No. CV-12-9545-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF 3113736 CANADA LTD., 4362063 CANADA LTD., and A-Z SPONGE & FOAM PRODUCTS LTD.

(the "**Applicants**")

BOOK OF AUTHORITIES OF THE APPLICANT, 4362063 CANADA LTD.
(MOTION RE: CLASS ACTION PROCEEDS)

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TAB 1

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Creston Moly Corp. v. Sattva Capital Corp.

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Sattva Capital Corporation (formerly Sattva Capital Inc.), Appellant and Creston Moly Corporation (formerly Georgia Ventures Inc.), Respondent and Attorney General of British Columbia and BCICAC Foundation, Interveners

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

Heard: December 12, 2013
Judgment: August 1, 2014
Docket: 35026

Proceedings: reversing *Creston Moly Corp. v. Sattva Capital Corp.* (2012), 554 W.A.C. 114, 326 B.C.A.C. 114, 2 B.L.R. (5th) 1, 36 B.C.L.R. (5th) 71, 2012 BCCA 329, 2012 CarswellBC 2327, Bennett J.A., Kirkpatrick J.A., Neilson J.A. (B.C. C.A.); reversing *Creston Moly Corp. v. Sattva Capital Corp.* (2011), 2011 CarswellBC 1124, 2011 BCSC 597, 84 B.L.R. (4th) 102, Armstrong J. (B.C. S.C.); and reversing *Creston Moly Corp. v. Sattva Capital Corp.* (2010), 319 D.L.R. (4th) 219, 2010 BCCA 239, 2010 CarswellBC 1210, 7 B.C.L.R. (5th) 227, Levine J.A., Low J.A., Newbury J.A. (B.C. C.A.); reversing *Creston Moly Corp. v. Sattva Capital Corp.* (2009), 2009 BCSC 1079, 2009 CarswellBC 2096, Greyell J. (B.C. S.C.)

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Darrell W. Roberts, Q.C., David Mitchell, for Respondent
Jonathan Eades, Micah Weintraub, for Intervener, Attorney General of British Columbia
David Wotherspoon, Gavin R. Cameron, for Intervener, BCICAC Foundation

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Public

Headnote

Alternative dispute resolution --- Appeal from arbitration awards — Question of law

Dispute arose between CM and SC regarding SC's finder's fee under fee agreement, with SC taking position that it was entitled to be paid in shares of CM valued at $0.15 per share — Arbitrator concluded that stock exchange would have probably valued finder's fee at $0.15 per share under terms of agreement and that SC lost opportunity to sell shares at that value — CM brought application for leave to appeal arbitration award and chambers judge dismissed application as it was not brought on basis of question of law but question of fact or mixed fact and law — CM's appeal from decision to dismiss application for leave to appeal arbitrator's award of damages was allowed — CA Leave Court decided that the construction of s. 3.1 of agreement, and in particular "maximum amount" proviso, was question of law — SC's appeal to Supreme Court of Canada allowed — Historical approach regarding determination of legal rights and obligations of parties under written contract as question of law should be abandoned — Even if it had been question of law, Court of Appeal Leave Court should have deferred to decision of Supreme Court Leave Court.

Alternative dispute resolution --- Appeal from arbitration awards — Leave to appeal — Miscellaneous

Dispute arose between CM and SC regarding SC's finder's fee under fee agreement, with SC taking position that it was entitled to be paid in shares of CM valued at $0.15 per share — CM brought application for leave to appeal arbitration award and chambers judge dismissed application as it was not brought on basis of question of law but on question of fact or mixed fact and law — CM's appeal from decision to dismiss application for leave to appeal arbitrator's award of damages was allowed — CA Leave Court decided that the construction of s. 3.1 of Agreement, and in particular "maximum amount" proviso, was question of law — SC's appeal to Supreme Court of Canada allowed — Unless Court places restrictions in order granting leave, order granting leave is "at large" — Appellants may raise issues on appeal that were not set out in leave application — Historical approach regarding determination of legal rights and obligations of parties under written contract as question of law should be abandoned — Even if it had been question of law, Court of Appeal Leave Court should have deferred to decision of Supreme Court Leave Court.

Business associations --- Powers, rights and liabilities — Contracts by corporations — Miscellaneous

Dispute arose between CM and SC regarding SC's finder's fee under fee agreement, with SC taking position that it was entitled to be paid in shares of CM valued at $0.15 per share — Arbitrator found that under agreement SC was entitled to fee equal to maximum amount payable pursuant to rules and policies of TSX Venture Exchange, and quantum of fee was US$1.5 million — Arbitrator found that under agreement, fee was payable in shares based on market price, as defined in agreement, unless SC elected to take it in cash or combination of cash and shares — Arbitrator found market price, as defined in agreement, was $0.15 per share — CM appealed arbitration award without success — Further appeal was allowed, Court of Appeal holding that to give effect only to "market price" definition resulted in absurdity that could not reasonably be within contemplation of parties or in accordance with good business sense — SC's appeal to Supreme Court of Canada allowed — Arbitrator's decision that shares should be priced according to Market Price definition gave effect to both Market Price definition and "maximum amount" proviso — Arbitrator's interpretation of agreement achieved goal by reconciling market price definition and "maximum amount" proviso in reasonable manner.

Contracts --- Construction and interpretation — Resolving ambiguities — Reasonableness

Dispute arose between CM and SC regarding SC's finder's fee under fee agreement, with SC taking position that it was entitled to be paid in shares of CM valued at $0.15 per share — Arbitrator found that under agreement SC was entitled to fee equal to maximum amount payable pursuant to rules and policies of TSX Venture Exchange, and quantum of fee was US$1.5 million — Arbitrator found that under agreement, fee was payable in shares based on market price, as defined in agreement, unless SC elected to take it in cash or combination of cash and shares — Arbitrator found market price, as defined in agreement, was $0.15 per share — CM appealed arbitration award without success — Further appeal was allowed, Court of Appeal holding that to give effect only to "market price" definition resulted in absurdity that could not reasonably be within contemplation of parties or in accordance with good business sense — SC's appeal to Supreme Court of Canada allowed — Arbitrator's decision that shares should be priced according to Market Price definition gave effect to both Market Price definition and "maximum amount" proviso — Arbitrator's interpretation of agreement achieved goal by reconciling market price definition and "maximum amount" proviso in reasonable manner.

Résolution alternative des conflits --- Appel interjeté à l'encontre de sentences arbitrales — Question de droit

Litige opposait CM et SC concernant les honoraires d'intermédiation de SC qui étaient prévus dans une entente et qui, selon SC, devaient lui être payés sous forme d'actions de CM évaluées à 15 cents l'unité — Arbitre a conclu que la bourse aurait probablement évalué les honoraires d'intermédiation à 15 cents l'unité en vertu des termes de l'entente et que SC avait perdu l'occasion de vendre les actions à ce prix — CM a déposé une demande d'autorisation d'appel à l'encontre de la sentence arbitrale et le juge siégeant en son cabinet a rejeté la demande au motif qu'elle ne soulevait pas une question de droit, mais une question mixte de fait et de droit — Appel interjeté par CM à l'encontre de la décision ayant rejeté la demande d'autorisation d'appeler à l'encontre de la sentence arbitrale portant sur les dommages-intérêts a été accueilli — Formation de la Cour d'appel saisie de la demande d'autorisation a conclu que l'interprétation de l'art. 3.1 de l'entente, et en particulier de la stipulation relative au « plafond », constituait une question de droit — Pourvoi de SC formé devant la Cour suprême du Canada accueilli — Approche qui a prévalu par le passé selon laquelle la détermination des droits et obligations juridiques des parties à un contrat écrit était considérée comme une question de droit devrait être abandonnée — Même s'il s'était agi d'une question de droit, la formation de la Cour d'appel saisie de la demande d'autorisation aurait dû s'en remettre à la décision de la formation de la Cour suprême saisie de la demande d'autorisation.

Résolution alternative des conflits --- Appel interjeté à l'encontre de sentences arbitrales — Demande d'autorisation d'appel — Divers

Litige opposait CM et SC concernant les honoraires d'intermédiation de SC qui étaient prévus dans une entente et qui, selon SC, devaient lui être payés sous forme d'actions de CM évaluées à 15 cents l'unité — CM a déposé une demande d'autorisation d'appel à l'encontre de la sentence arbitrale et le juge siégeant en son cabinet a rejeté la demande au motif qu'elle ne soulevait pas une question de droit, mais une question mixte de fait et de droit — Appel interjeté par CM à l'encontre de la décision ayant rejeté la demande d'autorisation d'appeler à l'encontre de la sentence arbitrale portant sur les dommages-intérêts a été accueilli — Formation de la Cour d'appel saisie de la demande d'autorisation a conclu que l'interprétation de l'art. 3.1 de l'entente, et en particulier de la stipulation relative au « plafond », constituait une question de droit — Pourvoi de SC formé devant la Cour suprême du Canada accueilli — À moins que la Cour n'impose des restrictions dans l'ordonnance accordant l'autorisation, cette ordonnance est de « portée générale » — Appelant peut soulever en appel une question qui n'était pas énoncée dans la demande d'autorisation — Approche qui a prévalu par le passé selon laquelle la détermination des droits et obligations juridiques des parties à un contrat écrit était considérée comme une question de droit devrait être abandonnée — Même s'il s'était agi d'une question de droit, la formation de la Cour d'appel saisie de la demande d'autorisation aurait dû s'en remettre à la décision de la formation de la Cour suprême saisie de la demande d'autorisation.

Associations d'affaires --- Pouvoirs, droits et responsabilités — Contrats signés par la société — Questions diverses

Litige opposait CM et SC concernant les honoraires d'intermédiation de SC qui étaient prévus dans une entente et qui, selon SC, devaient lui être payés sous forme d'actions de CM évaluées à 15 cents l'unité — Arbitre a conclu qu'en vertu de l'entente, SC avait droit à des honoraires équivalant au montant maximal payable en vertu des règles et des politiques de la Bourse de croissance TSX, et le montant des honoraires s'élevait à 1,5 million $US — Arbitre a conclu qu'en vertu de l'entente, les honoraires étaient payables sous forme d'actions en fonction du cours, tel que l'entente le prévoyait, à moins que SC ne choisisse d'être payée en argent comptant ou à la fois en argent comptant et sous forme d'actions — Arbitre a conclu que le cours, selon la définition qu'en donnait l'entente, s'établissait à 15 cents l'unité — CM a interjeté appel à l'encontre de la sentence arbitrale, sans succès — Cour d'appel a accueilli l'appel après que la Cour ait estimé que de donner effet qu'à la définition du « cours » donnait lieu à une absurdité que les parties n'avaient raisonnablement pas voulu créer ou qui ne correspondait pas au bon sens des affaires — Pourvoi formé par SC devant la Cour suprême du Canada accueilli — Décision de l'arbitre selon laquelle les actions devraient être évaluées en fonction de la définition du cours donnait effet non seulement à la définition du cours, mais également à la stipulation relative au « plafond » — Interprétation par l'arbitre de l'entente atteignait cet objectif en conciliant la définition du cours et la stipulation relative au « plafond » d'une manière qui ne pouvait être considérée comme déraisonnable.

Contrats --- Interprétation — Résolution des ambiguïtés — Caractère raisonnable

Litige opposait CM et SC concernant les honoraires d'intermédiation de SC qui étaient prévus dans une entente et qui, selon SC, devaient lui être payés sous forme d'actions de CM évaluées à 15 cents l'unité — Arbitre a conclu qu'en vertu de l'entente, SC avait droit à des honoraires équivalant au montant maximal payable en vertu des règles et des politiques de la Bourse de croissance TSX, et le montant des honoraires s'élevait à 1,5 million $US — Arbitre a conclu qu'en vertu de l'entente, les honoraires étaient payables sous forme d'actions en fonction du cours, tel que l'entente le prévoyait, à moins que SC ne choisisse d'être payée en argent comptant ou à la fois en argent comptant et sous forme d'actions — Arbitre a conclu que le cours, selon la définition qu'en donnait l'entente, s'établissait à 15 cents l'unité — CM a interjeté appel à l'encontre de la sentence arbitrale, sans succès — Cour d'appel a accueilli l'appel après que la Cour ait estimé que de donner effet qu'à la définition du « cours » donnait lieu à une

absurdité que les parties n'avaient raisonnablement pas voulu créer ou qui ne correspondait pas au bon sens des affaires — Pourvoi formé par SC devant la Cour suprême du Canada accueilli — Décision de l'arbitre selon laquelle les actions devraient être évaluées en fonction de la définition du cours donnait effet non seulement à la définition du cours, mais également à la stipulation relative au « plafond » — Interprétation par l'arbitre de l'entente atteignait cet objectif en conciliant la définition du cours et la stipulation relative au « plafond » d'une manière qui ne pouvait être considérée comme déraisonnable.

The dispute concerned which date should be used to determine the price of shares and thus the number of shares to which SC was entitled. The arbitrator ruled in favour of SC, and CM sought leave to appeal from the Supreme Court Leave Court, which dismissed the application on the grounds that it did not involve a question of law, but rather mixed fact and law. The Court of Appeal granted CM leave to appeal, holding that it was a question of law. The Supreme Court dismissed the appeal, but the Court of Appeal reversed this decision and found in favour of CM. SC appealed both this decision and the decision of the Court of Appeal Leave Court to the Supreme Court of Canada.

Held: The appeals were allowed.

Per Rothstein J. (McLachlin C.J.C., LeBel, Abella, Moldaver, Karakatsanis and Wagner JJ. concurring): The issue of whether the Court of Appeal Leave Court erred in finding a question of law for the purposes of granting leave to appeal was properly before the Court. While the subject of the appeal was important to the parties, the question was not a question of law within the meaning of s. 31 of the Arbitration Act. Historically, determining the legal rights and obligations of the parties under a written contract was considered a question of law. Canadian courts, however, have moved away from this historical approach. The interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding". Questions of law "questions about what the correct legal test is". Yet in contractual interpretation, the goal of the exercise is to ascertain the objective intent of the parties. One central purpose of drawing a distinction between questions of law and those of mixed fact and law is to limit the intervention of appellate courts to cases where the results can be expected to have an impact beyond the parties to the particular dispute. The legal obligations arising from a contract are, in most cases, limited to the interest of the particular parties. The fact that the legal system leaves broad scope to tribunals of first instance to resolve issues of limited application supports treating contractual interpretation as a question of mixed fact and law.

The issue whether the proposed appeal was on a question of law was expressly argued before the Leave Courts of both the Supreme Court and Court of Appeal. There was no reason why SC should be precluded from raising this issue on appeal despite the fact it was not mentioned in its application for leave to appeal to the Supreme Court of Canada. Appellate review of an arbitrator's award will only occur where the requirements of s. 31(2) of the Arbitration Act are met and where the leave court does not exercise its residual discretion to nonetheless deny leave. Even if the Court of Appeal Leave Court had identified a question of law and the miscarriage of justice test had been met, it should have upheld the Supreme Court Leave Court's denial of leave to appeal in deference to that court's exercise of judicial discretion. The Court of Appeal Court erred in holding that the Leave Court's comments on the merits of the appeal were binding on it and on the Supreme Court Appeal Court. A court considering whether leave should be granted is not adjudicating the merits of the case. A leave court decides only whether the matter warrants granting leave, not whether the appeal will be successful. This is true even where the determination of whether to grant leave involves a preliminary consideration of the question of law at issue. A grant of leave cannot bind or limit the powers of the court hearing the actual appeal. The fact that the Court of Appeal provided its own reasoning as to why it came to the same conclusion as the Leave Court did not vitiate the error.

The arbitrator's decision that the shares should be priced according to the market price definition gave effect to both the market price definition and the "maximum amount" proviso. The arbitrator's interpretation of the agreement, as reconciled the market price definition and the "maximum amount" proviso in a manner that cannot be said to be unreasonable.

Le litige portait sur la date devant servir à déterminer le prix des actions et, ainsi, le nombre d'actions auxquelles SC avait droit. L'arbitre a tranché en faveur de SC, et CM a déposé une demande d'autorisation d'appel auprès de la Cour suprême, laquelle a rejeté la demande au motif qu'elle ne soulevait pas une question de droit, mais une question mixte de fait et de droit. CM a obtenu l'autorisation d'appeler de la Cour d'appel, laquelle a estimé qu'il s'agissait d'une question de droit. La Cour suprême a rejeté l'appel, mais la Cour d'appel a infirmé cette décision et a tranché en faveur de CM. SC a formé un pourvoi à l'encontre de cette décision et de la décision de la formation de la Cour d'appel saisie de la demande d'autorisation d'appel auprès de la Cour suprême du Canada.

Arrêt: Les pourvois ont été accueillis.

Rothstein, J. (McLachlin, J.C.C., LeBel, Abella, Moldaver, Karakatsanis, Wagner, JJ., souscrivant à son opinion) : C'était à bon droit que la Cour était saisie de la question de savoir si la formation de la Cour d'appel a commis une erreur en concluant à la présence d'une question de droit dans le cadre de la demande d'autorisation d'appel. Bien que la question faisant l'objet du pourvoi était importante, il ne s'agissait pas d'une question de droit au sens de l'art. 31 de l'Arbitration Act. Historiquement, la détermination des droits et obligations juridiques des parties à un contrat écrit était considérée comme une question de droit. Les tribunaux canadiens, toutefois, ont abandonné cette approche historique. L'interprétation des contrats a évolué vers une démarche pratique, axée sur le bon sens plutôt que sur des règles de forme en matière d'interprétation. La question prédominante consiste à discerner « l'intention des parties et la portée de l'entente ». Les questions de droit « concernent la détermination du critère juridique applicable ». Or, lorsqu'il s'agit d'interprétation contractuelle, le but de l'exercice consiste à déterminer l'intention objective des parties. En établissant une distinction entre les questions de droit et les questions mixtes de fait et de droit, on vise principalement à restreindre l'intervention de la juridiction d'appel aux affaires qui entraîneraient probablement des répercussions qui ne seraient pas limitées aux parties au litige. Les obligations juridiques issues d'un contrat se limitent, dans la plupart des cas, aux intérêts des parties au litige. Le vaste pouvoir de trancher les questions d'application limitée que notre système judiciaire confère au tribunal administratif siégeant en première instance étaye la proposition selon laquelle l'interprétation contractuelle est une question mixte de fait et de droit.

La question de savoir si l'appel proposé soulevait une question de droit a été expressément débattue devant les formations de la Cour suprême et de la Cour d'appel saisies de la demande d'autorisation. Rien n'empêchait SC de soulever cette question en appel, même si elle ne l'a pas mentionnée dans la demande d'autorisation d'appel qu'elle a présentée à la Cour suprême du Canada. L'appel d'une sentence arbitrale n'est donc entendu que si les critères de l'art. 31(2) de l'Arbitration Act sont remplis et que le tribunal saisi de la demande d'autorisation ne refuse pas néanmoins l'autorisation en vertu de son pouvoir discrétionnaire résiduel. Même si la formation de la Cour d'appel saisie de la demande d'autorisation avait défini une question de droit et qu'il avait été satisfait au critère du risque d'erreur judiciaire, elle aurait dû confirmer la décision de la formation de la Cour suprême saisie de la demande d'autorisation de rejeter cette demande, par égard pour l'exercice du pouvoir discrétionnaire de cette cour. La Cour d'appel saisie de l'appel a commis une erreur en concluant que les commentaires sur le bien-fondé de l'appel formulés par la formation de la Cour d'appel saisie de la demande d'autorisation la liaient et liaient également la formation de la Cour suprême saisie de l'appel. Le tribunal chargé de statuer sur une demande d'autorisation ne tranche pas l'affaire sur le fond; il détermine uniquement s'il est justifié d'accorder l'autorisation, et non si l'appel sera accueilli. Cela vaut même lorsque l'étude de la demande d'autorisation appelle un examen préliminaire de la question de droit en cause. L'autorisation accordée ne saurait lier le tribunal chargé de statuer sur l'appel ni restreindre ses pouvoirs. Le fait que la Cour d'appel soit arrivée à la même conclusion que celle saisie de la demande d'autorisation pour des motifs différents n'annule pas l'erreur.

La sentence arbitrale, selon laquelle l'action devrait être évaluée en fonction de la définition du cours, donnait effet à cette dernière et à la stipulation relative au « plafond ». L'interprétation par l'arbitre de l'entente atteignait cet objectif en conciliant la définition du cours et la stipulation relative au « plafond » d'une manière qui ne pouvait être considérée comme déraisonnable.

APPEAL from judgment reported at *Creston Moly Corp. v. Sattva Capital Corp.* (2012), 2012 BCCA 329, 2012 CarswellBC 2327, 36 B.C.L.R. (5th) 71, 2 B.L.R. (5th) 1, 326 B.C.A.C. 114, 554 W.A.C. 114 (B.C. C.A.), reversing dismissal of appeal from arbitrator's decision; APPEAL from judgment reported at *Creston Moly Corp. v. Sattva Capital Corp.* (2010), 2010 BCCA 239, 2010 CarswellBC 1210, 319 D.L.R. (4th) 219, 7 B.C.L.R. (5th) 227 (B.C. C.A.), reversing decision to dismiss application for leave to appeal arbitrator's award of damages.

POURVOI formé à l'encontre d'un jugement publié à *Creston Moly Corp. v. Sattva Capital Corp.* (2012), 2012 BCCA 329, 2012 CarswellBC 2327, 36 B.C.L.R. (5th) 71, 2 B.L.R. (5th) 1, 326 B.C.A.C. 114, 554 W.A.C. 114 (B.C. C.A.), ayant infirmé le rejet d'un appel interjeté à l'encontre d'une sentence arbitrale; POURVOI formé à l'encontre d'un jugement publié à *Creston Moly Corp. v. Sattva Capital Corp.* (2010), 2010 BCCA 239, 2010 CarswellBC 1210, 319 D.L.R. (4th) 219, 7 B.C.L.R. (5th) 227 (B.C. C.A.), ayant infirmé la décision de rejeter la demande d'autorisation d'appeler à l'encontre de la sentence arbitrale portant sur les dommages-intérêts.

***Rothstein J.* (McLachlin C.J.C. and LeBel, Abella, Moldaver, Karakatsanis and Wagner**

JJ. concurring):

1 When is contractual interpretation to be treated as a question of mixed fact and law and when should it be treated as a question of law? How is the balance between reviewability and finality of commercial arbitration awards under the *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55 (now the *Arbitration Act*, hereinafter the "*AA*"), to be determined? Can findings made by a court granting leave to appeal with respect to the merits of an appeal bind the court that ultimately decides the appeal? These are three of the issues that arise in this appeal.

I. Facts

2 The issues in this case arise out of the obligation of Creston Moly Corporation (formerly Georgia Ventures Inc.) to pay a finder's fee to Sattva Capital Corporation (formerly Sattva Capital Inc.). The parties agree that Sattva is entitled to a finder's fee of US$1.5 million and is entitled to be paid this fee in shares of Creston, cash or a combination thereof. They disagree on which date should be used to price the Creston shares and therefore the number of shares to which Sattva is entitled.

3 Mr. Hai Van Le, a principal of Sattva, introduced Creston to the opportunity to acquire a molybdenum mining property in Mexico. On January 12, 2007, the parties entered into an agreement (the "Agreement") that required Creston to pay Sattva a finder's fee in relation to the acquisition of this property. The relevant provisions of the Agreement are set out in Appendix I.

4 On January 30, 2007, Creston entered into an agreement to purchase the property for US$30 million. On January 31, 2007, at the request of Creston, trading of Creston's shares on the TSX Venture Exchange ("TSXV") was halted to prevent speculation while Creston completed due diligence in relation to the purchase. On March 26, 2007, Creston announced it intended to complete the purchase and trading resumed the following day.

5 The Agreement provides that Sattva was to be paid a finder's fee equal to the maximum amount that could be paid pursuant to s. 3.3 of Policy 5.1 in the TSXV Policy Manual. Section 3.3 of Policy 5.1 is incorporated by reference into the Agreement at s. 3.1 and is set out in Appendix II of these reasons. The maximum amount pursuant to s. 3.3 of Policy 5.1 in this case is US$1.5 million.

6 According to the Agreement, by default, the fee would be paid in Creston shares. The fee would only be paid in cash or a combination of shares and cash if Sattva made such an election. Sattva made no such election and was therefore entitled to be paid the fee in shares. The finder's fee was to be paid no later than five working days after the closing of the transaction purchasing the molybdenum mining property.

7 The dispute between the parties concerns which date should be used to determine the price of Creston shares and thus the number of shares to which Sattva is entitled. Sattva argues that the share price is dictated by the Market Price definition at s. 2 of the Agreement, i.e. the price of the shares "as calculated on close of business day before the issuance of the press release announcing the Acquisition". The press release announcing the acquisition was released on March 26, 2007. Prior to the halt in

trading on January 31, 2007, the last closing price of Creston shares was $0.15. On this interpretation, Sattva would receive approximately 11,460,000 shares (based on the finder's fee of US$1.5 million).

8 Creston claims that the Agreement's "maximum amount" proviso means that Sattva cannot receive cash or shares valued at more than US$1.5 million on the date the fee is payable. The shares were payable no later than five days after May 17, 2007, the closing date of the transaction. At that time, the shares were priced at $0.70 per share. This valuation is based on the price an investment banking firm valued Creston at as part of underwriting a private placement of shares on April 17, 2007. On this interpretation, Sattva would receive approximately 2,454,000 shares, some 9 million fewer shares than if the shares were priced at $0.15 per share.

9 The parties entered into arbitration pursuant to the *AA*. The arbitrator found in favour of Sattva. Creston sought leave to appeal the arbitrator's decision pursuant to s. 31(2) of the *AA*. Leave was denied by the British Columbia Supreme Court (2009 BCSC 1079 (B.C. S.C.) (CanLII) ("SC Leave Court")). Creston successfully appealed this decision and was granted leave to appeal the arbitrator's decision by the British Columbia Court of Appeal (2010 BCCA 239, 7 B.C.L.R. (5th) 227 (B.C. C.A.) ("CA Leave Court")).

10 The British Columbia Supreme Court judge who heard the merits of the appeal (2011 BCSC 597, 84 B.L.R. (4th) 102 (B.C. S.C.) ("SC Appeal Court")) upheld the arbitrator's award. Creston appealed that decision to the British Columbia Court of Appeal (2012 BCCA 329, 36 B.C.L.R. (5th) 71 (B.C. C.A.) ("CA Appeal Court")). That court overturned the SC Appeal Court and found in favour of Creston. Sattva appeals the decisions of the CA Leave Court and CA Appeal Court to this Court.

II. Arbitral Award

11 The arbitrator, Leon Getz, Q.C., found in favour of Sattva, holding that it was entitled to receive its US$1.5 million finder's fee in shares priced at $0.15 per share.

12 The arbitrator based his decision on the Market Price definition in the Agreement:

> What, then, was the "Market Price" within the meaning of the Agreement? The relevant press release is that issued on March 26 .... Although there was no closing price on March 25 (the shares being on that date halted), the "last closing price" within the meaning of the definition was the $0.15 at which the [Creston] shares closed on January 30, the day before trading was halted "pending news" .... This conclusion requires no stretching of the words of the contractual definition; on the contrary, it falls literally within those words. [para. 22]

13 Both the Agreement and the finder's fee had to be approved by the TSXV. Creston was responsible for securing this approval. The arbitrator found that it was either an implied or an express term of the Agreement that Creston would use its best efforts to secure the TSXV's approval and that Creston did not apply its best efforts to this end.

14 As previously noted, by default, the finder's fee would be paid in shares unless Sattva made an

election otherwise. The arbitrator found that Sattva never made such an election. Despite this, Creston represented to the TSXV that the finder's fee was to be paid in cash. The TSXV conditionally approved a finder's fee of US$1.5 million to be paid in cash. Sattva first learned that the fee had been approved as a cash payment in early June 2007. When Sattva raised this matter with Creston, Creston responded by saying that Sattva had the choice of taking the finder's fee in cash or in shares priced at $0.70.

15 Sattva maintained that it was entitled to have the finder's fee paid in shares priced at $0.15. Creston asked its lawyer to contact the TSXV to clarify the minimum share price it would approve for payment of the finder's fee. The TSXV confirmed on June 7, 2007 over the phone and August 9, 2007 via email that the minimum share price that could be used to pay the finder's fee was $0.70 per share. The arbitrator found that Creston "consistently misrepresented or at the very least failed to disclose fully the nature of the obligation it had undertaken to Sattva" (para. 56(k)) and "that in the absence of an election otherwise, Sattva is entitled under that Agreement to have that fee paid in shares at $0.15" (para. 56(g)). The arbitrator found that the first time Sattva's position was squarely put before the TSXV was in a letter from Sattva's solicitor on October 9, 2007.

16 The arbitrator found that had Creston used its best efforts, the TSXV could have approved the payment of the finder's fee in shares priced at $0.15 and such a decision would have been consistent with its policies. He determined that there was "a substantial probability that [TSXV] approval would have been given" (para. 81). He assessed that probability at 85 percent.

17 The arbitrator found that Sattva could have sold its Creston shares after a four-month holding period at between $0.40 and $0.44 per share, netting proceeds of between $4,583,914 and $5,156,934. The arbitrator took the average of those two amounts, which came to $4,870,424, and then assessed damages at 85 percent of that number, which came to $4,139,860, and rounded it to $4,140,000 plus costs.

18 After this award was made, Creston made a cash payment of US$1.5 million (or the equivalent in Canadian dollars) to Sattva. The balance of the damages awarded by the arbitrator was placed in the trust account of Sattva's solicitors.

III. Judicial History

A. British Columbia Supreme Court — Leave to Appeal Decision, 2009 BCSC 1079 (B.C. S.C.)

19 The SC Leave Court denied leave to appeal because it found the question on appeal was not a question of law as required under s. 31 of the *AA*. In the judge's view, the issue was one of mixed fact and law because the arbitrator relied on the "factual matrix" in coming to his conclusion. Specifically, determining how the finder's fee was to be paid involved examining "the TSX's policies concerning the maximum amount of the finder's fee payable, as well as the discretionary powers granted to the Exchange in determining that amount" (para. 35).

20 The judge found that even had he found a question of law was at issue he would have exercised his

discretion against granting leave because of Creston's conduct in misrepresenting the status of the finder's fee to the TSXV and Sattva, and "on the principle that one of the objectives of the [*AA*] is to foster and preserve the integrity of the arbitration system" (para. 41).

B. British Columbia Court of Appeal — Leave to Appeal Decision, 2010 BCCA 239 (B.C. C.A.)

21 The CA Leave Court reversed the SC Leave Court and granted Creston's application for leave to appeal the arbitral award. It found the SC Leave Court "err[ed] in failing to find that the arbitrator's failure to address the meaning of s. 3.1 of the Agreement (and in particular the 'maximum amount' provision) raised a question of law" (para. 23). The CA Leave Court decided that the construction of s. 3.1 of the Agreement, and in particular the "maximum amount" proviso, was a question of law because it did not involve reference to the facts of what the TSXV was told or what it decided.

22 The CA Leave Court acknowledged that Creston was "less than forthcoming in its dealings with Mr. Le and the [TSXV]" but said that "these facts are not directly relevant to the question of law it advances on the appeal" (para. 27). With respect to the SC leave judge's reference to the preservation of the integrity of the arbitration system, the CA Leave Court said that the parties would have known when they chose to enter arbitration under the *AA* that an appeal on a question of law was possible. Additionally, while the finality of arbitration is an important factor in exercising discretion, when "a question of law arises on a matter of importance and a miscarriage of justice might be perpetrated if an appeal were not available, the integrity of the process requires, at least in the circumstances of this case, that the right of appeal granted by the legislation also be respected" (para. 29).

C. British Columbia Supreme Court — Appeal Decision, 2011 BCSC 597 (B.C. S.C.)

23 Armstrong J. reviewed the arbitrator's decision on a correctness standard. He dismissed the appeal, holding the arbitrator's interpretation of the Agreement was correct.

24 Armstrong J. found that the plain and ordinary meaning of the Agreement required that the US$1.5 million fee be paid in shares priced at $0.15. He did not find the meaning to be absurd simply because the price of the shares at the date the fee became payable had increased in relation to the price determined according to the Market Price definition. He was of the view that changes in the price of shares over time are inevitable, and that the parties, as sophisticated business persons, would have reasonably understood a fluctuation in share price to be a reality when providing for a fee payable in shares. According to Armstrong J., it is indeed because of market fluctuations that it is necessary to choose a specific date to price the shares in advance of payment. He found that this was done by defining "Market Price" in the Agreement, and that the fee remained US$1.5 million in $0.15 shares as determined by the Market Price definition regardless of the price of the shares at the date that the fee was payable.

25 According to Armstrong J., that the price of the shares may be more than the Market Price definition price when they became payable was foreseeable as a "natural consequence of the fee

agreement" (para. 62). He was of the view that the risk was borne by Sattva, since the price of the shares could increase, but it could also decrease such that Sattva would have received shares valued at less than the agreed upon fee of US$1.5 million.

26 Armstrong J. held that the arbitrator's interpretation which gave effect to both the Market Price definition and the "maximum amount" proviso should be preferred to Creston's interpretation of the agreement which ignored the Market Price definition.

27 In response to Creston's argument that the arbitrator did not consider s. 3.1 of the Agreement which contains the "maximum amount" proviso, Armstrong J. noted that the arbitrator explicitly addressed the "maximum amount" proviso at para. 23 of his decision.

D. British Columbia Court of Appeal — Appeal Decision, 2012 BCCA 329 (B.C. C.A.)

28 The CA Appeal Court allowed Creston's appeal, ordering that the payment of US$1.5 million that had been made by Creston to Sattva on account of the arbitrator's award constituted payment in full of the finder's fee. The court reviewed the arbitrator's decision on a standard of correctness.

29 The CA Appeal Court found that both it and the SC Appeal Court were bound by the findings made by the CA Leave Court. There were two findings that were binding: (1) it would be anomalous if the Agreement allowed Sattva to receive US$1.5 million if it received its fee in cash, but shares valued at approximately $8 million if Sattva took its fee in shares; and (2) the arbitrator ignored this anomaly and did not address s. 3.1 of the Agreement.

30 The Court of Appeal found that it was an absurd result to find that Sattva is entitled to an $8 million finder's fee in light of the fact that the "maximum amount" proviso in the Agreement limits the finder's fee to US$1.5 million. The court was of the view that the proviso limiting the fee to US$1.5 million "when paid" should be given paramount effect (para. 47). In its opinion, giving effect to the Market Price definition could not have been the intention of the parties, nor could it have been in accordance with good business sense.

IV. Issues

31 The following issues arise in this appeal:

(a) Is the issue of whether the CA Leave Court erred in granting leave under s. 31(2) of the *AA* properly before this Court?

(b) Did the CA Leave Court err in granting leave under s. 31(2) of the *AA*?

(c) If leave was properly granted, what is the appropriate standard of review to be applied to commercial arbitral decisions made under the *AA*?

(d) Did the arbitrator reasonably construe the Agreement as a whole?

(e) Did the CA Appeal Court err in holding that it was bound by comments regarding the merits of the appeal made by the CA Leave Court?

V. Analysis

A. The Leave Issue Is Properly Before This Court

32 Sattva argues, in part, that the CA Leave Court erred in granting leave to appeal from the arbitrator's decision. In Sattva's view, the CA Leave Court did not identify a question of law, a requirement to obtain leave pursuant to s. 31(2) of the *AA*. Creston argues that this issue is not properly before this Court. Creston makes two arguments in support of this point.

33 First, Creston argues that this issue was not advanced in Sattva's application for leave to appeal to this Court. This argument must fail. Unless this Court places restrictions in the order granting leave, the order granting leave is "at large". Accordingly, appellants may raise issues on appeal that were not set out in the leave application. However, the Court may exercise its discretion to refuse to deal with issues that were not addressed in the courts below, if there is prejudice to the respondent, or if for any other reason the Court considers it appropriate not to deal with a question.

34 Here, this Court's order granting leave to appeal from both the CA Leave Court decision and the CA Appeal Court decision contained no restrictions (2013 CanLII 11315). The issue — whether the proposed appeal was on a question of law — was expressly argued before, and was dealt with in the judgments of, the SC Leave Court and the CA Leave Court. There is no reason Sattva should be precluded from raising this issue on appeal despite the fact it was not mentioned in its application for leave to appeal to this Court.

35 Second, Creston argues that the issue of whether the CA Leave Court identified a question of law is not properly before this Court because Sattva did not contest this decision before all of the lower courts. Specifically, Creston states that Sattva did not argue that the question on appeal was one of mixed fact and law before the SC Appeal Court and that it conceded the issue on appeal was a question of law before the CA Appeal Court. This argument must also fail. At the SC Appeal Court, it was not open to Sattva to reargue the question of whether leave should have been granted. The SC Appeal Court was bound by the CA Leave Court's finding that leave should have been granted, including the determination that a question of law had been identified. Accordingly, Sattva could hardly be expected to reargue before the SC Appeal Court a question that had been determined by the CA Leave Court. There is nothing in the *AA* to indicate that Sattva could have appealed the leave decision made by a panel of the Court of Appeal to another panel of the same court. The fact that Sattva did not reargue the issue before the SC Appeal Court or CA Appeal Court does not prevent it from raising the issue before this Court, particularly since Sattva was also granted leave to appeal the CA Leave Court decision by this Court.

36 While this Court may decline to grant leave where an issue sought to be argued before it was not argued in the courts appealed from, that is not this case. Here, whether leave from the arbitrator's decision had been sought by Creston on a question of law or a question of mixed fact and law had been

argued in the lower leave courts.

37 Accordingly, the issue of whether the CA Leave Court erred in finding a question of law for the purposes of granting leave to appeal is properly before this Court.

B. The CA Leave Court Erred in Granting Leave Under Section 31(2) of the AA

(1) Considerations Relevant to Granting or Denying Leave to Appeal Under the AA

38 Appeals from commercial arbitration decisions are narrowly circumscribed under the *AA*. Under s. 31(1), appeals are limited to either questions of law where the parties consent to the appeal or to questions of law where the parties do not consent but where leave to appeal is granted. Section 31(2) of the *AA*, reproduced in its entirety in Appendix III, sets out the requirements for leave:

> (2) In an application for leave under subsection (1) (b), the court may grant leave if it determines that
>
> > (a) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a miscarriage of justice,
> >
> > (b) the point of law is of importance to some class or body of persons of which the applicant is a member, or
> >
> > (c) the point of law is of general or public importance.

39 The B.C. courts have found that the words "may grant leave" in s. 31(2) of the *AA* give the courts judicial discretion to deny leave even where the statutory requirements have been met (*Student Assn. of the British Columbia Institute of Technology v. British Columbia Institute of Technology*, 2000 BCCA 496, 192 D.L.R. (4th) 122 (B.C. C.A.) ("*BCIT*"), at paras. 25-26). Appellate review of an arbitrator's award will only occur where the requirements of s. 31(2) are met and where the leave court does not exercise its residual discretion to nonetheless deny leave.

40 Although Creston's application to the SC Leave Court sought leave pursuant to s. 31(2)(a), (b) and (c), it appears the arguments before that court and throughout focused on s. 31(2)(a). The SC Leave Court's decision quotes a lengthy passage from *BCIT* that focuses on the requirements of s. 31(2)(a). The SC Leave Court judge noted that both parties conceded the first requirement of s. 31(2)(a): that the issue be of importance to the parties. The CA Leave Court decision expressed concern that denying leave might give rise to a miscarriage of justice — a criterion only found in s. 31(2)(a). Finally, neither the lower courts' leave decisions nor the arguments before this Court reflected arguments about the question of law being important to some class or body of persons of which the applicant is a member (s. 31(2)(b)) or being a point of law of general or public importance (s. 31(2)(c)). Accordingly, the following analysis will focus on s. 31(2)(a).

(2) The Result Is Important to the Parties

41 In order for leave to be granted from a commercial arbitral award, a threshold requirement must be met: leave must be sought on a question of law. However, before dealing with that issue, it will be convenient to quickly address another requirement of s. 31(2)(a) on which the parties agree: whether the importance of the result of the arbitration to the parties justifies the intervention of the court. Justice Saunders explained this criterion in *BCIT* as requiring that the result of the arbitration be "sufficiently important", in terms of principle or money, to the parties to justify the expense and time of court proceedings (para. 27). The parties in this case have agreed that the result of the arbitration is of importance to each of them. In view of the relatively large monetary amount in dispute and in light of the fact that the parties have agreed that the result is important to them, I accept that the importance of the result of the arbitration to the parties justifies the intervention of the court. This requirement of s. 31(2)(a) is satisfied.

(3) The Question Under Appeal Is Not a Question of Law

(a) When Is Contractual Interpretation a Question of Law?

42 Under s. 31 of the *AA*, the issue upon which leave is sought must be a question of law. For the purpose of identifying the appropriate standard of review or, as is the case here, determining whether the requirements for leave to appeal are met, reviewing courts are regularly required to determine whether an issue decided at first instance is a question of law, fact, or mixed fact and law.

43 Historically, determining the legal rights and obligations of the parties under a written contract was considered a question of law (*King v. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80, 270 Man. R. (2d) 63 (Man. C.A.), at para. 20, *per* Steel J.A.; K. Lewison, *The Interpretation of Contracts* (5th ed. 2011 & Supp. 2013), at pp. 173-76; and G. R. Hall, *Canadian Contractual Interpretation Law* (2nd ed. 2012), at pp. 125-26). This rule originated in England at a time when there were frequent civil jury trials and widespread illiteracy. Under those circumstances, the interpretation of written documents had to be considered questions of law because only the judge could be assured to be literate and therefore capable of reading the contract (Hall, at p. 126; and Lewison, at pp. 173-74).

44 This historical rationale no longer applies. Nevertheless, courts in the United Kingdom continue to treat the interpretation of a written contract as always being a question of law (Thorner v. Major, [2009] UKHL 18, [2009] 3 All E.R. 945 (U.K. H.L.), at paras. 58 and 82-83; and Lewison, at pp. 173-77). They do this despite the fact that U.K. courts consider the surrounding circumstances, a concept addressed further below, when interpreting a written contract (*Prenn v. Simmonds*, [1971] 3 All E.R. 237 (U.K. H.L.); and *Reardon Smith Line v. Hansen-Tangen*, [1976] 3 All E.R. 570 (U.K. H.L.)).

45 In Canada, there remains some support for the historical approach. See for example *Jiro Enterprises Ltd. v. Spencer*, 2008 ABCA 87 (Alta. C.A.) (CanLII), at para. 10; *QK Investments Inc. v. Crocus Investment Fund*, 2008 MBCA 21, 290 D.L.R. (4th) 84 (Man. C.A.), at para. 26; *Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd.*, 2010 ABCA 126, 25 Alta. L.R. (5th) 221 (Alta. C.A.), at paras. 11-12; and *Costco Wholesale Canada Ltd. v. R.*, 2012 FCA 160, 431 N.R. 78 (F.C.A.), at para. 34.

However, some Canadian courts have abandoned the historical approach and now treat the interpretation of written contracts as an exercise involving either a question of law or a question of mixed fact and law. See for example *WCI Waste Conversion Inc. v. ADI International Inc.*, 2011 PECA 14, 309 Nfld. & P.E.I.R. 1 (P.E.I. C.A.), at para. 11; *269893 Alberta Ltd. v. Otter Bay Developments Ltd.*, 2009 BCCA 37, 266 B.C.A.C. 98 (B.C. C.A.), at para. 13; *Hayes Forest Services Ltd. v. Weyerhaeuser Co.*, 2008 BCCA 31, 289 D.L.R. (4th) 230 (B.C. C.A.), at para. 44; *Plan Group v. Bell Canada*, 2009 ONCA 548, 96 O.R. (3d) 81 (Ont. C.A.), at paras. 22-23 (majority reasons, *per* Blair J.A.) and paras. 133-35 (*per* Gillese J.A. in dissent, but not on this point); and *King*, at paras. 20-23.

46 The shift away from the historical approach in Canada appears to be based on two developments. The first is the adoption of an approach to contractual interpretation which directs courts to have regard for the surrounding circumstances of the contract — often referred to as the factual matrix — when interpreting a written contract (Hall, at pp. 13, 21-25 and 127; and J. D. McCamus, *The Law of Contracts* (2nd ed. 2012), at pp. 749-51). The second is the explanation of the difference between questions of law and questions of mixed fact and law provided in *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.), at para. 35, and *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.), at paras. 26 and 31-36.

47 Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744 (S.C.C.), at para. 27 *per* LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69 (S.C.C.), at paras. 64-65 *per* Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:

> No contracts are made in a vacuum: there is always a setting in which they have to be placed.... In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

(*Reardon Smith Line*, at p. 574, *per* Lord Wilberforce)

48 The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement (see *Geoffrey L. Moore Realty Inc. v. Manitoba Motor League*, 2003 MBCA 71, 173 Man. R. (2d) 300 (Man. C.A.), at para. 15, *per* Hamilton J.A.; see also Hall, at p. 22; and McCamus, at pp. 749-50). As stated by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society* (1997), [1998] 1 All E.R. 98 (U.K. H.L.):

> The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [p. 115]

49 As to the second development, the historical approach to contractual interpretation does not fit well with the definition of a pure question of law identified in *Housen* and *Southam Inc.* Questions of law "are questions about what the correct legal test is" (*Southam Inc.*, at para. 35). Yet in contractual interpretation, the goal of the exercise is to ascertain the objective intent of the parties — a fact-specific goal — through the application of legal principles of interpretation. This appears closer to a question of mixed fact and law, defined in *Housen* as "applying a legal standard to a set of facts" (para. 26; see also *Southam Inc.*, at para. 35). However, some courts have questioned whether this definition, which was developed in the context of a negligence action, can be readily applied to questions of contractual interpretation, and suggest that contractual interpretation is primarily a legal affair (see for example *Bell Canada*, at para. 25).

50 With respect for the contrary view, I am of the opinion that the historical approach should be abandoned. Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix.

51 The purpose of the distinction between questions of law and those of mixed fact and law further supports this conclusion. One central purpose of drawing a distinction between questions of law and those of mixed fact and law is to limit the intervention of appellate courts to cases where the results can be expected to have an impact beyond the parties to the particular dispute. It reflects the role of courts of appeal in ensuring the consistency of the law, rather than in providing a new forum for parties to continue their private litigation. For this reason, *Southam Inc.* identified the degree of generality (or "precedential value") as the key difference between a question of law and a question of mixed fact and law. The more narrow the rule, the less useful will be the intervention of the court of appeal:

> If a court were to decide that driving at a certain speed on a certain road under certain conditions was negligent, its decision would not have any great value as a precedent. In short, as the level of generality of the challenged proposition approaches utter particularity, the matter approaches pure application, and hence draws nigh to being an unqualified question of mixed law and fact. See R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994), at pp. 103-108. Of course, it is not easy to say precisely where the line should be drawn; though in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future. [para. 37]

52 Similarly, this Court in *Housen* found that deference to fact-finders promoted the goals of limiting the number, length, and cost of appeals, and of promoting the autonomy and integrity of trial proceedings (paras. 16-17). These principles also weigh in favour of deference to first instance decision-

makers on points of contractual interpretation. The legal obligations arising from a contract are, in most cases, limited to the interest of the particular parties. Given that our legal system leaves broad scope to tribunals of first instance to resolve issues of limited application, this supports treating contractual interpretation as a question of mixed fact and law.

53 Nonetheless, it may be possible to identify an extricable question of law from within what was initially characterized as a question of mixed fact and law (*Housen*, at paras. 31 and 34-35). Legal errors made in the course of contractual interpretation include "the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor" (*King*, at para. 21). Moreover, there is no question that many other issues in contract law do engage substantive rules of law: the requirements for the formation of the contract, the capacity of the parties, the requirement that certain contracts be evidenced in writing, and so on.

54 However, courts should be cautious in identifying extricable questions of law in disputes over contractual interpretation. Given the statutory requirement to identify a question of law in a leave application pursuant to s. 31(2) of the *AA*, the applicant for leave and its counsel will seek to frame any alleged errors as questions of law. The legislature has sought to restrict such appeals, however, and courts must be careful to ensure that the proposed ground of appeal has been properly characterized. The warning expressed in *Housen* to exercise caution in attempting to extricate a question of law is relevant here:

> Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact". Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" .... [para. 36]

55 Although that caution was expressed in the context of a negligence case, it applies, in my opinion, to contractual interpretation as well. As mentioned above, the goal of contractual interpretation, to ascertain the objective intentions of the parties, is inherently fact specific. The close relationship between the selection and application of principles of contractual interpretation and the construction ultimately given to the instrument means that the circumstances in which a question of law can be extricated from the interpretation process will be rare. In the absence of a legal error of the type described above, no appeal lies under the *AA* from an arbitrator's interpretation of a contract.

(b) The Role and Nature of the "Surrounding Circumstances"

56 I now turn to the role of the surrounding circumstances in contractual interpretation and the nature of the evidence that can be considered. The discussion here is limited to the common law approach to contractual interpretation; it does not seek to apply to or alter the law of contractual interpretation governed by the *Civil Code of Québec*.

57 While the surrounding circumstances will be considered in interpreting the terms of a contract,

they must never be allowed to overwhelm the words of that agreement (*Hayes Forest Services*, at para. 14; and Hall, at p. 30). The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (Hall, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v. BC Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62 (B.C. C.A.)).

58 The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (*King*, at paras. 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" (*Investors Compensation Scheme*, at p. 114). Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.

(c) Considering the Surrounding Circumstances Does Not Offend the Parol Evidence Rule

59 It is necessary to say a word about consideration of the surrounding circumstances and the parol evidence rule. The parol evidence rule precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing (*King*, at para. 35; and Hall, at p. 53). To this end, the rule precludes, among other things, evidence of the subjective intentions of the parties (Hall, at pp. 64-65; and *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129 (S.C.C.), at paras. 54-59, *per* Iacobucci J.). The purpose of the parol evidence rule is primarily to achieve finality and certainty in contractual obligations, and secondarily to hamper a party's ability to use fabricated or unreliable evidence to attack a written contract (*C.J.A., Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316 (S.C.C.), at pp. 341-42, *per* Sopinka J.).

60 The parol evidence rule does not apply to preclude evidence of the surrounding circumstances. Such evidence is consistent with the objectives of finality and certainty because it is used as an interpretive aid for determining the meaning of the written words chosen by the parties, not to change or overrule the meaning of those words. The surrounding circumstances are facts known or facts that reasonably ought to have been known to both parties at or before the date of contracting; therefore, the concern of unreliability does not arise.

61 Some authorities and commentators suggest that the parol evidence rule is an anachronism, or, at the very least, of limited application in view of the myriad of exceptions to it (see for example *Gutierrez v. Tropic International Ltd.* (2002), 63 O.R. (3d) 63 (Ont. C.A.), at paras. 19-20; and Hall, at pp. 53-64). For the purposes of this appeal, it is sufficient to say that the parol evidence rule does not apply to

preclude evidence of surrounding circumstances when interpreting the words of a written contract.

(d) Application to the Present Case

62 In this case, the CA Leave Court granted leave on the following issue: "Whether the Arbitrator erred in law in failing to construe the whole of the Finder's Fee Agreement ..." (A.R., vol. 1, at p. 62).

63 As will be explained below, while the requirement to construe a contract as a whole is a question of law that could — if extricable — satisfy the threshold requirement under s. 31 of the *AA*, I do not think this question was properly extricated in this case.

64 I accept that a fundamental principle of contractual interpretation is that a contract must be construed as a whole (McCamus, at pp. 761-62; and Hall, at p. 15). If the arbitrator did not take the "maximum amount" proviso into account, as alleged by Creston, then he did not construe the Agreement as a whole because he ignored a specific and relevant provision of the Agreement. This is a question of law that would be extricable from a finding of mixed fact and law.

65 However, it appears that the arbitrator did consider the "maximum amount" proviso. Indeed, the CA Leave Court acknowledges that the arbitrator had considered that proviso, since it notes that he turned his mind to the US$1.5 million maximum amount, an amount that can only be calculated by referring to the TSXV policy referenced in the "maximum amount" proviso in s. 3.1 of the Agreement. As I read its reasons, rather than being concerned with whether the arbitrator ignored the maximum amount proviso, which is what Creston alleges in this Court, the CA Leave Court decision focused on how the arbitrator construed s. 3.1 of the Agreement, which included the maximum amount proviso (paras. 25-26). For example, the CA Leave Court expressed concern that the arbitrator did not address the "incongruity" in the fact that the value of the fee would vary "hugely" depending on whether it was taken in cash or shares (para. 25).

66 With respect, the CA Leave Court erred in finding that the construction of s. 3.1 of the Agreement constituted a question of law. As explained by Justice Armstrong in the SC Appeal Court decision, construing s. 3.1 and taking account of the proviso required relying on the relevant surrounding circumstances, including the sophistication of the parties, the fluctuation in share prices, and the nature of the risk a party assumes when deciding to accept a fee in shares as opposed to cash. Such an exercise raises a question of mixed fact and law. There being no question of law extricable from the mixed fact and law question of how s. 3.1 and the proviso should be interpreted, the CA Leave Court erred in granting leave to appeal.

67 The conclusion that Creston's application for leave to appeal raised no question of law would be sufficient to dispose of this appeal. However, as this Court rarely has the opportunity to address appeals of arbitral awards, it is, in my view, useful to explain that, even had the CA Leave Court been correct in finding that construction of s. 3.1 of the Agreement constituted a question of law, it should have nonetheless denied leave to appeal as the application also failed the miscarriage of justice and residual discretion stages of the leave analysis set out in s. 31(2)(a) of the *AA*.

(4) May Prevent a Miscarriage of Justice

(a) Miscarriage of Justice for the Purposes of Section 31(2)(a) of the AA

68 Once a question of law has been identified, the court must be satisfied that the determination of that point of law on appeal "may prevent a miscarriage of justice" in order for it to grant leave to appeal pursuant to s. 31(2)(a) of the *AA*. The first step in this analysis is defining miscarriage of justice for the purposes of s. 31(2)(a).

69 In *BCIT*, Justice Saunders discussed the miscarriage of justice requirement under s. 31(2)(a). She affirmed the definition set out in *Domtar Inc. v. Belkin Inc.* (1989), 39 B.C.L.R. (2d) 257 (B.C. C.A.), which required the error of law in question to be a material issue that, if decided differently, would lead to a different result: "... if the point of law were decided differently, the arbitrator would have been led to a different result. In other words, was the alleged error of law material to the decision; does it go to its heart?" (*BCIT*, at para. 28). See also *Cusson v. Quan*, 2009 SCC 62, [2009] 3 S.C.R. 712 (S.C.C.), which discusses the test of whether "some substantial wrong or miscarriage of justice has occurred" in the context of a civil jury trial (para. 43).

70 Having regard to *BCIT* and *Quan*, I am of the opinion that in order to rise to the level of a miscarriage of justice for the purposes of s. 31(2)(a) of the *AA*, an alleged legal error must pertain to a material issue in the dispute which, if decided differently, would affect the result of the case.

71 According to this standard, a determination of a point of law "may prevent a miscarriage of justice" only where the appeal itself has some possibility of succeeding. An appeal with no chance of success will not meet the threshold of "may prevent a miscarriage of justice" because there would be no chance that the outcome of the appeal would cause a change in the final result of the case.

72 At the leave stage, it is not appropriate to consider the full merits of a case and make a final determination regarding whether an error of law was made. However, some preliminary consideration of the question of law is necessary to determine whether the appeal has the potential to succeed and thus to change the result in the case.

73 *BCIT* sets the threshold for this preliminary assessment of the appeal as "more than an arguable point" (para. 30). With respect, once an arguable point has been made out, it is not apparent what more is required to meet the "more than an arguable point" standard. Presumably, the leave judge would have to delve more deeply into the arguments around the question of law on appeal than would be appropriate at the leave stage to find *more* than an arguable point. Requiring this closer examination of the point of law, in my respectful view, blurs the line between the function of the court considering the leave application and the court hearing the appeal.

74 In my opinion, the appropriate threshold for assessing the legal question at issue under s. 31(2) is whether it has arguable merit. The arguable merit standard is often used to assess, on a preliminary basis, the merits of an appeal at the leave stage (see for example *Quick Auto Lease Inc. v. Nordin*, 2014 MBCA 32, 303 Man. R. (2d) 262 (Man. C.A.), at para. 5; and *R. v. Fedossenko*, 2013 ABCA 164 (Alta.

C.A.) (CanLII), at para. 7). "Arguable merit" is a well-known phrase whose meaning has been expressed in a variety of ways: "a reasonable prospect of success" (*Quick Auto Lease Inc.*, at para. 5; and *Enns v. Hansey*, 2013 MBCA 23 (Man. C.A.) (CanLII), at para. 2); "some hope of success" and "sufficient merit" (*R. v. Hubley*, 2009 PECA 21, 289 Nfld. & P.E.I.R. 174 (P.E.I. C.A.), at para. 11); and "credible argument" (*R. v. Will*, 2013 SKCA 4, 405 Sask. R. 270 (Sask. C.A. [In Chambers]), at para. 8). In my view, the common thread among the various expressions used to describe arguable merit is that the issue raised by the applicant cannot be dismissed through a preliminary examination of the question of law. In order to decide whether the award should be set aside, a more thorough examination is necessary and that examination is appropriately conducted by the court hearing the appeal once leave is granted.

75 Assessing whether the issue raised by an application for leave to appeal has arguable merit must be done in light of the standard of review on which the merits of the appeal will be judged. This requires a preliminary assessment of the applicable standard of review. As I will later explain, reasonableness will almost always apply to commercial arbitrations conducted pursuant to the *AA*, except in the rare circumstances where the question is one that would attract a correctness standard, such as a constitutional question or a question of law of central importance to the legal system as a whole and outside the adjudicator's expertise. Therefore, the leave inquiry will ordinarily ask whether there is any arguable merit to the position that the arbitrator's decision on the question at issue is unreasonable, keeping in mind that the decision-maker is not required to refer to all the arguments, provisions or jurisprudence or to make specific findings on each constituent element, for the decision to be reasonable (*N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 (S.C.C.), at para. 16). Of course, the leave court's assessment of the standard of review is only preliminary and does not bind the court which considers the merits of the appeal. As such, this should not be taken as an invitation to engage in extensive arguments or analysis about the standard of review at the leave stage.

76 In *BCIT*, Saunders J.A. considered the stage of s. 31(2)(a) of the *AA* at which an examination of the merits of the appeal should occur. At the behest of one of the parties, she considered examining the merits under the miscarriage of justice criterion. However, she decided that a consideration of the merits was best done at the residual discretion stage. Her reasons indicate that this decision was motivated by the desire to take a consistent approach across s. 31(2)(a), (b) and (c):

> Where, then, if anywhere, does consideration of the merits of the the appeal belong? Mr. Roberts for the Student Association contends that any consideration of the merits of the appeal belongs in the determination of whether a miscarriage of justice may occur; that is, under the second criterion. I do not agree. In my view, the apparent merit or lack of merit of an appeal is part of the exercise of the residual discretion, and applies equally to all three subsections, (*a*) through (*c*). Just as an appeal woefully lacking in merit should not attract leave under (*b*) (of importance to a class of people including the applicant) or (*c*) (of general or public importance), so too it should not attract leave under (*a*). Consideration of the merits, for consistency in the section as a whole, should be made as part of the exercise of residual discretion. [para. 29]

77 I acknowledge the consistency rationale. However, in my respectful opinion, the desire for a consistent approach to s. 31(2)(a), (b) and (c) cannot override the text of the legislation. Unlike s. 31(2)(b) and (c), s. 31(2)(a) requires an assessment to determine whether allowing leave to appeal "may prevent a miscarriage of justice". It is my opinion that a preliminary assessment of the question of law is an implicit component in a determination of whether allowing leave "may prevent a miscarriage of justice".

78 However, in an application for leave to appeal pursuant to s. 31(2)(b) or (c), neither of which contain a miscarriage of justice requirement, I agree with Justice Saunders in *BCIT* that a preliminary examination of the merits of the question of law should be assessed at the residual discretion stage of the analysis as considering the merits of the proposed appeal will always be relevant when deciding whether to grant leave to appeal under s. 31.

79 In sum, in order to establish that "the intervention of the court and the determination of the point of law may prevent a miscarriage of justice" for the purposes of s. 31(2)(a) of the *AA*, an applicant must demonstrate that the point of law on appeal is material to the final result and has arguable merit.

(b) Application to the Present Case

80 The CA Leave Court found that the arbitrator may have erred in law by not interpreting the Agreement as a whole, specifically in ignoring the "maximum amount" proviso. Accepting that this is a question of law for these purposes only, a determination of the question would be material because it could change the ultimate result arrived at by the arbitrator. The arbitrator awarded $4.14 million in damages on the basis that there was an 85 percent chance the TSXV would approve a finder's fee paid in $0.15 shares. If Creston's argument is correct and the $0.15 share price is foreclosed by the "maximum amount" proviso, damages would be reduced to US$1.5 million, a significant reduction from the arbitrator's award of damages.

81 As s. 31(2)(a) of the *AA* is the relevant provision in this case, a preliminary assessment of the question of law will be conducted in order to determine if a miscarriage of justice could have occurred had Creston been denied leave to appeal. Creston argues that the fact that the arbitrator's conclusion results in Sattva receiving shares valued at considerably more than the US$1.5 million maximum dictated by the "maximum amount" proviso is evidence of the arbitrator's failure to consider that proviso.

82 However, the arbitrator did refer to s. 3.1, the "maximum amount" proviso, at two points in his decision: paras. 18 and 23(a). For example, at para. 23 he stated:

> In summary, then, as of March 27, 2007 it was clear and beyond argument that under the Agreement:
>
> > (a) Sattva was entitled to a fee equal to the maximum amount payable pursuant to the rules and policies of the TSX Venture Exchange — section 3.1. It is common ground that the quantum of this fee is US$1,500,000.

(b) The fee was payable in shares based on the Market Price, as defined in the Agreement, unless Sattva elected to take it in cash or a combination of cash and shares.

(c) The Market Price, as defined in the Agreement, was $0.15.

[Emphasis added.]

83 Although the arbitrator provided no express indication that he considered how the "maximum amount" proviso interacted with the Market Price definition, such consideration is implicit in his decision. The only place in the contract that specifies that the amount of the fee is calculated as US$1.5 million is the "maximum amount" proviso's reference to s. 3.3 of the TSXV Policy 5.1. The arbitrator acknowledged that the quantum of the fee is US$1.5 million and awarded Sattva US$1.5 million in shares priced at $0.15. Contrary to Creston's argument that the arbitrator failed to consider the proviso in construing the Agreement, it is apparent on a preliminary examination of the question that the arbitrator did in fact consider the "maximum amount" proviso.

84 Accordingly, even had the CA Leave Court properly identified a question of law, leave to appeal should have been denied. The requirement that there be arguable merit that the arbitrator's decision was unreasonable is not met and the miscarriage of justice threshold was not satisfied.

(5) Residual Discretion to Deny Leave

(a) Considerations in Exercising Residual Discretion in a Section 31(2)(a) Leave Application

85 The B.C. courts have found that the words "may grant leave" in s. 31(2) of the *AA* confer on the court residual discretion to deny leave even where the requirements of s. 31(2) are met (*BCIT*, at paras. 9 and 26). In *BCIT*, Saunders J.A. sets out a non-exhaustive list of considerations that would be applicable to the exercise of discretion (para. 31):

1. "the apparent merits of the appeal";

2. "the degree of significance of the issue to the parties, to third parties and to the community at large";

3. "the circumstances surrounding the dispute and adjudication including the urgency of a final answer";

4. "other temporal considerations including the opportunity for either party to address the result through other avenues";

5. "the conduct of the parties";

6. "the stage of the process at which the appealed decision was made";

7. "respect for the forum of arbitration, chosen by the parties as their means of resolving

disputes"; and

8. "recognition that arbitration is often intended to provide a speedy and final dispute mechanism, tailor-made for the issues which may face the parties to the arbitration agreement".

86 I agree with Justice Saunders that it is not appropriate to create what she refers to as an "immutable checklist" of factors to consider in exercising discretion under s. 31(2) (*BCIT*, at para. 32). However, I am unable to agree that all the listed considerations are applicable at this stage of the analysis.

87 In exercising its statutorily conferred discretion to deny leave to appeal pursuant to s. 31(2)(a), a court should have regard to the traditional bases for refusing discretionary relief: the parties' conduct, the existence of alternative remedies, and any undue delay (*Immeubles Port Louis Ltée c. Lafontaine (Village)*, [1991] 1 S.C.R. 326 (S.C.C.), at pp. 364-67). Balance of convenience considerations are also involved in determining whether to deny discretionary relief (*MiningWatch Canada v. Canada (Minister of Fisheries & Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6 (S.C.C.), at para. 52). This would include the urgent need for a final answer.

88 With respect to the other listed considerations and addressed in turn below, it is my opinion that they have already been considered elsewhere in the s. 31(2)(a) analysis or are more appropriately considered elsewhere under s. 31(2). Once considered, these matters should not be assessed again under the court's residual discretion.

89 As discussed above, in s. 31(2)(a), a preliminary assessment of the merits of the question of law at issue in the leave application is to be considered in determining the miscarriage of justice question. The degree of significance of the issue to the parties is covered by the "importance of the result of the arbitration to the parties" criterion in s. 31(2)(a). The degree of significance of the issue to third parties and to the community at large should not be considered under s. 31(2)(a) as the *AA* sets these out as separate grounds for granting leave to appeal under s. 31(2)(b) and (c). Furthermore, respect for the forum of arbitration chosen by the parties is a consideration that animates the legislation itself and can be seen in the high threshold to obtain leave under s. 31(2)(a). Recognition that arbitration is often chosen as a means to obtain a fast and final resolution tailor-made for the issues is already reflected in the urgent need for a final answer.

90 As for the stage of the process at which the decision sought to be appealed was made, it is not a consideration relevant to the exercise of the court's residual discretion to deny leave under s. 31(2)(a). This factor seeks to address the concern that granting leave to appeal an interlocutory decision may be premature and result in unnecessary fragmentation and delay of the legal process (D. J. M. Brown and J. M. Evans, with the assistance of C. E. Deacon, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 3-67 to 3-76). However, any such concern will have been previously addressed by the leave court in its analysis of whether a miscarriage of justice may arise; more specifically, whether the interlocutory issue has the potential to affect the final result. As such, the above-mentioned concerns

should not be considered anew.

91 In sum, a non-exhaustive list of discretionary factors to consider in a leave application under s. 31(2)(a) of the *AA* would include:

- conduct of the parties;
- existence of alternative remedies;
- undue delay; and
- the urgent need for a final answer.

92 These considerations could, where applicable, be a sound basis for declining leave to appeal an arbitral award even where the statutory criteria of s. 31(2)(a) have been met. However, courts should exercise such discretion with caution. Having found an error of law and, at least with respect to s. 31(2)(a), a potential miscarriage of justice, these discretionary factors must be weighed carefully before an otherwise eligible appeal is rejected on discretionary grounds.

(b) Application to the Present Case

93 The SC Leave Court judge denied leave on the basis that there was no question of law. Even had he found a question of law, the SC Leave Court judge stated that he would have exercised his residual discretion to deny leave for two reasons: first, because of Creston's conduct in misrepresenting the status of the finder's fee issue to the TSXV and Sattva; and second, "on the principle that one of the objectives of the [*AA*] is to foster and preserve the integrity of the arbitration system" (para. 41). The CA Leave Court overruled the SC Leave Court on both of these discretionary grounds.

94 For the reasons discussed above, fostering and preserving the integrity of the arbitral system should not be a discrete discretionary consideration under s. 31(2)(a). While the scheme of s. 31(2) recognizes this objective, the exercise of discretion must pertain to the facts and circumstances of a particular case. This general objective is not a discretionary matter for the purposes of denying leave.

95 However, conduct of the parties is a valid consideration in the exercise of the court's residual discretion under s. 31(2)(a). A discretionary decision to deny leave is to be reviewed with deference by an appellate court. A discretionary decision should not be interfered with merely because an appellate court would have exercised the discretion differently (*R. c. Bellusci*, 2012 SCC 44, [2012] 2 S.C.R. 509 (S.C.C.), at paras. 18 and 30). An appellate court is only justified in interfering with a lower court judge's exercise of discretion if that judge misdirected himself or if his decision is so clearly wrong as to amount to an injustice (*R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651 (S.C.C.), at para. 15; and *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297 (S.C.C.), at para. 117).

96 Here, the SC Leave Court relied upon a well-accepted consideration in deciding to deny discretionary relief: the misconduct of Creston. The CA Leave Court overturned this decision on the grounds that Creston's conduct was "not directly relevant to the question of law" advanced on appeal (at

para. 27).

97 The CA Leave Court did not explain why misconduct need be directly relevant to a question of law for the purpose of denying leave. I see nothing in s. 31(2) of the *AA* that would limit a leave judge's exercise of discretion in the manner suggested by the CA Leave Court. My reading of the jurisprudence does not support the view that misconduct must be directly relevant to the question to be decided by the court.

98 In *Homex Realty & Development Co. v. Wyoming (Village)*, [1980] 2 S.C.R. 1011 (S.C.C.), at pp. 1037-38, misconduct by a party not directly relevant to the question at issue before the court resulted in denial of a remedy. The litigation in *Homex* arose out of a disagreement regarding whether the purchaser of lots in a subdivision, Homex, had assumed the obligations of the vendor under a subdivision agreement to provide "all the requirements, financial and otherwise" for the installation of municipal services on a parcel of land that had been subdivided (pp. 1015-16). This Court determined that Homex had not been accorded procedural fairness when the municipality passed a by-law related to the dispute (p. 1032). Nevertheless, discretionary relief to quash the by-law was denied because, among other things, Homex had sought "throughout all these proceedings to avoid the burden associated with the subdivision of the lands" that it owned (p. 1037), even though the Court held that Homex knew this obligation was its responsibility (pp. 1017-19). This conduct was related to the dispute that gave rise to the litigation, but not to the question of whether the by-law was enacted in a procedurally fair manner. Accordingly, I read *Homex* as authority for the proposition that misconduct related to the dispute that gave rise to the proceedings may justify the exercise of discretion to refuse the relief sought, in this case refusing to grant leave to appeal.

99 Here, the arbitrator found as a fact that Creston misled the TSXV and Sattva regarding "the nature of the obligation it had undertaken to Sattva by representing that the finder's fee was payable in cash" (para. 56(k)). While this conduct is not tied to the question of law found by the CA Leave Court, it is tied to the arbitration proceeding convened to determine which share price should be used to pay Sattva's finder's fee. The SC Leave Court was entitled to rely upon such conduct as a basis for denying leave pursuant to its residual discretion.

100 In the result, in my respectful opinion, even if the CA Leave Court had identified a question of law and the miscarriage of justice test had been met, it should have upheld the SC Leave Court's denial of leave to appeal in deference to that court's exercise of judicial discretion.

101 Although the CA Leave Court erred in granting leave, these protracted proceedings have nonetheless now reached this Court. In light of the fact that the true concern between the parties is the merits of the appeal — that is how much the Agreement requires Creston to pay Sattva — and that the courts below differed significantly in their interpretation of the Agreement, it would be unsatisfactory not to address the very dispute that has given rise to these proceedings. I will therefore proceed to consider the three remaining questions on appeal as if leave to appeal had been properly granted.

C. Standard of Review Under the AA

102 I now turn to consideration of the decisions of the appeal courts. It is first necessary to determine the standard of review of the arbitrator's decision in respect of the question on which the CA Leave Court granted leave: whether the arbitrator construed the finder's fee provision in light of the Agreement as a whole, particularly, whether the finder's fee provision was interpreted having regard for the "maximum amount" proviso.

103 At the outset, it is important to note that the Administrative Tribunals Act, S.B.C. 2004, c. 45, which sets out standards of review of the decisions of many statutory tribunals in British Columbia (see ss. 58 and 59), does not apply in the case of arbitrations under the *AA*.

104 Appellate review of commercial arbitration awards takes place under a tightly defined regime specifically tailored to the objectives of commercial arbitrations and is different from judicial review of a decision of a statutory tribunal. For example, for the most part, parties engage in arbitration by mutual choice, not by way of a statutory process. Additionally, unlike statutory tribunals, the parties to the arbitration select the number and identity of the arbitrators. These differences mean that the judicial review framework developed in *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.), and the cases that followed it is not entirely applicable to the commercial arbitration context. For example, the *AA* forbids review of an arbitrator's factual findings. In the context of commercial arbitration, such a provision is absolute. Under the *Dunsmuir* judicial review framework, a privative clause does not prevent a court from reviewing a decision, it simply signals deference (*Dunsmuir*, at para. 31).

105 Nevertheless, judicial review of administrative tribunal decisions and appeals of arbitration awards are analogous in some respects. Both involve a court reviewing the decision of a non-judicial decision-maker. Additionally, as expertise is a factor in judicial review, it is a factor in commercial arbitrations: where parties choose their own decision-maker, it may be presumed that such decision-makers are chosen either based on their expertise in the area which is the subject of dispute or are otherwise qualified in a manner that is acceptable to the parties. For these reasons, aspects of the *Dunsmuir* framework are helpful in determining the appropriate standard of review to apply in the case of commercial arbitration awards.

106 *Dunsmuir* and the post-*Dunsmuir* jurisprudence confirm that it will often be possible to determine the standard of review by focusing on the nature of the question at issue (see for example *A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61, [2011] 3 S.C.R. 654 (S.C.C.), at para. 44). In the context of commercial arbitration, where appeals are restricted to questions of law, the standard of review will be reasonableness unless the question is one that would attract the correctness standard, such as constitutional questions or questions of law of central importance to the legal system as a whole and outside the adjudicator's expertise (*A.T.A.*, at para. 30). The question at issue here, whether the arbitrator interpreted the Agreement as a whole, does not fall into one of those categories. The relevant portions of the *Dunsmuir* analysis point to a standard of review of reasonableness in this case.

D. The Arbitrator Reasonably Construed the Agreement as a Whole

107 For largely the reasons outlined by Justice Armstrong in paras. 57-75 of the SC Appeal Court decision, in my respectful opinion, in determining that Sattva is entitled to be paid its finder's fee in shares priced at $0.15 per share, the arbitrator reasonably construed the Agreement as a whole. Although Justice Armstrong conducted a correctness review of the arbitrator's decision, his reasons amply demonstrate the reasonableness of that decision. The following analysis is largely based upon his reasoning.

108 The question that the arbitrator had to decide was which date should be used to determine the price of the shares used to pay the finder's fee: the date specified in the Market Price definition in the Agreement or the date the finder's fee was to be paid?

109 The arbitrator concluded that the price determined by the Market Price definition prevailed, i.e. $0.15 per share. In his view, this conclusion followed from the words of the Agreement and was "clear and beyond argument" (para. 23). Apparently, because he considered this issue clear, he did not offer extensive reasons in support of his conclusion.

110 In *N.L.N.U.*, Abella J. cites Professor David Dyzenhaus to explain that, when conducting a reasonableness review, it is permissible for reviewing courts to supplement the reasons of the original decision-maker as part of the reasonableness analysis:

> "Reasonable" means here that the reasons do in fact or in principle support the conclusion reached. That is, even if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them. For if it is right that among the reasons for deference are the appointment of the tribunal and not the court as the front line adjudicator, the tribunal's proximity to the dispute, its expertise, etc, then it is also the case that its decision should be presumed to be correct even if its reasons are in some respects defective. [Emphasis added by Abella J.; para. 12.]
>
> (Quotation from D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 304.)

Accordingly, Justice Armstrong's explanation of the interaction between the Market Price definition and the "maximum amount" proviso can be considered a supplement to the arbitrator's reasons.

111 The two provisions at issue here are the Market Price definition and the "maximum amount" proviso:

> **2. DEFINITIONS**
>
> **"Market Price"** for companies listed on the TSX Venture Exchange shall have the meaning as set out in the Corporate Finance Manual of the TSX Venture Exchange as calculated on close of business day before the issuance of the press release announcing the Acquisition. For companies listed on the TSX, Market Price means the average closing price of the Company's stock on a recognized exchange five trading days immediately preceding the issuance of the press release

> announcing the Acquisition.

And:

> **3. FINDER'S FEE**
>
> 3.1 ... the Company agrees that on the closing of an Acquisition introduced to Company by the Finder, the Company will pay the Finder a finder's fee (the "Finder's Fee") based on Consideration paid to the vendor equal to the maximum amount payable pursuant to the rules and policies of the TSX Venture Exchange. Such finder's fee is to be paid in shares of the Company based on Market Price or, at the option of the Finder, any combination of shares and cash, provided the amount does not exceed the maximum amount as set out in the Exchange Policy 5.1, Section 3.3 Finder's Fee Limitations.
>
> [Emphasis added.]

112 Section 3.1 entitles Sattva to be paid a finder's fee in shares based on the "Market Price". Section 2 of the Agreement states that Market Price for companies listed on the TSXV should be "calculated on close of business day before the issuance of the press release announcing the Acquisition". In this case, shares priced on the basis of the Market Price definition would be $0.15 per share. The words "provided the amount does not exceed the maximum amount as set out in the Exchange Policy 5.1, Section 3.3 Finder's Fee Limitations" in s. 3.1 of the Agreement constitute the "maximum amount" proviso. This proviso limits the amount of the finder's fee. The maximum finder's fee in this case is US$1.5 million (see s. 3.3 of the TSXV Policy 5.1 in Appendix II).

113 While the "maximum amount" proviso limits the amount of the finder's fee, it does not affect the Market Price definition. As Justice Armstrong explained, the Market Price definition acts to fix the date at which one medium of payment (US$) is transferred into another (shares):

> The medium for payment of the finder's fee is clearly established by the fee agreement. The market value of those shares at the time that the parties entered into the fee agreement was unknown. The respondent analogizes between payment of the $1.5 million US finder's fee in shares and a hypothetical agreement permitting payment of $1.5 million US in Canadian dollars. Both agreements would contemplate a fee paid in different currencies. The exchange rate of the US and Canadian dollar would be fixed to a particulate date, as is the value of the shares by way of the Market Price in the fee agreement. That exchange rate would determine the number of Canadian dollars paid in order to satisfy the $1.5 million US fee, as the Market Price does for the number of shares paid in relation to the fee. The Canadian dollar is the form of the fee payment, as are the shares. Whether the Canadian dollar increased or decreased in value after the date on which the exchange rate is based is irrelevant. The amount of the fee paid remains $1.5 million US, payable in the number of Canadian dollars (or shares) equal to the amount of the fee based on the value of that currency on the date that the value is determined.
>
> (SC Appeal Court decision, at para. 71)

114 Justice Armstrong explained that Creston's position requires the Market Price definition to be ignored and for the shares to be priced based on the valuation done in anticipation of a private placement.

115 However, nothing in the Agreement expresses or implies that compliance with the "maximum amount" proviso should be reassessed at a date closer to the payment of the finder's fee. Nor is the basis for the new valuation, in this case a private placement, mentioned or implied in the Agreement. To accept Creston's interpretation would be to ignore the words of the Agreement which provide that the "finder's fee is to be paid in shares of the Company based on Market Price".

116 The arbitrator's decision that the shares should be priced according to the Market Price definition gives effect to both the Market Price definition and the "maximum amount" proviso. The arbitrator's interpretation of the Agreement, as explained by Justice Armstrong, achieves this goal by reconciling the Market Price definition and the "maximum amount" proviso in a manner that cannot be said to be unreasonable.

117 As Justice Armstrong explained, setting the share price in advance creates a risk that makes selecting payment in shares qualitatively different from choosing payment in cash. There is an inherent risk in accepting a fee paid in shares that is not present when accepting a fee paid in cash. A fee paid in cash has a specific predetermined value. By contrast, when a fee is paid in shares, the price of the shares (or mechanism to determine the price of the shares) is set in advance. However, the price of those shares on the market will change over time. The recipient of a fee paid in shares hopes the share price will rise resulting in shares with a market value greater than the value of the shares at the predetermined price. However, if the share price falls, the recipient will receive shares worth less than the value of the shares at the predetermined price. This risk is well known to those operating in the business sphere and both Creston and Sattva would have been aware of this as sophisticated business parties.

118 By accepting payment in shares, Sattva was accepting that it was subject to the volatility of the market. If Creston's share price had fallen, Sattva would still have been bound by the share price determined according to the Market Price definition resulting in it receiving a fee paid in shares with a market value of less than the maximum amount of US$1.5 million. It would make little sense to accept the risk of the share price decreasing without the possibility of benefitting from the share price increasing. As Justice Armstrong stated:

> It would be inconsistent with sound commercial principles to insulate the appellant from a rise in share prices that benefitted the respondent at the date that the fee became payable, when such a rise was foreseeable and ought to have been addressed by the appellant, just as it would be inconsistent with sound commercial principles, and the terms of the fee agreement, to increase the number of shares allocated to the respondent had their value decreased relative to the Market Price by the date that the fee became payable. Both parties accepted the possibility of a change in the value of the shares after the Market Price was determined when entering into the fee agreement.

(SC Appeal Court decision, at para. 70)

119 For these reasons, the arbitrator did not ignore the "maximum amount" proviso. The arbitrator's reasoning, as explained by Justice Armstrong, meets the reasonableness threshold of justifiability, transparency and intelligibility (*Dunsmuir*, at para. 47).

E. Appeal Courts Are Not Bound by Comments on the Merits of the Appeal Made by Leave Courts

120 The CA Appeal Court held that it and the SC Appeal Court were bound by the findings made by the CA Leave Court regarding not simply the decision to grant leave to appeal, but also the merits of the appeal. In other words, it found that the SC Appeal Court erred in law by ignoring the findings of the CA Leave Court regarding the merits of the appeal.

121 The CA Appeal Court noted two specific findings regarding the merits of the appeal that it held were binding on it and the SC Appeal Court: (1) it would be anomalous if the Agreement allowed Sattva to receive US$1.5 million if it received its fee in cash, but allowed it to receive shares valued at approximately $8 million if Sattva received its fee in shares; and (2) that the arbitrator ignored this anomaly and did not address s. 3.1 of the Agreement:

> The [SC Appeal Court] judge found the arbitrator had expressly addressed the maximum amount payable under paragraph 3.1 of the Agreement and that he was correct.
>
> This finding is contrary to the remarks of Madam Justice Newbury in the earlier appeal that, if Sattva took its fee in shares valued at $0.15, it would receive a fee having a value at the time the fee became payable of over $8 million. If the fee were taken in cash, the amount payable would be $1.5 million US. Newbury J.A. specifically held that the arbitrator did not note this anomaly and did not address the meaning of paragraph 3.1 of the Agreement.
>
> The [SC Appeal Court] judge was bound to accept those findings. Similarly, absent a five-judge division in this appeal, we must also accept those findings. [paras. 42-44]

122 With respect, the CA Appeal Court erred in holding that the CA Leave Court's comments on the merits of the appeal were binding on it and on the SC Appeal Court. A court considering whether leave should be granted is not adjudicating the merits of the case (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3 (S.C.C.), at para. 88). A leave court decides only whether the matter warrants granting leave, not whether the appeal will be successful (*Pacifica Mortgage Investment Corp. v. Laus Holdings Ltd.*, 2013 BCCA 95, 333 B.C.A.C. 310 (B.C. C.A.), at para. 27, leave to appeal refused, [2013] 3 S.C.R. viii (note) (S.C.C.)). This is true even where the determination of whether to grant leave involves, as in this case, a preliminary consideration of the question of law at issue. A grant of leave cannot bind or limit the powers of the court hearing the actual appeal (*Tamil Co-operative Homes Inc. v. Arulappah* (2000), 49 O.R. (3d) 566 (Ont. C.A.), at para. 32).

123 Creston concedes this point but argues that the CA Appeal Court's finding that it was bound by

the CA Leave Court was inconsequential because the CA Appeal Court came to the same conclusion on the merits as the CA Leave Court based on separate and independent reasoning.

124 The fact that the CA Appeal Court provided its own reasoning as to why it came to the same conclusion as the CA Leave Court does not vitiate the error. Once the CA Appeal Court treated the CA Leave Court's reasons on the merits as binding, it could hardly have come to any other decision. As counsel for Sattva pointed out, treating the leave decision as binding would render an appeal futile.

VI. Conclusion

125 The CA Leave Court erred in granting leave to appeal in this case. In any event, the arbitrator's decision was reasonable. The appeal from the judgments of the Court of Appeal for British Columbia dated May 14, 2010 and August 7, 2012 is allowed with costs throughout and the arbitrator's award is reinstated.

Appeals allowed.

Pourvois accueillis.

Appendix I

Relevant Provisions of the Sattva-Creston Finder's Fee Agreement

(a) "Market Price" definition:

2. DEFINITIONS

"Market Price" for companies listed on the TSX Venture Exchange shall have the meaning as set out in the Corporate Finance Manual of the TSX Venture Exchange as calculated on close of business day before the issuance of the press release announcing the Acquisition. For companies listed on the TSX, Market Price means the average closing price of the Company's stock on a recognized exchange five trading days immediately preceding the issuance of the press release announcing the Acquisition.

(b) Finder's fee provision (which contains the "maximum amount" proviso):

3. FINDER'S FEE

3.1 ... the Company agrees that on the closing of an Acquisition introduced to Company by the Finder, the Company will pay the Finder a finder's fee (the "Finder's Fee") based on Consideration paid to the vendor equal to the maximum amount payable pursuant to the rules and policies of the TSX Venture Exchange. Such finder's fee is to be paid in shares of the Company based on Market Price or, at the option of the Finder, any combination of shares and cash, provided the amount does not exceed the maximum amount as set out in the Exchange Policy 5.1, Section 3.3 Finder's Fee Limitations.

Appendix II

Section 3.3 of TSX Venture Exchange Policy 5.1: Loans, Bonuses, Finder's Fees and Commissions

3.3 Finder's Fee Limitations

The finder's fee limitations apply if the benefit to the Issuer is an asset purchase or sale, joint venture agreement, or if the benefit to the Issuer is not a specific financing. The consideration should be stated both in dollars and as a percentage of the value of the benefit received. Unless there are unusual circumstances, the finder's fee should not exceed the following percentages:

Benefit	Finder's Fee
On the first $300,000	Up to 10%
From $300,000 to $1,000,000	Up to 7.5%
From $1,000,000 and over	Up to 5%

As the dollar value of the benefit increases, the fee or commission, as a percentage of that dollar value should generally decrease.

Appendix III

Commercial Arbitration Act, R.S.B.C. 1996, c. 55 (as it read on January 12, 2007) (now the Arbitration Act)

Appeal to the court

31

(1) A party to an arbitration may appeal to the court on any question of law arising out of the award if

(a) all of the parties to the arbitration consent, or

(b) the court grants leave to appeal.

(2) In an application for leave under subsection (1) (b), the court may grant leave if it determines that

(a) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a miscarriage of justice,

(b) the point of law is of importance to some class or body of persons of which the applicant is a member, or

(c) the point of law is of general or public importance.

(3) If the court grants leave to appeal under this section, it may attach conditions to the order

granting leave that it considers just.

(4) On an appeal to the court, the court may

(a) confirm, amend or set aside the award, or

(b) remit the award to the arbitrator together with the court's opinion on the question of law that was the subject of the appeal.

TAB 2

1998 CarswellOnt 4170
Ontario Court of Appeal

Kentucky Fried Chicken Canada v. Scott's Food Services Inc.

1998 CarswellOnt 4170, [1998] O.J. No. 4368, 114 O.A.C. 357, 41 B.L.R. (2d) 42, 71 O.T.C. 157, 83 A.C.W.S. (3d) 382

Kentucky Fried Chicken Canada, a Division of Pepsi-Cola Canada Ltd., Plaintiff (Respondent) and Scott's Food Services Inc. and Scott's Hospitality Inc., Defendants (Appellants)

Moldaver, Goudge JJ.A., Ferrier J. (ad hoc)

Heard: May 4-5, 1998
Judgment: November 2, 1998
Docket: CA C28208

Proceedings: reversing (1997), 35 B.L.R. (2d) 21 (Ont. Gen. Div.); additional reasons at (November 5, 1997), Doc. 96-CU-103096 (Ont. Gen. Div.)

Counsel: *Dennis R. O'Connor, Q.C.*, *David Stockwood, Q.C.*, *Nancy J. Spies* and *Timothy H. Mitchell*, for the appellants.
David R. Byers, *Katherine L. Kay* and *Christopher J. Cosgriffe*, for the respondent.

Subject: Intellectual Property; Corporate and Commercial; Contracts; Torts; Property; Civil Practice and Procedure; Evidence

Headnote

Contracts --- Franchising contracts — Construction and interpretation — General

Corporation's subsidiary and licensor entered into license agreement for operation of franchise outlets — Agreement restrained licensee from transferring or assigning agreement or rights without consent of licensor — Corporation subsequently entered into transaction which included transfer of shares in subsidiary to newly formed corporation, without consent of licensor — Licensee brought application for interpretation of licence agreement, and licensor brought action for breach of contract — Action allowed — Trial judge held that corporation was obligated to seek approval and consent of licensor to any sale of majority control of voting shares of corporation or licensee — Failure to obtain such approval was breach of licence agreement — Appeal by licensee allowed — Agreement did not give licensor right to approve change in controlling shareholder of licensee — Ordinary meaning of language in agreement suggested licensor had right on entering franchise agreement to know and approve shareholders of licensee — Nothing in agreement suggested right to approve change in shareholders seven years later — Throughout relationship licensee had made it clear that it would not agree to any restriction on changes of ownership of licensee — Deemed transfer provisions which gave rise to licensor's right to approve change in shareholders of other franchisees under standard franchise agreements were absent from agreement between licensee and licensor — It would lead to commercial absurdity to interpret right of approval as continuing right — Provision in agreement requiring licensee to give licensor information about shareholders of prospective purchaser would be superfluous if licensor had continuing right to approve shareholders of licensee — Given history of parties, it could not be said that it did not make good business sense to restrict right of approval to time parties entered into agreement — Strong bargaining position of licensee made generally accepted industry practice of little use in interpreting agreement — Change in shareholders of licensee did not constitute licensee dealing with its interest under license agreement — Licensor did not have right to prior written consent to corporation's sale of assets — Corporation's transaction did not give rise to right of first refusal on part of licensor as there was no offer to licensee.

Corporations --- Nature of corporation — Distinct existence — From owner — Lifting the corporate veil

Corporation's subsidiary and licensor entered into license agreement for operation of franchise outlets — Agreement restrained licensee from transferring or assigning agreement or rights without consent of licensor — Corporation subsequently entered into transaction which included transfer of shares in subsidiary to newly formed corporation, without consent of licensor — Licensee brought application for interpretation of licence agreement, and licensor brought action for breach of contract — Licensor argued parent corporation was bound by terms of agreement because subsidiary executed it as alter ego, and agreement gave licensor control over transfer of shares of subsidiary and parent corporation — Subsidiary not alter ego of parent corporation — Both parties knew licence agreement was between licensor and subsidiary — Parent corporation completely controlled subsidiary for primary purposes of licence agreement, but took no part in its daily management — Appeal by licensee allowed on other grounds.

Agency --- General principles

Corporation's subsidiary and licensor entered into license agreement for operation of franchise outlets — Agreement restrained licensee from transferring or assigning agreement or rights without consent of licensor — Corporation subsequently entered into transaction which included transfer of shares in subsidiary to newly formed corporation, without consent of licensor — Licensee brought application for interpretation of licence agreement, and licensor brought action for breach of contract — Licensor argued parent corporation was bound by terms of agreement because subsidiary executed it as agent, and agreement gave licensor control over transfer of shares of subsidiary and parent corporation — Subsidiary not agent of parent corporation — Both parties knew licence agreement was between licensor and subsidiary — Parent corporation completely controlled subsidiary for purposes of licence agreement, but took no part in its daily management — Fact that parent corporation made major policy and financial decisions carried out by subsidiary not determinative — Profits of subsidiary were treated as profits of parent corporation on consolidated balance sheet only — Profits of subsidiary not directly traceable to skill and direction of parent corporation — Appeal by licensee allowed on other grounds.

Evidence --- Parol evidence rule — Interpretation — Usage, custom, course of dealings — General

Parties entered into franchise licence agreement — Licensor brought action involving interpretation of agreements and moved to exclude extrinsic parol evidence — Motion allowed in part — Extrinsic evidence admissible to enable court to determine latent ambiguity in written agreement and to construe true intention of parties — Evidence of subjective intention with respect to agreement, and of negotiations and drafts leading to execution of agreement, was not admissible — Relationship between parties and custom in industry were part of factual matrix that must be looked at to interpret agreement — Evidence of licence agreements between licensor and other franchisees in Canada, and between licensor's associated companies and franchisees in other countries, were admissible as relevant to custom in industry — Appeal by licensee allowed on other grounds — Agreement to be interpreted objectively, in accordance with sound commercial principles and good business sense.

Equity --- Equitable doctrines — Relief against penalty and forfeiture — General

Corporation's subsidiary and licensor entered into license agreement for operation of franchise outlets — Agreement restrained licensee from transferring or assigning agreement or rights without consent of licensor — Corporation subsequently entered into transaction which included transfer of shares in subsidiary to newly formed corporation, without consent of licensor — Licensee brought application for interpretation of licence agreement, and licensor brought action for breach of contract — Action allowed — Transactions were in breach of licence agreement and gave licensor right to terminate agreement, subject to claim for relief from forfeiture — Licensee knowingly committed breach of licence agreement — Relief from forfeiture not insurance policy for party taking chance on interpretation of essential term of its contractual rights and losses — Conduct of licensor in vigorously opposing what it considered to be breach of licence agreement was not exceptional or unconscionable — No valid reason to grant relief from forfeiture — Appeal by licensee allowed on other grounds.

Contracts --- Franchising contracts — Performance or breach — Duty of franchisees — General

License agreement provided licensor could require renovations and remodelling of franchise outlets to its standards — Agreement required licensee to upgrade all outlets in accordance with "world wide image" standards and obtain "outlet certification agreements" for each outlet — Development agreement provided for annual enhancement program covering at least 10 per cent of outlets — Licensee upgraded more than 10 per cent of outlets each year from 1990 to 1996, except for 1991, but failed to have 10 per cent of outlets certified every year — Licensee admitted 69 outlets were not upgraded to "world wide image" standards, but were upgraded within its interpretation of agreements — At end of 1996, 28 per cent of outlets did not comply with upgrade provisions of development agreement — Trial judge held that licensee was in substantial breach of development agreement, and provided licensee with three months to remedy default — Licensee brought appeal against finding that licensee must enhance all of its outlets within three months and not just sufficient number so that failure becomes less than material and substantive — Appeal allowed — License agreement permitted licensor to terminate if licensee failed in "material and substantive manner" to meet enhancement obligations — Trial judge held that licensee was in substantive breach where more than five to ten percent of outlets fell below required standard — To correct failure, licensee was only required to ensure that no more than five percent of its outlets were substandard.

Practice --- Costs — Jurisdiction and discretion as to costs

In written submissions at end of trial both parties referred to provision of license agreement between them and claimed full indemnity of their costs — Law was clear that contractual right should be followed by court unless there are special circumstances or where there had been inequitable conduct — In present case had been no inequitable conduct nor special circumstances relating to action — Trial judge ordered there be no costs of trial on basis of provision in license agreement — Appeal of judgment by licensee allowed — Trial judge's order as to costs affirmed — Licensee entitled to costs of appeal.

Practice --- Judgments and orders — Amending or varying — General

From notes it could be seen that counsel had conceded that plaintiff had not called any evidence regarding monetary damages, not as mistakenly put into reasons that plaintiff had not suffered any monetary damages — Reasons for judgment were amended to take this into account — Appeal of judgment allowed on other grounds.

APPEAL by licensee from judgment reported at (1997), 35 B.L.R. (2d) 21 (Ont. Gen. Div.), allowing licensor's action for breach of license agreement.

The judgment of the court was delivered by *Goudge J.A.*:

1 This appeal was heard on May 4 and 5, 1998. This court's reasons for judgment were ready for release on July 9, 1998 when the parties contacted the court to request that this not be done. On the basis of the reasons given by the parties for this request, the court agreed to refrain from releasing its judgment until November 1, 1998 but made clear that the judgment would then be released unless prior to October 31, 1998 both parties notified the court in writing that the matter had been fully and finally settled and that the appellant wished to withdraw the appeal. This has not happened and these reasons are therefore being released.

2 The appellant Scott's Food is the largest Kentucky Fried Chicken ("KFC") franchisee in the world. Its franchise agreement (the "license agreement") with the respondent covers some four hundred outlets, approximately half of all KFC outlets in Canada.

3 Up until 1996, Scott's Food was owned by the appellant Scott's Hospitality whose other major business was a school bus operation. At that point, as part of a transaction with Laidlaw Inc. ("Laidlaw") in which Laidlaw acquired the school bus business, the shareholders of Scott's Hospitality replaced it as the sole shareholder of the franchisee with a new company, Scott's Restaurants. As a result, these shareholders then owned Scott's Restaurants which in turn owned Scott's Food. This change was made without the respondent's consent.

4 There were two main issues at trial. The second, which the parties call the enhancement issue, was

whether, apart altogether from the corporate changes entailed by the Laidlaw transaction, Scott's Food had upgraded its outlets as required by its contract. At trial, Steele J. found that it had not. I will come in due course to the limited appeal taken from the judgment below on this issue.

5 The first and indeed the fundamental issue at trial, called the transfer issue, was whether the license agreement required the appellants (to whom I will refer jointly as "Scott's") to obtain the respondent's consent to the change in ownership of the franchisee failing which the respondent could terminate the agreement. Steele J. interpreted the contract as requiring consent, thereby giving the respondent the right to terminate since no consent was obtained. For the reasons that follow, I have come to the opposite conclusion and I would therefore allow the appeal on the transfer issue.

The Transfer Issue

The Relevant Facts

6 The license agreement that is the subject of this litigation was signed on June 9, 1989, effective January 1, 1989. The respondent was the franchisor and the appellant Scott's Food the franchisee. The latter was a wholly-owned subsidiary of Scott's Hospitality which was not a party to the agreement.

7 At the time the license agreement was made, Scott's operated about one-half of all the KFC outlets in Canada and more than ten times as many as the next largest franchisee in the country. Unlike most franchisees, Scott's had very significant bargaining power in the negotiations which led up to the agreement.

8 For the purposes of the transfer issue, the critical paragraphs of the license agreement are the following:

> **16. Transfer**
>
> 16.1 The grant of the License hereunder is personal to Licensee. The grant of the License hereunder is based upon full disclosure in writing by the Licensee to KFC, and approval by KFC, of all directors and holders of majority control of the voting shares of Licensee and of any corporation or corporations which directly or indirectly (whether by means of any intermediate corporations or otherwise) own or control or have an interest in the shares of the Licensee. Licensee acknowledges that the restrictions provided in this Paragraph 16 are reasonable and necessary to protect the KFC System and the KFC Marks and are for the benefit and protection of all KFC licensees as well as KFC.
>
> 16.2 Licensee agrees that it shall not sell, transfer, assign, encumber, sub-license or otherwise deal with this Agreement or its rights or interest hereunder (hereinafter referred to as "transfer"), without KFC's prior written consent and Licensee's compliance in all respects with the terms and conditions of this Paragraph 16. Any transfer or any attempt to do so, contrary to Paragraph 16 shall be a breach of this Agreement and shall be void but shall give KFC the right of termination as provided in Paragraph 17.2(d).

9 Paragraph 17.2(d) reads as follows:

> 17.2 KFC may, without prejudice to any other rights or remedies contained in this Agreement or at law or in equity, terminate the License upon immediate notice (or in the event advance notice is required by law, upon the giving of such notice) in the event that:
>
> . . . . .
>
> (d) Licensee makes or permits a transfer contrary to the provision of Paragraph 16;

10 The history of Scott's as a KFC franchisee predates the license agreement by twenty years. It goes back to 1969 when Scott's Hospitality entered into an agreement to become a franchisee operating KFC outlets in Canada. The franchisor then was Col. Sanders Kentucky Fried Chicken Limited ("Colonel Sanders"), the owner of the KFC trademarks in Canada. This agreement was to run until January 1, 1994. It is noteworthy that it contained no clause like the current paragraph 16.1. It did not specify that the rights of Scott's Hospitality were personal to it, nor were there any provisions restricting the transfer of its shares. There was, however, a provision restricting the transfer of the license without the prior written consent of the franchisor.

11 By 1985, the franchisor had developed a standard franchise agreement ("the 1985 Agreement") containing certain restrictions on the transfer of shares in the franchisee which, at that point, were standard in all KFC franchise agreements in Canada except that with Scott's Hospitality.

12 While paragraph 16.1 of the 1985 Agreement reads identically to paragraph 16.1 in the license agreement, paragraph 16.2 of the 1985 Agreement when coupled with paragraph 16.4 contains significant differences. These two paragraphs are reproduced below, highlighting the words that do not appear in the license agreement:

> 16.2 The Franchisee agrees that it shall not sell, transfer, assign, encumber, sub-license or otherwise deal with this Agreement or its rights or interest hereunder (hereinafter referred to as "transfer"), **and shall not suffer or permit any deemed sale, transfer or assignment of this Agreement or its rights or interest hereunder (hereinafter referred to as "deemed transfer" and more particularly defined in paragraph 16.4)**, without KFC's prior written consent and **Franchisee's** compliance in all respects with the terms and conditions of this Paragraph 16. Any transfer **or deemed transfer**, or any attempt to do so, contrary to this Paragraph 16 shall be a breach of this Agreement and shall be void but shall give KFC the right of termination as provided in paragraph 17.2(d).
>
> **16.4 For the purposes of this Paragraph 16, a deemed transfer of this Agreement or the rights and interest hereunder shall include**:
>
> (a) ...
>
> **(b) in the event that Franchisee is a corporation, any change (including but**

> **without limitation any issuance, sale, assignment, transfer, redemption or cancellation of, or conversion of any securities into, voting shares of the corporate Franchisee or any other corporation referred to in paragraph 16.1, or any amalgamation, merger or other reorganization of the corporate Franchisee or any such other corporation) in any of the holdings of voting shares referred to in paragraph 16.1; provided that, in the case of any such corporation the voting shares of which are listed and publicly traded on a stock exchange, no such change in any of the holdings of its voting shares shall constitute a deemed transfer unless, in the sole opinion of KFC, direct or indirect control of the corporate Franchisee would thereby be changed.**

13 In 1987, Col. Sanders sold its entire interest in the KFC trademarks in Canada to Kentucky Fried Chicken's corporation ("KFC Corp." or "KFC") which held those rights for the rest of the world.

14 Just prior to this sale, by letter agreement dated July 16, 1987, KFC Corp. agreed that when the sale from Col. Sanders was concluded, it would grant Scott's Hospitality a ten-year renewal of the 1969 agreement. This letter agreement suggested no constraint on the transfer of shares of the franchisee.

15 Pursuant to the 1987 letter agreement, negotiations ensued between KFC and Scott's Hospitality. In these negotiations, Scott's Hospitality refused to agree to terms in the language of the 1985 agreement, just as it had previously refused to do with Col. Sanders. The Scott's representative made clear to KFC that Scott's would not agree to any restrictions on changes of ownership in the licensee.

16 The relative bargaining power of Scott's and KFC in these negotiations was the subject of some considerable attention at trial. The chief KFC negotiator testified that Scott's was at least the equal of KFC in bargaining power. The leading expert for KFC testified that it was unusual for a franchisee to be in such a position.

17 Because of these unique circumstances, the trial judge concluded that the evidence of the experts as to the usual practice in the franchising industry must be applied with caution. Ultimately, he found that Scott's had sufficient bargaining power to negotiate a contract in which there would be no restriction on the transferability of shares. The question he had to decide was whether the resulting license agreement contained such a restriction.

18 The first of the two Laidlaw transactions, which triggered the need to answer this question, began in January 1996 with an unsolicited offer from Laidlaw to purchase all of the shares of Scott's Hospitality. Laidlaw's intention was that following a successful takeover, it would sell off Scott's Food and retain the school bus business operated by Scott's Hospitality. Laidlaw's offer contained a condition that it be satisfied that there was no impediment to its disposing of the shares of Scott's Food to a third party without affecting the franchisee's rights under the license agreement. KFC was not prepared to give its consent to this transaction and indeed commenced this litigation in response. As a result, this Laidlaw proposal could not be completed within its time frame and hence it did not proceed.

19 Rather, a second Laidlaw transaction was structured in which Scott's Restaurants was incorporated as a subsidiary of Scott's Hospitality. Scott's Hospitality then transferred its shares in Scott's Food to Scott's Restaurants in exchange for shares of Scott's Restaurants which were dividended out to the shareholders of Scott's Hospitality. The shareholders of Scott's Hospitality thereby became the owners of Scott's Restaurants which, in turn, became the owner of the franchisee, Scott's Food. Laidlaw then purchased the shares of Scott's Hospitality thereby acquiring the school bus business.

20 KFC was kept fully informed of this transaction but continuously opposed it. Indeed, its consent was never expressly sought. The simple question at trial was whether that consent was required.

The Judgment Below

21 The trial judge found that while Scott's Food as franchisee was bound by the license agreement, Scott's Hospitality was not bound by its terms. He concluded that Scott's Food was neither the alter ego nor the agent of Scott's Hospitality. The respondent does not contest this conclusion.

22 He then went on to his core finding on the transfer issue, namely, the construction of paragraph 16.1 of the license agreement. He construed that paragraph to contain a continuing obligation on the part of the franchisee to obtain approval of KFC to any transfer of the shares of either Scott's Food or its controlling shareholder. He put his findings in these terms:

> In my opinion the disclosure and approval of the directors and holders of majority control would be meaningless unless it was a continuing obligation and not merely at the time of execution. Based on good business sense section 16.1 must be construed as being a continuing obligation.
>
> . . . . .
>
> In my opinion there is nothing in section 16 that prohibits or gives the right of approval to KFC of trading of shares of Scott's Food or Hospitality provided that there is no issue of a change of control.
>
> There are no clearly expressed words requiring the approval of KFC to any transfer of the shares of Scott's Food or its controlling shareholders. However section 16.1 referring to the grant being personal and the reference to the directors and holders of majority control of the shares of Scott's Food and the broad reference to any other corporations with control make it clear that any transfer of the controlling shares of Scott's Food or Hospitality are subject thereto. To interpret the section otherwise would defeat the personal aspect and not make good business sense and would be contrary to the generally accepted practice in the franchise industry.

23 He then moved directly and without elaboration to a finding that paragraph 16.2 prohibits a transfer or an attempted transfer of the license agreement without consent and since the first Laidlaw proposal was an attempted transfer and the second was an actual transfer, each breached paragraph 16.2 and gave KFC the right to terminate the license agreement pursuant to paragraph 17.2(d).

Analysis

24 The question to be determined on the transfer issue is one of contractual interpretation: properly construed, does either paragraph 16.1 or paragraph 16.2 of the license agreement require KFC's consent to either Laidlaw transaction? The trial judge determined that this was not a case of ambiguity and on this basis, he declined to consider evidence of the subjective intentions of the parties which were not communicated to each other. Equally he excluded the various draft documents leading up to the license agreement. He did, however, consider the relationship between the parties and the custom of the industry, including the license agreements between the respondent and other franchisees in Canada, as part of the factual matrix that must be looked at in interpreting the agreement.

25 I agree with this approach. While the task of interpretation must begin with the words of the document and their ordinary meaning, the general context that gave birth to the document or its "factual matrix" will also provide the court with useful assistance. In the famous passage in *Reardon Smith Line v. Hansen-Tangen*, [1976] 1 W.L.R. 989 (U.K. H.L.) at 995-96 Lord Wilberforce said this:

> No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as "the surrounding circumstances" but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

26 The scope of the surrounding circumstances to be considered will vary from case to case but generally will encompass those factors which assist the court "... to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract.": *Consolidated Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co.* (1979), [1980] 1 S.C.R. 888 (S.C.C.) at 901.

27 Where, as here, the document to be construed is a negotiated commercial document, the court should avoid an interpretation that would result in a commercial absurdity[1]. Rather, the document should be construed in accordance with sound commercial principles and good business sense[2]. Care must be taken, however, to do this objectively rather than from the perspective of one contracting party or the other, since what might make good business sense to one party would not necessarily do so for the other.

28 With these broad principles of interpretation in mind, I turn first to the construction to be given to paragraph 16.1 of the license agreement. Properly construed, does it give KFC the right to approve a change in the controlling shareholder of the franchisee? It is the second Laidlaw transaction that requires this question to be answered. Given that the first Laidlaw transaction was not proceeded with, KFC did not argue at trial or on appeal that it breached paragraph 16.1.

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1. *Toronto (City) v. W.H. Hotel Ltd.* (1966), 56 D.L.R. (2d) 539 (S.C.C.) at 548.
2. *Scanlon v. Castlepoint Development Corp.* (1992), 11 O.R. (3d) 744 (Ont. C.A.) at 770.

29 It is helpful at this point to set out the provision again:

> 16.1 The grant of the License hereunder is personal to Licensee. The grant of the License hereunder is based upon full disclosure in writing by the Licensee to KFC, and approval by KFC, of all directors and holders of majority control of the voting shares of Licensee and of any corporation or corporations which directly or indirectly (whether by means of any intermediate corporations or otherwise) own or control or have an interest in the shares of the Licensee. Licensee acknowledges that the restrictions provided in this Paragraph 16 are reasonable and necessary to protect the KFC System and the KFC Marks and are for the benefit and protection of all KFC licensees as well as KFC.

30 I have concluded that this clause does not give KFC a right to approve a change in the controlling shareholder of its franchisee Scott's Food. In other words, paragraph 16.1 does not extend to the second Laidlaw transaction. I say this for a number of reasons.

31 First, the license agreement was signed in 1989. The Laidlaw transactions occurred in 1996. The ordinary meaning of the language used in paragraph 16.1 suggests that the franchisor KFC had the right on entering the contract to know and approve the shareholders of the franchisee. There is nothing to suggest a right to approve a change in those shareholders some seven years later.

32 Second, such a right would mean a significant change from the agreement which had governed this franchise relationship since 1969 which clearly contained no such right. Moreover, Scott's had refused to enter into an agreement like the 1985 standard franchise agreement which did provide the franchisor with this right. The trial judge found that prior to executing the license agreement, KFC knew this and had been told that Scott's would not agree to any restriction on changes of ownership in the franchisee.

33 Third, the language of the 1985 standard franchise agreement is revealing. In 1989, when the license agreement was concluded, every other KFC franchise agreement in Canada expressly provided for the franchisor's right to approve a change in the shareholders of the franchisee. This was done not by means of paragraph 16.1 but rather through the "deemed transfer" language of paragraphs 16.2 and 16.4. Paragraph 16.1 in the license agreement ought not to be construed to provide the franchisor with this right where the identical language in the 1985 standard franchise agreement was clearly not intended to have that effect. The corollary to this is that the deemed transfer language which does provide this right to the franchisor in the 1985 standard franchise agreement is conspicuously absent from the license agreement.

34 Fourth, paragraph 16.1 extends the right of approval to the holders of majority control of the franchisee and any corporation which has an interest in the shares of the franchisee. If this language is read to give KFC a right to approve any subsequent change in the majority shareholder of the franchisee, it must also give KFC the right to approve a subsequent change in shareholder control of any corporation which owns any interest in the franchisee, even if it is only a single share. In argument, the respondent conceded that this would be a commercial absurdity. To find, as the trial judge did, that the

franchisor's right of approval is limited to a change of control in the franchisee is, in my opinion, to read out of paragraph 16.1 the phrase "have an interest in". By contrast, to extend this right of approval to the majority shareholder and also to shareholders who have an interest in the shares of the franchisee does not create a commercial absurdity if that right applies simply at the point of entering the license agreement.

35 Fifth, paragraph 16.4 provides support for this interpretation. It requires the franchisee to seek KFC's consent to a transfer to a third party of the franchisee's interest under the license agreement. To allow an informed consent, this paragraph expressly obliges the franchisee to give KFC the same information about the shareholders of the third party that paragraph 16.1 provided concerning the franchisee. However, if paragraph 16.1 contained an ongoing right of KFC to be informed of and approve the shareholders of the party holding the franchise, paragraph 16.4 would be superfluous.

36 Finally, and with respect, it is my view that the three reasons offered by the trial judge for the opposite interpretation of paragraph 16.1 do not withstand scrutiny.

37 The first reason given by the trial judge was that the meaning I would accord to paragraph 16.1 would defeat the personal aspect of the license agreement. That paragraph certainly makes clear that the grant of the license is personal to the licensee. However, that licensee is clearly and expressly Scott's Food, not its controlling shareholder. A change in the latter leaves the licensee unchanged. Following the second Laidlaw transaction, the license is still granted personally to Scott's Food.

38 The second reason was that it would not make good business sense to read paragraph 16.1 so that it did not extend to a change in the shareholders of the franchisee. While this might not make good business sense from the perspective of the franchisor, it might well make good business sense for the franchisee. In my view, neither of these is helpful in the required task of contractual interpretation. Rather, in applying objectively the interpretive principle of what accords with sound commercial principles and good business sense, the key fact is that for twenty years, from 1969 to 1989, this franchise relationship operated with apparent viability without the right of approval contended for by the respondent. In light of this history, it cannot be concluded that the meaning I give to paragraph 16.1 would not make good business sense.

39 Finally, it was said that reading paragraph 16.1 as I do would be contrary to the generally accepted practice in the franchise industry. The fallacy in this reasoning is that, as the trial judge recognized, this was a very unusual franchising relationship. This franchisee appeared to have bargaining power at least equal to that of KFC and certainly sufficient power to achieve a contract with no restriction on the transferability of shares. By contrast, the trial judge found the industry standard to be that the franchisor has control over the franchisee. In these circumstances, the generally accepted industry practice is of little use in interpreting this particular license agreement.

40 Hence, I conclude that paragraph 16.1 of the license agreement cannot be construed to give KFC the right to approve a change in the shareholders of Scott's Food. This paragraph, therefore, was not breached when Scott's did not obtain KFC's approval of the second Laidlaw transaction.

41 It is next necessary to consider the proper interpretation to be given to paragraph 16.2 of the license agreement. It is helpful to reproduce this provision a second time:

> 16.2 Licensee agrees that it shall not sell, transfer, assign, encumber, sub-license or otherwise deal with this Agreement or its rights or interest hereunder (hereinafter referred to as "transfer"), without KFC's prior written consent and Licensee's compliance in all respects with the terms and conditions of this Paragraph 16. Any transfer or any attempt to do so, contrary to Paragraph 16 shall be a breach of this Agreement and shall be void but shall give KFC the right of termination as provided in Paragraph 17.2(d).

42 The respondent's primary argument was that the second Laidlaw transaction engaged the last sentence of this paragraph. It was said to be a transfer contrary to paragraph 16.1 which, because of paragraph 16.2, triggered the right of termination in paragraph 17.2(d). Given the conclusion I have reached concerning paragraph 16.1, this argument must fail.

43 Apart altogether from paragraph 16.1, however, the respondent also argues that for the purposes of paragraph 16.2, the first Laidlaw transaction was an attempted transfer and the second was an actual transfer and that KFC's prior written consent was therefore required.

44 In my view, this argument also must fail. On the ordinary meaning of the words used in paragraph 16.2, it is the licensee Scott's Food that is constrained from dealing with its interest under the license agreement. Once the alter ego argument is dismissed, this paragraph simply cannot reach Scott's Hospitality, the shareholder of the franchisee. Nor does it reach the shareholders of Scott's Hospitality. Neither an attempted change nor an actual change in the shareholders of the franchisee constitutes the franchisee dealing with its interest under the license agreement.

45 This conclusion is assisted by examining the language of the counterpart paragraph 16.2 in the 1985 standard franchise agreement. The two Laidlaw transactions would be encompassed by that provision only because of the inclusion of the "deemed transfer" concept. As I have said, this concept is conspicuously absent from paragraph 16.2 of this license agreement.

46 The respondent argues that its proposed reading of paragraph 16.2 is consistent with good business sense and industry practice. However, as I have indicated in connection with the argument on paragraph 16.1, in the circumstances of this case, neither of these aids to interpretation requires that paragraph 16.2 be read to give KFC the right to consent to a change in the shareholders of its franchisee.

47 Finally, the respondent relies on *GATX Corp. v. Hawker Siddeley Canada Inc.* (1996), 27 B.L.R. (2d) 251 (Ont. Gen. Div. [Commercial List]) to assert a broad meaning for the phrase "or otherwise deal with" as found in paragraph 16.2. That case is different from this one in that, there, the contracting party was clearly dealing indirectly with its interest under the agreement. Here, neither Laidlaw transaction involved the franchisee dealing in any way with its interest under the license agreement.

48 I therefore find that, properly construed, paragraph 16.2 does not give KFC the right to prior written consent to either Laidlaw transaction.

49 Given my conclusions about paragraphs 16.1 and 16.2 of the license agreement, it is unnecessary to deal with the appellant's alternative arguments: that paragraph 16.1 is limited to a change in ultimate control of the franchisee; that KFC could not have reasonably refused its approval of the second Laidlaw transaction; that a breach of paragraph 16.1 entitles KFC to terminate only if it was a fundamental breach of the license agreement; but in any event, for KFC to terminate would be a breach of its good faith duty under the license agreement; and finally, that the appellants are entitled to relief from forfeiture. Nor is it necessary to deal with the respondent's alternative argument that a breach of paragraph 16.1 allows it to terminate through direct resort to paragraph 17.3 of the license agreement.

50 Before leaving the transfer issue, the remaining matter required to be dealt with arises from the finding below that pursuant to paragraph 16.3 of the license agreement, KFC had a right of first refusal in the circumstances of both Laidlaw transactions. That paragraph reads in part as follows:

> 16 3 In the event that **Licensee receives** a bona fide offer, which **licensee is willing to accept**, from a third party to purchase or otherwise acquire any of the Licensee's rights and interest in this Agreement, ..., Licensee shall first offer to sell the same to KFC at the same price and on the same terms and conditions as in the third party's offer... In the event that KFC so accepts such offer to sell, a binding agreement of purchase and sale shall thereby be constituted between Licensee and KFC at the said price and upon the said terms and conditions....
>
> [Emphasis added.]

51 The reasons below reveal no analysis of the language in this paragraph by the trial judge in reaching his conclusion.

52 In my opinion, the ordinary meaning of the words used in the paragraph dictates the opposite conclusion -- that neither Laidlaw transaction triggered a right of first refusal. Neither an offer to purchase the shares of Scott's Hospitality nor an offer to change the controlling shareholder of Scott's Food is an offer which the franchisee receives or one which the franchisee can accept. The licensee cannot receive a takeover bid for the licensee's parent or for the licensee itself.

53 In summary, therefore, the appellant did not breach either paragraph 16.1 or paragraph 16.2 of the license agreement because of the Laidlaw transactions and KFC does not have the right to terminate the license agreement as a result. Nor did either Laidlaw transaction give KFC a right of first refusal.

54 I would accordingly allow the appeal on the transfer issue and set aside the declarations in paras. 1, 2, 3 and 4 of the judgment below. Instead, an order will go dismissing the claims for these declarations. Finally, I would set aside para. 13 of the judgment below and would grant the declaration sought therein.

The Enhancement Issue

55 The other major issue at trial was whether Scott's Food had failed to meet its obligations to enhance its KFC outlets. These obligations are contained in the license agreement and the addendum to

it, the Master Development Agreement, signed at the same time. The trial judge's two principal findings on this issue were that Scott's Food had failed to enhance its outlets as required by paragraph 7.2 of the Master Development Agreement and, secondly, because more than five to ten per cent of the outlets had not been enhanced as required, the failure was material and substantive, thereby entitling KFC to terminate the license agreement pursuant to paragraph 17.2(e) unless Scott's Food corrects the failure within three months. The appellants appeal neither of these findings. Indeed, they raise only two grounds of appeal in connection with the enhancement issue.

56 Firstly, they appeal the declaration that KFC is also entitled to terminate the license agreement pursuant to paragraphs 17.2(e) and 17.3 because Scott's Food's enhancement failures were breaches of paragraphs 3.2, 5 and 6 of the license agreement. While the judgment contains this declaration, the reasons for judgment do not reveal the basis upon which the declaration was made.

57 Second, they appeal the finding that to avoid KFC's right to terminate under paragraph 17.2(e), Scott's Food must, within three months, enhance all of its outlets, not just a sufficient number that the failure becomes less than material and substantive.

58 Turning to the first of these two grounds of appeal, it is helpful to set out paragraphs 17.2(e) and 17.3 of the license agreement:

> 17.2 KFC may, without prejudice to any other rights or remedies contained in this Agreement or at law or in equity, terminate the License upon immediate notice (or in the event advance notice is required by law, upon the giving of such notice) in the event that:
>
> . . . . .
>
> > (e) Licensee fails to satisfy, in a material and substantive manner, the requirements for enhancement and development contained in Articles 3.3, 3.4, 7.2 and 7.3 of the Addendum, provided that notice of any such failure is delivered to Licensee and Licensee shall not have corrected such failure within (3) months from the delivery of such notice.
>
> 17.3 The License will terminate on the termination date specified in any notice by KFC to Licensee (without any further notice of termination unless required by law), provided that (a) the notice is hand delivered or mailed at least thirty (30) days (or such longer period as may be required by law) in advance of the termination date, (b) the notice reasonably identifies one or more breaches or defaults in Licensee's obligations or performance hereunder, (c) the notice specifies the manner in which the breach(es) or default(s) are not fully remedied before, and as of, the termination date.

59 In my view, paragraph 17.2(e) deals explicitly and exhaustively with the enhancement obligations on the franchisee that, if not met, give KFC the right to terminate the license agreement. None of paragraphs 3.2, 5 or 6 of the license agreement is included in that list.

60 Moreover, as indicated by the trial judge, paragraph 17.3 merely sets out the procedure of formal notice. It does not accord to KFC a substantive right to terminate for any failure by Scott's Food to

discharge its enhancement obligations. To so interpret paragraph 17.3 would fly in the face of paragraph 17.2 where the parties have carefully selected the enhancement obligations that, if breached, justify termination. Hence I would reverse the declaration that because the franchisee's enhancement failures breached paragraphs 3.2, 5 and 6 of the license agreement, KFC is entitled to terminate pursuant to paragraphs 17.2(e) and 17.3.

61 As to the second ground of appeal on the enhancement issue, paragraph 17.2(e) of the license agreement provides that failure *in a material and substantive manner* (my emphasis) to meet the franchisee's enhancement obligations as specified therein gives KFC the right to terminate if the failure is not corrected within three months. As I have said, the trial judge found that where more than five to ten per cent of the outlets fall below this required standard, Scott's Food was in substantial breach for the purposes of this paragraph. He went on to say this:

> ...KFC must give three months' notice from the date of this judgment to Scott's to allow it to remedy the default found in this decision on the enhancement issue. In other words, Scott's must be given three months in which to upgrade all of its remaining outlets to certification standards. If it chooses not to do so, it may close those stores under other termination procedures.

62 There is nothing in the actual judgment appealed from that requires the franchisee to enhance or close all of its remaining outlets to avoid termination. Hence, I propose to make no order on this ground of appeal.

63 However, in my opinion, if failure in a material and substantive manner to meet the enhancement requirements occurs when five to ten per cent of the outlets are below standard, correcting that failure means enhancing at least enough outlets so that there is no possibility of this line being crossed. This means that to correct that failure within three months, Scott's Food must ensure that no more than five per cent of its outlets are substandard. I would therefore not think it necessary that to correct the failure, the franchisee must sufficiently upgrade all its remaining outlets. To do so would make the correction incongruent with the failure contrary to what I think is meant by the final phrase of paragraph 17.2(e).

64 The view I have expressed is also consistent with paragraph 6.3 of the Master Development Agreement. It contemplates that the franchisee could operate outlets for a limited period of time even if they had not been enhanced to the required standard. This paragraph is inconsistent with a correction requirement that would compel the franchisee to properly enhance all of its remaining outlets.

65 In summary, I would allow the appeal on the enhancement issue. I would set aside the declaration in para. 9 of the judgment below and order that the claim for this declaration be dismissed.

Costs

66 The trial judge ordered that there be no costs of the trial on the basis of paragraph 18.3 of the license agreement which required this result unless one party prevailed entirely, something that did not occur at this trial.

67 Before us, neither party sought to disturb this order and I do not do so. Both parties submitted that costs of the appeal should follow the result. I can see no reason why this should not happen.

68 In conclusion, I would allow the appeals with costs on the transfer issue and the enhancement issue in accordance with these reasons. The trial judgment is otherwise undisturbed.

Appeal allowed.

Footnotes1Toronto (City) v. W.H. Hotel Ltd. (1966), 56 D.L.R. (2d) 539 (S.C.C.) at 548.2Scanlon v. Castlepoint Development Corp. (1992), 11 O.R. (3d) 744 (Ont. C.A.) at 770.

TAB 3

2019 SCC 60, 2019 CSC 60
Supreme Court of Canada

Resolute FP Canada Inc. v. Ontario (Attorney General)

2019 CarswellOnt 19886, 2019 CarswellOnt 19887, 2019 SCC 60, 2019 CSC 60, [2019] S.C.J. No. 60, 29 C.E.L.R. (4th) 1, 311 A.C.W.S. (3d) 767, 444 D.L.R. (4th) 77, 96 B.L.R. (5th) 1

Resolute FP Canada Inc. (Appellant) and Her Majesty The Queen as represented by the Ministry of the Attorney General and Weyerhaeuser Company Limited (Respondents)

Her Majesty The Queen as represented by the Ministry of the Attorney General (Appellant) and Weyerhaeuser Company Limited and Resolute FP Canada Inc. (Respondents)

Weyerhaeuser Company Limited (Appellant) and Her Majesty The Queen as represented by the Ministry of the Attorney General (Respondent) and Attorney General of British Columbia (Intervener)

Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin JJ.

Heard: March 28, 2019
Judgment: December 6, 2019
Docket: 37985

Proceedings: reversing in part *Weyerhaeuser Company Limited v. Ontario (Attorney General)* (2017), 77 B.L.R. (5th) 175, 13 C.E.L.R. (4th) 28, 2017 ONCA 1007, 2017 CarswellOnt 20156, David Brown J.A., John Laskin J.A., P. Lauwers J.A. (Ont. C.A.); reversing in part *Weyerhaeuser Co. v. Ontario (Ministry of the Attorney General)* (2016), 2016 CarswellOnt 11807, 2016 ONSC 4652, [2016] O.J. No. 3900, 60 B.L.R. (5th) 237, 3 C.E.L.R. (4th) 278, Hainey J. (Ont. S.C.J. [Commercial List])

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Subject: Civil Practice and Procedure; Environmental; Property; Public

Headnote

Environmental law --- Liability for environmental harm — Practice and procedure — Miscellaneous

In 2011, Ministry of Environment issued director's order requiring W Ltd. and R Inc. to perform remedial work on abandoned mercury waste disposal site, as two of previous owners of site — W Ltd. and R Inc. contended they enjoyed benefit of 1985 indemnity provided by provincial government to earlier owners of pulp and paper facility, including waste disposal site — W Ltd. and R Inc. contended that government was obligated to indemnify them for any costs incurred to comply with director's order — Litigation ensued and motion judge granted summary judgment in favour of W Ltd. and R Inc. —

Government's appeal was allowed in part — Government, W Ltd. and R Inc. appealed — Government's appeal allowed; R Inc. and W Ltd.'s appeals dismissed — Indemnity did not cover director's order — Motion judge misconstrued purpose and effect of waste disposal site — Site was not source of ongoing mercury contamination or environmental liability and therefore, its creation would not give rise to pollution claim — Indemnity was intended to cover only proceedings arising from discharge or continued presence of mercury in related ecosystems.

Public law --- Crown — Miscellaneous

In 2011, Ministry of Environment issued director's order requiring W Ltd. and R Inc. to perform remedial work on abandoned mercury waste disposal site, as two of previous owners of site — W Ltd. and R Inc. contended they enjoyed benefit of 1985 indemnity provided by provincial government to earlier owners of pulp and paper facility, including waste disposal site — W Ltd. and R Inc. contended that government was obligated to indemnify them for any costs incurred to comply with director's order — Litigation ensued and motion judge granted summary judgment in favour of W Ltd. and R Inc. — Government's appeal was allowed in part — Government, W Ltd. and R Inc. appealed — Government's appeal allowed; R Inc. and W Ltd.'s appeals dismissed — Properly interpreted, indemnity only applied to third party claims — Fact that requirements of paras. 2 and 3 of memorandum of agreement would be utterly meaningless in first party claims implied that pollution claims encompassed only those brought by third parties.

Droit de l'environnement --- Responsabilité pour dommages causés à l'environnement — Procédure — Divers

En 2011, le ministère de l'Environnement a pris un arrêté du directeur exigeant de W ltée et R inc. qu'elles exécutent des travaux de réparation dans un lieu d'élimination de déchets mercuriels abandonné, en tant qu'anciennes propriétaires du site — W ltée et R inc. ont fait valoir qu'elles étaient bénéficiaires de l'indemnité de 1985 accordée par le gouvernement provincial aux anciennes propriétaires d'une usine de pâtes et papiers, incluant le lieu d'élimination de déchets — W ltée et R inc. ont fait valoir que le gouvernement était requis de les indemniser en raison de tout frais encouru pour se conformer à l'arrêté du directeur — Différend s'en est suivi et le juge des requêtes a rendu un jugement sommaire en faveur de W ltée et R inc. — Appel interjeté par le gouvernement a été accueilli en partie — Gouvernement, W ltée et R inc. ont formé des pourvois — Pourvoi du gouvernement accueilli; pourvois de R inc. et de W ltée rejetés — Indemnité ne visait pas l'arrêté du directeur — Juge des requêtes a mal interprété l'objet et l'effet du lieu d'élimination des déchets — Site n'était pas une source constante de contamination par le mercure ou de responsabilité environnementale, et sa création n'était donc pas susceptible de donner lieu à une réclamation pour pollution — Indemnité était censée s'appliquer seulement aux procédures découlant du rejet ou de la présence continue de mercure dans les écosystèmes connexes.

Droit public --- Couronne — Divers

En 2011, le ministère de l'Environnement a pris un arrêté du directeur exigeant de W ltée et R inc.

qu'elles exécutent des travaux de réparation dans un lieu d'élimination de déchets mercuriels abandonné, en tant qu'anciennes propriétaires du site — W ltée et R inc. ont fait valoir qu'elles étaient bénéficiaires de l'indemnité de 1985 accordée par le gouvernement provincial aux anciennes propriétaires d'une usine de pâtes et papiers, incluant le lieu d'élimination de déchets — W ltée et R inc. ont fait valoir que le gouvernement était requis de les indemniser en raison de tout frais encouru pour se conformer à l'arrêté du directeur — Différend s'en est suivi et le juge des requêtes a rendu un jugement sommaire en faveur de W ltée et R inc. — Appel interjeté par le gouvernement a été accueilli en partie — Gouvernement, W ltée et R inc. ont formé des pourvois — Pourvoi du gouvernement accueilli; pourvois de R inc. et de W ltée rejetés — Interprétée comme il se doit, l'indemnité s'appliquait seulement aux réclamations de tiers — Fait que les exigences des par. 2 et 3 du protocole d'entente soient dénuées de tout sens en ce qui a trait aux réclamations de premières parties signifiait que les réclamations pour pollution englobaient seulement celles présentées par des tiers.

In 1985, the province of Ontario granted an indemnity to two former owners of a pulp and paper mill as well as to their successors and assigns from and against any obligation, liability or loss after the date of indemnity as a result of a claim arising from damage, loss, event or circumstance caused by or with respect to the discharge, escape or presence of pollutants. The indemnity was agreed to by parties pursuant to a settlement of litigation brought by two First Nations in relation to the mercury waste contamination of two rivers. Twenty-six years later, the Ministry of the Environment and Climate Change issued a remediation order in relation to monitoring and maintaining the mercury waste disposal site at the mill. In the intervening period, ownership of the mill changed hands in several transactions and the order was issued to W Ltd. and R Inc.

W Ltd. brought an action seeking a declaration that the terms of the indemnity required the government to compensate it for the cost of complying with the order. R Inc. brought a motion for leave to intervene in order to claim the same protection. W Ltd., R Inc. and the government each brought motions for summary judgment. The motion judge held that the indemnity applied to a statutory claim brought by an agent of the province. The motion judge granted the summary judgment in W Ltd. and R Inc.'s favour. The government appealed.

The Court of Appeal agreed that the indemnity applied to the director's order but held that R Inc. was not entitled to indemnification and remitted W Ltd.'s entitlement to indemnification to the Superior Court. The majority of the Court of Appeal found that the motion judge erred in concluding that W Ltd. could claim the benefit of the enurement because this clause applied only to corporate successors. The government, R Inc. and W Ltd. appealed.

Held: The government's appeal was allowed; R Inc. and W Ltd.'s appeals were dismissed.

Per Abella, Moldaver, Karakatsanis, Martin JJ.: The indemnity did not cover the director's order. The motion judge erred in finding that the waste disposal site continued to discharge mercury into the environment. The mistaken finding that mercury discharges were an ongoing source of serious environmental liability undoubtedly drove the motion judge's conclusion that the discharges could give rise to pollution claims. There was no evidence of mercury-contaminated waste being discharged from the waste disposal site. The motion judge misconstrued the purpose and effect of the waste disposal site. The site was not a source of ongoing mercury contamination or environmental liability and as a result, its creation would not give rise to a pollution claim. The indemnity was intended to cover only proceedings arising from the discharge or continued presence of mercury in the related ecosystems, not those related to the mere presence of mercury contained in the waste disposal site.

Properly interpreted, the indemnity only applied to third party claims. The fact that the requirements of paras. 2 and 3 of the memorandum of agreement would be utterly meaningless in first party claims implied that pollution claims encompassed only those brought by third parties. The inclusion of paras. 2 and 3 in the indemnity were completely inconsistent with the notion that para. 1 contemplated first party claims.

Per Côté, Brown JJ. (dissenting in part) (Rowe J. concurring): R Inc.'s appeal should be allowed. R Inc. was entitled to rely on the indemnity to cover past and future costs incurred in complying with the director's order as a corporate successor. The motion judge did not err in failing to consider the text of the indemnity with reference to the factual matrix. The motion judge did not err in failing to interpret the indemnification clause in para. 1 in light of the agreement as a whole. The motion judge did not make any palpable and overriding errors in characterizing the reason the former owner expended certain money or in concluding that the waste disposal site was the source of the mercury contamination. The motion judge did not err in interpreting the indemnity to impermissibly fetter the legislature's law-making powers, rendering the indemnity unenforceable.

The appeals brought by the province and W Ltd. should be dismissed. W Ltd. was neither an assignee of the benefit of the indemnity nor a corporate successor of former owners and thus, it had no entitlement to benefit under the indemnity. The motion judge erred in holding that R Inc.'s predecessor assigned the benefit of the indemnity to W Ltd. by failing to read the contractual term in light of the factual matrix and in a commercially sensible way. The motion judge erred in concluding that the indemnity's enurement clause extended the benefit of the indemnity to successors-in-title. When used in relation to corporations, a successor generally denoted another corporation which, through some type of legal succession, assumed the burdens and became vested with the rights of the first corporation.

En 1985, la province de l'Ontario a accordé une indemnité à deux anciennes propriétaires d'une usine de pâtes et papiers ainsi qu'à leurs successeurs et ayants droit à l'égard de toute obligation, responsabilité ou perte survenue après la date de l'indemnité en raison d'une réclamation découlant de préjudices, pertes, d'événements ou de circonstances causés par le rejet, la fuite ou la présence de polluants. L'indemnité a été convenue entre les parties dans le cadre du règlement de la poursuite intentée par deux Premières Nations relativement à la pollution par le mercure de deux rivières. Vingt-six ans plus tard, le ministère de l'Environnement et des changements climatiques a pris un arrêté de remédiation en lien avec la surveillance et l'entretien d'un lieu d'élimination de déchets mercuriels à l'usine. Dans l'intervalle, l'usine avait changé de propriétaires à la suite de plusieurs opérations et l'arrêté a été adressé à W ltée et R inc.

W ltée a déposé une requête visant à faire déclarer que, selon les modalités de l'indemnité, le gouvernement était tenu de l'indemniser pour les frais engagés pour se conformer à l'arrêté. R inc. a demandé l'autorisation d'intervenir pour réclamer la même protection. W ltée, R inc. et le gouvernement ont chacun présenté une motion en jugement sommaire. Le juge des requêtes a conclu que l'indemnité s'appliquait aux réclamations prévues par la loi présentées par un agent de la province. Le juge des requêtes a rendu un jugement sommaire en faveur de W ltée et R inc. Le gouvernement a interjeté appel.

La Cour d'appel a convenu que l'indemnité visait l'arrêté du directeur, mais a estimé que R inc. n'avait pas droit à une indemnisation et a renvoyé à la Cour supérieure la question du droit de W ltée à une indemnité. Les juges majoritaires de la Cour d'appel ont conclu que le juge des requêtes avait commis une erreur en concluant que W ltée pouvait se prévaloir de la clause d'extension des bénéfices, affirmant que cette clause ne s'appliquait qu'aux successeurs corporatifs. Le gouvernement, R inc. et W ltée ont formé des pourvois.

Arrêt: Le pourvoi du gouvernement a été accueilli; les pourvois de R inc. et de W ltée ont été rejetés.

Abella, Moldaver, Karakatsanis, Martin, JJ. : L'indemnité ne visait pas l'arrêté du directeur. Le juge des requêtes a commis une erreur en concluant que le lieu d'élimination des déchets continuait de rejeter du mercure dans l'environnement. La conclusion erronée suivant laquelle les rejets de mercure depuis le lieu d'élimination des déchets constituaient une source constante de lourde responsabilité environnementale l'a sans nul doute amené à conclure que les rejets en question pourraient donner lieu à des réclamations pour pollution. Rien ne prouvait que des déchets contaminés par le mercure étaient rejetés du lieu d'élimination des déchets. Le juge des requêtes a mal interprété l'objet et l'effet du lieu d'élimination des déchets. Le site n'était pas une source constante de contamination par le mercure ou de responsabilité environnementale, et sa création n'était donc pas susceptible de donner lieu à une réclamation pour pollution. L'indemnité était censée s'appliquer seulement aux procédures découlant du rejet ou de la présence continue de mercure dans les écosystèmes connexes, et non à celles liées à la simple présence de mercure dans le lieu d'élimination des déchets.

Interprétée comme il se doit, l'indemnité s'appliquait seulement aux réclamations de tiers. Le fait que les exigences des par. 2 et 3 du protocole d'entente soient dénuées de tout sens en ce qui a trait aux réclamations de premières parties signifiait que les réclamations pour pollution englobaient seulement celles présentées par des tiers. L'inclusion des par. 2 et 3 à l'indemnité est tout à fait incompatible avec l'idée selon laquelle le par. 1 visait les réclamations de première partie.

Côté, Brown, JJ. (dissidents en partie) (Rowe, J., souscrivant à leur opinion) : Le pourvoi formé par R. inc. devrait être accueilli. R inc. avait le droit de bénéficier de l'indemnité pour couvrir les frais passés et futurs engagés pour se conformer à l'arrêté du directeur en tant que successeur corporatif. Le juge des requêtes n'a pas commis d'erreur en n'examinant pas le libellé de l'indemnité à la lumière du fondement factuel. Le juge des requêtes n'a pas commis l'erreur de ne pas avoir interprété la clause d'indemnisation figurant au par. 1 de l'indemnité à la lumière de l'entente dans son ensemble. Le juge des requêtes n'a pas commis d'erreurs manifestes et déterminantes en décrivant les raisons qui ont poussé l'ancienne propriétaire à faire certaines dépenses ou en concluant que le lieu d'élimination des déchets était la source de la contamination par le mercure. Le juge des requêtes n'a pas commis l'erreur d'avoir interprété l'indemnité de manière à entraver de manière inacceptable les pouvoirs de légiférer de la législature, de sorte que l'indemnité est devenue non exécutoire.

Les pourvois formés par le gouvernement et W ltée devraient être rejetés. W ltée n'était ni cessionnaire du bénéfice de l'indemnité ni un successeur corporatif des anciennes propriétaires et, partant, n'avait pas droit au bénéfice de l'indemnité. Le juge des requêtes a commis une erreur en concluant que la prédécesseure de R inc. avait cédé le bénéfice de l'indemnité à W ltée, n'ayant pas lu la clause contractuelle contestée à la lumière du fondement factuel et d'une manière qui a du sens sur le plan commercial. Le juge des requêtes a commis une erreur en concluant que la clause d'extension des bénéfices de l'indemnité étendait le bénéfice de celle-ci aux successeurs en titre. Employé à l'égard de sociétés, le terme « successeur » désignait généralement une autre société qui, par une forme de succession juridique, assumait les obligations et acquérait les droits de la première société.

APPEALS by government, R Inc. and W Ltd. from judgment reported at *Weyerhaeuser Company Limited v. Ontario (Attorney General)* (2017), 2017 ONCA 1007, 2017 CarswellOnt 20156, 13 C.E.L.R. (4th) 28, 77 B.L.R. (5th) 175 (Ont. C.A.), allowing government's appeal in part, finding that R Inc. was not entitled to indemnification and remitting W Ltd.'s entitlement to indemnification to Superior Court.

POURVOIS formés par le gouvernement, R inc. et W ltée à l'encontre d'un jugement publié à *Weyerhaeuser Company Limited v. Ontario (Attorney General)* (2017), 2017 ONCA 1007, 2017 CarswellOnt 20156, 13 C.E.L.R. (4th) 28, 77 B.L.R. (5th) 175 (Ont. C.A.), ayant accueilli en partie l'appel interjeté par le gouvernement, ayant conclu que R inc. n'avait pas droit à une indemnité et ayant renvoyé à la Cour supérieure la question de savoir si W ltée avait droit à une indemnité.

***Abella, Moldaver, Karakatsanis, Martin JJ.*:**

1 In 1985, the Province of Ontario granted an indemnity (the "1985 Indemnity") to Reed Ltd. and Great Lakes Forest Products Limited, both former owners of a pulp and paper mill located in Dryden, Ontario, as well as their successors and assigns, for "any damage, loss, event or circumstances, caused or alleged to be caused by or with respect to, either in whole or in part, the discharge or escape or presence of any pollutant by Reed or its predecessors, including mercury or any other substance, from or in the plant or plants or lands or premises". The 1985 Indemnity was agreed to by the parties in the context of the settlement of litigation brought by two First Nations in relation to mercury pollution caused by the operation of the Dryden mill.

2 Twenty-six years later, the Director of the Ministry of the Environment and Climate Change issued a remediation order in relation to monitoring and maintaining a mercury disposal site at the Dryden mill. In the intervening period, ownership of the mill had changed hands in several transactions. The Director's Order was issued to both Resolute, Great Lakes' corporate successor, and Weyerhaeuser, which also owned the Dryden property for a time. Both Resolute and Weyerhaeuser sought indemnification from Ontario for the costs of complying with the Director's Order.

3 Although the parties in these appeals raise a number of issues relating to Resolute and Weyerhaeuser's claims for indemnification, the threshold question is whether the 1985 Indemnity covers the Director's Order. In our view, and for the dissenting reasons of Laskin J.A. (2017 ONCA 1007, 77 B.L.R. (5th) 175 (Ont. C.A.)), it does not. We would, therefore, allow Ontario's appeal, and grant Ontario's motion for summary judgment.

4 In the 1960s, the Dryden Paper Company Limited owned and operated a pulp and paper mill in Dryden. As part of the operation of the paper mill, Dryden Paper — through a related company, Dryden Chemicals Limited — operated a mercury cathode chlor-alkali plant on property near the mill. The chlor-alkali plant released untreated mercury waste into the English and Wabigoon rivers, which resulted in harm to the health of some local residents, the closure of a commercial fishery and damage to the region's tourism industry. Many of the affected people were members of the Grassy Narrows and Islington First Nations who lived on reserves downstream.

5 In 1971, Dryden Paper constructed a waste disposal site on its lands to serve as a burial site for mercury-contaminated waste from the chlor-alkali plant. Six monitoring wells were installed when the waste disposal site was created, with three additional wells installed in 2002, and one in 2010. These monitoring wells were sampled and analyzed twice per year. Since 1977, the waste disposal site has been the subject of various certificates under the Environmental Protection Act, R.S.O. 1990, c. E.19. The initial Provisional Certificate of Approval required the monitoring of groundwater and surface water by the owner of the waste disposal site. In 2011, the site was thought to have 35 years remaining in its "contaminating lifespan".

6 In 1976, Dryden Paper and Dryden Chemicals amalgamated to form Reed.

7 In June 1977, the two First Nations bands sued Reed, Dryden Paper and Dryden Chemicals for damages in relation to the mercury waste contamination of the rivers (the "Grassy Narrows Litigation").

8 In 1978, the Ministry of the Environment issued two further Provisional Certificates of Approval that required Reed to maintain the water monitoring program at the waste disposal site.

9 By 1979, Reed wanted to sell its Dryden properties. Its prospective purchaser, Great Lakes, expressed reluctance to complete the sale because of the Grassy Narrows Litigation. Concerned that the local economy would suffer if the pulp and paper mill closed, Ontario intervened. It agreed to limit the combined liability of Great Lakes and Reed for any environmental damages caused by Reed prior to Great Lakes' purchase of the Dryden operation to $15 million. Great Lakes and Reed agreed to share the financial consequences of the Grassy Narrows Litigation up to that limit. Great Lakes also agreed to spend approximately $200 million on the expansion and modernization of the Dryden facilities in consideration for the indemnity granted by Ontario (the "1979 Indemnity").

10 On December 4, 1979, the Ministry of the Environment issued another Provisional Certificate of Approval. It required Reed to register the certificate against title to the waste disposal site. That same month, the sale of the Dryden properties to Great Lakes closed in accordance with the terms set out in a

Memorandum of Agreement dated December 7, 1979.

11 In January 1980, the Ministry issued another Provisional Certificate of Approval requiring Great Lakes to maintain the groundwater monitoring and testing program at the waste disposal site.

12 Contemporaneously, the Governments of Ontario and Canada engaged in mediation with the Islington and Grassy Narrows First Nations to address the harms caused by mercury discharge. These discussions involved the Grassy Narrows Litigation. Great Lakes, meanwhile, was reluctant to contribute to any settlement of the litigation unless it obtained a release from liability. On January 28, 1982, the then Provincial Secretary for Resources Development wrote to Great Lakes, indicating that Ontario was "prepared to indemnify Great Lakes Forest Products Limited against any claims related to mercury pollution" (the "1982 Indemnity" (A.R., vol. III, at p.176)). The 1982 Indemnity stated that Ontario would indemnify Great Lakes for any damages awarded by a court or any settlement above $15 million. Any mercury pollution-related actions were to be brought to the attention of Ontario, which would then become involved in the litigation.

13 In late 1985, the Grassy Narrows Litigation settled. The terms of the settlement were set out in a Memorandum of Agreement dated November 22, 1985, entered into by Canada, Ontario, the Islington and Grassy Narrows First Nations, Reed and Great Lakes. The issues, as defined in the Memorandum of Agreement, pertained to "[t]he discharge by Reed and its predecessors of mercury and any other pollutants into the English and Wabigoon and related river systems, and the continu[ed] presence of any such pollutants discharged by Reed and its predecessors ... in the related ecosystems". Significantly for the purposes of the present appeals, para. 2.4 of the Memorandum of Agreement stipulated that Ontario would indemnify Great Lakes and Reed with respect to the issues, and Great Lakes and Reed would provide Ontario releases in respect of the 1979 and 1982 Indemnities.

14 The indemnification required by para. 2.4 of the Memorandum of Agreement is contained in a schedule to the settlement agreement entitled the "Ontario Indemnity" (referred to herein as the "1985 Indemnity") which was signed by Ontario, Great Lakes, Reed and Reed International. These appeals involve the interpretation of the 1985 Indemnity, and particularly para. 1, which reads:

> 1. Ontario hereby covenants and agrees to indemnify Great Lakes, Reed, International and any company which was at the Closing Date a subsidiary or affiliate company (whether directly or indirectly) of International, harmless from and against any obligation, liability, damage, loss, costs or expenses incurred by any of them after the date hereof as a result of any claim, action or proceeding, whether statutory or otherwise, existing at December 17, 1979 or which may arise or be asserted thereafter (including those arising or asserted after the date of this agreement), whether by individuals, firms, companies, governments (including the Federal Government of Canada and any province or municipality thereof or any agency, body or authority created by statutory or other authority) or any group or groups of the foregoing, because of or relating to any damage, loss, event or circumstances, caused or alleged to be caused by or with respect to, either in whole or in part, the discharge or escape or presence of any pollutant by Reed or its predecessors, including mercury or any other substance, from or in the plant or plants or lands or premises forming part of the Dryden

> assets sold by Reed Ltd. to Great Lakes under the Dryden Agreement (hereinafter referred to as "Pollution Claims"). It is hereby expressly acknowledged and agreed that in respect of Ontario's covenant and agreement hereunder to indemnify Great Lakes that the term "Pollution Claims" shall include any obligation, liability, damage, loss, costs or expense incurred by Great Lakes as a result of any claim, action or proceeding resulting from or in connection with the indemnity agreement of even date herewith made between Great Lakes, Reed and International. [A.R., vol. IV, at pp. 189-90]

15 Paragraph 2 of the 1985 Indemnity requires Great Lakes or Reed to give Ontario prompt notice of any Pollution Claim as defined in para. 1, at which point Ontario could take carriage of or participate in the litigation. Great Lakes and Reed must cooperate with Ontario in relation to the investigation of any Pollution Claims (para. 3). The 1985 Indemnity is "valid without limitation as to time" (para. 4). An enurement clause contained in para. 6 provided that: "[t]he indemnity shall be binding upon and enure to the benefit of the respective successors and assigns of Ontario, Reed, International and Great Lakes, provided however that Ontario shall not be entitled to assign this indemnity without the prior written consent of the other parties hereto" (A.R., vol. IV, at pp. 191-92).

16 In accordance with the Memorandum of Agreement, Reed and Great Lakes released Ontario from its obligations under the 1979 and 1982 Indemnities. The settlement of the Grassy Narrows Litigation was approved by the Supreme Court of Ontario on June 26, 1986.

17 In subsequent years, both Reed and Great Lakes underwent corporate changes. After amalgamating with other corporations, Reed's successor corporation dissolved in 1993. In 1998, Great Lakes became Bowater which, in 2010, became part of Abitibi-Consolidated Inc. In 2012, it became Resolute.

18 In August 1998, Weyerhaeuser entered into an agreement with Bowater, Great Lakes' corporate successor, to purchase certain assets used in the Dryden pulp and paper business. Given the potential environmental liabilities, Weyerhaeuser initially sought to exclude the waste disposal site from the purchased assets. However, this exclusion required severing the waste disposal site from title, which could not be effected before the closing of the sale. As a result, when the transaction closed, Bowater conveyed title to the waste disposal site to Weyerhaeuser, which then immediately leased it back to Bowater. When severance finally occurred some two years later, Weyerhaeuser reconveyed the waste disposal site to Bowater. Title was registered in Weyerhaeuser's name from September 30, 1998, to August 25, 2000. In 2007, Weyerhaeuser sold the Dryden paper plant to Domtar Inc.

19 In April 2009, Bowater and its related companies filed for protection under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 ("CCAA"). In the course of the CCAA proceedings, with court approval, the waste disposal site was abandoned in April 2011.

20 On August 25, 2011, the Ministry of the Environment issued a Director's Order to Weyerhaeuser (as a former owner of the waste disposal site) and Bowater, Resolute's corporate predecessor. This order imposed three main obligations: (1) to repair certain site erosion, perform specific groundwater and

surface water testing, and file annual reports containing specified information; (2) to deliver to the Ministry of the Environment the sum of $273,063 as financial assurance in respect of the waste disposal site; and (3) to "take all reasonable measures to ensure that any discharge of a contaminant to the natural environment is prevented and any adverse effect that may result from such a discharge is dealt with according to all legal requirements" (A.R., vol. IV, at p. 27).

21 Weyerhaeuser filed a notice of appeal to the Environmental Review Tribunal, seeking to revoke or amend the Director's Order.

22 In May 2013, Weyerhaeuser commenced an action in Superior Court seeking a declaration that the terms of the 1985 Indemnity required Ontario to compensate it for the cost of complying with the Director's Order. Resolute sought leave to intervene. Ontario submitted it was not responsible for the costs of complying with the Director's Order. All three parties moved for summary judgment.

23 The motion judge held that the 1985 Indemnity clearly applied to a statutory claim or proceeding brought by an agent of the Province and that *both* Resolute and Weyerhaeuser were entitled to indemnification under the 1985 Indemnity for their costs of complying with the Director's Order. He therefore granted summary judgment in favour of Resolute and Weyerhaeuser (2016 ONSC 4652, 60 B.L.R. (5th) 237 (Ont. S.C.J. [Commercial List])).

24 Ontario appealed. The majority at the Court of Appeal for Ontario agreed with the motion judge with respect to the scope of the 1985 Indemnity, namely that it applied to the Director's Order. The majority concluded, however, that Resolute was not entitled to indemnification and remitted the issue of Weyerhaeuser's entitlement to indemnification to the Superior Court.

25 Justice Laskin, dissenting, would have allowed Ontario's appeal. In his view, the motion judge made reversible errors in his interpretation of the 1985 Indemnity. Properly construed, the 1985 Indemnity was intended to cover *only* pollution claims brought by third parties. First party regulatory claims, such as the Director's Order, did not fall within the scope of the 1985 Indemnity.

Analysis

26 The overriding issue in this case is the scope of the 1985 Indemnity. We would, with respect, allow Ontario's appeal substantially for the reasons of Laskin J.A. We conclude, as he did, that the motion judge made palpable and overriding errors of fact and failed to give sufficient regard to the factual matrix when interpreting the scope of the 1985 Indemnity justifying appellate intervention. We find it difficult to improve on his reasons, and would add only the following brief comments.

27 Both Laskin J.A. and the majority at the Court of Appeal agreed that the motion judge erred when he found that the waste disposal site continues to discharge mercury into the environment. In the words of Laskin J.A.:

> The motion judge's mistaken finding that discharges of mercury from the [waste disposal site] were an ongoing source of "serious environmental liability" undoubtedly drove his conclusion that these

> discharges could give rise to "pollution claims", and that unless the 1985 Indemnity covered first party claims, the respondents would be exposed to significant financial liability. His conclusion is wrong.
>
> The motion judge misconstrued the purpose and effect of the [waste disposal site]. The [waste disposal site] was not a source of ongoing mercury contamination or environmental liability. Its creation would not give rise to a pollution claim. Quite the opposite. The [waste disposal site] was created and used as a solution to the mercury pollution problem, effectively as a burial site for mercury-contaminated waste. Again, there was no evidence of mercury-contaminated waste being discharged from the [waste disposal site]. Neither respondent submitted otherwise.
>
> [paras. 233-34]

28 We agree that this erroneous factual finding was key to the motion judge's conclusion that the Director's Order, which imposed maintenance and monitoring obligations, was a "Pollution Claim" within the meaning of the 1985 Indemnity.

29 Yet, as Laskin J.A. noted, the 1985 Indemnity was a schedule to the broader Memorandum of Agreement settling the Grassy Narrows Litigation. The scope of the 1985 Indemnity was limited to the issues defined in that agreement, namely, "[t]he discharge by Reed and its predecessors of mercury and any other pollutants into the English and Wabigoon and related river systems, and the continu[ed] presence of any such pollutants discharged by Reed and its predecessors ... in the related ecosystems" (A.R., vol. IV, at p. 140). The motion judge failed to consider this context when interpreting the scope of the 1985 Indemnity. We agree with Laskin J.A. that, properly interpreted, the 1985 Indemnity was intended to cover only proceedings arising from the discharge or continued presence of mercury *in the related ecosystems*, not those related to the mere presence of mercury contained in the waste disposal site.

30 We also agree with Laskin J.A. that the 1985 Indemnity must be read in the context of the 1979 and 1982 Indemnities. Indeed, the 1985 Indemnity was given in partial consideration for Great Lakes and Reed releasing Ontario from its obligations under those prior Indemnities. It is clear that the 1979 and 1982 Indemnities were in response to the ongoing Grassy Narrows Litigation, which involved claims brought by *third parties*, not by Ontario directly. As Laskin J.A. observed, there is no language in those indemnities that would imply Ontario intended to provide protection against the costs of regulatory compliance.

31 Although the motion judge concluded that the addition of the phrase "statutory or otherwise" in the 1985 Indemnity expanded the scope of protection beyond that provided previously, we agree with Laskin J.A. that the motion judge's view of the importance of that phrase and *why* the parties entered into the 1985 Indemnity was materially affected by a palpable and overriding factual error. The motion judge found that the 1985 Indemnity was provided in consideration for commitments from Great Lakes to make significant financial investments in the Dryden plant. Given what he found to be the rationale for entering into the 1985 Indemnity, the motion judge concluded that it would be commercially absurd

if Ontario could still impose remediation costs. However, Great Lakes' financial commitments were actually provided as part of the prior 1979 Indemnity. Later, Great Lakes gave no new commitments to modernize in consideration for the 1985 Indemnity. The motion judge thus premised his interpretation of the 1985 Indemnity on an incorrect factual basis — one that, as Laskin J.A. noted, led him to place too much emphasis on a change in language and misconstrue the bargain actually struck in the 1985 Indemnity.

32 Moreover, as Laskin J.A. found, the motion judge erred by failing to consider the 1985 Indemnity as a whole when determining whether or not the Director's Order fell within its scope. Paragraphs 2 and 3 of the 1985 Indemnity are critical in this regard. Paragraph 2 provides that, in "any Pollution Claim ... Ontario shall have the right to elect to either take carriage of the defence or to participate in the defence and/or settlement of the Pollution Claim and any proceeding relating thereto as Ontario deems appropriate" (A.R., vol. IV, at p. 190). Paragraph 3 of the 1985 Indemnity also requires the parties to cooperate with Ontario in the defence of a claim. We agree with Laskin J.A. that these clauses would be "utterly meaningless for first party claims".

33 Indeed, the inclusion of paras. 2 and 3 in the 1985 Indemnity are completely inconsistent with the notion that para. 1 contemplates first party claims. Nothing in the 1985 Indemnity suggests that pollution claims included both first and third party claims, but that the requirements of paras. 2 and 3 would apply only to the *subset* of pollution claims brought by third parties. To the contrary, para. 2 applies in "*any* Pollution Claim" (emphasis added). The fact that the requirements of paras. 2 and 3 would be "utterly meaningless" in first party claims, implies that pollution claims encompass *only* those brought by third parties. It follows that we agree with Laskin J.A. that the motion judge erred by failing to read the 1985 Indemnity as a whole. Properly interpreted, the 1985 Indemnity only applies to third party claims.

34 In sum, we agree with Laskin J.A.'s conclusion that the 1985 Indemnity does not cover the Director's Order and we would allow Ontario's appeal on that basis. As a result, we find it unnecessary to address the remaining arguments raised in these appeals.

Conclusion

35 We would allow Ontario's appeal and grant summary judgment in its favour, with costs throughout. Resolute and Weyerhaeuser's appeals are dismissed.

***Côté, Brown JJ.* (dissenting in part) (Rowe J. concurring):**

I. Overview

36 During the 1960s, the owner of a pulp mill in Dryden, Ontario (the corporate predecessor of Reed Ltd.), stemmed the discharge of untreated mercury waste into a nearby river system by burying the waste at an adjacent disposal site. In 1979, Reed — by then the owner — sold the entire property (including the waste disposal site) and the pulp and paper operation to Great Lakes Forest Products Limited. As part of a settlement of claims related to the earlier mercury waste discharge, the Province of

Ontario granted an environmental liability indemnity to both Reed and Great Lakes (the "Ontario Indemnity"). This indemnity was to inure to the benefit of those corporations' successors and assigns.

37 Our reasons address three appeals. At issue in the appeal brought by the Province is whether the scope of the Ontario Indemnity covers the costs of compliance with first party regulatory orders, including those made under legislation enacted after the execution of the agreement. The appeals brought by Weyerhaeuser Company Limited and Resolute FP Canada Inc. go to whether either or both of those corporations can benefit from the Ontario Indemnity as successors and assigns of Great Lakes.

38 These appeals also present an opportunity for this Court to apply the principles of contractual interpretation articulated in *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 (S.C.C.) , and *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23 (S.C.C.) , to a series of complex commercial arrangements. The Province's appeal also invites us to consider the doctrine of fettering as it applies to the legislature's law making powers.

39 For the reasons that follow, we would dismiss the appeals brought by the Province and Weyerhaeuser, and allow the appeal brought by Resolute.

II. Factual Background

A. Mercury Contamination of the English and Wabigoon Rivers in the 1960s and 1970s

40 During the 1960s and 1970s, Dryden Chemical Limited and Dryden Paper Company Limited operated a mercury cathode chlor-alkali plant and a pulp and paper mill, respectively, on property located in Dryden (the "Dryden Property"). Together, their operations produced various pollutants, including untreated mercury waste, which they released into the nearby English and Wabigoon rivers, harming the health and industry of those nearby, including members of the Grassy Narrows and Islington First Nations. To dispose of these environmental contaminants, Dryden Paper constructed a waste disposal site on the Dryden Property in 1971. Since 1977, the waste disposal site has been subject to compliance requirements imposed by the Province.

41 In 1976, Dryden Paper and Dryden Chemical amalgamated to form Reed.

42 In 1977, the Grassy Narrows and Islington First Nations sued Reed, Dryden Paper and Dryden Chemical for damage they say was caused by the contamination of the rivers (the "Grassy Narrows Litigation").

B. The Sale of the Dryden Property to Great Lakes in 1979

43 In 1979, Reed entered into negotiations to sell the operations at the Dryden Property to Great Lakes. Great Lakes was reluctant to proceed with the purchase, however, due to potential liabilities relating to the mercury contamination, including the Grassy Narrows Litigation. At the same time, the Province was anxious to see a successful sale, to ensure the continuing viability of Dryden's local economy. It therefore agreed to indemnify both Reed and Great Lakes for any environmental damages

caused by Reed in excess of $15 million (the "1979 Indemnity"). In exchange, Great Lakes and Reed agreed to spend around $200 million to modernize and expand the pulp mill. The terms of this agreement were set out in a letter dated November 6, 1979, from the Treasurer of Ontario to the President of Great Lakes. The relevant portion of this letter reads as follows:

> The continued viability of the Dryden facilities and the undertaking of major modernization expenditures with respect to them are of considerable importance to the people of this Province. The substantial and beneficial employment and economic effects that the operation of a modernized facility will have on the population and economy of Dryden is of real significance.
>
> In the event that Great Lakes negotiations with the Reed group of companies are successful then in the event that Great Lakes is required to pay any monies as a result of any final decision of a court against Great Lakes, Reed Ltd. or any other person prior to the year 2010 in respect of pollution caused by Reed Ltd. or any of its predecessor companies in the Dryden area prior to the date upon which Great Lakes acquires the assets and undertaking of the Dryden complex of Reed Ltd. or in the event that any settlement with any claimant is made the amount of which settlement has been approved by the Attorney General of Ontario, I have been authorized by the Executive Council of Ontario to advise you that I will make a Recommendation to the Executive Council of Ontario that the Government of Ontario take effective steps to ensure that Great Lakes Forest Products Limited will not be required to pay any monies in excess of the maximum amount of $15 million referred to in paragraph 2 of this letter, provided that over the next three to four years Great Lakes expends in the order of $200 million for the modernization and expansion of the Dryden facilities.
>
> (A.R., vol. IV, at pp. 135-36)

44 Great Lakes purchased the pulp mill in December 1979 by way of an asset purchase agreement (the "1979 Dryden Agreement"). That agreement addressed, among other things, environmental responsibilities respecting the Dryden Property. In particular, clause 5.3 of the 1979 Dryden Agreement created a regime for the sharing of costs arising from pollution claims, pursuant to which Reed and Great Lakes were to share the costs of environmental liabilities up to $15 million, leaving Great Lakes exclusively responsible for anything exceeding that amount. Clause 11.4 carves out of this regime the costs of compliance with a control order that the Province had issued in 1979 (the "Control Order"), making Great Lakes solely responsible for those costs.

C. The Settlement of the Grassy Narrows Litigation in 1985

45 The Governments of Canada and Ontario initiated a mediation process with the Islington and Grassy Narrows First Nations to address the problems regarding the mercury contamination and to settle the Grassy Narrows Litigation. Great Lakes was reluctant to participate in any such settlement without releases from liability in relation to the mercury pollution caused by Reed and its predecessors. To overcome this impasse, Ontario's Provincial Secretary for Resources Development, the Honourable R. H. Ramsay, wrote to Great Lakes on January 28, 1982 (the "1982 Ramsay Letter"), stating that the Province would indemnify Great Lakes against any claims related to mercury pollution:

> The purpose of this letter is to facilitate a settlement of current negotiations ....
>
> The Government of Ontario recognizes the distinct advantage of the Indian people obtaining a settlement in the very near future. Accordingly, the Government is prepared to indemnify Great Lakes Forest Products Limited against any claims related to mercury pollution such that the Company's total payments to all claimants in respect of damages awarded by any court or for any settlement approved by the Attorney General of Ontario attributable to the operations of Reed Paper Ltd. or any of its predecessor companies in the Dryden area will be limited to $15 million. The Government of Ontario will assume responsibility for any damages awarded by any court or for any settlement approved by the Attorney General of Ontario, after $15 million has been paid by the Great Lakes Forest Products Limited, Reed Ltd., Reed International Ltd., Dryden Chemicals Ltd. and Dryden Paper Co. Ltd. in connection with the above mentioned mercury pollution claims. Such claims include personal injury, property damage and economic claims of any claimants, including adults, minors and those yet unborn, related to mercury pollution.
>
> It must be understood that any legal proceedings which could result in the Government of Ontario becoming liable to make payments pursuant to this undertaking must be brought to the attention of the Government of Ontario immediately upon such proceedings being launched, and the Government of Ontario shall have the right either to take carriage of or to participate in the defence and/or settlement of the litigation. Failure to give such notification or to allow the Government of Ontario to either take carriage of or to participate in the defence and/or settlement of the litigation will preclude the making of any payments by the Province with regard to the action in question.
>
> (A.R., vol. III, at pp. 175-76)

46 The Grassy Narrows Litigation was settled on terms formalized in a Memorandum of Agreement (the "Settlement Agreement") executed on November 22, 1985, by Canada, the Province, the Grassy Narrows and Islington First Nations, Reed, and Great Lakes. Its terms were approved by the Supreme Court of Ontario in 1986 (*Mandamin v. Reed Ltd.*, No. 14716/77, June 26, 1986), and were given effect by both Parliament and the Ontario Legislature (*Grassy Narrows and Islington Indian Bands Mercury Pollution Claims Settlement Act*, S.C. 1986, c. 23; *English and Wabigoon River Systems Mercury Contamination Settlement Agreement Act, 1986*, S.O. 1986, c. 23).

47 The Settlement Agreement provides that "the parties agree, without admission of liability by any party and subject to the terms of this Agreement, that the settlement is to settle all claims and causes of action, past, present and future, *arising out of the issues*" (A.R., vol. IV, at p. 140 (emphasis added)). The "issues" were defined in the recitals as follows:

> The discharge by Reed and its predecessors of mercury and any other pollutants into the English and Wabigoon and related river systems, and the continuing presence of any such pollutants discharged by Reed and its predecessors, including the continuing but now diminishing presence of methylmercury in the related ecosystems since its initial identification in 1969, and governmental actions taken in consequence thereof, may have had and may continue to have effects and raise

> concerns in respect of the social and economic circumstances and the health of the present and future members of the Bands (the "issues").
>
> (A.R., vol. IV, at p. 140)

48 The Settlement Agreement also required the Province to indemnify Great Lakes and Reed "in respect of the issues" (para. 2.4(a)), which led to the Ontario Indemnity (A.R., vol. IV, at p. 6). That indemnity was incorporated into Schedule F of the Settlement Agreement. In return, Great Lakes and Reed released the Province from any obligations under the 1979 Indemnity and the 1982 Ramsay Letter (para. 2.4(b); (A.R., vol. IV, at p. 6).

49 Paragraph 1 of the Ontario Indemnity — the meaning of which lies at the heart of this appeal — reads, in part, as follows:

> Ontario hereby covenants and agrees to indemnify Great Lakes, Reed, International and any company which was at the Closing Date [December 17, 1979] a subsidiary or affiliate company (whether directly or indirectly) of International, harmless from and against any obligation, liability, damage, loss, costs or expenses incurred by any of them after the date hereof as a result of any claim, action or proceeding, whether statutory or otherwise, existing at December 17, 1979 or which may arise or be asserted thereafter (including those arising or asserted after the date of this agreement), whether by individuals, firms, companies, governments (including the Federal Government of Canada and any province or municipality thereof or any agency, body or authority created by statutory or other authority) or any group or groups of the foregoing, because of or relating to any damage, loss, event or circumstances, caused or alleged to be caused by or with respect to, either in whole or in part, the discharge or escape or presence of any pollutant by Reed or its predecessors, including mercury or any other substance, from or in the plant or plants or lands or premises forming part of the Dryden assets sold by Reed Ltd. to Great Lakes under the [1979] Dryden Agreement (hereinafter referred to as "Pollution Claims").
>
> (A.R., vol. III, at pp. 189-90)

50 Paragraph 2 of the Ontario Indemnity requires the party seeking indemnification to promptly notify the Province of the receipt of any notice of "Pollution Claims" (defined in para. 1), and gives the Province the right either to take carriage of the defence, or to participate in the pollution claim's defence and settlement; para. 3 requires Great Lakes to cooperate with the Province in the investigation, defence and settlement of a pollution claim; para. 4 states that the indemnity shall be valid without limitation as to time; and para. 6 provides that the indemnity enures to the benefit of the parties' respective successors and assigns. That provision reads as follows:

> The indemnity shall be binding upon and enure to the benefit of the respective successors and assigns of Ontario, Reed, International and Great Lakes, provided however that Ontario shall not be entitled to assign this indemnity without the prior written consent of the other parties hereto.
>
> (A.R., vol. III, at pp. 191-92)

51 Great Lakes provided an indemnity to Reed in respect of environmental liabilities contemporaneously, as part of the Settlement Agreement. The parties contemplated that these two indemnities (this indemnity and the Ontario Indemnity) would operate in tandem; to the extent that Reed claimed on its indemnity against Great Lakes, Great Lakes would be indemnified under the Ontario Indemnity. This linkage was expressly recognized in the closing words of para. 1 of the Ontario Indemnity:

> It is hereby expressly acknowledged and agreed that in respect of Ontario's covenant and agreement hereunder to indemnify Great Lakes that the term "Pollution Claims" shall include any obligation, liability, damage, loss, costs or expenses incurred by Great Lakes as a result of any claim, action or proceeding resulting from or in connection with the indemnity agreement of even date herewith made between Great Lakes, Reed and International.
>
> (A.R., vol. IV, at p. 190)

52 After the parties executed the Settlement Agreement but before they signed the Ontario Indemnity, the *Environmental Protection Act*, R.S.O. 1980, c. 141, was amended to confer a statutory right of action on the Province and third parties against certain polluters. The amendments arose out of *An Act to amend The Environmental Protection Act, 1971*, S.O. 1979, c. 91, also known as the "Spills Bill". Although the Spills Bill never came into force, elements of it were incorporated into the 1980 *Environmental Protection Act*. The relevant provisions came into force in November 1985. For convenience, those amendments will be referred to as the "Spills Bill".

D. The Changes in Corporate Status between 1985 and 1998

53 Reed subsequently amalgamated with other corporations, and its successor corporation was dissolved in 1993. For its part, Great Lakes became Bowater Pulp and Paper Canada Inc. in July 1998.

E. Weyerhaeuser's Purchase of the Dryden Property in 1998

54 On September 30, 1998, Weyerhaeuser bought the Dryden Property from Bowater, along with certain assets used in the pulp and paper operation. This sale was recorded in the "1998 Asset Purchase Agreement". Because of possible environmental liabilities associated with the waste disposal site, Weyerhaeuser initially sought to exclude the parcel of land on which it was constructed from the transaction, and Bowater agreed to this. This parcel could not be severed from the property before the closing date, however, and the deal was therefore re-structured such that Bowater conveyed title to the entire Dryden Property — including the waste disposal site — to Weyerhaeuser. Weyerhaeuser then immediately leased the waste disposal site back to Bowater. Once title to the waste disposal site was severed from the rest of the Dryden Property, it was to be transferred back to Bowater.

55 The lease agreement between Bowater and Weyerhaeuser in respect of the waste disposal site (the "Lease Agreement") required Bowater to indemnify Weyerhaeuser for, among other things, "the presence or release of mercury and any other contaminant, substance or waste on or in the land" (A.R., vol. V, at p. 126). This indemnity was to survive the term of the lease.

56 Bowater and Weyerhaeuser acknowledged that they had entered into the Lease Agreement "solely as an interim agreement pending severance approval under the *Planning Act*", at which time title to the waste disposal site was to be transferred back to Bowater (*ibid*., at p. 123). Approval of the severance was obtained around two years later, and Weyerhaeuser re-conveyed the waste disposal site to Bowater on August 25, 2000.

57 In 2007, Weyerhaeuser sold the Dryden pulp mill to Domtar Inc.

F. Bowater's Corporate Restructuring

58 In April 2009, Bowater (which by then had become Bowater Canadian Forest Products Inc.) and a number of related companies filed for creditor protection under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 ("CCAA"). At this point, Bowater still owned the waste disposal site. As part of the CCAA proceedings, Bowater was granted an order authorizing it to transfer the waste disposal site to 4513541 Canada Inc. in October 2010. Several months later, 4513541 Canada Inc.'s receiver obtained court approval to abandon the waste disposal site, with no associated liability.

59 In 2012, Bowater became Resolute FP Canada Inc.

G. The 2011 Director's Order

60 On August 25, 2011, the Province, through its Ministry of the Environment, issued a Director's Order against 4513541 Canada Inc., Weyerhaeuser, Bowater, and several of Bowater's directors, requiring them:

> (i) to repair certain site erosion, perform specified groundwater and surface water testing, and file annual reports containing specified information; (ii) to deliver to the [Ministry of the Environment] the sum of $273,063 as financial assurance in respect of the [Waste Disposal Site]; and (iii) to take all reasonable measures to ensure that any discharge of a contaminant to the natural environment is prevented and any adverse effect that may result from such a discharge is dealt with according to all legal requirements.
>
> (C.A. reasons, at para. 50, citing the Director's Order, A.R., vol. IV, at p. 27)

Paragraph 3.1 of the Director's Order described these requirements as "minimum requirements only", adding that their discharge would not relieve the named parties from "complying with any other applicable Order, Statute or Regulation", or from "obtaining any approvals or consents not specified in [the Director's] Order" (A.R., vol. IV, at p. 28).

61 The Director's Order was issued under the Environmental Protection Act, R.S.O. 1990, c. E.19. That statute had been amended in 1990 to empower the Director to impose certain obligations upon *former* owners and those who *previously* held management or control of a given undertaking or property (see *An Act to amend the Environmental Protection Act*, S.O. 1990, c. 18, ss. 18(1) and 21-23).

62 Both Weyerhaeuser and Resolute appealed the Director's Order to the Environmental Review

Tribunal. The Province says that these appeals are in abeyance. Weyerhaeuser also filed a proof of claim in Bowater's CCAA proceedings (which were still ongoing at the time) for indemnification under the Lease Agreement for the present value of the work required by the Director's Order and estimated legal costs, amounting to approximately $373,063. In settlement of its claim, Weyerhaeuser received shares in a company that emerged from CCAA protection, which shares were subsequently sold in May 2015.

III. Proceedings Below

63 Shortly after being served with the Director's Order, counsel for Weyerhaeuser provided notice thereof to Ontario's Ministry of the Attorney General, invoking paras. 2 and 6 of the Ontario Indemnity, and claiming indemnity as a successor and assignee of Great Lakes. In response, the Attorney General denied that the costs of complying with the Director's Order fell within the scope of the Ontario Indemnity. Weyerhaeuser sued the Province for an order declaring that it is entitled to be indemnified under the terms of the Ontario Indemnity "for the costs that it has incurred and may incur as a result of [the] Director's Order made effective on September 6, 2011" (A.R., vol. II, at p. 3). Resolute was granted leave to intervene as a party to that proceeding.

A. Decision of the Ontario Superior Court of Justice, 2016 ONSC 4652, 60 B.L.R. (5th) 237 (Ont. S.C.J. [Commercial List])

64 All parties brought various motions for summary judgment before the Ontario Superior Court of Justice. At issue was whether the Ontario Indemnity covered the costs of complying with the Director's Order and, if so, whether Weyerhaeuser and Resolute are entitled to benefit thereunder.

65 The motion judge found in favour of Weyerhaeuser and Resolute, holding that the scope of the Ontario Indemnity, as set out in its own first paragraph, covered first party regulatory orders. He further held that the Ontario Indemnity did not improperly fetter the Ontario Legislature's law-making powers.

66 The motion judge also held that the enurement clause extended the rights and obligations under the Ontario Indemnity to Resolute and Weyerhaeuser — Resolute as a corporate successor to Great Lakes, and Weyerhaeuser as both a successor-in-title to the Dryden Property and an assignee of the Ontario Indemnity from Bowater pursuant to s. 3.1(xiv) of the 1998 Asset Purchase Agreement.

B. Decision of the Court of Appeal, 2017 ONCA 1007, 77 B.L.R. (5th) 175 (Ont. C.A.)

67 The Province appealed, arguing the motion judge erred in holding that the Ontario Indemnity covers the costs of complying with the Director's Order, and that Weyerhaeuser and Resolute enjoyed the benefit of indemnification thereunder.

68 At the Court of Appeal, the majority found no error in the motion judge's finding that the Ontario Indemnity covered the costs of complying with first party claims, including the Director's Order. Nor did the majority disturb the finding that the 1998 Asset Purchase Agreement had the effect of transferring the full benefit of the Ontario Indemnity from Bowater to Weyerhaeuser. Given that Weyerhaeuser had subsequently sold the Dryden pulp mill to Domtar in 2007, however, the issue of what rights, if any,

Weyerhaeuser possessed as an assignee of the Ontario Indemnity at the time the Director's Order was issued in 2011 was returned to the Ontario Superior Court of Justice for decision. The majority did, however, find palpable and overriding error in the motion judge's conclusion that Weyerhaeuser could claim the benefit of the enurement clause in the Ontario Indemnity, holding that this clause applies only to *corporate* successors.

69 As to Resolute, the majority held that the motion judge erred in finding that Resolute could claim the benefit of the Ontario Indemnity as a corporate successor of Great Lakes, following the assignment of the Ontario Indemnity from Bowater to Weyerhaeuser under the 1998 Asset Purchase Agreement. The effect of this assignment was to extinguish Bowater's interest therein, such that Bowater could not then pass that interest on to Resolute as its corporate successor.

70 In dissent, Laskin J.A. would have found that the Ontario Indemnity did not cover the Director's Order, because it was not intended to cover first party claims, and because the Director's Order does not constitute a "Pollution Claim" as defined in that document. Having so concluded, he found it unnecessary to address the question of whether Resolute and Weyerhaeuser (or either of them) could benefit from the Ontario Indemnity as successors and assignees.

IV. Issues and Positions of the Parties

71 The Province, Resolute and Weyerhaeuser each appeal to this Court. Although they raise various interrelated issues, these appeals can be resolved by answering the following two questions:

1. Did the motion judge err in concluding that the Ontario Indemnity covers the costs of complying with the Director's Order?

2. Did the motion judge err in concluding that Resolute and Weyerhaeuser benefit from the Ontario Indemnity as successors and assigns of Great Lakes?

72 The Province argues that the motion judge erred in both these respects and, further, that his interpretation of the Ontario Indemnity has the effect of impermissibly fettering the Ontario Legislature's law-making power. Resolute and Weyerhaeuser seek to uphold the motion judge on both questions, and further argue that the Province's obligation under the Ontario Indemnity does not impose an impermissible fetter upon the Ontario Legislature.

V. Analysis

A. Principles of Contractual Interpretation

73 The Ontario Indemnity is a contract. Today's lawyers are fortunate to live in "an age when there is a galaxy of high appellate guidance on how to interpret contracts" (Royal Devon and Exeter NHS Foundation Trust v. ATOS IT Services UK Ltd. [2017] EWCA Civ 2196, [2018] 2 All E.R. (Comm.) 535, at para. 45). While not wishing to add more gas and dark matter to the "galaxy", we do find it helpful here to stress certain first principles which we see as important in interpreting this particular contract.

74 This Court has described the object of contractual interpretation as being to ascertain the objective intentions of the parties (*Sattva* , at para. 55). It has also described the object of contractual interpretation as discerning the parties' "reasonable expectations with respect to the meaning of a contractual provision" (*Ledcor* , at para. 65). In meeting these objects, the Court has signalled a shift away from an approach to contractual interpretation that is "dominated by technical rules of construction" to one that is instead rooted in "practical[ities and] common-sense" (*Sattva* , at para. 47). This requires courts to read a contract "as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract" (*ibid*.).

75 We recognize that this Court's references to the *objective intentions* of the parties at the time they entered into the contract, and to parties' *reasonable expectations*, may leave a degree of uncertainty respecting the objects of contractual interpretation (see A. Swan, J. Adamski and A. Y. Na, *Canadian Contract Law* (4th ed. 2018), at pp. 671-916). Since there is no suggestion here of a divergence between the parties' *intentions* and their *expectations*, we do not find it necessary to resolve this here, but we simply note the inconsistency.

76 Contractual interpretation begins with reading the words of the contract. A legitimate interpretation will be consistent with the language that the parties employed to express their agreement (G. R. Hall, *Canadian Contractual Interpretation Law* (3rd ed. 2016), at p. 11). As this Court stated in *Sattva* , the meaning of a contract is rooted in the actual language used by the parties (para. 57). A meaning that strays too far from the actual words fails to give effect to the way in which the parties chose to define their obligations (*Canadian Contractual Interpretation Law*, at p. 9).

77 This is not to say that the words of the contract are to be read in isolation. This Court's direction in *Sattva* was that the words of the contract are to be read in light of the surrounding circumstances — sometimes referred to as the "factual matrix" — which consists of "objective evidence of the background facts at the time of the execution of the contract, that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting" (para. 58 (citation omitted)). An interpretation that ignores the context in which the contract was formed will not accurately discern what the parties intended to achieve, even if the interpretation is "literally correct" (*Canadian Contractual Interpretation Law*, at p. 9; see also *Sattva* , at para. 57). Put simply, contractual text derives its meaning, in part, from the context.

78 We stress that text derives its meaning from context *in part*. This leads to an important caveat: the context — that is, the factual matrix — cannot "overwhelm the words" of the contract or support an interpretation that "deviate[s] from the text such that the court effectively creates a new agreement" (*Sattva* , at para. 57). The factual matrix assists in *discerning the meaning* of the words that the parties chose to express their agreement; it is not a means by which to *change* the words of the contract in a manner that would modify the rights and obligations that the parties assumed thereunder (*Canadian Contractual Interpretation Law*, at pp. 33-34).

79 As we will explain below, contractual interpretation also requires courts to consider the principle

of commercial reasonableness and efficacy. Contracts ought therefore to be interpreted "in accordance with sound commercial principles and good business sense" (*Scanlon v. Castlepoint Development Corp.* (1992), 11 O.R. (3d) 744 (Ont. C.A.) , at p. 770). As Lord Diplock explained in *Antaios Compania Naviera S.A. v. Salen Rederierna A.B. (the Antaios)* (1984), [1985] A.C. 191 (U.K. H.L.), at p. 201, "if detailed semantic and syntactical analysis of a word in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense". The principle that requires contracts to be read in a commercially reasonable and efficient manner is therefore an important interpretive aid in construing contractual terms.

80 Ultimately, contractual interpretation involves the application of various tools — including consideration of the factual matrix and the principle of commercial reasonableness — in order to properly understand the meaning of the words used by the parties to express their agreement.

B. The Province's Appeal

81 At issue in the Province's appeal is whether the motion judge erred in concluding that the Province's obligation to indemnify under para. 1 of the Ontario Indemnity extends to the costs of compliance with first party regulatory orders, such as the Director's Order. In so finding, the motion judge placed considerable emphasis on the text of para. 1, which referred to "*any claim*, action or proceeding, *whether statutory or otherwise* ... whether by individuals, firms, companies, *governments* (including the Federal Government of Canada *and any province* or municipality thereof or *any agency, body, or authority created by statutory or other authority*)" (A.R., vol. IV, at p. 189 (emphasis added)). In his view, neither a reading of the contract as a whole nor the surrounding circumstances supported reading the Ontario Indemnity as excluding from coverage the costs of compliance with first party regulatory orders.

82 The Province sees it differently. It says that para. 1, properly interpreted, covers only "third party claims, whether statutory or at common law, in the nature of those settled in 1985" (Ontario A.F., at para. 3). Because the Director's Order was made in 2011 by the Province's Ministry of the Environment using provisions of the 1990 Environmental Protection Act, which was enacted five years after the Settlement Agreement was executed, the Province says that the obligation to indemnify does not extend to the resulting compliance costs to Weyerhaeuser and Resolute.

83 More specifically, the Province says the motion judge made four errors: (1) failing to consider the text of the Ontario Indemnity with reference to the factual matrix, which, the Province says, includes the 1979 Indemnity, the 1982 Ramsay Letter, the 1979 Dryden Agreement, the Settlement Agreement, and the Spills Bill; (2) failing to interpret para. 1 of the Ontario Indemnity in light of the remainder of the Ontario Indemnity; (3) making palpable and overriding errors in two factual findings; and (4) interpreting the Ontario Indemnity so as to impermissibly fetter the Legislature's law-making powers, thereby rendering the Ontario Indemnity altogether unenforceable.

84 Like the majority at the Court of Appeal, we reject each of these arguments, and would dismiss the Province's appeal. The motion judge made no error in interpreting the Ontario Indemnity as covering

the costs imposed on the successors and assigns of Great Lakes by the Director's Order. Although his analysis on this point was rooted primarily in the wording of para. 1 of the Ontario Indemnity, the motion judge also considered para. 1's meaning in light of the agreement as a whole, and with reference to the circumstances surrounding its formation in 1985. Far from excluding the context of the agreement as a whole or the surrounding circumstances from consideration, he *considered* them, and then simply found that neither supported an interpretation of the Ontario Indemnity that would exclude coverage for first party claims.

(1) Did the Motion Judge Err in His Appreciation of the Factual Matrix?

85 The Province submits that the motion judge erred by focusing on the text of the Ontario Indemnity and that, in so doing, he "failed to appreciate that events going back to 1979 significantly informed the meaning of the [Ontario] Indemnity" (Ontario A.F., at para. 71). He ought, the Province says, to have considered the interrelationship between the Ontario Indemnity and the 1979 Indemnity, the 1982 Ramsay Letter, the 1979 Dryden Agreement, the Settlement Agreement (inclusive of an escrow agreement and schedules), and the enactment of the Spills Bill.

86 The motion judge's appreciation of the factual matrix in these circumstances is entitled to deference on appeal (*Sattva* , at para. 52). The Province bears the burden of showing that any error in this respect is of a palpable and overriding nature.

(a) The 1979 Indemnity and the 1982 Ramsay Letter

87 The Province notes that the 1979 Indemnity, which can only be invoked in the case of a court decision requiring the payment of monies or a settlement approved by the Province, and the 1982 Ramsay Letter which contains similar terms, both evidence an intention, on its part, to indemnify only third party claims. A proper consideration of these elements of the factual matrix, it says, should have led the motion judge to find that the Ontario Indemnity likewise extends only to costs associated with third party obligations arising from court orders or settlements in respect of mercury contamination claims, and does not cover the costs of compliance with first party regulatory orders.

88 Although he did not specifically refer to the 1982 Ramsay Letter in his analysis, the motion judge did reject any comparison between the Ontario Indemnity and the 1979 Indemnity on the basis that the former "is a separate agreement and must be interpreted by considering the words used by the parties in it, not a previous agreement" (para. 48). We see no error in this holding. While it is true that the three indemnities address the same underlying problem (the mercury contamination), our colleagues in the majority do not recognize that they each represent *distinct* agreements given for *distinct* purposes in *distinct* sets of negotiations. Specifically, the 1979 Indemnity was given to encourage Great Lakes to purchase the Dryden Property; the indemnity in the 1982 Ramsay Letter was given to encourage Great Lakes to settle the Grassy Narrows Litigation; and the Ontario Indemnity was given as part of a final settlement of those claims.

89 Significantly, the Ontario Indemnity — unlike the 1979 Indemnity or the 1982 Ramsay Letter —

captures much more than just court orders and settlements relating to the Reed-era mercury contamination, applying to "any obligation, liability, damage, loss, costs or expenses incurred ... as a result of any claim, action or proceeding, whether statutory or otherwise" (A.R., vol. IV, at p. 189). This breadth of scope, relative to the other indemnities, is significant to the interpretive exercise.

90 Additionally, the fact that the parties replaced the 1979 Indemnity and the commitment in the 1982 Ramsay Letter with the Ontario Indemnity suggests that the parties *themselves* — whose intentions the motion judge was called upon to discern — did not view those earlier agreements as being co-extensive in scope with the Ontario Indemnity. Tellingly, there would have been no point served by Great Lakes and Reed releasing the Province of its obligations under the 1979 Indemnity and the 1982 Ramsay Letter in Schedule E of the Settlement Agreement, only then to bind the Province to the same terms by executing the Ontario Indemnity at Schedule F of that same agreement.

91 We therefore see no palpable and overriding error in the motion judge's refusal to restrict the scope of the Ontario Indemnity on the basis of the prior indemnities.

(b) The 1979 Dryden Agreement

92 The scope of the Ontario Indemnity is substantially the same as the scope of the indemnity given to Reed by Great Lakes in clause 5.3 of the 1979 Dryden Agreement as part of its cost-sharing regime. As we have already explained, clause 11.4 of that agreement exempted the costs of complying with the Control Order issued by the Ministry of the Environment in 1979, making those costs the responsibility of Great Lakes exclusively. The motion judge found that the existence of this "specific provision that *excluded* the cost of regulatory compliance supports the conclusion that the Ontario Indemnity *includes* these costs because it does not contain a similar provision" (para. 48 (emphasis added)).[3]

93 Before this Court, the Province observes that the 1979 Dryden Agreement "was a private contractual arrangement made between Reed and Great Lakes", such that the absence of any specific exemption in the Ontario Indemnity does not mean that the Province intended to cover regulatory costs (Ontario A.F., at para. 83). While it is true that the Province was not a party to the 1979 Dryden Agreement, it was aware of its terms when it agreed to the Ontario Indemnity (as para. 7 of the Ontario Indemnity makes clear). Moreover, the text used in the indemnity in clause 5.3 of the 1979 Dryden Agreement is almost identical to that used in para. 1 of the Ontario Indemnity. Given the term exempting the Control Order from the scope of the cost-sharing regime in the 1979 Dryden Agreement, the parties must have understood that this regulatory order would otherwise have constituted a "Pollution Claim" for the purpose of clause 5.3. And, because para. 1 of the Ontario Indemnity defines the term "Pollution Claim" in near-identical terms, the motion judge did not err in placing weight on the absence of a similar exemption in the Ontario Indemnity as supporting the conclusion that regulatory orders — like the Director's Order — would fall within the scope of that indemnity.

94 In his dissenting reasons, Laskin J.A. says that "similar carve out language was not needed" in the

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3. The motion judge stated that the 1979 indemnity contained that "specific provision", but given the context, it is clear that he misspoke and was instead referring to the 1979 Dryden Agreement. The Province does not take the position that this amounts to a palpable and overriding error of fact (Ontario A.F., at paras. 81-83).

Ontario Indemnity, since by 1985, neither Reed nor Great Lakes had any obligations under the Control Order (para. 256). But, and with respect, the parties must have been aware that a new regulatory order could easily have been made subsequent to the execution of the Ontario Indemnity. Nothing prevented them from expressly providing — as did the parties to the 1979 Dryden Agreement — that such orders would not fall within the scope of the indemnity.

(c) The Settlement Agreement

95 Under para. 2.4(a) of the Settlement Agreement, the Province was to indemnify Reed and Great Lakes in respect of "the issues" — a term that was defined in the recitals to the Settlement Agreement as follows:

> The discharge by Reed and its predecessors of mercury and any other pollutants into the English and Wabigoon and related river systems, and the continuing presence of any such pollutants discharged by Reed and its predecessors, including the continuing but now diminishing presence of methylmercury in the related ecosystems since its initial identification in 1969, and governmental actions taken in consequence thereof, may have had and may continue to have effects and raise concerns in respect of the social and economic circumstances and health of the present and future members of the Bands (the "issues"). [Emphasis added.]
>
> (A.R., vol. IV, at p. 140)

96 The Province says the motion judge failed to appreciate the importance of these portions of the Settlement Agreement to the interpretation of para. 1 of the Ontario Indemnity. Preventative orders — like the Director's Order — do not fall within the scope of "the issues" that the Settlement Agreement was intended to address, the Province says, since the waste disposal site was not a source of the discharge. We note, however, that among those "issues" are *"governmental actions taken in consequence" of the mercury contamination by Reed and its predecessors*. The record provides ample indication that the Province was aware of Dryden Paper's construction of the waste disposal site for the purpose of containing mercury waste, and that it had been the subject of oversight by governmental agencies since 1977 (A.R., vol. IV, at pp. 35-36; A.R., vol. VI, at pp. 2-3). It follows that such oversight falls well within the scope of the "issues" which the Settlement Agreement was intended to address.

97 In any event, the Ontario Indemnity expressly applies in respect of (among other things) the "presence of any pollutant ... including mercury or any other substance ... in the plant or plants or lands or premises forming part of the Dryden assets sold by Reed Ltd. to Great Lakes under the [1979] Dryden Agreement" (A.R., vol. IV, at p. 190). Irrespective, then, of how one understands the scope of the issues set out in the Settlement Agreement, that element of the factual matrix cannot "overwhelm" or be used to "deviate from" the text of the Ontario Indemnity (*Sattva* , at para. 57).

(d) The Spills Bill

98 Paragraph 1 of the Ontario Indemnity closely tracks the language of the indemnity given by Great Lakes to Reed as part of the cost-sharing regime in clause 5.3 of the 1979 Dryden Agreement, with one

important difference: while the scope of the former expressly covers claims, actions and proceedings, "whether statutory or otherwise", the latter does not. The Province explains this specific reference to statutory claims in the Ontario Indemnity as reflecting the enactment of the Spills Bill, which created a new statutory right of action against polluters in favour of both the government and private parties, and which was proclaimed only two weeks before the parties executed the Settlement Agreement and the Ontario Indemnity. This language, it says, "addressed a significant new statutory cause of action created by the Spills Bill, along with other third party statutory claims which could have been brought at that time" (Ontario A.F., at para. 88). The Province's submission is therefore that the courts below erred by construing those terms as capturing the costs of compliance with (a) first party regulatory claims made under statutory powers, and (b) other kinds of claims arising from legislation enacted *after* the closing date in 1985 — like the Director's Order, which was made under provisions of the Environmental Protection Act that came into force in 1990.

99 The motion judge did not consider the Spills Bill. (Neither, for that matter, do our colleagues in the majority). He did, however, rely on the text of para. 1 of the Ontario Indemnity in concluding that it applies to "a statutory claim or proceeding brought by an agency of the Province such as the [Director's Order] issued by the [Ministry of the Environment]" (para. 47). The majority at the Court of Appeal saw no error in this: "it was not open to the motion judge to consider evidence of the parties' specific intentions or negotiations, including whether they discussed the Spills Bill during the negotiations that culminated in the execution of the Ontario Indemnity" (para. 112). This, the majority explained, was rooted in the principle that evidence of the parties' specific negotiations is inadmissible for the purpose of contractual interpretation. Justice Laskin, however, instead characterized the enactment of the Spills Bill as an objective fact that the parties would have or reasonably ought to have known about when entering into their agreement, and concluded that "[t]he timing of the Spills Bill relative to the [Ontario] Indemnity demonstrates that the Spills Bil[l] was undoubtedly the reason why the [Ontario] Indemnity contained the added words relied on by the motion judge and the respondents" (para. 249).

100 We note that the "general rule" that renders evidence of the parties' specific negotiations and subjective intentions inadmissible sits uneasily next to the rule that the circumstances surrounding the formation of the agreement inform contractual interpretation. As was noted in *Canadian Contact Law*:

> The difficulty in Canada in now giving content to or even acknowledging the continued existence of the rule stems from Rothstein J.'s statement in *Sattva Capital* that a court must look at the surrounding circumstances or "factual matrix". It seems very difficult to separate what happened during the negotiations from the "surrounding circumstances"; in fact and notwithstanding the decision of the House of Lords in Chartbrook Ltd. v. Persimmon Homes Ltd., [[2009] UKHL 38,] it is hard to imagine where or how the line could be drawn. [Footnote omitted; p. 746.]

The majority of the Court of Appeal may have been alluding to this difficulty when it suggested that the rule may be in need of change "as a matter of policy" (para. 112). Although we recognize the uncertainty surrounding this point of law, we would leave its resolution for another day, where it is both necessary to the disposition of the appeal and more directly addressed by the courts below and the parties in their submissions.

101 Even accepting that the proclamation of the Spills Bill in November 1985 is objective and admissible evidence of what the parties did or ought to have had in contemplation when entering into the Ontario Indemnity, it is a far leap from that premise to the conclusion that they would have understood "statutory or otherwise" to refer solely to claims brought under the Spills Bill, "or other third party statutory claims which could have been brought at that time" (Ontario A.F., at para. 88). This element of the factual matrix does not support the position that the indemnity excludes claims, actions or proceedings brought under legislation enacted following the execution of the Ontario Indemnity — particularly given that it is expressly said to cover those "existing at December 17, 1979 *or which may arise or be asserted thereafter*" (A.R., vol. IV, at p. 189 (emphasis added)).

102 Moreover, the proposition that the enactment of the Spills Bill as a surrounding circumstance supports reading the Ontario Indemnity narrowly — as excluding the costs of first party claims — cannot be reconciled with the Spills Bill's creation of a right of action for private persons *and for the Province of Ontario*. On this point, s. 68*i*(2) of the Spills Bill states:

> (2) Her Majesty in right of Ontario or in right of Canada or any other person has the right of compensation,
>
> (a) for loss or damage incurred as a direct result of,
>
> (i) the spill of a pollutant that causes or is likely to cause adverse effects,
>
> (ii) the exercise of any authority under subsection 1 of section 68*j* or the carrying out of or attempting to carry out a duty imposed or an order or direction made under this Part, or
>
> (iii) neglect or default in carrying out a duty imposed or an order or direction made under this Part;
>
> (b) for all reasonable cost and expense incurred in respect of carrying out or attempting to carry out an order or direction under the Part,
>
> from the owner of the pollutant and the person having control of the pollutant.

Indeed, if the parties had (or, at least, ought to have had) the Spills Bill in contemplation when executing the Ontario Indemnity, they would have known that it created first *and* third party liability.

103 In a similar vein, the Province also advances the curious argument that first party claims should be excluded from the scope of the Ontario Indemnity because its reference to claims, actions and proceedings brought by any "province" does not include those brought by the Government of Ontario (Ontario A.F., at paras. 43 and 93). With respect, the notion that the parties would not have understood the reference to "any province" as including the province in which the Dryden Property is located, and which clearly has the constitutional authority to enact and pursue statutory claims in circumstances such as these, is simply absurd (see motion judge's reasons, at para. 48). Indeed, Ontario may be *the*

only "*province*" to which this provision could apply since, in *Interprovincial Co-operative Ltd. v. R.* (1975), [1976] 1 S.C.R. 477 (S.C.C.) , this Court held that Manitoba lacked the constitutional jurisdiction to enact and pursue a statutory claim against Dryden Chemical in respect of the mercury contamination into the rivers.

104 Finally, the suggestion that the scope of the indemnity excludes the costs of complying with first party regulatory orders is further undermined by its express application to claims, actions and proceedings brought by "any agency, body or authority created by statutory or other authority" (A.R., vol. IV, at p. 189). The role of such agencies, bodies or authorities is to act under the authority of Ontario statutes or regulations by, in this case, issuing regulatory orders such as that at issue in this appeal.

105 In light of the foregoing, we see no reversible error in the motion judge's consideration of the factual matrix, nor, therefore, in his interpretation of the Province's obligation under para. 1 of the Ontario Indemnity as extending to first party claims, including those brought under subsequently-enacted legislation.

(2) Did the Motion Judge Err in Failing to Read Paragraph 1 of the Ontario Indemnity in Light of the Agreement as a Whole?

106 In support of its second argument, the Province submits that paras. 2 and 3 of the Ontario Indemnity, which give Ontario the right to take carriage of a pollution claim and oblige the companies to cooperate with Ontario in relation to a pollution claim, are typical of third party indemnities, such that it should be clear that the Ontario Indemnity was not meant to address first party claims as well. Those two provisions read as follows:

> 2. Upon the receipt of notice of any Pollution Claim directed to Great Lakes or Reed or any predecessor in title of Reed, Great Lakes or Reed or failing Reed, International, as the case may be, shall promptly notify Ontario in writing of receipt of such notice giving reasonable particulars thereof, and Ontario shall have the right to elect to either take carriage of the defence or to participate in the defence and/or settlement of the Pollution Claim and any proceeding relating thereto as Ontario deems appropriate.
>
> . . . . .
>
> 3. Where a Pollution Claim is brought against any of the companies referred to in paragraph 1 hereof, the said companies shall fully cooperate with Ontario in the investigation and defence and settlement of any such Pollution Claim and shall use their best efforts to obtain the cooperation of all personnel having any knowledge or information relevant to any such Pollution Claim and shall make available to Ontario all information. ...

107 We agree with Laskin J.A. that these provisions "are meaningful only for third party claims" against the indemnified parties, and are "utterly meaningless" in the context of first party claims and orders, such as the Director's Order (para. 268). Nor did this escape the motion judge. Rather, he viewed the notification requirement in para. 2 as being "not inconsistent with the Province's obligation

to indemnify Weyerhaeuser and Resolute for their costs of complying with the [Director's Order]" (para. 48). In other words, while para. 2 does not provide for first party indemnity, it did not exclude it either, and does not oust the language in para. 1 which clearly includes it. As Weyerhaeuser points out, "the fact that some procedural provisions may be unnecessary or redundant in the case of certain types of claims does not mean that a [c]ourt should ignore clear language confirming that those claims are covered by the [Ontario] Indemnity" (Weyerhaeuser R.F. (Ontario Appeal), at para. 55). (This reasoning would also apply to para. 3, given its similarity to para. 2.) Again, we see no reversible error here.

(3) Did the Motion Judge Commit Palpable and Overriding Errors of Fact in His Findings of Fact?

108 The Province's third submission relies upon what it says were two palpable and overriding errors of fact by the motion judge. It points, first, to the motion judge's suggestion that Great Lakes "continued to spend significant amounts of money to modernize the pulp and paper operation in Dryden" as part of the Settlement Agreement (para. 48). This statement shows, the Province says, that he failed to appreciate that such modernization efforts were given in exchange for the 1979 Indemnity, and that they formed no part of the consideration given by Great Lakes for the Ontario Indemnity. The second putative error is said to be found in the motion judge's conclusion, unsupported by evidence, that the waste disposal site was the source of the mercury contamination into the English and Wabigoon rivers.

109 We begin by rejecting the proposition that the motion judge erred when he stated that the Ontario Indemnity "replaced the 1979 Indemnity and was part of the settlement of the lawsuit in which Great Lakes agreed to pay millions of dollars, and also continued to spend significant amounts of money to modernize the pulp and paper operation in Dryden" (para. 48). Specifically, and contrary to the position taken by our colleagues in the majority, the motion judge did not actually find that the modernization commitment was given to the Province *as part of the settlement in 1985*. Rather, he simply observed that Great Lakes continued to invest in the Dryden pulp and paper mill through to 1985, as it was required to do in exchange for the 1979 Indemnity (which, as the motion judge properly found, was subsequently replaced by the Ontario Indemnity). We agree with the Court of Appeal that there is ample evidence in the record supporting these findings, and that no basis for appellate intervention is disclosed.

110 In any event, and to the extent that either of these are "errors", or even "palpable" errors, we again agree with the majority at the Court of Appeal that they could not possibly have had an overriding effect on the conclusion reached by the motion judge. In our respectful view, neither the Province nor our colleagues remotely justify the exaggerated claim that such minor and collateral findings of fact somehow acquired an overriding significance so as to determine the outcome of the case (*Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352 (S.C.C.) , at para. 38, quoting *South Yukon Forest Corp. v. R.*, 2012 FCA 165, 4 B.L.R. (5th) 31 (F.C.A.), at para. 46) — particularly where the motion judge's ultimate conclusion on the scope of the indemnity rested on *different* factual and contextual considerations. This ground of appeal must fail.

(4) Did the Motion Judge's Interpretation of the Ontario Indemnity Render the Agreement Unenforceable as an Impermissible Fetter on the Legislature's Law-Making Powers?

111 The Province's argument here is that the motion judge's interpretation of the Ontario Indemnity — that it extends to the cost of compliance with first party statutory claims made under legislation enacted *after* the indemnity was given to Great Lakes and Reed in 1985 — has the impermissible effect of indirectly fettering the legislature's law-making power. *Ex hypothesi*, the expense that the Province would incur by indemnifying Great Lakes and Reed for compliance with such statutory claims would deter the legislature from enacting the enabling legislation in the first place. Based on the "presumption of law in favour of a legal, enforceable interpretation of a contract", the Province says that the motion judge's interpretation should be rejected and the Ontario Indemnity should instead be read as excluding the costs of complying with the Director's Order and other first party statutory claims based on legislation enacted post-1985 (Ontario A.F., at para. 132).

112 This argument rests on two key premises. The first is that the motion judge "*implied* a term into [the Ontario Indemnity] under which [the Province] is required to compensate for costs incurred to comply with an order made under future legislation" (Ontario A.F., at para. 116 (emphasis added)). The second is that a contract that *implicitly* discourages legislative action is invalid and unenforceable. As to this second point, the Province says that an indirect fetter of legislative power — which occurs where a contract imposes an obligation on the government to compensate the other contracting party in the event of future legislative action or inaction — "should only be permitted where there is an express intention to allocate commercial risk" in this manner (Ontario A.F., at para. 115).

113 We agree with the majority at the Court of Appeal. The Province's argument rests on a mischaracterization of the terms of the Ontario Indemnity, and a significant misunderstanding of the doctrine of fettering.

(a) The Motion Judge Did Not Imply Any Terms Into the Ontario Indemnity Regarding the Effect of Orders Pursuant to Subsequently-Enacted Legislation

114 We begin by rejecting the Province's stated but unelaborated premise that the motion judge's conclusion rested on the implication of terms. Rather, his conclusion was drawn from a straightforward interpretation of the scope of the Province's obligation, expressly stated in para. 1 of the Ontario Indemnity as extending to "any obligation, liability, damage, loss, costs or expenses incurred ... as a result of any claim, action or proceeding ... existing at December 17, 1979 *or which may arise or be asserted thereafter*" (A.R., vol. IV, at p. 189 (emphasis added)). The motion judge's conclusion is fortified by para. 4, which provides that the indemnity is valid "without limitation as to time" (*ibid.*). These provisions contemplate that Reed and Great Lakes are to be indemnified in respect of *all* Pollution Claims, as defined, *whenever asserted*. Neither the text nor the surrounding circumstances support the restricting that the Province would seek to have recognized.

115 The majority at the Court of Appeal was correct. There was no error — let alone a palpable and overriding error — in the motion judge's conclusion that the Ontario Indemnity requires the Province to indemnify the costs of compliance with an order made under subsequently-enacted legislation. More to the point, the motion judge implied no term into the agreement.

(b) The Fettering Doctrine Does Not Render Unenforceable Any Contract that Discourages Legislative Action or Inaction, Whether Implicitly or Explicitly

116 As a matter of constitutional law, the executive of the Canadian state cannot bind or restrict the legislature's sovereign law-making power, whether by contract or otherwise. As this Court affirmed in *Reference re Canada Assistance Plan (Canada)*, [1991] 2 S.C.R. 525 (S.C.C.) , "Ministers of State cannot ... by means of contractual obligations entered into on behalf of the State fetter their own freedom, or the freedom of their successors or the freedom of other members of parliament, to propose, consider and, if they think fit, vote for laws, even laws which are inconsistent with the contractual obligations" (p. 560, quoting *West Lakes Ltd. v. South Australia* (1980), 25 S.A.S.R. 389 (Australia S.C.) , at p. 390). Similarly, this Court recently explained in *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189 (S.C.C.) , that "the executive is incapable of interfering with the legislature's power to enact, amend and repeal legislation", with the result being that "[a]n executive agreement that purports to bind the parties' respective legislatures cannot, therefore, have any such effect" (para. 53).

117 It follows that a contract entered into by the executive that purports to require that a certain law be enacted, amended or repealed cannot be enforced by way of injunction or specific performance. The legislature's sovereign power to "make or unmake any law whatever" means that it can never be bound by such an order (P. W. Hogg, P. J. Monahan and W. K. Wright, *Liability of the Crown* (4th ed. 2011), at p. 324). This is sometimes referred to as the rule against "direct fettering".

118 At the same time — and this is the point that eludes the Province — there is an important difference between a contract that impermissibly *fetters* the legislature's power to enact, amend and repeal legislation, and a contract whose breach by the Crown exposes it to *liability*. Where the legislature exercises its law-making power in a manner inconsistent with the terms of a contract, the Crown may still face consequences in the form of liability in damages. While the possibility of such liability may deter the legislature from acting in a manner that runs contrary to the Crown's contractual promises — sometimes referred to as an "indirect fetter" — the legislature is not thereby truly *fettered*. Its freedom-of-action in these circumstances "is not diminished by holding that the enactment of a particular piece of legislation gives rise to an action for damages for breach of contract" (S. M. Waddams, *The Law of Contracts* (7th ed. 2017), at pp. 453-454; see also K. Horsman and G. Morley, eds., *Government Liability: Law and Practice* (loose-leaf), at p. 2-10). As is explained in *Liability of the Crown*:

> While a contract entered into by the Crown (or anyone else) cannot validly impose a *direct* fetter on legislative power, an exercise of legislative power in breach of contract will give rise to an obligation on the Crown to compensate the private contracting party for any loss suffered by the breach of contract. That obligation is an *indirect* fetter on legislative power, but it is not forbidden by the rule against fettering; on the contrary, it is required by the rule of law. [Emphasis in original; p. 325.]

119 We say nothing new here: the same point emerges from *Wells v. Newfoundland*, [1999] 3 S.C.R. 199 (S.C.C.) . There, the claimant Wells served as a commissioner on a statutory board, under a contract which entitled him to hold office during good behaviour until the age of 70. By legislation, the board was

restructured and Wells' office was abolished. When he was not reappointed to the new board, he sued for breach of contract.

120 While accepting that the legislature had throughout retained *unfettered* authority to restructure the Board and eliminate Wells' office, this Court nonetheless found for Wells by applying the "crucial distinction ... between the Crown legislatively avoiding a contract, and altogether escaping the legal consequences of doing so" (para. 41). The Court went on to explain that:

> In a nation governed by the rule of law, we assume that the government will honour its obligations unless it explicitly exercises its power not to. In the absence of a clear express intent to abrogate rights and obligations — rights of the highest importance to the individual — those rights remain in force. To argue the opposite is to say that the government is bound only by its whim, not its word. In Canada, this is unacceptable, and does not accord with the nation's understanding of the relationship between the state and its citizens [para. 46].

121 *Wells* therefore affirms the distinction between *fettering* and *exposure to liability*. A legislature must be free — that is, *unfettered* — to exercise its law-making powers as it sees fit, within constitutional bounds. But where the legislature exercises its powers in such a way as to breach a government contract (that is, a contract between the executive and a counterparty), the Crown is, as a general rule, liable, unless the legislature also expressly and unambiguously extinguished the counterparty's rights of action or excluded Crown liability.

122 *Even if*, therefore (to return to the facts of this appeal), the Ontario Indemnity has the effect of imposing liability upon the Province to indemnify against first party claims — or even of deterring or otherwise discouraging the legislature from exercising its law-making power in a certain way — *Wells* makes it clear that these effects do not render the agreement unenforceable at law. *Wells* also undermines the proposition, advanced by the Province, that indirect fettering "should only be permitted where there is an express intention to allocate commercial risk" (Ontario A.F., at para. 115), since there was no such express allocation in that case. Even though Wells' employment contract was silent on the point of compensation in the event of abolition of his office, this Court had no difficulty finding that "[t]he most plausible interpretation of the respondent's terms of employment is that while his position, and the authority flowing from it, could be eliminated, he could not be deprived of the benefits of the job except by virtue of age or bad behaviour" (para. 36).

123 For its part, the Province relies heavily on this Court's decision in *Pacific National Investments Ltd. v. Victoria (City)*, 2000 SCC 64, [2000] 2 S.C.R. 919 (S.C.C.) ("*Pacific National No. 1*"). At issue in that case was a contract between Pacific National Investments ("PNI") and the City of Victoria, which required PNI to redevelop a seaside neighbourhood and required the City to pass the necessary zoning and to grant subdivision. Bowing to public pressure, the City subsequently down-zoned to limit further development, thereby scuttling PNI's redevelopment. PNI sued, arguing that its contract implicitly prohibited the City from re-zoning the lands until the expiry of a reasonable amount of time, and that the City breached this implicit term when it re-zoned the land.

124 In finding for the City, this Court explained that, as a creature of statute, the City could only agree to the implied term posited by PNI if it had the statutory authority to do so. And even accepting that such a term might be read into the contract, such a term would nevertheless have been invalid as "an illegal fetter on [the City's] discretionary legislative powers" (para. 66). Indeed, the Court went as far as to reject the distinction between direct and indirect fettering, stating that "an agreement to compensate for a legislative decision ... is no more acceptable than an outright restriction on the legislative power" (para. 63). Here, the Court was responding to an argument that a "duty to compensate ... along these lines would necessarily make that legislative choice subject to considerations other than an objective examination of what is best for the community of which [PNI] is undoubtedly also a part" (para. 64).

125 The difficulty is that this reasoning is irreconcilable with the Court's decision only one year earlier in *Wells* . If the law commands that Wells be entitled to compensation for the breach of his employment contract that resulted from legislative action, we struggle to explain why the law would not operate similarly so as to entitle PNI to compensation for the breach of its development contract with the City when the City Council decided to "down-zone" the seaside lands. We note that the reasoning in*Pacific National No. 1* has been the subject of heavy criticism on this very issue of fettering. The authors of *Liability of the Crown* take the view that "*the decision is wrong*, even if it is limited to the exercise of municipal legislative powers" (p. 328 (emphasis added); see also *Government Liability*, at pp. 2-10; and *Andrews v. Canada (Attorney General)*, 2014 NLCA 32, 354 Nfld. & P.E.I.R. 42 (N.L. C.A.), at paras. 34-41). Likewise, Perell J. in *Rio Algom Ltd. v. Canada (Attorney General)*, 2012 ONSC 550 (Ont. S.C.J.) , said there is "a very strong argument that *Pacific National No. 1 is wrong* and inconsistent with other equally binding and authoritative Supreme Court of Canada's decisions" (para. 153 (emphasis added)); see also *Ontario First Nations (2008) Limited Partnership v. Ontario (Minister of Aboriginal Affairs)*, 2013 ONSC 7141, 118 O.R. (3d) 356 (Ont. S.C.J.), at paras. 53-59).

126 Significantly, this Court in *Pacific National No. 1* did not purport to overrule *Wells* , and instead distinguished it on two bases. First, the majority observed that *Wells* "did not deal with a contract governing the exercise of municipal legislative powers" (para. 61). The logic appears to be that, unlike a province, a municipality cannot indirectly fetter its law-making powers in the absence of "legislation expressing a public policy permitting it to do so" (para. 65). With great respect, and while the failing may well be ours, this distinction eludes us. As Bastarache J. observed in dissent, public policy would tend to work the other way — there is no reason why the principle that the government should honour its commitments unless its legislature explicitly exercises the power not to (as was stated in *Wells* , at para. 46) should not apply with equal force in the context of municipalities (see*Pacific National No. 1*, at para. 112). In any event, this distinction would not assist the Province here, since it — and not a municipality — agreed to the Ontario Indemnity. Meaning, the circumstances of this appeal are analogous to *Wells* , and not to *Pacific National No. 1*.

127 The second way that the majority in *Pacific National No. 1* distinguished *Wells* was to describe Wells' employment agreement as "a business contract in relation to the hiring of senior civil servants" (para. 61). In other words, a distinction was drawn between "business contracts" which *can* have the effect of indirectly fettering law-making powers, and other kinds of contracts which *cannot*. Again with

great respect, we do not see the significance of this distinction — particularly since the contract in *Pacific National No. 1* for land redevelopment could hardly have been seen as less of a "business contract" than Wells' employment contract. In any event, if the principle that the government should honour its commitments unless its legislature explicitly exercises the power not to is to be cast aside, we see no reason for doing so in respect of one kind of contract and not another.

128 We also note that the statements in *Pacific National No. 1* regarding fettering were called into question only four years later when that dispute found its way back to this Court in *Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75, [2004] 3 S.C.R. 575 (S.C.C.) ("*Pacific National No. 2*"). In its action against the City, PNI had also claimed in unjust enrichment for the $1.08 million that it had spent on improvements made in performing the failed development contract. In finding for PNI, a unanimous Court rejected the City's argument that the obligation to make restitution in those circumstances would constitute an indirect fetter on the City legislative power, explaining that "[t]he power to down-zone in the public interest does not immunize the City against claims for unjust enrichment" (para. 52). Commenting on this case, the authors of *Liability of the Crown* had the following to say:

> [In *Pacific National No. 2*], Binnie J. said: "Municipalities are subject to the law of unjust enrichment in the same way as other individuals or entities". We would add: what a shame that the same cannot be said about the law of contract! [Footnote omitted; p. 329.]

129 Bearing all of this in mind, and to the extent that *Pacific National No. 1* can be taken as holding that the Crown will not be liable in damages for the breach of a governmental contract where that breach was caused by legislative action (or inaction), we are of the respectful view that it does not state the law as it relates to the fettering doctrine. On this point, we consider ourselves bound by *Wells* , and not *Pacific National No. 1*.

(c) Conclusion on the Fettering Issue

130 It follows that we reject the Province's arguments that invoke the doctrine of fettering. Even if the Ontario Indemnity was to be interpreted as deterring the legislature from enacting new first party statutory claims, which would then be covered by the Province's obligation under para. 1 when asserted against Great Lakes and Reed, such an effect does not render the contract unenforceable or invalid such that the legislature was fettered. This accords with the authority of this Court's judgment in *Wells* .

131 It also follows that we do not view the motion judge's interpretation of the Ontario Indemnity as requiring the Province to indemnify the cost of complying with orders made under subsequent legislation — as impermissibly fettering the Ontario Legislature's law-making power. While the enactment of new statutory claims might expose the Province to greater liability under the Ontario Indemnity (which might therefore discourage such enactments in the first place), the Ontario Indemnity, as interpreted by the motion judge, in no way prevents the legislature from exercising its sovereign authority to "make or unmake any law whatever" (A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed. 1959), at p. 40, cited in *Reference re Pan-Canadian Securities*

Regulation , at para. 54).

C. The Resolute and Weyerhaeuser Appeals

132 The appeals brought by Resolute and Weyerhaeuser ask whether either or both of them enjoy the benefit of the Ontario Indemnity by operation of the enurement clause (para. 6) of that agreement. That clause states that the indemnity "shall be binding upon and enure to the benefit of the *respective successors and assigns of Ontario, Reed, International and Great Lakes*" (A.R., vol. IV, at p. 191 (emphasis added)).

133 The parties' submissions on this question are directed to three separate, but related, issues, which we will address below, in turn. The first is whether the benefit of the Ontario Indemnity extends to all of Great Lakes' successors and assigns, in perpetuity, irrespective of whether those successors and assigns had themselves assigned their benefits thereunder to third parties. Resolute and Weyerhaeuser say it does, while the Province (like the Court of Appeal) says that that the assignor of a chose in action — such as a right to indemnity — loses the benefit thereunder upon assignment (see C.A. reasons, at paras. 194 and 196-98).

134 The second issue is whether Bowater actually assigned the benefit of the Ontario Indemnity to Weyerhaeuser under the 1998 Asset Purchase Agreement. Resolute says it did not, and that both the motion judge and the majority of the Court of Appeal erred in concluding otherwise. Weyerhaeuser and the Province both say no such error was made by the courts below.

135 The final issue is whether Weyerhaeuser may benefit under the Ontario Indemnity as Great Lakes' successor-in-title to the Dryden Property, independently of whether it can also benefit as an assignee of the rights thereunder. Weyerhaeuser says the motion judge correctly interpreted the term "successor" in the enurement clause as extending to Great Lakes' corporate successors (like Resolute) *and* to successors-in-title to the Dryden Property.

(1) Can an Indemnified Party Continue to Enjoy the Benefit of the Ontario Indemnity After It Assigns Its Rights Thereunder Absolutely to a Third Party?

136 Resolute and Weyerhaeuser say that all of Great Lakes' successors and assigns may continue to benefit in perpetuity from the Ontario Indemnity, even where they have assigned the benefit of the indemnity to third parties. In other words, they say that the enurement clause contemplates (1) Resolute's continued enjoyment of the benefit of the Ontario Indemnity as a corporate successor of Great Lakes, *even if* it had assigned its interest thereunder to Weyerhaeuser under to the 1998 Asset Purchase Agreement, and (2) Weyerhaeuser's continued enjoyment of the same as a successor-in-title to the Dryden Property and assignee of the Ontario Indemnity, *even if* it had subsequently assigned its interest thereunder to a third party. According to Resolute:

> There is no legal principle that required the Court of Appeal to apply [a] "hot potato" theory, in which only the singular legal owner of an indemnity may rely on it. This Court relaxed the requirement of privity more than 25 years ago. Rather, the relevant question is what the parties to

> the Ontario Indemnity objectively intended. The only reasonable interpretation of the indemnity is that the parties intended to protect Great Lakes and its successors *and* assigns, in perpetuity. Any other interpretation is fundamentally inconsistent with the nature of the environmental liability that the Ontario Indemnity was given to protect against. [Emphasis in original.]
>
> (Resolute A.F., at para. 64)

137 We disagree. Our starting position is that of the majority of the Court of Appeal: the effect of an absolute assignment of contractual right is to extinguish the assignor's right to call upon the obligation for him or herself, and to place that right in the hands of the assignee:

> The party making the assignment was a promisee but became an assignor who assigned the contract right he had against a promisor. Unless the assignment is made to secure the payment of a debt, it extinguishes the contract right in the assignor (former promisee) and the right is recreated in the assignee to whom the party with the correlative duty (the promisor) made no promise. There is no longer any promisee since the former promisee has surrendered the right previously created by his promise by becoming an assignor.
>
> (J. E. Murray, Jr., *Corbin on Contracts* (rev. ed. 2007), vol. 9, at p. 130)

See also C.A. reasons, at para. 194; G. Tolhurst, *The Assignment of Contractual Rights* (2nd ed. 2016), at § 3.10.

138 The enurement clause alters none of this. By referring to "successors and assigns", it simply affirms that the rights and obligations thereunder continue to the benefit of successors and assigns. We see nothing in either the text of para. 6 or its surrounding circumstances, and Resolute and Weyerhaeuser direct our attention to nothing in this respect that would allow the indemnity to apply to those who have alienated their interest. We therefore find no error in the conclusion of the Court of Appeal on this point.

(2) Did Bowater Transfer the Benefit of the Ontario Indemnity to Weyerhaeuser Under the 1998 Asset Purchase Agreement?

139 On this issue, Resolute says that a proper consideration of the context in which the 1998 Asset Purchase Agreement was made by the parties, in accordance with the modern approach to contractual interpretation rather than a purely textual reading of the relevant provisions, should have led the motion judge to conclude Bowater did not absolutely assign the Ontario Indemnity to Weyerhaeuser under that agreement. We agree with Resolute. By failing to read the impugned contractual term in light of the factual matrix and in a commercially sensible way, the motion judge erred in holding that Bowater assigned the Ontario Indemnity to Weyerhaeuser under the 1998 Asset Purchase Agreement. We would therefore allow Resolute's appeal. Resolute is entitled to rely on the Ontario Indemnity to cover past and future costs incurred in complying with the Director's Order.

(a) The Motion Judge Erred in Principle in His Approach to Interpreting the 1998 Asset

Purchase Agreement

140 Generally, the interpretation of negotiated contracts involves questions of mixed fact and law, such that appellate review is confined to seeking out palpable and overriding error. Extricable questions of law, however, are reviewed for correctness (see *Sattva* , at para. 53). Such questions include "the application of an incorrect principle, the failure to consider a required element of a legal test, ... the failure to consider a relevant factor", or questions with respect to substantive legal rules of contract (*Sattva* , at para. 53, quoting *King v. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80, 341 D.L.R. (4th) 520 (Man. C.A.), at para. 21).

141 We accept Resolute's submission that the motion judge erred *in law* by failing to properly apply the rules of contractual interpretation in determining whether Bowater assigned the Ontario Indemnity to Weyerhaeuser under the 1998 Asset Purchase Agreement. Indeed, the motion judge gave no reasons in support of his conclusion on this point, which was stated in a somewhat peremptory manner, and grounded solely on an analysis of the text of the relevant provisions of the 1998 Asset Purchase Agreement (motion judge reasons, at paras. 20 and 64). In our respectful view, he was required to consider both the context and circumstances surrounding the formation of the 1998 Asset Purchase Agreement, as well as the commercial reasonableness of any purported assignment. As he failed to apply the proper approach to contractual interpretation, his conclusion that the Ontario Indemnity was assigned from Bowater to Weyerhaeuser is entitled to no appellate deference.

(b) Bowater Did Not Assign the Benefit of the Ontario Indemnity to Weyerhaeuser Under the 1998 Asset Purchase Agreement

(i) Contracts Must Be Interpreted With a View to Commercial Reasonableness

142 As we have already observed, commercial reasonableness is a crucial consideration in interpreting a contract (see *Canadian Contractual Interpretation Law*, at p. 55). This is simply a corollary of the object of discerning the parties' intentions: when interpreting commercial contracts, courts seek to reach a commercially sensible interpretation, since doing so is more likely than not to give effect to the intention of the parties (see *ibid.*, at p. 57; *Nickel Developments Ltd. v. Canada Safeway Ltd.*, 2001 MBCA 79, 156 Man. R. (2d) 170 (Man. C.A.), at para. 34). Simply put, courts safely assume that those who enter into commercial contracts intend for their contracts to "work" (*Humphries v. Lufkin Industries Canada Ltd.*, 2011 ABCA 366, 68 Alta. L.R. 175 (Alta. C.A.) , at para. 15).

143 Discerning commercial reasonableness entails, like all contractual interpretation, an objective analysis (see *Canadian Contractual Interpretation Law*, at p. 57). Courts should therefore read commercial contracts in a "positive and purposive manner", seeking to understand the structure of the agreement reached by the parties, the purpose of the transaction and the business context in which the contract was intended to operate (*Humphries* , at para. 15). As Lord Wilberforce said in *Reardon Smith Line v. Hansen-Tangen*, [1976] 3 All E.R. 570 (U.K. H.L.) , and as quoted with approval by this Court in *Sattva* , at para. 47:

> No contracts are made in a vacuum: there is always a setting in which they have to be placed. ... In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

144 Given, then, the choice between an interpretation that allows the contract to function in furtherance of its commercial purpose and one that does not, it is generally the former interpretation that should prevail (see *Humphries* , at para. 15). While a party cannot avoid its contractual obligations simply because the bargain that they entered into was undesirable or unusual, commercially absurd interpretations should be avoided (see *Canadian Contractual Interpretation Law*, at pp. 61-63). As this Court said in *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 (S.C.C.) , at para. 61, "[i]f a given construction of the contract would lead to an absurd result, the assumption is that this result could not have been intended by rational commercial actors in making their bargain, absent some explanation to the contrary". See also *Toronto (City) v. W.H. Hotel Ltd.*, [1966] S.C.R. 434 (S.C.C.) , at p. 440.

(ii) It Was Not Commercially Reasonable for Bowater to Transfer the Ontario Indemnity to Weyerhaeuser

145 In light of the foregoing — and, in particular, based on an interpretation of the 1998 Asset Purchase Agreement that properly reflects the factual matrix and which is consistent with the principle of commercial reasonableness — we find ourselves in respectful disagreement with the conclusions reached by the courts below. We would instead hold that the Ontario Indemnity was *not* assigned by Bowater to Weyerhaeuser as part of the 1998 Asset Purchase Agreement. The manner in which the parties structured the transfer of the Dryden Property from Bowater to Weyerhaeuser reveals an intention that Bowater would both continue to bear the risk associated with the waste disposal site and indemnify Weyerhaeuser in respect of any environmental liabilities that the latter may incur in relation to the Reed-era mercury contamination.

146 Section 3.1(vii) and (xiv) of the 1998 Asset Purchase Agreement recorded Bowater's agreement to sell certain intangible assets forming part of the Dryden Property to Weyerhaeuser. As already noted, the motion judge relied on both provisions in concluding that the benefit of the Ontario Indemnity was assigned to Bowater as part of the asset sale. The majority at the Court of Appeal agreed, citing the "plain and unambiguous language of s. 3.1(xiv)", and the commercial reasonableness of Weyerhaeuser's seeking to "maximize its protection against environmental liabilities associated with the [waste disposal site]" (paras. 156 and 159).

147 But s. 3.1(xiv) of the 1998 Asset Purchase Agreement cannot be read in isolation. Instead, as we have stressed throughout these reasons, contractual text must be interpreted in light of the surrounding circumstances and with a view to commercial reasonableness, taking into account the commercial purpose and the structure of the agreement.

148 Further, commercial reasonableness must be assessed *from the perspective of both parties*. After

all, a commercial arrangement that makes sense for one party but no sense for another makes no sense as a commercial arrangement at all. As the Court of Appeal for Ontario explained in *Kentucky Fried Chicken Canada v. Scott's Food Services Inc.* (1998), 114 O.A.C. 357 (Ont. C.A.) , at para. 27:

> Where ... the document to be construed is a negotiated commercial document, the court should avoid an interpretation that would result in a commercial absurdity. Rather, the document should be construed in accordance with sound commercial principles and good business sense. Care must be taken, however, to do this objectively rather than from the perspective of one contracting party or the other, since what might make good business sense to one party would not necessarily do so for the other.
>
> [Emphasis added; citations omitted.]

149 This point looms large in considering the text of s. 3.1(xiv), which, at first glance, appears to transfer to Weyerhaeuser the full benefit of *all* of the intangible rights that Bowater enjoys under the representations, warranties, guarantees, indemnities, undertakings, certificates, covenants, agreements and security that it has received upon the acquisition of the Dryden Property *or "otherwise"*. Read literally, "otherwise" suggests that Bowater would be stripped of all of its contractual benefits by operation of s. 3.1(xiv) *even if* those benefits were unconnected to the Dryden Property. This simply could not have been the intention of the parties: Weyerhaeuser could not reasonably have expected to enjoy rights unrelated to the assets it was purchasing. Such an arrangement would be commercially absurd.

150 The meaning of the term "otherwise" in s. 3.1(xiv) — and, specifically, whether it captures the benefit of the Ontario Indemnity — becomes evident, however, once the structure of the agreement between Bowater and Weyerhaeuser, and how they chose to allocate risk as between them is understood. The latter is a key consideration, since the allocation of contractual risk is an attempt by one party to shape the other's expectations in light of what they are prepared to do (see *Canadian Contract Law*, at p. 731).

151 Here, the parties structured the 1998 Asset Purchase Agreement in a way that imposed *all risk* in relation to environmental liabilities — especially in relation to the waste disposal site — *on Bowater*, and not on Weyerhaeuser. First and foremost, as part of the deal, Bowater provided to Great Lakes a broad environmental indemnity in respect of the entire Dryden Property, in the following terms:

> **10.7 Environmental Indemnity**
>
> The Vendor shall indemnify the Purchaser from and against any Claim wherein the Claimant alleges that any Loss, or any damages of any nature whatsoever, was suffered or incurred as a result of a release or discharge of any Hazardous Substance that occurred prior to the Time of Closing, which Hazardous Substance leaves or left the Purchased Assets prior to the Time of Closing and which originated from the Purchased Assets (the "Claim"). For purposes of this paragraph, Claimant shall not include the Purchaser. The carriage and defence of the Claim shall be conducted

in accordance with Section 18.4. There shall be no limitation period and no maximum amount for the Indemnity under this Section 10.7.

(A.R., vol. V, at p. 70)

152 Further, by s. 9.01 of the 1998 Lease Agreement, Bowater also provided to Weyerhaeuser a separate indemnity for *all claims* relating to the presence or release of mercury in relation to the waste disposal site:

9.01 Tenant's Indemnity

[Bowater] covenants to indemnify and save harmless [Weyerhaeuser] from all claims, actions, costs and losses of every nature arising during the Term or thereafter relating to or arising in any way from this lease of the Lands and the Access Area except to the extent caused by the Landlord's negligence or wilful misconduct. The foregoing indemnity extends without limitation to all claims, actions, costs or losses arising out of or relating to:

(1) the presence or release of mercury and any other contaminant, substance or waste on or in the Lands;

. . . . .

The obligations of the Tenant to indemnify the Landlord under the provisions of this section are to survive the termination or expiry of this lease.

(A.R., vol. V, at p. 126-27)

153 These two broadly-worded indemnities reveal with absolute clarity the risk allocation structure that Bowater and Weyerhaeuser intended to achieve. Once the indemnity in the 1998 Lease Agreement was provided, Weyerhaeuser was protected from any and all environmental liability resulting from its temporary ownership of the waste disposal site, in addition to the protection that it enjoyed in relation to the rest of the Dryden Property. The parties clearly intended that any claim against Weyerhaeuser in respect of the presence or release of the mercury waste would be covered by either the indemnity in s. 10.7 of the 1998 Asset Purchase Agreement or in s. 9.01 of the Lease Agreement (assuming, of course, that any such claim falls within the scope of either provision).

154 This risk-allocation structure makes commercial sense, however, if *and only if* Bowater's interests remained protected by the Ontario Indemnity. The Province acknowledged as much during the hearing in this Court and in its factum in the Superior Court of Justice (see hearing transcript, at p. 121; A.R., vol. VIII, at p. 24). As Resolute says, such an interpretation of the 1998 Asset Purchase Agreement makes sense because "Weyerhaeuser would have recourse against Bowater, and Bowater would have recourse against [the Province]", the result being that "[e]veryone would be protected" (Resolute A.F., at para. 101).

155 Weyerhaeuser also conceded that "it would have been commercially absurd for Bowater to

> assign the indemnity if, by doing so, Bowater (and its successor, Resolute) would lose the benefit of the Indemnity" (Weyerhaeuser R.F. (Resolute Appeal), at para. 28). It argues, however — and the majority at the Court of Appeal accepted — that it was "perfectly reasonable" for Weyerhaeuser to seek both an assignment of the Ontario Indemnity *and* a separate indemnity from Bowater under the Lease Agreement (*ibid.*, at para. 27; see also C.A. reasons, at para. 159). While this is undoubtedly so, this submission views the commercial reasonableness of the transaction exclusively from the standpoint of Weyerhaeuser. But, again, commercial reasonableness has to be assessed from the standpoint of *each party*, and not just one of them. And, as Weyerhaeuser concedes, from the standpoint of *Bowater*, this arrangement would be ridiculous, leaving Bowater (and its successors) responsible for *two* contractual indemnities *vis-à-vis* Weyerhaeuser, and completely exposed to all environmental liabilities in respect of both the Dryden Property and the waste disposal site.

156 It follows that, in our view, for the purpose of applying s. 3.1(xiv) of the 1998 Asset Purchase Agreement, the contractual rights and indemnities "otherwise" received by Bowater and its corporate predecessors must not be read so as to confer on Weyerhaeuser *all* the rights and indemnities enjoyed by Bowater. Both the factual matrix (which includes the indemnities in the 1998 Asset Purchase Agreement and in the Lease Agreement) and the principle of commercial reasonableness indicate that this provision did not effect a transfer of Bowater's rights under the Ontario Indemnity to Weyerhaeuser. The parties could not reasonably have intended that Bowater would be obliged to indemnify Weyerhaeuser for all environmental liabilities in relation to the Dryden Property and the waste disposal site, while relinquishing its own protection.

157 We would therefore allow Resolute's appeal.

(3) Is Weyerhaeuser a "Successor" of Great Lakes for the Purpose of the Enurement Clause at Paragraph 6 of the Ontario Indemnity?

158 While Weyerhaeuser is not an assignee of the benefit of the Ontario Indemnity, it also says that it may still benefit thereunder as a successor owner of the Dryden Property. In its submission, the term "successor" in para. 6 of the Ontario Indemnity includes both corporate successors of Great Lakes *and* successors-in-title to the Dryden Property. Relying on *Brown v. Belleville (City)*, 2013 ONCA 148, 114 O.R. (3d) 561 (Ont. C.A.), Weyerhaeuser argues that the enurement clause extends the benefit of the Ontario Indemnity to a *class* of beneficiaries, all of whom may simultaneously benefit from the agreement.

159 Like the majority at the Court of Appeal, we are of the respectful view that the motion judge made a palpable and overriding error in concluding that the enurement clause extended the benefit of the Ontario Indemnity to successor owners of the Dryden Property (i.e., successors-*in-title*). In our view, the term "successors" clearly refers only to *corporate* successors. It is worth noting that this clause is a standard contractual term — that is, "boilerplate" — that solicitors use in order to protect their clients' interests and expectations (see *Canadian Contract Law*, at pp. 741-42). Certainty in commercial transactions is best protected where courts give effect to the common understanding and inclusion of

such terms in contracts, absent any indication that the parties intended them to have a different effect.

160 In *National Trust Co. v. Mead*, [1990] 2 S.C.R. 410 (S.C.C.) , this Court observed that, "when used in relation to corporations a 'successor' generally denotes another corporation which, through merger, amalgamation or some other type of legal succession, assumes the burdens and becomes vested with the rights of the first corporation" (p. 423). Indeed, this common understanding of the term "successor" has been recognized in considering enurement clauses like the one at issue here (see C. L. Elderkin and J. S. Shin Doi, *Behind and Beyond Boilerplate: Drafting Commercial Agreements* (1998), at pp. 250-251; M. H. Ogilvie, "Re-Defining Privity of Contract: *Brown v. Belleville (City)* " (2015), 52 *Alta. L. Rev*. 731, at p. 736). Again, bearing in mind that the object of contractual interpretation is to discern the parties' objective *intentions*, the commonly-accepted meaning of that term provides a helpful starting point to considering what the parties understood the words in the enurement clause to mean.

161 We agree with the majority at the Court of Appeal that, in these particular circumstances, "nothing in the language of the Ontario Indemnity or in the circumstances surrounding the formation of the contract" supports Weyerhaeuser's interpretation of the enurement clause (para. 184). To the contrary, in reading the enurement clause together with the rest of the Ontario Indemnity, it becomes clear that the parties intended to restrict the term "successors" to *corporate* successors. Paragraph 2 of the Ontario Indemnity refers to Reed's "predecessor[s] *in title*", while para. 6 uses the term "successors" without any such qualification. As this Court remarked in *Heritage Capital Corp. v. Equitable Trust Co.*, 2016 SCC 19, [2016] 1 S.C.R. 306 (S.C.C.) , at para. 47, "[m]eaning must be given to the choice to use one term in one clause and a different term in a different clause of the same agreement". Had the parties to the Ontario Indemnity intended the enurement clause to apply to all successors-in-title over the Dryden Property, they could have made those intentions clear.

162 This is not to say that our conclusion with respect to the word "successors" in this specific enurement clause sets out a universal definition of that term. It may be possible, in other circumstances, for the term "successors" to refer to successors-in-title (e.g. *Belleville*).

163 For these reasons, Weyerhaeuser is neither an assignee of the benefit of the Ontario Indemnity nor a corporate successor of either Great Lakes or Reed. Notwithstanding its rights under the 1998 Asset Purchase Agreement and the Lease Agreement, it has no entitlement to benefit under the Ontario Indemnity, and we would dismiss its appeal.

164 Given this conclusion, it is unnecessary for us to decide whether the enurement clause operates to the benefit of a class of beneficiaries (being Great Lakes' successors *and* assigns).

VI. Conclusion

165 We would dismiss the appeals of the Province and of Weyerhaeuser. We would allow Resolute's appeal and declare that Weyerhaeuser enjoys no benefit under the Ontario Indemnity. Resolute is entitled to its costs in this Court and throughout, including costs before the motion judge on the terms

he ordered (*Weyerhaeuser Company Limited v. Ontario (Attorney General)*, 2017 ONCA 1007 (Ont. C.A.)).

Government's appeal allowed; R Inc. and W Ltd.'s appeals dismissed.

Pourvoi du gouvernement accueilli; pourvois de R inc. et de W ltée rejetés.

Footnotes1The motion judge stated that the 1979 indemnity contained that "specific provision", but given the context, it is clear that he misspoke and was instead referring to the 1979 Dryden Agreement. The Province does not take the position that this amounts to a palpable and overriding error of fact (Ontario A.F., at paras. 81-83).

TAB 4

2018 ONCA 374
Ontario Court of Appeal

Atos IT Solutions v. Sapient Canada Inc.

2018 CarswellOnt 5977, 2018 ONCA 374, 140 O.R. (3d) 321, 291 A.C.W.S. (3d) 530, 82 B.L.R. (5th) 251

Atos IT Solutions and Services GMBH and Atos Inc. (Plaintiffs / Respondents) and Sapient Canada Inc. (Defendant / Appellant)

Janet Simmons, David Brown, Fairburn JJ.A.

Heard: November 27, 2017
Judgment: April 18, 2018
Docket: CA C63181

Proceedings: varying *Atos IT Solutions and Services GMBH v. Sapient Canada Inc.* (2016), 63 B.L.R. (5th) 1, 2016 ONSC 6852, 2016 CarswellOnt 19250, L.A. Pattillo J. (Ont. S.C.J. [Commercial List])

Counsel: Mark Gelowitz, Alexander Cobb, Evan Thomas, for Appellant
Peter H. Griffin, Paul-Erik Veel, Laurel D. Hogg, for Respondents

Subject: Civil Practice and Procedure; Contracts; Insolvency

Headnote

Remedies --- Damages — Damages in contract — Loss of profits consequent to breach — Commercial losses

In 2006, defendant SA was awarded contract with gas company to update its software systems — SA subcontracted portions of project to predecessor of plaintiff SI — Installation commenced in June 2007 but was not completed until September 2009, which was five months behind schedule — In June 2009, SA terminated subcontract for what it termed to be cause — SI was successful in its action for wrongful termination of subcontract and was awarded $6,291,680 plus $3.1 million in costs — Trial judge rejected SA's claim that minimum performance principle in 2004 Supreme Court of Canada decision of Open Window Bakery should limit SI's damages to lesser amount calculated in accordance with subcontract's termination for convenience clause — SA appealed — Appeal allowed in part — Trial judge failed to apply minimum performance principle respecting data conversion services portion of parties' contract — Under subcontract, SA was allowed to terminate for cause or for convenience and although SA invoked termination for cause provision, it was entitled to benefit of less burdensome mode of performance of subcontract offered by termination for convenience clause — Although expectancy principle governs calculation of compensatory damages, which is usual measure of damages for breach of contract, minimum performance principle places common law limit on expectancy principle — Termination for convenience clause effectively defined upper limit of SI's liability for damages, and damages were therefore reduced to $4,947,405 — Trial judge's interpretation of "for the last milestone preceding the termination" in clause of subcontract raised question of mixed fact and law and was entitled to deference — Trial judge's reasons disclosed interpretive principle of commercial efficacy and its corollary as he was attentive to plain language of clause, provisions of subcontract as whole and factual matrix from which subcontract emerged and left little to argue that his interpretation gave rise to commercial absurdity — Trial judge's interpretation of limitation of damages clauses and analysis as to how it applied to application management support services was not marked by rare extricable error of law or palpable and overriding errors of fact — Trial judge concluded limitation of liability clauses did not apply to damages for loss of profits on subcontract; limitation of liability clauses only excluded indirect loss of profits.

APPEAL by defendant from judgment reported at *Atos IT Solutions and Services GMBH v. Sapient Canada Inc.* (2016), 2016 ONSC 6852, 2016 CarswellOnt 19250, 63 B.L.R. (5th) 1 (Ont. S.C.J. [Commercial List]), allowing plaintiffs' claim for damages for wrongful termination of subcontract.

***David Brown J.A.*:**

I. OVERVIEW

1 Sapient Canada Inc. ("Sapient") appeals three aspects of the damages awarded to the respondent, Atos Inc. ("Atos"), following a lengthy breach of contract trial. Sapient seeks to reduce the damages awarded to Atos from $6,291,680.00 to $1,510,738.89.

2 Sapient contends the trial judge made three errors when calculating damages: (i) he failed to apply the minimum performance principle set out in *Hamilton v. Open Window Bakery Ltd.* (2003), 2004 SCC 9, [2004] 1 S.C.R. 303 (S.C.C.), in respect of the data conversion services portion of the parties' contract; (ii) he did not properly interpret a formula in the data conversion services portion of the contract; and (iii) he misinterpreted a limitation of damages clause as it applied to application management support services.

3 Sapient also seeks leave to appeal the trial judge's award of costs to Atos. It asks this court to reduce the $3.1 million costs award to zero or, alternatively, to remit the issue of costs to the trial judge for determination in accordance with the outcome of this appeal.

4 For the reasons set out below, I would not interfere with the trial judge's interpretation of the two contractual provisions determining available damages. However, I conclude, with respect, that the trial judge erred in law in failing to apply the *Open Window Bakery* minimum performance principle.

5 As a result, I would vary para. 1 of his Judgment and reduce the award of damages to Atos to $4,947,405. Since that alters the basis upon which the parties had agreed to the amount of the costs below, but only in part, I would grant Sapient leave to appeal costs but, as agreed by the parties, would remit the issue of costs to the trial judge for determination in accordance with the results of this appeal.

II. SUMMARY OF THE DISPUTE, THE TRIAL JUDGE'S FINDINGS, AND THE ISSUES

The dispute

6 Only a brief review of the facts is required to place the damages issues in context.

7 In early 2006, Enbridge Gas Distribution Inc. ("Enbridge") embarked on a major project to replace its many legacy customer information software systems with a single new system using enterprise resource planning software on a single IT platform (the "Project").

8 Sapient was the successful bidder and became the Project's prime contractor. Sapient entered into a fixed price subcontract with Siemens Canada Limited ("Siemens") dated June 4, 2007, which was amended as of September 30, 2007 (collectively, the "Subcontract"). The Subcontract required Siemens to provide two services for the Project: (i) data conversion ("DC") services, which would convert data from the legacy systems into the new system's format; and (ii) application management support ("AMS") services to Enbridge personnel for a period of time after the new system went into operation.

9 The respondent, Atos, is the corporate successor to Siemens. Since the trial judge's reasons refer to Siemens, for ease of reference I will refer to Atos as Siemens.

10 The Project involved extensive planning and implementation. Installation of the software began in June 2007 but was not completed until September 2009, five months behind schedule.

11 On June 29, 2009 Sapient terminated the Subcontract with Siemens for cause.

12 Siemens sued, claiming damages for wrongful termination of the Subcontract. In turn, Sapient counterclaimed for damages arising from the delay in completing the Project.

The trial judge's findings

13 The trial judge concluded that Sapient wrongfully terminated the Subcontract. However, he also held that Siemens breached parts of the Subcontract at various times during the Project, entitling Sapient to damages as well. Neither party appeals those findings.

14 The trial judge awarded damages to Siemens for both the DC and AMS services portions of the Subcontract. I will deal in some detail with the trial judge's damages calculations later in these reasons. At this point, I shall simply summarize the awards he made to Siemens.

15 The trial judge awarded Siemens damages of $2.404 million for the balance owing for DC services. He rejected Sapient's argument that the minimum performance principle in *Open Window Bakery* should limit Siemens' damages to a lesser amount calculated in accordance with the Subcontract's termination for convenience clause. However, the trial judge quite properly performed an alternative damages calculation for DC services using the termination for convenience formula, resulting in alternative damages for the termination of DC services of $1,059,725.

16 The trial judge awarded Siemens damages of $3,575,990 for the wrongful termination of AMS services, representing Siemens' estimated gross profits.

The issues

17 This appeal raises four issues, which I will deal with in the following order:

(i) In calculating damages for the DC services portion of the Subcontract, did the trial judge err by failing to apply the *Open Window Bakery* minimum performance principle?

(ii) If he did, and DC services damages should have been calculated in accordance with the formula contained in the Subcontract's termination for convenience clause, did the trial judge err in interpreting that clause?

(iii) In calculating damages for the AMS services portion of the Subcontract, did the trial judge err in his interpretation of the Subcontract's limitation of liability clause?

(iv) Finally, if the trial judge erred in any part of his calculation of damages, should his award of costs be set aside and the issue of the costs below be remitted to him for further determination?

III. FIRST ISSUE: DOES THE OPEN WINDOW BAKERY PRINCIPLE APPLY TO THE CALCULATION OF DAMAGES FOR DATA CONVERSION SERVICES?

A. The issue stated

The Subcontract's termination provisions

18 Article 17 of the Subcontract afforded Sapient two rights to terminate. First, s. 17.2 entitled Sapient to terminate the entire Subcontract for cause by providing notice to Siemens in certain circumstances, one of which (contained in s. 17.2.2) was where Siemens "commits a material breach of its obligations under this Agreement and such breach is not capable of being cured".

19 A more limited termination right was available in s. 17.4 of the Subcontract: it entitled Sapient to terminate the DC services part of the Subcontract "for convenience".

20 Sapient relied on the s. 17.2 termination "for cause" provision in its June 29, 2009 termination letter by which it terminated the entire Subcontract "effective immediately".

21 When Sapient terminated the Subcontract, the DC services were "almost, if not entirely, complete": Trial Reasons ("Reasons"), at para. 325. There was little work left for Sapient to finish.

22 At the time of termination Siemens was putting in place the organization to provide AMS services, but those services would not commence until the "go-live" date in September 2009. The trial judge found Sapient "had no intention of terminating just the Data Conversion portion of the Subcontract": Reasons, para. 331. Sapient wanted to provide the AMS services itself. And, in the result, the day after it terminated Siemens, Sapient executed a new agreement with Enbridge to provide AMS services.

The calculation of damages for data conversion services

23 The Subcontract set a fixed fee for DC services. Siemens' damages claim for the wrongful termination of that portion of the Subcontract included a claim for the amount of the balance owing: $2,404,000.

24 Sapient contended such an award would dramatically over-compensate Siemens. Instead, Siemens was entitled only to the difference between the Subcontract price and its costs to complete the DC services. According to Sapient, Siemens had not established the amount of that difference.

25 The trial judge accepted Siemens' submission that the proper measure of damages for the termination of the DC services portion of the Subcontract was the balance owing.

26 Sapient advanced an alternative argument: Siemens was only entitled to damages for DC services calculated in accordance with the formula contained in the Subcontract's termination for convenience clause. Although Sapient had invoked the termination "for cause" provision (s. 17.2) to end the Subcontract, not the termination "for convenience" clause (s. 17.4), it argued that using the termination for convenience formula would result in it paying a smaller amount of damages. Sapient pointed to the *Open Window Bakery* minimum performance principle to argue it was entitled to the benefit of the less burdensome mode of performance of the Subcontract offered by the termination "for convenience" clause.

27 At paras. 327 to 331 of the Reasons, the trial judge described Sapient's argument and explained why he rejected it:

> Sapient further submits that even if it did not have the right to terminate the Subcontract for cause, it had the right to terminate the Data Conversion portion of the Subcontract for convenience pursuant to Section 17.4 of the Subcontract. Accordingly, it submits that Siemens' damages in respect of Data Conversion should be limited to the amount provided for in Section 17.4 in accordance with the rule confirmed by the Supreme Court of Canada in *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303. According to that rule, where there are several ways in which a contract may be performed, damages are awarded based on the mode of performance that is least profitable to the plaintiff and least burdensome to the defendant.
>
> Section 17.4 of the Subcontract (Section 2.5 of the Data Conversion Amendment) provides:
>
> > Sapient may terminate the Data Conversion Services for convenience by providing notice to the Subcontractor of such termination, effective as of the date set forth in the notice of termination. Subcontractor shall receive payment for the last milestone preceding the termination plus the lesser of (a) a time and materials rate of $1450 per person (not to exceed 12 people) per day for each day of Data Conversion Services provided following the last completed milestone until the effective date of termination, plus a one time charge of $50,000 and (b) the amount due at the next milestone, had the Data Conversion Services not been terminated.
>
> Sapient submits that, given the termination date of June 29, 2009, the amount that would be owing to Siemens in accordance with the formula set out in Section 17.4 is $622,725.
>
> In my view, the rule in *Open Window* does not apply to Sapient's termination of the Subcontract having regard to its terms. Simply put, given Sapient's intention to terminate the entire Subcontract

> pursuant to Section 17.2, Section 17.4 is not an alternative mode of performance permitting Sapient to terminate the entire Subcontract.
>
> Section 17.2 of the Subcontract permitted Sapient to terminate the entire Subcontract, including AMS. As I have found, that is exactly what Sapient intended to do. It had no intention of terminating just the Data Conversion portion of the Subcontract. On the other hand, Section 17.4, the termination for convenience provision, applies only to the Data Conversion portion of the Subcontract. Accordingly, termination for convenience is not an alternate mode enabling Sapient to terminate the entire Subcontract. It follows that because Sapient intended to terminate the entire Subcontract, it cannot rely on the termination for convenience provision to limit Siemens' Data Conversion damages.

The issue on appeal

28 Sapient submits the trial judge erred in law by failing to calculate damages for the DC services portion of the Subcontract in accordance with the minimum performance principle. That error attracts review on the correctness standard.

29 Siemens argues the trial judge was "quite right" in his conclusion that the minimum performance principle did not apply. Since Sapient could not terminate the entire Subcontract using the termination for convenience clause, the Subcontract did not contain an alternative means of performance upon which the minimum performance principle rests. Further, the reasons in *Open Window Bakery* must be read in light of the decision of the Supreme Court of Canada in *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494 (S.C.C.) , which recognized an over-arching duty of good faith and honest performance of contracts. In the present case, bad faith characterized Sapient's termination of the Subcontract. As a result, Siemens argues, the minimum performance principle could not apply.

B. Analysis

The minimum performance principle

30 Compensatory damages are the usual measure of damages for breach of contract. The expectancy principle governs the calculation of compensatory damages. It requires the breaching party to pay as damages an amount that will provide the non-breaching party with the financial equivalent of performance: John D. McCamus, *The Law of Contracts*, 2d ed. (Toronto: Irwin Law, 2012), at p. 871; and Angela Swan & Jakub Adamski, *Canadian Contract Law*, 3d ed. (Markham, ON: LexisNexis Canada, 2012), at pp. 381-383.

31 The common law places several limits on the expectancy principle: see McCamus, at pp. 877-882; and Swan & Adamski at p. 471. One limit is the minimum performance principle. The principle has been expressed in several different ways. In *Open Window Bakery*, at paras. 11 and 20, the Supreme Court of Canada expressed the principle this way: in cases where the defaulting party had alternative modes of performing the contract, damages are calculated on the basis of the mode of performance least burdensome to the defaulting party and least profitable to the non-breaching party.

32 The jurisprudence and legal literature contain other formulations of the minimum performance principle:

> (i) "[D]amages for breach of a contract with alternative performances are assessed by reference to the promisor's minimum or least extensive performance": Michael G. Pratt, "Damages for Breach of Contracts with Alternative Performances" in Jeff Berryman & Rick Bigwood, eds., *The Law of Remedies: New Directions in the Common Law* (Toronto: Irwin Law, 2010), p. 105 at p. 107;
>
> (ii) "[W]here the option of fulfilling one of two alternative promises rests with the promisor who is in default, the measure of damages is the loss caused by reason of the promisor failing to perform the promise with the lesser value": *Stewart v. Cran-Vela Rental Co.*, 510 F.2d 982 (U.S. C.A. 5th Cir. 1975), at p. 986; and
>
> (iii) Damages are assessed "on the basis that the defendant will perform the contract in the way most beneficial to himself and not in the way that is most beneficial to the plaintiff": *Withers v. General Theatre Corp.*, [1933] 2 K.B. 536 (Eng. C.A.), at p. 549.

33 In *Withers*, at p. 549, the English Court of Appeal gave a simple example of the principle in operation. If a vendor agreed to sell a purchaser 800 to 1200 tons of a certain commodity but failed to deliver any amount, the court would assess damages on the basis the vendor had failed to supply the lower amount — 800 tons — not on the basis of a failure to supply the higher amount of 1200 tons.

34 In the *Open Window Bakery* case, the supplier, Open Window Bakery ("OWB"), was entitled under the terms of its contract with a distributor, Hamilton, to terminate in several ways, two of which were relevant on appeal: (i) for cause; or (ii) on three months' notice, without cause, but only after the 19 month of the contractual term.

35 The trial judge, as summarized by the Supreme Court at para. 7, "held that OWB wrongfully repudiated the contract and awarded damages reflecting the payments that would have been made under the full 36-month term of the contract, less an allowance of 25 percent. The discount reflected the possibility that OWB might at some later point have validly exercised its right to terminate the contract with notice" (citations omitted).

36 This court and the Supreme Court, however, held that damages for OWB's wrongful termination of the contract for cause should be calculated on the basis of the three-month's notice provision. The Supreme Court explained the rationale for applying the minimum performance principle, at paras. 17-18:

> [U]nder the general principle applicable in breach of contracts with alternative performances enunciated above, it is not necessary that the non-breaching party be restored to the position they would likely, as a matter of fact, have been in but for the repudiation. Rather, the non-breaching party is entitled to be restored to the position they would have been in had the contract been performed.

> In this case, the relevant contractual duties have been expressly set out by the parties in the agreement. Hamilton is entitled to OWB's performance of these voluntarily assumed duties. Hamilton has no compensable interest in the advantages she might have expected under any particular performance of the contract, since the contract itself provided for alternative methods of performance at the election of the defendant. If Hamilton wanted to secure herself the benefits associated with a given particular method of performance, she should have contracted for only that method of performance. [Emphasis in original.]

37 In *Open Window Bakery*, the Supreme Court acknowledged that "[t]he method of performance that is most advantageous or least costly for the defendant may not always be clear at the outset from the contract's terms"; as a result, "[a] court may have to consider evidence to determine an estimated cost of the various means of performance": para. 21. The need for such a factual inquiry, however, does not undermine the general principle: para. 21.

Application to the present case

38 The trial judge held that the minimum performance principle did not apply to Sapient's termination of the Subcontract because the termination for convenience clause was not an alternative mode open to Sapient to terminate the entire Subcontract. That clause only entitled Sapient to terminate the DC services part of the Subcontract, not the AMS services portion. Since Sapient intended to terminate the entire Subcontract, not just the DC services portion, it was not entitled to have the damages for its termination of DC services calculated using the less burdensome formula in the termination for convenience clause: Reasons, paras. 330-331.

39 With respect, I disagree. Instead, I accept Sapient's submission that the damages for the wrongful termination of the DC services should have been calculated on the basis of the minimum performance Siemens was entitled to expect under the Subcontract with respect to those services alone.

40 Under the terms of the Subcontract, Sapient could terminate the DC services portion in one of two ways: (i) under s. 17.4, for convenience; or (ii) under 17.2, for cause. Although the Subcontract did not contain a formula for calculating damages where DC services were terminated for cause, s. 17.4 specified the formula the parties were to use where those services were terminated for convenience. In those circumstances, the minimum performance principle applied to the calculation of damages for the termination of the DC services because the alternative mode of performance contained in s. 17.4 shaped and constrained Siemens' reasonable expectations concerning the damages it could recover in the event Sapient terminated the DC services.

41 That Sapient terminated the entire contract, and not just the DC services portion, does not alter how the expectancy principle operates in connection with its termination of the DC services. The terms of the Subcontract did not prevent Sapient terminating both the DC and AMS services portions at the same time. The termination for convenience clause did not stipulate it would apply only in the event Sapient terminated the DC services portion but continued the contract with Siemens for AMS services.

42 On the language of the Subcontract, it was open to Sapient to use the termination for convenience clause to terminate the DC services part, while relying on the termination for cause provision to terminate the rest of the contract. While Sapient did not purport to terminate the Subcontract in that fashion, it was a mode of termination open on the language of ss. 17.2 and 17.4. Even if Sapient ultimately could not justify its termination of AMS services for cause, that would not alter the limit placed by the Subcontract's language on Siemens' reasonable expectation about the damages recoverable for the termination of the other part of the contract involving DC services. The termination for convenience clause effectively defined the upper limit of Sapient's liability for damages in respect of DC services: *Hamilton v. Open Window Bakery Ltd.* (2002), 58 O.R. (3d) 767 (Ont. C.A.), at para. 43, varied on other grounds, (2003), 2004 SCC 9, [2004] 1 S.C.R. 303 (S.C.C.), at paras. 9 and 23.

43 Siemens argues that even if the terms of the Subcontract provided Sapient with alternative modes of performance, the minimum performance principle should not apply because Sapient did not act in good faith when it terminated the Subcontract. Siemens contends the minimum performance principle should be read in light of the over-arching duty of good faith and honest performance recognized in *Bhasin*. Siemens argues that, in terminating the Subcontract, Sapient breached its common law duty of good faith, as well as its contractual duty of good faith set out in s. 20.1 of the Subcontract. Consequently, Sapient cannot take advantage of the less burdensome damages calculation formula contained in the Subcontract's termination for convenience clause.

44 I am unable to accept these submissions for two reasons.

45 First, although the trial judge found that Sapient did not act in good faith when invoking the termination for cause provision to end the entire Subcontract, he did not conclude that Sapient's lack of good faith barred the application of the minimum performance principle. Instead, he concluded the principle did not apply because the termination for convenience clause was not an available alternative mode of performance given Sapient's intention to terminate the entire Subcontract, not just the DC services portion.

46 Second, in *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460, 106 O.R. (3d) 427 (Ont. C.A.) , at para. 47, this court stated that the application of the minimum performance principle did not depend upon good faith conduct by the breaching party.

47 Siemens submits that the decision in *Agribrands Purina Canada Inc.* has been overtaken by that in *Bhasin*. I am not persuaded by that submission. *Bhasin* focused on the issue of the performance of contracts: specifically, the existence of a general organizing principle of good faith contractual performance and a common law duty to perform contractual obligations honestly. *Bhasin* did not purport to alter the existing principles concerning the proper measure of expectation damages in the event of a breach of contract.

48 Indeed, there are suggestions in *Bhasin* — albeit not definitive — that the minimum performance principle operates in conjunction with the general organizing principle of good faith. Recall that in *Bhasin* the contract ran for an initial term of three years, with an automatic renewal for a further three

years unless one party gave six month's written notice to the contrary. At issue was whether the terminating party, Can-Am, had acted honestly in exercising the non-renewal clause. In the course of discussing the breadth of an organizing principle of good faith, the Supreme Court alluded to the minimum performance principle when it stated, at para. 90:

> 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.

49 Given that comment, I am not persuaded, as Siemens submits, that this court's decision in *Agribrands Purina Canada Inc.* has been overtaken by that in *Bhasin*.

50 Accordingly, I conclude the trial judge should have applied the minimum performance principle and calculated Siemen's damages for the wrongful termination of the DC services portion of the Subcontract by using the formula in s. 17.4, the termination for convenience clause. His failure to do so amounted to an error of law, which is subject to review on the correctness standard: *Deslaurier Custom Cabinets Inc. v. 1728106 Ontario Inc.*, 2017 ONCA 293, 135 O.R. (3d) 241 (Ont. C.A.), at paras. 58-61, leave to appeal refused, [2017 CarswellOnt 16214 (S.C.C.)] 37039 (Oct. 19, 2017). Accordingly, I would set aside his finding that Siemens was entitled to damages for the wrongful termination of the DC services portion of the Subcontract in the amount of $2,404,000: Reasons, at paras. 321, 345 and 410.

IV. SECOND ISSUE: THE INTERPRETATION OF THE DAMAGES FORMULA IN THE TERMINATION FOR CONVENIENCE CLAUSE

A. The issue stated

51 As noted, the trial judge performed an alternative calculation of damages in accordance with the formula set out in the Subcontract's termination for convenience clause. That section, s. 17.4, provided for a payment to Siemens calculated as follows:

> *[Siemens] shall receive payment for the last milestone preceding the termination* plus the lesser of (a) a time and materials rate of $1450 per person (not to exceed 12 people) per day for each day of Data Conversion Services provided following the last completed milestone until the effective date of the termination, plus a one time charge of $50,000 and (b) the amount due at the next milestone, had the Data Conversion Services not been terminated. [Emphasis added.]

52 Sapient had argued that under the termination for convenience clause Siemens was entitled to damages of $622,725. Siemens disagreed. It submitted that s. 17.4 entitled it to an additional $437,000, representing the payment due for the last milestone preceding termination. As put by the trial judge, the dispute was "what is meant by the words 'for the last milestone preceding termination' in Section 17.4."

53 The trial judge accepted Siemens' submission that it was entitled to an additional $437,000. He stated, at paras. 336 to 338:

> The plain language of the words in that Section provides that Sapient must pay Siemens for the last milestone preceding the termination in the event of termination. Significantly, the words do not provide that payment in respect of the last milestone is only to be made if it has not yet been paid.
>
> Further, it is reasonable to conclude that at the time the termination for convenience provision is invoked, Sapient's obligation to pay the previous milestone would have already crystallized and been paid. Consequently, the provision in Section 17.4 to pay for the last milestone preceding termination is not to ensure that Siemens was paid for that previous milestone but rather to provide an additional level of compensation to Siemens given that termination was for convenience and not cause.
>
> I conclude, therefore, that Section 17.4 requires Sapient to pay to Siemens the amount owing for the last milestone preceding termination regardless of whether that amount has already been paid, together with the lesser of the two amounts set out for services since the last completed milestone.

54 The trial judge concluded Siemens would be entitled under s. 17.4 to damages for breach of the DC services in the amount of $1,059,725 — the undisputed $622,725, plus an additional $437,000.

B. The positions of the parties

55 Sapient submits the trial judge interpreted the formula in s. 17.4 in a commercially absurd manner. Under his interpretation, Siemens would be entitled to a payment of $437,000 "for the last milestone preceding the termination" even though it already had received payment for that milestone. According to Sapient, where a contract provides that a party "'shall receive payment for' something," it means only one payment, unless clear words to the contrary are present to sanction payment twice.

56 Siemens contends that the plain language of s. 17.4 supports the trial judge's interpretation. The section does not provide that payment for the last milestone was to be made only if it had not already been paid. The trial judge's interpretation was reasonable and entitled to deference.

C. Analysis

57 The standard of review applicable to the contractual interpretation issues raised on this appeal is that set out by the Supreme Court of Canada in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 (S.C.C.), and subsequent decisions. As summarized by this court in*Weyerhaeuser Company Limited v. Ontario (Attorney General)* (1111), 2017 ONCA 1007, 13 C.E.L.R. (4th) 28 (Ont. C.A.), at para. 55:

> That standard holds the interpretation of non-standard form contracts involves issues of mixed fact and law that are subject to deferential review on appeal and in respect of which appellate courts may not intervene in the absence of a palpable and overriding error. Although it may be possible to

> identify an extricable question of law in a contractual interpretation dispute, courts should be cautious about identifying such questions because of the close relationship between the selection and application of principles of contractual interpretation. The construction ultimately given to the contract means that the circumstances in which a question of law can be extricated from the interpretation process will be rare: *Sattva*, paras. 50 to 55; *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, at para. 24; *Uniprix inc. v. Gestion Gosselin et Bérubé inc.*, 2017 SCC 43, at para. 41.

58 On first impression, how to interpret the phrase "for the last milestone preceding the termination" in s. 17.4 of the Subcontract would seem to raise a quintessential question of mixed fact and law, with the trial judge's interpretation entitled to deference. However, Sapient contends the interpretation reached by the trial judge ran afoul of the legal principle of contractual interpretation that requires any interpretation to accord with good business sense and avoid a commercial absurdity. Sapient paints the trial judge's interpretation as offending that principle, thereby raising an extricable question of law which attracts review on a correctness standard.

59 Sapient's argument does not persuade me.

60 The interpretive principle of commercial efficacy — and its corollary, avoiding interpretations that result in a commercial absurdity — is merely one of several tools used by courts to give an accurate meaning to the parties' intentions as stated in a contract: Geoff R. Hall, *Canadian Contractual Interpretation Law*, 3d ed. (Toronto: LexisNexis Canada, 2016), at pp. 55-66. Commercial reasonableness is not "judged solely from the perspective of one of the contracting parties but rather must be assessed objectively": Hall, at p. 57. "[I]n assessing commercial reasonableness the court will consider both the language of the contract as a whole (such that individual provisions are not assessed in isolation for commercial reasonableness) and the factual matrix (as the surrounding circumstances are essential to understanding whether a particular interpretation makes good business sense)": Hall, at p. 58.

61 The trial judge's reasons disclose that he was attentive to the plain language of s. 17.4, the provisions of the Subcontract as a whole, and the factual matrix from which the Subcontract emerged. Given those circumstances, little ground remains on which Sapient can erect an argument based on commercial absurdity.

62 Moreover, the trial judge offered a commercial rationale for interpreting s. 17.4 as requiring an additional payment of $437,000. He stated, at para. 337:

> Further, it is reasonable to conclude that at the time the termination for convenience provision is invoked, Sapient's obligation to pay the previous milestone would have already crystallized and been paid. Consequently, the provision in Section 17.4 to pay for the last milestone preceding termination is not to ensure that Siemens was paid for that previous milestone but rather to provide an additional level of compensation to Siemens given that termination was for convenience and not cause.

63 As the trial judge noted, a payment of $437,000 "due for the last milestone preceding termination" would amount to only 10% of the total Subcontract price. Although a material amount, in the circumstances of this case awarding damages of that magnitude would not come close to approaching a commercially unreasonable result.

64 Accordingly, I see no basis for appellate interference with the trial judge's interpretation of s. 17.4. He applied the governing principles of contractual interpretation and clearly explained the basis for his interpretation. His interpretation was reasonable in the circumstances and was not the product of palpable and overriding error. I would not give effect to this ground of appeal.

V. THIRD ISSUE: DAMAGES FOR AMS SERVICES

A. The issue stated

65 The AMS portion of the Subcontract required Siemens to implement and operate a 24/7 toll free call centre to respond to questions or concerns from Enbridge personnel after the new system went into operation. Although Siemens' delivery of the AMS services would start after the new system went live, the Subcontract required Siemens to perform some preparatory work, including having AMS personnel on site before the "go-live" date.

66 The trial judge did not accept Sapient's position that it had cause to terminate the AMS portion of the Subcontract because of a "lack of urgency" by Siemens in performing the preparatory work. He found that as of June 29, 2009 Siemens was not in breach of its contractual obligations concerning AMS services.

67 Siemens claimed damages for loss of profits arising from Sapient's wrongful termination of the AMS portion of the Subcontract in the amount of $3,575,990. That amount represented Siemens' estimate of the total gross profits it would have earned from the AMS portion of the Subcontract had it remained in force for the full three year period following the "go live" date. The trial judge accepted the accuracy of Siemens' estimate.

68 Sapient contended that s. 18.6 of the Subcontract, entitled "Limitation of Liability", precluded Siemens from recovering damages for lost profits resulting from the termination of the AMS services. The relevant portions of s. 18.6 provided:

> 18.6.1 SUBJECT TO SECTION 18.6.2, NOTWITHSTANDING ANYTHING TO THE CONTRARY HEREIN, EACH OF SUBCONTRACTOR AND SAPIENT WILL BE LIABLE TO THE OTHER WITH RESECT TO THIS AGREEMENT AND ANY OTHER OBLIGATIONS RELATED THERETO *ONLY FOR DIRECT DAMAGES* AND FOR AN AMOUNT THAT WILL NOT EXCEED, IN THE AGGREGATE
>
> . . . .
>
> FOR GREATER CERTAINTY, SUBJECT TO SECTION 18.6.2, NEITHER SUBCONTRACTOR NOR

SAPIENT WILL BE LIABLE TO THE OTHER FOR INDIRECT, SPECIAL, CONSEQUENTIAL OR PUNITIVE DAMAGES OR FOR LOSS OF PROFITS (COLLECTIVELY, "**EXCLUDED DAMAGES**"), EVEN IF THE PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

. . .

18.6.3 THIS SECTION 18.6 WILL APPLY IRRESPECTIVE OF THE NATURE OF THE CAUSE OF ACTION, DEMAND OR CLAIM, INCLUDING BUT NOT LIMITED TO, BREACH OF CONTRACT (INCLUDING FUNDAMENTAL BREACH), NEGLIGENCE, TORT OR ANY OTHER LEGAL THEORY, AND WILL SURVIVE A FUNDAMENTAL BREACH OR BREACHES AND/OR FAILURE OF ESSENTIAL PURPOSE OF THIS AGREEMENT OR OF ANY REMEDY CONTAINED HEREIN. [Bold in original and italics added.]

69 Sapient argued s. 18.6.1 clearly excluded any liability on its part for "loss of profits", with the result that Siemens' damages for the AMS portion of the Subcontract should be limited to its alternative claim of incremental staffing costs in the amount of $543,548.89.

70 The trial judge did not accept Sapient's position. He started his analysis by considering the first step in the test set out in *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69 (S.C.C.), at para. 122. Under the first step, a court must ask whether the exclusion clause would even apply in the circumstances of the case.

71 The trial judge applied the principles of contractual interpretation discussed in *Sattva* and concluded, at para. 354, that "when the words in Section 18.6.1 are read both on their own and in the context of the Subcontract as a whole, the limitation of liability set out in Section 18.6.1 does not apply to Siemens damage claim for loss of profits in respect of AMS."

72 The trial judge explained how he reached this conclusion, at paras. 356 to 361 of his reasons:

Turning first to the wording of Section 18.6, the wording in Section 18.6.1, which limits damages to direct damages only, includes loss of profits under the Subcontract. As previously discussed, expectation damages, which are direct damages, include loss of profits.

Section 18.6.1 goes on, however, "for greater certainty" to provide that neither Siemens nor Sapient will be liable to the other for "indirect, special, consequential or punitive damages or for loss of profits (collectively, 'Excluded Damages'), even if the party has been advised of the possibility of such damages."

Given the above grouping and inclusion of "loss of profits" as Excluded Damages along with "indirect, special and consequential damages", in my view the reference to "loss of profits" in Section 18.6.1 refers to consequential or indirect lost profits, i.e., a breach that causes either Siemens or Sapient to lose profit from other work forgone as a result of the breach. Consequential lost profits do not include profits under the Subcontract but rather are indirect losses which are only recoverable when they are foreseeable or communicated to the defendant: *Hadley v. Baxendale* (1854), 9 Exch. 341, 156 E.R. 145 (Eng. Ex. Div.) at para. 3. My conclusion that the provision of "loss of profits" in Excluded Damages relates to consequential or indirect profits is further confirmed by the concluding words of the paragraph which provide: "even if the party has been advised of the possibility of such damages." That language is in accordance with the *Hadley* recovery principle for consequential damages.

In my view, the above interpretation of "loss of profits" in s. 16.1 is also confirmed when considering the context of the Subcontract. The AMS portion of the Subcontract is a fixed price commercial contract for services. It is reasonable to assume that parties who enter into such a contract would rely on the fact that they would receive the loss of profit component of the price in the event of a breach. As stated by Professor Waddams in the *Law of Contracts*, (6 ed.), at pp. 523-524, the main purpose of contracts in a commercial context is to allow and protect reliance. The learned author goes on to state:

> Thus . . . reliance can only be fully protected, at least in a commercial context, by a rule that measures damages by the value of performance, enabling the plaintiff to recover what has been called the "expectation" interest or damages for "the loss of bargain."

Further, there is no evidence surrounding the formation of the contract that would support a finding that it was the intention of the parties at the outset of the Subcontract that the limitation of liability clause would apply to prevent the recovery of loss of profits in the event of a breach of the Subcontract.

For the above reasons, therefore, I conclude as a matter of interpretation that the limitation of liability clause in Section 18.6 of the Subcontract does not apply to Siemens' claim for loss of profits arising from Sapient's breach of the AMS portion of the Subcontract. The claim for lost profits is a direct damage claim and does not come within the exclusion in Section 18.6.1 of the Subcontract. As a result of my conclusion, as noted above by Justice Binnie in *Tercon*, there is no need to proceed further with the *Tercon* analysis.

73 The trial judge awarded Siemens damages of $3,575,990 for Sapient's breach of the AMS portion of the Subcontract.

B. Positions of the parties

74 Sapient advances two main arguments in support of its position that the trial judge erred in concluding s. 18.6.1 did not exclude a claim for loss of profits: (i) the proper interpretation of this exclusion clause involves an extricable question of law to which the correctness standard applies; or (ii) alternatively, the trial judge made a palpable and overriding error in light of the unambiguous and unqualified language chosen by the parties in s. 18.6 to exclude liability for loss of profits.

75 Siemens contends the trial judge's interpretation of the limitation of liability provision is a question of mixed fact and law, reviewable on a deferential standard. His interpretation was a

reasonable one.

C. Analysis

The standard of review

76 In support of its argument that the correctness standard applies, Sapient points to this court's decision in *Biancaniello v. DMCT LLP*, 2017 ONCA 386, 138 O.R. (3d) 210 (Ont. C.A.). Sapient contends *Biancaniello* stands for the proposition that the interpretation of a contractual term that uses language common to other contracts — such as "consequential" or "indirect" damages — involves an extricable question of law to which the correctness standard applies.

77 I am not persuaded by this submission.

78 Sapient seeks to stretch the decision in *Biancaniello* beyond its specific circumstances. At issue in that case was whether the words releasing any claim "existing to the present time" covered claims unknown at the time the parties signed a release. The issue of the standard of review was intertwined with the litigation history of the case: leave to appeal had been granted by the Divisional Court from the initial dismissal of the summary judgment motion; the Divisional Court dismissed the appeal; and then this court granted further leave to appeal. This court stated, at paras. 20-22, that this litigation history affected the applicable standard of review because leave to appeal would only have been granted if the issue raised was one of general public importance.

79 Consequently, I do not read this court's explanation in *Biancaniello* for its choice of the correctness standard of review in that particular case as establishing some broader proposition that a correctness standard applies to contractual interpretation when a non-standard form contract uses words found in other agreements. The choice of the standard of review in *Biancaniello* was firmly rooted in that case's procedural history.

80 Further, Sapient's submission that a correctness standard should apply where a non-standard form contract uses words found in other contracts runs against the grain of two basic directions given by this court about contractual interpretation.

81 First, following *Sattva* this court has cautioned that reviewing courts should be slow to identify extricable questions of law in interpretation disputes given that the goal of ascertaining the objective intentions of the parties is inherently fact specific: *Trillium Motor World Ltd. v. Cassels Brock & Blackwell LLP*, 2017 ONCA 544, 72 B.L.R. (5th) 177 (Ont. C.A.) , at para. 25, leave to appeal refused, (2018), [2017] S.C.C.A. No. 366 (S.C.C.), citing *Sattva*, at paras. 54-55. As *Sattva* emphasized, at para. 55, "[t]he close relationship between the selection and application of principles of contractual interpretation and the construction ultimately given to the instrument means that the circumstances in which a question of law can be extricated from the interpretation process will be rare." To adopt the correctness standard whenever a contract uses a word found in another would turn the "rare" into the "common".

82 Second, the meaning of a contractual term is derived not just from the words used, but from the context or circumstances in which the words are used. Sometimes it may prove difficult to understand contractual language without some knowledge of its context and the purpose of the contract: *Dumbrell v. Regional Group of Cos.*, 2007 ONCA 59, 85 O.R. (3d) 616 (Ont. C.A.), at para. 52. This too militates against adopting the correctness standard of review simply because a contract uses a word found in other agreements.

83 Accordingly, the trial judge's interpretation of s. 18.6 of the Subcontract attracts the deferential *Sattva* standard of review.

The trial judge's interpretation of s. 18.6 of the Subcontract

84 Sapient contends the trial judge made numerous errors in interpreting s. 18.6: (i) he failed to determine the parties' intentions in accordance with the language they used; (ii) he read one part of s. 18.6 — "direct damages" — in isolation, without construing the contract as a whole; (iii) he ignored the ordinary and grammatical meaning of the clause, including the disjunctive language used; (iv) his interpretation deprived the phrase "loss of profits" of any meaning; (v) he failed to consider the clause in relation to a similar (but not identical) clause in the Prime Contract between Sapient and Enbridge; and (vi) he did not have regard to the overall commercial context of the Subcontract.

85 I would not accept these submissions. Sapient's long list of purported errors simply reflects its disagreement with the trial judge's detailed analysis, at paras. 356 to 361 of the Reasons, reproduced above. Sapient would have interpreted s. 18.6 in a different fashion. So be it. Reasonable people can disagree about the meaning of some contractual provisions.

86 But *Sattva* and its successors are premised on the inevitability of reasonable disagreements about the interpretation of provisions in a non-standard form contract. Where, as in this case, the trial judge gives a considered, detailed, and context-sensitive explanation about how he arrived at the specific interpretation, and his analysis is not marked by a rare extricable error of law or palpable and overriding errors of fact, then an appellate court should defer to his interpretation. That another interpretation might reasonably be available does not provide a basis for appellate intervention.

87 Accordingly, I would not give effect to this ground of appeal.

VI. SUMMARY ON THE APPEAL FROM DAMAGES

88 I conclude the trial judge erred in his assessment of the damages for the termination of DC services. Instead of awarding damages based upon the balance owing for DC services ($2,404,000), he should have applied the formula contained in s. 17.4 of the Subcontract. However, I see no basis for appellate intervention in the alternative damages calculation he performed under s. 17.4 ($1,059,725) or in his award of damages for termination of the AMS services part of the Subcontract.

89 Consequently, I would reduce the damages awarded to Siemens by $1,344,275 (i.e., $2,404,000 less $1,059,725). That would result in an award of damages to Siemens of $4,947,405 (i.e., $6,291,680

less $1,344,275).

VII. FOURTH ISSUE: COSTS

90 Siemens and Sapient resolved the costs below, fixed at an award of $3,100,000 to Siemens, subject to the outcome of any appeal made by Sapient.

91 In the event this court reduced the damages awarded to Siemens, the parties agreed that the costs of the proceedings below should be remitted to the trial judge for his further consideration.

VIII. DISPOSITION

92 For the reasons set out above, I would reduce the damages awarded to Siemens by $1,344,275. Accordingly, I would set aside para. 1 of the judgment and substitute an award of damages in favour of Siemens in the amount of $4,947,405. I would also set aside the award of costs to Siemens and remit the issue of the costs below back to the trial judge.

93 The parties agreed that the successful party on the appeal would be entitled to costs fixed at $50,000. In the result, success on the appeal has been mixed. In the event the parties are unable to resolve the issue of the costs of the appeal, they may file brief, written cost submissions to the panel no later than April 30, 2018.

***Janet Simmons J.A.*:**

I agree.

***Fairburn J.A.*:**

I agree.

Appeal allowed in part.

TAB 5

2014 ONCA 538
Ontario Court of Appeal
Unique Broadband Systems Inc., Re
2014 CarswellOnt 9327, 2014 ONCA 538, [2014] O.J. No. 3253, 121 O.R. (3d) 81, 13 C.B.R. (6th) 278, 242 A.C.W.S. (3d) 80, 322 O.A.C. 122
In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
In the Matter of a Plan of Compromise or Arrangement of Unique Broadband Systems, Inc.

Robert J. Sharpe, E.E. Gillese, C.W. Hourigan JJ.A.

Heard: June 17, 2014
Judgment: July 10, 2014
Docket: CA C57884

Proceedings: reversingi n part *Unique Broadband Systems Inc., Re* (2013), 5 C.B.R. (6th) 1, 2013 ONSC 2953, 2013 CarswellOnt 6926, Mesbur J. (Ont. S.C.J. [Commercial List]); additional reasons at *Unique Broadband Systems Inc., Re* (2013), 5 C.B.R. (6th) 241, 2013 ONSC 5121, 2013 CarswellOnt 11112, Mesbur J. (Ont. S.C.J. [Commercial List])

Counsel: Clifford I. Cole, Benjamin Na for Appellant, Unique Broadband Systems, Inc.
Joseph Groia, Tatsiana Okun for Respondents, Jolian Investments Limited and Gerald McGoey

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency; Torts

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous

UBS alleged decisions relating to executive compensation made by former board were made in breach of fiduciary obligations to UBS and should be set aside — CEO and chairman sought payment of compensation and other amounts CEO claimed were due to CEO from UBS — CEO submitted proofs of claim against UBS totalling $9.5 million, which were denied — CEO sought to have claims, as amended, approved — Trial judge found SAR cancellation award and deferred bonus award in favour of CEO were set aside — Trial judge found there was no business rational for CEO's bonus — Trial judge found it was unclear how it was in best interests of UBS to pay large amount to CEO in order to incentivize CEO to remain with UBS — Trial judge found UBS breached fiduciary duties in failing to consider interests of shareholders when UBS came to decisions concerning SAR cancellation pool and deferred bonus pool — Trial judge found CEO was terminated without cause and was entitled to enhanced termination benefits — Trial judge found CEO's actions did not constitute cause — Trial judge found CEO not being elected to UBS board or being appointed CEO constituted termination without cause — Trial judge found potentially oppressive acts were cured — Trial judge found CEO breached fiduciary duties to UBS in relation to setting enhanced benefits for himself and UBS had no obligation to indemnify — Any money

UBS paid on account ordered repaid — UBS appealed — Appeal allowed in part — Findings of breach of fiduciary duties to UBS driven by self-interest were well supported, and actions were not protected by business judgment rule — Finding that price of SAR units was unrealistic was reasonable — Trial judge properly found that bonus pool was breach of fudiciary duty — Removal from office of CEO did not affect his liability, as breach of duty is wrongdoing whether or not result can be foreseen — Trial judge properly found that indemnification provisions were not operative in face of breach of duty — Trial judge did not specifically state that director acted in bad faith, but did properly conclude that he was ineligible to receive indemnification because he had not met standard of acting honestly and in good faith — Trial judge erred in finding management services contract was not breached — Finding contract for management services was not breached was absurd result and ignored requirements under s. 134(3) of Ontario Business Corporations Act — Cause under agreement was not limited to enumerated grounds of fraud, theft, or misappropriation, but included all serious misconduct that was materially injurious to UBS.

Business associations --- Specific matters of corporate organization — Directors and officers — Miscellaneous

UBS alleged decisions relating to executive compensation made by former board were made in breach of fiduciary obligations to UBS and should be set aside — CEO and chairman sought payment of compensation and other amounts CEO claimed were due to CEO from UBS — CEO submitted proofs of claim against UBS totalling $9.5 million, which were denied — CEO sought to have claims, as amended, approved — Trial judge found SAR cancellation award and deferred bonus award in favour of CEO were set aside — Trial judge found there was no business rational for CEO's bonus — Trial judge found it was unclear how it was in best interests of UBS to pay large amount to CEO in order to incentivize CEO to remain with UBS — Trial judge found UBS breached fiduciary duties in failing to consider interests of shareholders when UBS came to decisions concerning SAR cancellation pool and deferred bonus pool — Trial judge found CEO was terminated without cause and was entitled to enhanced termination benefits — Trial judge found CEO's actions did not constitute cause — Trial judge found CEO not being elected to UBS board or being appointed CEO constituted termination without cause — Trial judge found potentially oppressive acts were cured — Trial judge found CEO breached fiduciary duties to UBS in relation to setting enhanced benefits for himself and UBS had no obligation to indemnify — Any money UBS paid on account ordered repaid — UBS appealed — Appeal allowed in part — Findings of breach of fiduciary duties to UBS driven by self-interest were well supported, and actions were not protected by business judgment rule — Finding that price of SAR units was unrealistic was reasonable — Trial judge properly found that bonus pool was breach of fudiciary duty — Removal from office of CEO did not affect his liability, as breach of duty is wrongdoing whether or not result can be foreseen — Trial judge properly found that indemnification provisions were not operative in face of breach of duty — Trial judge did not specifically state that director acted in bad faith, but did properly conclude that he was ineligible to receive indemnification because he had not met standard of acting honestly and in good faith — Trial judge erred in finding management services contract was not breached — Finding contract for management services was not breached was absurd result and ignored requirements under s. 134(3) of Ontario Business Corporations Act — Cause under agreement was not limited to enumerated grounds of fraud, theft, or misappropriation, but included all serious misconduct that was materially injurious to UBS.

Business associations --- Specific matters of corporate organization — Directors and officers — Liabilities — Oppression

UBS alleged decisions relating to executive compensation made by former board were made in breach of fiduciary obligations to UBS and should be set aside — CEO and chairman sought payment of compensation and other amounts CEO claimed were due to CEO from UBS — CEO submitted proofs of claim against UBS totalling $9.5 million, which were denied — CEO sought to have claims, as amended, approved — Trial judge found SAR cancellation award and deferred bonus award in favour of CEO were set aside — Trial judge found there was no business rational for CEO's bonus — Trial judge found it was unclear how it was in best interests of UBS to pay large amount to CEO in order to incentivize CEO to remain with UBS — Trial judge found UBS breached fiduciary duties in failing to consider interests of shareholders when UBS came to decisions concerning SAR cancellation pool and deferred bonus pool — Trial judge found CEO was terminated without cause and was entitled to enhanced termination benefits — Trial judge found CEO's actions did not constitute cause — Trial judge found CEO not being elected to UBS board or being appointed CEO constituted termination without cause — Trial judge found potentially oppressive acts were cured — Trial judge found CEO breached fiduciary duties to UBS in relation to setting enhanced benefits for himself and UBS had no obligation to indemnify — Any money UBS paid on account ordered repaid — UBS appealed — Appeal allowed in part — Findings of breach of fiduciary duties to UBS driven by self-interest were well supported, and actions were not protected by business judgment rule — Finding that price of SAR units was unrealistic was reasonable — Trial judge properly found that bonus pool was breach of fudiciary duty — Removal from office of CEO did not affect his liability, as breach of duty is wrongdoing whether or not result can be foreseen — Trial judge properly found that indemnification provisions were not operative in face of breach of duty — Trial judge did not specifically state that director acted in bad faith, but did properly conclude that he was ineligible to receive indemnification because he had not met standard of acting honestly and in good faith — Trial judge erred in finding management services contract was not breached — Finding contract for management services was not breached was absurd result and ignored requirements under s. 134(3) of Ontario Business Corporations Act — Cause under agreement was not limited to enumerated grounds of fraud, theft, or misappropriation, but included all serious misconduct that was materially injurious to UBS.

APPEAL by corporation from judgment reported at *Unique Broadband Systems Inc., Re* (2013), 2013 ONSC 2953, 2013 CarswellOnt 6926, 5 C.B.R. (6th) 1 (Ont. S.C.J. [Commercial List]), regarding claims under Companies' Creditors Arrangement Act.

***C.W. Hourigan J.A.*:**

1 Unique Broadband Systems Inc. ("UBS") appeals the judgment of Justice Mesbur, dated May 21, 2013, rendered in connection with a claim made by Gerald McGoey and his personal company, Jolian Investments Limited ("Jolian"), pursuant to s. 20 of the Companies' Creditors Arrangement Act, R.S.C.

1985, c. C-36 (the "CCAA").

2 The trial judge ordered UBS to pay Jolian and Mr. McGoey's claim for an enhanced severance payment that was the equivalent to 300% of Mr. McGoey's compensation (the "Enhanced Severance"). That order is the subject of UBS' appeal.

3 The trial judge dismissed Mr. McGoey and Jolian's claims for payment of a SAR Cancellation Award, a Bonus Award, and indemnification for legal and other professional Services expenses.[4] That order is the subject of a cross-appeal by Mr. McGoey and Jolian.

4 For the reasons that follow, I would grant the appeal and dismiss the cross-appeal.

Facts

5 UBS is a public company listed on the TSX Venture Exchange. It is incorporated under the Ontario Business Corporations Act, R.S.O. 1990, c. B.16 (the "OBCA").

6 In 2002, Mr. McGoey was appointed a director and acting CEO of the corporation. Eventually, Mr. McGoey took on the role of CEO on a permanent basis. His employment relationship with UBS was first governed by a personal employment contract and later by a management services agreement between UBS and Jolian dated May 3, 2006 (the "Jolian Management Services Agreement"). Both the personal employment contract and the Jolian Management Services Agreement contained a "golden parachute" provision which granted Mr. McGoey enhanced termination benefits in certain situations.

7 Since November 2006, UBS had in place an incentive-driven share appreciation rights plan ("SAR Plan") for its directors and senior management. Upon certain triggering events, a SAR unit holder would be paid an amount equal to the difference between the market trading price of a UBS share and a strike price specified in the SAR Plan.

8 In 2003, UBS acquired a controlling 51.8% equity interest in Look Communications Inc. ("Look"), a telecommunications company. Mr. McGoey also served as a director and CEO of Look. UBS and Look were parties to a services agreement pursuant to which Mr. McGoey performed management services for Look. Other than those services, UBS was essentially a holding company and did not engage in any active business.

9 Look's primary asset was a band of telecommunications spectrum. In early 2009, Look engaged in a process to sell the spectrum through a court-supervised plan of arrangement. Ultimately the spectrum was sold for $80 million on May 4, 2009 to Inukshuk Wireless Partnership ("Inukshuk"), a consortium of Rogers Communications Inc. ("Rogers") and Bell Canada (the "Spectrum Sale"). Mr. McGoey expected that the sale would generate a significantly higher sale price and was very disappointed with the figure offered by Inukshuk.

10 The board of directors of UBS (the "UBS Board") resolved to treat the Spectrum Sale as a triggering event pursuant to the SAR Plan. Prior to the announcement of the Spectrum Sale, UBS's

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4. The capitalized terms are defined below.

shares were trading at approximately $0.15 per share. The UBS shares were anticipated to appreciate as a consequence of the Spectrum Sale's announcement. However, the anticipated share price increase did not materialize and the shares continued to trade at the $0.15 range after the announcement.

11 After court approval of the Spectrum Sale on May 14, 2009, Mr. McGoey engaged in negotiations with Rogers for a potential purchase of the balance of Look's assets, including roughly $300 million in tax losses and similar assets, subscribers, and real estate. Rogers withdrew from the negotiations on July 20, 2009 and the transaction never came to fruition.

12 Also after the Spectrum Sale, the UBS Board's compensation committee, which consisted of Mr. McGoey and two other UBS Board members, began reviewing the SAR Plan. Each member of the compensation committee had a considerable number of SAR units.

13 Executive compensation was on the agenda for the UBS Board meeting of June 17, 2009. In anticipation of that meeting, Mr. McGoey sought the advice of UBS' outside legal counsel, David McCarthy, regarding board approval of executive bonuses. Mr. McCarthy advised that, while s. 3.15 of National Policy 58-201 (which deals with the Corporate Governance Guidelines) says that a board should appoint a compensation committee entirely of independent directors, this was a guideline only and was not a requirement either pursuant to securities law or TSX Rules.

14 Mr. McGoey also requested that Mr. McCarthy provide the UBS Board with a letter outlining its authority, duties, and obligations in making payments to officers and employees. Mr. McCarthy provided such a letter, dated June 17, 2009. In that letter, he specifically advised the UBS Board that, in exercising its power to compensate officers and employees, the directors were obliged to meet their fiduciary obligations to the corporation.

15 At the June 17, 2009 UBS Board meeting, the directors considered the issue of the SAR Plan. Mr. McCarthy's letter was before the UBS Board and Mr. McCarthy was present for a portion of the meeting. Mr. McCarthy was not asked to opine on the UBS Board's decision at the meeting. He also did not provide the UBS Board with advice regarding the UBS Board's process or about the quantum of the benefits being considered.

16 At the meeting, each director disclosed his conflict of interest regarding their SAR unit holdings. The directors then unanimously resolved to cancel the SAR units and establish a SAR cancellation payment pool of $2,310,000, based on a fixed unit price of $0.40 per share. Under this new arrangement, Mr. McGoey, along with three other directors and one member of management, would receive a SAR cancellation award (the "SAR Cancellation Awards") based upon the $0.40 per unit figure.

17 The payment was contingent on: Look receiving the full compensation of $80 million from the Spectrum Sale; UBS receiving adequate cash resources; Mr. McGoey and the other SAR Plan unit holders relinquishing all rights to the SAR units awarded to them as of May 31, 2009; and the SAR Plan unit holders executing releases with respect to the SAR Plan and a stock option plan established in

2002.

18 The UBS Board met on July 8 and 9, 2009. At that meeting, the directors considered the issue of awarding bonuses for certain personnel. Mr. McGoey proposed the establishment of a bonus pool of $7 million. That plan was not approved. However, the UBS Board did approve the establishment of a bonus pool in the amount of $3.4 million (the "Bonus Pool").

19 The SAR Cancellation Awards and the Bonus Pool were allocated to the recipients in August 2009. Under the SAR Cancellation Awards, Mr. McGoey was allocated to receive $600,000 and, under the Bonus Pool, he was allocated to receive $1,200,000.

20 In addition to the SAR Cancellation Awards and the Bonus Pool, Mr. McGoey and the other directors of Look also established a SAR cancellation payment pool and a bonus pool for that company. The total amount funded directly by UBS or indirectly, through its 51.8% equity interest in Look, in the new compensation plans of the two companies was $14,637,025, or approximately 97.6% of the market capitalization of UBS.

21 The disclosure of the SAR Cancellation Awards and the Bonus Pool was met with resistance by UBS share holders. Faced with this resistance, Mr. McGoey caused UBS to advance to him $200,000 for the payment of anticipated legal fees.

22 A special shareholders' meeting was held pursuant to s. 122 of the OBCA on July 5, 2010. At that meeting, Mr. McGoey and the other directors were removed and not re-elected as directors of UBS. Mr. McGoey then resigned as CEO of UBS and took the position that he was terminated without cause because he was not re-elected to the UBS Board.

23 Mr. McGoey commenced an action against UBS seeking, *inter alia*, payment of Enhanced Severance in the amount of $9,500,000. He successfully moved for partial summary judgment before Marrocco J. on the issue of the payment of legal fees. However, Marrocco J.'s decision was subject to any finding of misfeasance that the court might make against Mr. McGoey.

24 On July 5, 2011, UBS was granted CCAA protection. It was ordered that Mr. McGoey's lawsuit be determined pursuant to the claims process under s. 20(1) of the CCAA. Mr. McGoey filed a proof of claim in the amount of $10,112,648, which the monitor disallowed in its entirety. Mr. McGoey sought to reverse that denial and a trial was ordered on the issue. That trial is the subject of this appeal and cross-appeal.

Decision of the Trial Judge

25 After thoroughly reviewing the underlying facts, the trial judge considered the law with respect to the business judgment rule. She concluded that the business judgment rule would only be of assistance to Mr. McGoey if he acted honestly and in good faith, with a view towards the best interests of the corporation.

26 The trial judge then examined Mr. McGoey's actions to determine whether they would be protected by the business judgment rule or whether they constituted a breach of his fiduciary duty. She noted that, since Mr. McGoey was the only UBS director who testified, she had no independent evidence of what the compensation committee or the UBS Board discussed and considered when deciding on the SAR Cancellation Awards and the Bonus Pool. In particular, she had no evidence as to how or if the UBS Board followed Mr. McCarthy's advice that the directors were obliged to meet their fiduciary duties to the corporation when setting executive compensation.

27 The trial judge accepted the evidence of Michael Thompson, a partner at Mercer, who was qualified as an expert regarding executive compensation and best practices for establishing executive compensation. She noted that Mr. Thompson opined that Mr. McGoey's compensation package did not pass any test of reasonableness and that she had heard no other independent evidence to refute Mr. Thompson's opinion. The trial judge found that Mr. Thompson's evidence gave her a "helpful context" to consider the UBS Board's decision-making process as part of her fiduciary duty analysis.

28 The trial judge focused on the decision of the UBS Board to cancel the SAR Plan and set a price of $0.40 per unit "at a time when the board knew, or ought to have known, that the market had not reacted to the Inukshuk sale as they had hoped": at para. 140.

29 The trial judge noted that the UBS compensation committee did not have any independent members, as all of the directors on that committee held SAR units.

30 The trial judge made the following findings with respect to the SAR Cancellation Awards and the Bonus Pool, at paras. 145-147:

> The decision to cancel the SAR plan really came out of the blue, and only when it was apparent to the board members, who were the majority of the SAR unit holders that their SARs units would have little or no value on the triggering date.
>
> Absent any evidence to the contrary (and there is really none), I am led to the inescapable conclusion the decision to cancel [the] SARs and replace them with a fixed amount must have been driven by the board's own self interest, and not the interests of the corporation. There was nothing in it for UBS shareholders.
>
> As for Mr. McGoey's bonus, there was no business rationale for it. UBS was a holding company. It had no real employees, other than bookkeeping and secretarial staff. I fail to see how it was in UBS' interests to pay such a staggering amount of money to Mr. McGoey in order to "incentivize" him to remain with UBS. The situation at Look might be viewed differently; that issue, however, is not for me to decide.

31 The trial judge went on to find that the $0.40 unit value was not determined by any objective means, did not reflect the actual market price for the shares, and "represented more of a hope for share value based in large part on a Rogers sale transaction that was fraught with difficulty, and nowhere near a firm transaction": at para. 154. She stated that any valuation based on the possible Rogers transaction

"should have been discounted for the real possibility the transaction might not close, or the purchase price might be significantly reduced": at para. 155.

32 With respect to the Bonus Pool, the trial judge found that it was not based on any objective criteria. She noted that, previously, Mr. McGoey's bonuses had been in the range of $400,000 to $440,000 and stated that she had "heard no evidence to support any reasonable rationale for a bonus at the level of $1.2 million": at para. 157.

33 The trial judge rejected the argument advanced by Mr. McGoey that the UBS Board's actions were done on the advice of Mr. McCarthy, finding that he "was not asked to opine on the reasonableness of the changes to the SAR and bonus plans": at para.159.

34 The trial judge concluded that the UBS Board breached its fiduciary duties to UBS in establishing the SAR Cancellation Awards and the Bonus Pool. She set aside the allocations to Mr. McGoey and Jolian pursuant to the SAR Cancellation Awards and the Bonus Pool.

35 The next issue was whether Mr. McGoey and Jolian triggered the default provisions in the Jolian Management Services Agreement, such that they were disentitled to the golden parachute benefits under the agreement. Specifically, Mr. McGoey and Jolian are disentitled to golden parachute benefits if Mr. McGoey and Jolian are in default as that term is defined in the agreement. The trial judge concluded that a breach of fiduciary duty did not qualify as a default under the Jolian Management Services Agreement and, therefore, UBS was obliged to pay the amounts due under the golden parachute provisions of the agreement.

36 UBS relied upon the oppression remedy provisions in the OBCA. However, the trial judge found, at para. 180, as follows:

> Since I have determined the enhanced benefits represented a breach of the board's fiduciary duties and have set those benefits aside, it seems to me the potentially oppressive acts have been cured and I need not deal with whether the board's actions might also constitute oppressive conduct.

37 The trial judge concluded that UBS had no obligation to indemnify Mr. McGoey for his legal fees because he had breached his fiduciary duties to the corporation.

38 In her costs decision, the trial judge found that there was divided success at trial and ordered that there be no costs.

Issues

39 The appeal and cross-appeal raise the following issues:

(i) Did the trial judge err in finding that Mr. McGoey breached his fiduciary duties to UBS?

(ii) Did the trial judge err in finding that Mr. McGoey is not entitled to indemnification from UBS?

(iii) Did the trial judge err in finding that Mr. McGoey is entitled to Enhanced Severance under the Jolian Management Services Agreement? and

(iv) Did the trial judge err in failing to consider the oppression remedy argument advanced by UBS?

Positions of the Parties

40 UBS submits that the trial judge did not err in finding that Mr. McGoey had breached his fiduciary duties to UBS by virtue of his involvement in establishing the SAR Cancellation Awards and the Bonus Pool. Nor did the trial judge err in finding that, as a consequence of the breach, Mr. McGoey was not entitled to indemnification from UBS. However, UBS submits that the trial judge erred in finding that Mr. McGoey's conduct did not amount to "Cause" or a "Jolian Default" under the Jolian Management Services Agreement and that Mr. McGoey was entitled to Enhanced Severance. Specifically, UBS argues that the trial judge's interpretation of the Jolian Management Services Agreement is inconsistent with s. 134(3) of the OBCA and leads to a commercially absurd result. In addition, UBS submits that the trial judge, having rejected UBS's interpretation of the Jolian Management Services Agreement, was obliged to consider the oppression remedy argument it had advanced.

41 In his cross-appeal, Mr. McGoey submits that the trial judge erred in finding a breach of fiduciary duty. His position is that the actions taken regarding the SAR Cancellation Awards and the Bonus Pool were within a range of commercially reasonable decisions and are, therefore, protected by the business judgment rule. He also submits that the trial judge erred in finding that he was not entitled to indemnification from UBS under the terms of the Jolian Management Services Agreement. Mr. McGoey argues that the trial judge otherwise correctly interpreted the Jolian Management Services Agreement and that, because the oppression remedy does not apply, the trial judge was under no obligation to consider that argument.

Analysis

(i) Breach of Fiduciary Duty

42 As mentioned above, Mr. McGoey asserts that the trial judge erred in finding that he had breached his fiduciary duties. At the heart of Mr. McGoey's submission is that the decisions he made with respect to the SAR Cancellation Awards and the Bonus Award were done with the advice of experienced legal counsel and are protected by the business judgment rule.

43 In my view, the trial judge's finding that Mr. McGoey's breached his fiduciary duties to UBS was well supported in the evidence before her and by the lack of any clear explanation from Mr. McGoey as to how the UBS Board decided to establish the SAR Cancellation Awards and the Bonus Pool. For the reasons set forth below, I see no error in the trial judge's reasoning and in her conclusion that Mr. McGoey's actions were driven by self-interest, unsupported by any reasonable or objective criteria, and contrary to the best interests of UBS.

44 Below I consider the general principles of the law of fiduciary duties, an analysis of the trial judge's decision regarding the SAR Cancellation Awards and Bonus Pool, and the defences raised by Mr. McGoey.

General Principles

45 It is undisputed that, Mr. McGoey, as a director and CEO of UBS, owed the company fiduciary duties. The imposition of fiduciary duties on directors and officers of a corporation is consistent with the origins of the doctrine in trust law. A director or senior officer of a corporation is in a position of trust. He or she is charged with managing the assets of a corporation honestly and in a manner that is consistent with the objects of the corporation. Courts will be loath to interfere with the legitimate exercise of corporate duties, but they will intervene where a fiduciary breaches the trust reposed in him or her.

46 Mr. McGoey's fiduciary duties included an obligation to act in good faith and in the best interests of the corporation. He had a specific obligation to scrupulously avoid conflicts of interest with the corporation and not to abuse his position for personal gain: *People's Department Stores Ltd. (1992) Inc., Re*, 2004 SCC 68, [2004] 3 S.C.R. 461 (S.C.C.), at paras. 35 and 42; and *BCE Inc., Re*, 2008 SCC 69, [2008] 3 S.C.R. 560 (S.C.C.), at paras. 39 and 89.

47 As Granger J. stated in *Moffat v. Wetstein* (1996), 29 O.R. (3d) 371 (Ont. Gen. Div.), at p. 390:

> Subsumed in the fiduciary's duties of good faith and loyalty is the duty to avoid a conflict of interest. The fiduciary must not only avoid a direct conflict of interest but must also avoid the appearance of a possible or potential conflict. The fiduciary is barred from dividing loyalties between competing interests, including self-interest.

48 Disclosure of a directors' interest in a transaction is just the first step. Disclosure does not relieve a director of his or her obligation to act honestly and in the best interests of the corporation: *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.* (2002), 214 D.L.R. (4th) 496 (Ont. S.C.J. [Commercial List]), aff'd (2004), 183 O.A.C. 310 (Ont. C.A.).

49 It is against these standards that the trial judge was obliged to consider the actions of Mr. McGoey.

SAR Cancellation Awards

50 With respect to the SAR Cancellation Awards, the trial judge concluded that there was no evidence as to how the UBS Board arrived at the non-market price of $0.40 per unit and how it determined that it was in the best interests of the corporation. The UBS Board provided no credible analysis to justify why they considered that these payments, which represented a significant percentage of UBS market capitalization, were fair and reasonable in the circumstances.

51 In considering the reasonableness of the UBS Board's actions in this regard, I find that the following facts are germane.

52 As of May 4, 2009, when the UBS Board resolved to treat the Spectrum Sale as a triggering event pursuant to the SAR Plan, it anticipated that the trading price of UBS shares would rise from $0.15 to a range of $0.30 to $0.50 per share.

53 On June 17, 2009, the shares of UBS were still trading at $0.15 per share. Thus, the anticipated gains between the strike price and the trading price had not materialized. It was in these circumstances that the UBS Board decided to implement the SAR Cancellation Awards without the benefit of any independent or third party advice that could speak to the reasonableness of their decision.

54 As found by the trial judge, the potential Rogers share transaction never went beyond the negotiation stage and was completely off the table by July 20, 2009 and could not serve as a justification for the $0.40 unit price.

55 Mr. McGoey's SAR Cancellation Award was allocated to him on August 28, 2009, pursuant to which he was entitled to receive a payment from UBS of $600,000, whereas, under the SAR Plan, he would have been entitled to a payment of $75,000.

56 Given these facts, and in the absence of any credible evidence regarding the *bona fides* of the SAR Cancellation Awards or the process by which they were created, the trial judge reached the reasonable conclusion that the decision to implement the new scheme was driven by UBS Board's self-interest. I see no error in that conclusion.

57 I also agree with the trial judge's conclusion that the $0.40 unit value was unjustified and unrealistic. It was notionally based on a transaction with Rogers that was far from certain and which had been terminated at the time when the SAR Cancellation Awards were allocated. What the SAR Cancellation Awards really achieved was the removal of the uncertainty that was part of the SAR Plan. Under this new scheme, the recipients' awards were not dependant on an increase in the share price, the awards would be granted regardless of the trading price of the shares. This removal of the uncertainty was to the benefit of the recipients and was of no benefit to the corporation.

Bonus Pool

58 The trial judge rejected the position of Mr. McGoey that there was a reasonable rationale for the establishment of the Bonus Pool and his allocation of $1.2 million. This finding was well supported by the evidence at trial, including the following.

59 The UBS Board did not seek or receive any expert advice on an appropriate bonus structure. Nor did they have any comparable or other data regarding executive compensation in the marketplace.

60 There was no documentation that stipulated the performance factors or criteria by which Mr. McGoey's performance would be evaluated. The trial judge rejected Mr. McGoey's evidence that the services he provided for Look qualified as the criteria under which he could be awarded a bonus by UBS. She concluded that, when the UBS bonus was awarded, there were, in fact, no criteria.

61 Similarly, there was no documentation that showed how the Bonus Pool was quantified. The best evidence we have is that Mr. McGoey went to a UBS Board meeting seeking to establish a $7 million bonus pool but the UBS Board found that amount "too high" and established a $3.4 million bonus pool instead.

62 In my view, on these facts, the trial judge was correct to conclude that Mr. McGoey's establishment of the Bonus Pool and the allocation of a part of the Bonus Pool to him breached his fiduciary duties to UBS.

Defences

63 I do not accept Mr. McGoey's rather novel argument that there can be no finding of a breach of fiduciary duty because, before he could be paid under the SAR Cancellation Awards or the Bonus Pool, he was removed from office by the shareholders of UBS. Counsel for Mr. McGoey suggests that the breach is incomplete because no damages have been suffered.

64 This submission is not correct at law. As stated by Mark Ellis in his text, *Fiduciary Duties in Canada*,[5] in the context of a discussing conflicts of interest:

> Entering into a *potential* conflict of interest is a breach whether or not the conflict is operative; once such a conflict becomes operative to jeopardize the beneficiary or his property, the fiduciary breach would then give rise to the remedies available in law. The point is important: to wait until damage or prejudice actually occurs is to prejudice the beneficiary's right to utmost loyalty and avoidance of conflict. If such a schism in theory is allowed, the law would be encouraging a finding that the duty "piggy-backs" the damage caused rather than premising damage on the basis of duty. [Emphasis in original.]

65 Similarly, in *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534 (S.C.C.), at p. 553, McLachlin J. (as she then was) stated that "[a] breach of fiduciary duty is a wrong in itself, regardless of whether a loss can be foreseen".

66 It would be a remarkable result if a fiduciary could be allowed to act in a manner contrary to his duty with impunity, on the basis that he was prevented by the beneficiary's vigilance from receiving a personal benefit.

67 Mr. McGoey's counsel also argued that the trial judge erred in simply comparing the payments under the SAR Plan and the SAR Cancellation Awards, without considering that the SAR Cancellation Awards also required the recipients to execute releases and were contingent upon Look receiving the full payment of funds from the Spectrum Sale and UBS having sufficient resources.

68 I do not find this argument persuasive. The last payment under the Spectrum Sale was received on September 11, 2009. Mr. McGoey's release was executed four days later. It is true that the funds from the Spectrum Sale had not been paid over to UBS; however, it was hardly a doubtful proposition that the

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5. Mark Ellis, *Fiduciary Duties in Canada*, loose-leaf (consulted on 25 June 2014), (Carswell, Toronto: 2014), ch. 1 at 5.

money would have found its way to UBS, given Mr. McGoey and his associates' control over Look's board.

69 The trial judge also rejected Mr. McGoey's argument that his actions were undertaken with the assistance of independent legal advice from Mr. McCarthy and, therefore, could not constitute a breach of his fiduciary duties. I agree with the trial judge's conclusion on this issue. The UBS Board never sought an opinion from Mr. McCarthy regarding the reasonableness of the changes to the SAR Plan and the bonuses. Indeed, the evidence is clear that Mr. McCarthy did not have any information during the relevant time regarding the quantity of the Bonus Award or the SAR Cancellation Awards allocated to Mr. McGoey or to any other director or officer of UBS.

70 Finally, the trial judge carefully considered Mr. McGoey's argument that his actions were protected by the business judgment rule. She reviewed the law and identified the critical issue at para. 122 of her reasons:

> I must now examine the board's and Mr. McGoey's actions and decide whether business judgment is what was exercised here, or whether it was self help, or worse, breach of fiduciary duty, dressed in business judgment's clothes.

71 The trial judge properly concluded that the business judgment rule was of no assistance to Mr. McGoey because he did not satisfy the rule's preconditions of honesty, prudence, good faith, and a reasonable belief that his actions were in the best interests of the company: *Corporacion Americana de Equipamientos Urbanos S.L. v. Olifas Marketing Group Inc.* (2003), 66 O.R. (3d) 352 (Ont. S.C.J.), at paras. 13 and 14.

72 It must be remembered that the business judgment rule is really just a rebuttable presumption that directors or officers act on an informed basis, in good faith, and in the best interests of the corporation. Courts will defer to business decisions honestly made, but they will not sit idly by when it is clear that a board is engaged in conduct that has no legitimate business purpose and that is in breach of its fiduciary duties. In the present case, there was ample evidence upon which the trial judge could base her conclusion that the presumption had been rebutted.

73 In summary, I conclude that the trial judge did not err in finding that Mr. McGoey breached his fiduciary duties to UBS.

(ii) Eligibility for Indemnification

74 The trial judge noted that UBS' indemnity obligations arise under various sources and documents: the Jolian Management Services Agreement; Article 7 of the UBS by-laws; specific indemnity agreements between Mr. McGoey and UBS; and s. 134(4.1) of the OBCA.

75 The trial judge also referred to Marrocco J.'s finding that the indemnification provisions under the UBS by-laws are "only available if the director or officer acted honestly and in good faith with a view to the best interests of the Corporation": at para. 183.

76 The trial judge concluded that, given her finding of a breach of fiduciary duty, the indemnity obligations were not operative.

77 I see no error in this finding. The purpose of statutory and contractual indemnity provisions is to ensure that officers and directors who are acting in good faith and in the best interests of a corporation are not exposed to legal costs. It is commercially sensible and good public policy to offer this protection. The rationale for offering the protection is eliminated, however, where the officer or director has not acted in good faith and in the best interests of the corporation.

78 In a related case, this court upheld an application judge's decision to refuse advanced funding for the legal costs of Look's directors and officers because the corporation had established a strong *prima facie* case of bad faith on the part of the parties seeking the funding: *Cytrynbaum v. Look Communications Inc.*, 2013 ONCA 455, 116 O.R. (3d) 241 (Ont. C.A.), leave to appeal refused, (2014), [2013] S.C.C.A. No. 377 (S.C.C.).

79 In the present case, while the trial judge did not specifically state that Mr. McGoey acted in bad faith, she did conclude that he was ineligible to receive indemnification because he had not met the standard of acting honestly and in good faith. This decision was open to the trial judge to make on the evidence before her and there is no basis for appellate interference.

(iii) Interpretation of the Jolian Management Services Agreement

80 The trial judge held that, pursuant to the terms of the Jolian Management Services Agreement, a breach of fiduciary duty did not constitute "Cause" or a "Jolian Default" as defined in the agreement, and, consequently, Mr. McGoey was entitled to receive Enhanced Severance. However, this payment was to be calculated on the basis of what the entitlement would have been prior to the SAR Plan cancellation and the establishment of the Bonus Pool.

81 Mr. McGoey and Jolian were directed to file a revised proof of claim within 30 days to reflect the trial judge's finding. The revised claim filed pursuant to this direction was in excess of $4 million.

82 For the reasons that follow, I am of the view that the trial judge erred in law in her interpretation of the Jolian Management Services Agreement and in her finding that Mr. McGoey was entitled to Enhanced Severance under the contract. Set forth below, I consider some general principles of contractual interpretation, the specific terms of the Jolian Management Services Agreement, and the trial judge's analysis of the agreement.

General Principles

83 The following principles of contractual interpretation are relevant in considering the trial judge's analysis of the Jolian Management Services Agreement.

84 In *Manulife Bank of Canada v. Conlin*, [1996] 3 S.C.R. 415 (S.C.C.), at pp. 439-40, quoting Ruth Sullivan, *Driedger on the Construction of Statutes*, 3d. ed. (Toronto: Butterworths, 1994), at p. 131,

L'Heureux-Dubé J., dissenting, described the interpretation of statutes in the following way that applies equally to contractual interpretation:

> There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of [that which is to be judicially interpreted] in its *total context*, having regard to [its] purpose ..., the *consequences of proposed interpretations*, the *presumptions and special rules of interpretation*, as well as*admissible external aids*. In other words, the*courts must consider and take into account all relevant and admissible indicators of [...] meaning*. *After taking these into account, the court must then adopt an interpretation that is appropriate* [Emphasis added by L'Heureux-Dubé J.]

85 The subjective intent of one party to a contract "has no independent place" in interpreting contractual provisions: *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129 (S.C.C.), at para. 54.

86 While the plain meaning of the words used by the contracting parties is important, the contract must be read as a whole and in the context of the circumstances as they existed when the contract was created: *Dumbrell v. Regional Group of Cos.*, 2007 ONCA 59, 85 O.R. (3d) 616 (Ont. C.A.), at para. 52.

87 Courts will avoid a contractual interpretation which results in rendering the agreement unlawful. As Blair J.A. discussed in *Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust*, 2007 ONCA 205, 85 O.R. (3d) 254 (Ont. C.A.), at para. 57, quoting John D. McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2005), at p. 729,[6] "where an agreement admits of two possible constructions, one of which renders the agreement lawful and the other of which renders it unlawful, courts will give preference to the former interpretation"; see also Cantor Art Services v. Kenneth Bieber Photography, [1969] 1 W.L.R. 1226 (Eng. C.A.).

88 A commercial contract will be interpreted in a manner that is consistent with commercial principles and that avoids a commercial absurdity. In *Consolidated-Bathurst Export Ltd. c. Mutual Boiler & Machinery Insurance Co.* (1979), [1980] 1 S.C.R. 888 (S.C.C.), at p. 901, Estey J. stated:

> [w]here words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result.

89 As stated by the House of Lords in *Mannai Investment Co. v. Eagle Star Life Assurance Co.*, [1997] 2 W.L.R. 945 (Eng. H.L.), at p. 964, commercial contracts should be "interpreted in the way in which a reasonable commercial person would construe them. And the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language".

90 The interpretation of a contract is a question of law. Accordingly, the standard of review by an appellate court is correctness: *Plan Group v. Bell Canada*, 2009 ONCA 548, 96 O.R. (3d) 81 (Ont. C.A.) .

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6. See also John D. McCamus,*The Law of Contracts* (Toronto: Irwin Law, 2012), at p. 773.

Jolian Management Services Agreement

91 UBS and Jolian entered into the Jolian Management Services Agreement in 2006. However the terms of the agreement were not disclosed to UBS shareholders until May 2010, when it was filed on SEDAR.

92 The relevant sections of the agreement are as follows:

> "**Cause**" means an act of fraud, embezzlement or misappropriation or other act which constitutes "Cause" at common law, and, in each case, which is materially injurious to the Company.
>
> "**CEO Designee**" means Gerald T. McGoey or such other individual designated by the parties in conformity with Section 1.3 of this Agreement.
>
> "**CEO Services**" means the duties typically performed by, and responsibilities assumed by the chief executive officer of a company, including, without limitation, the overseeing of:
>
> > (a) the preparation and administration of the annual budget;
> >
> > (b) the hiring, firing and supervising of all senior staff;
> >
> > (c) UBS' compliance with all regulatory requirements and shareholder communication;
> >
> > (d) the monitoring and, where appropriate, the updating of UBS' broadcast and information technology; and
> >
> > (e) customer service.
>
> . . .
>
> **"Jolian Default"** means:
>
> > (a) an act of fraud, theft or misappropriation or other act which constitutes "Cause" at common law committed by the CEO designee; and
> >
> > (b) the material failure by the CEO Designee to perform the CEO Services after having received written notice of such material failure and been given reasonable time to correct same;
>
> in each case, which is materially injurious to USB or which has not been waived by UBS.

Interpretation by the Trial Judge

93 The trial judge's analysis of the Jolian Management Services Agreement was limited to considering the term "Jolian Default". After setting out the definition of that term found in the agreement, the trial stated, at paras. 172-77:

> As I read the definition, both parts must be met before actions constitute "Jolian Default". I say this

> because the drafters clearly chose to use "and" between the two paragraphs, thus making them conjunctive.
>
> Here, regardless of whether subsection (a) of the definition has been met, there is no question subsection (b) has not. No one provided Mr. McGoey with written notice of any "material failure to perform the CEO services" together with a reasonable time to correct any such material failure.
>
> As to subsection (a), in my view it has not been met either. It would have been an easy matter for the drafters to include "breach of fiduciary duty" or "bad faith" as enumerated items of cause. They did not.
>
> It also would have been an easy matter for the drafters to define "cause" simply as "cause at common law". They did not.
>
> From this I infer that "cause at common law" in the context of this provision means acts of fraud and defalcation of the types enumerated. I cannot conclude breach of fiduciary duty falls into this category.
>
> In any event, since both provisions of the section have not been met I therefore conclude there has been no "Jolian Default" under the Jolian Management Services Agreement. Thus UBS remains bound to pay the amounts due under the golden parachute provisions of the agreement. This is so unless there is another reason to find the obligation no longer exists.

94 In my view, the trial judge erred in law in her interpretation of the agreement for the following reasons.

95 First, the trial judge's interpretation of the agreement ignores the provisions of s. 134(3) of the OBCA. That section provides:

> Subject to subsection 108(5), no provision in a contract, the articles, the by-laws or a resolution relieves a director or officer from the duty to act in accordance with this Act and the regulations or relieves him or her from liability for a breach thereof.

96 Pursuant to s. 134(1) of the act, a director or officer of an OBCA corporation is required to act honestly and in good faith with a view to the best interests of the corporation. In addition, the director or officer must exercise the care, diligence, and skill that a reasonably prudent person would exercise in comparable circumstances.

97 The effect of the trial judge's interpretation is to eviscerate the prohibition found in s. 134(3). If her interpretation were accepted, Mr. McGoey would be relieved of his obligation to act in manner that is consistent with his duties under the legislation (*i.e.* he could breach his fiduciary duties to the company). Such conduct would not constitute a "Jolian Default" under the agreement and he would be entitled to receive Enhanced Severance.

98 Second, the trial judge's interpretation of the Jolian Management Services Agreement leads to a

commercially absurd result. Given her finding that subparagraphs (a) and (b) are conjunctive, Mr. McGoey could commit theft from the company but such conduct would not constitute a "Jolian Default" under the agreement unless UBS gave Mr. McGoey written notice of the theft and provided him with the opportunity to cure the fraud.

99 Clearly this type of result could not be consistent with the intentions of reasonable business people entering into a commercial transaction. While the word "and" generally imports a conjunctive sense, this is not an inexorable cannon of construction. In some cases the word "and" will be interpreted as "or", in order to make sense and give effect to the contract: *H.H. Vivian & Co. v. Clergue* (1909), 41 S.C.R. 607 (S.C.C.); and *Boy Scouts of Canada, Provincial Council of Newfoundland v. Doyle* (1997), 149 D.L.R. (4th) 22 (Nfld. C.A.). This was one of those cases.

100 Third, the trial judge's interpretation of the agreement has the effect of ignoring the phrase "or other act which constitutes 'Cause' at common law". If the intention of the parties was to limit the prohibited conduct to the enumerated grounds of fraud, theft, or misappropriation, this additional phrase would be unnecessary.

101 When the contract is read as a whole, it is evident that the parties sought to ensure that a "Jolian Default" would be limited to serious misconduct that was materially injurious to UBS. The enumerated grounds of fraud, theft and misappropriation are examples of the types of conduct which would constitute a default.

102 A serious breach of fiduciary duty would logically meet this definition, as it would constitute a breach of Mr. McGoey's statutory and common law duties to the corporation and would amount to cause at common law. The conduct of Mr. McGoey, in establishing the SAR Cancellation Awards and the Bonus Pool and thereby preferring his own interests to the interests of UBS, qualifies as a serious breach of fiduciary duty.

103 Given the amount of money involved in the SAR Cancellation Awards and the Bonus Pool, these plans would have been materially injurious to UBS had the payouts been made. Again, in my view, the fact that Mr. McGoey was prevented by shareholder vigilance from receiving the funds allocated to him cannot serve as a defence. It would be commercially absurd to interpret the agreement to mean that UBS would be obligated to pay Jolian and Mr. McGoey an amount equivalent to 300% of Mr. McGoey's compensation because he had not succeeded in wrongfully diverting funds for his own benefit.

104 Interpreting "Jolian Default" to include a serious breach of fiduciary duty that was materially injurious to UBS, gives effect to the entirety of the words used in the definition of the term in their context. It is also commercially sensible and does not result in an interpretation that is inconsistent with the OBCA.

105 The trial judge erred in law in her contractual interpretation, and her finding that Mr. McGoey was entitled to Enhanced Severance cannot stand.

(iv) Oppression Remedy

106 Given my finding regarding the proper interpretation of the Jolian Management Services Agreement, it is not necessary to consider UBS's argument that the trial judge erred in failing to consider the oppression remedy argument advanced by UBS. I only note that the trial judge, having concluded that Mr. McGoey was entitled to receive Enhanced Severance, had an obligation to consider the oppression argument. Contrary to her conclusion, the setting aside of the SAR Cancellation Award and the Bonus Award did not cure Mr. McGoey's wrongful conduct. It was still necessary to determine whether the entitlement to Enhanced Severance was oppressive.

107 The oppression remedy is a flexible, equitable remedy that affords the court broad powers to rectify corporate malfeasance. It is an important remedy for shareholders and other corporate stakeholders. In the circumstances of this case, it may well have provided a remedy to protect the interests of the shareholders.

108 It was an error in law not to consider the oppression remedy in these circumstances.

Disposition

109 I would allow the appeal and substitute paragraph 2 of the judgment with a finding that Mr. McGoey's actions constitute "Cause" and a "Jolian Default" under the Jolian Management Services Agreement, set aside paragraph 3 of the judgment, and substitute paragraph 4 of the judgment with a finding that Jolian/Mr. McGoey are not entitled to Enhanced Severance. I would dismiss the cross-appeal.

110 On the issue of costs of the trial, the trial judge's decision that there be no order as to costs was premised on her finding that both parties had achieved some measure of success at trial. Given my findings, the costs order cannot stand. As the successful party, UBS is entitled to costs of the trial. If the parties cannot agree on the scale and/or quantum of the costs, they may attend before the trial judge to fix the costs.

111 The parties agreed that, if one party were successful on both the appeal and the cross appeal, then that party would be entitled to costs of the appeal in the amount of $60,000. Accordingly, I would order that Mr. McGoey and Jolian are jointly and severally liable to UBS for the costs of the appeal in the amount of $60,000, inclusive of fees, disbursements, and H.S.T.

***Robert J. Sharpe J.A.*:**

I agree

***E.E. Gillese J.A.*:**

I agree

Appeal allowed in part.

Footnotes1The capitalized terms are defined below.2Mark Ellis, Fiduciary Duties in Canada, loose-leaf (consulted on 25 June 2014), (Carswell, Toronto: 2014), ch. 1 at 5.3See also John D. McCamus,The Law of

Contracts (Toronto: Irwin Law, 2012), at p. 773.

TAB 6

2017 ONCA 648
Ontario Court of Appeal

RBC Dominion Securities Inc. v. Crew Gold Corporation

2017 CarswellOnt 12188, 2017 ONCA 648, 281 A.C.W.S. (3d) 756, 73 B.L.R. (5th) 173

RBC Dominion Securities Inc. and Royal Bank of Canada Europe Limited (Plaintiffs / Appellants) and Crew Gold Corporation (Defendant / Respondent)

K.M. Weiler, K. van Rensburg, Grant Huscroft JJ.A.

Heard: June 9, 2017
Judgment: August 10, 2017
Docket: CA C62781

Proceedings: affirming *RBC Dominion Securities Inc. v. Crew Gold Corp.* (2016), 62 B.L.R. (5th) 151, 2016 CarswellOnt 14607, 2016 ONSC 5529, Gans J. (Ont. S.C.J.)

Counsel: Jeremy Devereux, Michael Bookman, for Appellants
Alistair Crawley, Natalia Vandervoort, for Respondent

Subject: Contracts

Headnote

Contracts --- Construction and interpretation — General principles

Plaintiff R Inc. entered into agreement to assist defendant C Corp. in developing and implementing "strategic alternatives" — Agreement provided for service fees based on specific work performed by R Inc., and for success fee, payable on completion of "transaction", as defined by agreement ("tail provision") — In course of agreement, C Corp. was subject of takeover R Inc. brought action against C Corp. — Sole issue at trial was whether, under agreement, R Inc. was entitled to success fee in respect of any or all of transactions involved in takeover even though it played no part in transactions — Action dismissed — R Inc. appealed — Appeal dismissed — Trial judge found that R Inc. was not entitled to success fee under agreement — Tail provision simply provided for payment of success fee if mandate is carried out after agreement has been terminated — This interpretation of tail provision was not inconsistent with requirement that transaction in respect of which success fee was payable related to work performed by R Inc. before agreement was terminated — Trial judge did not dismiss out of hand R Inc.'s claim for success fee because R Inc. had not provided services in respect of transactions that occurred — Rather, he interpreted agreement to determine whether success fee was payable in such circumstances, and concluded that in respect of this agreement, "causal link" was required before success fee was payable — Trial judge's interpretation of success fee requirement as being linked to some action on part of R Inc. was reasonable interpretation borne out by consideration of agreement as whole — Trial judge determined, based on his review of agreement, what was objectively intended by agreement, or "intent expressed in the written words" — Trial judge did not make findings as to parties' subjective intentions in entering agreement, nor did he allow evidence of subjective intention to oust plain words of agreement — Interpretation adopted by trial judge was not commercially unreasonable and made commercial sense.

APPEAL from judgment reported at *RBC Dominion Securities Inc. v. Crew Gold Corp.* (2016), 2016 ONSC 5529, 2016 CarswellOnt 14607, 62 B.L.R. (5th) 151 (Ont. S.C.J.), dismissing action for breach of contract.

***K. van Rensburg J.A.*:**

I. OVERVIEW

1 This is an appeal in a contract interpretation case.

2 The central facts are not in dispute. The appellants, RBC Dominion Securities Inc. and Royal Bank of Canada Europe Limited (together "RBC"), sued the respondent, Crew Gold Corporation ("Crew"), for a fee, described as a Success Fee, that they argued was owed to them under an engagement letter for the provision of investment banking services (the "Agreement"). RBC provided services under the Agreement to assist Crew in developing and implementing "strategic alternatives". The Agreement provided for service fees based on specific work performed by RBC, and for a Success Fee, payable on completion of a "Transaction", as defined by the Agreement.

3 In the course of the Agreement, Crew, then a public company, was the subject of a takeover, an event that was not anticipated by either party. The sole issue at trial was whether, under the Agreement, RBC was entitled to a Success Fee in respect of any or all of the transactions involved in the takeover even though it played no part in the transactions. The trial judge found that RBC was not entitled to a Success Fee under the Agreement and dismissed RBC's action.

4 RBC appeals, asserting that the trial judge made extricable errors of law in his interpretation of the Agreement. I find no such errors, and for the reasons that follow, would dismiss the appeal.

II. FACTS

5 Crew was a gold mining company whose principal asset was a gold mine in West Africa. At all material times, Crew's shares were publically traded on the Toronto and Oslo Stock Exchanges (the "TSE" and the "Oslo Bors").

6 In October 2008, the mine was not yielding sufficient net revenue to service Crew's significant debt obligations. Crew's board of directors (the "Crew Board") retained RBC as a financial advisor for a term of 18 months to develop, evaluate and potentially assist the company in implementing strategic transaction alternatives based on its valuation of the company (the "2008 Engagement"). After RBC presented its strategic alternatives to Crew, RBC invoiced the company and was paid US$95,000 for its work under the 2008 Engagement.

7 In late November 2008, using a Norwegian securities firm, Crew undertook a rights offering on the Oslo Bors to meet its cash flow needs.

8 In March 2009, RBC made a further presentation to the Crew Board on Crew's strategic alternatives in light of the rights offering and improved market conditions. These generally contemplated either an *en bloc* sale of shares for cash or shares, or the disposition of Crew assets or some form of strategic partnership (the "RBC Alternatives"). In October 2009, RBC made another presentation to the Crew Board, outlining, among other things, its strategies for implementing one of the RBC Alternatives.

9 The parties entered into the Agreement in mid-December, dated as of October 20, 2009. The term of RBC's engagement under the Agreement was until the earliest of "the closing of the Transaction", the termination of the engagement by either party upon written notice, and 12 months after the Agreement's commencement.

10 The relevant terms of the Agreement are as follows:

- Crew engaged RBC "as its financial advisor in connection with a potential transaction (the "Transaction") involving the direct or indirect sale or disposition of the Company".

- The Transaction "may involve (i) a sale of all or a substantial portion of the shares, business or assets of the Company to a third party, (ii) an investment by a third party in the Company that results in a change of control of the Company or (iii) an amalgamation, arrangement or other business transaction involving the Company and a third party to effect such sale or disposition".

- RBC agreed to provide services "in connection with a Transaction", which included financial analysis and advice on structuring, planning and negotiating a Transaction; if requested, the furnishing of fairness opinions; assistance in preparing a confidential information memorandum ("CIM") for prospective investors; and managing the sale process, including contacting prospective purchasers, evaluating offers, and assisting in the completion of a Transaction.

- The fees for RBC's services consisted of a Work Fee of US$25,000 per month for each month that RBC was actively involved in assisting in the execution of the Transaction; an Announcement Fee/ Opinion Fee of US$750,000 payable on the earlier of the public announcement of the Transaction or the delivery of a fairness opinion; an Additional Opinion Fee of US$125,000 payable upon the delivery of each additional fairness opinion provided by RBC (after its initial opinion); and a Success Fee.

- The Success Fee was to be calculated as the greater of US$2,000,000, and 0.95% of the Transaction Proceeds up to US$325,000,000 plus 1.75% of the Transaction Proceeds in excess of US$325,000,000, against which was to be credited 100% of the other fees paid or payable under the Agreement.

- "Transaction Proceeds" included "all amounts received by the Company or any affiliate or shareholder of the Company . . . from the purchaser".

- RBC was entitled to the Success Fee "if a Transaction [was] completed involving any party, whether or not solicited by RBC, pursuant to an agreement to effect or otherwise complete a Transaction entered into during the term of its engagement or for a period of twelve months after termination of its engagement" (the "tail provision").

11 While the Agreement was in force, Crew concluded a restructuring agreement with its debenture holders that closed in December 2009, and was also handled by the Norwegian securities firm. As a result of the restructuring, the debenture holders came to own 95% of Crew's issued and outstanding equity. GLG Partners ("GLG"), a London-based hedge fund and former debenture holder, became Crew's largest shareholder, with a control block of approximately 31.6% of Crew's shares, and appointed three new directors to the Crew Board.

12 RBC made another presentation to the Crew Board on December 15, 2009 regarding the RBC Alternatives. RBC asserted that the time was right to engage in a "broad solicitation" of potential bidders under RBC's stewardship. At a meeting on January 22, 2010, the Crew Board approved by resolution "the implementation of the RBC plan involving the marketing and sale or partial sale of the Company". In December 2009 and January 2010, RBC worked on numerous tasks to prepare a sale process, including the preparation of a draft CIM and identifying potential bidders to purchase GLG's control block.

13 RBC and Crew were aware that GLG could sell its interest to a third party without their involvement. Neither contemplated, however, that a serious purchaser would conclude an agreement without some form of due diligence, which would require a CIM and standstill agreement.

14 In fact, Endeavour Financial Corporation ("Endeavour"), a Vancouver-based investment bank, was in serious discussions with GLG to buy its control block, and was prepared to buy the block without reliance on the RBC/Crew-controlled due diligence process and without the execution of a CIM. In January 2010, Endeavour purchased GLG's shares and that of another institutional investor through one of its subsidiaries on the Oslo Bors, bringing its holdings in Crew to just under 38%. Endeavour was not on RBC's list of potential bidders and RBC played no part in brokering the deal.

15 Immediately after the Endeavour purchase, OAO Severstal ("Severstal"), a Russian mining company, began to significantly increase its holdings in Crew. As the trial judge described it, "the race was then on between Endeavour and Severstal for the ultimate control and ownership of Crew." By early April 2010, each had increased its absolute position — Severstal owned almost 27% and Endeavour owned almost 43% of the company. In July 2010, Severstal had increased its shareholdings in Crew to just over 50%. Endeavour then sold its interest in Crew to Severstal in mid-September. Severstal eventually acquired the remaining Crew shares in January 2011 through a plan of arrangement.

16 While the takeover was unfolding, RBC offered to assist the Crew Board, but the offer was refused. Instead, Crew engaged Genuity Capital Markets to assist it in the takeover matters. On April 29, 2010, Crew terminated the Agreement. RBC immediately invoiced Crew for the Work Fee covering a six-month period, ending January 2010, which Crew paid.

17 In late August 2010, RBC sent the first in a series of Success Fee invoices to Crew, claiming an amount in excess of US$5,700,000, calculated on amounts paid by Severstal and Endeavour for the shares they acquired in the open market or by agreement with institutional vendors in 2010. Later, after Severstal purchased Endeavour's block, RBC sent an amended invoice for the Success Fee for in excess of US$7,200,000.

18 As the trial judge explained, with the exception of the acquisition of the last remaining shares, each of the trades leading up to the takeover by Severstal, including those obtained by Endeavour, was through an open market transaction concluded on the Oslo Bors, and none of the transactions triggered Canadian or Norwegian takeover laws.

19 After Crew refused to pay the Success Fee invoices, RBC started the underlying action.

III. THE TRIAL JUDGE'S REASONS

20 The trial judge rejected RBC's claim. After setting out the facts, he turned to consider the positions of the parties.

21 RBC argued that the language of the Agreement was so broad and general as to permit the claim even though RBC was not involved in Endeavour's or Severstal's purchases of Crew shares. RBC argued that Severstal's activities between February and December 2010 in purchasing the entirety of Crew's shares and thereafter taking the company private amounted to the sale of all of the Company's shares to a third party. Alternatively, RBC argued that the separate purchases by Endeavour and Severstal amounted to the sale of a "substantial portion of the shares . . . of the Company to a third party". RBC relied on what it asserted was the expanded definition of Transaction in the definition of "Transaction Proceeds" to argue that these purchases constituted Transactions under the Agreement. RBC also asserted that, unlike the other fees payable under the Agreement, there was nothing to tie the Success Fee to services provided by RBC; and that the payment of the Service Fee depended only on the closing of a Transaction. Finally, RBC relied on the tail provision in support of the argument that it was entitled to a Success Fee so long as a Transaction was concluded within 12 months of the termination of the Agreement, regardless of RBC's contribution.

22 Crew argued that, for a Transaction to have taken place, RBC had to be involved in some manner and that a Success Fee was only payable as a consequence of the provision of financial advisory services. For a fee to be payable upon the "closing" of the Transaction, the Transaction must arise from the work effort of RBC. The description of services contained in the RBC proposals tabled before and after the execution of the Agreement underscored the notion RBC would be controlling any process connected to a Transaction, and that the Success Fee was payable as a function of the services performed. Crew also argued that RBC's interpretation, which would require it to pay a Success Fee upon the conclusion of any transaction between a third party and Crew's shareholders who were disposing of a control block, made no commercial sense.

23 After setting out the relevant principles of contractual interpretation, which were not in dispute,

the trial judge interpreted the Agreement.

24 First, he noted there was no ambiguity in the language used in respect of the terms "Transaction" or "Success Fee". He held that, in interpreting the term "Transaction" and determining the intention of the parties at the time the Agreement was drawn, it was too limiting to simply have regard to the preamble and the extended definition found in "Transaction Proceeds", as proposed by RBC, and that regard must be had to the Agreement as a whole.

25 The trial judge held that the Agreement was intended to speak to the rights and obligations of the parties in engaging RBC as the "financial advisor in connection with a potential transaction . . . involving the direct or indirect sale or disposition of the Company". The Agreement described a range of services RBC was to provide, which anticipated RBC's involvement in the Transaction. Under the Agreement, according to the trial judge, RBC was to be the "composer, arranger and orchestrator — if not the orchestra leader — of the Transaction, in all its facets, for which it was to be paid a series of fees for services rendered".

26 The trial judge concluded that RBC was not intended to receive a Success Fee unless there was some causal link between its activities and the completed transaction, even though RBC was not required to introduce the successful purchaser to the transaction and even though RBC's involvement was not required to be a material cause of the transaction. The trial judge rejected RBC's submission that the wording of "Transaction Proceeds" expanded the definition of Transaction, concluding instead that it described the amounts to be included for Success Fee calculation purposes.

27 The trial judge then reviewed the factual matrix. He found that the entire thrust of RBC's strategy after the debt restructuring was to maximize shareholder value by creating and rolling out an RBC Alternative, namely a process for the sale of Crew's assets or control shares. RBC's presentations all emphasized some form of an *en bloc* sale of assets or shares through a process orchestrated by RBC. RBC never spoke of the possibility of a third party purchase. Further, it was "not on anyone's radar" that any one of the RBC Alternatives would include a purchase of control through the acquisition of sufficient shares on the Oslo Bors, or that any purchaser would acquire a significant interest in Crew without a due diligence inquiry, which would have involved RBC.

28 The trial judge offered an alternative ground for his interpretation of the Agreement that was not argued by the parties. The Agreement provided for the negotiation of an additional fee in the event that there was "an investment by a third party in the Company that does not result in a change of control". The trial judge characterized the share purchases by Severstal and Endeavour in the first six months of 2010 to be a "substantial portion" of Crew's outstanding shares, but concluded that these purchases did not amount to a change of control. Therefore, RBC would not be entitled to a Success Fee on the purchases that took place in the lead up to an actual change of control. I note here that Crew does not necessarily agree with this characterization and does not seek to uphold the trial judge's decision on this basis.

IV. STANDARD OF REVIEW

29 The primary goal of contractual interpretation is to determine the objective intent of the parties at the time the contract was drawn. Contractual interpretation involves the application of contractual interpretation principles to the words of the contract, considered in light of the factual matrix, and is therefore a question of mixed fact and law, which is entitled to deference absent a palpable and overriding error: *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 (S.C.C.), at paras. 50, 55. The palpable and overriding error test is met if the trial judge misapprehended the evidence in that the findings are "clearly wrong", "unreasonable" or not "reasonably supported by the evidence": *L. (H.) v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401 (S.C.C.), at paras. 55-56.

30 Where an extricable error of law can be identified independent of the trial judge's application of the law to the facts, the error is to be reviewed on a standard of correctness. Extricable errors of law made in the course of contractual interpretation may include "the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor": *Sattva Capital Corp.*, at para. 53, citing *King v. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80, 270 Man. R. (2d) 63 (Man. C.A.), at para. 21. The circumstances in which a question of law can be extricated from the interpretation process will be rare: *Sattva Capital Corp.*, at para. 55.

V. ISSUES

31 RBC contends that, although the trial judge correctly identified the proper principles of contractual interpretation, he did not apply these principles and, as such, committed errors of law. RBC argues that there were three categories of extricable errors of law in the trial judge's interpretation of the Agreement, which can be broadly described as follows:

1. The trial judge failed to consider the plain words of the Agreement in the context of the contract as a whole, and in a manner that gives meaning to all of its terms and that avoids an interpretation that would render one or more of its terms ineffective.

2. The trial judge failed to correctly consider the objective evidence of the surrounding circumstances and relied on his findings as to the parties' subjective intentions or the lack thereof, and allowed those findings to overwhelm the wording of the Agreement.

3. The trial judge failed to consider the commercial reasonableness of the interpretation of the Agreement advanced by RBC.

32 Within these three categories, RBC seeks to identify specific errors. I will address each category in turn.

VI. DISCUSSION

(1) Alleged Failure to Consider the Plain Words of the Agreement in the Context of the Contract as a Whole

33 RBC contends that the trial judge failed to determine the meaning of the words in the Agreement by construing the contract "as a whole, in a manner that gives meaning to all of its terms, and avoids an interpretation that would render one or more of its terms ineffective": *Salah v. Timothy's Coffees of the World Inc.*, 2010 ONCA 673, 268 O.A.C. 279 (Ont. C.A.), at para. 16.

34 Here RBC relies on many of the same arguments it advanced at trial — essentially that "Transaction" is broadly defined in the Agreement; that the purchases by Endeavor and Severstal fell within the enumerated examples of "Transaction" in the Agreement, as Endeavor's purchased a "substantial portion" of Crew's shares and Severstal's purchases resulted in a "change of control"; and that the definition contained no express requirement for the involvement of Crew or RBC in the Transaction.

35 As well, RBC says the trial judge ignored the fact that, while the other fees under the Agreement are expressly linked to services provided by RBC, the Success Fee is payable upon "the closing of the Transaction". RBC contends that this distinction supports the conclusion that a "causal link" between its services and a Transaction was not necessary for entitlement to a Success Fee. RBC also argues that the trial judge disregarded the broad definition of "Transaction Proceeds", which it says does not exclude the sale of Crew shares from qualifying as a "Transaction" simply on the basis that the shares were purchased on a stock exchange.

36 All of these arguments were addressed by the trial judge at paras. 56 to 61 of his reasons. As the trial judge observed, the specific words RBC relied on had to be considered in the context of the Agreement as a whole. In rejecting its proposed interpretation, the trial judge did not, as RBC alleges, fail to apply proper contract interpretation principles; rather, the trial judge applied the principles, just not in the manner proposed by RBC.

37 The trial judge's interpretation of the Success Fee requirement as being linked to some action on the part of RBC is a reasonable interpretation borne out by a consideration of the Agreement as a whole.

38 As the trial judge observed, the Success Fee was payable in the context of RBC's engagement as a financial advisor to Crew in connection with a potential Transaction. The range of services to be provided by RBC covered the entire sale process, whatever form that took, and the Agreement anticipated RBC's involvement in the Transaction. In exchange for these services, RBC was to receive a variety of fees. RBC was unable to provide most of the anticipated advisory services because of the intervention of the takeover and the way it took place. Indeed, the Agreement was terminated only a few months after it had been concluded and, at that point, RBC was only on the cusp of providing services with respect to the RBC Alternatives.

39 The Transaction was the culmination of RBC's financial advisory services, and the provision of a very large "Success Fee" to be paid on completion of the Transaction was presumably meant to reward

RBC for *its success* in completing the Transaction and implied that there must be a connection between the services provided by RBC and the Transaction. Indeed, *all* of the fees payable under the Agreement, including the Success Fee, are stated to be "for its services hereunder". This contemplates a nexus between RBC's services and all of the fees payable to RBC under the Agreement, including the Success Fee.

40 RBC's approach to interpreting the Agreement is too narrow — focusing on the terms "Transaction" and "Transaction Proceeds", without considering the nature and substance of the Agreement as a whole. In my view, there would have been an extricable error of law if the trial judge had adopted the approach advocated by RBC and read the "provision[s] of [the] contract in isolation rather than construe[d] the contract as a whole": *1298417 Ontario Ltd. v. Lakeshore (Town)*, 2014 ONCA 802, 122 O.R. (3d) 401 (Ont. C.A.), at para. 8.

41 In addition to the arguments set out above, RBC claims that the trial judge ignored the tail provision, which provided that RBC would be entitled to a Success Fee even if RBC did not solicit the Transaction and where the agreement to effect the Transaction was entered into in the 12-month period after the termination of the engagement (in other words, at a time when RBC had no obligation to provide Crew with services under the Agreement). RBC says the tail provision expressly contemplates that RBC will be paid for a Transaction in respect of which it did not provide services, and that the trial judge failed to deal with this provision.

42 I agree with Crew that, while the trial judge might have fleshed out in greater detail his analysis of this provision and its impact on the interpretation of the Agreement, he adverted to the wording of the tail provision at para. 60 of his reasons, where he stated that a causal link was required even though "RBC was not required to introduce the successful purchaser to the transaction", and even though "RBC's involvement was not required to be a material cause". As well, his reasons as a whole reject the interpretation advanced by RBC. The tail provision simply provides for the payment of a Success Fee if a mandate is carried out after the Agreement has been terminated. This interpretation of the tail provision is not inconsistent with the requirement that the Transaction in respect of which a Success Fee is payable relate to work performed by RBC before the Agreement was terminated. Nor is this interpretation inconsistent with the evidence of Patrick Meier, relied on by RBC, who testified about the commercial purpose of the clause.

43 Finally, RBC argues that the trial judge failed to recognize and apply the case law holding that a contract may call for payment based solely on the occurrence of an event, without the service-provider having to demonstrate that it caused or contributed to the event. RBC says that the Agreement is similar to that in *Galan v. Alekno*, [1950] O.R. 387 (Ont. C.A.) where the plaintiff was entitled to a commission on any sale effected during the currency of its authority, including sales that occurred without the plaintiff's intervention or assistance.

44 To the contrary, the trial judge did not dismiss out of hand RBC's claim for a Success Fee because RBC had not provided services in respect of the transactions that occurred. Rather, he interpreted the Agreement to determine whether a Success Fee was payable in such circumstances, and concluded that

in respect of *this* Agreement, a "causal link" was required before a Success Fee was payable. Similarly, the fact that there are reported cases involving contracts that anticipate a fee being paid on the occurrence of an event, without the provision of services in respect of the transaction, does not assist: See, for example, *Hemosol Corp., Re* (2007), 37 C.B.R. (5th) 128. As RBC's counsel submitted in argument, these cases simply stand for the principle that each contract must be interpreted according to its own terms and factual context.

(2) Alleged Reliance on the Parties' Subjective Intentions and Failure to Consider the Objective Surrounding Circumstances

45 In *Dumbrell v. Regional Group of Cos.*, 2007 ONCA 59, 85 O.R. (3d) 616 (Ont. C.A.), at para. 50, Doherty J.A. emphasized that, when interpreting written contracts in the context of commercial relationships, it is not helpful to frame the analysis in terms of the subjective intention of the parties at the time the contract was drawn. The purpose of the interpretation of a contract is not to discover how the parties understood the language of the text they adopted, but to determine the meaning of the contract against its objective contextual scheme. The focus must be on the intent expressed in the written words. The court must consider, among other things, the contract as a whole, the factual matrix underlying it, and the need to avoid commercial absurdity. But the court does not consider the subjective intention of the parties: *Downey v. Ecore International Inc.*, 2012 ONCA 480, 294 O.A.C. 200 (Ont. C.A.), at paras. 37-38 and *Salah*, at para. 16.

46 RBC argues that the trial judge based his decision that RBC was not entitled to a Success Fee unless there was some causal link between its activities and the Transaction, in large part on his findings as to the parties' subjective intentions, or lack of thereof, and that he allowed evidence of subjective intention to overwhelm his interpretation of the plain meaning of the Agreement. RBC contends that the trial judge did not limit himself to the parties' *objective* intentions as expressed in the words of the contract, as required.

47 There is no indication in the trial judge's reasons that he relied on any evidence of the parties' subjective intentions in interpreting the Agreement. The passages RBC relies on (which appear to be every occasion where the trial judge uses the words "intention" or "intended") simply do not support this argument. An example is para. 57, where the trial judge stated that it was his view that the Agreement *was intended to* speak to the rights and obligations of the parties in engaging RBC as Crew's financial advisor, and that the words in the Agreement *were intended to* describe the services RBC would undertake. The trial judge here was doing no more than determining, based on his review of the Agreement, what was objectively intended by the Agreement, or the "intent expressed in the written words". There is no reference to either Crew's or RBC's *subjective* intentions.

48 Nor is the trial judge's description of the takeover as "not on anyone's radar" a statement of the parties' subjective intentions. This was simply a statement of an obvious background fact. The parties agreed that the takeover was an unexpected event they had not contemplated when they entered into the Agreement. And there is no indication, as argued by RBC, that the trial judge dismissed its claim simply because it arose from an unanticipated transaction (which RBC contends is an "absence" of subjective

intentions). Rather, the trial judge was interpreting the Agreement to determine whether the unanticipated transaction was a Transaction that would give rise to the payment of a Success Fee under the Agreement.

49 Finally, RBC argues that the trial judge erred in interpreting the contract by relying on the parties' conduct following the execution of the contract. RBC points to the trial judge's reference to the conduct of the parties after learning of GLG's intention to sell its shares in Crew at paras. 70 and 71 of his reasons — namely, that RBC attempted to ensure that either GLG's shares were sold to a compliant buyer or that a standstill agreement would be concluded. RBC contends that this contravened this court's caution that "evidence of subsequent conduct should be admitted only if the contract remains ambiguous after considering its text and its factual matrix": *Shewchuk v. Blackmont Capital Inc.*, 2016 ONCA 912, 404 D.L.R. (4th) 512 (Ont. C.A.), at para. 46.

50 I disagree that, in interpreting the contract, the trial judge relied on the subsequent conduct of the parties. These observations were made after he had interpreted the Agreement. They were not part of his analysis of the meaning of the Agreement but confirmatory of his conclusions. The trial judge specifically stated that this was "not part of the classical factual matrix" and was "consonant with [his] conclusion on the intention of the parties at the time the Agreement was executed".

51 There is simply no merit to this ground of appeal. The trial judge did not make findings as to the parties' subjective intentions in entering the Agreement, nor did he allow evidence of subjective intention to oust the plain words of the Agreement, as alleged by RBC.

(3) Commercial Common Sense

52 RBC contends that the trial judge adopted an interpretation of the Agreement that was not "in accordance with sound commercial principles and good business sense": *Kentucky Fried Chicken Canada v. Scott's Food Services Inc.* (1998), 41 B.L.R. (2d) 42 (Ont. C.A.), at para. 27. In particular, RBC argues that the trial judge failed to recognize the business reasons for allocating risk in contracts by providing for payment based on the occurrence of an event rather than services rendered, and that the trial judge failed to appreciate that it would be impracticable to require RBC to demonstrate the extent to which it caused or contributed to a transaction.

53 RBC relies principally on the evidence of its witness, Patrick Meier, RBC's lead investment banker on the Crew mandate, who provided an explanation of the commercial purposes for transaction-based fees in investment banking contracts. In *Kentucky Fried Chicken Canada*, however, this court cautioned that the construction of contracts in accordance with sound commercial principles and good business sense must be done objectively rather than from the perspective of the contracting parties. Further, Mr. Meier's evidence did not fully support RBC's interpretation. He acknowledged under cross-examination that some connection to the services provided would be required before a Success Fee would be payable.

54 Simply because the trial judge did not analyze the parties' arguments on this point under a separate heading does not mean that he ignored the commercial realities in interpreting the Agreement.

Considerations of commercial reasonableness permeate his reasons. The objective evidence of the circumstances or factual matrix in this case was that both parties had a plan to embark on a sale process, which they were unable to complete because of the unanticipated takeover. The trial judge made a specific finding on the evidence that was available to him (and which has not been argued or demonstrated to be a palpable and overriding error) that the parties anticipated a sale process. The expectation was that RBC would have provided services in connection to the process culminating in the closing of a Transaction to warrant payment of a Success Fee.

55 I agree with Crew that the interpretation adopted by the trial judge was not commercially unreasonable and made commercial sense. Although the words of the Agreement might bear the interpretation RBC proposes, the interpretation advocated by RBC would have resulted in a significant windfall, with RBC receiving a very large Success Fee where there was no association between any services it provided Crew and the transactions, and where Crew was not in a position to avail itself of RBC's services.

56 RBC also argues that the trial judge failed to recognize the commercial sense in the allocation of risk in contracts that call for payment upon the occurrence of an event, such as in the real estate context. I agree with Crew that the commercial context here is very different from an exclusive listing agreement in the real estate agency context. Here, the Crew Board retained RBC to assist the company in pursuing specific strategic alternatives to maximize shareholder value. In my view, the requirement to pay the significant fee claimed by RBC in respect of the transactions that occurred, which did not relate in any way to RBC's financial services would be commercially unreasonable.

VII. CONCLUSION AND DISPOSITION

57 For these reasons I would dismiss the appeal. I would award Crew its costs fixed at $40,000, inclusive of HST and disbursements.

***K.M. Weiler J.A.*:**

I agree.

***Grant Huscroft J.A.*:**

I agree.

Appeal dismissed.

TAB 7

2020 ONSC 2936
Ontario Superior Court of Justice

Carras v. Altus Group Limited

2020 CarswellOnt 6545, 2020 ONSC 2936, 2020 C.L.L.C. 210-049, 318 A.C.W.S. (3d) 60, 62 C.C.E.L. (4th) 16

GEORGE CARRAS (Applicant) and ALTUS GROUP LIMITED (Respondent)

F.L. Myers J.

Heard: February 26, 2020
Judgment: May 11, 2020
Docket: CV-19-00623297

Counsel: Hilary Book, Alycia Young, for Applicant
Dena N. Varah, Chris Trivisonno, for Respondent

Subject: Public; Employment; Labour

Headnote

Labour and employment law --- Employment law — Termination and dismissal — Defences — Miscellaneous

GC sold business, R Inc., to AG Ltd. — As part of transaction, GC agreed to stay on as president of business under AG Ltd. — Parties also agreed that GC would become eligible to receive stock options in AG Ltd. as long as he stayed for three years or if AG Ltd. terminated position without cause prior to end of three years — GC claimed that AG Ltd. terminated employment after one year and offered him no new role — GC brought application for constructive dismissal without cause that entitled him to receive stock options — Application dismissed — After one year, by mutual agreement, GC became independent contractor or consultant — Change in status had been contemplated throughout and was not dismissal by AG Ltd. — At end of second year, GC decided to move on to greener pastures — He left by mutual agreement — GC never became entitled to receive options.

APPLICATION by GC for finding for constructive dismissal without cause that entitled him to receive stock options.

***F.L. Myers J.*:**

I — OVERVIEW

1 In 2014, George Carras sold his business, RealNet Canada Inc., to Altus Group Limited. As part of the transaction, Mr. Carras agreed to stay on as President of the business under Altus. The parties also agreed that Mr. Carras would become eligible to receive stock options in Altus as long as he stayed for three years or if Altus terminated his position without cause prior to the end of three years.

2 Mr. Carras claims that Altus terminated his employment after one year and offered him no new

role. This, he submits, amounted to constructive dismissal without cause and entitled him to receive the stock options. Altus takes the position that Mr. Carras worked for Altus for two years, transitioning from an employment position into a consulting position by mutual agreement after the first year. Altus says that Mr. Carras voluntarily left at the end of the second year. Therefore, Altus denies that Mr. Carras ever became entitled to receive stock options.

3 For the reasons set out below, I find that Mr. Carras was not constructively dismissed from his employment. After one year, by mutual agreement, Mr. Carras became an independent contractor or consultant. This change in status had been contemplated throughout and was not a dismissal by Altus. At the end of the second year, Mr. Carras decided to move on to greener pastures. He left by mutual agreement. Mr. Carras therefore never became entitled to receive the options.

II — THE FACTS

A. The Development and Sale of RealNet

4 Mr. Carras founded RealNet in in 1995. Over the next two decades, RealNet developed real estate information services for both the commercial and new homes markets. By 2014, RealNet had approximately 40 employees and annual recurring revenues of over $7 million.

5 In early 2014, RealNet began exploring avenues to sell the company. Altus was a prospective buyer. Altus is a provider of real estate consulting and advisory services, software, and data solutions. Mr. Carras negotiated a deal in principle with Altus' CEO, Bob Courteau. The transaction closed on July 23, 2014.

B. The Employment Agreement

6 Initially, Mr. Carras did not intend to continue working for RealNet under Altus. However, Mr. Courteau wanted Mr. Carras to stay with the company for three years to demonstrate stability to the marketplace. Mr. Courteau and Barry Eisen, Altus' Executive Vice President, Mergers and Acquisitions, negotiated a written employment agreement with Mr. Carras.

7 Mr. Carras testified that Mr. Courteau told him that the way these deals work at Altus, Mr. Carras would be moved to a consulting arrangement after one year. In other words, the parties contemplated a shift to consulting after the first year of employment. Article 1.4 of the employment agreement reflects this discussion:

> During the first year of the Term of employment, your primary responsibilities will be to continue to manage the RealNet Canada Inc. business in accordance with the business plan for RealNet Canada Inc. as may be amended by future determination. In the remaining two (2) years of the Term, the Company is amenable to having discussions with you about redefining your ongoing role and accountabilities with the Company and, if mutual agreement is reached, amending the terms of this Agreement.

8 The "Term" is defined in Article 1.2 as a period of three years commencing on the closing date of the sales transaction. The "Company" is defined in the preamble as Altus Group Limited. Mr. Johnston testified that part of the purpose of Article 1.4 was to provide Mr. Carras with flexibility to move onto other opportunities and pursue other business ventures for his own account. Read objectively, Article 1.4 demonstrates a meeting of the minds between the parties that Mr. Carras' role with Altus could change by mutual agreement after his first year of employment.

9 Altus did not want to pay Mr. Carras his previous salary of over $600,000 per year. Mr. Carras agreed to a lower base salary of $300,000 per year plus a grant of 50,000 stock options in Altus. The stock options would give Mr. Carras the entitlement to purchase shares of Altus at a pre-established price at a future date.

10 Altus requested and Mr. Carras agreed that in order to incentivize Mr. Carras to stay with the company for the full three years, Mr. Carras would not become entitled to receive the stock options until the end of the last day of the three-year term. Article 4.2(c) of the agreement provides:

> Except as otherwise provided herein, you must be actively employed with the Company on the last day of the Term or you must have entered into and be providing services to the Company under a consulting agreement on the day that would have been the last day of the Term.

11 Article 4.2(c) contemplates two conditions under which Mr. Carras would become entitled to receive stock options. He could either be actively employed with Altus on the last day of the Term, or he could be providing services under a consulting agreement on that day.

12 Salary negotiations, including the terms of the options, are captured in emails between Mr. Eisen and Mr. Carras dating between July 17-21, 2014.[7] During the negotiations, Mr. Carras became concerned that if Altus unilaterally ended the employment relationship before its three-year term, he would lose his entitlement to the stock options. Mr. Carras wanted to protect the stock options in the event that Altus unilaterally terminated his position without cause. In an email dated July 17, 2014, Mr. Carras proposed that a portion of the stock options vest each year. Mr. Eisen did not agree to this. In an email dated July 18, 2014, he reiterated that "[t]he options are only there for you if you stay 3 years."

13 In a subsequent email, Mr. Carras proposed instead that an amendment be made to Article 8.2 so that he would receive the options if he was terminated without cause prior to the passage of three years. Altus agreed to this change. This change is reflected in Article 8.2(f):

> Notwithstanding anything to the contrary contained in this Agreement or the Plan, upon termination of your employment without cause, any unvested Options shall vest and become exercisable in accordance with the Plan.

14 If Altus terminated Mr. Carras' employment without cause, the agreement also required it to provide eight months' notice to Mr. Carras.

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7. I note that the contemporaneous emails are considered as part of the surrounding circumstances.

15 I find that the parties agreed that Mr. Carras was entitled to receive stock options if he was still employed or serving as a consultant for Altus on the third anniversary of its purchase of RealNet or if Altus terminated his position without cause before then. Nothing in the agreement provided for Mr. Carras to receive stock options if he resigned, left by mutual agreement, or if Altus terminated his position for cause before the third anniversary of its purchase of RealNet.

C. The Amalgamation of RealNet results in a Consulting Agreement

16 The sale of RealNet closed in July 2014. Mr. Carras continued working as the president of RealNet after it had become a division of Altus. He reported to Colin Johnston, Altus' President of Research, Valuation and Advisory in Canada. Other than reporting to Mr. Johnston, many of Mr. Carras' duties as President of RealNet were the same as they had been before Altus acquired the company.

17 Between January and April 2015, Altus contemplated merging four of its divisions, including RealNet, to create a new division called Altus Data Solutions ("ADS"). Mr. Carras expressed interest in leading the new, amalgamated division. Mr. Carras recalls that Mr. Courteau told him that the position would not be a good fit for him. Mr. Courteau does not recall this conversation. However, Mr. Johnston, who had direct oversight of the development of the new division, agreed that he had determined that Mr. Carras would not be a good fit for the leadership position. In Altus' view, in light of Mr. Carras' strong reputation in the industry, his greatest value was as a public representative of the firm in the external marketplace. Altus wanted Mr. Altus to serve a "market facing" role rather than an internal administrative one.

18 In an email dated April 6, 2015, Mr. Carras told Mr. Johnston he would like to discuss a "fork in the road." Mr. Johnston testified that this referred to the decision about what Mr. Carras' role with Altus would look like if he were no longer going to be President of RealNet, including a potential transition to a consulting role.

19 In a subsequent email dated April 16, 2015 Mr. Carras wrote to Mr. Johnston "Thanks for the beer and the chat yesterday . . . it meant a lot to me and I'm actually really excited . . . " Mr. Johnston testified that Mr. Carras was expressing excitement about transitioning into a consultant role. In his reply affidavit, Mr. Carras points out that the emails do not expressly say anything about a consulting role or a consulting agreement.

20 On August 6, 2015, Mr. Johnston emailed Mr. Carras to inform him that Altus had hired someone to the lead the ADS division and invited Mr. Carras to talk "next steps." On August 14, Mr. Carras emailed Mr. Johnston with some discussion points for a meeting introducing the new head of ADS. Mr. Carras also offered two discussion points about his continued involvement with Altus, which included some consulting activities. He asked Mr. Johnston to meet again on Monday to review "the bullet points we discussed," with a goal of making arrangements for September 1.

21 On August 17, 2015, Altus announced the hiring of Richard Simon as Managing Director of ADS. On August 18, Mr. Carras emailed Mr. Johnston a set of terms for a role he called "Strategic Advisor."

The terms Mr. Carras put forward included:

• Payment of $20,000 per month [equivalent to $240,000 annually];

• Mr. Carras would attend at the Altus offices two days per week;

• His activities would include market briefings, participating in client meetings, and assisting with business development;

• Altus would provide administrative assistance, meeting space as required, and access to Altus / RealNet information; and

• A one-year term.

22 Mr. Johnston believed that the duties Mr. Carras described in the August 18 email would allow Mr. Carras to continue with external "market facing" duties in support of Altus while allowing him time to contemplate and move on to the next step in his career. Mr. Carras never expressed to Mr. Johnston a belief that he had been terminated. They never discussed providing a record of employment, pay in lieu of notice, or anything else that would typically accompany a termination.

23 Mr. Carras asserts that when Altus hired Richard Simon as Managing Director of the new ADS division in August 2015, he was constructively dismissed. As Mr. Simon's purview included RealNet as part of the new amalgamated division, Mr. Simon took over Mr. Carras' job duties. Mr. Carras' cleaned out his office and Mr. Simon took it over.

24 Mr. Carras' view is that Altus told him he would not receive the new leadership role and no employment position was ever offered to him.

25 Mr. Johnston's view is that once Mr. Carras knew he would not get the new position in the amalgamated division, he turned his mind to transitioning into the part-time consulting role. This was the subject of the April 6, 2015 "fork in the road" email. It would not make sense for Altus to offer a new employment position for Mr. Carras if both parties were interested in a different consulting arrangement.

26 Mr. Carras proposed the terms of the consulting arrangement in August 2015, including changes to his remuneration and the number of days per week he would attend at the office. He proposed a consulting term of one year during which he would work 40% of the time for 80% of his prior salary. Altus agreed.

27 After negotiating the principal terms of the consulting agreement, the parties did not finalize a written agreement. The parties disagree about why the agreement was never finalized, but that is not dispositive of any material issue. Mr. Carras and Mr. Johnston exchanged further emails on September 21, 2015, October 2, 2015 and March 09, 2016 attempting to finalize a written contract, but the area of disagreement was never resolved. The fundamental terms of the consulting agreement, being the payment to Mr. Carras of $20,000 per month for market facing services, access to Altus support, and

attendance at Altus two days per week, were implemented by the parties and continued for the duration of the one-year consulting term. I find that the parties entered into a consulting relationship by mutual agreement in August 2015 as contemplated by Article 1.4 of the employment agreement.

28 The parties did not discuss the stock options at any point during their negotiation of the consulting agreement.

D. Mr. Carras' Departure from Altus

The January 2016 meeting with Mr. Simon

29 Following a client event in January 2016, Mr. Simon asked Mr. Carras to describe the nature of his consulting work for Altus. In essence, Mr. Simon inquired into what services Mr. Carras was rendering to Altus in exchange for $20,000 per month coming from Mr. Simon's departmental budget. Mr. Carras says he analogized his consulting arrangement to the receipt of termination pay. Mr. Carras asserts that he told Mr. Simon that he was entitled to notice of termination or pay in lieu of notice of termination. Mr. Carras claimed that the value of the consulting agreement was of similar value to pay in lieu of notice. This version of events aligns with Mr. Carras' position that he was terminated, or constructively dismissed by Altus in August 2015.

30 Mr. Simon recalls the conversation differently. He does not agree with Mr. Carras' version of events. Mr. Simon recalls Mr. Carras characterizing his services as allowing Altus to "leverage his relationships" and that Altus could "bounce ideas off of him." Mr. Simon testified that Mr. Carras did not say that he had been terminated, did not analogize the consulting agreement to termination pay, and that Mr. Simon never acknowledged Mr. Carras' entitlement to termination pay.

31 I do not need to resolve this conflict in the evidence. Even if Mr. Carras analogized to severance pay, he was plainly speaking as a metaphor and was not asserting that he had actually been dismissed. Under the terms of the employment agreement, Mr. Carras was entitled to eight months' notice of termination. Mr. Carras confirmed in cross-examination that he treated the $20,000 monthly payments as consulting fees and not as a retiring allowance. Moreover, payment in lieu of notice would not have been calculated at 80% of Mr. Carras' employment income. It would be 100%. It would not have been payable for a year — only eight months. Furthermore, no work would be required by an employee who was terminated and entitled to payment in lieu. If Mr. Carras made the analogy, I interpret the comment as an indication that Mr. Carras believed that he was not required to do much other than to show his face to the marketplace in association with the RealNet business being carried on by Altus. He quite fairly viewed his consulting role as a soft exit strategy during the transition of his former business to Altus.

The End of the Consulting Agreement in August 2016

32 While consulting with Altus, Mr. Carras started multiple projects on his own account. He founded RealStrategies in August 2015, to provide consulting to Altus and the Toronto Star. He founded OneClose in either February or August 2016, a company designed to solve interim occupancy issues with

new condominiums.

33 Mr. Johnston testified that at the end of the one-year consulting term, he and Mr. Carras went for a social beer on August 8, 2016 to mark the end of Mr. Carras' tenure with Altus. Mr. Johnston testified that "It was understood that Mr. Carras' consultant relationship with Altus was at an end." This evidence was not challenged in cross-examination.

34 On August 8, 2016, Mr. Carras emailed Mr. Johnston, and wrote "[t]hanks for the beer, the honesty and the friendship!"

35 Johnston responded, "[y]ou are most welcome for beers, I wish only the best for you my friend."

36 Mr. Carras thanked him and suggested an opportunity for possible future collaboration, to which Mr. Johnston never responded. Mr. Carras then went on vacation. When he returned from his vacation, his Altus email and telephone had been disabled. Mr. Carras stopped coming into Altus' offices and was no longer paid by Altus.

37 After leaving Altus, Mr. Carras continued his entrepreneurial career. He started new projects and founded new companies. He founded R-Hauz Solutions in November 2017, a company designed to provide prebuilt infill housing for laneways and avenues. He founded R-LABS Canada Inc. in February 2018 and R-LABS Canada Limited Partnership in August 2018.

38 The nature of the parties' relationship and the correspondence informs the factual analysis. In 2015, it was Mr. Carras who suggested a one-year term for consulting. That term ended in August 2016. The nature and tone of Mr. Carras and Mr. Johnston's emails suggest a mutual parting of ways, which is consistent with the consulting agreement's one-year term coming to a close.

39 There is no evidence of any subsequent conversation about the nature of Mr. Carras' relationship with Altus, or any inquiries from either party.

The Exercise of Stock options in August 2017

40 On August 4, 2017, Mr. Carras contacted Altus concerning the exercise of his stock options. Altus' in-house counsel informed Mr. Carras that he was not entitled to any stock options because he had not been employed by Altus or providing services under a consulting agreement for the required three-year period.

III — THE LAW OF CONSTRUCTIVE DISMISSAL

41 Mr. Carras submits that Altus constructively dismissed him in 2015. He was constructively dismissed, he argues, when Mr. Simon was hired to replace him as president of the new amalgamated division and his employment position was converted to a consulting position.

42 The Supreme Court of Canada reviewed the law of constructive dismissal in *Potter v. New Brunswick (Legal Aid Services Commission)*, 2015 SCC 10 (S.C.C.). The concept is broadly outlined at

para. 30:

> When an employer's conduct evinces an intention no longer to be bound by the employment contract, the employee has the choice of either accepting that conduct or changes made by the employer, or treating the conduct or changes as a repudiation of the contract by the employer and suing for wrongful dismissal.

43 An employment contract is not automatically terminated by an employer's unilateral act in breach of the contract. The breach must be of sufficient materiality or otherwise evince the employer's intention to no longer be bound by the contract of employment.

44 In addition, when confronted by a breach by the employer, the employee has the option to agree to the new terms or accept the repudiation of the agreement by the employer and bring the employment to an end. Only then, once the contract is over, can an employee sue for wrongful dismissal (*Persaud* (ONSC), at para. 40). The employee must be given some time to respond (*Persaud* (ONCA), at para. 14). The employee has "a *positive obligation* to signal his or her rejection of the new terms in a timely fashion, or else risk being viewed as condoning the changes [emphasis added]" (*Persaud* (ONSC), at para. 40).

45 When a situation is unclear, the employer may have a duty to clarify or to inquire (*Johal v. Simmons da Silva LLP*, 2016 ONSC 7835 (Ont. S.C.J.), at paras. 107-108) to determine if the employee will accept the new terms, or if he believes that the employer dismissed him, or if he is resigning.

46 Acquiescence can be a defence to constructive dismissal. If an employee consents or acquiesces to a change of an essential term, that change is no longer considered a unilateral act by the employer. It will not constitute a breach and it will not amount to constructive dismissal (*Persaud v. Telus Corp.*, 2016 ONSC 1577 (Ont. S.C.J.), at para. 40, aff'd 2017 ONCA 479 (Ont. C.A.), at para. 14; *Potter*, at para. 37).

IV — ANALYSIS

A. Was Mr. Carras constructively dismissed at the end of the first year of employment?

47 Mr. Carras submits that he was "all but fired" when the defendant refused to give him the new leadership role. He received no particular role and was offered no alternatives. He argues that Altus took his job away. This, he submits, amounted to a constructive dismissal without cause that entitled him to his stock options immediately.

48 I reject this characterization of Mr. Carras' situation. No one thought Mr. Carras was fired. Altus did not go through any formal steps to separate him as it does with other employees when they are leaving. Neither did Altus take steps that were inconsistent with the ongoing contractual terms. The employment contract anticipated that the parties could agree to alter the form of their relationship from employment to a consultancy. This is what they did. It is not inconsistent with the contract. It is in fact carrying out the contractual intent.

49 Counsel for Mr. Carras noted that the later consulting agreement made no reference to the original employment agreement. It did not release Altus from its obligations in that agreement.

50 I note as well that Mr. Carras did not ask to have his options conveyed to him in August 2015. If he thought that he had become entitled to them at that time, he did not say so. If Mr. Carras had, at any time point during the consulting year, asked about the status of his options, Altus would have been contractually required to confirm they were still available under Article 4.2(c) of their agreement. The agreement specifically contemplated Altus maintaining its obligation to provide stock options while Mr. Carras was consulting.

51 When the company said it had no role for him like his previous role, Mr. Carras responded that he wanted to consult and took initiative to create a new role for himself that Altus accepted. That does not demonstrate that he was "all but fired." He also did not demonstrate an intention to resign. There was no constructive dismissal because the employer did not act as if the agreement was at an end or as if it was no longer bound by it.

Employer's duty to clarify

52 Absent a resignation by Mr. Carras or any ambiguity as to the parties' intentions in August 2015, I do not view it as necessary to consider whether Altus might have had a duty to clarify the status of affairs.

53 This case is distinguishable from *Johal*. At para. 105 of *Johal*, Justice Sloan provided a list of 19 factors he had considered, including the fact that the plaintiff had worked for the employer for 27 years, had maintained a particular role for 4 years, was called into a meeting without any particular notice, received oral information about a change of role, and that her sudden departure was out of character. This led Justice Sloan to find at para. 107, "on the facts of this case, [the employer] was required to do more to determine the Plaintiff's true and unequivocal intention."

54 There was no such ambiguity at the end of Mr. Carras' first year with Altus. Mr. Carras was a sophisticated individual with extensive business experience. The agreement he signed with Altus anticipated his duties changing from year to year. Mr. Carras put forward a new proposal for the 2015-2016 year. He then worked as a consultant for that year and was paid according to the terms he proposed.

Mr. Carras acquiesced to any changes in the employment relationship

55 Mr. Carras asserts that by replacing him with Mr. Simon as the president of ADS, Altus' acts were inconsistent with his ongoing employment under the parties' agreement. If he believed that this was a breach of the agreement, he had two options. He could consent to Altus' actions or treat them as amounting to a repudiation of the contract. If Mr. Carras chose to treat the actions as repudiation, he had to tell Altus at some point. He could then sue for wrongful dismissal and for his stock options, on the basis that he had been constructively dismissed (*Persaud* (ONSC), at para. 40).

56 Mr. Carras did not treat Altus' actions as repudiation of the contract or as termination of his agreement. Accepting that Mr. Carras must be given some time to make his decision, he asserted none of his rights on termination under the agreement. The agreement had an 8-month severance provision. Mr. Carras did not ask for severance pay. Nor did Mr. Carras claim that he had become entitled to receive his stock options because he had been terminated. Crucially, Mr. Carras *initiated* the negotiations for his consulting agreement and then worked for a year under terms that he had proposed.

57 This is not a circular holding that because Mr. Carras had not yet asked for his stock options, he cannot now ask for his stock options. Chronology imbues the analysis. If Mr. Carras believed that Altus breached an essential term of the agreement, or that he had been "all but fired" in August 2015, he had an obligation at law — if he wished to pursue a claim for breach of contract — to accept Altus' repudiation and treat the contract as being repudiated. He did not do so.

58 I have already found that the change in Mr. Carras' status in August 2015 was a mutual agreement as contemplated by Article 1.4 of the agreement. However, were it not, Mr. Carras acquiesced in the change. He worked under the new terms for a year and was paid in the agreed upon amount. He never communicated to Altus that he believed that it had repudiated the employment agreement and acted accordingly.

B. The events of August 2016

59 At the end of his year as a consultant, Mr. Carras had completed two years with Altus. Mr. Carras did not inquire as to how his role would change for the last of his three years. Mr. Johnston's evidence is that Mr. Carras was excited to move on from Altus. The emails between Mr. Carras and Mr. Johnson evidence a mutual farewell.

60 When Mr. Carras returned from vacation and his phone and email were disconnected, he did not inquire into the circumstances. He did not protest. He did not question what had happened to his job. He simply moved on without any further question. He was involved in new businesses he had founded during the consulting year, and subsequently founded several others. I find that this departure in August 2016 was voluntary and arose by mutual agreement.

61 It is important to note that Mr. Carras makes no argument otherwise. He bases his claim to entitlement of stock options on the events in August 2015 and not 2016.

62 However, it is the voluntary ending of the relationship by both parties in August 2016, and not any of the parties' actions in August 2015, that prevents Mr. Carras from qualifying for the stock options.

V — CONCLUSION

63 Mr. Carras' employment was not terminated without cause by Altus. As Mr. Carras did not work for three years and his employment was not terminated without cause prior to the three-year period expiring, he does not qualify for stock options under his agreement with Altus.

64 The application is therefore dismissed.

65 The parties agreed that costs of this application totaling $50,000 inclusive of taxes and disbursements are to go to the successful party. So ordered.

Application dismissed.

Footnotes1I note that the contemporaneous emails are considered as part of the surrounding circumstances.

TAB 8

1979 CarswellQue 157
Supreme Court of Canada

Consolidated Bathurst Export Ltd. c. Mutual Boiler & Machinery Insurance Co.

1979 CarswellQue 157F, 1979 CarswellQue 157, [1979] S.C.J. No. 133, [1980] 1 S.C.R. 888, [1980] I.L.R. 1-1176, 112 D.L.R. (3d) 49, 1 A.C.W.S. (2d) 169, 29 O.R. (2d) 720, 32 N.R. 488, REJB 1979-109268

Consolidated-Bathurst Export Limited, (Plaintiff) Appellant and Mutual Boiler and Machinery Insurance Company, (Defendant) Respondent

Martland, Ritchie, Pigeon, Dickson, Beetz, Estey, and McIntyre JJ.

Judgment: March 13, 1979
Judgment: December 21, 1979

Proceedings: affirmed *Consolidated-Bathurst Export Ltd. c. Mutual Boiler & Machinery Insurance Co.* ((4 octobre 1977)), no C.A. Montréal 500-09-000267-757 ((Que. C.A.))

Counsel: *Guy Desjardins, Q.C.*, for the appellant.
Marcel Cinq-Mars, Q.C., for the respondent.

Subject: Insurance; Family

Headnote

Insurance --- Principles of interpretation and construction — Contra proferentem rule

Products of factory damaged following corrosion of machinery -- Insurer having right to inspect and terminate contract -- Exclusion clause in policy excluding liability for damages directly caused by corrosion -- Other exclusion clauses excluding liability for damages caused directly or indirectly -- Insurer liable under contra proferentem doctrine in not employing less ambiguous language to exclude liability for corrosion -- Liability also being imposed using normal rules of construction to discern intent of parties.

The reasons of Martland, Ritchie and McIntyre JJ. were delivered by *Ritchie J.* (*dissenting*):

1 This is an appeal from a judgment of the Court of Appeal of the Province of Quebec affirming the judgment rendered at trial by Mr. Justice Bisson and dismissing the claim of the appellant against its insurer for damage sustained to its property located at a plant which it operated at New Richmond in the Province of Quebec, where it was engaged in the manufacture of paper and paper and wood products.

2 By reason of their malfunction, direct damage was caused to several tubes in the heaters employed for the heating of bunker "C" fuel with the consequence that temporary closing of the plant became necessary. The appellant's claim in this action encompasses not only the direct damage done to the tubes, but the consequential loss allegedly sustained because of the breakdown of the tubes.

3 I have had the privilege of reading the reasons for judgment prepared for delivery by my brother Estey in this case, but as I reach a different conclusion concerning the risk insured against by the policy in question, I have found it necessary to express my views separately.

4 The appellant's claim is made pursuant to the terms of an insurance agreement with the respondent which was in force at the time of the events above referred to whereby the respondent agreed

> In consideration of the Premium the Company does hereby agree with the named Insured respecting loss from an Accident, as defined herein, as follows:
>
> . . . . .
>
> 1. ...To pay the Insured for loss or damage to property of the Insured directly caused by such Accident *to an Object*, or if the Company so elects, to repair or replace such damaged property; ...
>
> (The italics are my own.)

5 The objects covered by the policy are defined in the 1st Schedule thereof as follows:

> The Objects covered under this Schedule are of the type designated as follows:
>
> 1. Any metal fired or metal unfired pressure valve; and
>
> 2. Any piping, on or between premises of the Insured, connected with such vessel and which contains steam or other heat transfer medium or condensate thereof, air, refrigerant, or boiler feedwater between the feed pump or injector and a boiler, together with the valves, fittings, separators and traps on all such piping.

6 What is insured against by this agreement in my opinion is damage to the property of the insured "directly caused to an "object" by an "accident" as that word is defined in the policy. While the policy covers damage to property other than the object itself, it only covers that damage when it has been directly caused by "accident" to an "object". I am satisfied that the tubes were "objects" within the meaning of the above definition and that damage directly caused to the tubes would have been covered by the insurance agreement had it not been for the terms of the definition of "accident" contained therein which reads as follows:

> C. Definition of Accident — As respects any Object covered under this Schedule, 'Accident' shall mean any sudden and accidental occurrence to the Object, or a part thereof, which results in damage to the Object and necessitates repair or replacement of the Object or part thereof; but Accident shall not mean (a) *depletion, deterioration, corrosion, or erosion of material*, (b) wear and tear (c) leakage at any valve, fitting, shaft seal, gland packing, joint or connection, (d) the breakdown of any vacuum tube, gas tube or brush, (e) the breakdown of any structure or foundation supporting the Object or any part thereof, nor (f) the functioning of any safety device or protection device.

(The italics are my own.)

7 Both the trial judge and the Court of Appeal were satisfied that the damage to the tubes was occasioned by corrosion and this conclusion is supported by the fact that quantities of salt water did flow through the pipes. Expert evidence was called on behalf of the appellant directed to supporting the submission that the damage was caused by an hydraulic hammer effect of sudden origin which placed an inordinate strain on the pipes and tubes causing them to break. This evidence was, however, not accepted either at trial or in the Court of Appeal and I do not find it necessary to discuss it. In the result it has been concurrently found at trial and on appeal that corrosion was the cause of the damage to the tubes and pipes and it follows from the terms of the "definition of accident" that this damage is not insured against by the policy in question.

8 It was contended also that even if the coverage afforded by the policy did not include damage by "depletion, deterioration, corrosion" or "wear and tear" within the meaning of the definition of "accident", it was nevertheless effective to make the insurer responsible for consequential loss suffered by the insured as a result of a sudden rupture of the heat exchanger, whether due to corrosion or not. In view of the fact that the coverage is limited to indemnity in respect of loss or "damage to property of the insured *directly* caused by such accident to an Object", I cannot adopt an interpretation which would result in affording coverage to the insured for *consequential* damage whether it was due to "corrosion" or otherwise. In my opinion, the only "direct" damage to any object in the appellant's plant was the damage to the tubes themselves and the plain language of the insuring agreement in defining "accident" appears to me to contemplate and exclude from coverage the very event which happened here, namely, damage being caused to an object which was the property of the insured as a result of "corrosion of ... material".

9 It has been suggested that the language employed in the policy should be construed against the insurance company which was the author of it in accordance with the *contra proferentem* rule which is frequently invoked in the construction of insurance contracts when it is found that all other rules of construction fail to assist the Court in determining the true meaning of the policy.

10 In this regard my brother Estey has made reference to the reasons for judgment of Cartwright J., as he then was, in *Stevenson v. Reliance Petroleum Limited; Reliance Petroleum Limited v. Canadian General Insurance Company*[8] where he said at p. 953:

> The rule expressed in the maxim, *verba fortius accipiuntur contra proferentem*, was pressed upon us in argument, but resort is to be had to this rule only when all other rules of construction fail to enable the Court of construction to ascertain the meaning of a document.

It will however be seen from what I have said that I do not find it necessary to resort to this rule in the interpretation of the policy here at issue.

11 My brother Estey has, however, adopted the view that in construing the policy and particularly the definition of accident contained therein in the manner adopted in these reasons and in those of the

8. [1956] S.C.R. 936.

majority of the Court of Appeal, the result is to "largely, if not completely, nullify the purpose for which the insurance was sold" which is "a circumstances to be avoided so far as the language used will permit". In this regard reliance is placed on the judgment of this Court in *Indemnity Insurance Company of North America v. Excel Cleaning Service*[9], at pp. 177-178, but with the greatest respect I am unable to relate the circumstances of that case to those with which we are here concerned.

12 The *Excel Cleaning Service* case was one in which an "on location cleaning service" business was covered by a property damage liability policy insuring it for damage to property caused by accident arising out of its work. This policy however contained an exclusion relating "to damage to or destruction of property owned, rented, occupied or used by or in the care, custody and control of the insured", and the insurer contended that a wall to wall carpet fixed to the floor of a house where the insured was employed which was damaged was "in the care, custody and control of the insured" and therefore excluded from the coverage. Consistent with this reasoning all of the customer's belongings on which the insured was working were similarly exclusions which would have meant that the policy afforded no coverage whatever for the business of the insured. It was in this connection that this Court said, at pp. 177-178:

> Such a construction [as advanced by the insurer] would largely, if not completely, nullify the purpose for which the insurance was sold — a circumstance to be avoided, so far as the language used will permit.

13 I am respectfully of the opinion that this case involves a very different situation from the one with which we are here concerned. The construction sought to be placed on the Excel Cleaning Service Policy would have meant that although it purported to be a property damage liability policy covering the insured's business, it in fact insured nothing whereas the present policy affords insurance "for loss or damage to property of the insured" directly caused by an accident as defined therein. The meaning assigned to the word "accident" in the policy does not constitute an exclusion from the coverage but is rather a part of the definition of the risk insured against.

14 For all these reasons, as well as for those stated by Mr. Justice Turgeon, I would dismiss this appeal with costs.

The judgment of Pigeon, Dickson, Beetz and Estey JJ. was delivered by *Estey J.*:

15 The appellant operates a manufacturing facility for the production of paper products, including paper boxes, at New Richmond, Quebec, and the respondent is the insurer under a policy of insurance issued in respect of certain property of the appellant including the property with which this action is concerned, being three heat exchangers. The heat exchangers in question are described by the trial judge as follows:

> [TRANSLATION] The parts of this system with which we are particularly concerned are three heat exchangers, a type of pipe measuring fifteen feet long with an interior diameter of ten inches.

---

9. [1954] S.C.R. 169.

Within each of these three exchangers there are 102 tubes thirteen feet long, with an exterior diameter of $/_8$ inch and a metal casing measuring $/_{16}$ inch, or .065 inch.

Inside each exchanger at the ends the 102 pipes pass through a tubular metal plate one inch thick.

Further, the 102 tubes of each exchanger are themselves divided into three groups of 34 tubes each, so that oil flowing in the tubes passes around the exchanger three times and is heated to the right level before emerging and being directed towards the boilers as a fuel.

Steam circulates in the exchangers, passing in through the left end immediately to the right of the tubular plate and emerging at the right end, just as it strikes the other tubular plate.

Each exchanger is sealed at each end by a lid.

As the exchanger measures fifteen feet and the tubes thirteen feet, it follows that a space of one foot remains at each end between the tubular plate and the lid closing the exchanger.

The whole apparatus forms a sealed unit, which it was established cannot be opened without causing a breakdown and considerable damage.

16 Due to the failure of these heat exchangers, the appellant was required to shut down part of their facilities and thereby suffered a loss which the parties have agreed amounted to $158,289.24. This sum is set out in the Plaintiff's Declaration and includes "Direct Damage Loss" of $15,604.44. The insurer resists the appellant's claim on the basis that the damage was caused by corrosion of the tubes inside the heat exchanger and this risk was specifically excluded from the coverage provided by the policy of insurance. The material provisions of the policy of insurance issued by the respondent are as follows:

INSURING AGREEMENT

In consideration of the Premium the Company does hereby agree with the named Insured respecting loss from an Accident, as defined herein, as follows:

COVERAGE A — PROPERTY OF THE INSURED

1. ACTUAL CASH VALUE — To pay the Insured for loss of or damage to property of the Insured directly caused by such Accident to an Object, or if the Company so elects, to repair or replace such damaged property; and

The definition of accident as employed in the above excerpt is as follows:

As respects any Object covered under this Schedule, "Accident" shall mean any sudden and accidental occurrence to the Object, or a part thereof, which results in damage to the Object and necessitates repair or replacement of the Object or part thereof; but Accident shall not mean (a) depletion, deterioration, corrosion, or erosion of material, (b) wear and tear, (c) leakage at any value, fitting, shaft seal, gland packing, joint or connection, (d) the breakdown of any vacuum tube, gas tube or brush, (e) the breakdown of any structure or foundation supporting the Object or any part thereof, nor (f) the functioning of any safety device or protective device.

17 The employees of the appellant became aware of the failure of the heat exchangers when small fuel oil spots were noticed on linerboard being produced in the mill. The source of the oil was traced to the boiler and hence to the heat exchangers where a number of ruptured tubes were discovered.

18 The appellant advanced two main submissions:

(a) that the damage was caused by hydraulic hammer effect; and,

(b) alternatively, that the damage was caused by corrosion and that the terms of the policy do not exclude damage thus occasioned.

19 The learned trial judge found that the damage was caused by corrosion and discusses the contribution of pressure changes as follows:

[TRANSLATION] There is no doubt that the damage occurred suddenly, but the phenomenon which led up to it, namely the chemical process of corrosion, was not of a sudden and accidental nature, so that it could not be regarded as an "accident".

On December 4, 1968 some occurrence, probably a fall in the steam pressure in the heat exchanger, caused a failure in certain oil tubes, which moreover apparently broke in a relatively short space of time.

The fact remains, however, that corrosion was the cause of the damage.

20 The majority of the Court of Appeal found the damage was the result of corrosion and thereby excluded from policy coverage. Turgeon J.A. dealt with the hydraulic hammer theory as follows:

[TRANSLATION] This was a possibility, not a probability, mentioned by appellant's expert witness Mahoney in his examination in chief. However, when he was cross-examined, he admitted that he could not provide any direct evidence that a "hydraulic hammer" effect was produced, or that there was excessive pressure, or that the safety valves did not operate effectively.

Dissenting from the majority, Kaufman J.A. appears to have adopted in part the hydraulic hammer theory as being a "trigger" which precipitated the leaks in the tubes. The learned justice went on to state:

But where, as here, the pressure suddenly increased, it will not do for the insurer to point to the corrosion and say that, sooner or later, the tubes would have burst anyway.

Thus it will be seen that in both courts below the cause of the damage was found to be corrosion of the tubes which both courts went on to conclude was a risk or peril not covered by the insurance contract.

21 The issue is simply, therefore, whether the admitted loss suffered by the appellant and which was occasioned by the corrosion of the heat exchangers is a loss recoverable under the above-quoted terms

of the policy of insurance issued by the respondent to the appellant. This leaves the alternative submission advanced by the appellant, namely that the term of the contract of insurance covers the damages suffered by the appellant. The heart of this argument is that while the definition of accident does not include the event of corrosion or similar events such as "wear and tear, deterioration, depletion, or erosion of material", the definition does include, in the appellant's submission, events which succeed and which may be due to the event of corrosion. Thus the insurer would not be liable under the contract for the cost of repairing or replacing any insured property damaged by "depletion, deterioration, corrosion, wear and tear, etc.", but would be responsible for any consequential loss to the insured following the sudden rupture of the heat exchanger whether or not it be due to "corrosion" or "wear and tear", etc.

22 In the preliminary provisions setting up the coverage under the policy of insurance, the definition of accident is, of course, fundamental, and strip ping out the words not here relevant, the definition reads as follows:

> Accident shall mean a sudden and accidental occurrence to the object ... but accident shall not mean ... corrosion...

23 Some light may be thrown on this interpretation difficulty by reference to a latter portion of the policy of insurance headed "Exclusions". The following excerpts illustrate the drafting technique employed in the policy where risks are to be excluded from its coverage:

> **EXCLUSIONS**
>
> This policy does not apply to
>
> 1. *WAR DAMAGE* — Loss from an Accident *caused directly or indirectly* by
>
>   (a) Hostile or warlike action, including action in hindering, combating or defending against an actual, impending or expected attack, by
>
>   •
>
>   . . . . .
>
> 2. *NUCLEAR HAZARDS* — Loss, *whether it be direct or indirect, proximate or remote*,
>
>   (a) From an Accident *caused directly or indirectly* by nuclear reaction...
>
>   (b) From nuclear reaction, nuclear radiation or radioactive contamination, all whether controlled or uncontrolled, *caused directly or indirectly by, contributed to or aggravated by an Accident*;
>
>   •
>
>   . . . . .

3. *MISCELLANEOUS PERILS* — Loss under Coverages A and B from

- . . . . .

(b) An Accident *caused directly or indirectly by fire* or from the use of water or other means to extinguish fire;

- . . . . .

(d) Flood *unless an Accident ensues and the Company shall then be liable only for loss from such ensuing Accident*;

- . . . . .

(Emphasis added.)

Thus it may be argued that when the draftsman wished to exclude consequences from an event, the words "directly or indirectly" were employed. Had this technique been adopted in the primary coverage provisions excerpted above, it would have read;

Accident does not mean that which directly or indirectly results from corrosion.

Alternatively, if the consequences of corrosion were intended by the parties to be beyond the protection of the contract, such circumstances would have been included under the heading "Exclusions" as a subparagraph comparable to one of those set out above.

24 At best, one must conclude that the definition of accident, including as it does the reference to corrosion, leaves two clear alternative interpretations open. Firstly, the definition may not include an event relating to corrosion. Secondly, the definition may exclude only the cost of making good the corrosion itself.

25 Insurance contracts and the interpretative difficulties arising therein have been before courts for at least two centuries, and it is trite to say that where an ambiguity is found to exist in the terminology employed in the contract, such terminology shall be construed against the insurance carrier as being the author, or at least the party in control of the contents of the contract. This is, of course, not entirely true because of statutory modifications to the contract, but we are not here concerned with any such mandated provisions. Meredith J.A. put the proposition in *Pense v. Northern Life Assurance Co.*[10] at p. 137:

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10. (1907), 15 O.L.R. 131 (Ont. C.A.).

> There is no just reason for applying any different rule of construction to a contract of insurance from that of a contract of any other kind; and there can be no sort of excuse for casting a doubt upon the meaning of such a contract with a view to solving it against the insurer, however much the claim against him may play upon the chords of sympathy, or touch a natural bias. In such a contract, just as in all other contracts, effect must be given to the intention of the parties, to be gathered from the words they have used. A plaintiff must make out from the terms of the contract a right to recover; a defendant must likewise make out any defence based upon the agreement. The onus of proof, if I may use such a term in reference to the interpretation of a writing, is, upon each party respectively, precisely the same. We are all, doubtless, insured, and none insurers, and so, doubtless, all more or less affected by the natural bias arising from such a position; and so ought to beware lest that bias be not counteracted by a full apprehension of its existence.
>
> (Adopted in this Court in 1908[11].)

Such a proposition may be referred to as step one in the interpretative process. Step two is the application, when ambiguity is found, of the *contra proferentem* doctrine. This doctrine finds much expression in our law, and one example which may be referred to is found in *Cheshire and Fifoot's Law of Contract* (9th ed.), at pp. 152-3:

> If there is any doubt as to the meaning and scope of the excluding or limiting term, the ambiguity will be resolved against the party who has inserted it and who is now relying on it. As he seeks to protect himself against liability to which he would otherwise be subject, it is for him to prove that his words clearly and aptly describe the contingency that has in fact arisen.

This Court applied the doctrine in *Indemnity Insurance Company of North America v. Excel Cleaning Service*[12] where at pp. 179-180 it was stated:

> It is, in such a case, a general rule to construe the language used in a manner favourable to the insured. The basis for such being that the insurer, by such clauses, seeks to impose exceptions and limitations to the coverage he has already described and, therefore, should use language that clearly expresses the extent and scope of these exceptions and limitations and, in so far as he fails to do so, the language of the coverage should obtain ... Furthermore, the language of Lord Greene in Woolfall & Rimmer, Ltd. v. Moyle, [1942] 1 K.B. 66 at 73, is appropriate. He there states:
>
> > I cannot help thinking that, if underwriters wish to limit by some qualification a risk which, prima facie, they are undertaking in plain terms, they should make it perfectly clear what that qualification is.

As has already been stated, this is, of course, the second phase of interpretation of such a contract. Cartwright J., as he then was, stated in *Stevenson v. Reliance Petroleum Limited; Reliance Petroleum Limited v. Canadian General Insurance Company*[13] at p. 953:

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11. (1908), 42 S.C.R. 246.
12. [1954] S.C.R. 169.
13. [1956] S.C.R. 936.

> The rule expressed in the maxim, *verba fortius accipiuntur contra proferentem*, was pressed upon us in argument, but resort is to be had to this rule only when all other rules of construction fail to enable the Court of construction to ascertain the meaning of a document.

Lindley L.J. put it this way:

> In a case on the line, in a case of real doubt, the policy ought to be construed most strongly against the insurers; they frame the policy and insert the exceptions. But this principle ought only to be applied for the purpose of removing a doubt, not for the purpose of creating a doubt, or magnifying an ambiguity, when the circumstances of the case raise no real difficulty.
>
> *Cornish v. Accident Insurance Company*[14], at p. 456.

26 Even apart from the doctrine of *contra proferentem* as it may be applied in the construction of contracts, the normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract. Consequently, literal meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted. Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result. It is trite to observe that an interpretation of an ambiguous contractual provision which would render the endeavour on the part of the insured to obtain insurance protection nugatory, should be avoided. Said another way, the courts should be loath to support a construction which would either enable the insurer to pocket the premium without risk or the insured to achieve a recovery which could neither be sensibly sought nor anticipated at the time of the contract.

27 The *Cornish* case, *supra*, illustrates a course generally taken when such contracts reach the courts. There the court was interpreting an insurance contract in the light of the death of the insured while crossing a railway track. The policy included an exception from insured risks resulting from "exposure of the insured to obvious risk of injury". Lindley L.J., in the course of judgment, stated:

> The words are "exposure of the insured to obvious risk of injury." These words suggest the following questions: Exposure by whom? Obvious when? Obvious to whom? It is to be observed that the words are very general. There is no such word as "wilful," or "reckless," or "careless"; and to ascertain the true meaning of the exception the whole document must be studied and the object of the parties to it must be steadily borne in mind. The object of the contract is to insure against accidental death and injuries, and the contract must not be construed so as to defeat that object, nor so as to render it practically illusory. A man who crosses an ordinary

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14. (1889), 23 Q.B. 453 (C.A.).

> crowded street is exposed to obvious risk of injury; and, if the words in question are construed literally, the defendants would not be liable in the event of an insured being killed or injured in so crossing, even if he was taking reasonable care of himself. Such a result is so manifestly contrary to the real intention of the parties that a construction which leads to it ought to be rejected. But, if this be true, a literal construction is inadmissible, and some qualification must be put on the words used. (at p. 456)

An example of the application of the same principles is found in the *Indemnity Insurance Company of North America v. Excel Cleaning Service, supra*, where, at pp. 177-8, it was concluded:

> Such a construction [as advanced by the insurer] would largely, if not completely, nullify the purpose for which the insurance was sold — a circumstance to be avoided, so far as the language used will permit.

The appellant, as the owner and operator of a large forest products facility, sought insurance protection of the machinery employed in the plant in its industrial processes. There is no dispute that the heat exchangers in question were covered by the insurance contract. There is also no serious dispute, at least by the time the litigation had reached this Court, that corrosion of the tubes inside the heat exchanger, probably caused by the presence of sea water, was the effective cause of the breakdown of the heat exchanger, and the consequential release of oil into the processed steam. The insurer, as was its right, sought in the terms of the contract to limit its exposure to accidental loss and did so by seeking to confine the definition of accident. If a court were to accept the submissions of the respondent, that loss suffered by the insured by reason of the failure of a machine due to wear and tear and the consequential downtime of the plant was excluded by the definition of accident, then the insured would have purchased, by its premiums, no coverage for what may well be the most likely source of loss, or certainly a risk pervasive through much of the plant. Similarly, to interpret corrosion as that word is employed in the definition of accident in the manner sought by the respondent would be to eliminate from the insurance coverage any and all loss suffered by the insured mill operator by reason of the intervention of the condition of corrosion. Such an interpretation would necessarily result in a substantial nullification of coverage under the contract. It may well be argued by insurers that the premium will reflect such a narrowed coverage. There is no evidence that such is the case here.

28 It may also be argued by the insurance industry that applying the more favourable construction to this ambiguous provision will be to unnecessarily and unfairly burden the carrier. The carrier under this policy has at least two defensive mechanisms which it can readily call to its aid: firstly, the right of inspection which was exercised here both before and during the contract; and secondly, the right to terminate in the event the insurance carrier determines that the condition of the insured machinery is such as to make it impractical to extend coverage in the manner required by the contract.

29 I therefore would allow the appeal, set aside the judgment at trial and of the Court of Appeal and direct the entry of judgment in favour of the appellant in the amount of $158,289.24 with interest from the 1st of April, 1969, as claimed (it being the date of submission of claim and which date has not been

contested in any court in these proceedings), together with costs throughout. In the event the parties are in disagreement as to whether the "Direct Damage" in the amount of $15,604.44 mentioned above is, in fact, repairs of the actual corrosion damage and should not therefore, on the basis of these reasons be included in judgment granted, the matter shall be determined on application to a Judge of the Superior Court.

Appeal allowed with costs, Martland, Ritchie and McIntyre JJ. dissenting.

Solicitors of record:

Solicitors for the appellant: *Desjardins, Ducharme*, Desjardins & Bourque, Montreal.
Solicitors for the respondent: *Martineau, Walker, Allison, Beaulieu, MacKell* & *Clermont*, Montreal.

Footnotes1[1956] S.C.R. 936.2[1954] S.C.R. 169.3(1907), 15 O.L.R. 131 (Ont. C.A.).4(1908), 42 S.C.R. 246.5[1954] S.C.R. 169.6[1956] S.C.R. 936.7(1889), 23 Q.B. 453 (C.A.).

TAB 9

2019 ONSC 3740
Ontario Superior Court of Justice

Old Navy (Canada) Inc. v. The Eglinton Town Centre Inc.

2019 CarswellOnt 10843, 2019 ONSC 3740, 307 A.C.W.S. (3d) 863, 7 R.P.R. (6th) 116

OLD NAVY (CANADA) INC. (Applicant) and THE EGLINTON TOWN CENTRE INC. (Respondent)

Michael G. Quigley J.

Heard: January 14-18, 2019
Judgment: June 21, 2019
Docket: Toronto CV-17-00571262-0000

Counsel: Jonathan Lancaster, Daniel Richer, for Applicant
Catherine Francis, for Respondent

Subject: Contracts; Property

Headnote

Real property --- Landlord and tenant — Nature and elements of lease — Interpretation

Commercial tenant claimed to have overpaid rents to landlord — Tenant sought to have court give effect to rent reduction provision contained in co-tenancy operating requirements in lease, which applied in certain circumstances where one or more of small number of stipulated "Key Stores" at shopping centre left or if there was significant failure of shopping centre — Tenant brought application seeking declaratory relief and refund of overpaid rents — Application dismissed — Provisions of lease relating to co-tenancy requirements were not straightforward or unambiguous — Language used in lease differed from description of co-tenancy provisions that parties agreed to as set out in letters of intent — Parties appeared to have different understandings of what lease said from moment it was signed — There was no clarity on what final common intention of parties was meant to be — Evidence suggested parties did not share common understanding or intention — Landlord's interpretation of provisions was most objectively reasonable — It was not commercially reasonable for tenant to expect to be able to occupy premises for balance of existing lease term, effectively without paying rent, merely because of technical event that had no evident impact on its business operations — Tenant's position violated foundational principles of business efficacy and led to absurd result — Tenant's claim that any co-tenancy failure took place was rejected.

Real property --- Landlord and tenant — Nature and elements of lease — Rectification — Grounds — Mistake

Commercial tenant claimed to have overpaid rents to landlord — Tenant sought to have court give effect to rent reduction provision contained in co-tenancy operating requirements in lease, which applied in certain circumstances where one or more of small number of stipulated "Key Stores" at shopping centre left or if there was significant failure of shopping centre — Tenant brought application seeking declaratory relief and refund of overpaid rents — Landlord brought request for equitable relief by way of rectification to amend lease to include reciprocal termination right as intended by parties and as reflected in letters of intent (LOIs) — Application dismissed; request granted — Provisions of lease relating to co-tenancy requirements were not unambiguous, and landlord's interpretation was most objectively reasonable — Landlord was entitled to rectification remedy — It was plain from comparison of words between lease and LOIs that there was failure on part of parties to include key term of LOIs: ability of landlord to terminate lease after six months, in event tenant invoked its co-tenancy "rights" — As tenant did not suffer any losses from closure of another store, it seemed unlikely that it would have invoked its purported co-tenancy rights, if that would have caused it to face termination of lease — Nothing in tenant's submissions took issue with characterization of exclusion of reciprocal termination right as anything other than mutual mistake — Parties had reached prior agreement to include reciprocal lease termination right.

APPLICATION by tenant for declaratory relief and refund of allegedly overpaid rents; REQUEST by landlord for rectification to amend lease to include reciprocal termination right.

***Michael G. Quigley J.*:**

Overview

1 This proceeding involves the interpretation of a lease (the "Lease") between Old Navy (Canada) Inc. as tenant ("Old Navy") and The Eglinton Town Centre (the "Centre") as landlord (the "Landlord").

2 Old Navy commenced this matter as an application for declaratory relief, but on May 28, 2018, Gans J. ordered that it be converted to an action to be heard at a two-day trial, with the application affidavits to serve as the pleadings. Firestone J. extended it to a five-day trial. In this action, the Landlord now also seeks equitable relief.

3 In addition to declaratory relief, Old Navy seeks a refund of rents that it claims to have overpaid to the Landlord. At its core, the issues in this case involve the interpretation of certain provisions of the parties' Lease that went into effect on May 1, 2000. Old Navy asks the Court to give effect to a rent reduction provision contained in co-tenancy operating requirements in the Lease, (the "Co-Tenancy Requirements"), which applies in certain circumstances where one or more of a small number of stipulated "Key Stores" at the Centre leave or if there is a significant failure of the Centre as a whole.

4 This decision focuses on whether the provisions of the Lease are clear, straightforward, and reflect the contract that the parties thought they had signed. It requires an interpretation of the Lease as well as an analysis of the parties' contractual intent, their respective understanding of the Lease, and whether their dealings with each other were in good faith. With hindsight, in a contractual context, this dispute can be analogized to two ships passing in the night because neither the Landlord nor Old Navy ever had the same understanding of the Lease, and in particular, the Co-Tenancy Requirements.

Background

(a) The Parties

5 Old Navy is a prominent retailer of clothing. It operates stores throughout Canada, the United States, and worldwide. Old Navy is a subsidiary of GAP Inc. ("GAP"), which is headquartered in San Francisco, California. Old Navy's operations and stores are owned and directed by GAP. Because GAP is the directing mind for Old Navy, the applicant and their store at the Centre are frequently referred to in these reasons collectively as "GAP/Old Navy."

6 GAP is the largest specialty retailer in the United States. It has approximately 3,700 stores worldwide, including 240 stores in enclosed malls, so-called lifestyle centres and strip/power centres across Canada, operating under the GAP, Banana Republic, and Old Navy brands. Of the three, Banana Republic is considered to be at the top end of the GAP family of brands, while Old Navy is the low level, inexpensive or budget brand.

7 Mr. Ryan O'Connor testified for GAP/Old Navy at this trial. Mr. O'Connor is a member of the GAP Real Estate Department and is responsible for the retailer's worldwide leases. Although Mr. O'Connor is not licensed to practice law, he is legally trained and has had extensive experience in GAP lease negotiations since he joined GAP in 2005. Importantly, that was five years after the Lease in this matter was negotiated and concluded. As explained in greater detail below, there were no witnesses at this trial who testified for GAP about these earlier lease negotiations.

8 The Landlord is owned and operated by Lebovic Enterprises, a well-known Toronto and Canadian property developer. Amongst others, it owns and operates the Centre. The Centre is a so-called "Power Centre", located at Eglinton Avenue East and Lebovic Avenue in Scarborough, Ontario.

9 Old Navy was an original or at least early tenant at the Centre, before it was fully constructed, and it has remained a tenant under a Lease since May 2000. Old Navy's Lease with the Landlord has been extended from time to time through several renewal options.

10 The Centre has in place a varied mix of retail stores, restaurants, and service providers offering complementary goods and services to the same general demographic as Old Navy shoppers. As is typical in any Centre, there is a frequent change of tenants.

(b) The Drafting of the Letters of Intent and Lease

11 The foundation for the Lease between the Landlord and Old Navy was three letters of intent ("LOIs"). The first and third LOIs between the parties were dated March 31 and April 4, 2000, with the second being of an unknown intermediate date.

12 The Lease was negotiated between GAP and the Landlord. None of the individuals at GAP involved in this Lease negotiation still work for GAP, so there was no contemporaneous memory of the negotiations from their perspective. One individual who was involved still works in San Francisco for a private law firm, but was either not approached or unwilling to speak to her role in these matters.

13 The Landlord's Executive Vice-President, Lloyd Cherniak, signed the LOIs on behalf of the Landlord but he was not their principal negotiator. However, as an experienced and qualified veteran in real estate and commercial leases, who has now been part of Lebovic Enterprises Limited for more than 37 years[15], Mr. Cherniak did formally represent the Landlord.

14 In addition, the Landlord also had the assistance of Paracom Realty Corporation ("Paracom"), as represented by Seymour Schwartz. Paracom was the agent for the Landlord in the negotiation of the LOIs and the Lease. Discussions started in November, 1999, between GAP/Old Navy and Paracom regarding the possibility of a lease at the Centre. It was most likely that Paracom brought the parties together. Both sides were legally represented and there is no realistic suggestion of unequal bargaining power between them.

15 The template used for Old Navy's lease was the GAP standard form of lease as it read at that time. As is becoming increasingly common in commercial leases for space in shopping centres and malls like this one, as the Lease was being negotiated, GAP wanted there to be a co-tenancy requirement included.

16 The original typed version of the LOI described what the content of the Lease and that provision was to include. Two prospective tenants of the Centre were stipulated as the Key Stores: Canadian Tire and Cineplex. These are the kinds of large, heavy draw businesses that are so-called "anchor tenants". They are called anchor tenants because their premises occupy a significant amount of space, and more importantly because they are businesses that tend to draw a lot of traffic to the Centre. This is traffic that GAP wanted to ensure was present at the Centre in order to enhance the retail success and profitability of its Old Navy store.

17 Canadian Tire is located in very close proximity to the Centre. At the time the LOI was drafted, Canadian Tire was situated on land that comprised part of the Centre. However, it later bought out the underlying freehold from the Landlord. While the store still has a significant presence in the area, it is now independently owned and no longer forms part of the Centre. As a result, there needed to be one or more other Key Stores to take its place.

18 As the LOI negotiations progressed, after it was realized that Canadian Tire could not be a Key Store, Mr. Schwartz suggested the change to the Co-Tenancy Requirements to: (i) delete Canadian Tire and add Roots, Danier, and Globo Shoes as Key Stores; and (ii) change from a 80% to 70% store occupancy and opened requirement as of the date that Old Navy opened its retail space. As explained below, these provisions were included in the final terms of the Lease and form the heart of the subject matter of the dispute between the parties.

19 There was no contemporaneous evidence of how the reference to Canadian Tire was struck out in the LOIs and "Roots, Globo and Danier Leather" were handwritten in its place. None of them were anchor tenants at the Centre. They were, however, all retail stores located in the only fully completed

15. There were others involved in the negotiations as well, including John Temesvary, a lawyer of 35 years standing who was a partner at Fogler Rubinoff in the Business Law Department at the time. Mr. Temesvary was probably involved in the negotiations of the LOIs and he executed the Lease on behalf of the Landlord, together with Joseph Lebovic, as the sole officers and directors of the Landlord at the time.

section of the Centre at that time. Roots sells men's, women's and children's clothing, active wear, shoes and small home furnishings. Globo Shoes sells "affordable shoes for the family", and Danier Leather, at that time[16], sold upscale leather clothing from outlet type retail stores.

20 There remains one very important difference between the LOIs as amended over the negotiation period and the final Lease terms as it relates to the operation of the Co-Tenancy Requirements: the LOI was amended in handwriting, evidently by the Landlord or its agent, providing that in the event Old Navy exercised its Co-Tenancy rights, then *either* the Landlord or the Tenant would be entitled to terminate the Lease not earlier than six months following the commencement of the payment of Alternate Rent.

21 Notably, this provision was *not* incorporated into the final Lease terms. There was no evidence at trial of any negotiated agreement to *remove* that provision's reciprocal application to *both* Old Navy *and* the Landlord in the event of an election by Old Navy to enforce its Co-Tenancy rights.

22 No one was able to cast light on that claimed oversight. None of the GAP/Old Navy personnel actually involved in the Lease negotiation provided evidence. As mentioned, Mr. O'Connor was not employed at GAP until 2005 and so had no reliable knowledge or history of these negotiations. The only evidence on point was that of Mr. Cherniak. I will refer to the evidence on this point later in these reasons.

(c) Key Lease Provisions

23 Article 13 of the Lease contains the Co-Tenancy Requirements as reflected in the final Lease terms that were intended to be consistent with the terms of agreement in the LOIs. Section 13.3 of the Lease provides as follows:

13.3 Operating Requirements

(A) Notwithstanding anything to the contrary in this Lease, Tenant shall not be required to open the Premises for business at all nor operate during Designated Times (or, in the absence thereof, Minimum Times) unless the Key Stores plus retail stores (other than the Premises and the Key Stores) having an aggregate of eighty percent (80%) or more of the total built GLA, as at the expiry of the Construction Period, of the Shopping Centre (other than the Premises and the Key Stores) are also open for business during the Designated Times (or, in the absence thereof, Minimum Times) (the "Operating Requirements");

(B) The Key Stores are the following retailers occupying the floor area indicated:

Trade Name	Floor Area
Cineplex	68,000 sf
Roots	6,545 sf

16. Since its bankruptcy, Danier has re-opened under new ownership. It has deleted the word "Leather" from its branding and now simply sells apparel.

Globo Shoes 12,084 sf
Danier Leather 6,548 sf

(C) A store shall not be considered open for business if such store is open and operating

(1) less than the Designated Times (or, in the absence thereof, Minimum Times), or

(2) in less than substantially all of its space. Any of the foregoing events shall be deemed a failure of the Operating Requirements and may sometimes be referred to as a "Co-Tenancy Failure." Landlord shall immediately notify Tenant of any Co-Tenancy Failure. If the Operating Requirements are not being met because a store is closed by reason of casualty, expropriation or the making of repairs or alterations (collectively, an "Excused Closure"), such Excused Closure shall not give rise to Tenant's right to pursue Operating Requirement Remedies unless such Excused Closure continues for more than a period of sixty (60) days. Any waiting period before which Tenant may exercise the Operating Requirement Remedies shall be deemed to run concurrently with such 60-day grace period for an Excused Closure.

24 As can be seen, s. 13.3(A) of the Lease appears to contain two operating requirements: the presence of Key Stores *and* a percentage of GLA based operating requirement. Section 13.3(B) of the Lease then identifies the Key Stores and their respective areas in square feet. This is to enable the calculations to be performed that determine when the provision applies. Finally, section 13.3(C) of the Lease identifies when a co-tenancy failure has occurred and sets out a Landlord notice requirement to the Tenant. Collectively, these are the three elements of the Co-Tenancy Requirements.

25 Section 13.3(D) contemplated that the Landlord would deliver annually to Old Navy, at Old Navy's request, a notice certifying the then current trade name and GLA of each tenant. Additionally it also permitted Old Navy to conduct an audit and inspect the Landlord's records on 30 days' notice at its expense. However, Old Navy never required annual listings of tenants or their GLA at the Centre and it never conducted any audits in relation to the tenancies and leasable GLA. Old Navy did request tenant listings from time to time, but that only occurred on several occasions over the years connected with and in anticipation of exercising lease renewal options for additional terms.

26 Section 13.4(A) of the Lease goes on to describe the Tenant's recourse in the event that the Landlord does not achieve the operating requirements, either for the purposes of whether the Tenant is required to open for business at all, or continue to operate. This is the provision Old Navy relies upon in its ongoing payment of reduced rent. Section 13.4(A)(2) of the Lease (the "Alternate Rent Section") provides as follows:

13.4 Operating Requirement Remedies

(A) If the Operating Requirements are not met within 30 days' written notice, then, effective immediately, Tenant shall have the following rights:

> (1) Right to Close Remedy. Tenant may close the Premises for business and, during such period of closure, Tenant shall pay Minimum Rent in lieu of all other Rent and perform all of such other obligations as are applicable to a vacant premises. This remedy is referred to herein as the "Right to Close Remedy." If at any time during the Term the Premises have been closed for business for a continuous period of six (6) months pursuant to the Right to Close Remedy, Landlord shall have the right to terminate this Lease upon written notice to Tenant effective on a date stipulated in such notice, which date shall be not less than sixty (60) days and not more than one hundred and twenty (120) days following the date on which such notice is given to Tenant. Tenant shall be entitled, within thirty (30) days after receipt of Landlord's notice of termination, to give Landlord written notice undertaking to re-open the Premises for business within ninety (90) days after the termination date set out in Landlord's notice of termination, and provided Tenant does re-open the Premises for business by such time, Landlord's notice of termination shall be automatically revoked and of no effect.
>
> (2) Alternate Rent Remedy. Tenant may remain open for business and pay monthly, as "Alternate Rent" during the period that the Operating Requirements are not being met, in lieu of Minimum Rent and Other Charges, an amount equal to: (a) for the first three (3) months of the Co-Tenancy Failure, fifty percent (50%) of the amount of Minimum Rent then applicable; and (b) thereafter, until the Operating Requirements are once again met, twenty-five percent (25%) of the amount of Minimum Rent then applicable. Each such payment of the Alternate Rent shall be made on the same days as monthly instalments of Minimum Rent are payable hereunder. This remedy is referred to herein as the "Alternate Rent Remedy."

27 As is apparent from section 13.4(A)(2), it provides for a rent adjustment during the period of a co-tenancy failure. The Co-Tenancy Requirements found in Article 13 of the Lease are *not* entitled "Default". The Co-Tenancy provisions are not events of default contained in Article 22 of the Lease, but instead purport merely to regulate the amount of rent payable (as, for example, a percentage rent[17] provision may also do, albeit in other ways).

28 Finally, section 13.5, which deals with the substitution of tenants, is of relevance to this dispute. It provides as follows:

> **13.5 Substitution**
>
> (A) If Landlord desires to substitute a retailer for one of the Key Stores for purposes of satisfying the Operating Requirements, Landlord shall submit the name of such substitute retailer to Tenant for its prior written approval. The approval of Tenant shall not be unreasonably withheld if: (1) the use to be conducted by such substitute retailer is substantially

17. A common provision in a commercial retail lease is a percentage (or participating) rent clause under which a tenant pays a rent based on a fraction of gross sales on gross revenues, in addition to base (or minimum) rent, and additional rent for taxes, maintenance, insurance and other charges.

the same as that conducted by the Key Store it is intended to replace; (2) the merchandise sold by such substitute retailer is of equal or better quality, and is offered at similar price points as the Key Store that it is intended to replace; and (3) such substitute retailer will operate a retail business from substantially all of the premises being vacated by the Key Store it is intended to replace.

(B) The aforementioned right of approval of Tenant is solely for the purpose of determining whether such proposed replacement retailer qualifies as a Key Store for purposes of determining Tenants rights under this Lease and is not intended to impair or restrict the freedom of Landlord to enter into leases or operating agreements with any party with whom Landlord desires in the exercise of its sole and absolute discretion.

29 Old Navy, through the GAP head office and as represented by Mr. O'Connor, and the Landlord, as represented by Mr. Cherniak, differ in their interpretation of this provision.

30 As noted above, the LOIs expressly provided that in the event Old Navy exercised its co-tenancy rights, either the Landlord or the Tenant would be entitled to terminate the Lease after six months. While this provision was *not* included in the final Lease terms, I note there was no agreement to remove that reciprocal entitlement, and indeed, that is the provision for which the Landlord seeks rectification.

31 Section 27.12 of the Lease is entitled "Landlord and Tenant and their Respective Representatives to Act Reasonably and in Good Faith" and it expressly provides as follows:

27.12 Landlord and Tenant and their Respective Representatives to Act Reasonably and in Good Faith

Landlord, and each person acting for Landlord, in making any determination (including, without limitation, any determination as to whether or not to grant any consent or approval required of it), designation, calculation, estimate, conversion, or allocation under this Lease, will act reasonably and in good faith and each accountant, architect, engineer, surveyor and other professional person employed or retained by Landlord will act in accordance with the applicable principles and standards of such person's profession.

Tenant, and each person acting for Tenant, in making any determination (including, without limitation, any determination as to whether or not to grant any consent or approval required of it), designation, calculation, estimate, conversion, or allocation under this Lease, will act reasonably and in good faith and each accountant, architect, engineer, surveyor and other professional person employed or retained by Tenant will act in accordance with the applicable principles and standards of such person's profession.

32 The Lease was dated as of May 1, 2000 but because of the custom building work required to outfit its store consistent with its branding, Old Navy did not take possession under the Lease until December 8, 2000 and it opened for business on April 4, 2001. Old Navy did receive a significant leasehold allowance from the Landlord of $16.00 per square foot, that is, $360,000, as a contribution towards the

construction and outfitting of the store to meet GAP's spatial and branding requirements.

33 The original term of the Lease was from May 1, 2000 to April 30, 2006. It was renewed and amended, without material change on three occasions: (i) by a simple renewal letter dated September 6, 2005, for the period from April 30, 2006 to April 30, 2011; (ii) by a renewal letter dated July 30, 2010 and agreement dated April 5, 2012, for the period from May 1, 2011 to April 30, 2016; and (iii) by a renewal and amendment dated January 16, 2014, for the period from May 1, 2016 to April 30, 2021, with a further 5-year optional renewal period stipulated in the last renewal. There is no evidence the parties had any material discussions about the other Lease terms during the three successive Lease renewals.

(d) The Danier bankruptcy and its aftermath

34 Danier was a prominent Canadian retailer of leather goods. The Landlord entered into a lease with Danier for an initial 10-year term from June 10, 1999 to June 9, 2009. Danier's lease was renewed in 2009 and Danier remained a tenant of the Centre until 2016. Danier's premises were comprised of 6,548 square feet of space out of a total of 285,425.37 square feet of GLA in the Centre. In other words, Danier's retail outlet accounted for only 2.3% of the current GLA.

35 Danier was a public company. Its shares were listed on the Toronto Stock Exchange. However, public filings showed that Danier had been struggling financially since its 2014 fiscal year, with declining revenues and annual losses. This decline is believed to have been attributable to a change in tastes of the purchasing public away from leather products and apparel. On February 4, 2016, Danier filed a Notice of Intention to File a Proposal under the Bankruptcy and Insolvency Act, R.S.C., 1985 c. B-3 (the "NOI").

36 Certainly, Danier's bankruptcy filing was a significant event in the retail industry and it was publicly reported in the national media. At the time of the NOI filing, Danier operated 84 stores across Canada. All of the stores were leased. In the end, however, Danier decided not to file a bankruptcy proposal and instead made an assignment in bankruptcy. A receiver was appointed over Danier to liquidate the stores. Danier continued operating until July 2016.[18]

37 Certainly all of the tenants at the Centre, including the local management of the Old Navy store, would have known that Danier was conducting a "store closing" sale, as authorized by the court orders in Danier's insolvency filing. However, no one appears to have advised the GAP/Old Navy Head Office that Danier had closed until late summer of 2016.

38 Importantly, throughout the period of the closing of the Danier outlet, the other retail businesses at the Centre were thriving. The Centre's construction had long been completed and was well over 90% leased at the time of Danier's bankruptcy and the subsequent store closure. Cineplex was drawing movie

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18. I note as an aside, that there was at least one Danier Leather Store, located in downtown Toronto in the Toronto Dominion Centre, which continued to operate after the insolvency of the other stores. It was evidently owned by one of the former principals of Danier Leather. It continues to sell leather goods to this day. In addition, as noted, under new ownership, Danier has now resurrected itself, but selling a broader range of apparel.

audiences every day and the remaining three pods of stores including the building in which the Old Navy store was situated, across the parking lot from the Danier outlet, were all operating. There was no evidence they were not operating profitably.

39 The Landlord insists that the closure of Danier had no material impact whatsoever on foot traffic at the Centre or on Old Navy's sales. Given its interpretation of the Co-Tenancy Requirements, the evidence showed that the Landlord did not consider that a co-tenancy failure had occurred, and accordingly that it had any obligation at that time under section 13.3 (C) of the Lease. Consequently, the Landlord did not provide any notice to GAP/Old Navy of Danier's closure.

40 By September 15, 2016, GAP/Old Navy claimed they had finally learned about Danier's failure. As such, Old Navy issued a Notice of Co-Tenancy Failure to the Landlord (the "Co-Tenancy Failure Notice") and took the position that: (i) Danier Leather's bankruptcy constituted a "co-tenancy failure" under the Lease; (ii) that the Landlord had breached the Lease by failing to advise Old Navy of Danier's bankruptcy; and (iii) that Old Navy was therefore exercising its "right" under the Lease to pay Alternate Rent to the Landlord, retroactive to May 1, 2016.

41 Unfortunately GAP/Old Navy sent the Co-Tenancy Failure Notice to a former address for the Landlord, so that notice did not come to Mr. Cherniak's attention until the end of September, 2016. That was after Ms. Erin Rowe from GAP Head Office left Mr. Cherniak a voicemail message on or about September 28, 2016, and then sent a follow-up email. She took the position that the Centre was "currently in co-tenancy failure due to the closure of Danier Leather" and advised that Old Navy would be pursuing the Alternate Rent remedy under the Lease.

42 The Landlord disputed that the Centre was "currently in co-tenancy failure due to the closure of Danier" and advised that if the current rent was not paid, the Landlord would consider Old Navy to be in default under the terms of the Lease. At the same time, the Landlord retained counsel, Mr. Jason Cherniak, to provide a formal legal response to Old Navy's September 15, 2016 letter. Mr. Jason Cherniak is Mr. Cherniak's son, who practices law on his own entirely separate from the Landlord's business. As counsel for the Landlord and on its instructions, Mr. Jason Cherniak responded to this letter on October 24, 2016. In that response, Mr. Jason Cherniak proposed to substitute Party City, an existing tenant at the Centre, as an alternative Key Store under the Lease.

43 After approximately six weeks, GAP/Old Navy provided a formal response to the Landlord. The Landlord's proposal for Party City appeared to go through at least two departments at GAP Head Office before the Landlord received a substantive response on December 6, 2016.

44 First, on October 26, 2016, Magdalena Silva-Baneulos took the position that Mr. Cherniak's alternative Key Store proposal would have to be submitted by way of written request to the proper GAP legal address as set out in the Lease. Eight days later, on November 3, 2016, Ms. Silva-Banuelos advised that GAP's legal department was reviewing the claim. In the meantime, she requested that the Landlord provide to GAP a Tenant Listing and/or Site Plan by November 16, 2016. Finally, Mr. Ryan O'Connor wrote a formal letter to the Landlord on December 6, 2016 advising that GAP would not accept Party

City as a substitute Key Store under the Lease.

45 It was GAP's position that Party City could not meet the criteria for substitution under section 13.5 of the Lease for four reasons. First, it was insufficient to GAP that both Danier and Party City were retail stores. Second and third, in its view, Party City's business sold different merchandise than had been sold by Danier Leather and it was not of equal or better quality and not at similar price point to Danier merchandise. Finally, GAP rejected the proposal because it was GAP's position that a substitute retailer would only be acceptable if it took over and commenced to operate out of the *same* retail space formerly occupied by Danier. Another location in the Centre would not be acceptable.

46 As a result, Old Navy ceased paying rent under the Lease. It took the position that it was entitled to offset its retroactive rent decrease under its claimed Alternative Rent rights against its current rent payments.

47 The Landlord responded a week later on December 13, 2016, when Mr. Jason Cherniak wrote to GAP/Old Navy formally putting them on notice that the Landlord considered them to be in default of the Lease due to the Tenant's election under the Alternate Rent section. The December 13 Notice letter contains the usual draconian boilerplate language typical of a Landlord's assertion of default on the part of a tenant, but it also specifically required as follows:

> You are hereby required to forthwith remedy the aforesaid default by delivering to the Landlord, by not later than December 24, 2016, a certified cheque in the amount of One-Hundred Two Thousand, Five Hundred Fifty-Seven Dollars and Seventy-Five Cents ($102,557.75) (comprising all arrears to December 14, 2016 as set out on the enclosed statement of account plus legal fees). If a certified cheque in the aforesaid amount is not received by that time, the Landlord will thereupon and thereafter have the right, without further notice, to exercise such remedies under the Lease or at law as it may be advised including, without limitation, the right to terminate the Lease and take possession of the Premises. Any such termination will be without prejudice to all of the Landlord's other rights under the Lease and at law in respect of any defaults, including without limitation, the right to collect any amounts owing and the right to hold you responsible for all future losses over what would have been the unexpired term of your tenancy but for such termination.

48 GAP/Old Navy paid the disputed amount with two certified cheques, one issued on December 21, 2016 for $15,057.86, and a second for between $125,000 and $135,000, subject to verification, to be sent to the Landlord on Friday, January 6, 2017.

49 Mr. Daniel Byma, Old Navy's external Canadian counsel in Vancouver, sent a letter advising the Landlord that any further and future rent payments in excess of the Alternative Rent amounts were being paid under protest. The letter also advised that Old Navy was reserving its right to commence legal proceedings against the Landlord. Old Navy has continued to pay rent under protest since that time. The amount paid under protest now exceeds $1.5 million.

50 In a subsequent letter sent on December 23, GAP/Old Navy reiterated its position that there was a

Co-Tenancy Failure under s. 13.3 of the Lease, that it was entitled to the Alternate Rent Remedy pursuant s. 13.4, and that it was not obligated to pay the $97,557.75 as demanded.

51 Mr. Byma also sent an email stating that he did not have instructions from GAP to accept service of the Notice and instructed Mr. Cherniak to serve it at GAP's San Francisco office. Mr. Cherniak sent the Notice to Old Navy by UPS courier on December 23, 2016.

52 By this time, the Landlord was in advanced negotiations with Ren's Pets Depot ("Ren's") to lease Danier's space at the Centre. Ren's is a growing Canadian retail chain selling principally pet supplies. The Landlord was of the view that Ren's sold high quality merchandise within the same price range as Danier, and that the presence of a Ren's would actually be complementary to the retail mix at the Centre and increase traffic draw.

53 On December 23, 2016, Jason Cherniak wrote to Mr. Byma advising Old Navy that the Landlord had entered into a lease with Ren's. While the letter formally proposed Ren's as the substitute Key Store for Danier, the Landlord would be proceeding with a lease with Ren's regardless of the position taken by GAP/Old Navy. Mr. Cherniak also enclosed a corporate profile on Ren's and an exterior photo of one of its stores.

54 Neither Mr. Byma nor any official from GAP/Old Navy provided an answer to the Landlord's request to substitute Ren's as a Key Store in the Danier retail space. They simply never responded. Mr. O'Connor testified, frankly, that they saw no point in responding because by that time GAP/Old Navy appears to have decided that they would take the matter to litigation and seek a determination from the courts on their position.

55 In its written materials, Old Navy submitted that it saw no point in responding to the Landlord's suggestion to bring in Ren's because, at least in its view, Ren's was clearly not qualified to be a substitute Key Store as it was not a retailer of "upscale apparel", but rather was a pet food and supplies retailer.

56 At its core, GAP maintains that the merchandise sold by Ren's was not of equal or better quality than that offered by Danier, and that no evidence had been provided by the Landlord to show that Ren's and Danier's merchandise were at similar price points. In its view, the use of the premises by Ren's, a supplier of pet products, would clearly have been different than that of Danier, a retailer of upscale leather apparel and accessories. In other words, as far as GAP/Old Navy was concerned, Ren's was not a qualifying substitute retailer within the meaning of section 13.5(A) of the Lease.

57 In support of this position, GAP/Old Navy relied on the terms of Danier's 1999 lease with the Landlord in arguing that the only retailer that could qualify as a Key Store would need to meet the following, very constrained attributes: "a retail business featuring principally the retail sale of men's, ladies' and children's leather, fur, suede and sheepskin garments and as ancillary to such principal use, the sale at retail of belts, leather handbags and purses, leather hats and other items from time to time being sold in the majority of the Tenant's other retail stores located in Canada."

58 Although GAP/Old Navy considered the information provided by the Landlord about substituting

Ren's to be sparse and inadequate, GAP/Old Navy's counsel asserts that GAP was nevertheless able to determine from the information provided that Ren's did *not* meet the criteria in sections 13.5(A)(1) and (2) of the Lease.

59 While GAP claims to assess each mall/centre on a case-by-case basis, the evidence before me suggests that GAP plainly prefers other apparel stores and sometimes cinemas as Key Stores, but definitely not pet stores or novelty stores. Indeed, while GAP did not ever provide a copy of its current Standard Form Lease, I understood from Mr. O'Connor's evidence that it now contains an outright ban on pet stores being located in shopping centres where GAP rents premises. As a result, GAP felt no need to respond to the request concerning Ren's.

60 In the end, the Landlord rented the former Danier premises to Ren's and on March 20, 2017, GAP/Old Navy issued the Notice of Application that gave rise to this action. Notably, nothing in the Application Record made any reference at all to the Landlord's request that Old Navy approve of Ren's as a substitute Key Store, or the fact that the former Danier premises had been rented to Ren's.

61 The Landlord asserts that by failing to respond to its efforts to find replacement tenants, GAP/Old Navy did not act in good faith. In response, GAP/Old Navy claims that the Landlord's threat to terminate the Lease in the December 13 notice letter is germane to their position that the Landlord did not act in good faith. In their position, the Landlord's conduct during that time clearly demonstrates an underlying absence of good faith on the Landlord's part.

Legal Principles

(a) Principles of Contractual Interpretation

62 The "interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract."[19] The interpretive exercise is objective rather than subjective: "[t]he goal in interpreting an agreement is to discover, objectively, the parties' intention at the time the contract was made."[20] Equally and fundamentally, commercial contracts must be interpreted with sound commercial principles and good business sense.[21]

63 At para. 2.5.2, in his seminal text on *Canadian Contractual Interpretation Law*[22], Geoff Hall writes as follows:

> Courts seek a commercially sensible interpretation of the contract to give effect to the intentions of the contracting parties. Since those who enter into commercial contracts generally have sensible goals, a commercially sensible interpretation is more likely to be consistent with their intentions and is one that does not make commercial sense. This point was made by the Manitoba Court of Appeal in the following way:

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19. *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53 (S.C.C.), at para. 57.
20. *Gilchrist v. Western Star Trucks Inc.*, [2000] B.C.J. No. 164 (B.C. C.A.) at para. 17.
21. *Scanlon v. Castlepoint Development Corp.*, [1992] O.J. No. 2692, 11 O.R. (3d) 744 (Ont. C.A.) at p. 770, leave to appeal to S.C.C. refused [1993] S.C.C.A. No. 62 (S.C.C.).
22. G. Hall, *Canadian Contractual Interpretation Law*, 3rd ed. (Markham: Lexis Nexis, 2016) at pp. 24-26.

> In determining the meaning of the language of a commercial contract, and unilateral contractual notices, the law therefore generally favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties.[23] [Emphasis added]

> The House of Lords, in a passage which has been applied in Canada, put the point the following way: "the more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend that the more necessary it is that they shall make that intention abundantly clear".[24]

64 Since contractual interpretation is an objective exercise, commercial reasonableness cannot be judged solely from the perspective of one of the contracting parties, but rather must be assessed objectively:

> [T]he document should be construed in accordance with sound commercial principles and good business sense. Care must be taken, however, to do so objectively rather than from the perspective of one contracting party or the other, since what might make good business sense to one party would not necessarily do so for the other.[25]

65 The corollary of the commercial efficacy principle is the precept that commercially absurd interpretations are to be avoided[26], and it is the duty of the Court in interpreting commercial documents, to avoid an interpretation that would result in a commercial absurdity.[27]

66 In a recent decision, *Park Royal Centre Holdings Ltd. v. GAP (Canada) Inc.*[28], DeWitt-Van Oosten J. analysed a co-tenancy provision that was at issue in that lease, and which had similarities to this co-tenancy provision. However, she commenced her analysis by emphasizing the fundamental rule that:

> [t]he contractual intent of parties to a written contract is objectively determined by construing the plain and ordinary meaning of the words of the contract in the context of the contract as a whole and the surrounding circumstances (or factual matrix) that existed at the time the contract was made, unless to do so would result in an absurdity.[29]

67 As such, the courts have long adhered to the principle enunciated by Jessel M.R. in *Wallis v. Smith*[30] as " . . . the well-known doctrine that in the construction of written instruments you may depart from the literal meaning of the words, if reading the words literally leads to an absurdity".[31] Put another

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23. *Nickel Developments Ltd. v. Canada Safeway Ltd.*, 2001 MBCA 79 (Man. C.A.) at para. 34.
24. *L. Schuler A.G. v. Wickman Machine Tool Sales Ltd.* (1973), [1974] A.C. 235 (U.K. H.L.)
25. *Kentucky Fried Chicken Canada v. Scott's Food Services Inc.*, [1998] O.J. No. 4368 (Ont. C.A.), at para. 27. See Hall, *supra* note 8 at para. 2.5.3.
26. *Ibid* at para. 27. *Buildevco Ltd. v. Monarch Construction Ltd.* (1990), 73 O.R. (2d) 627 (Ont. H.C.) at 634
27. *Toronto (City) v. W.H. Hotel Ltd.*, [1966] S.C.R. 434 (S.C.C.) at p. 548. See Hall, *supra* note 8 at para. 2.5.5.
28. *Park Royal Shopping Centre Holdings Ltd. v. Gap (Canada) Inc.*, 2017 BCSC 1257 (B.C. S.C.).
29. *Athwal v. Black Top Cabs Ltd.*, 2012 BCCA 107 (B.C. C.A.).
30. *Wallis v. Smith* (1882), 21 Ch. D. 243 (Eng. C.A.), at 257

way: "[contracts] should be interpreted in a reasonable way to give "business" efficacy and in such a way to avoid all absurd results".[32]

68 The wording of relevant provisions may be ambiguous or capable of more than one meaning looked at in the context of the contract as a whole and the negotiations that took place between the parties to produce the contract. While it may not always be possible to discern the parties' intent, the Court should strive to do so.

69 In circumstances where the contract is found to contain ambiguity, the *contra proferentem* rule can be applied to resolve the ambiguity. Under the *contra proferentem* rule, the ambiguous clause or portion of the contract will be interpreted against the interests of the drafter.[33] In this case, since the GAP/Old Navy standard form lease was used as the template for the Lease, and since Old Navy had control of ensuring all terms in the LOIs were included in the Lease, if found to apply here, this rule would require that any ambiguity be resolved in the Landlord's favour and against Old Navy.

70 Another principle central to the positions of the parties in this case is the requirement that they demonstrate good faith in their conduct under the contract. In *Bhasin v. Hrynew*[34], the Supreme Court of Canada recognized an organizing principle of good faith in contractual performance. 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. This requires, in certain respects, honest, candid, forthright, and reasonable contractual performance.

71 In *Mohamed v. Information Systems Architects Inc.*.[35], the defendant terminated the plaintiff's consulting contract in circumstances where the contract expressly provided for termination rights. Perell J. held that the defendant improperly terminated the contract and acted in bad faith and awarded the plaintiff damages. The Court of Appeal found that Perell J. had made extricable errors of law in his interpretation of the contract. However, his decision was upheld on the basis that the defendant had exercised its contractual termination rights in bad faith.

72 Recently the duty of good faith was re-examined by the Supreme Court of Canada in *Churchill Falls (Labrador) Corp. v. Hydro-Québec*[36] There, the Court determined that good faith confers a broad, flexible power to create law and serves as a basis for a court to intervene and to impose on contracting parties, obligations that are based on a notion of contractual fairness.

(b) The Lease Co-Tenancy Requirements

73 Co-tenancy provisions are well-known features of shopping centre leases. GAP/Old Navy is by no

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31. *1525292 Ontario Ltd. v. Canadian Tire Real Estate Ltd.* [2004 CarswellOnt 1819 (Ont. S.C.J.)], 2004 CanLII 15587, citing *Holt v. Thunder Bay (City)* (2003), 65 O.R. (3d) 257 (Ont. C.A.))
32. *TDL Group Ltd. v. P.J.P. Developments Ltd.*, [1997] O.J. No. 5357 (Ont. Gen. Div.)
33. *Consolidated-Bathurst Export Ltd. c. Mutual Boiler & Machinery Insurance Co.* (1979), [1980] 1 S.C.R. 888 (S.C.C.), at pp. 899-900.
34. *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494 (S.C.C.).
35. *Mohamed v. Information Systems Architects Inc.*, 2018 ONCA 428 (Ont. C.A.).
36. *Churchill Falls (Labrador) Corp. v. Hydro-Québec*, 2018 SCC 46 (S.C.C.).

means the only retailer that has a policy of including operating requirements and co-tenancy provisions when it leases commercial retail space. Mr. Cherniak acknowledged that the Landlord also employs co-tenancy provisions in its standard form of lease, so certainly such clauses are not new to either of these parties now, nor were they at the time they negotiated the Lease. However, as the evidence and disagreement on the meaning of the nuanced wording showed, the purposes each appears to have had in mind were different.

74 Regardless, co-tenancy provisions are a matter of bargain between a landlord and a tenant, and the case law appears to accept that they are intended conceptually to reflect a balancing of landlords' and tenants' interests. This will be particularly true in cases (unlike this one) where there has been no financial contribution by the Landlord to outfitting the tenant's space, but less true in circumstances, like in this case, where a substantial contribution has been made by the Landlord to the Tenant's initial capital costs.[37]

75 Retail tenants in shopping centres rely not only on their own brand to attract customers but also on spin-off traffic generated by other occupants of the shopping centre, particularly so-called anchor tenants. Tenants may seek remedies against landlords if the traffic is too low for any number of reasons, including shopping centre vacancy rates being too high, or where part of the shopping centre is incapable of being rented because the landlord has undertaken renovations or failed to complete construction on a timely basis. However, in the absence of language specifically addressing such tenant concerns, courts have dismissed claims for such remedies and instead have suggested that the tenant should have required a specific clause in the lease to deal with those specific issues.[38]

76 In *9202-9131 Québec inc. v. 6943870 Canada inc.*, for example, the Court refers to *9142-9134 Québec inc. c. 9180-9293 Québec inc.* [2010 CarswellQue 9763 (C.S. Que.)], where Mayer J. dismissed the tenant's claim that the high vacancy rate constituted an unacceptable change by the landlord in the permissible use of the property. He stated:

> [155] To begin, when synergies are an important aspect of a tenant's success, it is wise to negotiate a co-tenancy provision in a lease, which gives a tenant the right to terminate his lease or reduce his rent if a prescribed percentage of neighbouring tenants become vacant or anchor tenants leave the shopping centre. This type of clause will help ensure that a tenant will obtain a certain relief in the event that there is not sufficient customer traffic that enables his business to remain viable. [Emphasis Added]

77 That need for such specific situation focused remedies appears to be the driver behind increased use of co-tenancy provisions in shopping centre leases, not only in Quebec, but across Canada and elsewhere.

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37. See H. Haber et al., *Shopping Centre Leases*, below, at p. 353. The authors suggest that where the landlord has invested significant capital in the tenancy, as the Landlord did in this case, in the form of construction work or allowance/inducement funding, it will seek to tighten the co-tenancy conditions as much as possible as it does not wish to risk the loss of both the lease and its investment.

38. *9202-9131 Québec inc. v. 6943870 Canada inc.*, 2015 QCCS 1209 (C.S. Que.) at paras. 37-40.

78 In his seminal and authoritative text, *Shopping Centre Leases*[39], H.M. Haber, Q.C. et al. comments on the underlying purposes of co-tenancy provisions, and provides insight into what the parties' likely intent was or would have been in agreeing to include co-tenancy provisions in the Lease. Those purposes are borne out by the evidence that I accept in this case. I refer specifically to the commentary at pp. 352-353, which reads in part as follows:

> A retail tenant enters into a shopping centre lease in expectation of neighbouring tenants who will create synergy that will enhance the retailer's business. No retailer wants to be the only tenant in the shopping centre. A co-tenancy clause (sometimes called a co-occupancy clause) is included in a shopping centre lease to protect the retailer if a certain threshold level of other retail tenants leave the shopping centre and are not promptly replaced by other viable retailers.
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> . . .
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> Co-tenancy clauses vary to a great degree and are susceptible to prolonged negotiation but there are several common elements to be found in a typical co-tenancy clause:
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> • if a certain level of occupancy (expressed as a percentage of the total number of leasable stores in the shopping centre or a percentage of leasable area in the shopping centre) is not continuously present, the tenant will be entitled to rent reduction (often expressed as a gross rent calculated as a percentage of gross sales) pending the occupancy condition being restored;
>
> • if the critical level of occupancy is not restored within a set period (often, a year), the tenant will be entitled to terminate the lease without bonus or penalty; and
>
> • if the tenant does not in fact terminate the lease within a set period (often, 30 days), the termination right lapses and co- tenancy "remedy" of reduced rent no longer applies, i.e., the tenant will be required to revert to paying full rent.
>
> Sometimes a co-tenancy clause stipulates that in order for the tenant to be entitled to the contemplated rent reduction, it must first demonstrate that gross sales for the subject period have decreased (or decreased by a material percentage) when compared to gross sales for the same period in the preceding year.
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> . . .
>
> As to the scope of the conditions included in a co-tenancy clause, this depends entirely on the shopping centre. Some shopping centres are more dependent on the presence of 'anchor tenants' than others. Depending on the layout, co-tenancy conditions may be defined in relation to neighbouring tenants or certain specialty stores/tenants (e.g., restaurant tenants may tie their obligations to the presence of the cinema tenant, whereas electronics or fashion retailers may tie their obligations to the presence of department stores and/or other electronics or fashion retailers).

79 While co-tenancy provisions are becoming increasingly common features of shopping centre

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39. Edited by H.M. Haber, Q.C., 2nd ed. (Aurora: Canada Law Book, 2008).

leases, only seldom have they been the subject of litigation, at least in Canada. One instructive case is the recent British Columbia decision in *Park Royal Shopping Centre Holdings Ltd. v. Gap (Canada) Inc.*.[40] There are also cases from the United States and more recently in Canada, involving the interpretation of co-tenancy provisions that have arisen out of Target Canada's insolvency, as well as the insolvency and restructuring of Eaton's of Canada about 20 years ago. Beyond that, there are no reported decisions that counsel were aware of or that I was able to discover.

80 *Park Royal* is relevant not only because GAP was one of the parties to that lease and litigation, as they are here, but because the co-tenancy provision at issue in that decision had similarities to the provisions present here. As well, the Court recognized the authoritative commentary in *Shopping Centre Leases*[41], reproduced above, and in part, in DeWitt-Van Oosten J.'s reasons.

81 In *Park Royal*, GAP had leased retail premises in the Park Royal Shopping Centre in North Vancouver, on its own under the GAP brand and under its Banana Republic brand. The leases provided there, as they do here, for reduced rent in defined circumstances, including if there was a failure in relation to operating requirements of the centre. The landlord undertook extensive renovations that included demolishing parts of the shopping centre and rebuilding them from the ground up. Both GAP and Banana Republic stopped paying their regular rent under their lease agreements and instead paid no rent or alternative rent as stipulated in the lease. They claimed this remedy on the basis that the demolished areas in the shopping centre had to still be counted as areas "designated for leasing to tenants" for the purposes of determining whether the landlord was in compliance with the percentage of GLA operating requirements.

82 The landlord issued notices to GAP that they and Banana Republic were in default and subsequently brought an action against the two stores for rent owing. GAP and Banana Republic claimed they were entitled to pay alternative rent because they claimed that the landlord had failed to meet the ongoing operating requirements. While the operating requirements were somewhat different from those in this case, there were similarities regarding the GLA provisions.

83 In *Park Royal*, the landlord argued that GAP could only pay alternative rent when one of two thresholds were met: if either (i) stores representing 85% of the "Gross Leasable Area" of the interior North Mall that *is capable of being leased* are not open for business; or (ii) 65% of the stores in the interior North Mall that *are capable of being leased* are not open for business. For Banana Republic, the applicable percentage was 80% of the "Gross Leasable Area" of the North Mall.

84 For purposes of these calculations, however, the landlord, Park Royal, took the position that the relevant GLA area had to be *reduced* during demolition and reconstruction because once demolition had occurred, there was no longer a leasable area, store or premise in place. However, DeWitt-Van Oosten J. disagreed and found that "[h]ad it been intended that demolished stores within the North Mall would be carved out of the triggering thresholds, the signatories would have made this express." This would have been expressed because the demolition certainly could have caused adverse impacts to the tenants'

40. *Park Royal Shopping Centre Holdings Ltd. v. Gap (Canada) Inc.*, 2017 BCSC 1257 (B.C. S.C.).

41. H.M. Haber, *supra* note 25.

businesses, including the risk or potential for decreased traffic-flow to the centre as a whole for a prolonged period and its resulting revenue deprivation to the tenants from what their expectations would otherwise have been.

85 Notably, in that case, unlike in this case, GAP and Banana Republic produced financial evidence of the negative impact the construction had caused to their profitability.

86 There have also been some limited legal developments in the United States and in Canada that cast some light on the efficacy of co-tenancy provisions that permit the payment of alternative rent in prescribed circumstances. Those cases have focused on the issue raised by the Landlord here, relative to the enforceability of co-tenancy provisions. The first of those cases is relied upon here by the Landlord for the proposition that GAP/Old Navy's claim of Alternative Rent under this Lease owing to the insolvency of Danier is unenforceable because it is a penalty clause.

87 There are no Canadian cases directly on point dealing with the enforceability of co-tenancy provisions and whether they represent penalty clauses.[42] However, this issue has been litigated in the United States, including in GAP's home state of California.

88 In *Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.*[43], Ross was given an opening co-tenancy clause, which did not require Ross to commence business and pay rent until both Target and Mervyns, a department store, were open for business. The clause also said that if the co-tenancy requirement was not met within 12 months of Ross taking possession of the premises (but not opening), Ross could terminate the lease. Ross took possession, but before it opened, Mervyns went bankrupt and closed its store in the shopping centre. As a result, the co-tenancy requirement was not satisfied and Ross elected to not open and more importantly, to not pay rent. After the 12-month period expired, Ross terminated its lease.

89 The landlord sued Ross arguing that the co-tenancy clause was unconscionable and constituted an unlawful penalty. The California Court of Appeal agreed with respect to the rent abatement component based on the general principle that a contractual provision will be an unlawful penalty if the value of the money or property given up under it is not reasonably related to the harm that is anticipated to be caused. The evidence in that case, accepted by the trial judge and similar to the evidence or absence of evidence in this case, showed that Ross did not think the closure of the Mervyn's department store would actually have *any* measurable impact on their store's viability, that is, they did not anticipate *any* lost sales.

90 The Court of Appeal of California accepted that "a contractual provision that provides a party with a true alternative method of performance — that is, an alternative that provides a rational choice between two reasonable possibilities — does not involve an unenforceable penalty."[44] It described the test for unenforceability at p. 1361 as follows:

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42. But see Sharpe J.A., in *869163 Ontario Ltd. v. Torrey Springs II Associates Ltd. Partnership* (2005), 76 O.R. (3d) 362 (Ont. C.A.) at paras. 19-34, discussed below, that unconscionability is the preferred analytical route in Ontario.

43. *Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.*, 232 Cal. App. 4th 1332 (U.S. C.A. 5th Cir. 2015).

44. *Ibid.* at p. 1358.

> Generally, a contractual provision is an unenforceable penalty if the value of the money or property forfeited or transferred to the party protected by the provision bears no reasonable relationship to the range of harm anticipated to be caused to that party by the failure of the provision's requirements.

91 Consequently, while emphasizing that the determination of the enforceability of a co-tenancy provision will always depend heavily on the particular facts of each case, the Court found that Ross had breached the lease and required it to pay several hundred thousand dollars in damages in respect of the rent payments that it did not make prior to terminating the lease.

92 Importantly, and surprisingly in that case, there was *no* stipulated time limit on the rent abatement. It could continue indefinitely, or at least until the 12-month period passed when Ross could then break the lease. Yet in this case, there is exactly the same absence of a stipulated time limit to GAP/ Old Navy's claim to pay the Alternative Rent remedy, and at least up until the commencement of this trial, Old Navy appeared to take the position that it could continue to pay Alternative Rent indefinitely merely because of Danier's insolvency. That issue is addressed below.

93 I note that the Court's analysis and conclusion in *Ross* relative to the rent abatement clause constituting an unlawful penalty is similar to the results that have been reached by some Canadian courts. Under Canadian law, penalty clauses are generally not enforceable. Generally, a provision that specifies the payment of an amount upon a breach, regardless of the damages actually sustained, will be regarded as a penalty clause. To avoid being characterized as unenforceable, the amount to be paid needs to be reasonable and a genuine pre-estimate of damages. If both of those elements are not present, the Court may not find the clause to be enforceable.

94 Alternatively, as the Ontario Court of Appeal has concluded in several cases, referenced further below[45], so-called penalty clauses may simply breach principles of unconscionability. The argument is that within the context of good-faith performance under the contract, it would be unconscionable to permit such a clause to be enforced, particularly where no time limit is specified for the period during which it may operate, and no alternative remedies given to either party to bring the lease to an end, say six months after such an event has occurred.

95 Regrettably, given their reliance on it, counsel for the Landlord did not provide me with any update to the California decision, but it now appears from more recent developments that it may be limited to its own specific circumstances. I learned from my own noting up of the decision in *Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.*, that the *opposite* result was reached in a 2017 Pennsylvania decision upholding the award of a panel of Arbitrators, and that also involved Ross Dress for Less, Inc., as defendant.

96 In that case, Ross had a lease for retail space in the Lycoming Crossing Centre in Eastern Pennsylvania, owned by a company named VIWY. That lease contained a co-tenancy provision. It

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45. *869163 Ontario Ltd. v. Torrey Springs II Associates Ltd. Partnership* (2005), 76 O.R. (3d) 362 (Ont. C.A.) per Sharpe J.A. at paras. 19-34; *Redstone Enterprises Ltd. v. Simple Technology Inc.*, 2017 ONCA 282, 137 O.R. (3d) 374 (Ont. C.A.), at paras. 21-26 and 30-32.

permitted Ross to pay reduced alternative rent in the event of the business failure of *any one of* the three anchor tenants stipulated for that shopping centre. One of the three, a company named Circuit City, went out of business in 2009. It was one of the named anchor tenants expected to draw traffic to that mall. The landlord could have satisfied the anchor tenant provision of the lease by finding another similar store but it did not, yet it continued to demand that Ross pay full rent.

97 Ross demanded a refund, the landlord refused and terminated Ross' lease. Ross then alleged breach of lease in U.S. District Court. The case was ultimately decided at arbitration, but in contrast to the California case, the arbitrators awarded Ross $1.9 million in damages including legal fees.

98 Ross then moved for confirmation of the arbitration panel's June 26, 2017 decision on its breach of contract claim against the defendant, and the defendant brought a motion to vacate the arbitration award, arguing that the arbitration panel failed to properly apply the Statute of Limitations to Ross' claim. In the result, the award was confirmed by Sanchez J. of the United States District Court for the Eastern District of Pennsylvania in September 2017.[46]

99 As a result, in contrast to the California decision, in this latest U.S. instalment on co-tenancy provisions, the tenant's right to claim alternate rent under the co-tenancy provisions of that lease *was* upheld by the approval of the arbitrators' award, but the case as reported does not permit great insight into the arbitrator's reasoning. It instead focuses on a limitation period issue that is of no import in this context.

100 Finally, in *T. Eaton Co., Re*[47], as in the more recent failure of Target Canada, tenants who sought to enforce co-tenancy rights following the business failure of an anchor tenant, like Eatons of Canada or Target Canada, have seen their alternate rent and closure remedies curtailed to permit insolvency restructuring. Recent developments have also occurred in Canada relative to the enforcement of co-tenancy rights in the wake of the insolvency of Target Canada.

The Positions of the Parties

101 Old Navy relies on section 13.3 (A) of the Lease. It takes the position that the clause is crystal clear. According to Old Navy's interpretation, if *any one of the Key Stores* ceases to operate at any time during the term of the Lease or extensions, this is a "Co-Tenancy Failure", entitling Old Navy to reduce its rent to 50% of minimum rent for three months and 25% of minimum rent thereafter and indefinitely. In other words, GAP/Old Navy regards the test as containing two distinct elements. One is related to the identity and continuing operation of the Key Stores. The other relates to the overall occupancy and operations of the GLA of the Centre. In GAP's view, *both* elements, which it regards as distinct, apply at all times,

102 Further, in GAP/Old Navy's interpretation, *both* of the Co-Tenancy Requirements: (i) presence of the named Key Stores; and (ii) the occupied and operative GLA requirement, subsisted on an ongoing basis, and were not simply operative as a two-prong test to be met at the initial opening point of the Old

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46. *Ross Dress for Less, Inc. v. VIWY, L.P.*, Doc. 12-131 (U.S. Dist. Ct. E.D. Penn. September 19, 2017).
47. *T. Eaton Co., Re* (1997), 46 C.B.R. (3d) 293 (Ont. Gen. Div.)

Navy Store, that is, not just at the commencement of the Lease during the construction and immediate post-construction period, as claimed by the Landlord.

103 There is a further important interpretive component to GAP's position. The evidence shows that it was GAP/Old Navy's view that if a Key Store closed, it would be entitled to commence and to continue to pay Alternate Rent for its premises *unless and until*: (i) the Landlord replaced the failed Key Store with another retailer; (ii) such other retailer was also engaged, not simply in retail, but in the sale of "upscale high quality apparel" consistent with Old Navy's view of its products; and (iii) the new Key Store actually took over the exact same premises as had been occupied by the failed store. Nevertheless, GAP also took the position that the Landlord could lease space to anyone it wished, without complying with these three criteria, but if it did, then the Co-Tenancy remedies would be operative, with no apparent end date.

104 GAP's position changed somewhat at trial, and Old Navy ultimately conceded that other provisions of the Lease would limit and prevent the payment of Alternative Rent from continuing indefinitely. That seems likely to have been a change of position encouraged by counsel, but there is nothing in the original application materials that suggests that GAP/Old Navy were not adhering to their original expansive view when these matters first became a source of conflict between the parties.

105 In contrast, the Landlord was adamant that it was not its intention, nor did Mr. Cherniak ever understand that it was Old Navy's intention and belief that the future loss of *any* Key Store would trigger Old Navy's co-tenancy rights under the Lease, *provided the GLA operating requirements continued to be met.*

106 As his evidence showed, instead, Mr. Cherniak's understanding of these provisions was quite different. He believed that the requirement for the listed Key Stores being in place referred *only* to the initial lease-up period/opening requirements, and that *thereafter* only the 80% percentage occupancy test was applicable. The Landlord understood and believed that the purpose of the Co-Tenancy Requirements was to protect Old Navy from a catastrophic loss of tenants at the Centre, which would or could have resulted in the loss of the foot traffic that the Landlord understood GAP required in order to protect the economic viability of its Old Navy store. Mr. Cherniak also made clear that he relied on Old Navy and GAP to act reasonably and in good faith, and in accordance with the usual and understood reasonable expectations between a landlord and a tenant in a long-term shopping centre lease.

Issues

107 This case raises four questions. First and foremost is the question of contractual interpretation:

> (i) Is the Lease clear, as GAP/Old Navy argues, with Old Navy entitled to pay Alternative Rent following the insolvency of Danier, and with the Landlord having failed in its notice obligations, and to put in place a satisfactory replacement Key Store?

or

(ii) Is the Lease unclear and poorly drafted, as the Landlord argues, suffering from latent ambiguity, not reflective of the parties' intent and leading to absurd and inefficacious business results?

108 The case law shows that the answer to this question must necessarily be informed by a number of factors: (i) the commercial purpose of the Co-Tenancy provisions; (ii) the evidence relative to the importance and identity of Key Stores in this particular Lease; (iii) the understanding and intent of the parties at the time the Lease was negotiated; and (iv) the understanding and intent of the parties as reflected in their subsequent conduct.

109 The second question is whether either of the parties adhered to their obligations to act reasonably and in good faith in their performance of the entirety of the contract.

110 Third and fourth, but subsidiary in importance to the first two questions, are the validity of the two further claims made by the Landlord. The first is that the Co-Tenancy Requirements amount to an unenforceable penalty clause. The second is that the failure to include a key term in the final Lease terms, a term which the LOIs show was intended to be included, requires that the Court exercise its equitable jurisdiction to rectify the Lease.

111 I consider each of these questions in the paragraphs that follow.

Analysis

(a) Interpretation of the Lease and the Co-Tenancy Requirements

112 GAP/Old Navy claims the provisions of the Lease are straightforward and should be given effect despite the Landlord's arguments of perceived unfairness. The Landlord raises numerous grounds to support its position that the language the parties have used is not only unclear, but is also unreasonable, not what was ever intended, and absurd. It says that GAP/Old Navy's interpretation of the Lease and the co-tenancy-related provisions is untenable.

113 I find that the provisions of the Lease relating to co-tenancy are not straightforward nor unambiguous as claimed by GAP/Old Navy. I find that the language used in section 13.3(A) is unclear and capable of two different interpretations. The parties' beliefs greatly differ on the operation of the provision. These were not after-the-fact positions — both appeared to have different understandings of what the Lease said from the moment it was signed. The 15 plus years of co-operative and largely uninvolved dealings further demonstrates that each party did have different understandings of what the contract said from the moment it was signed, because the issue never came up before until Danier's insolvency.

114 Further, the language used in the Lease differs from the description of the Co-Tenancy Requirements that the parties agreed to as set out in the LOIs. Yet no explanation for that variance can be found in the evidence. GAP/Old Navy produced no evidence outside of the Lease to support its position, and yet its claim makes no sense in the context of how events actually unfolded.

115 Stated summarily, I find that there is no clarity on what the final common intention of the parties was meant to be, assuming they had a common intention, which, frankly, is arguably belied by the evidence of their conduct.

116 GAP/Old Navy offered no evidence from anyone who was actually involved or participated in the negotiation of this Lease. Mr. O'Connor testified based solely on his own experiences in *other* leases and conceded that he cannot testify reliably about what was in the minds of the parties from GAP's perspective at the relevant time because he simply was not there.

117 Neither did Mr. O'Connor have *any* discussions with *anybody* from GAP who was involved at the time of the negotiation of the Lease. No other GAP personnel participants came forward to provide evidence. Ms. Carol Hee had been in-house counsel for GAP/Old Navy at the time, and she was clearly involved, because she wrote some of the correspondence that went back and forth between GAP and the Landlord at the time. Blair Hodgson, the Director of Real Estate at GAP and GAP's Canadian real estate representative at the time was also certainly involved. As GAP's signatory during the Lease negotiation phase, it is Mr. Hodgson's initials which can be seen on the LOIs and the handwritten amendments to those LOIs.

118 However, Mr. Hodgson no longer works for GAP and there was no evidence of any effort made to find him. Further, by the time this litigation was underway, Ms. Hee had left GAP and was working for a San Francisco law firm. However, Mr. O'Connor never spoke to her and it was his understanding that "she had no recollection at all" of this Lease transaction. Unfortunately this information did not come from Ms. Hee, but from some other unnamed partner at that firm.

119 In contrast, Mr. Cherniak, who testified for the Landlord, was directly involved in the negotiations of and drafting of the Lease. As I explain in greater detail below, in my view, his evidence speaks volumes about what the Landlord understood, which I find seems contextually and objectively reasonable having regard to the language used. This is plainly at odds with what GAP/Old Navy now advances as the meaning of the clause. It was his direct and blunt testimony that the interpretation now put forward by GAP was neither ever understood, nor would it have ever been agreed to by the Landlord.

120 While I find both parties at fault in their conduct relative to the drafting of the Lease, overall I accept Mr. Cherniak's evidence and prefer it to that of Mr. O'Connor, as his evidence relates to the relevant time period including what happened, what the parties agreed to, and what they would have understood at the time, not sixteen years later. I examine these issues separately in the subsections that follow.

121 Regardless, the ambiguity I have found in the language used in ss. 13.3 and 13.4, combined with the absence of a reciprocal provision that was intended but not included in the Lease, requires me to consider the intent of the parties in 2000 when the Lease was concluded and to use their conduct thereafter to assist in understanding their intent and determining the appropriate disposition in this matter.

(b) The parties' intentions in 2000: The LOI amendments and choice of Key Stores

122 In considering the interpretation of the Lease and what the reasonable understanding of the parties would have been, I find it important to make several observations.

123 First, this started out in a new and unusual situation. This was one of the first Old Navy stores opened in Canada, and that appears to have affected the negotiations that led to the conclusion of this Lease.

124 Second, a unique aspect of the Lease was the unusual and last minute circumstances and impromptu process that led to the determination of the Key Stores. That is important since *none* of the Roots, Globo Shoes, or Danier Leather Outlet stores would normally have been considered to be anchor tenants and they were *not* designated as Key Stores in *any* other GAP or Old Navy leases.

125 Finally, there is the obvious discrepancy between the LOIs and the Lease relative to what was certainly intended to be a reciprocal termination right.

126 I find I am unable to accept Mr. O'Connor's contention that Danier and the other Key Stores at the Centre, apart from Cineplex, were intentionally chosen because of their particular retail specialties. That contention is not borne out on the evidence.

127 First, the evidence shows that Mr. O'Connor had no real knowledge of who any of Danier, Roots, or Globo Shoes were as Canadian retailers before the time Danier failed in 2016, and there is no evidential reason to believe GAP/Old Navy would have had any specific knowledge of these retailers before then.[48] In fact, this is the *only* shopping centre where GAP had any outlets, for any of its brands, that also had a Danier as a named Key Store tenant.

128 Nevertheless, at questions 178-182 of his examination for discovery, Mr. O'Connor stated that the choice of these Key Stores by GAP was specific and intentional. He was asked if he had any knowledge of the demographic of shoppers who would shop at Danier or know why they were named. He responded that "[i]t would be consistent with the demographic of an Old Navy, that's why we named them as a key store", but had to acknowledge that he had no personal knowledge as to why they were named, had not asked anyone else why they were named, and could find nothing in GAP's files indicating why any of Danier, Roots or Globo Shoes were named as a Key Store.

129 While Mr. O'Connor may have claimed that the choice of these Key Stores by GAP was specific and intentional, that construction is not supported on the evidence. There is no evidence that GAP/Old Navy itself "selected" or "named" these tenants as Key Stores. Indeed, Mr. O'Connor later admitted this.[49] More importantly, seemingly undermining his own claim, Mr. O'Connor gave evidence that these stores would not generally have qualified as Key Stores according to GAP's internal policies or under the provisions of its standard form Lease, to the very limited extent GAP was willing to reveal them in the

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48. Excerpts from Cross Examination of Ryan O'Connor held November 15, 2017, read in as part of the Landlord's case: Q. 144-145, Q. 163-175.
49. Q. 239-244

course of these proceedings.

130 Mr. O'Connor explained that GAP generally identified key stores based on size guidelines. GAP generally preferred so-called "big box stores", meaning a retail store comprising somewhere between 50,000 to 100,000 square feet, depending on the size of the Centre. He acknowledged that GAP's preferred key stores could typically be regarded as anchor tenants, but GAP does not use the "anchor tenant" phraseology in its standard form Lease, preferring the use of the term Key Store in this Lease.

131 Regardless of which term may be used, however, the point here was that none of the identified Key Stores at this Centre, except Cineplex, came even close to fitting that profile. I found these answers to be telling relative to the selection process, given that the square footage of Danier was only about 6,500 sq. ft. That store was about the same size as Roots, but only about half the size of Globo Shoes, and just over one-tenth the size of Cineplex.

132 Most importantly, when asked in reference to "big box tenants" whether he was referring to anchor tenants, Mr. O'Connor confirmed that the selection of key stores was all about identifying the so-called "drivers of traffic." He confirmed in his evidence that *the purpose of picking key stores was to pick the traffic generators, the drivers of traffic to the Centre, the businesses which would most strongly attract customers and shoppers. These would typically be the big box stores, that is, retail outlets or service providers comprising 50,000 to 100,000 square feet, like Canadian Tire and Cineplex. [Emphasis added]*

133 Rather than having been specifically selected by GAP, however, it is evident that the Key Stores here were proposed by Seymour Schwartz of Paracom, the Landlord's Agent, acting in effect for both parties, and it is plain on the evidence before me that they came to be chosen, almost as an afterthought.

134 Initially, the LOI shows that GAP/Old Navy preferred Canadian Tire and Cineplex as Key Stores for the Co-Tenancy Requirements. These choices would have been consistent with their corporate policy respecting key stores. It is unknown whether the GAP representatives knew anything about Canadian Tire in 2000 when the Key Stores were chosen, other than that it was a so-called "big box" store.

135 However, Mr. O'Connor knew nothing when examined in 2018 about the pervasive retail presence of Canadian Tire across Canada or the range of products it sells. It would probably surprise many Canadian shoppers given the ubiquitous presence of Canadian Tire as a pan Canadian retailer, but Mr. O'Connor was not familiar with the store or aware that it sold a wide variety of products, from car parts and tires to tools, appliances, hardware, furniture and sporting goods, clothing, and pet supplies. He betrayed this lack of knowledge when asked on discovery whether he knew what kind of merchandise it sold. His answer is telling:

> **249. Q.** Do you know what kind of merchandise it sells?
>
> **A.** I imagine tires. I . . .
>
> **250. Q**. You truly are not familiar with it then?

A. Right.

136 Mr. O'Connor was also not aware if there were any other shopping centres in Canada where GAP had a presence where any of Canadian Tire or the other three alternative choice stores were key stores. Although at the time the LOI was drafted, GAP representatives wanted Canadian Tire as a Key Store, that was not possible as it was learned that the Canadian Tire store freehold was independently owned and therefore not technically part of the Centre.[50]

137 The evidence shows that during the construction of the Centre, a CIBC bank branch, a Tim Horton's, another chain restaurant outlet, and the retail stores in Pod B (where all of Globo Shoes, Danier Leather and Roots were located, along with Party City) were the *only* retail outlets that were actually up and running at the time this Lease was being negotiated. Several of the current building pods that now exist at the Centre had not yet been constructed and had no tenants committed to those spaces at the time Old Navy entered into the Lease, or were under construction but some time away from opening. Consequently, these were amongst the only stores that were available to be chosen as Key Stores, and that could have been chosen, regardless of their retail specialties or size.

138 When asked if he had ever been told that GAP/Old Navy particularly wanted to have Roots, Globo Shoes, and Danier in the Centre as Key Stores, Mr. Cherniak responded:

> No. As I said yesterday, we were at the agent's office. I raised the issue that Canadian Tire had been sold and I had no control over it. And he said okay, we'll put in these three tenants to replace Canadian Tire. My assumption was simply - it was the only other building, really, where there were retailers. So, Old Navy chose at the agent's advice. I assumed he was acting for both parties, quite frankly, that this was sort of a standard way of dealing with it. [Emphasis added]

139 An examination of the December 15, 1999 LOI, as updated to April 4, 2000, confirms how the thinking of the parties progressed. That LOI originated from Blair Hodgson and was addressed, not to the Landlord, but rather to Paracom Realty Corporation, the Landlord's agent, to the attention of Seymour Schwartz. This LOI went back and forth between the parties and contains handwritten amendments and initials reflecting the progress of the negotiations, as well as the changes made to the intended and agreed terms of the Lease as those negotiations moved forward.

140 The ongoing Co-Tenancy Requirements were set out at p. 3 of the December LOI, as follows:

> **Ongoing Co-Tenancy Requirements**: Tenant shall not be required to open the Premises for business at all nor operate during the designated times for the Centre unless (a) Canadian Tire and Cineplex are open during the designated times for the Centre and (b) stores occupying at least 80%

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50. Ironically, I note that in the *Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.* case, note 29 above, the Mervyns Department Store that failed and caused that litigation was an anchor tenant, but like Canadian Tire in this case, its store was not actually part of the shopping centre there, but was on land separately owned by Mervyn's. Nevertheless, the Landlord chose to permit a co-tenancy provision based upon its occupancy. Thus, since that land was outside of the control of the Landlord, that severely curtailed the landlords ability to cure the default within 12 months, which would have required not only the purchase of the Mervyn's property, but also new tenants to be located who would have been acceptable to Ross. That was an important factor in the decision reached.

of the gross leasable area of the Centre are open in the Centre* in which event tenant shall immediately have the following remedies:

• Operate its business and pay, in lieu of Rent (including minimum rent, any additional rents, CAM and taxes) 50% of tenants' monthly Minimum Rent for the first three months and 25% of tenants' monthly Minimum Rent thereafter until such conditions are met

• If such condition is not satisfied for six months, tenant may terminate the lease at any time before such condition is satisfied upon 30 days' notice to Landlord.

141 As mentioned, handwritten changes were made to the language of the above provisions. First, the Co-Tenancy Requirement was changed to substitute "Roots, Globo Shoes and Danier Leather" in lieu of "Canadian Tire". Further, the words "as of the date Old Navy opens" were inserted by the Landlord's agent at point * in the text (above), but then that addition was struck through and replaced by the words "given the shopping centre size at the time Old Navy opens."

142 There was also an important change made to the second remedy. Rather than being solely in favour of the Tenant, the second remedy was amended to read:

If such condition is not satisfied for six months, the Landlord or the Tenant may terminate the lease at any time before such condition is satisfied upon 30 days' notice to Landlord.

143 The evidence established that all of the changes were handwritten by Seymour Schwartz, at Paracom, acting effectively as agent for both parties.

144 The date on which Blair Hodgson signed the final LOI is unclear, but Lloyd Cherniak appears to have signed his name to that amended LOI on March 31, 2000. The dates of initialization of the handwritten interlineations and changes, is also uncertain. Be that as it may, the final terms of the Occupancy Requirements as set out in the Lease are as described above.

145 I find that the Lease documents contain material differences from the concepts that appeared to have been agreed in the terms of the LOIs. The three important differences are:

(i) There was no apparent intent in the LOIs that each of the Key Stores be open at all times that Old Navy was open;

(ii) There is uncertainty about the ongoing test relative to the GLA of the Centre and whether a co-tenancy default could occur merely because one Key Store accounting for less than 2% of the GLA might fail, when the Centre was otherwise fully operational; and

(iii) There was no provision included in the Lease for the Landlord to have a reciprocal right as GAP/Old Navy did, to terminate the Lease six months after a default in the Co-Tenancy operating requirements, and as had clearly been written in by hand.

146 The last point is particularly important because that omission left the Landlord in a materially

disadvantaged position under the Lease. Under this interpretation Old Navy could claim it was entitled to continue to pay alternative rent for the duration of a lease term following an alleged Co-Tenancy Failure, when the Centre was otherwise busy and fully operational with a lot of shopping traffic. The failure to include that provision in the Lease, even though it was obviously intended to be included, meant there was no reciprocal escape provision available to the Landlord.

147 In his evidence, Mr. Cherniak testified that he had a different understanding of the Co-Tenancy Provisions at the time they were negotiated. He said he *never* understood that a failure at any time after opening of any *one* of the three of the smaller Key Stores would be enough to trigger Old Navy's Alternative Rent remedy. Instead, it was the Landlord's understanding that to activate Old Navy's Alternative Rent remedy, not only would *all three* of the Key Stores have to fail, but in addition, that the Landlord would also have had to fail the operational square footage requirement. Mr. Cherniak testified that:

> I had assumed that we had an agreement in terms of the key tenants. They were there. And that Old Navy was satisfied with the key tenants. And that the clause that remained was simply that there was a square footage requirement. So, that if there were major catastrophe in the mall, a failure of Cineplex, or *the three tenants that were replacing Canadian Tire*, that they would be in some financial problem, and that there would be kicking in some reductions in rent, and that we could terminate the lease, or we replace defaulting covenant. I always assumed there would be a conversation with Old Navy on any kind of issue like that. [Emphasis added]

148 Later, he was asked what his understanding was of the application of the Co-Tenancy Requirements in the summer of 2016 after Danier had failed. Mr. Cherniak responded:

> Well, as I said, I mean, I didn't think they applied. The lease specified there was a percentage of the Centre had to be achieved. I felt that the clause gave me permission to basically provide the tenant mix that best suited the plaza, subject to any reasonable provisions. And we were nowhere near in a position where there was any sort of default in co-tenancy. I mean, in my mind that provision only applied if there were catastrophic failure in the mall. If Cineplex left and suddenly the Centre started to depopulate, then there would be the situation were a tenant might either leave or ask for a reduced rent. [Emphasis added]

149 I find on the basis of all of this evidence that much clearer wording would have been needed if the actual contractual intention had been that the loss of any *one* of these tenants, on its own, at any time during the term of the Lease, and any renewals, whether by failure to renew, relocation, closure, bankruptcy, or for any other cause, could reasonably have been expected or understood to trigger such onerous co-tenancy rights as GAP/Old Navy is now asserting in this case.

150 In particular, I find that much clearer wording would have to have been used if such a relatively inconsequential event, such as the failure of one small retailer, was intended to relieve GAP/Old Navy of its primary obligation under the Lease to pay rent for the use of its leased retail premises. Yet, that is the effect of GAP/Old Navy's claimed interpretation, because under the Alternative Rent remedy, GAP/Old

Navy effectively pays only part of the Common Administration costs for the Centre, and no rent at all. I reject this construction of the Lease.

(c) The parties' intentions and the contra proferentum rule

151 While the Lease was based on GAP/Old Navy's standard form of lease, it has provided no evidential explanation for the variance between the LOIs and the final Lease terms.

152 GAP/Old Navy's counsel contends that there is no room for the *contra proferentum* rule to operate in circumstances where both parties are sophisticated commercial parties, like these two were. He relies upon Holden J.'s admonition in *McKee v. Montemarano*[51], at paras. 27-28:

> 27. Mr. Monaghan submits that the context of this Agreement is that each party had a sales representative acting for him, Mr. Ingram for McKee and Mr. Whetung for Montemarano. They are both associated with the one agent-broker, Re/Max, which had the duty to share all information (subject to the exceptions in the Confirmation of Co-operation and Representation signed by the parties). The Agreement must be read as a whole and within its factual matrix, not through a literal parsing of individual words, which could defeat the objective of the parties in signing the agreement. Dumbrell v. Regional Group of Cos. (2007), 85 O.R. (3d) 616 (Ont. C.A.); J.D. McCamus, *The Law of Contracts*, Toronto, Irwin Law, 2005, at p.717-719.
>
> 28. Mr. Monaghan further submitted that the *contra proferentem* doctrine should play no part in the exercise because in Estey J.'s words:
>
>> A *contra proferentem* approach, a device often used by courts to avoid injustice, does not seem appropriate where the contracting parties are sophisticated, of equal bargaining power and where Antorisa contracted with the benefit of competent legal advice after considering the scope of the limitations on liability, including the indemnities, and after being provided with the opportunity to amend them.
>
> Antorisa Investments Ltd. v. 172965 Canada Ltd., [2007] O.J. No. 195 (Ont. S.C.J.), at para. 6. I agree. There is no inequality in bargaining power and access to legal advice in this case.

153 However, I find that it is the very next paragraph that more accurately, by contrast, frames the problem of interpretation here, and the problems raised by the absence of explanatory evidence. In *McKee*, Holden J. found as follows at para. 29:

> 29. Where I cannot accept Mr. Monaghan's submission on this branch of his argument is the proposition that a harmonious contractual approach requires that express provisions in the contract should be ignored in order to achieve a reading more in line with one party's present requirements. The parties agreed to a general notice provision in paragraph 6 of the Agreement, there is no doubt of that. But, contrary to Mr. Monaghan's suggestion that part of the factual matrix of this Agreement was a complete lack of contemplation or concern by the parties over possible

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51. *McKee v. Montemarano* [2008 CarswellOnt 4285 (Ont. S.C.J.)], 2008 CanLII 36163.

delay in providing notice or waiver, this Agreement includes a "time of the essence" clause and, added as part of the contract, a term in Schedule "A" specifically directed at the due diligence condition and a change to the deadline at Mr. McKee's request to move it forward. That clause and that change were specifically initialled by both parties.

154 I find the decision in *McKee* to be different from the case before me here. In *McKee* the Court found that it was able to give unambiguous meaning to the words of the clause through a harmonious contractual approach and rejected counsel's submissions that "express provisions in the contract should be ignored in order to achieve a reading more in line with one party's present requirements."

155 In contrast, in this case, I find that I am *unable* to give unambiguous meaning to the words of the co-tenancy clauses through a harmonious contractual approach, because the provisions appear, on their face, to be ambiguous, unclear, and capable of alternative meanings.

156 The Supreme Court's seminal decision in *Consolidated-Bathurst Export Ltd. c. Mutual Boiler & Machinery Insurance Co.*[52] also assists in understanding *contra proferentum*. That decision involved the interpretation of an insurance contract, where the rule for centuries had been that "where an ambiguity is found to exist in the terminology employed in the contract, such terminology shall be construed against the insurance carrier as being the author, or at least the party in control of the contents of the contract."[53] Even there, however, Estey J. accepts the earlier admonition of Cartwright J., as he then was, that resort is to be had to the *contra proferentum* rule "only when all other rules of construction fail to enable the Court of construction to ascertain the meaning of a document."[54]

157 Estey J. completes the thought at para. 26 as follows:

> 26. Even apart from the doctrine of *contra proferentem* as it may be applied in the construction of contracts, the normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract. Consequently, literal meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted. Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result. It is trite to observe that an interpretation of an ambiguous contractual provision, which would render the endeavour on the part of the insured to obtain insurance protection nugatory, should be avoided. Said another way, the courts should be loath to support a construction which would

52. *Consolidated-Bathurst Export Ltd. c. Mutual Boiler & Machinery Insurance Co.* (1979), [1980] 1 S.C.R. 888 (S.C.C.), per Estey J. for the majority.
53. *Ibid* at para. 25.
54. *Reliance Petroleum Ltd. v. Stevenson*, [1956] S.C.R. 936 (S.C.C.) at p. 951. See also Lindley L.J. in *Cornish v. Accident Insurance Co.* (1889), 23 Q.B.D. 453 (Eng. C.A.), at p. 456.

> either enable the insurer to pocket the premium without risk or the insured to achieve a recovery which could neither be sensibly sought nor anticipated at the time of the contract.

158 Based on this background, I do not accept the contention that *contra proferentum* cannot apply here, not because of the rule *per se*, but for two other reasons. First, GAP/Old Navy was in control of the drafting, but it took no steps to adduce contemporaneous evidence that would support its interpretation of what the words were intended to mean. GAP had no evidence to offer from anyone who was actually involved or participated in the negotiation of this Lease. Mr. O'Connor's evidence cannot fill that lacuna because he simply was not there and does not know what happened.

159 Second, while GAP admits that the reciprocal termination right was in the final version of the LOIs, it also acknowledges that it did not include that term in the Lease. The final production of the Lease was within GAP's control — it sent the Lease to the Landlord with the ambiguous provisions regarding the Key Stores and the absence of a reciprocal right in the Landlord to bring the Lease to an end after six months of Alternative Rent being paid. This was despite the fact that a handwritten amendment had been specifically inserted in the LOI.

160 When questioned on the handwritten insertion of a reciprocal termination right in favour of the Landlord as well as the Tenant, Mr. O'Connor acknowledged the handwritten words, "The landlord or the tenant", were inserted after the phrase: " . . . If such a condition is not satisfied for six months...", but he did not know whose handwriting it was. More importantly, he acknowledged that provision disappeared and was not contained in the final version of the Lease, that he was not aware of any discussion between the Landlord and the Tenant leading to the removal of that provision, knew of no-one from whom he could obtain such information and did not know whether the Landlord was ever sent the clause that appeared to have been intentionally deleted.

161 However, while the Landlord acknowledged the Co-Tenancy Requirements, he believed they would only be triggered if a catastrophic event occurred that affected major tenants and caused the traffic in the Centre to decline as a result of a failure of the percentage GLA tests. The Landlord did not believe that a relatively insignificant tenant that went into insolvency after 15 years constituted such an event. I find this interpretation to be more consistent with the evidence as a whole, the case law, and legal commentary on the purposes of co-tenancy clauses.

162 I reject GAP/Old Navy's contention that as a consequence of this omission, the Landlord is now bound to accept rent that barely covered common area expenses. It is not a commercially reasonable position and offends the business efficacy rule of interpretation.

163 GAP's claims make no sense in the context of how events actually unfolded, and I am unable to find that the parties actually shared a common intention consistent with GAP's interpretation, because, frankly, the existence of such a common intention is belied by the evidence of their conduct. Amongst the ambiguities that I find in s. 13.3 of the Lease, apart from seemingly poor and ambiguous drafting, characterized by the presence and confusing use of punctuation and parenthetical phrases, are the following:

(i) The clause does not state that each of the Key Stores must be open for business at all times during the term of the Lease and renewals thereof;

(ii) Consistent with Mr. Cherniak's understanding, the clause addresses the conditions for the opening and initial operations of Old Navy and refers specifically to GLA at the expiry of the construction period (in 2000);

(iii) Instead, it appears that for ongoing operations, the clause requires that 80% of the Key Stores and other retail stores in the Centre be open for business.

164 Having considered the evidence as a whole, I find that it was reasonable for the Landlord to have understood that the Lease required the Key Stores to be open for business at the commencement of the Lease, but that thereafter that requirement reduced to 80% of the Key Stores and other retail stores being open for business. That is a reasonable construction because it appears to be what the LOIs contemplated. Moreover, that construction would have avoided the business absurdity of the failure of a business occupying less than 2.5% of the GLA of the Centre to have the same consequence as if Cineplex or Canadian Tire had failed, assuming it had continued to be a named Key Store. That is simply not a rational result.

165 Even then, I consider the Landlord's understanding that the provisions were intended to apply only to a catastrophic situation, not to an inconsequential technical default, to be a reasonable interpretation, consistent with the business efficacy rule.

166 Moreover, no catastrophe occurred here. The Centre was well over 90% leased, occupied and operational at the time of Danier's insolvency and the subsequent closure of the Danier Leather Outlet at the Centre. GAP/Old Navy adduced no evidence that there was *any* diminished shopper traffic as a result of Danier closing at the Centre — I add that they had the high-tech surveillance cameras to substantiate such a claim, if they had wanted to or such a claim was merited.[55]

167 GAP/Old Navy did not produce a shred of financial evidence to suggest that Danier's business failure had *any* impact on the financial success or operations of its Old Navy outlet. To the contrary, the evidence was that the Centre has been and continues to be a very successful commercial operation. Mr. Cherniak's evidence about the turnover of stores and restaurants shows that there is nothing unusual about changes of tenancy over time, and so long as the percentage GLA occupancy requirements are being met, there is no diminution in traffic, and no factual foundation for the highly-technical Key Store replacement system interpretation adopted by Old Navy.

168 A technical interpretation of language that leads to commercially absurd results is to be avoided. If the language used in s. 13.3 of the Lease literally means what GAP/Old Navy says it means, then this

55. I was somewhat disturbed to learn from the evidence to learn that GAP/Old Navy actually used surveillance cameras to surreptitiously record and keep track of not only all foot traffic into and out of its Old Navy outlet, provided the potential customers stayed in the store for a *de minimis* period of time, but also that reach of the surveillance camera also extended to capture traffic outside of the store, recording anybody that walked or drove within a set distance of the front of the store. It maintained statistics of that traffic at head office in San Francisco, but I note there was no evidence produced that showed any decline in traffic attendant on the Danier Leather Outlet failure.

leads to a commercially absurd situation where Old Navy would be entitled to continue to enjoy the use of the leased premises for the duration of the Lease and all extensions, while paying considerably less than its share of the operating costs, let alone paying any rent to the Landlord. Plainly, such an interpretation fails to take into consideration the legitimate expectations of the Landlord. It fails the business efficacy test.

169 In *1525292 Ontario Ltd. v. Canadian Tire Real Estate Ltd.*[56], this Court addressed a similar situation, where a literal interpretation of the lease would result in Canadian Tire effectively being excused from payment of rent for an indefinite period of time. The Court found that this would result in a commercial absurdity. O'Connor J. writes:

> To excuse CTREL from rent payments for an indefinite period (possibly up to 25 years) while it enjoyed the use of the premises for its business ends would result in a commercial absurdity. The courts have long adhered to a principle enunciated by Jessel M.R. in *Wallis v. Smith*[57] as " . . . the well-known doctrine that in the construction of written instruments you may depart from the literal meaning of the words, if reading the words literally leads to an absurdity".
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> In *Holt v. Thunder Bay (City)*[58], Rosenberg J.A. writing for the Court of Appeal, instructed that:
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>> [T]he contract should be construed as a whole, giving effect to all of its terms, so long as it does not result in an absurdity. In the case at bar, I interpret the words at issue to mean the term of the renewal starts when CTREL opens for business, that is, the first ten years of the renewal. While usually the obligation for the payment of rent also commences with the term, the clause does not specifically say that. An interpretation that rent commences with the term, in the circumstances of this agreement, leads to the absurdity of the tenant occupying premises rent free for as long as it wishes, possibly up to 25 years, if it forgoes opening the gas bar for business. The true intent of the parties cannot have been to require the owner/landlord to bear the costs of a valuable piece of property while precluded from occupying it or enjoying any of the commercial benefits of it, i.e. rents.
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> Another way of putting the courts' function of interpreting contracts to prevent absurdities is to say contracts should be interpreted to give 'business efficacy' to the terms of the agreement. In *TDL Group Ltd. v. P.J.P. Developments Ltd.*[59], Farley J. of the Ontario Court of Justice (General Division) said at 6, " . . . they (contracts) should be interpreted in a reasonable way to give "business" efficacy and in such a way to avoid all absurd results". In *The Law of Contracts*, Fourth Edition, S.M. Waddams, in discussing the circumstances in which the courts will imply terms in contracts, says at para. 497, "Even under the most restrictive approach terms are regularly implied to give business efficacy to agreements . . . "
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> In this case, not only does CTREL's interpretation of clause 18(e)(i) result in an absurdity but it also

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56. *1525292 Ontario Ltd. v. Canadian Tire Real Estate Ltd.*, 2004 CanLII 15587.
57. *Supra* note 16 at 257.
58. *Holt v. Thunder Bay (City)* (2003), 65 O.R. (3d) 257 (Ont. C.A.).
59. *TDL Group Ltd. v. P.J.P. Developments Ltd.*, [1997] O.J. No. 5357 (Ont. Gen. Div.).

> subverts the court's obligation to give business efficacy to its interpretation of it. Furthermore, CTREL's paying rent for seven months without a valid explanation leads the court to the conclusion that CTREL also initially interpreted the clause as does this Court.

170 I find this analysis to be directly applicable here. It was not commercially reasonable for GAP/Old Navy to expect to be able to occupy the premises for the balance of its existing Lease term without paying rent, and presumably during the further extension, at least as it did initially, merely because of an event which had no evident impact on its business operations.

171 Old Navy's minimum monthly rent was $39,390.75 plus HST and its share of the common area maintenance costs and taxes ("CAM") was $16,800.00 per month plus HST, for a gross monthly rent of $56,190.75 plus HST.

172 Under the Alternative Rent provision, Old Navy claims the right to reduce its rent to only $9,578.84 per month plus HST. Under its interpretation of the Lease, the total "rent" payable by Old Navy covers only 57% of its share of CAM, and results in the Landlord receiving no rent for the actual use of the premises at all, indefinitely.

173 I find this was a commercially unreasonable position. It is an interpretation that leads to an absurd result and that violates the foundational principles of business efficacy. Moreover, it results in a circumstance where the Landlord had no way of avoiding the problem continuing indefinitely because Old Navy failed to include the reciprocal termination right that had been agreed would be included in the formal Lease document. This is a further reason why I reject Old Navy's claim that any co-tenancy failure took place in the circumstances of this case. The ambiguity of the co-tenancy language cannot support Old Navy's highly technical, but in my view, inaccurate interpretation of that provision.

(d) The Intent of the Parties as Reflected in Their Conduct

(i) Danier's Assignment into Bankruptcy

174 In determining whether the language of the Lease is clear, and reflects a meeting of minds and common contractual intent, the case law shows that subsequent conduct of the parties is one of the best ways of determining what the parties intended, and whether their agreement was ambiguous or uncertain. In *Montreal Trust Co. of Canada v. Birmingham Lodge Ltd.*[60], Laskin J.A. instructs as follows at paras. 23-24:

> 23 . . . Subsequent conduct may be used to interpret a written agreement because "it may be helpful in showing what meaning the parties attached to the document after its execution, and this in turn may suggest that they took the same view at the earlier date." S.M. Waddams, *The Law of Contracts*, 3d edition (Aurora, Ont.: Canada Law Book, 1993), at 323. Often, as Thomson J. wrote in Bank of Montreal v. University of Saskatchewan (1953), 9 W.W.R. (N.S.) 193, at p. 199 (Sask. Q.B.), "there is no better way of determining what the parties intended than to look to what they did under it."

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60. *Montreal Trust Co. of Canada v. Birmingham Lodge Ltd.* (1995), 125 D.L.R. (4th) 193 (Ont. C.A.).

24 Lambert J.A. discussed the relevance of subsequent conduct in Canadian National Railway v. Canadian Pacific Ltd., [1979] 1 W.W.R. 358, at p. 372 (B.C. C.A.), affirmed (1979), 105 D.L.R. (3d) 170 (S.C.C.):

> In Canada the rule with respect to subsequent conduct is that, if, after considering the agreement itself, including the particular words used in their immediate context and in the context of the agreement as a whole, there remain two reasonable alternative interpretations, then certain additional evidence may be both admitted and taken to have legal relevance if that additional evidence will help to determine which of the two reasonable alternative interpretations is the correct one.[61]

175 The conduct of the parties associated with the failure of Danier shows just how accurate these observations are in the particular circumstances of this case.

176 It was GAP/Old Navy's evidence that it received no information from its local store manager notwithstanding that any of the tenants operating at the Centre would unquestionably have known that Danier had failed nationally, that it was in receivership, and that its inventory was being liquidated.

177 However, it was not until August 29, 2016 when a GAP employee named Steven Fastenau contacted P. Ghandi at the Landlord's office that GAP appears to have become aware of Danier's liquidation. Despite the alleged importance of Danier as a Key Store at the Centre, Mr. O'Connor acknowledged that before this problem arose, he had never heard of Danier or any of the other named Key Stores, apart from Cineplex, that had been identified and named in this Lease. Even though GAP had been willing initially to have Canadian Tire be one of the Key Stores, apart from Mr. O'Connor's unfamiliarity with Canadian Tire as one of the largest and most successful retail chains in Canada, he also did not know that it also sold certain products, in particular pet food and pet-related products, which GAP claimed was counter to its policies on acceptable shopping centre co-tenant retailers.

178 As a result, GAP/Old Navy accused the Landlord of failing to comply with its obligations to notify GAP of the failure of a Key Store.

179 However, the Landlord saw no need to provide notice to GAP/Old Navy because, based on its understanding of the provision, the event of Danier's bankruptcy had not triggered the operation of the co-tenancy remedies in the Lease. It was only by mid to late September that the Landlord became aware that GAP was regarding Danier's assignment in bankruptcy as a Co-Tenancy Failure. Mr. Cherniak stated he was shocked to learn of GAP/Old Navy's position and consequently retained his son to prepare a legal response. Equally, the evidence showed that the Landlord was astonished when GAP sent notice that it was going to start to pay Alternative Rent.

180 By the end of September, the Landlord started discussions with Ren's to take over Danier's space, as Ren's had done in several other shopping plazas in Ontario where there had been a Danier outlet.

181 Mr. Cherniak made clear in his evidence that turnover of tenants is normal and expected in a

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61. See also *Arthur Andersen Inc. v. Toronto Dominion Bank* (1994), 17 O.R. (3d) 363 (Ont. C.A.), at p. 372.

Centre. Old Navy's Lease was for an initial five-year term with three options to renew for successive five-year terms. In his testimony, there could never have been a reasonable expectation on GAP's part that *each* of Roots, Globo Shoes, and Danier would remain tenants of the Centre for the entire duration of Old Navy's tenancy, absent which, if not replaced by a specific tenant approved by GAP, Old Navy could pay Alternative Rent indefinitely.

182 Indeed, Danier's initial lease was only for an initial 10-year term, although Danier ended up remaining as a tenant for over 16 years. Roots and Globo are still tenants. I accept Mr. Cherniak's evidence that it was never within the reasonable contemplation of the parties that there would be no turnover of these three retail tenants at any time during the term of Old Navy's Lease. This finding is important, because it emphasizes the absurdity of the technical position advanced by GAP.

(ii) GAP/Old Navy's Conduct Regarding the Key Stores Requirements

183 GAP/Old Navy was not content that a replacement Key Store be simply a retail store, but instead wanted a store that was very similar in character to Danier. As Mr. O'Connor explained, that required that the replacement store be a retailer of upscale clothing.

184 Given that the principal purpose of co-tenancy provisions is the creation of traffic, it is difficult in my view to square that purpose with GAP's read of the provisions. The reason is because any number of types of retailing could have achieved the increased traffic objective, and indeed the Landlord was focused on that objective.

185 I do acknowledge that the stipulated Key Stores requirements are clear in their language, even though I have found that it is not clear that the individual Key Stores requirement had to be met at all times as GAP insisted. It follows, in part for that reason, that I have found that no co-tenancy failure occurred. Since no co-tenancy failure occurred based on what I have found to be the most objectively reasonable interpretation of the relevant provisions of the Lease, while there was a need to replace Danier, no alternative rent entitlement arose.

186 One troubling aspect of that process was the stipulation that a retailer be of exactly the same nature as GAP viewed itself and that such replacement retailer would occupy exactly the same space as Danier had occupied. As such, even if a substitute retailer of upscale clothing (only) had been identified as a potential Key Store, a chain perhaps like Club Monaco or Ralph Lauren, they could still have been refused by GAP unless they agreed to take *exactly* the same space Danier had occupied.

187 GAP acknowledges that it has no ability to tell the Landlord who it can rent space to, but it says that until at least June of 2017, when it claims it first learned of the precise terms of the Ren's lease, it would continue to be entitled to pay virtually nothing for its space because of non-compliance. That was its amended position, but originally, when this litigation commenced, it claimed that could continue for the duration of the Lease, potentially a period of years.

188 Initially, the Landlord proposed Party City as a replacement for Danier, but not to put it into Danier's space. Mr. Cherniak explained that Party City had bought Party Packagers, the Canadian

operation, and they wanted a bigger store, 12,000 square feet in the Centre but double the size of the Danier store. I was advised that Party City is a huge company operating in over a hundred countries, with 40,000 stores around the world and with billions of dollars in sales.

189 The Landlord believed having Party City as a Key Store would be very complementary to Old Navy, given the overlap of marketing to children. The Landlord considered it to be a reasonable request to substitute Party City for Danier, but GAP first provided no reaction and then rejected Party City as non-compliant with the Key Store parameters.

190 During that same period, the Landlord was in ongoing discussions with Ren's. They were anxious to take over Danier's space, which was empty by this time. However, Ren's was not interested in other space at the Centre — it wanted to lease the former Danier space, and only that space. The Landlord offered another suitable location for Ren's in one of the other vacancies in the plaza, but they refused to accept it.

191 Finally, an email was sent from Jason Cherniak to Mr. Byma on January 4, 2017. At the end of the message it indicates that "[w]ithout prejudice, before beginning any court action my client proposes a meeting in Toronto the week of January 16 to discuss the situation and try to come to an agreement. Please advise when your client would be available."

192 GAP/Old Navy never responded, either to that proposal, or to the Landlord's request that GAP approve Ren's as the replacement Key Store for Danier. Further, the evidence showed that the Landlord never knew and was confounded by learning that Old Navy had a policy against pet stores being in the same plazas as any of its brand stores. There was no such policy in the Lease. Even more surprising to the Landlord was GAP's acceptance of Canadian Tire, evidently without knowing that most if not all Canadian Tire stores *do* sell pet food and pet-related products.

193 Despite GAP's stated position regarding Ren's or other pet or pet food and supply stores, being unsuitable co-tenants at shopping centres where it maintains retail outlets, the evidence showed that, contrary to that position, there is another power centre in the west end of Toronto where the opposite is true. That centre was the Stock Yards Village, where the anchor tenant was Target until it failed several years ago. What is important in this context, however, is that there is an Old Navy store operating in the same complex along with a PetSmart retail outlet, seemingly contradicting GAP's position on suitable co-tenants. The two outlets are in different buildings of the same power centre at the Stock Yards Village, just as they are located in different buildings at the Centre.

194 Regardless whether Old Navy had the right to insist on the payment of Alternative Rent unless a substitute Key Store meeting the requirements of the relevant provisions was chosen, that right would only have arisen where there was a Co-Tenancy Failure. I have found that there was no Co-Tenancy Failure triggered by the insolvency of Danier, because I have rejected GAP/Old Navy's interpretation of how the Co-Tenancy Requirement operates.

195 However, even if a technical Co-Tenancy Failure had arisen, issues arise whether the conduct of

the parties was reasonable and in good faith. In interpreting a contract, the entire contract must be considered. Both parties in this case make allegations of unreasonable and bad faith conduct on the part of the other. Both claim that the other has ignored the good faith requirement imposed under s. 27.12 of the Lease.

196 I have found that no Co-Tenancy Failure occurred in this case so the question may be moot, but I feel it is important to comment on the conduct of both parties. I do not criticize the parties for an absence of good faith, and from their subjective perspectives, there were reasonable grounds for each to believe that its interpretation of the relevant provisions was the correct one. Nevertheless, I have found that both acted somewhat unreasonably in the circumstances and cannot help but feel this entire situation and dispute could have been avoided with a bit more reasonable conduct from both of them.

197 In my view, there are several examples of unreasonable conduct by GAP/Old Navy:

(i) Old Navy's retroactive claim of reduced rent to the very low level contemplated in the Alternative Rent remedy was based on what was, at best, a very technical position, because Danier's failure had no impact on Old Navy's operations or sales, its ongoing viability as a retail store, or its profitability. As such, in my view it was not reasonable to demand the reduced Alternative Rent remedy in those circumstances;

(ii) It was unreasonable for GAP/Old Navy to retroactively reduce rent when there is no provision of the Lease that contemplates a retroactive rent reduction. Old Navy had no right to unilaterally cease paying rent and never provided a proper notice under the Lease;

(iii) I find that Old Navy acted unreasonably in stalling in response to the Landlord's proposal of an alternative Key Store; and

(iv) Lastly, Old Navy's position regarding Ren's unsuitability is based on an unreasonable and unarticulated policy against pets, but is contradicted by other evidence such as the finding that Old Navy and PetSmart are located within the same complex at the Stock Yards Village.

198 Nevertheless, I also find that Gap/Old Navy had what they considered to be a reasonable belief that their conduct was correct and in accordance with the terms of the Lease, even if those provisions made no business sense under the circumstances, or were objectively unreasonable. However, Old Navy took no steps to actually communicate with the Landlord about the situation, as one would reasonably have expected, given the language of s. 27.12 of the Lease, and therein lies the unreasonable conduct.

199 However, I regard the Landlord's aggressive approach with the almost immediate issuance of legal threats of default to be equally unreasonable. Its conduct may be only slightly less reprehensible once the alleged failure was claimed, but it hardly acted in the rational or reasonable manner that Mr. Cherniak said was his custom.

200 The evidence shows that the Landlord's response to GAP in these circumstances was to make an immediate demand for GAP to cease claiming the Alternative Rent remedy and comply with its rent

obligations, absent which the Landlord would declare GAP/Old Navy to be in default and pursue proceedings to have them removed as a tenant. Neither of these supposedly sophisticated parties is blame-free in this sorry story.

(e) Is the Alternative Rent Remedy an Unenforceable Penalty Clause?

201 The Landlord argues that the Co-Tenancy Requirements should be struck down as an unenforceable penalty clause if interpreted in the manner proposed by Old Navy. It relies upon the *Grand Prospect* decision, and the American case law discussed there, in support of this claim, on the basis that there is no resemblance between the amount of remedy, which Old Navy seeks under the Alternative Rent remedy, and any actual loss or damages that have been suffered by Old Navy. Indeed, no evidence has been provided of any loss having been suffered, including no evidence of either: (i) a reduction in Old Navy's sales or profitability; or (ii) reduced foot traffic at the Centre.

202 On this basis, the *Grand Prospect* decision might provide a basis for the Alternative Rent remedy to be construed to be an unenforceable penalty clause. However, in my view there is no need in this case to decide that question. I reach that conclusion for several reasons.

203 First, while counsel did not provide additional case law on unenforceable penalty clauses beyond the *Grand Prospect* decision, it appears to me that the subsequent legal developments raise a question on whether *Grand Prospect* is authoritative, or should be confined to its own circumstances. More importantly, in a Canadian context, courts have cautioned against striking down damages clauses as being unenforceable penalty clauses.

204 Rather, as the Ontario Court for Appeal has concluded in several cases, referenced further below[62], so-called penalty clauses may simply breach principles of unconscionability, that is equitable rather than common law principles. The argument is that within the context of good-faith performance under the contract, it would be unconscionable to permit such a clause to be enforced, particularly when there is no time limit specified for the period during which it may operate, and no alternative remedies given to either party to bring the Lease to an end, say six months after such an event has occurred as would have been the case had the reciprocal termination right been included in the Lease as I have found was intended.

205 I would adopt the discussion on this subject by in *Redstone Enterprises Ltd. v. Simple Technology Inc.*[63], at paras. 15, 18, and, in part, at paras. 21-32. In essence, the questions to be asked in considering relief against penalties and forfeitures are: (i) whether the forfeited deposit was out of all proportion to the damages suffered; and (ii) whether it would be unconscionable for the seller to retain the deposit.[64]

206 In *Redstone Enterprises Ltd.*, Lauwers J.A. found that a consideration of the relevant factors

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62. *869163 Ontario Ltd. v. Torrey Springs II Associates Ltd. Partnership* (2005), 76 O.R. (3d) 362 (Ont. C.A.) at paras. 19-34; *Redstone Enterprises Ltd. v. Simple Technology Inc.*, 2017 ONCA 282, 137 O.R. (3d) 374 (Ont. C.A.), at paras. 21-26 and 30-32.
63. *Redstone Enterprises Ltd. v. Simple Technology Inc.*, 2017 ONCA 282, 137 O.R. (3d) 374 (Ont. C.A.).
64. See also *Varajao v. Azish*, 2015 ONCA 218 (Ont. C.A.) at para. 11.

showed there was no unconscionability in that case. Instead, he found it to be a straightforward commercial real estate transaction undertaken in the expectation of profit by both sides, who were previously strangers. There was no inequality of bargaining power between them. There was no fiduciary relationship, and both parties were sophisticated.

207 *869163 Ontario Ltd. v. Torrey Springs II Associates Ltd. Partnership*[65] is also instructive. The case explored the distinction between penalties and forfeitures. Sharpe J.A. notes, at paras. 31-32:

> [C]ourts should, if at all possible, avoid classifying contractual clauses as penalties and, when faced with a choice between considering stipulated remedies as penalties or forfeitures, favour the latter.
>
> [C]ourts should, whenever possible, favour analysis on the basis of equitable principles and unconscionability over the strict common law rule pertaining to penalty clauses.

208 Accordingly, Sharpe J.A. pointed out that in the interests of furthering the policy of upholding freedom of contract, "the strict rule of the common law refusing to enforce penalty clauses should not be extended." At para. 25 he expressed his agreement that "the finding of unconscionability must be an exceptional one, strongly compelled on the facts of the case." Nevertheless, he went on to add that:

> 30 The list of the indicia of unconscionability is never closed, especially since they are context-specific. But the cases suggest several useful factors such as inequality of bargaining power, a substantially unfair bargain, the relative sophistication of the parties, the existence of bona fide negotiations, the nature of the relationship between the parties, the gravity of the breach, and the conduct of the parties.

209 In this case, looked at from the front end of the Lease, as I am required to do, I cannot conclude that the possibility of the Alternative Rent remedy being activated causes it to be unenforceable, because the question of enforceability depends on the size and context of the penalty. Certainly, in a meltdown situation, if the percentage GLA tests were not being met and/ or there had been a failure of a number of the Key Stores, not just one occupying only 2% of the GLA of the Centre, then the reduction of traffic that would obviously and necessarily result would seem to entitle Gap/Old Navy to the agreed penalty. On the other hand, the quantum of rent that Old Navy claims to be entitled to pay here is out of proportion to any damage sustained by Old Navy, indeed there is no evidence of damage.

210 Accordingly, I would not characterize the Alternative Rent remedy as an unenforceable penalty clause *per se*. While I accept that arguments can be made to permit Old Navy to pay only Alternative Rent in the particular circumstances of this case, for the duration of time it claims would be unconscionable, despite the sophistication of the parties. There is no need to reach a conclusion on that point. The finding that the failure of Danier Leather did not trigger a Co-Tenancy failure eliminates the need to answer the question.

(f) Should rectification be granted?

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65. *869163 Ontario Ltd. v. Torrey Springs II Associates Ltd. Partnership* (2005), 76 O.R. (3d) 362 (Ont. C.A.), leave to appeal refused, (2006), [2005] S.C.C.A. No. 420 (S.C.C.).

211 It is plain from a comparison of the words between the Lease and the LOIs that there was a failure on the part of the parties, to include a key term of the LOIs: the ability of the Landlord to terminate the Lease after six months, in the event the Tenant invoked its Co-Tenancy "rights".

212 As Old Navy did not suffer any losses from Danier's closure, it seems unlikely that it would have invoked its purported Co-Tenancy rights, if taking that action would have caused it to face the termination of the Lease. There is nothing in GAP/Old Navy's submissions that takes issue with the characterization of the exclusion of the reciprocal termination right as anything other than a mutual mistake.

213 In the decision of *Alguire v. The Manufacturers Life Insurance Company (Manulife Financial)*[66], Hourigan J.A. set out the tests that must be met in order for an order of rectification to be made. The Landlord relies upon this language as supportive of its claim for rectification of the Lease in the circumstances of this case:

> 12. Rectification is an equitable doctrine that is available when it is clear that the parties' written agreement does not accord with their actual agreement. In such circumstances, a court may rectify the agreement so that it gives effect to the parties' true intentions: Canada (Attorney General) v. Fairmont Hotels Inc., 2016 SCC 56, [2016] 2 S.C.R. 720 (S.C.C.), at para. 12.
>
> 13. In the present case, Manulife argued that rectification was necessary to correct a common mistake. Such a mistake arises where the parties, "subscribe to an instrument under a *common* mistake that it accurately records the terms of their antecedent agreement": *Fairmont*, at para. 14. To obtain an order for rectification in these circumstances, Manulife was required to show, "that the parties had reached a prior agreement whose terms are definite and ascertainable; that the agreement was still effective when the instrument was executed; that the instrument fails to record accurately that prior agreement; and that, if rectified as proposed, the instrument would carry out the agreement": *Fairmont*, at para. 14.

214 In *Alguire*, the plaintiff argued that there was an insufficient evidentiary basis at trial to permit the trial judge to conclude that the parties had entered into an antecedent agreement. In other words, he claimed that it was not open to the trial judge on the evidentiary record to find that the agreement was definite and ascertainable, and as such, claimed that the remedy of rectification was not available. Interestingly, as part of his argument in that case, Mr. Alguire took the position that the trial judge had erred "in finding that Mr. Elias acted as his agent in securing the Policy." Hourigan J.A. rejected that contention, concluding at para. 15 that:

> 15. I am unable to give effect to this submission. In my view, there was ample evidence to ground the trial judge's conclusion that there was an antecedent agreement based on the Quote, which was for the issuance of a $5,000,000 key man insurance policy with no special provision for inflation protection.

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66. *Alguire v. The Manufacturers Life Insurance Company (Manulife Financial)*, 2018 ONCA 202, 140 O.R. (3d) 1 (Ont. C.A.), at paras. 12-13.

215 I see no material difference between the circumstances in *Alguire* that caused the Court to support the request for an order of rectification in that case, and the facts and circumstances that underlie the Landlord's request for rectification here. In my view, the evidence shows that the parties here had reached a prior agreement to include the reciprocal Lease termination right, for both Old Navy and the Landlord. The interlineations in the final LOI with handwritten changes make that clear. The language reads:

> If such condition is not satisfied for six months, the *Landlord or the Tenant* may terminate the lease at any time before such condition is satisfied upon 30 days' notice to Landlord.

216 The evidence established that all of the changes to the LOIs were handwritten by Seymour Schwartz, at Paracom, acting effectively as agent for *both* parties. The date on which Blair Hodgson signed the final LOI is unclear, but Lloyd Cherniak appears to have signed his name to that amended LOI on March 31, 2000. The dates of initialization of the handwritten interlineations and changes is uncertain, but there was no evidence presented to suggest that the final version of the LOIs reflecting this common intent of the parties was not known by both to contain this revision and intended by them to be included in the final Lease terms. Nevertheless, the provision did not find its way into the Lease.

217 As such, I find that GAP/Old Navy and the Landlord had reached a prior agreement whose terms were definite and ascertainable, that the agreement was still effective when the Lease was executed, and that, if rectified as proposed, the Lease would carry out the agreement in that respect. Accordingly, I find that the Landlord is entitled to the rectification remedy it seeks.[67]

Conclusion and Disposition

218 On this application, GAP/Old Navy claimed that the provisions of the Lease, particularly the Co-Tenancy Requirements and the remedies for an operational failure, are straightforward and should be given effect. On the other hand, the Landlord raised numerous grounds to support its position that the language of the Lease as interpreted by Old Navy is not only unclear, but also unreasonable, not what was ever intended, and absurd. It says that GAP/Old Navy's interpretation of the Lease and the Co-Tenancy Requirements is untenable.

219 As these reasons show, I have rejected Old Navy's interpretation and found that the provisions of the Lease relating to the Co-Tenancy Requirements are not straightforward or unambiguous. The language of s. 13.3(A) is unclear and capable of two different interpretations. The language used in the Lease differs from the description of the Co-Tenancy Provisions that the parties agreed to as set out in the LOIs. Both parties appeared to have different understandings of what the Lease said from the moment it was signed.

220 Stated summarily, I have found that there is no clarity on what the final common intention of the

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67. I note that GAP/Old Navy appeared to resist the Landlord's efforts to secure this remedy, in part on the basis of *Limitations Act* considerations. However, in *Alguire*, Hourigan J.A. refused to give effect to this ground of appeal. He concluded that the rectification relief sought by Manulife was not barred by the *Limitations Act* because it was an independent claim. In my view, the same considerations apply here. See *Alguire*, above, at paras 25-26.

parties was meant to be, assuming they had a common intention. Moreover, the evidence suggests they did not share a common understanding or intention.

221 As a result, I have accepted the Landlord's interpretation of the relevant provisions as being the most objectively reasonable. Unlike GAP/Old Navy's evidence which was speculative and not supported by testimony of anyone who was involved in the negotiation of the Lease, the evidence of the Landlord was provided by one of the main individuals involved in the negotiation of the Lease at that time, and who still has day-to-day responsibility for the operation of the Centre.

222 I have found that it was not commercially reasonable for GAP/Old Navy to expect to be able to occupy the premises for the balance of its existing Lease term, effectively without paying rent, merely because of a technical event that had no evident impact on its business operations.

223 Old Navy's rent and its share of the common area maintenance costs and taxes totaled $56,190.75 plus HST per month. However, by invoking the Alternative Rent remedy in response to the alleged Co-Tenancy failure that resulted from Danier's insolvency, Old Navy was able to reduce its rent by over 60% to only $9,578.84 per month plus HST, an amount that covered only 57% of its share of common area maintenance costs, but more importantly resulted in the Landlord receiving no rent for the actual use of the premises at all, for a potentially indefinite period.

224 I found that this was not a commercially reasonable position. It flows from an interpretation that, in my view, violates the foundational principles of business efficacy and leads to an absurd result. Moreover, while the Landlord may be faulted for not catching the omission at the time the Lease was signed, Old Navy's failure to include the reciprocal termination right that had been agreed would be included in the formal Lease document left the Landlord with no mechanism to avoid the problem from continuing indefinitely. This is a further reason why I have rejected Old Navy's claim that any co-tenancy failure took place in the circumstances of this case. The ambiguity of the co-tenancy language cannot support Old Navy's highly technical, but in my view, inaccurate interpretation of that provision.

225 Old Navy commenced this matter as an application for declaratory relief relative to the interpretation of the Lease and for a refund of rents that it claims to have overpaid to the Landlord. That application for declaratory relief and a refund of alleged overpayments of rent is dismissed. I also dismiss the Landlord's claim that the Co-Tenancy Requirements of the Lease are unenforceable as an impermissible penalty clause. There is no need to answer that question in light of my conclusion that no co-tenancy failure took place here under this Lease, reasonably and properly interpreted.

226 However, the Landlord's request for equitable relief by way of rectification to amend the Lease to include the reciprocal termination right as intended by the parties as reflected in the LOIs is granted.

227 Based on the result, it would seem likely that costs would presumptively go to the Landlord, but I have no knowledge if there were offers or counteroffers that might affect the costs result. I would be grateful to be advised of those matters by both counsel in writing within two weeks of the release of this decision.

228 If the parties are unable to address and resolve issues of costs between themselves, they may contact me through the Trial Coordinator to schedule a date and time when the matter may be spoken to in order to establish a schedule for the preparation and exchange of costs submissions, if necessary.

Application dismissed; request granted.

Footnotes1There were others involved in the negotiations as well, including John Temesvary, a lawyer of 35 years standing who was a partner at Fogler Rubinoff in the Business Law Department at the time. Mr. Temesvary was probably involved in the negotiations of the LOIs and he executed the Lease on behalf of the Landlord, together with Joseph Lebovic, as the sole officers and directors of the Landlord at the time.2Since its bankruptcy, Danier has re-opened under new ownership. It has deleted the word "Leather" from its branding and now simply sells apparel. 3A common provision in a commercial retail lease is a percentage (or participating) rent clause under which a tenant pays a rent based on a fraction of gross sales on gross revenues, in addition to base (or minimum) rent, and additional rent for taxes, maintenance, insurance and other charges.4I note as an aside, that there was at least one Danier Leather Store, located in downtown Toronto in the Toronto Dominion Centre, which continued to operate after the insolvency of the other stores. It was evidently owned by one of the former principals of Danier Leather. It continues to sell leather goods to this day. In addition, as noted, under new ownership, Danier has now resurrected itself, but selling a broader range of apparel. 5Creston Moly Corp. v. Sattva Capital Corp., 2014 SCC 53 (S.C.C.), at para. 57.6Gilchrist v. Western Star Trucks Inc., [2000] B.C.J. No. 164 (B.C. C.A.) at para. 17. 7Scanlon v. Castlepoint Development Corp., [1992] O.J. No. 2692, 11 O.R. (3d) 744 (Ont. C.A.) at p. 770, leave to appeal to S.C.C. refused [1993] S.C.C.A. No. 62 (S.C.C.).8G. Hall, Canadian Contractual Interpretation Law, 3rd ed. (Markham: Lexis Nexis, 2016) at pp. 24-26.9Nickel Developments Ltd. v. Canada Safeway Ltd., 2001 MBCA 79 (Man. C.A.) at para. 34.10L. Schuler A.G. v. Wickman Machine Tool Sales Ltd. (1973), [1974] A.C. 235 (U.K. H.L.)11Kentucky Fried Chicken Canada v. Scott's Food Services Inc., [1998] O.J. No. 4368 (Ont. C.A.), at para. 27. See Hall, supra note 8 at para. 2.5.3.12Ibid at para. 27. Buildevco Ltd. v. Monarch Construction Ltd. (1990), 73 O.R. (2d) 627 (Ont. H.C.) at 63413Toronto (City) v. W.H. Hotel Ltd., [1966] S.C.R. 434 (S.C.C.) at p. 548. See Hall, supra note 8 at para. 2.5.5.14Park Royal Shopping Centre Holdings Ltd. v. Gap (Canada) Inc., 2017 BCSC 1257 (B.C. S.C.).15Athwal v. Black Top Cabs Ltd., 2012 BCCA 107 (B.C. C.A.).16Wallis v. Smith (1882), 21 Ch. D. 243 (Eng. C.A.), at 257171525292 Ontario Ltd. v. Canadian Tire Real Estate Ltd. [2004 CarswellOnt 1819 (Ont. S.C.J.)], 2004 CanLII 15587, citing Holt v. Thunder Bay (City) (2003), 65 O.R. (3d) 257 (Ont. C.A.))18TDL Group Ltd. v. P.J.P. Developments Ltd., [1997] O.J. No. 5357 (Ont. Gen. Div.) 19Consolidated-Bathurst Export Ltd. c. Mutual Boiler & Machinery Insurance Co. (1979), [1980] 1 S.C.R. 888 (S.C.C.), at pp. 899-900.20Bhasin v. Hrynew, 2014 SCC 71, [2014] 3 S.C.R. 494 (S.C.C.).21Mohamed v. Information Systems Architects Inc., 2018 ONCA 428 (Ont. C.A.).22Churchill Falls (Labrador) Corp. v. Hydro-Québec, 2018 SCC 46 (S.C.C.).23See H. Haber et al., Shopping Centre Leases, below, at p. 353. The authors suggest that where the landlord has invested significant capital in the tenancy, as the Landlord did in this case, in the form of construction work or allowance/inducement funding, it will seek to tighten the co-tenancy conditions as much as possible as it does not wish to risk the loss of both the lease and its investment.249202-9131 Québec inc. v. 6943870 Canada inc., 2015 QCCS 1209 (C.S. Que.) at paras. 37-40.25Edited by H.M. Haber, Q.C., 2nd ed. (Aurora: Canada Law Book, 2008).26Park Royal Shopping Centre Holdings Ltd. v. Gap

(Canada) Inc., 2017 BCSC 1257 (B.C. S.C.).27H.M. Haber, supra note 25.28But see Sharpe J.A., in 869163 Ontario Ltd. v. Torrey Springs II Associates Ltd. Partnership (2005), 76 O.R. (3d) 362 (Ont. C.A.) at paras. 19-34, discussed below, that unconscionability is the preferred analytical route in Ontario.29Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc., 232 Cal. App. 4th 1332 (U.S. C.A. 5th Cir. 2015).30Ibid. at p. 1358.31869163 Ontario Ltd. v. Torrey Springs II Associates Ltd. Partnership (2005), 76 O.R. (3d) 362 (Ont. C.A.) per Sharpe J.A. at paras. 19-34; Redstone Enterprises Ltd. v. Simple Technology Inc., 2017 ONCA 282, 137 O.R. (3d) 374 (Ont. C.A.), at paras. 21-26 and 30-32. 32Ross Dress for Less, Inc. v. VIWY, L.P., Doc. 12-131 (U.S. Dist. Ct. E.D. Penn. September 19, 2017).33T. Eaton Co., Re (1997), 46 C.B.R. (3d) 293 (Ont. Gen. Div.)34Excerpts from Cross Examination of Ryan O'Connor held November 15, 2017, read in as part of the Landlord's case: Q. 144-145, Q. 163-175.35Q. 239-24436Ironically, I note that in the Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc. case, note 29 above, the Mervyns Department Store that failed and caused that litigation was an anchor tenant, but like Canadian Tire in this case, its store was not actually part of the shopping centre there, but was on land separately owned by Mervyn's. Nevertheless, the Landlord chose to permit a co-tenancy provision based upon its occupancy. Thus, since that land was outside of the control of the Landlord, that severely curtailed the landlords ability to cure the default within 12 months, which would have required not only the purchase of the Mervyn's property, but also new tenants to be located who would have been acceptable to Ross. That was an important factor in the decision reached.37McKee v. Montemarano [2008 CarswellOnt 4285 (Ont. S.C.J.)], 2008 CanLII 36163.38Consolidated-Bathurst Export Ltd. c. Mutual Boiler & Machinery Insurance Co. (1979), [1980] 1 S.C.R. 888 (S.C.C.), per Estey J. for the majority.39Ibid at para. 25.40Reliance Petroleum Ltd. v. Stevenson, [1956] S.C.R. 936 (S.C.C.) at p. 951. See also Lindley L.J. in Cornish v. Accident Insurance Co. (1889), 23 Q.B.D. 453 (Eng. C.A.), at p. 456. 41I was somewhat disturbed to learn from the evidence to learn that GAP/Old Navy actually used surveillance cameras to surreptitiously record and keep track of not only all foot traffic into and out of its Old Navy outlet, provided the potential customers stayed in the store for a de minimis period of time, but also that reach of the surveillance camera also extended to capture traffic outside of the store, recording anybody that walked or drove within a set distance of the front of the store. It maintained statistics of that traffic at head office in San Francisco, but I note there was no evidence produced that showed any decline in traffic attendant on the Danier Leather Outlet failure.421525292 Ontario Ltd. v. Canadian Tire Real Estate Ltd., 2004 CanLII 15587.43Supra note 16 at 257.44Holt v. Thunder Bay (City) (2003), 65 O.R. (3d) 257 (Ont. C.A.).45TDL Group Ltd. v. P.J.P. Developments Ltd., [1997] O.J. No. 5357 (Ont. Gen. Div.).46Montreal Trust Co. of Canada v. Birmingham Lodge Ltd. (1995), 125 D.L.R. (4th) 193 (Ont. C.A.).47See also Arthur Andersen Inc. v. Toronto Dominion Bank (1994), 17 O.R. (3d) 363 (Ont. C.A.), at p. 372.48869163 Ontario Ltd. v. Torrey Springs II Associates Ltd. Partnership (2005), 76 O.R. (3d) 362 (Ont. C.A.) at paras. 19-34; Redstone Enterprises Ltd. v. Simple Technology Inc., 2017 ONCA 282, 137 O.R. (3d) 374 (Ont. C.A.), at paras. 21-26 and 30-32. 49Redstone Enterprises Ltd. v. Simple Technology Inc., 2017 ONCA 282, 137 O.R. (3d) 374 (Ont. C.A.).50See also Varajao v. Azish, 2015 ONCA 218 (Ont. C.A.) at para. 11. 51869163 Ontario Ltd. v. Torrey Springs II Associates Ltd. Partnership (2005), 76 O.R. (3d) 362 (Ont. C.A.), leave to appeal refused, (2006), [2005] S.C.C.A. No. 420 (S.C.C.). 52Alguire v. The Manufacturers Life Insurance Company (Manulife Financial), 2018 ONCA 202, 140 O.R. (3d) 1 (Ont. C.A.), at paras. 12-13.53I note that GAP/Old Navy appeared to resist the Landlord's efforts to secure this remedy, in part on the basis of Limitations Act considerations. However, in Alguire, Hourigan J.A. refused to give effect to this ground of appeal. He concluded that the rectification relief sought by Manulife was not barred by the Limitations Act because it was an independent claim. In my view, the same considerations apply here. See Alguire, above, at paras 25-26.

TAB 10

1993 CarswellOnt 6889
Ontario Court of Justice (General Division)

Cathay Hing Kee Investment Co. v. Chung

1993 CarswellOnt 6889, [1993] O.J. No. 514, 39 A.C.W.S. (3d) 285

BETWEEN: CATHAY HING KEE INVESTMENT CO. LTD., BOWING INVESTMENT CO. LIMITED and MASCOT INVESTMENT CO. OF ONTARIO LTD. Plaintiffs - and - TONY Y.C. CHUNG, L. CHUNG DEVELOPMENT CO. LTD., ANDREW CHUNG INVESTMENT CO. LTD., TAPLEX INVESTMENT CO. LTD., GRAND UNIVERSAL INVESTMENT CO. LTD., PRIMARY ENTERPRISES INC., FONG & FONG PROPERTIES LTD., CHUNG INTERNATIONAL INVESTMENT COMPANY LTD., WINPRARM ENTERPRISES INC., DAVID SHAM, IN TRUST, TAO & STEPHEN ENTERPRISES LTD., TAK SING (INTERNATIONAL) TRADING LTD., C.S.K. INVESTMENTS LTD., CANATRANS INVESTMENT LTD., YUN YEUN COMPANY LIMITED, LAI CHIE INVESTMENTS LTD., LOBOFUN HOLDINGS NC., TIFFIELD DEVELOPMENT CORPORATION, 599356 ONTARIO LIMITED, MACEY INVESTMENTS LIMITED and HUNG TONG and BILL FONG Defendants; AND BETWEEN: TONY Y.C. CHUNG, L. CHUNG DEVELOPMENT CO. LTD., ANDREW CHUNG INVESTMENT CO. LTD., TAPLEX INVESTMENT CO. LTD., GRAND UNIVERSAL INVESTMENT CO. LTD., PRIMARY ENTERPRISES INC., CHUNG INTERNATIONAL INVESTMENT COMPANY LTD., WINPHARM ENTERPRISES INC., 599356 ONTARIO LIMITED and TIFFIELD DEVELOPMENT CORPORATION Plaintiffs by Counterclaim - and - CATHAY HING KEE INVESTMENT CO. LTD., BOWING INVESTMENT CO. LIMITED and MASCOT INVESTMENT CO. OF ONTARIO LTD., YUEN KWON YEE, FRED MA and YUNG SIT CHU also known as SIDNEY CHU Defendants by Counterclaim

Haley J

Judgment: March 2, 1993
Docket: Toronto B51/92

Counsel: Rubin Dexter, Ms. H. Nicholson for Plaintiffs
Ian J. Tod, Ms. K. Waters for all Defendants not represented by other Counsel ("the Chung defendants") except Hung Tong
John Rosolak for Fong & Fong Properties Limited and Bill FongTracy C. Warne, Q.C. for Defendants, Tao & Stepher Enterprises Ltd., Tak Sing (International) Trading Ltd., Csk Investments Ltd. and Canatrans Investments Ltd
Harold Maltz for Macey Investments Limited (addressed the court but took no part in the trial)Young H. Lee for Yun Yeun Company Limited (took no part in the trial)

Subject: Contracts; Estates and Trusts

***MADAM JUSTICE DONNA J. HALEY*:**

1 This action is brought over disputes arising out of a joint venture agreement for development of real estate in the City of Scarborough. The plaintiffs are all investors in the joint venture. The defendants Tony Y.C. Chung and Bill Fong were involved in the management of the joint venture while the balance of the defendants were Investors in the joint venture except for Tiffield Development Corporation, the Trustee for the joint venture.

2 Lim Chung, father of Tony Chung, came to Canada from Hong Kong with his family in 1976. In Hong Kong he had been a successful and respected real estate developer. Tony was educated in Hong Kong, Australia and Houston, Texas. In Houston he was engaged in real estate development as training for joining his father's real estate activities in Toronto.

3 In 1984 Lim Chung created a scheme for development of real estate in Scarborough which included acquisition of the lands, and construction and sale of commercial developments and residential housing, carried out in phases. The scheme operated as a joint venture which purchased land Lim had selected and for which Lim obtained a number of investors from Hong Kong or immigrants from Hong Kong. Among these were the plaintiffs in this action. The joint venture made use of a corporation, Torchin Development Corporation, which took title to the lands on behalf of the joint venture and which also arranged for the development and other aspects of the construction through separate management. The project of the joint venture was known as "The Torchin Project". Lim Chung had organized similar projects on other lands, which were also ongoing, known as "The Primary Properties Project" and "The Kamfai Project".

4 In the spring of 1987 Lim Chung located another parcel of land for real estate development in the Finch-Markham area of Scarborough. He entered into an agreement of purchase and sale for the property at an all cash purchase price of $7 million with a deposit of some $200,000 which he advanced from his own corporation, L. Chung Development Limited. The closing date of the purchase was to be October 14, 1987. He then sought investors for a joint venture to proceed with the development of these lands. The joint venture was to be organized in a fashion similar to that of the Torchin Development project. Tiffield Development Corporation was incorporated to hold the land and arrange for the development. The scheme was known as "The Tiffield Project".

5 Lim Chung was a sophisticated real estate developer. He headed what was known as the Chung Group of companies which was made up of a number of companies owned by his children and for which he supplied most of the capital. While the children were the chief officers and shareholders of these individual companies they took the advice of their father and in reality Lim Chung made the major decisions for the Chung Group.

6 Also investing with Lim Chung was another family group under the name of Fong & Fong Properties Ltd. Bill Fong's father directed the Fong Group in much the same way as Lim Chung did the Chung Group. The Chinese culture required that respect be paid to the wishes and decisions of the elder members of the family. This principle was at play in both these family groups. Tony Chung was designated by his father to take an active role in the operations of the Chung group and Tony in turn did as he was bidden by his father. He consulted with his father on any decisions to be made which did not

fall within the normal day-to-day operations of the projects.

7 About the time an Agreement of Purchase and Sale was entered into for the purchase of the lands for the Tiffield project, Lim Chung with the assistance of Tony sought investors for the new project. Lim was held in high esteem by a number of Hong Kong people and many were interested in his real estate developments. Among these was Sidney Chiu, the president of the plaintiff Bowing Investment.

8 Tony Chung proceeded to hire consultants for commencing development of the lands. By the fall of 1989 draft subdivision approval and re-zonings had been obtained but the joint venturers unanimously agreed in July 1989 to sell the lands as a parcel without undertaking any construction. The sale was completed in December 1989, reaping a gross profit of some $17 million. Then in December 1990 difficulties arose between the Plaintiffs and the Defendants which culminated in this law suit.

9 The plaintiffs claim:

(a) a declaration as to the correct ownership interests of the parties in the joint venture agreement.

(b) an accounting of and judgment for profits paid out in accordance with the declaration in (a).

(c) a deprivation of profits for those defendants whom they allege fraudulently misrepresented the capital structure of the joint venture to the plaintiffs.

(d) a declarationthat certain loans made by certain of the defendants were unauthorized and a breach of trust and that they constituted a withdrawal of capital by those defendants and a loss of the right to participate in the profits to the extent of the loans.

(e) a declaration that no management fees are payable to Primary Enterprises Inc.

10 The Chung Group defendants and Tiffield Corporation Limited counterclaim against the plaintiffs and their principals for damages and punitive damages.

AMENDMENT TO THE AMENDED STATEMENT OF CLAIM

11 After completion of the argument the plaintiffs moved to amend their Amended Statement of Claim to change the amounts of the Chung Group's contributions to the joint venture in paragraph 17 from $2,050,000 to $3,380,000; to amend paragraph 35 in the same manner, and to change the amount alleged to have been invested by the Chung Group from $1,300,000 to $2,530,000. These figures are those in the forensic accounting reports prepared for the defendants and introduced at trial. The plaintiffs also moved to add a new paragraph 35a:

> The Plaintiffs allege that the Defendants, the Chung Group of Companies, failed to contribute the sum of $3,380,000 into the project. Rather, the said Defendants contributed only the sum of $2,530,000 which contribution represented a 31.625% interest in the project. Moreover, in or about the month of February, 1988, the said Defendants transferred 8.125% of their interest in the project to Hung Tong.

12 The Chung defendants object to permitting the amendment on the grounds that to do so will alter the case they have to meet and had they known of these changes, even at the opening of the trial, they would have required further discoveries. In particular they argue that the plaintiffs have pleaded a fraudulent misrepresentation which is now altered to a different misrepresentation from that now in paragraphs 17 and 35 of the Amended Statement of Claim.

13 The Statement of Claim was amended twice before trial. It is difficult to understand why no motion for this amendment was made at the opening of the trial and before evidence was called since the Chung defendants had attacked the sufficiency of the misrepresentation in its opening. However Rule 26.01 provides that a motion for an amendment may be made at any stage of an action and it is mandatory for the court to allow such amendment unless the defendants persuade the court on a balance of probabilities that "prejudice would result that could not be compensated for by costs or an adjournment".

14 The issue is whether or not there is such prejudice. In *Hill v. Church of Scientology of Toronto* (1992), 7 O.R. (3d) 489 Carruthers J. said at p.489:

> Subsequent cases which have dealt with the wording of the rule, to my mind, suggest that "prejudice" within the context of that wording means that the amendment, if allowed, would alter the case to be met; and that costs or an adjournment would not permit the defendant the opportunity or ability to fairly meet it.

15 In his opening Mr. Dexter for the plaintiffs made a clear statement of the misrepresentation on which the plaintiffs were relying. He said at p.106 of the transcript:

> The plaintiffs allege that prior to their contribution of the $1.3 million into the cotenancy, the defendant, Tony Chung, represented to the plaintiffs that a total of $8 million was to be invested in the cotenancy as capital contribution ... and that the percentage interests in the cotenancy agreement is based upon a total capital contribution of $8 million.
>
> The plaintiffs allege that notwithstanding such representation by Mr. Chung, Mr. Tod's clients invested less than shown in the cotenancy agreement and that, specifically, Mr. Tod's clients invested $850,000 less than they should have invested in the cotenancy. In other words the amount that was actually invested in the cotenancy was $7,150,000, rather than $8 million. The percentage interest of the cotenants was calculated on the basis of $8 million.

16 The Chung defendants' forensic accounting report was available to all parties in September, 1991 and these dollar amounts were known to the parties and have not been in issue during the trial.

17 The Chung defendants' position is that since the plaintiffs are relying on a fraudulent misrepresentation that representation must be specifically pleaded. They object that they have no knowledge as to when the representation was made and they cannot therefore meet it.

18 In his opening on behalf of the Chung defendants, Mr. Tod said at p.131 of the transcript:

> They say there is a fraudulent misrepresentation concerning the initial investments by my clients. I'll outline to you in a few moments what evidence you should be hearing on that, but I believe that through the evidence that we're going to lead from the defendants, we are going to establish that the plaintiffs fail in their allegations.

19 At page 136 of the transcript he discusses paragraph 17 of the Amended Statement of Claim:

> What it is he is alleged to have represented both orally and in writing, is that a total of $8 million dollars was to be invested in the project by the cotenants, and that of that sum plaintiffs allege Mr. Chung represented that the Chung Group of Companies were investing the sum of two million and fifty thousand dollars and were accordingly entitled to a percentage interest from the project commensurate with such investment. The last sentence essentially states that Mr. Chung should have known the plaintiffs' reliance on such representation.

> And further at page 137 Mr. Tod said:

> This then is a claim of fraudulent misrepresentation. You are going to hear evidence, extensive readings from the examination-for-discovery of the plaintiffs, which I believe will establish that no such representation was ever made either or any. That should end the matter apart from some other issues.

> And finally he said at page 138:

> Mr. Dexter in his opening statement referred to the fact also that my client should not be entitled to a percentage ownership interest in this cotenancy because of underfunding. It is going to be our contention at the end of the day that has never been pleaded. But nevertheless you are going to hear evidence about it.

20 I have quoted extensively from the opening because I am of the view that the determinative point on this motion to amend is whether the defendants are now faced with a new case to meet. The onus is on the defendants to persuade me of that and I find that they have failed to do so. The evidence at trial from both Tony Chung and the accountants has dealt extensively with the amounts and timing of the contributions to the joint venture. The error in the amount of contribution alleged was patent to everyone and it has no effect on whether the alleged misrepresentation was made. The proposed paragraph 35a purports to deal with underfunding. I consider that to be just another way of stating that the representation that a total amount of $8 million was to be contributed was false. There is no new representation to be met. Nor is there any new case to be met. But if the Plaintiff seeks to advance underfunding as a matter of contract and not of misrepresentation, then that would be a new basis for their cause of action but arising out of identical facts of which the defendants have long been aware lie at foundation of the plaintiffs' case. There is no prejudice to the defendants in either case.

21 I am satisfied the plaintiff continues to rely on the fraudulent misrepresentation pleaded in paragraphs 17 and 35 of the Amended Statement of Claim. That matter has been dealt with in the evidence by both the plaintiffs and the defendants Chung and has been the subject of extensive

argument on both sides.

22 Paragraph 17 was read to Tony Chung on examination in chief and he was asked if he made such representation. He replied (transcript p.851):

> No I didn't. Never before, anytime, did I commit our family as to the total investment.

23 The motion to amend the Amended Statement of Claim as requested is therefore granted but the defendants are entitled to make submissions to the court with regard to any additional costs incurred by the defendants as a result of such amendment.

FRAUDULENT MISREPRESENTATION

24 The plaintiffs plead that Tony Chung, personally and as an officer and director and the operating mind of Tiffield and the Chung Group, represented, both orally and in writing, to the plaintiffs that the total investment in the Tiffield project was $8 million and of that amount the Chung Group was investing an amount which would entitle them to a percentage interest in the project commensurate with their investment. They plead that such representation was made fraudulently or recklessly not caring whether it was true or false.

25 It is clear from the evidence that Tony Chung was an officer and director of Tiffield Development Corporation. Lim Chung, K.Y. Yuen, Sidney Chiu and Bill Fong were also directors. Of the Chung Group of companies Tony controlled only his own corporation, Primary Enterprises Inc. L. Chung Development Co. Ltd. and the other corporations making up the Chung group were controlled by their respective owners, Lim Chung and the brothers and sisters of Tony Chung. It is also clear from the evidence that Lim Chung made the major decisions for the whole group. Tony Chung ran the day-to-day operations of Tiffield Development Corporation. He was also subject to his father's direction and assisted Lim Chung in putting together the joint venture. In those capacities he was in a position to make a representation to the plaintiffs.

26 The legal requirements for fraudulent misrepresentation were reviewed by Rutherford J. in Lister v. Dunlop Canada Ltd. (1978), 19 O.R. (2d) 380 (reversed on other grounds) at p-393:

> In order to succeed in an action for fraudulent misrepresentation or deceit, the plaintiff must prove that the defendant made a false statement of fact knowing it to be false or recklessly without caring whether it was true or false, with the intent that it be acted upon and which the plaintiff in fact acted upon to his detriment; *Derry et al. v. Peek* (1889), 14 App. Cas.337 (H.L.) *Peek v. Gurney et al.* (1873), L.R. 6 H.L. 377. As a matter of peaking, the particular matters constituting fraud must be specifically alleged (*Stewart v. Bundock* (1924), 25 O.W.N. 657 (H.C.)), and as a matter 31 proof, the plaintiff is confined to the particular fraud alleged, which must be clearly and distinctly proved: *Wilson v. Suburban Estates Co.* (1913), 4 O.W.N. 1488, and affirmed 5 O.W.N. 182 (C.A.); see also 13 C.E.D. (Ont. 3rd, 1977 Supp. Title 65, "Fraud & Misrepresentation" (S107, note 13).

27 In this case the representation arises out of the following events.

28 In early August 1987 Lim Chung and Tony Chung were seeking investors for the newly acquired lands. An undated letter was sent by Tony Chung to all potential participants. The letter stated in part:

> We have enclosed herein with a copy of the projection and (sic) acknowledgment for share participation for all interested parties. The attached forms have to be signed and returned to our office as soon as possible and all funds have to be deposited to our account no later than September 15, 1987, payable to Daksun Development Ltd.
>
> Royal Bank, Account #(6462) 103-108-7 OR to our office. (Daksun was a corporation used for Tiffield purposes while Tiffield Development Corporation was being incorporated.)

29 Enclosed in the letter was a typed acknowledgment form in which the amount of investment was to be filled in. The acknowledgment read:

> THE UNDERSIGNED hereby acknowledges that it is acquiring an undivided interest in the above-mentioned land purchase and is a joint venturer in this project. We agree to deliver to Daksun no later than September 15th, 1987, a cheque payable to it in the amount of
>
> DOLLARS ($) as our contribution representing * % of ownership in the joint venture. We acknowledge being advised that total contributions will exceed the purchase price in order to have a reserve fund for all usual development expenses to be incurred in developing the lands. We agree to sign within THIRTY (30) days a joint venture agreement to be prepared by Daksun's lawyers for the joint venture, which shall provide:
>
> (a) that each participant is an owner of an undivided interest in the land as a tenant-in-common;
>
> (b) no participant can partition and sever the land except in accordance with the joint venture agreement;
>
> (c) each participant can only deal with its interest in the land in accordance with the joint venture agreement; and
>
> (d) each participant will sign the usual banking documents for the bank for the development of the lands acknowledging their interest in the lands and acknowledging the priority of the bank for any monies it lends to the project or any guarantee for his own percentage of ownership if the bank requires it.
>
> Both the undersigned and Daksun acknowledge that Daksun is acting as a trustee on behalf of the joint venture and it will acknowledge by a Declaration of Trust the ownership percentage of each joint venturer in the lands.
>
> DATED at Scarborough this day of, 1987.

Tabular or graphic material set at this point is not displayable.

* Percentage of participation to be determined at a later date after we have received all the acknowledgement and total committed funds.

30 The plaintiffs duly signed acknowledgments indicating the amount of their respective investments. Mascot's acknowledgment was dated September 14, 1987. There was no evidence of the dates of the other two. The forensic report shows contributions by the plaintiffs as of the following dates:

Tabular or graphic material set at this point is not displayable.

In June, 1987, the Torchin project, in which the plaintiffs were also participants, had some $3 million of capital for distribution to the joint venturers. Of that amount the plaintiffs were entitled to $600,000. At the suggestion of Tony Chung in his letter of August 5, 1987, they agreed to have their share of the Torchin distribution transferred to Tiffield to make up the balance of their respective contributions to Tiffield. Each of them signed a direction authorizing the payment to Daksun for the Tiffield project. That of the plaintiff Cathay was dated August 24, 1987, that of Mascot, August 25, 1987 and that of Bowing was undated.

I am satisfied that the contributions were made by the plaintiffs in reliance on the representation made in Tony Chung's undated letter of August 1987 and the acknowledgment it enclosed. The invitation to invest was coupled with the terms on which investment was to be accepted as set out in these two documents.

31 The acknowledgment accompanying the letter contains an agreement that the participant will deliver a cheque to Daksun no later than September 15, 1987 and the addendum already quoted:

* Percentage of participation to be determined at a later date after we have received all the acknowledgment and total committed funds.

I find the addendum is in clear language and open to no other interpretation than that percentages of participation will not be determined until all funds have been received by Daksun.

I find that the effect of the representation on the plaintiffs was complete at the time they made their contributions to the project in accordance with the letter and the terms of the acknowledgment. They were entitled to expect that all other investors would adhere to the same terms.

What followed the making of their contributions were the events which confirm that the representation was false, false when it was made and false to the knowledge of the makers of the representatives, Lim Chung and Tony Chung.

A meeting of the Tiffield investors was held on September 17, 1987 at which all the plaintiffs were present. The minutes of that meeting record a report from Tony Chung:

The total number of shares at present is 800 which gives us a total capital contribution of $8,000,000.

32 By that time, the plaintiffs had applied for participation in the joint venture on the basis of the terms set out in the acknowledgment. They had made the cash payment and signed the directions arranging for payment in full of their respective contributions by Sept. 18, 1987. They had learned that the total capital contributions were $8 million. They were entitled to expect that their respective contributions of $500,000 for Cathay, $600,000 for Rowing and $300,000 from Mascot entitled them to a percentage interest of 6.25%, 7.5% and 2.5% in the joint venture. They were also entitled to expect that $8 million in contributions had been received by the project. They were not informed that those expectations were based on a false state of facts.

33 Both Lim Chung and Tony Chung testified at the trial that the intention was to have the capital monies in the hands of Tiffield before any percentages were assigned. Tony explained that they were dealing with some investors with whom they had not dealt before and therefore they wanted to have the money in hand first. They were both aware that when Tony Chung made the statement at the Tiffield meeting on September 17, 1987 that the total capital contribution was $8 million, all the monies had not then been received.

34 On September 23, 1987 Tony Chung executed a Declaration of Trust declaring the number of the 800 issued shares of Tiffield Development Corporation he held in trust for each of the listed beneficiaries. There was no evidence that this Declaration of Trust was sent out to the participants. However, the shares listed in the Declaration of Trust are in the same proportions as those shown as ownership percentages in the cotenancy agreement dated October 1, 1987 and as owned by the same persons. Tony Chung testified that he obtained the ownership percentages from his father Lim Chung and that he prepared and signed the Declaration of Trust on his instructions.

35 By October 2, 1987, the actual date of closing of the land purchase, except for $10,000 paid by Primary Enterprises on October 9, 1987, the groups had made cash contributions to capital as follows:

Tabular or graphic material set at this point is not displayable.

That left a balance of capital owing to make up the $8 million of $2,250,000. Of this latter amount $600,000 was on the plaintiffs' account because unbeknowest to them the transfer directed by them out of Torchin had never taken place. The remainder of the unpaid amount, i.e., $1,650,000 was to the account of the Chung Group. The Plaintiffs were not told of this situation.

36 Tony Chung explained why the transfers from Torchin had not been made as directed. The Torchin monies for the plaintiffs were available on August 20, 1987. Mr. Lai, another investor in Torchin, requested return of his capital and received a cheque for $750,000 from Torchin that day. However, the balance of the Torchin funds of some $2.25 million were invested that same day by Tony Chung and his bookkeeper, as was their custom, in a term deposit and a T-bill both maturing October 9,

1987. At that time the closing of the land purchase was expected to take place October 14 and the investments would have matured to meet the closing date. However, the closing was advanced because of the illness of the vendor and the monies were not then available to transfer to Tiffield for the closing on October 2, 1987.

$1.4 million was needed along with the $5.75 million in cash already contributed to Tiffield, to complete the funds for the closing. Tony Chung arranged to borrow $1.4 million against the line of credit Tiffield had arranged for the servicing of its lands. This amount with interest was repaid to Tiffield's bank a few days later when the T-bill and term deposit in Torchin matured by a transfer of cash from Torchin. The plaintiffs were not advised of the requirement for the funds nor of the loan against Tiffield's line of credit.

37 The balance of $850,000 still required to make up the $8 million in the joint venture was paid by a further cash payment from Torchin to Tiffield on February 10, 1988. The plaintiffs were not advised of this payment at the time it was made.

RELIANCE

38 One of the requirements for establishing liability for fraudulent misrepresentation is proof of reliance by the plaintiff on the misrepresentation to his detriment. None of the plaintiffs' representatives was called to testify at the trial. A representative of each of the three had been examined for discovery.

39 The defendants Chung now argue that there is no evidence coming from the plaintiffs to show each or any of them relied on the alleged misrepresentation when they paid their money as investment in the joint venture.

40 I find that the plaintiffs are entitled to rely on the letter of Tony Chung to all participants with the acknowledgment referred to, and their conduct in signing and returning the acknowledgment and their arrangements in making their contributions to show that it was on the truth of the representation in the documents that they relied. There was nothing in the testimony of either Lim Chung or Tony Chung to suggest that the plaintiffs made their payments on some other basis. It is also clear from the testimony of Lim and Tony Chung that participation was based on actual payment; that they knew the Chung Group had not made the payment of $850,000 at the time the percentage interests were allocated by Lim Chung and that they did nothing to tell the plaintiffs of the missing capital at any time. They were content to let the plaintiffs believe all monies had been paid in within a reasonable time of September 15, 1987.

41 I find that the plaintiffs relied on the false representation and clearly to their detriment which will be identified below.

42 Nor do I agree with the defendants that an adverse inference should be drawn against the plaintiffs for their failure to testify at the trial. The plaintiffs have the burden of proving the fraudulent misrepresentation and their reliance on it. The principle of adverse inferences arises where one party has established a *prima facie* case against another. Then an adverse inference may be drawn against the

party against whom a *prima facie* case has been made out if that party fails to call a witness who can give relevant evidence. Here the defence asks that an adverse inference be drawn simply because none of the plaintiffs has been called to give testimony. The plaintiffs rely on their conduct in response to the letter and acknowledgment of August 1987. There is nothing which allows the application in this case of the principle in *Vieczorek v. Piersma* (1987), 58 O.R. (2d) 583 at 588 referred to in Clairborne Industries v. National Bank of Canada (1989), 69 O.R. (2d) 65 at 77 (OCA).

43 Tony Chung continued to mislead the plaintiffs when he sent out the cotenancy agreement early in October which contained the assigned percentages which according to the representation in the Investor's acknowledgement were said to be based on percentages determined after all committed funds were received. Tony Chung knew that the Chung Group was assigned a 42.25% interest under the agreement when it had only paid $2.53 million, which entitled it to a 31.625 percentage interest only.

44 There were two factors which caused the late payment of $850,000. In September 1987 Lim Chung negotiated with one Hung Tong, for an 8.125% interest in the project. Hung Tong was interested but said he would be unable to pay until February 1988. Lim agreed to the late payment but said that it would have to be paid before the next investors' meeting "to be fair to all the investors". The Hung Tong percentage was included in that of Chung International but it was not paid for until February 10, 1988. On October 25, 1988 the Declaration of Trust was altered to show Rung Tong as having a 8.125% interest and the interest of Chung International was reduced accordingly.

45 The second factor I have already referred to in part. Tony Chung was clearly in error when he invested the Torchin monies on August 20, 1987 which he had suggested to the plaintiffs and which were intended by the plaintiffs to be transferred to Tiffield by September 15, 1987. He confused his authority to deal with Torchin monies and his obligation to the Plaintiffs and to Tiffield. He was wrong if he thought it made no difference whether the monies were in Torchin or in Tiffield. He explained the shortfall in the Chung Group's contributions by saying that the Bank of Montreal (Torchin's bank) was holding back $850,000 in the bank account pending release of performance bonds in that amount by the City of Scarborough. There was however no, evidence that he was aware of that at the time he invested in the T-bill and term deposit. Rather I find there was no intention on the part of the Chung Group to pay the 850,000 into the Joint Venture before February 1988.

46 Even if I were to accept his explanation, I find untenable the defendants' suggestion that the result of any failure in the ability of Torchin to deliver the funds because of the bank's position should be borne in part by the plaintiffs because they had a 23.33% share in Torchin. Delay affected both the plaintiffs and the Chung Group but because Tony acted on behalf of the Chung Group, as well as for Torchin, his knowledge of the money problems should be taken as the knowledge of the Chung Group. The plaintiffs had no such knowledge and are innocent victims of Torchin's actions directed by Tony Chung. How allocation of $1.4 million paid in October 9, 1987 was recorded in the books of Torchin, which were under the control and direction of Tony Chung, is irrelevant to the plaintiffs' position. I find the $850,000 shortfall was all to the account of the Chung Group.

47 In rejecting Tony Chung's explanation, I find significant the statement at p.14 in the Lindquist,

Avey report prepared on behalf of the defendants.

> It was originally intended that $1,400,000 of the purchase price would be funded from the transfer of capital from the Torchin project.

48 When asked about the source for this statement of original intent in the report, Mr. Hamilton, its author, testified that it came to him from Tony Chung. Tony Chung, when asked on cross-examination about errors in the report, failed to note this statement as an error and when asked about it specifically denied having told Hamilton it was an original intention and said in any event the statement was not complete. He did not say what was necessary to make it complete and was not asked about it in re-examination.

49 I am satisfied that the intention of Lim and Tony Chung, in October 1987 was to transfer only $1.4 million from Torchin to Tiffield, which was what was needed to complete the funds necessary to close the Tiffield land purchase, and to retain the balance against Torchin's bank's requirements for the Torchin performance letters of credit. The amount for the Hung Tong transfer was only $650,000 out of the $850,000. There was no explanation for the additional $200,000. I conclude that it was necessary to meet the amount of those letters of credit.

50 Based on all the evidence of these dealings it becomes clear that Lim Chung with the assistance of Tony Chung was operating an investment enterprise which had a number of projects. Where one project was in need of funds, another project would provide those monies. Up to Feb.1988 Torchin needed security of $850,000 and Tiffield had that amount in committed capital but did not need it immediately. It made good financial sense to them to deal with the $850,000 in this way. A 3 million dollar line of credit was established for the servicing of the Tiffield development. When the Torchin monies which were to be transferred for closing the Tiffield purchase were tied up in investments it made good financial sense to them to get a bridging loan against the Tiffield line of credit which was paid back with interest as soon as the Torchin investments matured. The loans from Tiffield to Primary Properties, another project, reflect the same financial approach.

51 However, it is also clear that these decisions were made without regard to the rights of the other investors who were not always investors in all the projects and in the same degree. There was no regard for potential risk created by the transaction. Lines drawn between the corporations and the projects by contract law, trust principles and fiduciary obligations among joint venturers were simply ignored. The Chung group's position is illuminated when it argues that except for a potential award of interest lost on the $850,000 by Tiffield of about $30,000 no loss was suffered by any of the Tiffield participants, that all transactions were properly documented, interest was paid in the ordinary course and in fact all participants profited handsomely from their investment in Tiffield at the time the lands were sold.

WHAT IS CAPITAL? WHAT IS OWNERSHIP?

52 The Chung Defendants argue that the percentages set out in the cotenancy agreement refer not to capital interests or contributions but to ownership interests. The cotenancy agreement provides:

Article III - Ownership of Assets, Profits and Losses

3.01 *Ownership Assets*

All property and assets belonging to the Co-Tenancy shall be owned by the Co-Tenants as tenants-in-common in the percentage set out opposite their names:

Tabular or graphic material set at this point is not displayable.

3.02 *Losses*

All expenses and losses incurred by the Co-Tenancy shall be borne and paid by each Co-Tenant in accordance with its proportionate interest.

53 The Chung defendants' counsel points to other examples where contributions of capital have taken the form of expertise rather than cash. (See *Keire v. Kutcher*, [1992] O.J. No.301).

54 Mr. Rosen, the forensic accountant retained by the plaintiffs, defines capital as money actually at risk in the joint venture. Mr. Hamilton, Mr. Rosen's counterpart for the defence, agreed with that definition but considered that money included both cash contributions and amounts of capital committed but not yet paid in.

55 However, I am satisfied that "capital" and "ownership" must be determined not by accounting opinion but as questions of fact based on the intention and conduct of the parties. In this instance it is clear from the outset that all investors were to pay cash into the Daksun bank account by September 15, 1987 and that the percentage interest in the ownership of the joint venture would be determined when all the cash was received - in the words of the Acknowledgement "after we have received all the acknowledgment and total committed funds".

56 The Chungs were in charge of this project and it was they who laid down this requirement. When the investors received for signature the cotenancy agreement containing the percentage breakdown, taken with requirements of the Acknowledgment and the statement at the meeting that the total capital was $8 million they were entitled to infer that a total of $8 million had been paid into Daksun.

57 There was nothing to indicate that the percentages stated in the agreement were other than a reflection of total capital paid in by the various participants. In this case, therefore, there is no basis for saying that at October 9, 1987 an ownership interest and a capital contribution were not synonymous. The payment of the $850,000 made in February 1988 confirms that the Chung Group considered that amount as capital owing to complete its payment obligations to the joint venture.

58 As of October 9, 1987, the Chung Group was shown in the agreement to have a 42.25% ownership interest which would call for a capital contribution of $3,380.000. At that date the Chung Group had contributed as capital $2,530,000. This amount at October 9, 1987 would support an ownership interest of only 31.625%. Accordingly the statement of ownership interest in the co-tenancy agreement at

October 9, 1987 was false and false to the knowledge of the Chungs. None of the other cotenants were aware of this falsity at that time nor at any time until the forensic investigations were done for this action.

59 There was no meeting advising the joint venturers of the falsity of the statement in the cotenancy agreement; there was no letter or oral communication which advised any of them of the falsity of the statement.

60 When asked why no board of directors' meeting of Tiffield was called to consider the issue of the shortfall in capital contributions in October 1987 Tony Chung said at the trial:

> A. I didn't think it is important issue, and I don't think my father at that time thought it an important issue. If that is important issue, he would remind me that we have to call meeting.

WAS A LATE CAPITAL CONTRIBUTION PERMITTED?

61 On February 10, 1987 the Chung Group paid into Tiffield $850,000 representing the balance of its required contribution under the agreement for the joint venture. Their counsel points out that the payment was only 4 months late, a very short time in relation to the projected time for the project of 60 months. Viewed in the time frame of the sale closed in December 1989, it was 4 months out of 26 months.

62 There was no disclosure at any time by the Chungs of their late payment. I find they had a duty to inform the joint venturers at the time they attempted to change the rules laid down for the joint venture by setting out percentage interests in the co-tenancy agreement not supported by capital contributions. They failed to do so. The joint venturers could have agreed to the late payment and to a confirmation of the percentage interest of the Chung Group but they were never asked. Without that agreement the provisions governing the joint venture could not be changed.

63 I conclude that the failure of the Chung Group to pay the $850,000 into Tiffield by October 9, 1987 placed it in breach of its obligation to the joint venture at that date.

EFFECT OF MISREPRESENTATION

64 How is the effect of the misrepresentation to be viewed by the court and what liability, if any, should the misrepresentation attract?

65 The cotenancy agreement here is silent about the making of contributions but I find there is an implied payment required which arises from the documentation leading up to the entering into of the cotenancy agreement as expressed in the documents referred to and that such payment was to have been by September 15, 1987, now extended to October 9, 1987 by the conduct of the parties. If the defendants Chung's failure to pay is a breach only of the implied contractual term then the remedy in these circumstances would be for damages and those damages would be interest on the $850,000 during the period from October 9, 1987 to February 10, 1987. The fraudulent misrepresentation requires

more.

66 A joint venture agreement creates certain rights and obligations among the joint venturers but as Carthy J. A. said in *Wousch Construction Company Ltd. v. National Bank of Canada* (1990), 50 B.L.R. 258 at p.262:

> I agree with the trial judge that a joint venture agreement creates fiduciary duties. However, all of the obligations between the parties do not fall into the fiduciary category.

67 The plaintiffs however argue that in these circumstances the Chung Group has in the making of the misrepresentation breached a fiduciary duty to the other joint venturers. In the Wousch case the Court of Appeal adopted the statement of the trial judge on the duties owed between joint venturers quoted at p.267 of the report:

> It seems now accepted that joint venturers owe fiduciary duties to each other similar to those owed by partners: Hogar Estates Ltd. v. Shebron Holdings Ltd. (1979), 25 O.R. 543 (H.C.J.). In general, the riduciary duties owed by a joint venturer to another joint venturer involve the `reciprocal obligations of good faith and loyalty as regards the common interest in the common venture' *Hitchcock v. Sykes* (1915), 23 D.L.R. 518 at 521 (S.C.C.), per Duff J. In particular, the duties include: (a) the duty of full disclosure; (b) the duty not to make secret profits; and (c) the duty not to compete with the business: *Meinhard v. Salmon* (1928), 164 N.E. %$% (N.Y.C.A.), per Cardozo J. See generally S. Goldberg, "Fiduciary Duties of Co-Venturers and Partners" in *Fiduciary Duties*, Law Society of Upper Canada, 1986."

Carthy J. A. then commented at p.268:

> I am in complete agreement with this statement. Applying these principles to the present case, it is my view that, as Wousch and Danzig entered this joint venture, all manner of fiduciary obligations implicitly bound them, such as the prohibitions against self-dealing, competing with the joint venturer and making secret profits and the requirement of maintaining confidentiality, all commonly wrapped up in the phrase "good faith and loyalty as regards the common interest and the common venture".

68 The plaintiffs have met the onus of proving the fraudulent misrepresentation by Tony Chung, made on behalf of the Chung Group, that all monies had been paid into the joint venture before ownership percentages were determined. The Chung Group had a contractual obligation to pay in the money by October 9, 1987. Having knowingly failed to do so and having failed to inform the other joint venturers of that failure they are in breach of the duty owed by one joint venturer to all other joint venturers to act in utmost good faith and in the best interests of the joint venture. Because this breach goes beyond that of a contractual obligation it is not sufficient to permit them to make a late payment of capital by paying interest on the late amount. That would be permitting them to reap a profit from their failure to pay and to ignore potential risks in which the joint venture was placed by their conduct and the breach of their fiduciary duty to the other joint venturers.

69 It is proper therefore for the court to prevent the Chung Group from profiting from its conduct by treating the late payment to the joint venture as an advance and not as a capital contribution. This is the way Mr. Rosen, the expert in forensic accounting called by the plaintiff, suggested that late payments should be treated and I accept that position. As an advance the $850,000 is not entitled to attract any share of the profit.

70 The result is that the capital of the joint venture is reduced to $7,150,000 and the percentage interests are to be calculated on the basis of the cash contributions made as of October 9, 1987. By that time the Chung Group had contributed $2,530,000 which would entitle it to a 35.39% interest in the $7,150,000.

71 Applying the same adjustment to the other joint venturers I find a readjusted schedule of ownership interests based on the capital contributions set out in the Lindquist Avery Report Schedule 1 and treating Hung Tong as part of the Chung Group as follows:

Tabular or graphic material set at this point is not displayable.

There will be a declaration to that effect.

72 The interest of Hung Tong reflected in the Declaration of Trust of October 25, 1988 is in no higher position than that of Chung International, from whose share the transfer to Hung Tong was made. It reflects an advance to the joint venture of $650,000 and not an interest in the joint venture. Whatever the arrangement may have been between Hung Tong and the Chung Group remains to be worked out between them. Hung Tong was served with the statement of claim in this action but chose not to take part.

73 All losses of the joint ventures are to be borne by the joint venturers in accordance with their respective percentage interests. The agreement is not explicit about profits but I have no difficulty in concluding that profits should be treated in the same fashion and the parties have treated them in this fashion. Accordingly, all distributions of capital and profits of joint venture are to be recalculated and paid as far as the plaintiffs are concerned in accordance with the recast percentages. Such recalculations should be made as soon as possible so that the position of each of the parties is made clear. The plaintiffs are entitled to judgment for the amount of any readjusted profits to which they are entitled against the Chung Group.

74 This recalculation raises the question of what the effect should be on the positions of the So Group, the clients represented by Mr. Warne, and by Mr. Maltz representing Macey Investments Limited, all of whom were named as defendants in the action. Both groups chose to take no part in the trial proceedings though Mr. Warne held a watching brief throughout and Mr. Maltz appeared to address the court. The court's declaration of the correct percentage interests in the joint venture does affect the interests of all joint venturers. The change in the percentage interests affect the share of profit. In that sense the redistribution of profit is not caused by a judgment of the court based solely on equitable

principles but arises out of the joint venture contract itself. I find that the right of the So Group and Macey Investments Limited to seek judgment for their respective shares in the redistribution of the profits is reserved to them.

LOANS

75 The plaintiffs say that not only was there a misrepresentation about the funding of the joint venture which reduced the Chung Group's capital in it but there was also a withdrawal of capital by way of certain unauthorized loans made out of Tiffield monies.

76 In January, 1989 Primary Properties, a project owned 50% by the Chung Group and 50% by Fong and Fong Properties Ltd., was being pressed for payment by the trades who were working on its construction project. L. Chung Development had committed its line of credit to other projects, particularly Torchin. Katie Tai, the bookkeeper for all the various projects and who was dealing with the trades, suggested to Tony Chung that Primary Properties borrow money from Tiffield which had monies available under its line of credit. Tony consulted with Bill Fong and then both went to see Lim Chung. The three agreed to the loan, Lim Chung, and Tony for Primary Enterprises Inc., representing the interest of the Chung Group in Tiffield for 34.125%, and Bill Fong representing the interest of Fong & Fong in Tiffield for 17.5%, for a total of 51.625% of the percentage interest in the Tiffield cotenancy agreement. (Hung Tong by that time had acquired an 8.125% interest and the interest of Chung International had been reduced accordingly). The majority interest relied on by the defendant is not changed to a minority position by the recalculation of the percentages in the foregoing declaration. The new combined position for the Chung and Fong groups is 54.97%.

77 It was Lim Chung's opinion that 51% of the percentage interests was sufficient to authorize the loan. This position was documented in memoranda filed in the bookkeeper's file, by cheque requisition forms and in the books of both Tiffield and Primary Properties. Tony Chung and the bookkeeper controlled the books and records of all the projects in which the Chung Group was involved.

78 No specific amount to be loaned was agreed at the meeting. The plaintiffs concede that Bill Fong gave a blanket approval for all of the loans made to Primary Properties. The first loan was made on January 20, 1989 for $330,000. It was repaid five days later with interest equal to the interest Tiffield had to pay to the bank on its line of credit. Twelve loans totalling $1,225,000 were made in this way. After the first loan was repaid, however, none of the other loans were paid until December 18, 1989, at which time they were paid from the L. Chung Development Co. Ltd. and Fong & Fong Properties' share of the Tiffield capital and profit distribution made at that date.

79 A loan of $30,000 was also made to the Kamfai project on July 31, 1989 and repaid on September 13, 1989 with interest. This loan was not approved by Bill Fong until sometime in 1991 and he was unaware of it at the time. Tony Chung says he signed the cheque requisition for the advance by oversight.

80 During the period when these loans were outstanding no disclosure of the transactions was made

at any of the meetings of the Tiffield joint venturers and no disclosure was made to any Individual joint venturers except that Tony testified he told Sidney Chiu, the President of Bowing in August 1990 that Primary Properties had borrowed on a short-term basis from Tiffield. The loans are shown in the Tiffield financial statements for the year ending August 31, 1989 which were first made available to the joint venturers in early March 1990 except for Macey Investments Limited whose accountant received a copy of the statement at his request in December 1989. The balance sheet of Tiffield showed, "Loans to affiliated companies $765,233. Note 3 to the financial statement showed:

Tabular or graphic material set at this point is not displayable.
The above loans are drawn from the line of credit bear interest at prime plus 3/4% and are payable on December 15, 1989.

The statements do not indicate the magnitude of the total loans but reflect the amount owing at the end of the period. There was no documentation or other evidence to support the date when the loans were payable.

81 The defence argues that the operation of Tiffield was left by the investors to Lim Chung and Tony Chung and that they were authorized to carry out the day-to-day operations of the project. Further they, with Bill Fong, represented 51% of the percentage interests under the co-tenancy agreement and were thereby clothed with the necessary authority to make loans.

82 There is nothing in the co-tenancy agreement which speaks of empowering or authorizing by 51% of the percentage interest. Articles 7.01 and 8.01 speak of transfers and sale to be authorized by consent of 51% of the co-tenants. My brother Meehan on the motion for relief against an order preventing Tiffield from acting held that certain steps could be taken on a vote of 51% of the percentage interests and I accept his determination.

83 However, in the circumstances, I am not satisfied that what was done by way of loans to Primary Properties and Kamfai could be done by the purported 51% majority. First, lending money to others was outside the scope of the joint venture. Article II paragraph 2.01 a) provides:

"The parties enter into this co-tenancy to acquire the lands and for the development and construction therein of same".

84 Second, lending money to corporations in which Lim Chung, Tony Chung and Bill Fong, either as directors of Tiffield or as joint venturers, had a financial interest was a clear conflict of interest. A trustee such as Tiffield or a joint venturer, such as Lim Chung, Tony Chung and Bill Fong all were, through their various corporations, owes a duty to act in the best interests of either the beneficiaries of the trust or of the other joint venturers. None of them was in a position to gauge what was in the best interests of the joint venture in such a conflict of interest situation. The interest rate charged on a loan in an arm's length transaction is an indication of the risk taken. Here the rate was simply that charged by the banks against the line of credit. It does not appear there was any effort to assess the risk or even

any thought that the Tiffield monies were being put at risk. There was no security taken for the loans. However, even if the interest rate had been set after a consideration of the risk, that would not remove the conflict of interest problem. The making of the loans by Tiffield was clearly an advantage to the borrowers while it was a risk to the joint venture.

85 Third, there was no effort or, the part of any of Lim Chung, Tony Chung or Bill Fong to inform the other joint venturers or hold a meeting of joint venturers at which the making of the loans could be considered or approved or ratified.

86 I find therefore that all of the loans were unauthorized and were in breach of Tiffield's trust duty to the joint venturers and of the duty owed by one joint venturer to all the other joint venturers of good faith and loyalty. However, as Bill Fong did not take part in the loan to Kamfai he and Fong and Fong are absolved from any liability concerning that loan.

PENALTY FOR BREACH

87 The plaintiffs argue that all of the unauthorized loan transactions should be treated as withdrawals of capital from Tiffield by the Chung Group and Fong and Fong Properties Ltd. and that their percentage interests in the joint venture should be reduced accordingly.

88 A breach of fiduciary duty does not automatically demand a severe penalty such as that sought by the plaintiffs which would disentitle these defendants to all profit based on withdrawn capital by way of loans which total $1,225,000. That based on the total capital of 7,150,000 would constitute a return of some 17% of their share of the capital and profit in the Tiffield venture. This amounts roughly to $2,890,000, a severe penalty indeed.

89 Anderson J. in *Soulos v. Korkontzilas* (1991), 4 O.R. (3d) 51 said at p. 67:

> "As a matter of law, not every breach, even a duty designated as fiduciary, calls for the same interference from the court."

He then quoted from Fletcher Moulton L.J. in *Re* Coomber: Coomber v. Coomber, [1911] 1 Ch. 723 at 728 and 729 a passage from which I extract a part:

> All these are cases of fiduciary relations, and the Courts have again and again, in cases where there has been a fiduciary relation, interfered and set aside acts which, between persons in a wholly independent position, would have been perfectly valid. Thereupon in some minds there arises the idea that if there is any fiduciary relation whatever any of these types of interference is warranted by it. They conclude that every kind of fiduciary relation justifies every kind of interference. Of course that is absurd. The nature of the fiduciary relation must be such that it 'justifies the interference. There is no class of case in which one ought more carefully to bear in mind the facts of the case, when one reads the judgment of the Court on those facts, than cases which relate to fiduciary and confidential relations and the action of the Court with regard to them.

90 There are a number of findings of fact which must be borne in mind in considering this breach of fiduciary duty. I am satisfied that all three of the actors, Lim Chung, Tony Chung and Bill Fong, had an honest belief that they were authorized by a 51% interest to make the loans. Each loan was correctly documented in the banks and records of both the borrower and the lender and there was no attempt to cover up the loans. Each loan was paid back within a few months with interest and no loss of capital occurred.

91 The law is clear that a trustee or a fiduciary should not profit from his or her breach of trust and any such profit must be disgorged. See *Lavigne v. Robern* (O.C.A.) (1984), 51 O.R. (2d) 60 where MacKinnon A.C.J.O. said at p. 63:

> "In dealing with this problem I start from the simple basis that the defendant under the recited circumstances must not be allowed to profit from his own wrongdoing. This may be an adoption of a penal rule of equity but it is warranted in this case:"

and on the same page

> "In my view this is an inappropriate disposition of the counter-claim. If it is accepted that the defendant should not profit by his wrongdoing, there is no penal aspect to the present result. As the matter now stands he received precisely what he would have received if he had acted honestly and brought his associates into the picture to share in the genuine sale price. The result provides no disincentive. In such cases, if the judgment were to stand, the fiduciary could breach his trust hoping to hide the breach and retain the secret profit, and if he failed to do so, he could still retain his 50% (or whatever his percentage interest in the company was) of the secret profit.

92 I find that some advantage did accrue to the defendants in being able to obtain from Tiffield unsecured loans unsupported by any loan agreement or specific repayment terms or terms at an interest rate identical to or below, in some cases, the rate of interest charged by the bank on a line of credit secured by the entire equity in the Tiffield lands. The Lindquist Avey Report in the footnotes its Schedule 9 sets out the prime rates charged by the bank during the loan periods and the rates paid by the borrowers upon repayment of the loans. In my opinion the rates paid do not correctly assess the interest rate which the defendants Chung and Fong would have had to pay in an arm's length transaction and they could reasonably be required to pay to Tiffield an amount of interest the respective borrowers would have had to pay under the circumstances at that time. It is irrelevant that they may have had other resources they could have called on to supply their needed funds. They did not resort to them.

93 The degree of penalty against those defendants for the unauthorized loans being an equitable remedy, should also take into account the conduct of the plaintiffs who were under an obligation to make complaint at the earliest possible moment. The first information came to Macey Holdings Limited when a copy of the Tiffield financial statements for the year ending August 31, 1989 was delivered to its accountant in December 1989. It may have been that the existence of the loans was mentioned to Patrick So, whose family's companies are also joint venturers, by Katie Tai in casual office conversation but

there is no evidence that either Macey's representative or So ever communicated their knowledge to any of the plaintiffs. The loans were first referred to in the plaintiffs' presence at a Tiffield meeting February 2, 1990 when Mr. Woznica, the Tiffield accountant made reference to the $57,000 of additional income which accrued to Tiffield from loans to Primary Properties. There was no mention of the expense to earn that income. At the March 1990 meeting each joint venturer received a copy of the Tiffield financial statements for the year ending August 31, 1989 showing loans to affiliated companies on the balance sheet. No mention was made of the earlier loan of $330,000 which had been repaid before the year end.

94 As for Tiffield Development Corporation as Trustee, I am satisfied that its breach of trust resulted from the actions of its directors, Lim Chung, Tony Chung and Bill Fong. None of the blame can be placed upon Mr. Yuen of Cathay, or Mr. Chiu of Bowing, who were also directors, as they were not aware of the loan transactions until March 1990 at the earliest and had no reason to inquire.

95 Cindy Yuen, daughter of K.Y. Yuen, the President of the plaintiff Cathay who was experienced in accounting matters, says she went over the 1989 financial statements with her father who said he had not heard about the loans before that. Tony Chung testified that he had not called Yuen about the loans because he did not think them important. Following the circulating of the statements no inquiries were ever directed to Tony Chung or Lim Chung regarding the loans or their status until the first complaint came in a letter from the plaintiffs' solicitor on December 31, 1990 when enquiries were started in connection with Torchin.

96 While the plaintiffs were not particularly diligent in requiring information about the loans I am satisfied that they are not so guilty of sleeping on their rights that those who made unauthorized loans and failed to disclose them earlier should be relieved of all penalty.

97 However, I view the failure of Lim Chung, Tony Chung and Bill Fong and the consequent breach of trust by Tiffield in making the loans as arising out of the same erroneous way of conducting business evidenced in the failure to pay in the capital when it was due. The penalty for that latter failure is very substantial and I do not consider it necessary or equitable to impose a further penalty for the improper loans. Should I be wrong on the issue of the capital contributions then another court might decide some penalty for the improper loans should be imposed.

MANAGEMENT FEES

98 The plaintiffs claim that fees for the management of the Tiffield project were paid out to Primary Enterprises Inc. and through that company to Tony Chung and Bill Fong as a breach of trust and that no management fees were in fact payable under the joint venture agreement.

Article 5.01 of the joint venture agreement provides:

5.01 Project Managers

The Co-Tenants agree to employ Primary Enterprises Inc. which shall supply Tony Chung and Bill Fong.to do all necessary management matters, including supervising, co-ordinating and expediting development and construction of the Lands. When the Lands shall be fully developed and the last development built thereon shall be sold, Primary Enterprises Inc. shall be entitled to receive TEN PERCENT (10%) of the gross profit of the total project before income tax. The gross profit of this project shall be determined by the accountants of the Co-Tenancy in accordance with generally accepted accounting principles. Payment shall be made upon the completion of each phase of development and shall be adjusted accordingly upon the final completion of the project.

99 In construing this article one must look at the whole document. In recital A the parties indicate their desire to enter the agreement "for the purposes of dealing with their acquisition of the Lands ... and the development and construction thereof on same...". This is confirmed in Article 2.01 which sets out the purpose and scope of the co-tenancy:

a) The parties enter into this Co-Tenancy to acquire the Lands and for the development and construction thereon of same.

100 Article 8.01 dealing with the sale of the Lands is also pertinent:

8.01 No sale of the Lands or any part thereof shall take place unless not less than FIFTY-ONE PERCENT (51%) of the Co-Tenants shall agree in writing to same.

101 Following the purchase of the lands on October 2, 1987 Tony Chung undertook the necessary steps of hiring consultants and dealing with the City of Scarborough officials to effect changes to the Official Plan and to obtain draft subdivision plan approval. By the fall of 1989 two of three zoning amendments and the draft plan of subdivision had been approved. Edward Elliott, an expert in land appraisal, testified that the obtaining of draft subdivision approval increased the value of raw land by 115% in an active market and that by late 1989 the market was "very, very active".

102 A meeting of the joint venturers was held on July 28, 1989 to consider whether to proceed with the development of the lands or to sell them. After discussion the joint venturers unanimously agreed to sell the whole of the Lands and instructed management to proceed with a tender process. An offer to purchase was accepted and the sale transaction was closed on December 15, 1989 for a sale price of $26.6 million, paid by $11 million in cash and the taking back of the first mortgage for the balance of $15.6 million.

103 There was no discussion at the July 28, 1989 meeting of what management fee, if any, was payable on such a sale but the report on tax planning presented at the meeting included in a consideration of tax planning alternatives a statement:

(b) Management Fee Payment: This, however, would only provide a very minor decrease in our taxes.

104 Following the closing of the transaction the Tiffield accountants determined the gross profit for the project for the period ending December 15, 1989 to be $17,192,692. The management fee was calculated at 10% of this amount to be $1,719,269 and was shown as an expense in the financial

statements of Tiffield for the year ending August 31, 1990. By January 3, 1991 $800,000 had been paid out to Primary Enterprises Inc. on account of management fees and the balance of fees owing at that time was $919,269. A further payment of $70,000 on account of management fees was made in July 1991. Of this amount $66,000 is being held in trust pending the judgment in this action.

105 In the fall of 1990 Price Waterhouse was retained by the plaintiff Cathay to examine the Tiffield financial statement. No objection was taken at that time to the amount of the management fees and the recommendation was made to Tiffield's accountants by Price, Waterhouse that the whole of the management fee should be deducted in the statements for the year ending August 31, 1990 on an accrual basis rather than spread over two years.

106 On December 15, 1991 the mortgagor defaulted on the mortgage. Foreclosure proceedings were taken resulting in a judgment of foreclosure in June, 1992. The land now held in the name of Tiffield Development Corporation was estimated by Mr. Elliott to have a value of $11,160 as of August 20, 1992.

107 The plaintiff argues that on a plain reading of Article 5.01 Primary Enterprises has no entitlement to any management fee until "the Lands shall be fully developed and the last development built thereon shall be sold". The original proposal prepared by Tony Chung in August 1987 contemplated the construction of a number of industrial and office condominium units. Offers for the sale of some of these units were entered into by the summer of 1989 but no construction of any kind was ever commenced on the lands prior to the sale of the whole parcel. The offers were cancelled at the time of the sale.

108 The plaintiff argues that a management fee would only be payable if the development and construction contemplated by the proposal and the joint venture agreement were actually undertaken, constructed and sold to the very last unit. This interpretation gives no meaning to the words "Payment shall be made upon the completion of each phase of development and shall be adjusted accordingly upon the final completion of the project". If the plaintiff is correct but some meaning is to be given to that sentence we have the result that management will be paid as each phase of development is completed but is subject to refunding the whole amount paid because there would be no entitlement to those monies if the development were never finished, the last unit were never sold or, as we have here, any part of the lands were sold without development and construction taking place. This would be an unusual financial risk for the joint venture to take in a business transaction. It would also be unusual for the management to undertake all the work entailed in this venture with the knowledge that some unforeseen occurrence could end or postpone indefinitely the development or the construction at any point or that at the very worst the joint venturers could block its entitlement to any fee at all by simply holding on to the last unit constructed. I do not think that the plaintiff's interpretation is acceptable in a business environment such as this was intended to be.

109 In my view, the words "When the Lands" etc. should be read as setting the time when gross profit of the project is to be calculated for the purpose of determining the management fee by application of the agreed percentage. This gives sensible meaning to the last sentence of the Article. Payments are to be made as each phase of the development is completed, presumably calculated on the gross profit for

each phase, but a final adjustment is to take place when the gross profit for the whole project is determined. For example, if gross profit is realized on two phases and a loss is suffered for the last phase an adjustment overall would be necessary.

110 Article 8.01 contemplates the sale of all or part of the lands. It is not clear if this means before or after development and/or construction.

111 When the joint venturers unanimously agreed to sell the lands in July 1989 they were also agreeing to alter the purpose and scope of the venture as set out in Article 2.01 to limit it to acquisition, development and sale of the lands. They had decided to terminate the whole project with a sale of the lands as they then were. In so doing, while they did not specifically amend Article 5.01, they were advancing the time at which gross profit was to be determined under Article 5.01. In my opinion Primary Enterprises cannot be deprived of its fees for work done by the unilateral act of the joint venturers in changing the scope of the project and hence of the management job, as the plaintiff argues. This is not a reasonable interpretation to be given to Article 5.01.

112 This is a commercial transaction in which the parties are experienced and sophisticated in real estate investment. They are concerned with making money and in minimizing the tax consequences of doing so. They have hired experts to advise them. In this milieu it is important to consider that the intention of all the parties is to act in a reasonable manner in their commercial activities. Their contractual arrangements should also be given a reasonable interpretation.

113 This principle was clearly recognized by the Supreme Court of Canada in *Consolidated-Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co.* (1979) 112 D.L.R. (3d) 49 where Estey J., in delivering the majority judgment of the court, said at p. 58:

> Even apart from the doctrine of *contra preferentem* as it may be applied in the construction contracts, the normal rules of construction lead a Court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract. Consequently, literal meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted. Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result. It is trite to observe that an interpretation of an ambiguous contractual provision which would render the endeavour on the part of the insured to obtain insurance protection nugatory, should be avoided. Said another way, the Courts should be loath to support a construction which would either enable the insurer to pocket the premium without risk or the insured to achieve a recovery which could neither be sensibly sought nor anticipated at the time of the contract.

114 I find the correct interpretation of Article 5.01 requires that a management fee is payable to Primary Enterprises at the time of the closing of the sale of the lands based on 10% of the gross profit of the project determined by Tiffield's accountant in accordance with generally accepted accounting principles. The project was finally completed at the time the sale was closed.

115 The key factor in the dealings in the joint venture is the many different capacities in which Tony Chung has acted. This is illustrated in this area by the fact that no management agreement appears to have been made, at least not in writing, between Primary Enterprises Inc. and Tiffield. There was no evidence given of what the terms were of the oral agreement, if any, between them. The parties have proceeded on the assumption that the terms were the same as those in Article 5.01. In December of 1990 the joint venturers met and passed Resolution 4A which purported to amend Article 5.01. There is no evidence that Primary Properties Inc. as consultant manager ever agreed to such an amendment. Tony Chung was present at the meetings representing Primary Enterprises Inc. which was one of the joint venturers. This is no indication that he negotiated the amendment on behalf of Primary Enterprises as the consultant manager. It could be argued that Primary Enterprises raised no objection and could be taken to have acquiesced. The matter has not been raised by the parties and I assume for the purposes of this judgment only that Primary Enterprises in its management capacity is bound by the actions of the joint venturers and by the joint venture agreement.

116 The joint venturers held meetings on October 3, 1991 and October 31, 1991 at which a resolution was passed by a majority of the joint venturers amending the timing for payment of the management fees. The purpose of the amendment was to recognize the difficulties which had arisen following the default under the mortgage and subsequent foreclosure which returned the lands to the joint venture. The resolution in its final form reads:

> It is resolved that the Co-Tenants hereby authorize and direct payment of Management Fees to Primary Enterprises Inc. in the amount of 10% of the aggregate to be distributed to the Co-Tenants until a total of 10% of the gross profit has been realized, giving credit for any Management Fees already paid. Gross profit shall be deemed to be realized when either:
>
> 1. the recovery of funds pursuant to either a sale by Power of Sale; Judicial Sale or Foreclosure and sale is completed; or
>
> 2. the Mortgage is paid or sold; or
>
> 3. the Co-Tenancy enters into any agreement whereby the Co-Tenancy participates in the development of the Tiffield lands in whole or in part.
>
> Payment will not be made so long as the Undertaking given to the Court stands, preventing any dealings with the Assets and subject to any Court Order to the contrary. In connection therewith, the Co-Tenants authorize and direct that the Management Fees retained by the Co-Tenancy with respect to the distribution made to the Co-Tenants in July, 1991 be paid to Primary Enterprises Inc.

117 The resolution provides that the management fees are to be paid as monies are received by the

joint venture and which are then available for distribution to the joint venturers. From a reading of the minutes one sees that some of the joint venturers were concerned about paying a management fee based on a gross profit which the joint venture has not actually received in cash. While accounting experts gave opinion evidence at the trial as to what "realized" meant in accounting terms I think that the intention of the parties is as set out in the discussion in the minutes and that accounting terms were not in contemplation when they passed the resolution. As it stands management fees are to be paid as the money representing the gross profit is actually received by the joint venture or when the event set out in exception 3 of the resolution occurs, at which time the balance of the fees immediately become due and payable.

118 Before this resolution can be effective it must be decided whether such a resolution required unanimous consent of all the joint venturers or whether a majority vote was sufficient. The minutes show that of those present or represented by proxy a majority, being the Chung Group and the Fong Group, were in favour of the resolution and the plaintiffs were opposed.

119 A joint venture is in many respects akin to a partnership in law. I have therefore resorted to principles applicable to partnership in considering this issue. Underhill's Principles of the Law of Partnership, 10th edition, 1975, London, Butterworths, at page 85 makes a useful distinction:

> Differences of Opinion between Partners
>
> Supposing that the partnership articles, or the partnership course of dealing, make no provision for difference of opinion as to the conduct of the business (and, of course, differences of opinion are almost certain to occur), how are these Differences to be settled? The answer is, that if such differences relate to an alteration of the partnership constitution - for instance, to a proposed change in or addition to the nature of the business, or the introduction of a new partner, or the substitution of a new partner for one who desires to retire and sell his share, or the expulsion of a partner then, in the absence of express stipulation, no such alterations can be made without the unanimous consent of all the partners, other than the one retiring and selling his share.

and at p. 86:

> But if the difference relates merely to the details of the business - 'ordinary matters connected with the partnership business,' as s.24(8) of the *Partnership Act*1890 puts it - then the question may be decided by the majority.

120 There is nothing in the *Ontario Partnership Act* which indicates that the distinction drawn by the learned author rests solely on the English statute and thus I am of the opinion that the distinction drawn may be applied in this case.

121 Does the Resolution of October 31, 1991 regarding management fees amend the structure of the joint venture or is it a matter connected to the ordinary operation of the joint venture?

122 When one considers the joint venture agreement as a whole it is plain that all of the articles

except Article 5, which is headed "Employment of Consultant", deals with rights and responsibilities of a joint venturer vis à vis the joint venture or with the structure of the joint venture. Article 5 deals with the employment of a manager, Primary Enterprises, and the provision of administration services by L. Chung Development Co. Ltd. for a monthly fee. The nature of these arrangements relates to the operation of the joint venture and not to its structure. They reflect a desire of Tony Chung and Lim Chung, through their respective companies, to control these aspects of the joint venture and to ensure their hold on these positions. Ordinarily the hiring of a manager and the provision of administrative services would fall within the obligation of Tiffield Development Corporation as nominee and agent of the Co-Tenants "to facilitate the management of the Co-Tenancy's affairs". (Recital C of the Co-Tenancy agreement).

123 Because Article 5 deals with operation of the business of the joint venture and not with its structure I find that a simple majority is all that is required for an amendment of Article 5.01 and that the resolution referred to above As effective to alter the management fee arrangement accordingly. There was full disclosure and discussion regarding this resolution which distinguishes it in one respect from the purported use of the 51% majority approval of the loans discussed earlier.

124 The plaintiffs' claim for a declaration that all management fees paid to Primary Enterprises Inc. and through it to Tony Chung and Bill Fong is a breach of the co-tenancy agreement and is a breach of trust by Tiffield Development Corporation is denied.

TRANSFERS TO TORCHIN DEVELOPMENT CORPORATION - DECEMBER 1990

125 The plaintiffs participated in the Torchin project with the Chung Group of companies. In October 1990 it was learned that the project was in a lass position. At a meeting of Torchin held on December 3, 1990 a resolution was passed which provided in part:

> All shareholders to pay up their proportionate share of lass, as prepared by Corporate Accountant, and calculated up to December 20th, 1990, into the account of the Corporate Solicitors, Torkin, Manes, Cohen & Arbus, in trust pending resolution of this matter.

126 Following that meeting Tiffield Development Corporation acting on the instructions of Tony Chung transferred to Torchin the plaintiffs' respective shares of the distribution made in Tiffield to all participants on December 17, 1990. The amounts so transferred were as follows:

Tabular or graphic material set at this point is not displayable.

Torchin applied these amounts to what is alleged to be the respective proportionate share of the plaintiffs in the Torchin losses.

127 The plaintiffs say that these transfers were unauthorized and were paid out consequent upon a breach of trust by Tiffield, induced by Tony Chung.

128 In determining this issue I do not make any finding regarding the relationship of any of the plaintiffs to Torchin Development Corporation and the Torchin project. That is to be determined in other proceedings. I consider the transfers only with respect to the relationship between Tiffield and each of the plaintiffs.

129 Towards the end of October 1990 Sidney Chiu, President of Bowing Investments, wrote to Tony Chung requesting details of its share of the losses in Torchin so that payment could be arranged. Shortly after, Chiu transferred the required amount to Torchin's bank account in full payment of Bowing's share. However the next day Chiu demanded return of the money saying that on legal and auditor's advice he required a resolution of the shareholders of Torchin prior to payment. The money was returned to Bowing immediately.

130 There is no doubt that Tony Chung was aware that to effect a transfer of monies from Tiffield to Torchin on behalf of the plaintiffs required a specific authorization in writing. He says in his October 23, 1990 letter to Chiu:

> Your share of the lass should be paid no later than October 31, 1990. However, since you participate in other projects, we can, on your brehalf (sic), withhold profit distribution to pay off this lass. If you decide to exercise this option, we require written confirmation of your consent for the transfer payment to cover this item. Interest will be included if payment is not received by October 31st, 1990. Please let me have your instructions regarding this.

131 On December 17, 1990 Tony Chung faxed to Chiu a request for a direction authorizing the transfer from Tiffield to Torchin and enclosed a direction for his signature. Chiu did not sign the direction. Neither Yuen nor Ma on behalf of the other plaintiff companies signed any authorization.

132 Ignoring his own assessment of what was needed to effect a legal transfer, Tony Chung then transferred the monies out of Tiffield to Torchin totalling the plaintiffs' share in the December 17, 1990 Tiffield distribution. There was neither express nor implied authority for doing so. I find, therefore, that Tiffield Development Corporation in making the transfer was in breach of its trust obligation owed to the plaintiffs.

BREACH OF TRUST

133 Tiffield Development Corporation was incorporated for the specific purpose of holding the land and carrying out the development of the Tiffield Development Project. Its officers are Lim Chung, President, Bill Fong, Vice-President and Tony Chung, Secretary. Its directors are Lim Chung, Bill Fong, Tony Chung, Sidney Chiu and K. Y. Yuen. Tony Chung, either as the manager supplied by Primary Enterprises Limited, or as an officer and director of the company or as the designate of Lim Chung, ran the day-to-day activities of the Tiffield Project and hence of Tiffield Development Corporation. There is also no doubt that Tony Chung took direction from his father Lim Chung in all matters of importance in the project. The shareholders of the corporation were the participants in the joint venture in proportion to their money contributions to the project.

134 It is clear from the testimony of Lim Chung that his was the operating and directing mind behind the Tiffield Project and also of the other projects he had undertaken for real estate development in Canada. He left the details of the operations to Tony but it was he who made the major decisions. Tony Chung's testimony also reflects his subservience to the ultimate decisions of Lim Chung. I am satisfied that this testimony is not an attempt to place responsibility on someone other than himself but is an honest statement of who controlled the whole of the project. If his father did not tell him. to call a meeting of joint venturers then he assumed no meeting was necessary. If his father said that 51% majority was sufficient to authorize loans then he accepted that. If his father gave him percentages to put in the cotenancy agreement he put them in as he was told and when his father told him to change the percentages he changed them.

135 Lim Chung's *modus operandi* over many years was the same. He directed the operations and kept the Investors informed to the extent he deemed it necessary. He was apparently successful in his developments and others were prepared to invest in his projects. Prior to the Tiffield Project he had not used a cotenancy agreement and only did so when Tony Chung persuaded him that such an extensive project required an agreement in writing. Tiffield Development Corporation was merely a vehicle that would formalize the *modus operandi* for tax and other legal purposes. The full extent of trust obligations was never a concern to Lim Chung or of Tony Chung and Bill Fong. However. Tiffield Development Corporation did assume the responsibilities of a trustee for the project and I find on the evidence that it is in breach of those responsibilities in three areas:

1 The Trustee under the cotenancy agreement was to hold title to the lands and to facilitate the management of the co-Tenancy's affairs. I find that it failed to look after the co-tenancy's affairs when it failed to get in all of the capital of the project totalling $8 million by October 9, 1987 and by taking out a loan against its servicing line of credit to fund the purchase price on the closing date of October 2, 1987. There was nothing in the agreement permitting it to do either and no specific authorization from its directors or shareholders. This breach of trust was induced by Lim Chung through the acts of Tony Chung. I am satisfied that Tony Chung did not act on his own to induce this breach but was directed to do so by Lim Chung.

2 The Trustee was to hold the assets of the project for the benefit of the Project and thereby for the benefit of its shareholders. It was in breach of this trust obligation when it lent the Corporation's monies to other projects of the Chung and Fong Groups without authorization as I have outlined earlier in the judgment. Lim Chung acted for the Chung Group and Bill Fong for the Fong & Fong Group when they voted to authorize the loans at the meeting in January 1989. It is not clear in which capacity Tony acted at the meeting since his interest in the Chung Group through Primary Enterprises Inc. was probably voted by Lim Chung. All three of them were directors of Tiffield as well. The breach was induced by all three of them acting in one or other of those capacities.

3 The Trustee was in breach of trust towards the plaintiffs when without written authority from them it transfered their respective shares in the Tiffield distribution of December 1990 to Torchin Development Corporation. Lim Chung, in a letter dated June 17, 1991 to all shareholders of Torchin,

wrote as follows about that action:

> Chi Fu [Tiffield] received some interest from the sale proceeds of some real estate lots. We were to distribute the interest to the shareholders. Mr. Yiu Cheung Chung [Tony Chung] wrote and phoned to get consent to transfer the money to cover the lass of Kam Po Court. [Torchin] There was no reply from any of the three. Therefore, we transferred the share of the three to cover their share of the lass in Kam Po Court.

Again the directing mind for this action was that of Lim Chung. Tony Chung did his father's bidding. I am satisfied that it was Lim Chung who induced the breach of trust.

REMEDIES FOR BREACH OF TRUST AGAINST THE TRUSTEE

136 The Trustee Corporation is a passive trustee acting through its officers and board of directors. It has no monies of its own out of which it might pay any monetary award made by the court. Both plaintiffs and defendants ask that it be removed as trustee. The Chung Group defendants seek to have it replaced with the Royal Trust. Evidence was called to show that Royal Trust is capable of assuming the duties of trustee in these circumstances. However, regardless of who is trustee, the real issue is who will direct the actions of the trustee. That issue ought to be determined by the joint venturers themselves but that will require joint venturers who are fully informed before any decisions are taken.

137 This venture has been placed in these difficulties because Lim Chung and Tony Chung took it upon themselves to make decisions which ought to have been made by all the joint venturers together. I do not find there was anything nefarious or anything motivated by personal gain in their actions or failures. When Lim Chung approved the loans to Primary Properties I am satisfied he honestly believed that approval of 51% of the joint venture interest was all that was required. Lim Chung and Tony Chung appear to have been very successful in their undertaking and the affairs of the project appear to have been dealt with correctly except for the breaches I have dealt with. I note that the principals of two of the plaintiff corporations, Chiu and Yuen, were directors of the corporation but do not appear to have made any effort to exercise their rights as directors or to inform themselves by seeking any information. It is clear from their lack of objection even after they were told about the loans that they were content to let Lim Chung and Tony Chung continue in the management.

138 In these circumstances I think the court ought not to act to remove the trustee until the joint venturers have had an opportunity to consider whether new directors or new procedural controls can be introduced to cure the weaknesses in the existing arrangements. An earlier application for removal of the trustee and the appointment of a new trustee is outstanding and it may be the vehicle for bringing this matter back before me if the joint venturers cannot agree on how to proceed. The prohibition against the trustee against taking any steps will continue so that there will not be undue delay in bringing this matter back to court if it cannot be resolved among the parties.

REMEDIES FOR INDUCEMENT OF BREACH OF TRUST

139 I have found that Lim Chung was the directing mind of the Chung Group of defendants and also

the directing mind of the whole project through the agency of Tony Chung who I have found was in charge of the day-to-day operations of the Tiffield project. Bill Fong, while a member of the management team supplied by Primary Enterprises Inc., and an officer and director of Tiffield Development Corporation, had no real control over the day-to-day operations. He was, however, an effective part of the inducement of the breach of trust which permitted the loans from Tiffield to the Primary Properties project. In my opinion he should be personally liable for any penalty which might be imposed for this breach regarding the loans to Primary Properties but as the plaintiffs are not seeking relief against him and as no penalty has been imposed there will be no judgment given against him. He is not liable for the loan made to Kamfai as he was not aware of the loan and did not approve it.

140 Although Tony Chung had assumed responsibilities for the day-to-day operations of Tiffield Development Corporation as officer and director and for the Tiffield Project itself as manager, I find that his actions throughout were controlled by his father, Lim Chung as the directing mind and he is not liable for inducing breach of trust by Tiffield in the failure to obtain the payment of capital into Tiffield and the borrowing from the Tiffield line of credit. In the case of the second breach, i.e., the loans to Primary Properties and Kamfai I find that the loan to Kamfai was made by inadvertence and ought not to attract any penalty. I also find that the loans to Primary Properties were made on the approval of Lim Chung and Bill Fong and that Tony Chung acted under their instructions in the making of the loans. Lim Chung was the directing mind and not Tony Chung although it is true the loan approval was given on his suggestion. In the case of the third breach, i.e. the transfer of the plaintiffs' money to Torchin, I find that Lim Chung was the operating mind and that Tony Chung acted on his instructions. No damages have been proved arising out of the transfer and none have been claimed in the Amended As Amended Statement of Claim against Tony Chung personally.

141 Lim Chung was not sued and accordingly no damages for inducement of breach of trust can be awarded against him.

COUNTERCLAIM OF THE CHUNG GROUP AND TONY CHUNG

142 The Chung group defendants and Tony Chung counterclaimed against the plaintiff corporations and their principals for damages, punitive damages and the replacement of Tiffield Development Corporation by Royal Trust Corporation of Canada. The claim for punitive damages was abandoned at trial. I have already dealt with the removal of the trustee corporation.

143 These defendants allege conspiracy and abuse of process resulting in lass of reputation for which they seek damages.

144 The basis for these allegations is to be found in the plaintiffs' relationship to the Torchin project and the losses occurring in that project in October 1990 already discussed. In mid-December, after the plaintiffs failed to pay the share of the losses allocated to them by the Torchin accountant, Tony Chung made the transfers from Tiffield to Torchin complained of by the plaintiff in this action. These defendants say that in order to avoid paying their obligations to Torchin the plaintiffs conspired to bring this action to bring improper pressure to bear on these defendants and thereby caused them serious lass

and damage including lass or reputation, lass of business opportunity and lass of profit.

145 On December 31, 1990 the solicitor for the plaintiffs wrote to Torchin to the attention of Tony Chung stating that he had been retained by the plaintiffs and a numbered company to respond to the request for funds and to look into the affairs of Torchin on their behalf as shareholders. He queried the right to demand capital investment from shareholders. He also objected to the transfers from Tiffield to Torchin. In the letter, on behalf of the three plaintiffs, he raised issues relating to the loans referred to in the Tiffield statements for the year ending August 31, 1990.

146 In support of the conspiracy these defendants refer to a letter of January 3, 1991 from Fred Ma of Mascot Investment, one of the plaintiffs, to Cindy Yuen, the daughter of K. Y. Yuen, and the person who conducted affairs in English on his behalf. The letter reads:

> I, your father, and Mr. Chiu want you to tell our lawyer that Torchin Development Corporation had issued the share certificate to all of us.
>
> Based on this point, this could help to prove that we are just shareholders.

147 These defendants then say that in furtherance of the conspiracy the solicitor for the plaintiffs wrote to the defendants' solicitors on January 24, 1991 in response to a letter from them. After objecting again to the Tiffield transfers and expressing concern about the relationship of the investors in the Torchin project he asked for copies of minutes and financial statements for Torchin Development Corporation, Tiffield Development Corporation and Kamfai Development Corporation as well as other documents relating to losses in Torchin. He then said:

> All of this has prompted my clients to want to look more carefully into the Tiffield project and the Kamfai project.
>
> It would appear that the Tiffield project, at some point, secured other Chung projects. On whose authority?
>
> The Kamfai property appears to be encumbered with a mortgage for $7,500,000.00. Why? On whose authority?
>
> I have just scratched the surface in investigating these projects but feel that counsel, if retained, would have a field day with his claims on behalf of my clients.
>
> I suggest we meet to talk about these matters before they become too involved.

148 These defendants ask me to interpret this letter as a threat made to pressure the defendants to rethink their position on the payment of losses in Torchin by the plaintiffs. The action brought by the plaintiffs in Tiffield they say is another step in furtherance of the conspiracy and is itself an abuse of process for which the defendants are entitled to recover damages.

149 The tort of abuse of process is described in Fleming, The Law of Torts, 6th edition, at p. 589:

> It involves the notion that the proceedings were "merely a stalking-horse to coerce the defendant in some way entirely outside the ambit of the legal claim upon which the court is asked to adjudicate". It is therefore immaterial whether the suit thus commenced was founded on reasonable cause or even terminated in favour of the instigator: the improper purpose is the gravamen of the liability.

150 Parker J., as he then was, in *Atland Containers Ltd. v. Macs Corp. Ltd.* (1974), 7 O.R. (2d) 107, after quoting the same passage from an earlier edition of Fleming, said at p. 111:

> In the case at bar the defendant claims for damages because the institution and prosecution of the plaintiff's action has caused and will continue to cause serious financial lass to the defendant. If followed to its logical conclusion every plaintiff would be open to such a claim. However, the law re the abuse of process is very narrow in scope. It is only where the process of the Court is used for an improper purpose and where there is a definite act or threat in furtherance of such a purpose.

151 I have already said that I make no findings in this case about the position of the parties in the Torchin project. I have considered the letters written by the plaintiffs' counsel and after reading the whole of the letters and in their context I am not persuaded that there is any threat contained in them which would indicate that this action was taken for an improper and collateral purpose. It is clear to me that the solicitor was considering the question of what liability shareholders of a corporation might have for capital calls. The letter of Fred Ma indicates to me that he and the other plaintiffs had been asked if they had any share certificates. It does not convince me that the letter was written in furtherance of a conspiracy. It is also clear to me that the solicitor then was only just becoming familiar with some of the complexities in the relationships in the joint venturers and was seeking information. In both the letters quoted from the solicitors he refers to both the Torchin and the Tiffield projects.

152 There is no evidence to support the alleged conspiracy or any improper or collateral purpose in the bringing of this action. Accordingly I find there is no conspiracy and there is no abuse of process.

153 The counterclaim, except so far as the removal of the trustee is concerned and which remains to be dealt with by the court, is dismissed.

SUMMARY

154 At the trial the plaintiffs abandoned their claim with regard to administration fees. They also conceded that no claim was being made against Bill Fong personally other than for repayment of management fees.

155 It may be useful to summarize the various aspects of the judgment. There will be:

1. A declaration adjusting the percentage interests in the cotenancy agreement based on a capital of $7,150,000.

2. An accounting and judgment for the plaintiffs against the Chung Group defendants whose percentage interests are decreased for the amount of profit overpaid to each of them to the extent of

the profit to which the plaintiffs are respectively entitled on their increased percentage interests. The right is reserved to the participants represented by Mr. Warne and Mr. Maltz who were not plaintiffs in the action to seek judgment for the increased share of the profit to which they may be entitled.

3. Denial of a declaration that no management fee is payable.

4. No removal of Tiffield Development Corporation as trustee until the parties consider that matter further.

5. Dismissal of the counterclaim.

156 Counsel may speak to me about costs and any aspects of the judgment which may require working out among the parties.

TAB 11

2012 ONSC 6027
Ontario Superior Court of Justice
Ontario v. Imperial Tobacco Canada Ltd.
2012 ONSC 6027, 2013 CarswellOnt 64, [2013] O.J. No. 11, 10 B.L.R. (5th) 286, 224 A.C.W.S. (3d) 604
Her Majesty the Queen in Right of Ontario, (Applicant) and Imperial Tobacco Canada Limited and The Ontario Flu-Cured Tobacco Growers' Marketing Board, (Respondents)

H.A. Rady J.

Heard: September 19, 2012
Judgment: January 2, 2013[68]
Docket: CV 10 14709

Counsel: John Kelly, Lise Favreau, Kristin Smith, for Applicant
Alan Mark, Orestes Pasparakis, Rahool Agarwal, for Imperial Tobacco Canada Limited
William Sasso, for Ontario Flu-Cured Tobacco Growers' Marketing Board
Harry Underwood, for Rothmans, Benson & Hedges, Inc.
Ronald Slaght, for Her Majesty the Queen in Right of Canada

Subject: Civil Practice and Procedure; Contracts; Public; Provincial Tax

Headnote

Civil practice and procedure --- Actions — Extinction of right of action — Release and satisfaction

Corporate respondent ITCAN Inc. entered into comprehensive settlement agreement with applicant to settle claims arising from ITCAN Inc.'s alleged role in tobacco smuggling between 1985 and 1996 — Agreement contained release in favour of ITCAN Inc., as well as number of defined terms related to that release — On December 2, 2009, respondent tobacco board started proposed class action against ITCAN Inc., seeking damages of $50,000,000 on behalf of growers and producers who sold tobacco through tobacco board between 1986 and 1996 — Tobacco board was corporation established by regulation under Farm Products Marketing Act, to regulate and control production and marketing of Ontario grown tobacco — ITCAN Inc. served notice under withholding provision of settlement agreement, which allowed ITCAN Inc. to pay into escrow funds owing to applicant if action in respect of released claim was commenced by government — Applicant sought declaration that proposed class action commenced by respondent tobacco board was not released claim by releasing entity within meaning of their settlement agreement — Application granted — Class proceeding was not released claim by releasing entity — Even if tobacco board was Crown agency, tobacco board was not acting as agent of Crown, for benefit of Crown in pursuing class action — In these circumstances, it was clear tobacco board was acting as agent for growers and producers, as it was obliged to do by statute and regulation — Had parties intended agreement to apply to Crown agencies, then they would have been added to definition

68. Affirmed at *Ontario v. Imperial Tobacco Canada Ltd.* (2013), 2013 CarswellOnt 10228, 2013 ONCA 481, 10 B.L.R. (5th) 301 (Ont. C.A.).

as they were in language of ITCAN Inc.'s release at paragraph 19.

Contracts --- Construction and interpretation — Surrounding circumstances

Release — Corporate respondent ITCAN Inc. entered into comprehensive settlement agreement with applicant to settle claims arising from ITCAN Inc.'s alleged role in tobacco smuggling between 1985 and 1996 — Agreement contained release in favour of ITCAN Inc., as well as number of defined terms related to that release — On December 2, 2009, respondent tobacco board started proposed class action against ITCAN Inc., seeking damages of $50,000,000 on behalf of growers and producers who sold tobacco through tobacco board between 1986 and 1996 — Tobacco board was corporation established by regulation under Farm Products Marketing Act, to regulate and control production and marketing of Ontario grown tobacco — ITCAN Inc. served notice under withholding provision of settlement agreement, which allowed ITCAN Inc. to pay into escrow funds owing to applicant if action in respect of released claim was commenced by government — Applicant sought declaration that proposed class action commenced by respondent tobacco board was not released claim by releasing entity within meaning of their settlement agreement — Application granted — Class proceeding was not released claim by releasing entity — Even if tobacco board was Crown agency, tobacco board was not acting as agent of Crown, for benefit of Crown in pursuing class action — In these circumstances, it was clear tobacco board was acting as agent for growers and producers, as it was obliged to do by statute and regulation — Had parties intended agreement to apply to Crown agencies, then they would have been added to definition as they were in language of ITCAN Inc.'s release at paragraph 19.

Contracts --- Formation of contract — Consensus ad idem — Intention of parties

Release — Corporate respondent ITCAN Inc. entered into comprehensive settlement agreement with applicant to settle claims arising from ITCAN Inc.'s alleged role in tobacco smuggling between 1985 and 1996 — Agreement contained release in favour of ITCAN Inc., as well as number of defined terms related to that release — On December 2, 2009, respondent tobacco board started proposed class action against ITCAN Inc., seeking damages of $50,000,000 on behalf of growers and producers who sold tobacco through tobacco board between 1986 and 1996 — Tobacco board was corporation established by regulation under Farm Products Marketing Act, to regulate and control production and marketing of Ontario grown tobacco — ITCAN Inc. served notice under withholding provision of settlement agreement, which allowed ITCAN Inc. to pay into escrow funds owing to applicant if action in respect of released claim was commenced by government — Applicant sought declaration that proposed class action commenced by respondent tobacco board was not released claim by releasing entity within meaning of their settlement agreement — Application granted — Class proceeding was not released claim by releasing entity — Even if tobacco board was Crown agency, tobacco board was not acting as agent of Crown, for benefit of Crown in pursuing class action — In these circumstances, it was clear tobacco board was acting as agent for growers and producers, as it was obliged to do by statute and regulation — Had parties intended agreement to apply to Crown agencies, then they would have been added to definition as they were in language of ITCAN Inc.'s release at paragraph 19.

Public law --- Crown — Practice and procedure involving Crown in right of province — On

action for declaration

Corporate respondent ITCAN Inc. entered into comprehensive settlement agreement with applicant to settle claims arising from ITCAN Inc.'s alleged role in tobacco smuggling between 1985 and 1996 — Agreement contained release in favour of ITCAN Inc., as well as number of defined terms related to that release — On December 2, 2009, respondent tobacco board started proposed class action against ITCAN Inc., seeking damages of $50,000,000 on behalf of growers and producers who sold tobacco through tobacco board between 1986 and 1996 — Tobacco board was corporation established by regulation under Farm Products Marketing Act, to regulate and control production and marketing of Ontario grown tobacco — ITCAN Inc. served notice under withholding provision of settlement agreement, which allowed ITCAN Inc. to pay into escrow funds owing to applicant if action in respect of released claim was commenced by government — Applicant sought declaration that proposed class action commenced by respondent tobacco board was not released claim by releasing entity within meaning of their settlement agreement — Application granted — Class proceeding was not released claim by releasing entity — Even if tobacco board was Crown agency, tobacco board was not acting as agent of Crown, for benefit of Crown in pursuing class action — In these circumstances, it was clear tobacco board was acting as agent for growers and producers, as it was obliged to do by statute and regulation — Had parties intended agreement to apply to Crown agencies, then they would have been added to definition as they were in language of ITCAN Inc.'s release at paragraph 19.

APPLICATION for declaration that proposed class action commenced by respondent was not released claim within meaning of parties' settlement agreement.

***H.A. Rady J.*:**

Introduction

1 The applicant seeks a declaration that a proposed class action commenced by the Ontario Flu-Cured Tobacco Growers' Marketing Board on its own behalf and on behalf of growers and producers of tobacco sold through the Tobacco Board is not a released claim by a releasing entity within the meaning of a settlement agreement made between the Imperial Tobacco Limited and Her Majesty the Queen in Right of Canada and Her Majesty the Queen in Right of the Provinces, including Ontario.

2 Rothman, Benson & Hedges Inc. is an intervener in this application, it having entered into the same form of settlement agreement. JTI-MacDonald Corp., which also executed a virtually identical agreement, has agreed to be bound by the result in this application. Her Majesty the Queen in Right of Canada is maintaining a watching brief.

The Parties and Interested Entities

(1) Her Majesty the Queen in Right of Ontario (Ontario)

(2) Her Majesty the Queen in Right of Canada (Canada)

(3) The Ontario Flu-Cured Tobacco Growers' Marketing Board (the Tobacco Board)

(4) Imperial Tobacco Canada Ltd. (ITCAN)

(5) Rothmans, Benson & Hedges Inc. (RBH)

(6) JTI-MacDonald Corp. (JTI)

Background

3 On July 31, 2008, ITCAN entered into a comprehensive agreement with Canada and the provinces including Ontario, to settle claims arising from ITCAN's alleged role in tobacco smuggling between January 1, 1985 and December 31, 1996. Nearly identical agreements were executed with RBH and JTI as well. The allegation was that tobacco designated for export was smuggled back into Canada and sold on the domestic market. As a result, it was alleged that ITCAN avoided payment of taxes, duties, excise or customs taxes.

4 As part of the comprehensive agreement, ITCAN agreed to pay up to $350 million over 15 years, payable in annual instalments, based on a percentage of ITCAN's sales revenues. Ontario's share of the annual payments is 14.267% of the total annual payment.

5 The comprehensive agreement provides for a release of ITCAN, as well as a number of defined terms, which are set out below. ITCAN also agrees to a form of release of Canada and the provinces.

6 The Release in favour of ITCAN is worded as follows:

> s. 15 The Releasing Entities hereby, without any further action on the part of such Releasing Entities, absolutely and unconditionally fully release and forever discharge, the Released Entities from the Released Claims. Without in any way limiting the generality of the foregoing, the Releasing Entities further agree that:
>
> > (a) in the event that a proceeding, claim, action, suit or complaint with respect to a Released Claim is brought by Releasing Entity against a Released Entity, this release may be pleaded as a complete defence and reply, and may be relied upon in such a proceeding as a complete estoppel to dismiss the said proceeding; and
> >
> > (b) in the event of (a), the Releasing Entity that initiated the proceeding shall be liable for all reasonable costs, legal fees, disbursements and expenses incurred by the Released Entity as a result of such proceeding.

7 Section 1 of the comprehensive agreement contains the following pertinent definitions:

> "**Releasing Entities"** means Her Majesty in Right of Canada and in Right of the Provinces and includes for greater certainty the Canada Revenue Agency and the Canada Border Services Agency.
>
> "**Released Entities"** means ITCAN, British American Tobacco p.l.c., the Entities listed on Scheduled "B", Philip Morris, and each of their current and former Affiliates and each and any of

their respective divisions, predecessors, successors and assigns and direct and indirect subsidiaries, as well as each and all of their respective current and former officers, directors, agents, servants and employees, including external legal counsel, and all of their respective heirs, executors and assigns. For avoidance of doubt, "Released Entities" shall not include Japan Tobacco Inc., R.J. Reynolds Tobacco Holdings, Inc., JTI Macdonald Corp. or any of their respective Affiliates (with the exception of Lane Limited and then only to the extent and during the period in which Lane Limited was an Affiliate of Rothmans, Benson and Hedges Inc. and for greater certainty this exception shall not apply during any period in which Lane Limited was or is an Affiliate of, or related in any way to, R.J. Reynolds Tobacco Holdings, Inc., or any of its Affiliates), or any of the current parties to the Actions or the CTMC.

"Released Claims" means (excepting only the obligations under this Agreement); all manner of civil, administrative and regulatory proceedings, actions, causes of action, suits, duties, debts, dues, accounts, bond, covenants, contracts, complaints, claims, charges, and demands of whatsoever nature for damages, liabilities, monies, losses, indemnity, restitution, disgorgement, forfeiture, punitive damages, penalties, fines, interest, taxes, assessments, duties, remittances, costs, legal fees and disbursements, expenses, interest in loss, or injuries howsoever arising, known or unknown, including without limitation any claims arising at common law or in equity, by any federal or provincial statute or regulation and including all civil claims that may be allowable to the Releasing Entities within criminal or other proceedings in the form of restitution, disgorgement, forfeiture, punitive damages, penalties, fines or interest or otherwise, which hereto may have been or may hereafter arise in any way relating to, arising out of or in connection with:

(a) any exportation transhipment or shipment out of Canada, smuggling, reimportation or transhipment into Canada or any of the provinces thereof of tobacco product...manufactured, distributed or sold by the Released Entities (including aiding or participating in such activities), smuggling or any conduct in any way relating to smuggling, contraband tobacco product, the exportation, reimportation, transhipment or shipment of tobacco products manufactured, distributed or sold by Released Entities that were otherwise contraband, during the Relevant Period;

(b) any failure by the Released Entities to pay taxes, duties, excise, customs or excise taxes or duties or other amounts payable on account of smuggled and/or reimported and/or transhipped (including inter-provincial transhipments) and/or otherwise contraband tobacco products manufactured, distributed, sold by the Released Entities and/or sold, delivered or consumed in Canada, or any expenditures relating to enforcing or recovering any such tax, duty, excise or other amounts alleged to be payable, or any failure to file a return, form, account or any other required documentation in respect of such amounts (including aiding or participating in such activities) in relation to the Relevant Period; and

(c) any after-the-fact conduct including any oral or written statements, representations or omissions related to the matters referred to in (a) and/or (b) whether during the Relevant

Period or afterward or during the negotiation of this Agreement.

(d) for avoidance of doubt, Released Claims shall not include any claims

(1) whether already commenced or that may be commenced, related to the recovery of alleged health care costs, unless such claims arise from (a), (b) or (c) above. This paragraph is not intended to limit the ability of a Releasing Entity to claim, in any health care cost recovery litigation, damages on an aggregated basis based on the actual incidence of smoking. For greater certainty, this Agreement does not limit the Releasing Entities' ability to introduce and rely on evidence of smoking incidence, even if such incidence may arise out of or is related to (a), (b) or (c) above, and a Released Entity shall not raise as a defence or lead any evidence that the actual incidence of smoking or the health care costs caused or contributed to by smoking should be reduced by reason of (a), (b) or (c) above;

(2) in proceedings bearing Court File Nos. 04-CL-5530 and O3-CV-253858 CMI, in the Ontario Superior Court of Justice (the "Actions"). For the avoidance of doubt, this exclusion shall not include any claims made against the Released Entities; or

(3) against the CTMC.

8 On December 2, 2009, the Tobacco Board and four individual tobacco farmers started a proposed class action against ITCAN, seeking damages of $50,000,000. The action was said to be on behalf of growers and producers who sold tobacco through the Tobacco Board between 1986 and 1996. Proposed class actions were also commenced against RBH on November 5, 2009 and JTI on April 23, 2010.

9 For the purposes of the proposed class action, it is important to understand that the tobacco companies paid higher prices to producers for tobacco designated for domestic use than that destined for export or for duty free. As a result, the Tobacco Board claims the difference between the lower export price paid by ITCAN to the Tobacco Board and the higher price that would have been paid for tobacco destined for domestic use, with respect to tobacco exported from Canada and then smuggled back in.

10 On March 29, 2010, ITCAN served a notice under s. 7 of the comprehensive agreement, which is a withholding provision that allows ITCAN to pay into escrow funds owing to Ontario if an action in respect of a released claim is commenced by a responsible government.

11 Section 7 provides as follows:

Without prejudice to any other rights or remedies as provided in paragraphs 15, 16, 17, 18 and 19 of this Agreement, in the event that monetary liabilities (including all fees, expenses and disbursements on a full indemnity scale) are incurred by Released Entities in any way relating to, arising out of or in connection with any Released Claims or Claims Over made by a Releasing Entity or an Entity claiming through or on behalf of a Releasing Entity (and for the avoidance of doubt including such Government's Crown-controlled corporations or Crown agencies) (a "Responsible Government"), the amount of the Payment due in the fiscal year in which the monetary liabilities are incurred, and Payments due in subsequent fiscal years, shall be reduced by such amounts incurred. Upon learning of the existence of any claim, action, suit, or proceeding that could give rise to such liabilities, ITCAN may, upon giving 30 days' notice to the Responsible Government, begin paying any funds which are then or thereafter due into an interest-bearing escrow account, up to the amount claimed in such claim, action, suit, or proceeding pending its resolution. The amount by which the Payments shall be so reduced or escrowed shall not exceed the then-remaining Responsible Government's share of the Payments (as set out in Schedule "C" hereto).

12 ITCAN (supported by RBH and JTI) took the position that the claim of the Tobacco Board is a released claim by a responsible government pursuant to the comprehensive agreement.

13 As a result, on April 30, 2010, Ontario commenced this application. ITCAN responded by serving a notice of arbitration under the comprehensive agreement. It brought a motion to challenge the court's jurisdiction to hear the application. The motions judge granted ITCAN's request for a stay of the application and ordered that the parties arbitrate the issue.

14 Ontario, supported by Canada and the Tobacco Board appealed. The Court of Appeal allowed the appeal in part, on the basis that an arbitrator has no jurisdiction to determine whether the Tobacco Board's claim in the class action is a released claim by a releasing entity. The matter was remitted to the Superior Court for a determination of this issue.

The Tobacco Regulatory Regime

15 The Tobacco Board is a corporation without share capital established by regulation under the Farm Products Marketing Act, R.S.O. 1990, c. F.9. Its principle role has been to regulate and control the production and marketing of Ontario grown tobacco.

16 The Ontario Farm Products Marketing Commission is a statutory body. It has the power to regulate virtually all aspects of the production and marketing of agricultural products in Ontario and to delegate powers to marketing boards. Pursuant to regulation[69], the Commission delegated supply management powers to the Tobacco Board to enable it to promote, regulate and control tobacco marketing and production. These powers included the power to establish a quota system, to license producers and buyers and to require all tobacco to be sold through the Tobacco Board's auction warehouse.

17 Up until June 1, 2009, one of the Tobacco Board's functions was to negotiate agreements with tobacco manufacturers on behalf of tobacco growers and producers for the sale of their tobacco. The Tobacco Board was charged with responsibility to set the price of tobacco, collect the amounts owed by manufacturers and distribute proceeds among the growers and producers.

18 The right to contract and to sue on those contracts was within the sole authority of the Tobacco Board. Section 8 of Regulation 383 and its successor, Regulation 435, provided as follows:

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69. R.R.O. 1980, Reg. 383; R.R.O. 1990, Reg. 435.

The Commission authorizes the local board to require the price or prices payable or owing to the producers for tobacco to be paid to or through the local board and to recover such price or prices by suit in a court of competent jurisdiction.

19 As I understand the regime, individual growers and producers did not sue on their own behalf. Their interests were to be protected by the Tobacco Board.

20 On February 13, 2009, the Tobacco Board and Canada concluded an agreement to eliminate the tobacco production quota system in Ontario. Substantial changes to the role and function of the Tobacco Board resulted. On March 25, 2009, the Commission ordered the Tobacco Board to obtain its written approval before it commenced litigation for the recovery of any payments owed to the growers and producers by the manufacturers.

21 On June 1, 2009, the Commission's order was replaced with new regulations[70], which permitted growers and producers to sell tobacco directly to the manufacturers; changed the Tobacco Board's role to primarily one of licensing; and required the consent of the Commission prior to the Tobacco Board commencing legal actions.

22 Prior to the Commission's March 25, 2009 order, the Tobacco Board did not require the Commission's consent to commence a class (or other) action because under Regulation 435 (and its predecessor Regulation 383) the Board was authorized to sue in its own name. However, thereafter, the Commission's authorization was required. By letter dated June 8, 2009, the Commission granted the Tobacco Board authorization to commence the class action that is at the center of this application.

The Parties' Positions

23 Ontario (supported by the Tobacco Board) submits that the Tobacco Board is not a releasing entity and that its claim as particularized in the class action is not a released claim. In support of its submission, Ontario makes the following points:

- The Tobacco Board is not a party to the Comprehensive Agreement.
- The Tobacco Board does not benefit from the settlement reached under the Comprehensive Agreement.
- The Tobacco Board's claim in the class proceeding is brought on behalf of and for the benefit of growers and producers of tobacco — not in any way for Ontario's benefit or on behalf of Ontario.
- The claim asserted by the Tobacco Board is in relation to losses suffered by growers and producers of tobacco in relation to lower purchase prices for tobacco — not in relation to unpaid taxes or to any losses suffered by Ontario or to which Ontario would have a valid claim.

24 ITCAN (supported by RBH) submits that the class action is a released claim by a releasing entity against a released entity. In support of its contention, it asserts the following:

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70. O. Reg. 208/09, 207/09 and 306/09.

• the class action is

a) "civil proceeding", "action", "suit" or "claim";

b) for "damages", "monies", "losses", "costs", "legal fees and disbursements" and/or "interest in loss";

c) "relating, arising out of or in connection with";

d) the "smuggling ... into Canada or any of the provinces ... of tobacco products, manufactured, distributed or sold by" ITCAN.

e) ITCAN is clearly a released entity;

f) the Commission is part of the Ontario Crown and the Tobacco Board is an agent of the Ontario Crown and they are therefore bound by the comprehensive agreement.

The Law

25 Releases are subject to the same principles that guide contractual interpretation: see Geoff R. Hall, *Canadian Contractual Interpretation Law*, 2007 (Markham: Lexis Nexis).

26 Hall goes on to explain that releases are subject to a special rule, which is derived from an 1870 decision of the House of Lords: *London & South Western Railway v. Blackmore* (1870), L.R. 4 H.L. 610 (U.K. H.L.). In that case, the rule was expressed in this way:

> The general words in a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time when the release was given. But a dispute that had not emerged or a question which had not at all arisen, cannot be considered as bound and concluded by the anticipatory words of a general release.

27 The rules governing the analysis are neatly summarized in *Bank of British Columbia Pension Plan, Re*, [2000] B.C.J. No. 903, 137 B.C.A.C. 37 (B.C. C.A.) quoting from *Chitty on Contracts:*

> *Chitty on Contracts* sums up the relevant case law with respect to the interpretation of a discharge of a contract or release as follows (pp. 1084-5):
>
> 1. No particular form of words is necessary to constitute a valid release. Any words which show an evident intention to renounce a claim or discharge the obligation are sufficient.
>
> 2. The normal rules relating to the construction of a written contract also apply to a release, and so, a release in general terms is to be construed according to the particular purpose for which it was made.
>
> 3. The court will construe a release which is general in its terms in the light of the circumstances existing at the time of its execution and with reference to its context and recitals

> in order to give effect to the intention of the party by whom it was executed.
>
> 4. In particular, it will not be construed as applying to facts of which the party making the release had no knowledge at the time of its execution or to objects which must then have been outside his contemplation.
>
> 5. The construction of any individual release will necessarily depend upon its particular wording and phraseology.

28 The Supreme Court of Canada's decision in *Consolidated-Bathurst Export Ltd. c. Mutual Boiler & Machinery Insurance Co.* (1979), [1980] 1 S.C.R. 888 (S.C.C.) is an often cited source of these hallmarks of contractual interpretation:

> Even apart from the doctrine of contra proferentem as it may be applied in the construction of contracts, the normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract. Consequently, literal meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted. Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result. It is trite to observe that an interpretation of an ambiguous contractual provision which would render the endeavour on the part of the insured to obtain insurance protection nugatory, should be avoided. Said another way, the courts should be loath to support a construction which would either enable the insurer to pocket the premium without risk or the insured to achieve a recovery which could neither be sensibly sought nor anticipated at the time of the contract.

29 Another decision that is frequently cited is *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129 (S.C.C.). The principles that emerge from it may be summarized as follows:

- the goal of contract interpretation is "to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract";
- the contractual intent of the parties is determined by reference to the words used, read in light of the surrounding circumstances or put another way, in context;
- evidence of one party's subjective intention is not permissible; and
- extrinsic evidence is unnecessary when a document is clear and unambiguous on its face.

Analysis

30 I have come to the conclusion that the class proceeding is not a released claim by a releasing entity, for the following reasons.

31 First, the context and circumstances giving rise to the comprehensive agreement are important. The claims of the governments that were being settled under the agreement were for the non-payment of taxes and related charges on the allegedly smuggled tobacco products. Support for this conclusion is found in the language of the agreement. The opening recital stipulates that the parties agree to "address [their] shared objective of combating the manufacture, sale, distribution, transport and storage of illicit and contraband tobacco products in Canada, as follows":

32 The definitions follow.

33 The definition of released claim is very broadly and comprehensively drafted and includes damages...however arising... known and unknown. However, it clearly relates, arises from, or is in connection to smuggling activities and any resulting "failure by the Released Entities to pay taxes, duties, excise, customs or excise taxes or duties or other amounts payable on account of smuggled ... tobacco products."

34 The definition goes on to exclude from the operation of the release, claims related to the recovery of alleged health care costs and two specifically identified existing proceedings. Of course, the Tobacco Board's claim is not mentioned because it had not yet been commenced and there is no evidence that it was in the contemplation of the parties to the agreement.

35 Releasing entities are defined as including the Canada Revenue Agency and the Canada Border Services Agency, the two entities who would have been impacted by the failure to remit "taxes, duties, excise, customs or excise taxes or duties...."

36 This too demonstrates that what the parties contemplated was a release of claims arising from or related to the failure to pay taxes to the governments. I agree with Ontario that the word "includes" as it is used here is equivalent to "means and includes" with the result that the definition restricts rather than enlarges the meaning of Canada and Ontario.

37 It is also significant that the Canada Revenue Agency and Canada Border Services Agency are specifically named, and no others, particularly when contrasted with the language in ITCAN'S release at paragraph 19. It says that ITCAN releases the releasing entities "and for the avoidance of doubt including Crown-controlled corporations and Crown agencies ... together with ministers, employees and agents...." By contrast, the definition of releasing entity does not contain this more expansive language.

38 Further support for this conclusion is found elsewhere in the definition of released claim. It is said to include "all civil claims that may be allowable to the releasing entities." It is noteworthy that any damages that may be awarded under the class action would not benefit Ontario. If successful, the claims are not allowable to Ontario but would be allowable to the Tobacco Board for the benefit of growers and

producers.

39 Even if the Tobacco Board is a Crown agency, the Tobacco Board is not acting as an agent of the Crown of the benefit of the Crown in pursuing the class action. Clearly, it is acting as an agent for the growers and producers as it was obliged to do by statute and regulation. It is the case that the negotiating parties are sophisticated and knowledgeable and capable of protecting their interests through contractual language. At the risk of repetition, had the parties intended the comprehensive agreement to apply to Crown agencies, then they would have been added to the definition as they were in the language of ITCAN's release at para. 19.

40 For these reasons, Ontario's application is granted.

41 I will receive brief written submissions from the applicant by January 18, 2013 and from the responding parties and intervener two weeks thereafter.

Application granted.

Footnotes*Affirmed at Ontario v. Imperial Tobacco Canada Ltd. (2013), 2013 CarswellOnt 10228, 2013 ONCA 481, 10 B.L.R. (5th) 301 (Ont. C.A.).1R.R.O. 1980, Reg. 383; R.R.O. 1990, Reg. 435.2O. Reg. 208/09, 207/09 and 306/09.

TAB 12

2013 ONCA 481
Ontario Court of Appeal

Ontario v. Imperial Tobacco Canada Ltd.

2013 CarswellOnt 10228, 2013 ONCA 481, 10 B.L.R. (5th) 301, 17 B.L.R. (5th) 267, 230 A.C.W.S. (3d) 688

Her Majesty the Queen in Right of Ontario, Applicant (Respondent) and Imperial Tobacco Canada Limited, Respondent (Appellant) and The Ontario Flue-Cured Tobacco Growers' Marketing Board, Respondent (Respondent)

A. Hoy A.C.J.O., K. Feldman, J.M. Simmons JJ.A.

Heard: July 3, 2013
Judgment: July 16, 2013
Docket: CA C56568, C56569

Proceedings: affirming *Ontario v. Imperial Tobacco Canada Ltd.* (2013), 2013 CarswellOnt 64, 2012 ONSC 6027 (Ont. S.C.J.)

Counsel: Orestes Pasparakis, Rahool P. Agarwal, for Appellant
John Kelly, Lise G. Favreau, Kristin Smith, for Respondent, Her Majesty the Queen in Right of Ontario
William V. Sasso, for Respondent, Ontario Flue-Cured Tobacco Growers' Marketing Board
Peter J. Osborne, for Intervener, Her Majesty the Queen in Right of Canada
Brian H. Greenspan, for Intervener, Rothmans, Benson & Hedges

Subject: Civil Practice and Procedure; Contracts; Public

Headnote

Civil practice and procedure --- Actions — Extinction of right of action — Release and satisfaction

Corporate respondent ITCAN Inc. entered into comprehensive settlement agreement with applicant to settle claims arising from ITCAN Inc.'s alleged role in tobacco smuggling between 1985 and 1996 — Agreement contained release in favour of ITCAN Inc., as well as number of defined terms related to that release — On December 2, 2009, respondent tobacco board started proposed class action against ITCAN Inc., seeking damages of $50,000,000 on behalf of growers and producers who sold tobacco through tobacco board between 1986 and 1996 — Tobacco board was corporation established by regulation under Farm Products Marketing Act to regulate and control production and marketing of Ontario-grown tobacco — ITCAN Inc. served notice under withholding provision of settlement agreement, which allowed ITCAN Inc. to pay into escrow funds owing to applicant if action in respect of released claim was commenced by government — Applicant's application for declaration that proposed class action commenced by respondent tobacco board was not released claim by releasing entity within meaning of their settlement agreement was granted — Trial judge found class proceeding was not released claim by releasing entity — Trial judge found even if tobacco board was Crown agency, tobacco board was not acting as agent of Crown, for benefit of Crown in pursuing class action — Trial judge found it was clear tobacco board was acting as agent for growers and producers, as it was obliged to do by statute and regulation — Trial judge found had parties intended agreement to apply to Crown agencies, then they would have been added to definition, as they were in language of ITCAN Inc.'s release at paragraph 19 — ITCAN Inc. appealed — Appeal dismissed — ITCAN Inc.'s interpretation of agreement was correct regarding interpretations of claims — It would not be necessary to exempt government health care claims against tobacco companies from definition of released claims, if health care claims could not otherwise be included as released claims under agreement — However, board was agent for producers and not Crown and could not be releasing entity under agreement.

Contracts --- Construction and interpretation — Surrounding circumstances

Release — Corporate respondent ITCAN Inc. entered into comprehensive settlement agreement with applicant to settle claims arising from ITCAN Inc.'s alleged role in tobacco smuggling between 1985 and 1996 — Agreement contained release in favour of ITCAN Inc., as well as number of defined terms related to that release — On December 2, 2009, respondent tobacco board started proposed class action against ITCAN Inc., seeking damages of $50,000,000 on behalf of growers and producers who sold tobacco through tobacco board between 1986 and 1996 — Tobacco board was corporation established by regulation under Farm Products Marketing Act to regulate and control production and marketing of Ontario grown tobacco — ITCAN Inc. served notice under withholding provision of settlement agreement, which allowed ITCAN Inc. to pay into escrow funds owing to applicant if action in respect of released claim was commenced by government — Applicant's application for declaration that proposed class action commenced by respondent tobacco board was not released claim by releasing entity within meaning of their settlement agreement was granted — Trial judge found class proceeding was not released claim by releasing entity — Trial judge found even if tobacco board was Crown agency, tobacco board was not acting as agent of Crown, for benefit of Crown in pursuing class action — Trial judge found it was clear tobacco board was acting as agent for growers and producers, as it was obliged to do by statute and regulation — Trial judge found had parties intended agreement to apply to Crown agencies, then they would have been added to definition, as they were in language of ITCAN Inc.'s release at paragraph 19 — ITCAN Inc. appealed — Appeal dismissed — ITCAN Inc.'s interpretation of agreement was correct regarding interpretations of claims — It would not be necessary to exempt government health care claims against tobacco companies from definition of released claims, if health care claims could not otherwise be included as released claims under agreement — However, board was agent for producers and not Crown and could not be releasing entity under agreement.

Contracts --- Formation of contract — Consensus ad idem — Intention of parties

Release — Corporate respondent ITCAN Inc. entered into comprehensive settlement agreement with applicant to settle claims arising from ITCAN Inc.'s alleged role in tobacco smuggling between 1985 and 1996 — Agreement contained release in favour of ITCAN Inc., as well as number of defined terms related to that release — On December 2, 2009, respondent tobacco board started proposed class action against ITCAN Inc., seeking damages of $50,000,000 on behalf of growers and producers who sold tobacco through tobacco board between 1986 and 1996 — Tobacco board was corporation established by regulation under Farm Products Marketing Act to regulate and control production and marketing of Ontario grown tobacco — ITCAN Inc. served notice under withholding provision of settlement agreement, which allowed ITCAN Inc. to pay into escrow funds owing to applicant if action in respect of released claim was commenced by government — Applicant's application for declaration that proposed class action commenced by respondent tobacco board was not released claim by releasing entity within meaning of their settlement agreement was granted — Trial judge found class proceeding was not released claim by releasing entity — Trial judge found even if tobacco board was Crown agency, tobacco board was not acting as agent of Crown, for benefit of Crown in pursuing class action — Trial judge found it was clear tobacco board was acting as agent for growers and producers, as it was obliged to do by statute and regulation — Trial judge found had parties intended agreement to apply to Crown agencies, then they would have been added to definition, as they were in language of ITCAN Inc.'s release at paragraph 19 — ITCAN Inc. appealed — Appeal dismissed — ITCAN Inc.'s interpretation of agreement was correct regarding interpretations of claims — It would not be necessary to exempt government health care claims against tobacco companies from definition of released claims, if health care claims could not otherwise be included as released claims under agreement — However, board was agent for producers and not Crown and could not be releasing entity under agreement.

Public law --- Crown — Practice and procedure involving Crown in right of province — On action for declaration

Corporate respondent ITCAN Inc. entered into comprehensive settlement agreement with applicant to settle claims arising from ITCAN Inc.'s alleged role in tobacco smuggling between 1985 and 1996 — Agreement contained release in favour of ITCAN Inc., as well as number of defined terms related to that release — On December 2, 2009, respondent tobacco board started proposed class action against ITCAN Inc., seeking damages of $50,000,000 on behalf of growers and producers who sold tobacco through tobacco board between 1986 and 1996 — Tobacco board was corporation established by regulation under Farm Products Marketing Act to regulate and control production and marketing of Ontario grown tobacco — ITCAN Inc. served notice under withholding provision of settlement agreement, which allowed ITCAN Inc. to pay into escrow funds owing to applicant if action in respect of released claim was commenced by government — Applicant's application for declaration that proposed class action commenced by respondent tobacco board was not released claim by releasing entity within meaning of their settlement agreement was granted — Trial judge found class proceeding was not released claim by releasing entity — Trial judge found even if tobacco board was Crown agency, tobacco board was not acting as agent of Crown, for benefit of Crown in pursuing class action — Trial judge found it was clear tobacco board was acting as agent for growers and producers, as it was obliged to do by statute and regulation — Trial judge found had parties intended agreement to apply to Crown agencies, then they would have been added to definition, as they were in language of ITCAN Inc.'s release at paragraph 19 — ITCAN Inc. appealed — Appeal dismissed — ITCAN Inc.'s interpretation of agreement was correct regarding interpretations of claims — It would not be necessary to exempt government health care claims against tobacco companies from definition of released claims, if health care claims could not otherwise be included as released claims under agreement — However, board was agent for producers and not Crown and could not be releasing entity under agreement.

APPEAL by respondent from judgment, reported at *Ontario v. Imperial Tobacco Canada Ltd.* (2013), 2013 CarswellOnt 64, 2012 ONSC 6027, 10 B.L.R. (5th) 286 (Ont. S.C.J.), granting applicant's application for declaration that proposed class action was not released claim within meaning of parties' settlement agreement.

***Per curiam*:**

1 The issue to be decided on this application and therefore on this appeal was set out in this court's Order dated July 20, 2011 [2011 CarswellOnt 7081 (Ont. C.A.)], para. 2 as follows:

> 2. THIS COURT ORDERS that the appeal be allowed in part and the stay of this Application be lifted to allow the Application to proceed, to seek a declaration that the claim of the Tobacco Board in Court file no. 6475CP is not a Released Claim for the purposes of s. 15 of the Comprehensive Agreement dated July 31, 2008.

2 The Comprehensive Agreement dated July 31, 2008 (the "2008 Agreement") was entered into between the appellant, Imperial Tobacco Canada Limited, Her Majesty the Queen in Right of Canada, Her Majesty the Queen in Right of Ontario and the nine other provinces, to settle claims arising out of a course of conduct by Imperial between 1985 and 1996 whereby Imperial smuggled tobacco out of Canada then back in without paying required duties and taxes. A number of other tobacco companies, including the intervener, Rothmans, Benson & Hedges Inc. ("Rothmans"), entered into similar agreements to settle similar claims with the same government entities.

3 The claim of the Tobacco Board referred to in the 2011 Order is contained in a class action brought in December 2009 against Imperial and other tobacco companies by the respondent, The Ontario Flue-Cured Tobacco Growers' Marketing Board and four individual tobacco farmers, as representative plaintiffs.

4 In the proposed class action, the Board and the farmers seek damages for breach of contract on behalf of a proposed class comprised of growers and producers in Ontario who sold tobacco through the Board pursuant to contracts between the Board and tobacco companies, including Imperial, during the period from January 1, 1986 and December 31, 1996.

5 The alleged breaches arose out of lmperial's underpayment to the Board for tobacco that was being sold illegally in Canada. As described in the statement of claim, Imperial purchased tobacco from the producers through the Board at the lower price applicable to tobacco intended for export and sale outside Canada, even though the tobacco was ultimately smuggled back into Canada and sold domestically.

6 Section 15 of the 2008 Agreement releases Imperial from certain claims and reads as follows:

> 15. The Releasing Entities hereby, without any further action on the part of such Releasing Entities,

> absolutely and unconditionally fully release and forever discharge, the Released Entities from the Released Claims. Without in any way limiting the generality of the foregoing, the Releasing Entities further agree that:
>
> > (a) in the event that a proceeding, claim, action, suit or complaint with respect to a Released Claim is brought by Releasing Entity against a Released Entity, this release may be pleaded as a complete defence and reply, and may be relied upon in such a proceeding as a complete estoppel to dismiss the said proceeding; and
> >
> > (b) in the event of (a), the Releasing Entity that initiated the proceeding shall be liable for all reasonable costs, legal fees, disbursements and expenses incurred by the Released Entity as a result of such proceeding.

In other words, if the claims the Board seeks to advance in the class action against Imperial are "Released Claims" by a "Releasing Entity", then the release in s. 15 constitutes a complete defence for Imperial to those claims and to the class action.

7 The terms "Released Claims", "Releasing Entities" and "Released Entities" are all defined terms in the 2008 Agreement. Section 1 provides that "Releasing Entities" means "Her Majesty in Right of Canada and in right of the Provinces and includes for greater certainty the Canada Revenue Agency and the Canada Border Services Agency."

8 The Board was established in 1957 on vote of Ontario's tobacco producers. It is a corporation without share capital established by regulation under the Farm Products Marketing Act, R.S.O. 1990, c. F.9. The Ontario Farm Products Marketing Commission delegated broad supply management powers to the Board. The Commission is a statutory body whose members are appointed by the Lieutenant Governor and whose employees are public servants. The Commission deposits moneys it receives into the Consolidated Revenue Fund.

9 The Board's primary role during the class period and at the time the 2008 Agreement was signed was to regulate and control the production and marketing of Ontario-grown tobacco. During this period, the Board operated autonomously. Its board of directors consisted of directors elected by the tobacco producers representing each of the tobacco growing districts in Ontario, plus an additional member appointed by the elected members.

10 Among other things, the Board had the power to, and did require that producers only market their tobacco through the Board. The Board entered into annual contracts on behalf of the producers for the sale of the producers' tobacco, including those annual contracts at issue in the proposed class proceedings.

11 When the 2008 Agreement was signed, and during the class period, the Board had the sole authority to enforce the rights of the producers to recover payments owed by tobacco companies under the annual contracts. Significantly, while the tobacco producers were the beneficiaries of those contracts, they were not parties to the contracts. Counsel for Imperial (and counsel for the intervener

Rothmans) fairly advised the court that they do not concede that the tobacco producers can bring class actions like the current one, without the involvement of the Board.

12 On the question of whether the claims are "Released Claims" within the meaning of the 2008 Agreement, s. 1 provides:

> "Released Claims" means (excepting only the obligations under this Agreement); all manner of civil, administrative and regulatory proceedings, actions, causes of action, suits, duties, debts, dues, accounts, bond, covenants, contracts, complaints, claims, charges, and demands of whatsoever nature for damages, liabilities, monies, losses, indemnity, restitution, disgorgement, forfeiture, punitive damages, penalties, fines, interest, taxes, assessments, duties, remittances, costs, legal fees and disbursements, expenses, interest in loss, or injuries howsoever arising, known or unknown, including without limitation any claims arising at common law or in equity, by any federal or provincial statute or regulation and including all civil claims that may be allowable to the Releasing Entities within criminal or other proceedings in the form of restitution, disgorgement, forfeiture, punitive damages, penalties, fines or interest or otherwise, which hereto may have been or may hereafter arise in any way relating to, arising out of or in connection with:
>
> (a) any exportation transhipment or shipment out of Canada, smuggling, reimportation or transhipment into Canada or any of the provinces thereof of tobacco products manufactured, distributed or sold by the Released Entities (including aiding or participating in such activities), smuggling or any conduct in any way relating to smuggling, contraband tobacco products, the exportation, reimportation, transhipment or shipment of tobacco products manufactured, distributed or sold by Released Entities that were otherwise contraband, during the Relevant Period;
>
> (b) any failure by the Released Entities to pay taxes, duties, excise, customs or excise taxes or duties or other amounts payable on account of smuggled and/or reimported and/or transhipped (including inter-provincial transhipments) and/or otherwise contraband tobacco products manufactured, distributed, sold by the Released Entities and/or sold, delivered or consumed in Canada, or any expenditures relating to enforcing or recovering any such tax, duty, excise or other amounts alleged to be payable, or any failure to file a return, form, account or any other required documentation in respect of such amounts (including aiding or participating in such activities) in relation to the Relevant Period; and
>
> (c) any after-the-fact conduct including any oral or written statements, representations or omissions related to the matters referred to in (a) and/or (b) whether during the Relevant Period or afterward or during the negotiation of this Agreement.
>
> (d) for avoidance of doubt, Released Claims shall not include any claims
>
> (1) whether already commenced or that may be commenced, related to the recovery of alleged health care costs, unless such claims arise from (a), (b) or (c) above. This

paragraph is not intended to limit the ability of a Releasing Entity to claim, in any health care cost recovery litigation, damages on an aggregated basis based on the actual incidence of smoking. For greater certainty, this Agreement does not limit the Releasing Entities' ability to introduce and rely on evidence of smoking incidence, even if such incidence may arise out of or is related to (a), (b) or (c) above, and a Released Entity shall not raise as a defence or lead any evidence that the actual incidence of smoking or the health care costs caused or contributed to by smoking should be reduced by reason of (a), (b) or (c) above;

(2) in proceedings bearing Court File Nos. 04-CL-5530 and O3-CV-253858 CMI, in the Ontario Superior Court of Justice (the "Actions"). For the avoidance of doubt, this exclusion shall not include any claims made against the Released Entities; or

(3) against the CTMC.

13 The dispute between the parties on what is included under this definition turns on whether the word "and" should be implied between clauses (a) and (b), having the effect of limiting the general words in clause (a) to the types of tax and penalty claims described in clause (b), or whether the word "or" should be read in, having the effect that each clause is given a separate meaning and that clause (b) does not modify or limit the claims described in clause (a).

14 The respondent, Her Majesty the Queen in Right of Ontario, argues that clause (a) sets out the transactions that could have given rise to the payment of taxes and duties while clause (b) addresses the failure to pay those taxes and duties. As a result, the respondents submit that clause (b) modifies and limits the claims as described in clause (a).

15 Imperial's position is that clause (a) and clause (b) should be read disjunctively. According to Imperial, the reference in clause (c) to "after-the-fact conduct ... related to the matters referred to in (a) *and/or* (b)" (emphasis added) means that after-the-fact conduct related to either clause (a) or clause (b) is a released claim. It would not make sense, Imperial argues, that after-the-fact conduct related to clause (a) alone be released, but not the actual conduct referred to in clause (a) alone. Imperial also relies on clause (d) which exempts certain claims by government for the recovery of health care costs "unless such claims arise from (a), (b) or (c) above." Again, if the claims in the three clauses are individually treated in the exempt claims provision, they must be individually released when they are not exempt.

16 We accept the interpretation suggested by Imperial based on the use of the word "or" as described. Furthermore, it would not be necessary to exempt government health care claims against the tobacco companies — which are not limited to taxes and duties - from the definition of Released Claims, if such health care claims could not otherwise be included as Released Claims.

17 However, although the claims asserted in the class action may come within the words of the definition of "Released Claims", they are only released under s. 15 of the 2008 Agreement if they are released by a Releasing Entity. In this way, the 2008 Agreement ensures that only claims within the

definition of Released Claims that belong beneficially to a Releasing Entity are released.

18 It is clear that in bringing the proposed class action, the Board is acting only as agent for the producers to enforce the annual contracts entered into by the Board on their behalf, and not as an agent on behalf of the Crown or for the benefit of the Crown. Accordingly, in bringing the proposed class action, the Board is not asserting a "Released Claim" belonging beneficially to the Crown and is not acting as a "Releasing Entity" within the meaning of the 2008 Agreement.

19 The appeal is therefore dismissed with costs payable by Imperial to the respondent Board in the amount of $15,000, and payable by Imperial and Rothmans to the respondent Her Majesty the Queen in Right of Ontario in the amount of $18,500, all inclusive of disbursements and HST.

Appeal dismissed.

TAB 13

2011 ONSC 3275
Ontario Superior Court of Justice

Modugno v. Cira

2011 CarswellOnt 5338, 2011 ONSC 3275, 204 A.C.W.S. (3d) 788, 88 B.L.R. (4th) 250

Frank Modugno and Gina Modugno and Michael Cira, All Traxx Tires Inc. and Stanton Tires Inc.

P.D. Lauwers J.

Heard: May 26-27, 2011
Judgment: June 22, 2011
Docket: CV-09-096712-SR

Counsel: David Pomer, for Plaintiffs
Gregory Gryguc, for Defendants

Subject: Corporate and Commercial; Contracts

Headnote

Business associations --- Specific matters of corporate organization — Shares — Transfer — General principles

Plaintiffs sold defendant S Inc. to defendant A Inc. through share purchase agreement ("SPA") — Transaction closed on May 30, 2007 — Plaintiffs brought action against corporate defendants for reimbursement of credits remitted to S Inc. for period before May 30, 2007 — Credits related to tax refunds or credits provided to S Inc. by Ontario Ministry of Revenue in respect of corporation tax and by Canada Revenue Agency in respect of income tax — Action allowed — With respect to adjustment scheme set out in s. 6.1(i) of SPA, vendor's critical promise in s. 6.1(i) was "that all accounts payable and accounts receivable, are to be dealt with by the Vendor" — This provision repeated commitment in s. 3.3 of SPA that "Vendors agree that they shall be responsible for the payment of all taxes payable be they federal or provincial, in connection with the within transaction, including GST, Retail Sales Tax, Source Deductions, Income Tax, WSIB, and any money owed to any creditors, trade, suppliers and Franchisors" — Overarching concept was that there was to be clear break between business of S Inc. on and before closing date, for which plaintiffs would be entirely responsible, and after closing date, for which defendants would be entirely responsible — This was concept underlying SPA — Rest of s. 6.1(i) simply recognized need to adjust amounts owing back and forth as they became clear — Reference in s. 3.3 to "all taxes payable be they federal or provincial, in connection with the within transaction, including GST, Retail Sales Tax, Source Deductions, Income Tax" had to be read as net taxes, net of tax refunds or tax credits — Words of s. 6.1(i) had to be interpreted similarly — It would not be consistent with SPA to allow defendants to pocket tax credits or refunds.

Contracts --- Construction and interpretation — Miscellaneous

ACTION against corporate defendants for reimbursement of certain credits.

***P.D. Lauwers J.*:**

1 The plaintiffs sold Stanton Tires Inc. to the defendant All Traxx Tires Inc. through a Share Purchase Agreement (the "Agreement"). The transaction closed on May 30, 2007. The plaintiffs sue the corporate defendants for reimbursement of credits remitted to Stanton Tire Inc. for the period before May 30, 2007, when the plaintiffs still owned its shares. (The plaintiffs concede that Michael Cira, the principal of All Traxx Tires Inc., was not properly named as a defendant.)

2 The credits relate to tax refunds or credits provided to Stanton Tire Inc. by the Ontario Ministry of Revenue in respect of corporation tax and by Canada Revenue Agency in respect of income tax. The plaintiffs are aware of such funds or credits in the amount of $30,982.24, but seek further disclosure.

3 The defendants submit that nothing in the Agreement entitles the plaintiffs to be reimbursed for the tax refunds or credits that the defendants received.

The Applicable Legal Principles

4 Both sides rely on the same law, but argue for proposed results that are diametrically opposed to each other. The parties invoked *Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust* (2007), 85 O.R. (3d) 254, [2007] O.J. No. 1083 (Ont. C.A.) per Blair J.A. at para. 24. The basic law is most recently expressed in *Salah v. Timothy's Coffees of the World Inc.* (2010), 74 B.L.R. (4th) 161, [2010] O.J. No. 4336 (Ont. C.A.) per Winkler C.J.O. at para. 16:

> The basic principles of commercial contractual interpretation may be summarized as follows. When interpreting a contract, the court aims to determine the intentions of the parties in accordance with the language used in the written document and presumes that the parties have intended what they have said. The court construes the contract as a whole, in a manner that gives meaning to all of its terms, and avoids an interpretation that would render one or more of its terms ineffective. In interpreting the contract, the court must have regard to the objective evidence of the "factual matrix" or context underlying the negotiation of the contract, but not the subjective evidence of the intention of the parties. The court should interpret the contract so as to accord with sound commercial principles and good business sense, and avoid commercial absurdity. If the court finds that the contract is ambiguous, it may then resort to extrinsic evidence to clear up the ambiguity.

The Factual Matrix or Context

5 As noted in *Salah*, *supra*, in interpreting the Agreement, the court must have regard to the objective evidence of the "factual matrix" or context underlying its negotiation, but not the evidence of the subjective intention of either party: see *Dumbrell v. Regional Group of Cos.* (2007), 85 O.R. (3d) 616 (Ont. C.A.) per Doherty J.A. at para 50.

6 The plaintiffs owned the shares in Stanton Tires Inc., which operated as a franchisee of Active Tire & Auto Centre Inc., carrying on business as Active Green + Ross. Michael Cira is the principal of the defendant All Traxx Tires Inc. and was also a franchisee. The plaintiffs wanted to sell the business of

Stanton Tires Inc. and All Traxx Tires wanted to buy the business.

7 Mr. Modugno and Mr. Cira negotiated the transaction, with the assistance of Luigi Rotondo, the principal of Rotondo and Associates Inc., a firm that supplied accounting services both to Mr. Modugno and Stanton Tires Inc., and also to Mr. Cira and All Traxx Tires Inc. Mr. Rotondo is not an accredited accountant but has a degree in business administration. The parties met many times, usually in Mr. Rotondo's office. He drafted the basic agreement and then sent it off to the parties' lawyers to have it put into proper legal form, executed and implemented. The lawyers did not consult him during the drafting of the final version.

8 Mr. Rotondo testified that the issue of tax credits and refunds came up during the negotiations. Mr. Rotondo was aware of the tax refunds that Stanton Tires was to receive due to current and prior year losses and had informed Mr. Modugno about them. Mr. Modugno took the position that the refunds belonged to him and that if he did not receive them before the closing date they should be refunded directly after that date. Mr. Rotondo testified that Mr. Cira agreed. Mr. Rotondo was not cross-examined on this evidence and it was not put to Mr. Cira in-chief or in cross-examination. Mr. Gryguc took the position that evidence of negotiations was inadmissible under the Parol Evidence Rule, especially in light of section 10.3 of the Agreement which is an "entire agreement" clause.

The Language of the Agreement

9 I am required to consider the whole document along with the relationship between the parties and the business purpose of the Agreement, and not just the specific words in a provision. See *Plan Group v. Bell Canada* (2009), 96 O.R. (3d) 81, [2009] O.J. No. 2829 (Ont. C.A.) per Blair J.A., where he noted:

> [38] In addition, as Doherty J.A. observed in *Glimmer Resources Inc. v. Exall Resources Ltd.*, [1999] O.J. No. 1357, 119 O.A.C. 78 (C.A.), at para. 17, each word in an agreement is not to be "placed under the interpretative microscope in isolation and given a meaning without regard to the entire document and the nature of the relationship created by the agreement". Courts should not strain to dissect a written agreement into isolated components and then interpret them in a way that — while apparently logical at one level — does not make sense given the overall wording of the document and the relationship of the parties.

10 Even the words that the parties used must be understood in their context or the circumstances in which they were used, given their inherent vagueness: see *Dumbrell v. The Regional Group of Companies Inc.*, *supra*, per Doherty J.A. at para. 52.

11 The provisions in the Agreement critical to the issue are set out below:

> 3.2 Subject to the terms and conditions hereof, the Vendors agree to sell, transfer and assign to the Purchaser and the Purchaser agrees to purchase from the Vendors the Purchased Shares for an aggregate purchase price of TWO HUNDRED TWENTY THOUSAND DOLLARS ($220,000.00), (the "Aggregate Purchase Price") which shall be paid, in cash or by certified cheque, on Closing to the Vendors or as they may otherwise, in writing, direct.

> The parties agree that included in the purchase price of the shares, are also all assets owned by the Corporation as listed in the Schedule "A" attached herein.
>
> The parties also agree that the Inventory will be sold separately at cost price, and the Purchaser shall have the right and option to refuse to purchase any obsolete inventory. The Purchaser will pay the costs of the purchased Inventory to the Vendor on closing.
>
> 3.3 The Vendors agree that they shall be responsible for the payment of all taxes payable be they federal or provincial, in connection with the within transaction, including GST, Retail Sales Tax, Source Deductions, Income Tax, WSIB, and any money owed to any creditors, trade, suppliers and Franchisors. Vendors agree that the Vendor's solicitor will hold in trust the sum of $25,000.00 as a holdback to satisfy any of the above debts of the business, for a period of six months from the date of closing. The Vendor's solicitor will deliver an Undertaking on closing to that effect. For clarity purposes, it does not include any holdback for any claim with respect to the condition of the chattels as of the date of closing.
>
> [Emphasis in original.]

12 The holdback concept in section 3.3 of the Agreement recognizes that the information necessary to square accounts would not be available until after the date of closing, even though that date was the critical one for identifying the parties' respective obligations.

13 The structure of the Agreement therefore required a future adjustment process, which is set out in section 6.1 (i) of the Agreement:

> 6.1 The Vendors covenant and agree with the Purchaser that on or before the Closing Date, they will do or cause to be done the following:
>
>> (i) Vendor covenants and warrants that all accounts payable and accounts receivable, are to be dealt with by the Vendor on or before closing, suitable arrangements made between the vendor and the purchaser, appropriate credits and/or adjustments as may be agreed to between the vendor and the purchaser, to be completed on or before closing.

14 The parties agree that the phrase "on or before closing" in section 6.1, and the phrase "to be completed on or before closing" at the end of section 6.1 (i), were included in error and are redundant since the purpose of the provision is to permit the adjustment of financial obligations that, as I noted above, could not be reliably quantified on the closing date. In interpreting the agreement I will therefore read those words out.

15 Although the accounts receivable created before the closing date were intended to be collected by Stanton Tires Inc. after the closing date, they were to offset any accounts payable that related to the business before the closing date. The purpose of section 6.1(i) was to allow the parties to sort these matters out later when these elements were clearer.

The Positions of the Parties

16 The plaintiffs rely particularly on section 6.1 (i) of the Agreement, which Mr. Rotondo drafted and which, on the evidence, the lawyers appear to have left untouched. As the plaintiffs interpret the provision, it deals with four separate elements: "accounts payable", "accounts receivable", "credits" and "adjustments". The tax refunds are properly understood as "credits." The tax liabilities relate to taxes that Stanton Tires Inc. owed for business prior to closing and are to be paid by the plaintiffs; these tax liabilities should be offset by any tax credits for that time.

17 The defendants make two basic arguments. First, section 3.3 of the Agreement refers specifically and expressly to the obligation of the vendors to pay all taxes payable. Nothing in the Agreement expressly obliges the purchaser to account for tax refunds and credits relating to the operation of the business before the closing date. The defendants rely heavily on the conceptual nature of a share purchase that ordinarily leaves all of the assets and liabilities with the acquired corporation. While nothing prevents the parties to a share purchase agreement from including additional language referring to specific assets, as has occurred here in sections 3.2 and 3.3, the basic nature of a share purchase means that any exceptions should be express. The listed assets did not include tax refunds or credits, so they are not recognized exceptions and should continue to flow through to Stanton Tires to the benefit of its shareholder All Traxx Tires.

18 Second, Mr. Gryguc submits that, properly construed, the reference to "suitable arrangements made between the vendor and purchaser, appropriate credits and/or adjustments as may be agreed to between the vendor and the purchaser" in section 6.1(i) refer only to accounts payable and accounts receivable. The words "credits and/or adjustments" do not refer to tax refunds or credits.

19 The plaintiffs submit that the basic disagreement between the parties as to the interpretation of section 6.1 (i) means that the provision (and the Agreement) is ambiguous on the critical issues in this lawsuit; the court is therefore permitted to consider evidence extrinsic to the words of the Agreement including the negotiations and the post-closing conduct of the parties.

Is There Ambiguity in the Language?

20 The plaintiffs rely on the decision of Ryan J. in *Delisle v. Bulman Group Ltd.*, [1991] 4 W.W.R. 637, [1991] B.C.J. No. 585, 1991 CarswellBC 54 (B.C. S.C.) at para. 12 (*Delisle* cited to CarswellBC):

> If, after examining the agreement itself in its factual matrix, including the particular words used in their immediate context and in the context of the agreement as a whole, there remain two reasonable alternative interpretations, then additional evidence may be admitted. This evidence includes evidence of the facts that led up to the making of the agreement, evidence of the circumstances as they existed at the time the agreement was made, and evidence of subsequent conduct of the parties to the agreement. The two existing reasonable interpretations may be the result of ambiguity arising from doubt, uncertainty or difficulty of construction. (Re C.N.R. and C.P. Ltd. (1979), 95 D.L.R. (3d) 242 (B.C.C.A.).

They also rely on the words of Gale C.J.O. in *Leitch Gold Mines Ltd. v. Texas Gulf Sulphur Co.* (1968), 3 D.L.R. (3d) 161, [1969] 1 O.R. 469, [1968] O.J. No. 1336 (Ont. H.C.) at para. 232 (*Leitch* cited to O.J.):

> Extrinsic evidence may be admitted to disclose a latent ambiguity, in either the language of the instrument or in its application to the facts, and also to resolve it, but it is to be noted that the evidence allowed in to clear up the ambiguity may be more extensive than that which reveals it. Thus, evidence of relevant surrounding circumstances can be accepted to ascertain the meaning of the document and may clarify the meaning by indirectly disclosing the intention of the parties.

21 In support of their interpretation of the Agreement the defendants called Paul Grossi, who has been a chartered accountant since 1978. Mr. Grossi testified as an expert without objection by Mr. Pomer, who had had his report since early May 2011.

22 Mr. Grossi testified that the two ways to effect the transfer of a business from one entity to another are either to buy the assets of the business or to buy the shares. Each basic form of transaction has certain distinct elements. As stated in his letter of opinion dated April 26, 2011:

> When the purchaser purchases these shares in the corporation then they assume all the assets and liabilities disclosed and undisclosed that are within the business corporation. For example if there are employees of the business then any potential future severance liability remains within the business corporation. The same can be said for the tax liabilities or recoveries. For example if the corporation incurred a loss in its fiscal year and this loss was carried back to a previously profitable year then the tax recovery belongs to the corporation.

23 Mr. Grossi was asked in cross-examination to interpret section 6.1(i) of the Agreement in accounting terms. He defined "accounts payable" in accounting terms as amounts that a corporation owes to its suppliers. He defined "accounts receivable" as amounts that a corporation's customers owe for goods and services.

24 Mr. Grossi testified that rebates that the franchisor owed to Stanton Tires Inc. as franchisee could not properly be described as accounts receivable since the franchisor is not a customer. He preferred to call the rebates "credits" that, in the context of an ongoing business, the franchisor would credit against future accounts payable to the franchisor. Similarly, he testified that it would be wrong in accounting terms to describe tax refunds that the taxing authorities owed to the corporation as accounts receivable since a taxing authority is not a customer. These would also be better described in accounting terms as "credits."

25 Mr. Grossi agreed in cross-examination that section 6.1(i) of the Agreement was "not clear, not precise" and "open to different interpretations" and "ambiguous". While I agree that the Agreement is ambiguous, I am reluctant to attach much weight to Mr. Grossi's evidence since I am not persuaded that the parties chose the words they did in reliance on an acute and strict accounting-based understanding of the words.

Post-closing Conduct

26 The law in Canada is that the evidence of the subsequent conduct of the parties to an agreement may be used in interpreting the agreement. See *Canadian National Railway v. Canadian Pacific Ltd.* (1978), 95 D.L.R. (3d) 242, [1978] B.C.J. No. 1298 (B.C. C.A.) (*Canadian National Railways, Re* cited to B.C.J.) per Lambert J.A., aff'd [1979] 2 S.C.R. 668 (S.C.C.):

> **82** In Canada the rule with respect to subsequent conduct is that if, after considering the agreement itself, including the particular words used in their immediate context and in the context of the agreement as a whole, there remain two reasonable alternative interpretations, then certain additional evidence may be both admitted and taken to have legal relevance if that additional evidence will help to determine which of the two reasonable alternative interpretations is the correct one. It certainly makes no difference to the law in this respect if the continuing existence of two reasonable alternative interpretations after an examination of the agreement as a whole is described as doubt or as ambiguity or as uncertainty or as difficulty of construction.

27 Mr. Rotondo produced what is effectively a statement of adjustments, dated November 5, 2008. It provided:

MIKE CIRA	**Amount $**
Vendors' Payments by Mike (Schedule-1)	$27,769.40
Sales Receipts credited to Frank A/c, M/C, Visa, Interac, Amex & Sears (Schedule-2)	$54,336.04
W.O 39344 Tires Returned by Enbridge under Warranty	$ 880.02
Amount settled by HO for items included in Inventory (Schedule-3)	$ 4,964.85
Outstanding Invoices Frank (164.02 + 112.63 + 3.53	$ 280.18
2002 EHT Annual Return Filed (See attached)	$ 1,029.40
SUB-TOTAL	$89,259.89

FRANK MODUGNO	
Inventory Valuation as of 29{th} May, 2007	($34,193.93)
Profit on Warranty re: Enbridge	($ 69.48)
HO Payments not agreed by Frank (Schedule-3A)	($ 752.60)
Total Amount as per Attached List (Schedule-4)	($11,234.95)
SUB-TOTAL	($46,250.96)

Cheques Paid to Active Green & Ross (Mike)			
15-Jun-07	$20,000.00		
6-Jul-07	$15,000.00		
29-Jun-07	$15,000.00		($50,000,00)
		SUB-TOTAL	($96,250.96)
		Final Amount Payable to Frank	($ 6,991.07)

Less Penalties & Interest ENT 2004	567.40
Final Total Owing:	($ 6,423.67)

28 In terms of the transactions recorded here, the line, "Vendors' Payments by Mike," referred to accounts payable that the business incurred before the closing date that Mr. Cira's company paid after the closing date and for which Mr. Cira's company was entitled to reimbursement. The line, "Sales Receipts credited to Frank," refers to accounts receivable earned by the business prior to, but which were collected after, the closing date. The final balance required All Traxx Tires Inc. to pay $6,423.67 to the plaintiffs, and that cheque was issued on January 12, 2009. It is common ground that all of the parties' obligations under the Agreement have been met, with the possible exception of the tax refunds.

29 The "Attached List", which details the amounts to be credited to Mr. Modugno, was largely comprised of supplier's rebates that the franchisor (also known as "Head Office") funnelled to the franchisee Stanton Tires Inc. Mr. Grossi described these rebates as not being "accounts receivable" to be adjusted, but simply as "credits". But the franchisor rebates were accounted for as credits to the plaintiffs in the adjustments. The plaintiffs argue that this post-contract conduct lends support to their interpretation of section 6.1 (i), and they claim that the tax refunds and credits should be treated the same way.

Analysis

30 As I see it, the tax refunds or credits constitute a bit of a windfall. This case is about which party gets that windfall. Although the amount, at around $30,000.00, is modest, it represents a significant percentage of the purchase price of $220,000.00.

31 The plaintiffs invoke the words of the Supreme Court in *Consolidated-Bathurst Export Ltd. c. Mutual Boiler & Machinery Insurance Co.* (1979), [1980] 1 S.C.R. 888, [1979] S.C.J. No. 133 (S.C.C.), per Estey J. at p. 901-02 (S.C.R.), para 26:

> Even apart from the doctrine of *contra proferentem* as it may be applied in the construction of contracts, the normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract. Consequently, literal meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted. Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result. It is trite to observe that an interpretation of an ambiguous contractual provision which would render the endeavour on the part of the insured to obtain insurance protection nugatory, should be avoided. Said another way, the courts should be loath to

> support a construction which would either enable the insurer to pocket the premium without risk or the insured to achieve a recovery which could neither be sensibly sought nor anticipated at the time of the contract.
>
> [Emphasis added.]

The plaintiffs suggest that the defendants are illegitimately attempting to pocket a windfall.

32 The parties testified that the transaction was structured as a share purchase agreement because that gave the plaintiffs certain tax advantages over an asset purchase agreement. Mr. Cira testified that he was indifferent as to the form of the transaction so long as All Traxx Tires Inc. ended up in control of the business that Stanton Tires Inc. operated, including its leased premises, equipment, inventory and so on. Mr. Cira was particularly concerned to ensure that All Traxx Tires Inc. acquired all of the assets owned by Stanton Tires Inc. that were listed in a Schedule to the Agreement, as required by section 3.2 of the Agreement.

33 Mr. Cira testified that he also wanted to ensure that All Traxx Tires Inc. was protected from and indemnified against the liabilities of Stanton Tires Inc; this is the reason for the strong commitment in section 3.3 of the Agreement and for the holdback. But it is also the reason for the adjustment scheme set out in section 6.1(i) of the Agreement, which I reproduce here for convenience:

> 6.1 The Vendors covenant and agree with the Purchaser that on or before the Closing Date, they will do or cause to be done the following:
>
> > (i) Vendor covenants and warrants that all accounts payable and accounts receivable, are to be dealt with by the Vendor on or before closing, suitable arrangements made between the vendor and the purchaser, appropriate credits and/or adjustments as may be agreed to between the vendor and the purchaser, to be completed on or before closing.

34 In my view, the Vendor's critical promise in section 6.1(i) is: "that all accounts payable and accounts receivable, are to be dealt with by the Vendor." This provision repeats the commitment in section 3.3 that: "[t]he Vendors agree that they shall be responsible for the payment of all taxes payable be they federal or provincial, in connection with the within transaction, including GST, Retail Sales Tax, Source Deductions, Income Tax, WSIB, and any money owed to any creditors, trade, suppliers and Franchisors." This is the commitment that made it possible for the share purchase approach to be used, as opposed to an asset purchase, because it protected the Purchaser.

35 The overarching concept was that there was to be a clear break between the business of Stanton Tires on and before the closing date, for which the plaintiffs would be entirely responsible, and the business of Stanton Tires after the closing date, for which the defendants would be entirely responsible. This was the concept underlying the Agreement. The rest of the section 6.1(i) simply recognizes the need to adjust the amounts owing back and forth as they became clear. This means that the reference in section 3.3 to: "all taxes payable be they federal or provincial, in connection with the within transaction, including GST, Retail Sales Tax, Source Deductions, Income Tax,..."

> must be read as net taxes, that is, net of tax refunds or tax credits, and the words of section 6.1(i) must be interpreted similarly. It would not be consistent with the Agreement to allow the defendants to pocket the tax credits or refunds.

36 I therefore find that the Agreement obliges the defendant All Traxx Tires Inc. to reimburse the plaintiffs for the tax credits or refunds at issue and obliges the defendant Stanton Tire Inc. to co-operate in the exercise of so doing. As noted, the credits relate to tax refunds or credits provided to Stanton Tire Inc. by the Ontario Ministry of Revenue in respect of corporation tax and by Canada Revenue Agency in respect of income tax. The plaintiffs are aware of such refunds or credits in the amount of $30,982.24, but seek further disclosure since they have not had access to Stanton Tire Inc.'s corporate information related since the transaction closed. The defendants will provide the necessary authorizations to the appropriate authorities to permit the plaintiffs to determine the reimbursement owed within 30 days. Any amounts found to be owing will be reduced by $2,251.36 to correct for the defendants' double payment on account of GST on equipment. The plaintiffs are entitled to pre-judgment interest on the amounts that the defendants owe to them.

37 The plaintiffs are also entitled to costs. If the parties cannot agree on costs, I will accept written submissions on a 10-day turnaround, starting with the plaintiffs and ending with their reply.

38 Judgment accordingly.

Action allowed.

TAB 14

Target Canada Co. (Re), 2016 ONSC 316 (CanLII)

Date: 2016-01-15

File number: CV-15-10832-00CL

Citation: **Target Canada Co. (Re), 2016 ONSC 316 (CanLII), <https://canlii.ca/t/gn05p>, retrieved on 2021-05-06**

CITATION: Target Canada Co. (Re), 2016 ONSC 316
COURT FILE NO.: CV-15-10832-00CL
DATE: 2016-01-15
SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 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 TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP., and TARGET CANADA PROPERTY LLC.

BEFORE: Regional Senior Justice Morawetz

COUNSEL: *Jeremy Dacks, Shawn Irving* and *Tracy Sandler* for Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC (the "Applicants")

Linda Galessiere and *Gus Camelino* for 20 VIC Management Inc. (on behalf of various landlords), Morguard Investments Limited (on behalf of various landlords), Calloway Real Estate Investment Trust (on behalf of Calloway REIT (Hopedale) Inc.), Calloway REIT (Laurentian Inc.), Crombie REIT, Triovest Realty Advisors Inc. (on behalf of various landlords), Brad-Lea Meadows Limited and Blackwood Partners Management Corporation (on behalf of Surrey CC Properties Inc.)

Laura M. Wagner and *Mathew P. Gottlieb* for KingSett Capital Inc.

Yannick Katirai and *Daniel Hamson* for Eleven Points Logistics Inc.

Daniel Walker for M.E.T.R.O. (Manufacture, Export, Trade, Research Office) Incorporated / Kerson Invested Limited

Jay A. Schwartz, Robin Schwill for Target Corporation

Miranda Spence for CREIT

Jay Carfagnini, Jesse Mighton, Alan Mark and Melaney Wagner for Alvarez & Marsal Canada Inc. in its capacity as Monitor

James Harnum for Employee Representative Counsel

Harvey Chaiton for the Directors and Officers of the Applicants

Stephen M. Raicek and *Mathew Maloley* for Faubourg Boisbriand Shopping Centre Limited and Sun Life Assurance Company of Canada

Vern W. DaRe for Doral Holdings Limited and 430635 Ontario Inc.

Stuart Brotman for Sobeys Capital Incorporated

Catherine Francis for Primaris Reit

Kyla Mahar for Centerbridge Partners and Davidson Kempner

William V. Sasso, Pharmacist Representative Counsel

Varoujan C. Arman for Nintendo of Canada Ltd., Universal Studios Canada Inc., Thyssenkrupp Elevator (Canada) Limited, RPI Consulting Group Inc.

Brian Parker for Montez (Cornerbrook) Inc., Admns Meadowlands Investment Corp, and Valiant Rental Inc.

Roger Jaipargas for Glentel Inc., Bell Canada and BCE Nexxia

Nancy Tourgis for Issi Inc.

HEARD: December 21, 2015 & December 22, 2015

SUPPLEMENTARY WRITTEN SUBMISSIONS: December 30, 2015, January 6, 2016 and January 8, 2016

eNDORSEMENT

[1] The Applicants Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp, Target Canada Pharmacy (Ontario) Corp, Target Canada Pharmacy Corp, Target Canada Pharmacy (Sk) Corp, and Target Canada Property LLC ("Target Canada") bring this motion for an order, *inter alia*:

(a) accepting the filing of a Joint Plan Compromise and Arrangement in respect of Target Canada Entities (defined below) dated November 27, 2015 (the "Plan");

(b) authorizing the Target Canada Entities to establish one class of Affected Creditors (as defined in the Plan) for the purpose of considering and voting on the Plan (the "Unsecured Creditors' Class");

(c) authorizing the Target Canada Entities to call, hold and conduct a meeting of the Affected Creditors (the "Creditors' Meeting") to consider and vote on a resolution to approve the Plan, and approving the procedures to be followed with respect to the Creditors' Meeting;

(d) setting the date for the hearing of the Target Canada Entities' motion seeking sanction of the Plan should the Plan be approved by the required majority of Affected Creditors of the Creditors Meeting.

[2] On January 13, 2016, the Record was endorsed as follows: "The Plan is not accepted for filing. The Motion is dismissed. Reasons to follow."

[3] These are the reasons.

[4] The Applicants and Partnerships listed on Schedule "A" to the Initial Order (the "Target Canada Entities") were granted protection from their creditors under the *Companies' Creditors Arrangement Act* ("CCAA") pursuant to the Initial Order dated January 15, 2015 (as Amended and Restated, the "Initial Order"). Alvarez & Marsal Canada Inc. was appointed in the Initial Order to act as the Monitor. [1][71]

[5] The Target Canada Entities, with the support of Target Corporation as Plan Sponsor, have now developed a Plan to present to Affected Creditors.

[6] The Target Canada Entities propose that the Creditors' Meeting will be held on February 2, 2016.

[7] The requested relief sought by Target Canada is supported by Target Corporation, Employee Representative Counsel, Centerbridge Partners, L.P. and Davidson Kempner, CREIT, Glentel Inc., Bell Canada and BCE Nexxia, M.E.T.R.O. Incorporated, Eleven Points Logistics Inc., Issi Inc. and Sobeys Capital Incorporated.

[8] The Monitor also supports the motion.

[9] The motion was opposed by KingSett Capital, Morguard Investments Limited, Morguard Investment REIT, Smart REIT, Crombie REIT, Triovest, Faubourg Boisbriand and Sun Life Assurance, Primaris REIT, and Doral Holdings Limited (the "Objecting Landlords").

Background

[10] In February 2015, the court approved the Inventory Liquidation Process and the Real Property Portfolio Sale Process ("RPPSP") to enable the Target Canada Entities to maximize the value of their assets for distribution to creditors.

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71. Capitalized terms not defined herein have the same meaning as set out in the Plan.

[11] By the summer of 2015, the processes were substantially concluded and a claims process was undertaken. The Target Canada Entities began to develop a plan that would distribute the proceeds and complete the orderly wind-down of their business.

[12] The Target Canada Entities discussed the development of the Plan with representatives of Target Corporation.

[13] The Target Canada Entities negotiated a structure with Target Corporation whereby Target Corporation would subordinate significant intercompany claims for the benefit of remaining creditors and would make other contributions under the Plan.

[14] Target Corporation maintained that it would only consider subordinating these intercompany claims and making other contributions as part of a global settlement of all issues relating to the Target Canada Entities including a settlement and release of all Landlord Guarantee Claims where Target Corporation was the Guarantor.

[15] The Plan as structured, if approved, sanctioned and implemented will

(i) complete the wind-down of the Target Canada Entities;

(ii) effect a compromise, settlement and payment of all Proven Claims; and

(iii) grant releases of the Target Canada Entities and Target Corporation, among others.

[16] The Plan provides that, for the purposes of considering and voting on the plan, the Affected Creditors will constitute a single class (the "Unsecured Creditors' Class").

[17] In the majority of CCAA proceedings, motions of this type are procedural in nature and more often than not they proceed without any significant controversy. This proceeding is, however, not the usual proceeding and this motion has attracted significant controversy. The Objecting Landlords have raised concerns about the terms of the Plan.

[18] The Objecting Landlords take the position that this motion deals with not only procedural issues but substantive rights. The Objecting Landlords have two major concerns.

Objection # 1 – Breach of paragraph 19A of the Amended and Restated Order

[19] First, in February 2015, an Amended and Restated Order was sought by Target Canada. Paragraph 19A was incorporated into the Amended and Restated Order, which provides that the claims of any landlord against Target Corporation relating to any lease of real property (the "Landlord Guarantee Claims") shall not be determined in this CCAA proceeding and shall not be released or affected in any way in any plan filed by the Applicants.

[20] Paragraph 19A provides as follows:

> 19A. THIS COURT ORDERS that, without in any way altering, increasing, creating or eliminating any obligation or duty to mitigate losses or damages, the rights, remedies and claims (collectively, the "Landlord Guarantee Claims") of any landlord against Target US pursuant to any indemnity, guarantee, or surety relating to a lease of real property, including, without limitation, the validity, enforceability or quantum of such Landlord Guarantee Claims: (a) shall be determined by a judge of the Ontario Superior Court of Justice (Commercial List), whether or not the within proceeding under the CCAA continue (without altering the applicable and operative governing law of such indemnity, guarantee or surety) and notwithstanding the provisions of any federal or provincial statutes with respect to procedural matters relating to the Landlord Guarantee Claims; provided that any landlord holding such guarantees, indemnities or sureties that has not consented to the foregoing may, within fifteen (15) days of the making of this Order, bring a motion to have the matter of the venue for the determination of its Landlord Guarantee Claim adjudicated by the Court; (b) shall not be determined, directly or indirectly, in the within CCAA proceedings; (c) shall be unaffected by any determination (including any findings of fact, mixed fact and law or conclusions of law) of any rights, remedies and claims of such landlords as against Target Canada Entities, whether made in the within proceedings under the CCAA or in any subsequent proposal or bankruptcy proceedings under the BIA, other than that any recoveries under such proceedings received by such landlords shall constitute a reduction and offset to any Landlord Guarantee Claims; and (d) shall be treated as unaffected and shall not be released or affected in any way in any Plan filed by the Target Canada Entities, or any of them, under the CCAA, or any proposal filed by the Target Canada Entities, or any of them, under the BIA.

[21] The evidence of Target Canada in support of the requested change consisted of the Affidavit of Mark Wong, who stated at the time:

> "A component of obtaining the consent of the Landlord Group for approval of the Real Property Portfolio Sales Process ("RPPSP") was the agreement of The Target Canada Entities to seek approval of certain changes to the initial order in the form of an amended and restated initial order…[T]hese proposed changes were the subject of significant negotiation between the Landlord Group and The Target Canada Entities, with the assistance and input of the Monitor and Target Corporation."

[22] The Monitor, in its second report dated February 9, 2015, stated:

> (3.4) Counsel to the Landlord Group advised that the Real Property Portfolio Sales Process proceeding on a consensual basis as described below is conditional on the proposed changes to the initial order.
>
> (3.5) The Monitor recommends approval of the amended and restated initial order as it reflects;

(a) revisions negotiated as among The Target Canada Entities, the Landlord Group and Target U.S. (in conjunction with revisions to the Real Property Portfolio Sales Process), with the assistance of the Monitor; and

(b) a fair and reasonable balancing of interests.

[23] Thus, Objecting Landlords contend that the agreement resulting in Paragraph 19A of the Amended and Restated Initial Order was not just a condition of the Landlord Group's agreement to the RPPSP – it was also a condition of the Landlord Group withdrawing both its opposition to the CCAA process and its intention to commence a bankruptcy application to put the Applicants into bankruptcy at the come back hearing.

[24] The Objecting Landlords contend that the Applicants now seek to file a plan that releases the Landlord Guarantee Claims. This, in their view, is a clear breach of paragraph 19A, which Target Canada sought and the Monitor supported.

Objection # 2 – Breach of paragraph 55 of the Claim Procedure Order

[25] Second, the Objecting Landlords contend that the Plan violates the Claims Procedure Order and the CCAA. They argue that the Claims Procedure Order was also settled after prolonged negotiations between the Target Canada Entities and their creditors, including the landlords and that this order sets out a comprehensive claims process for determining all claims, including landlords' claims.

[26] The Objecting Landlords contend that Paragraph 55 of the Claims Procedure Order expressly excludes Landlord Guarantee Claims and provides that nothing in the Claims Procedure Order shall prejudice, limit, or otherwise affect any claims, including under any guarantee, against Target Corporation or any predecessor tenant. Paragraph 55 also ends with the *proviso* that "[f]or greater certainty, this Order is subject to and shall not derogate from paragraph 19A of the Initial Order."

[27] The Objecting Landlords take the position that, in clear breach of Paragraph 55 and of the Claims Procedure Order generally, the Plan provides for a set formula to determine landlord claims, including claims against Target Corporation under its guarantees. KingSett further contends that the formula not only purports to determine landlords' claims for distribution purposes, it also purports to determine their claims for voting purposes, with no ability to challenge either. KingSett contends that this violates the terms of the Claims Procedure Order that was sought by the Applicants and supported by the Monitor.

[28] In summary, the Objecting Landlords take the position that the foregoing issues are crucial threshold issues and are not merely "procedural" questions and as such the court has to determine whether it can accept a plan for filing if that plan in effect permits Target Canada to renege on their agreements with creditors, violate court orders and the CCAA.

[29] In my view the issues raised by the Objecting Landlords are significant and they should be determined at this time.

Position of Target Canada

[30] Target Canada takes the position that the threshold for the court to authorize Target Canada to hold the creditors meeting is low and that Target Canada meets this threshold.

[31] Target Canada submits that the Plan has been the subject of numerous discussions and/or negotiations with Target Corporation (leading to a structure based on Target Corporation serving as Plan Sponsor), the Monitor and a wide variety of stakeholders. Target Canada states that if approved, the Plan will effect a compromise, settlement and payment of all proven claims in the near term in a manner that maximizes and accelerates stakeholder recovery.

[32] Target Corporation, as Plan Sponsor and a creditor of Target Canada, has agreed to subordinate approximately $5 billion in intercompany claims to the claims of other Affected Creditors. Based on the Monitor's preliminary analysis, the Plan provides for recoveries for Affected Creditors generally in the range of 75% to 85% of their proven claims.

[33] Target Canada contends that recent case law supports the jurisdiction of the CCAA court to provide that third party claims be addressed within the CCAA and leaves it open to a debtor company to address such claims in a plan.

[34] The Plan provides that Affected Creditors will vote on the Plan as a single unsecured class. Target Canada submits that this is appropriate on the basis that all Affected Creditors have the required commonality of interest (i.e. an unsecured claim) in relation to the claims against Target Canada and the Plan will compromise and release all of their claims.

[35] Target Canada is of the view that fragmentation of these creditors into separate classes would jeopardize the ability to achieve a successful plan.

[36] The Plan values the Landlord Restructuring Period Claims of landlords whose leases have been disclaimed by applying a formula ("Landlord Formula Amount") derived from the formula provided under s. 65.2 (3) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 ("BIA" and "BIA Formula"). The Landlord Formula Amount enhances the BIA Formula by permitting recovery of an additional year of rent. Target Corporation intends to contribute funds necessary to pay this enhancement (the "Landlord Guarantee Top-Up Amounts") Target Canada contends that the use of the BIA Formula to value landlord claims for voting and distribution purposes has been approved in other CCAA proceedings.

[37] With respect to the Landlord Formula Amount to calculate the Landlord Restructuring Period Claims, the formula provides for, in effect, Landlord Restructuring Period Claims to be valued at the lesser of either:

(i) rent payable under the lease for the two years following the disclaimer plus 15% of the rent for the remainder of the lease term; or

(ii) four years rent.

[38] Target Canada further contends that the court has the jurisdiction to modify the Initial Order on Plan Implementation to permit the Target Canada Entities to address Landlord Guarantee Claims in the Plan and that it is appropriate to do so in these circumstances. This justification is based on the premise that the landscape of the proceedings has been significantly altered since the filing date, particularly in light of the material contributions that Target Corporation prepared to make as Plan Sponsor in order to effect a global resolution of issues. Further, they argue that Landlord Guarantee Creditors are appropriately compensated under the Plan for their Landlord Guarantee Claims by means of the Landlord Guarantee Creditor Top-Up amounts, which will be funded by Target Corporation. As such, Landlord Guarantee Creditors will be paid 100% of their Landlord Restructuring Period Claims, valued in accordance with the Landlord Formula Amount.

[39] The Applicants contend that they seek to achieve a fair and equitable balance in the Plan. The Applicants submit that questions as to whether the Plan is in fact balanced, and fair and reasonable towards particular stakeholders, are matters best assessed by Affected Creditors who will exercise their business judgment in voting for or against the Plan. Until Affected Creditors have expressed their views, considerations of fairness are premature and are not matters that are required to be considered by the court in granting the requested Creditors' Meeting. If the Plan is approved by the requisite majority of the Affected Creditors, the court will then be in a position to fully evaluate the fairness and reasonableness of the Plan as a whole, with the benefit of the business judgment of Affected Creditors as reflected in the vote of the Creditors' Meeting.

[40] The significant features of the Plan include:

(i) the Plan contemplates that a single class of Affected Creditors will consider and vote on the plan.

(ii) the Plan entitles Affected Creditors holding proven claims that are less than or equal to $25,000 ("Convenience Class Creditors") to be paid in full;

(iii) the Plan provides that all Landlord Restructuring Period Claims will be calculated using the Landlord Formula Amount derived from the BIA Formula;

(iv) As a result of direct funding from Target Corporation of the Landlord Guarantee Creditor Top-Up amounts, Landlord Guarantee Creditors will be paid the full value of their Landlord Restructuring Period Claims;

(v) Intercompany Claims will be valued at the amount set out in the Monitor's Intercompany Claims Report;

(vi) If approved and sanctioned, the Plan will require an amendment to Paragraph 19A of the Initial Order which currently provides that the Landlord Guarantee Claims are to be dealt with outside these CCAA proceedings. The Plan provides that this amendment will be addressed at the sanction hearing once it has been determined whether the Affected Creditors support the Plan.

(vii) In exchange for Target Corporations' economic contributions, Target Corporation and certain other third parties (including Hudson's Bay Company and Zellers, which have indemnities from Target Corporation) will be released, including in relation to all Landlord Guarantee Claims.

[41] If the Plan is approved and implemented, Target Corporation will be making economic contributions to the Plan. In particular:

(a) In addition to the subordination of the $3.1 billion intercompany claim that Target Corporation agreed to subordinate at the outset of these CCAA proceedings, on Plan Implementation Date, Target Corporation will cause Property LLP to subordinate almost all of the Property LLP ("Propco") Intercompany Claim which was filed against Propco in an additional amount of approximately $1.4 billion;

(b) In turn, Propco will concurrently subordinate the Propco Intercompany Claim filed against TCC in an amount of approximately $1.9 billion (adjusted by the Monitor to $1.3 billion);

(c) Target Corporation will contribute funds necessary to pay the Landlord Guarantee Creditor Top-Up Amounts.

[42] Target Canada points out that in discussions with Target Corporation to establish the structure for the Plan, Target Corporation maintained that it would only consider subordinating these remaining intercompany claims as part of a global settlement of all issues relating to the Target Canada Entities, including all Landlord Guarantee Claims.

[43] The issue on this motion is whether the requested Creditors' Meeting should be granted. Section 4 of the CCAA provides:

4. Where a compromise or arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, or any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of shareholders of the company, to be summoned in such manner as the court directs.

[44] Counsel cites *Nova Metal Products* for the proposition that the feasibility of a plan is a relevant significant factor to be considered in determining whether to order a meeting of creditors. However, the court should not impose a heavy burden on a debtor company to establish the likelihood of ultimate success at the outset (*Nova Metal Products v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (C.A.).

[45] Counsel submit that the court should order a meeting of creditors unless there is no hope that the plan will be approved by the creditors or, if approved, the plan would not for some other reason be approved by the court (*ScoZinc Ltd.*, Re*,* 2009 NSSC 163, 55 C.B.R. (5th) 205).

[46] Counsel also submits that the court has described the granting of the Creditors' Meeting as essentially a "procedural step" that does not engage considerations of whether the debtors' plan is fair and reasonable. Thus, counsel contends, unless it is abundantly clear the plan will not be approved by its creditors, the debtor company is entitled to put its plan before those creditors and to allow the creditors to exercise their business judgment in determining whether to support or reject it.

[47] Target Canada takes the position that there is no basis for concluding that the Plan has, no hope of success and the court should therefore exercise its discretion to order the Creditors Meeting.

[48] Counsel to Target Canada submits that the flexibility of the CCAA allows the Target Canada Entities to apply a uniform formula for valuing Landlord Restructuring Period Claims for voting and distribution purposes, including Landlord Guarantee Claims, in the interests of ensuring expeditious distributions to all Affected Creditors

[49] Counsel contends that if each Landlord Restructuring Period Claim had to be individually calculated based on the unique facts applicable to each lease, including future prospects for mitigation and uncertain collateral damage, the resulting disputes would embroil disputes between landlords and the Target Canada Entities in lengthy proceedings. Counsel contends that the issue relating to the Landlord Guarantee Claims is more properly a matter of the overall fairness and reasonableness of the Plan and should be addressed at the sanction hearing.

[50] The Plan also contemplates releases for the benefit of Target Corporation and other third parties to recognize the material economic contribution that have resulted in favourable recoveries for Affected Creditors. These releases, Target Canada contends, satisfy the well established test for the CCAA court to approve third party releases. (*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, (2008) 2008 CanLII 21724 (ON SC), 42 C.B.R. (5) 90 (Ont. S.C.J. [Commercial List], affirmed 2008 ONCA 587, (sub nom. Re *Metcalfe & Mansfield Alternative Investments II Corp.*)

[51] Likewise, the issue of Third Party Claims and Third Party Releases is a matter that can be addressed at sanction.

[52] With respect to the amendment to Paragraph 19A of the Initial Order, counsel submits that since the date of the Initial Order, and since this paragraph was included in the Initial Order, the landscape of the restructuring has shifted considerably, most notably in the form of the economic contributions that are being offered by Target Corporation, as Plan Sponsor.

[53] The Target Entities propose that on Plan Implementation, Paragraph 19A of the Initial Order will be deleted. Counsel submits that the court has the jurisdiction to amend the Initial Order through its broad jurisdiction under s. 11 of the CCAA to make any order that it considers appropriate in the circumstances and further, the court would be exercising its discretion to amend its own order, on the

basis that it is just and appropriate to do so in these particular circumstances. Counsel submits that the requested amendment is essential to the success of the Plan and to maximize and expedite recoveries for all stakeholders. Further, the notion that a post-filing contract cannot be amended despite subsequent events fails to do justice to the flexible and "real time" nature of a CCAA proceeding.

[54] As such, counsel contends that no further information is necessary in order for the landlords to determine whether the Plan is fair and reasonable and they are in a position to vote for or against the Plan.

Position of the Objecting Landlords

[55] At the outset of this proceeding, Target Canada, Target Corporation and Target Canada's landlords agreed that Landlord Guarantee Claims would not be affected by any Plan. In exchange, several landlords with Landlord Guarantee Claims agreed to withdraw their opposition to Target Canada proceeding with the liquidation under the CCAA and the RPPSP.

[56] Counsel to the landlords submit that 10 months after having received the benefit of the landlords not opposing the RPPSP and the continuation of the CCAA, Target Canada seeks the court's approval to unequivocally renege on the agreement that violates the Amended Order by filing a Plan that compromises Landlord Guarantee Claims.

[57] The Objecting Landlords also contend that the proposed plan violates the Amended Order and the Claims Procedure Order by purporting to the value the landlords' claims, including all Landlord Guarantee Claims, using a formula.

[58] Objecting Landlords take the position that they have claims against Target Canada as a result of its disclaimer of long term leases, guaranteed by Target Corporation, in excess of the amount that the Plan values these claim. One example is the claim of KingSett. KingSett insists they have a claim of at least $26 million which has been valued for Plan purposes at $4 million plus taxes.

[59] The Objecting Landlords submit that the court cannot and should not allow a plan to be filed that violates the court's orders and agreements made by the Applicant. Further, if the motion is granted, the CCAA will no longer allow for a reliable process pursuant to which creditors can expect to negotiate with an Applicant in good faith. Counsel contends that the amendment of the Initial Order to buttress the agreement between the parties not to compromise the Landlord Guarantee Claims was intended to strengthen, not weaken, the landlords' ability to enforce Target Canada and Target Corporation's contractual obligation not to file a plan that compromises Landlord Guarantee Claims and it would be a perverse outcome for the court to hold otherwise.

[60] With respect to claims procedure, the Claims Procedure Order provides in Paragraph 32 that a claim that is subject to a dispute "shall" be referred to a claims officer of the court for adjudication. The Objecting Landlords submit that the Claims Procedure Order reaffirms the agreement between Target

Canada, Target Corporation and the Landlord Group with respect to Landlord Guarantee Claims; they refer to Paragraph 55 which specifically provides that nothing in the order shall prejudice, limit, bar, extinguish or otherwise affect any rights or claims, including under any guarantee or indemnity, against Target Corporation or any predecessor tenant.

[61] Counsel for the Objecting Landlords submit that the Plan provides the basis for Target Corporation to avoid its obligation to honour guarantees to landlords, which Target Corporation agreed would not be compromised as part of the CCAA proceedings. Counsel contends that the Plan seeks to use the leverage of the "Plan Sponsor" against the creditors to obtain approval to renege on its obligations. This, according to counsel, amounts to an economic decision by Target Corporation in its own financial interest.

[62] In support of its proposition that the court cannot accept a plan's call for a meeting where the plan cannot be sanctioned, counsel references *Crystallex International Corp.*, Re, 2013 ONSC 823, 2013 CarswellOnt 3043 [Commercial List]. Counsel submits that the court should not allow the Applicants to file a plan that from the outset cannot be sanctioned because it violates court orders or is otherwise improper.

[63] In this case, counsel submits that the Plan cannot be accepted for filing because it violates Paragraph 19A of the Amended Order and Paragraph 55 of the Claims Procedure Order. The Objecting Landlords stated as follows:

> Paragraph 19A of the Amended Order is unequivocal. Landlord Guarantee Claims:
>
> > (a) shall not be determined, directly or indirectly, in the CCAA proceeding;
> >
> > (b) shall be unaffected by any determination of claims of landlords against Target Canada; and,
> >
> > (c) shall be treated as unaffected and shall not be released or affected in any way in any Plan filed by Target Canada under the CCAA.
>
> Likewise, the Claims Procedure Order, as amended, clearly provides that:
>
> > (a) disputed creditors' claims shall be adjudicated by a Claims Officer or the Court;
> >
> > (b) creditors have until February 12, 2016 to object to intercreditor claims; and,
> >
> > (c) the claims process shall not affect Landlord Guarantee Claims and shall not derogate from paragraph 19A of the Amended Order.
>
> There is no dispute that the Plan that Target Canada now seeks to file violates these terms of the Amended Order and the Claims Procedure Order…

[64] With respect to the issue of Paragraph 19A, counsel submits that this provision benefits Target Canada's creditors who have guarantees from Target Corporation. Further, under the plan, these creditors gain nothing from subordination of Target Corporation's intercompany claim, which only benefits creditors who did not obtain guarantees from Target Corporation. Counsel referred to *Alternative Fuel Systems Inc.*, Re, 2003 ABQB 745, 20 Alta. L.R. (4th) 264, aff'd 2004 ABCA 31, 346 A.R. 28, where both courts emphasized the importance of following a claims procedure and complying with ss. 20(1)(a)(iii) to determine landlord claims.

[65] Accordingly, counsel submits that barring landlord consent at the claims process stage of the CCAA proceeding, the court cannot unilaterally impose a cookie cutter formula to determine landlord claims at the plan stage.

Analysis

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[66] Target Canada submits that the threshold for the court to authorize Target Canada to hold the creditors meeting is low and that Target Canada meets this threshold.

[67] In my view, it is not necessary to comment on this submission insofar as this Plan is flawed to the extent that even the low threshold test has not been met.

[68] Simply put, I am of the view that this Plan does not have even a reasonable chance of success, as it could not, in this form, be sanctioned.

[69] As such, I see no point in directing Target Canada to call and conduct a meeting of creditors to consider this Plan, as proceeding with a meeting in these circumstances would only result in a waste of time and money.

[70] Even if the Affected Creditors voted in favour of the Plan in the requisite amounts, the court examines three criteria at the sanction hearing:

(i) Whether there has been strict compliance with all statutory requirements;

(ii) Whether all materials filed and procedures carried out were authorized by the CCAA;

(iii) Whether the Plan is fair and reasonable.

(See *Re Quintette Coal Ltd.* (1992), 1992 CanLII 670 (BC SC), 13 C.B.R. (3d) 146 (B.C.S.C.); *Re Dairy Corp. of Canada Ltd.*, 1934 CanLII 132 (ON SC), [1934] O.R. 436 (Ont. S.C.); *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.); *Re Northland Properties Ltd.* (1988), 1988 CanLII 3250 (BC SC), 73 C.B.R. (N.S.) 175 (B.C.S.C.) at p. 182, aff'd (1989), 1989 CanLII 2672 (BC CA), 73 C.B.R. (N.S.) 195 (B.C.C.A.); *Re BlueStar Battery Systems International Corp.* (2000), 25 C.B.R. (4th) 216 (Ont. S.C.J. [Commercial List]).

[71] As explained below, the Plan cannot meet the required criteria.

[72] It is incumbent upon the court, in its supervisory role, to ensure that the CCAA process unfolds in a fair and transparent manner. It is in this area that this Plan falls short. In considering whether to order a meeting of creditors to consider this Plan, the relevant question to consider is the following: Should certain landlords, who hold guarantees from Target Corporation, a non-debtor, be required, through the CCAA proceedings of Target Canada, to release Target Corporation from its guarantee in exchange for consideration in the Plan in the form of the Landlord Formula Amount?

[73] The CCAA proceedings of Target Canada were commenced a year ago. A broad stay of proceedings was put into effect. Target Canada put forward a proposal to liquidate its assets. The record establishes that from the outset, it was clear that the Objecting Landlords were concerned about whether the CCAA proceedings would be used in a manner that would affect the guarantees they held from Target Corporation.

[74] The record also establishes that the Objecting Landlords, together with Target Canada and Target Corporation, reached an understanding which was formalized through the addition of paragraph 19A to the Initial and Restated Order. Paragraph 19A provides that these CCAA proceedings would not be used to compromise the guarantee claims that those landlords have as against Target Corporation.

[75] The Objecting Landlords take the position that in the absence of paragraph 19A, they would have considered issuing bankruptcy proceedings as against Target Canada. In a bankruptcy, landlord claims against Target Canada would be fixed by the BIA Formula and presumably, the Objecting Landlords would consider their remedies as against Target Corporation as guarantor. Regardless of whether or not these landlords would have issued bankruptcy proceedings, the fact remains that paragraph 19A was incorporated into the Initial and Restated Order in response to the concerns raised by the Objecting Landlords at the motion of the Target Corporation, and with the support of Target Corporation and the Monitor.

[76] Target Canada developed a liquidation plan, in consultation with its creditors and the Monitor, that allowed for the orderly liquidation of its inventory and established the sale process for its real property leases. Target Canada liquidated its assets and developed a plan to distribute the proceeds to its creditors. The proceeds are being made available to all creditors having Proven Claims. The creditors include trade creditors and landlords. In addition, Target Corporation agreed to subordinate its claim. The Plan also establishes a Landlord Formula Amount. If this was all that the Plan set out to do, in all likelihood a meeting of creditors would be ordered.

[77] However, this is not all that the plan accomplishes. Target Canada proposes that paragraph 19A be varied so that the Plan can address the guarantee claims that landlords have as against Target Corporation. In other words, Target Canada has proposed a Plan which requires the court to completely ignore the background that led to paragraph 19A and the reliance that parties placed in paragraph 19A.

[78] Target Canada contends that it is necessary to formulate the plan in this matter to address a change in the landscape. There may very well have been changes in the economic landscape, but I fail to see how that justifies the departure from the agreed upon course of action as set out in paragraph 19A. Even if the current landscape is not favourable for Target Corporation, this development does not justify this court endorsing a change in direction over the objections the Objecting Landlords.

[79] This is not a situation where a debtor is using the CCAA to compromise claims of creditor. Rather, this is an attempt to use the CCAA as a means to secure a release of Target Corporation from its liabilities under the guarantees in exchange for allowing claims of Objecting Landlords in amounts calculated under the Landlord Formula Amount. The proposal of Target Canada and Target Corporation clearly contravenes the agreement memorialized and enforced in paragraph 19A.

[80] Paragraph 19A arose in a post-CCAA filing environment, with each interested party carefully negotiating its position. The fact that the agreement to include paragraph 19A in the Amended and Restated Order was reached in a post-filing environment is significant (see *The Trustees of the Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation,* 2015 ONSC 4004, 27 C.B.R. (6th) 134 at paras. 33-35). In my view, there was never any doubt that Target Canada and Target Corporation were aware of the implications of paragraph 19A and by proposing this Plan, Target Canada and Target Corporation seek to override the provisions of paragraph 19A. They ask the court to let them back out of their binding agreement after having received the benefit of performance by the landlords. They ask the court to let them try to compromise the Landlord Guarantee Claims against Target Corporation after promising not to do that very thing in these proceedings. They ask the court to let them eliminate a court order to which they consented without proving that they having any grounds to rescind the order. In my view, it is simply not appropriate to proceed with the Plan that requires such an alteration.

[81] The CCAA process is one of building blocks. In this proceedings, a stay has been granted and a plan developed. During these proceedings, this court has made number of orders. It is essential that court orders made during CCAA proceedings be respected. In this case, the Amended Restated Order was an order that was heavily negotiated by sophisticated parties. They knew that they were entering into binding agreements supported by binding orders. Certain parties now wish to restate the terms of the negotiated orders. Such a development would run counter to the building block approach underlying these proceedings since the outset.

[82] The parties raised the issue of whether the court has the jurisdiction to vary paragraph 19A. In view of my decision that it is not appropriate to vary the Order, it is not necessary to address the issue of jurisdiction.

[83] A similar analysis can also be undertaken with respect to the Claims Procedure Order. The Claims Procedure Order establishes the framework to be followed to quantify claims. The Plan changes the basis by which landlord claims are to be quantified. Instead of following the process set forth in the

Claims Procedure Order, which provides for appeal rights to the court or claims officer, the Plan provides for quantification of landlord claims by use of Landlord Formula Amount, proposed by Target Canada.

[84] In my view, it is clear that this Plan, in its current form, cannot withstand the scrutiny of the test to sanction a Plan. It is, in my view, not appropriate to change the rules to suit the applicant and the Plan Sponsor, in midstream.

[85] It cannot be fair and reasonable to ignore post-filing agreements concerning the CCAA process after they have been relied upon by counter-parties or to rescind consent orders of the court without grounds to do so.

[86] Target Canada submits that the foregoing issues can be the subject of debate at the sanction hearing. In my view, this is not an attractive alternative. It merely postpones the inevitable result, namely the conclusion that this Plan contravenes court orders and cannot be considered to be fair and reasonable in its treatment of the Objecting Landlords. In my view, this Plan is improper (see *Crystallex*).

Disposition

[87] Accordingly, the Plan is not accepted for filing and this motion is dismissed.

[88] The Monitor is directed to review the implications of this Endorsement with the stakeholders within 14 days and is to schedule a case conference where various alternatives can be reviewed.

[89] At this time, it is not necessary to address the issue of classification of creditors' claim, nor is it necessary to address the issue of non-disclosure of the RioCan Settlement.

-

Regional Senior Justice G.B. Morawetz

Date: January 15, 2016

TAB 15

2004 CarswellOnt 5033
Ont. S.C.J. [Commercial List]

Noma Co., Re

2004 CarswellOnt 5033, [2004] O.J. No. 4914, [2004] O.T.C. 1068, 135 A.C.W.S. (3d) 373

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED, SECTION 18.6

IN THE MATTER OF THE APPLICATION OF NOMA COMPANY, ANCILLARY TO PROCEEDINGS UNDER CHAPTER 11 OF THE UNITED STATES BANKRUPTCY CODE (Applicant)

Cameron J.

Heard: November 25, 2004
Judgment: November 30, 2004
Docket: 02-CL-4804

Counsel: Michael McGraw, for Applicant, Noma Company
Peter Carlisi, for Despina Koutlemanis

Subject: Insolvency; Civil Practice and Procedure; Corporate and Commercial; Employment; Public

Headnote

Bankruptcy and insolvency --- Proving claim — Practice and procedure — Disallowance of claims — Notice of disallowance

Plaintiff brought action against defendant company for damages resulting from alleged harassment — Defendant's parent American company filed application for relief under U.S. bankruptcy court — Defendant sought and received order recognizing U.S. proceedings and granting defendant stay against claims and proceeding against it or its property in Canada — Order provided that any Canadian resident with claims against defendant pre-dating order must file proof of claim before bar date — Defendant published bar date notice in three major Canadian newspapers — Defendant sent notice of bar date to list of creditors, with list including plaintiff — Plaintiff and plaintiff's attorney never received notice — Plaintiff failed to file proof of claim before bar date — Defendant brought motion to dismiss plaintiff's action — Motion granted — Claim to action was forever discharged and released when plaintiff failed to file proof of claim by bar date — Defendant fulfilled all reasonable requirements of service — No evidence existed before court to suggest certification of service filed by defendant was not legitimate — No reason existed to lift bar and allow plaintiff to file late claim — Plaintiff did not act in timely fashion even after bar date expired — Plaintiff waited full 17 months before taking action after finding out about expired bar date.

Bankruptcy and insolvency --- Practice and procedure in courts — Orders — Enforcement of orders

Plaintiff brought action against defendant company for damages resulting from alleged harassment — Defendant's parent American company filed application for relief under U.S. bankruptcy court —

Defendant sought and received order recognizing U.S. proceedings and granting defendant stay against claims and proceeding against it or its property in Canada — Order provided that any Canadian resident with claims against defendant pre-dating order must file proof of claim before bar date — Defendant published bar date notice in three major Canadian newspapers — Defendant sent notice of bar date to list of creditors, with list including plaintiff — Plaintiff and plaintiff's attorney never received notice — Plaintiff failed to file proof of claim before bar date — Defendant brought motion to dismiss plaintiff's action — Motion granted — Claim to action was forever discharged and released when plaintiff failed to file proof of claim by bar date — Defendant fulfilled all reasonable requirements of service — No evidence existed before court to suggest certification of service filed by defendant was not legitimate — No reason existed to lift bar and allow plaintiff to file late claim — Plaintiff did not act in timely fashion even after bar date expired — Plaintiff waited full 17 months before taking action after finding out about expired bar date.

MOTION to dismiss action following failure of plaintiff to file proof of claim.

***Cameron J.*:**

1 These are motions:

1. by Noma Company to:

   a) dismiss the action commenced by Despina Koutlemanis ("Ms. Koutlemanis") in 1997 against Noma Inc., a predecessor of Noma Company, for damages for harassment during employment (the "Action") set to be tried December 15, 2004;

   b) for a declaration that the Action is a claim which, in this proceeding under the *Companies' Creditors Arrangement Act* ("CCAA"), was barred and extinguished on April 14, 2003 pursuant to a Claims Process and Bar Order ("Claims Bar Order") dated February 7, 2003 and a Canadian Recognition Order dated October 9, 2003 confirming a U.S. Federal Court order which confirmed a Plan of Reorganization respecting Noma Company and its affiliates ("Canadian Recognition Order").

2. by Ms. Koutlemanis for:

   a) a declaration that the Action is a valid and subsisting action not subject to the Claims Bar Order or the Canadian Recognition Order; and

   b) that this court can proceed to try the Action and that any judgment resulting therefrom is enforceable; or

   c) that the Claims Bar Order be lifted as it may apply to the Action; or

   d) that Ms. Koutlemanis be permitted to make a claim as contained in the Action notwithstanding the Claims Bar Order.

Chronology

2 The Action was commenced by Ms. Koutlemanis against Noma Inc. in 1997 for general, special and punitive damages totaling $650,000 for personal injuries resulting from harassment while she was an employee of Noma Inc. between 1990 and 1993.

3 Aylesworth Thompson Phelan O'Brien LLP ("Aylesworth") represented Ms. Koutlemanis and Gowling Henderson ("Gowlings") represented Noma Inc. and later Noma Company in the Action.

4 In or about 1998 Ms. Koutlemanis suffered personal injuries in a motor vehicle accident and in another incident and commenced actions in respect of them.

5 In 1999 Noma Inc. amalgamated with a numbered company under the laws of Nova Scotia and continued as Noma Company.

6 On October 11, 2002 (the "US Petition Date"), Noma's ultimate parent company, GenTek Inc. ("GenTek") and thirty-one of GenTek's subsidiaries and affiliates (the "Chapter 11 Debtors"), including Noma, filed petitions for relief under Chapter 11 of the United States Bankruptcy Code (the "US Proceedings") in the United States Bankruptcy Court for the District of Delaware (the "US Court") to facilitate a global restructuring of the GenTek group of companies.

7 In November 2002 Aylesworth received a Notice of Commencement of Chapter 11 Bankruptcy Cases in the U.S. Court "In re GenTek Inc. et al." and "In re: Noma Company" as debtors, dated October 29, 2002 naming as debtors 32 companies including "Noma Corporation" and "Noma Company", all having the address of: Liberty Lane, Hampton, New Hampshire, 03842.

8 The notice gave notice of a meeting of creditors on November 18, 2002 in Wilmington, Delaware and names as counsel for the debtors Skadden, Arps, Slater Meagher & Flom LLP of Wilmington, Delaware.

9 The notice gave notice of names used by the debtors in the last six years for some of the debtors. There were no prior names given for Noma Corporation or Noma Company.

10 On November 5, 2002 Aylesworth wrote to Gowlings asking whether the notice had any application to the Action against Noma Inc. Gowlings advised by voicemail that it was prepared to discuss the matter. Aylesworth, by letter, sought a written response. It received none.

11 On December 10, 2002, Noma Company sought and obtained an Initial Order pursuant to section 18.6 of the CCAA, recognizing the U.S. Proceedings and granting Noma Company, amongst other things, a stay against claims, proceedings and the exercise of any contractual rights against it or its property in Canada (the "Stay Period");

12 The Initial Order provides for a Stay of Proceedings against Noma Company such that actions could not be commenced or continued against Noma Company.

13 Noma Company was and is represented in this proceeding by Blake, Cassels & Graydon ("Blakes").

14 Neither Ms. Koutlemanis nor many other creditors of Noma Company received notice of the application for the Initial Order.

15 By Order of the Honourable Mr. Justice Ground dated February 7, 2003 (the "Claims Bar Order"), the Court granted an order establishing a process for filing proofs of claim and a bar date of April 14, 2003 (the "Bar Date") for creditors of Noma Company resident in Canada.

16 The Claims Bar Order provided that any Canadian resident with a claim against Noma Company which arose prior to October 11, 2002 was required to file a proof of claim to be received by Noma Company's claims agent on or before the Bar Date and that any party that failed to file such a proof of claim on or before the Bar Date, shall be forever barred, estopped and enjoined from asserting any claim against Noma Company.

17 Paragraph 3 of the Claims Bar Order provided:

> This court orders that Noma is authorized and directed to mail to all known creditors of Noma resident in Canada according to its books and records a proof of claim with instructions and notice of bar date substantially in the form annexed hereto...on or before February 13, 2003.

18 Paragraphs 10, 11, 12, 13 and 14 of the Claims Bar Order provided:

> 10. This court orders that notice of this Order and the Bar Date, substantially in the form of the notice of bar date attached hereto as Schedule "B" (the "Bar Date Notice"), shall be deemed good, adequate and sufficient notice if it is served by being deposited in the United States mail, first class postage prepaid, on or before February 13, 2003, upon:
>
> (a) all Canadian Creditors listed on the Schedules at the address stated therein;
>
> (b) all current and recent former employees of Noma who are resident in Canada;
>
> (c) all current and recent former customers of Noma who are resident in Canada; and
>
> (d) all persons and entities requesting notice of these proceedings.
>
> 11. This court orders that so long as the initial mailing of the Bar Date Notice occurs on or before February 13, 2003 as provided above, Noma may make supplemental mailings of the Bar Date Notice up to 23 days in advance of the Bar Date, as may be necessary in situations where (a) notices are returned by the Post Office with forwarding addresses, necessitating a re-mailing to the new address; (b) certain parties acting on behalf of parties in interest declining to pass along notices to such parties and instead return their names and addresses to Noma for direct mailing; and (c) additional potential claimants become known as a result of this process.
>
> 12. This court orders that Noma is entitled to establish Special Bar Dates (as defined in the US

Order) with respect to any subsequently identified Canadian Creditors. All Special Bar Dates will be established in accordance with paragraph 14 of the US Order.

13. This court orders that Noma publish a bar date notice in substantially the form attached as Schedule "C" (the "Publication Notice"), in the Globe and Mail (National Edition), the Toronto Star and the Montreal Gazette (including a French translation) on or before February 15, 2003.

14. This court orders that notification of the Bar Date by the mailing of a notice of Bar Date and publication of the Publication Notice as provided herein is fair and reasonable and will provide good, sufficient and proper notice to all Canadian Creditors of their rights and obligations in connection with any claims they may have against Noma in these proceedings or the US Proceedings.

19 An affidavit filed in support of the Claims Bar Order purported to exhibit a list of the Canadian creditors of Noma Company which would be the basis of the mailing of the proofs of claim and notices to Canadian creditors. There were on the list the names of about 700 creditors resident in Canada. Ms. Koutlemanis' name is on the list with an address "c/o Aylesworth Thompson Phelan, South Tower, Royal Bank Plaza, P.O. Box 15, Suite 3000, Toronto".

20 Gowlings was provided with a copy of the Claims Bar Order. There is no evidence that Gowlings advised Aylesworth of it.

21 A document headed "Affidavit of Service" signed but not sworn by Kathleen M. Logan on February 28, 2003 stated that "I hereby certify under penalty that" on or about February 13, 2003 she caused copies of the proof of claim form and notice of bar date requiring filing of proofs of claim on or before the Bar Date to be inserted in first class, postage pre-paid and the pre-addressed envelopes and delivered to the U.S. Postal Service for delivery to those persons on the Service List attached to the "Affidavit of Service" as an exhibit. The Exhibit in the Applicant's Record herein is only page "94 of 181". The exhibit is headed:

Service List

Notice of Bar Date Requiring Filing Of Proofs Of Claim On Or

Before April 14, 2003, At 4:00 P.M. Eastern Time

Noma Company — Canadian Entities

DEBTOR: GEN — TEK US AND CANADA

22 The one page exhibit shows the names of 27 creditors with Canadian addresses whose names begin with "K" which includes:

Creditor ID: 189-03

Koutlemanis, Despina

c/o Aylesworth Thompson Phelan et al.

South Tower Royal Bank Plaza

PO Box 15 Ste 3000

Toronto ON M5J 2J1

Canada

23 The affidavit of the lawyer of Blake Cassels & Graydon ("Blakes"), counsel for Noma Company herein, who swore the affidavit in support of this motion was patently incorrect in saying the "Affidavit of Service" was sworn but the error is not material.

24 Counsel for Ms. Koutlemanis argues that a certificate is not sufficient to prove service. Rule 39 permits evidence to be given by affidavit unless a statute or rule provides otherwise. This argument is initially not unattractive. However, I am satisfied from the material before me that the certificate was probably accepted by the U.S. Court. Further, on its face it was made "under penalty" which I take to mean that the certifier recognizes that she is subject to sanction if the information is false. That sanction is unlikely to carry the moral sanction of an oath but appears to have the potential of prosecution not unlike that for perjury. I equate the certificate to a solemn affirmation in our jurisdiction.

25 There is no evidence before me to suggest that the certification in the "Affidavit of Service" is not true.

26 On or about February 15, 2003, in accordance with the Claims Bar Order, Notice of the Bar Date was published in the Globe and Mail (National Edition), the Toronto Star and the Montreal Gazette.

27 The unchallenged evidence on these motions is that neither Aylesworth nor Ms. Koutlemanis received the Notice or Notice and Proof of Claim. Neither Aylesworth nor Ms. Koutlemanis saw the published notice. The Notice and Proof of Claim addressed to Aylesworth were not returned to Kathleen Logan's company.

28 Aylesworth moved its offices from Royal Bank Plaza to Toronto Dominion Centre in early June 2003.

29 Ms. Koutlemanis did not file a Proof of Claim by the Bar Date.

30 On June 17, 2003, Blakes sent a letter (the "June 17 Letter") to Aylesworth advising Aylesworth of Noma Company being the successor to Noma Inc. and of the Stay Period in the Initial Order, providing copies of the Initial Order, the Claims Bar Order, and an "Affidavit of Service" evidencing that Ms. Koutlemanis was served with a proof of claim and the notice as per the Claims Bar Order, and advising that Ms. Koutlemanis did not file a proof of claim by the Bar Date and a copy of an order extending the

Stay Period to September 30, 2003. On June 18 Noma Company changed its solicitors in the Action to Blakes. On the same day Blakes attended at the pre-trial in the Action and advised Aylesworth again of the Stay Period and the bar of claims.

31 Aylesworth asked Blakes at the pre-trial of the Action how the Action was affected by the Chapter 11 proceedings. Blakes suggested a possible change of name on the amalgamation of Noma Inc.

32 Aylesworth took the position that Noma Inc.'s counsel was obliged to advise counsel of any change of its client's name.

33 On August 11, 2003, Noma obtained an order in the US Proceedings approving a Canadian claims dispute process and ceding jurisdiction for the resolution of claims of Canadian creditors governed by Canadian law to this court. On August 19, 2003, this court granted the Claims Dispute Process Order, whereby Canadian claims, as defined therein, would be disputed in this jurisdiction, if necessary, and under the supervision of this court.

34 On June 30, 2003, the Joint Plan of Reorganization under Chapter 11, Title 11, United States Code of GenTek Inc., et al., and Noma Company, Debtors was filed. On August 21, 2003 the Plan of Reorganization and Disclosure Statement was filed with the US Court. The final Disclosure Statement and Plan of Reorganization was filed in the US Court on August 28, 2003 (the "Plan of Reorganization"). The US Court approved the Disclosure Statement on August 25, 2003.

35 In August 2003 Ms. Koutlemanis changed her solicitors from Aylesworth to Kapelos and Carlisi ("Kapelos"). Kapelos received the file from Aylesworth in September, 2003.

36 The Plan of Reorganization was approved by the requisite majority of creditors. By order of the US Court dated October 7, 2003 (the "US Confirmation Order"), the US Court found, among other things, that the Plan of Reorganization complied in all respects with the requirements of the US Bankruptcy Code and related rules.

37 On October 9, 2003, Noma Company sought and obtained a confirmation recognition order recognizing the US Confirmation Order in its entirety and directing that the US Confirmation Order be implemented and effective in Canada in accordance with its terms (the "Canadian Recognition Order").

38 Upon confirmation of the Plan of Reorganization, Noma Company was provided with a broad discharge and release of any and all claims and actions.

39 The Plan of Reorganization required claimants to elect by March 1, 2004 whether they wished to receive payment of their claims in money or in shares. In the absence of an election, the claimant was deemed to elect payment in shares. Successful unsecured claimants received six cents on the dollar or shares of the same value.

40 On December 1, 2003, Kapelos, the new and current counsel to Ms. Koutlemanis, sent a letter to Blakes requesting an adjournment of the trial of the Action. On December 4, 2003, Blakes sent a reply

letter to Kapelos (the "December 4 Letter"), providing copies of the Claims Bar Order, the Affidavit of Service and advising Kapelos that Aylesworth was served with the Notice and a Proof of Claim form but failed to file a proof of claim in advance of the Bar Date as mandated by the Claims Bar Order. Blakes stated that any claims by Ms. Koutlemanis against Noma Company, including the Action, are forever barred, estopped and enjoined from being asserted against Noma Company. Further, in the December 4 Letter, Blakes refused to consent to an adjournment of the trial of the Action and requested that Ms. Koutlemanis consent to an order dismissing the Action as against Noma Company. Ms. Koutlemanis has refused to provide such a consent.

41 On February 4, 2004, Blakes received a copy of a letter (the "February 4 Letter") from Kapelos to the Court Office advising that they had attended Trial Scheduling Court on February 2, 2004 and by Order of the Honourable Mr. Justice Cameron, the Action was being transferred to case management and would be tried together with two other actions in which Ms. Koutlemanis is the plaintiff. Blakes was not present at Trial Scheduling Court. The status of the Action was not an issue before me then.

42 Blakes attempted to contact Kapelos to confirm that the Action was not proceeding by leaving messages at Kapelos' office on February 5, 15, 23 and April 13, 2004, and did not receive a return call.

43 On March 1, 2004 the accepted claims of unsecured creditors received shares and warrants of New Gen-Tek for their claims unless they elected to receive cash. Those electing the cash option received six cents on the dollar. The remaining available equity is reserved to satisfy disputed claims which are ultimately allowed.

44 On June 2, 2004, Blakes sent a letter to Kapelos enclosing a copy of a draft motion record in these proceedings to dismiss the Action, advising Kapelos that Noma Company would be bringing a motion in these proceedings to have the Action dismissed.

45 Kapelos asserted that the Action was not barred and extinguished because the Action was commenced against Noma Inc. and not Noma Company. On July 7, 2004 Blakes sent a letter to Kapelos enclosing a corporate search confirming that Noma Inc. and 3034843 Nova Scotia Company amalgamated on November 1, 1999 and continued as Noma Company and confirmed its position that the Action is forever barred and extinguished by the failure to file a proof of claim by the Bar Date.

46 Kapelos obtained the affidavit of Andrea Taylor, a solicitor of Aylesworth, sworn July 28, 2004 (the "Taylor Affidavit"), in support of Ms. Koutlemanis' position.

47 The Taylor affidavit in support of Ms. Koutlemanis' position was delivered to Blakes on September 27, 2004.

48 Noma Company served its first version of the notice of motion herein on or about October 9, 2004.

49 Ms. Taylor swore that Aylesworth was never advised by counsel for Noma Inc., the defendant in the Action, that the corporation became Noma Company in 1999, two years after commencement of the

Action.

50 Ms. Koutlemanis served her cross-motion herein on November 18, 2004 and cross-examined the Noma Company witness on November 19, 2004.

Issues

1. Is the claim in the Action barred and extinguished by Ms. Koutlemanis' failure to file a proof of claim prior to the Bar Date in the Claims Procedure and Bar Order?

2. If so, should this court give leave to file a late claim so as to exempt the Action from the Claims Procedure and Bar Order?

51 I cast the second question in this way because all Ms. Koutlemanis lost by not receiving notice of the Claims Bar Order and requirement to file a proof of claim was her entitlement as an unsecured creditor in Noma Company's proposal. She has no grounds for the orders to have her claim excluded from the CCAA proceedings so that any judgment in the Action would be enforceable. She has not alleged fraud.

1. — Bar of the Action

52 The purpose of the CCAA is to facilitate compromises and arrangements between companies and their creditors. In furtherance of that objective it is essential that the debtor company be afforded a respite from the litigious and other rights being exercised by creditors while the company attempts to carry on business as a going concern and to negotiate a corporate restructuring arrangement which is approved by the creditors: *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.) at 309.

53 Section 6 of the CCAA provides that where the requisite majority of creditors agrees to a compromise or arrangement and it is sanctioned by the court it is binding on the company and on *all* creditors (emphasis added). Consequently no action can be brought by a creditor to enforce its claim as if the compromise had not been sanctioned by the court: *Tuckahoe Financial Corp. v. George W. Tindall Ltd.*, [1995] O.J. No. 4121 (Ont. Gen. Div. [Commercial List]) at para. 8, where a default judgment against the company obtained after court approval of the plan under the CCAA was declared a nullity.

54 *Lindsay v. Transtec Canada Ltd.* (1994), 28 C.B.R. (3d) 110 (B.C. S.C.) was a case where a substantial unsecured creditor was, through inadvertence, not on the list of creditors and not given notice of the stay of proceedings or the CCAA approval of the plan.

55 At p. 124 the court stated that once the creditors, the company and the court have agreed to the plan of reorganization, the company must be able to carry on business free of the burden of the creditors' claims except as the creditors have agreed to in approving the plan. In obtaining the creditors' agreement, the creditors will have agreed to compromise their claims. It would be unfair to them if a

dissident or absent creditor cold remain outside the plan and assert its full claim. The purpose of the CCAA is to avoid such a result. Those who participate in CCAA proceedings must be assured that there are no other creditors waiting outside the process for a mistake to be made of which they can take advantage or that an oversight or inadvertence in complying with court orders, will result in some claims remaining outside the system. The certainty of court orders must be assured. See *Lindsay v. Transtec Canada Ltd.* at pp. 125 and 129.

56 Counsel for Ms. Koutlemanis refers to *Ivorylane Corp. v. Country Style Realty Ltd.*, 2004 CarswellOnt 2567 (Ont. Gen. Div. [Commercial List]), June 22, 2004, 2004 WL1353660 at paragraphs 45, 49-52 as authority for the proposition that a claims bar of which notice has been published in a newspaper which has not been seen by the creditor cannot bind the creditor. However, in *Ivorylane* the debtor company did not comply with a term of the bar order requiring service on the creditor by fax transmission, personal delivery or pre-paid mail. More importantly the creditor was not a creditor affected by the plan of reorganization or obliged to file a proof of claim: See para. 34.

57 I am satisfied from:

a) the terms of the Claims Bar Order;

b) the certificate of mailing in the "Affidavit of Service" in accordance with the order;

c) advertising in accordance with the order;

d) Ms. Koutlemanis' failure to file a proof of claim by the Bar Date;

e) the Canadian Recognition Order; and

f) the provisions of s. 18.6 of the CCAA respecting recognition and co-ordination of proceedings under the CCAA with foreign proceedings dealing with the collective interests of the creditors generally,

that the claim in the Action was forever discharged and released.

2. — Permitting a Late Claim

58 Notwithstanding the effect of the terms of the CCAA and the court's orders herein, Ms. Koutlemanis seeks leave to file a late claim. I assume the motion is based on the equitable jurisdiction of this court. There are precedents for such claims: *Algoma Steel Corp. v. Royal Bank* (1992), 11 C.B.R. (3d) 11, 8 O.R. (3d) 449, 55 O.A.C. 303 (Ont. C.A.); *Blue Range Resource Corp., Re* (2000), 193 D.L.R. (4th) 314 (Alta. C.A.) [hereinafter Enron].

59 *Enron* dealt with the issue of allowing the filing of late claims after a court ordered claims bar date. The court determined at para. 26 on p. 324, that the issue should be determined on the application of the following criteria:

1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?

2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?

3. If relevant prejudice can be found can it be alleviated by attaching appropriate conditions to an order permitting late filing?

4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

60 In the context of the criteria, *Enron* stated that "inadvertent" includes carelessness, negligence and accident and is unintentional.

61 The delay immediately following the mailing and advertising on February 13, 2003 was probably caused by the inadvertence of either the mailing agent, the U.S. Postal Service, Canada Post or Aylesworth. There is no evidence that the non-receipt was not inadvertent.

62 However, on June 17, 2003 Blakes, Noma Company's new solicitor in the Action gave specific notice to Ms. Koutlemanis, through her solicitor, in the context of the Action, that the claims bar applied to the Action. Aylesworth was clearly on notice that the Claims Bar Order and the Stay Order applied to the defendant in the Action and to the claim in the Action and that Ms. Koutlemanis had not filed a proof of claim by the Bar Date.

63 Any inadvertence by Ms. Koutlemanis ceased to run on or about June 17, 2003.

64 The claim by Ms. Taylor on behalf of Ms. Koutlemanis that Noma Company could not be said to be Noma Inc. is not a *bona fide* reason for not reacting to the Blakes letter. The first sentence of the letter stated:

> We are counsel for Noma Company, successor in interest to Noma Inc. ("Noma").

65 The letter was delivered in the context of the Action.

66 If Aylesworth had any doubt of what it was being told, Aylesworth was put on notice with a duty to inquire. They could have done a corporate search to confirm Blakes' advice. There is no suggestion they did so.

67 Kapelos received the file from Aylesworth in September, 2003. I assume the Blakes letter was in the file. There is no evidence it was not.

68 Kapelos clearly had a separate notification from Blakes on December 4,2003 confirming the information in the July 17, 2003 letter to Aylesworth and concluding that Ms. Koutlemanis' claim was barred. Kapelos did nothing. It continued as if the Action was still subsisting and refused to consent to a dismissal of the action requested by Blakes.

69 On June 2, 2004 Blakes sent to Kapelos a draft motion record to dismiss the Action by way of offering an opportunity to respond before formally instituting the motion.

70 Kapelos did not respond to the June 2, 2004 letter. They did not commence the cross-motion herein until after the Noma Company motion was served.

71 In my opinion Ms. Koutlemanis' solicitors did not act in good faith after June 17, 2003. They waited over 17 months before bringing this motion.

72 If Ms. Koutlemanis' claim is allowed, it would undermine the purpose and assumptions on which the CCAA process is based. By not reacting to the Blakes June 17, 2003 letter on a timely basis her counsel permitted the process of approval and confirmation of the plan of reorganization to continue.

73 There is no evidence before me of the total of the proven claims against Noma Company. I am unable to assess the value of Ms. Koutlemanis' claims in the Action. There is no evidence before me of Noma Company's current net worth. Noma Company can issue additional equity only for disputed claims ultimately allowed, not for late claims. However, with a recovery potential of 6 cents on the dollar, the Action cannot be worth more than $39,000.

74 Even if Ms. Koutlemanis had received the notice and filed the proof of claim by the Bar Date her recovery would not have exceeded $39,000, being 6% of her claim in the Action.

75 I am offered no grounds on which the relevant prejudice could be alleviated save and except that she is an individual with a damage claim suing a corporation which her counsel implies is wealthy and so there may be money there.

76 I am sensitive to her loss but that argument does not address the issue before me. I must also be alert to the prejudice to Noma Company, its creditors and the reliability of this court's orders as to their finality.

77 It is argued that Gowlings knew of the change of name, the Initial Order and the Claims Bar Order and had a duty, as solicitor in the Action for Noma Company, to tell Aylesworth on a timely basis but that Gowlings failed to do so.

78 Counsel for Ms. Koutlemanis could offer no authority for the existence of such a duty or when such a duty arose.

79 If there was such a duty respecting notice of the Claims Bar Order, was Gowlings not entitled to rely on the notice provisions of that order, provided they were complied with?

80 When asked, Gowlings failed to respond to Aylesworth's request for information as to the application of the Notice of Commencement of Chapter 11 Proceedings to the Action and the defendant therein. In my opinion they should have done so. It was a reasonable request by Aylesworth and deserved a response. Communication, cooperation and common sense should govern relations between counsel in all civil proceedings, not just on the Commercial List.

81 Even if Noma Company's counsel had made Aylesworth aware of the change of the defendant's name to Noma Company, it is unlikely Aylesworth would have received notice of the application for the Initial Order or of the Bar Date and the need to file a proof of claim. The problem only arises, respecting the motion for the leave to file a claim late, on the receipt by Aylesworth of Blakes' June 17, 2003 letter. At that point Aylesworth had clear knowledge of the change of name and the Claims Bar Order. Had this cross-motion been brought on a timely basis after June 17, 2003, leave would probably have been given. Instead, Ms. Koutlemanis' counsel, knowing of the problem, ignored it and delayed for 17 months. Noma Company acted in the interim in reliance on there being no other provable claims by preparing a proposal, putting it to its creditors and obtaining the approval of the U.S. Court and this court.

82 Counsel referred to *Robinson v. Royal Bank* (1995), 1 R.P.R. (3d) 25, 26 O.R. (3d) 627 (Ont. Gen. Div.) as authority for an obligation on a solicitor for a party to disclose to the other side important information. In *Robinson* the plaintiff sought to defend enforcement of the mortgage against her which she knew had been forged by her husband but failed to tell the mortgagee. Her husband later became bankrupt. The court determined that the plaintiff's knowledge of the forgery, without telling the mortgagee, estopped her from relying on the forgery to deny the validity of the mortgage and its enforceability against her. The mortgagee had been denied its opportunity to claim against the husband. This has no application to the issue of Noma Company's failure to tell Ms. Koutlemanis of its change of name or the effect of the Claims Bar Order.

Conclusion

83 I declare that the claim in the Action is barred and extinguished and is no longer a valid and subsisting action.

84 I decline to exercise my discretion to lift the Claims Bar Order as it applies to the Action to permit Ms. Koutlemanis to file a proof of claim.

85 The Action is dismissed.

Costs

86 Unless the parties agree as to costs, the issue may be addressed by written submissions to me. Those of Noma Company shall be made within 15 days after release of these reasons and those of Ms. Koutlemanis within 10 days thereafter.

Motion granted.

TAB 16

1992 CarswellOnt 163
Ontario Court of Appeal

Algoma Steel Corp. v. Royal Bank

1992 CarswellOnt 163, [1992] O.J. No. 889, 11 C.B.R. (3d) 11, 34 A.C.W.S. (3d) 1109, 3 W.D.C.P. (2d) 397, 55 O.A.C. 303, 8 O.R. (3d) 449, 93 D.L.R. (4th) 98

ALGOMA STEEL CORPORATION, LIMITED v. ROYAL BANK OF CANADA, MONTREAL TRUST COMPANY (Trustee of certain debentures issued by Algoma Steel Corporation, Limited under a certain trust indenture) and ROYAL BANK OF CANADA, CANADIAN IMPERIAL BANK OF COMMERCE, HONGKONG BANK OF CANADA, and TORONTO DOMINION BANK (in their capacity as holders of certain of the debentures issued pursuant to said trust indenture)

Krever, McKinlay and Labrosse JJ.A.

Heard: April 21-23, 1992
Judgment: April 30, 1992
Docket: Doc. CA C11707

Counsel: *D.J.T. Mungovan* and *Debbie A. Campbell*, for Kelsey-Hayes Canada Limited and Kelsey-Hayes Company.
M.E. Royce and *M.E. Barrack*, for Algoma Steel Corporation, Limited.
W.L.N. Somerville, Q.C., and *B.H. Bresner*, for Royal Insurance Company of Canada.
R.N. Robertson, Q.C., and *W.A. Apps*, for Dofasco Inc.

Subject: Corporate and Commercial; Insolvency

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act

Corporations — Arrangements and compromises — Companies' Creditors Arrangement Act — Claims — Determination of claims of creditors — Power of court to amend plan — Creditor claiming contribution or indemnity from debtor in order to pursue proceeds of product liability insurance policy — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

One of the creditors of the debtor company subject to a plan of arrangement under the *Companies' Creditors Arrangement Act* ("CCAA"), was involved in product liability litigation in the U.S. The creditor, the defendant in the U.S. litigation, alleged that the steel used in the defective part was a defective product manufactured by the debtor company. The creditor sought to claim contribution or indemnity from the debtor company in order to be able to pursue, under s. 132 of the *Insurance Act* (Ont.), the proceeds of the debtor company's product liability insurance policy.

After the creditor notified the debtor company of its claim, the debtor company responded by valuing the claim at one dollar. The creditor applied to the court, under s. 12(2)(iii) of the CCAA, for a determination of the amount of its claim. The value of the claim was confirmed.

In the CCAA proceedings, an order was made prohibiting the commencement or proceeding with any action or proceeding against the debtor company without leave of the court. The creditor brought a motion for leave to appeal and, if granted, an appeal from the order dismissing its motion for the valuation of its claim and for leave to bring proceedings against the debtor company.

Held:

Leave to appeal was granted and the appeal was allowed; leave to proceed granted.

Generally, a plan of arrangement is consensual and the result of agreement. If it is fair and reasonable, according to the court, it is not to be interfered with by the court unless (a) the CCAA authorizes the court to affect the plan and (b) there are compelling reasons justifying the court's action. The court should not interfere where to do so would prejudice the interests of the company or the creditors. Where no prejudice would result and the needs of justice are to be met, the court may act if the CCAA authorizes intervention. Section 11(*c*), depending on the language of the plan itself, enables the court, in an appropriate case, to amend the plan.

In this case, the necessary amendment to the plan would be minor. Further, to secure the integrity of the plan, only insurance proceeds that might become available to the debtor company were to be the subject of any recovery against the company to which the creditor might prove entitlement. To accomplish this, the order provided that neither the assets of the debtor company (other than the insurance proceeds), nor the assets of any other company that might become responsible for the liabilities of the debtor under the plan would be available to satisfy any judgment obtained by the creditor against the debtor company.

Motion for leave to appeal and an appeal under the *Companies' Creditors Arrangement Act*.

Per curiam:

1 This is a motion for leave to appeal and, if leave is granted, an appeal, under the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "C.C.A.A."), from the order of Farley J. dismissing a motion for the valuation of the claim of Kelsey-Hayes Canada Limited ("Kelsey-Hayes") and for leave to bring proceedings against The Algoma Steel Corporation Limited ("Algoma"), the subject of a plan of arrangement under the C.C.A.A.

2 Kelsey-Hayes is involved in product-liability litigation in Missouri as a result of serious personal injuries suffered by a child when a wheel broke away from a Dodge truck and struck him. The wheel was manufactured by Kelsey-Hayes, against whom a Missouri jury awarded a verdict in excess of $4 million U.S. That verdict was set aside by the trial judge on the basis that Chrysler Corporation, the truck's manufacturer, had been improperly dismissed from the action at an earlier stage. The setting aside of the verdict was appealed to the Missouri Court of Appeals, but judgment on the appeal has been reserved. Kelsey-Hayes, the defendant in the Missouri litigation, alleges that the steel used for the

manufacture of the errant wheel was a defective product of Algoma and seeks to claim contribution or indemnity from Algoma in order to be able to pursue, under s. 132 of the *Insurance Act*, R.S.O. 1990, c. I.8, the proceeds of a product-liability insurance policy by which Algoma is insured by the Royal Insurance Company of Canada ("Royal"). It also seeks relief under the plan of arrangement in respect of the amount of any liability Algoma may have to it in excess of the policy limits.

3 In the C.C.A.A. proceedings, an order was made by Montgomery J. in the terms of s. 11(*c*) of the C.C.A.A. that no action or other proceeding may be proceeded with or commenced against Algoma except with the leave of the court. It is common ground that Kelsey-Hayes, by reason of its claim against Algoma, is a known designated unsecured creditor of Algoma, as defined in the plan of arrangement. The plan of arrangement, which has been voted on by all classes of affected creditors, and sanctioned, subject to the outcome of this appeal, by an order of Farley J. dated April 26, 1992, provides that upon payment by Algoma to a trustee of a certain sum in payment of the claims of the specified unsecured creditors, "all Claims of Specified Unsecured Creditors will be released, discharged and cancelled."

4 After Kelsey-Hayes notified Algoma of the litigation in Missouri, of its allegation of defective steel against Algoma, and of its claim in the amount of the Missouri verdict, Algoma responded by valuing the claim at the sum of $1. Kelsey-Hayes thereupon applied to the court, under the provisions of s. 12(2)(*a*)(iii) of the C.C.A.A., for the determination of the amount of its claim. Before the application was heard, Kelsey-Hayes enlarged the relief sought to include that described above and Royal was brought into the proceedings. Mr. Justice Farley held that he had no authority to permit Kelsey-Hayes to proceed against Algoma and went on to confirm the valuation of the claim at $1. The essential issue in this appeal is whether, under the C.C.A.A., the fact that the plan of arrangement now exists prevents the court from permitting Algoma from being proceeded against by Kelsey-Hayes even to the limited extent of the insurance proceeds.

5 We are of the view that, however weak the evidence available on the application may have been with respect to the origin of the steel used in the manufacture of the wheel, and thus the case against Algoma, it cannot be said that the case is without any foundation or is frivolous. The fact that s. 12(2)(iii) provides that the amount of a creditor's claim, if not admitted by the company, "shall be determined by the court on summary application by the company or by the creditor," does not compel the court to determine the valuation summarily. The provision simply authorizes the proceedings to be brought summarily, that is, by way of originating notice of motion or application rather than by the lengthier, and more complicated, procedure of an action. In an appropriate case, therefore, there is no reason why the determination cannot be made after a trial either of an issue or an action, in the course of which production and discovery would be available. In the absence of such a trial, it cannot be said, in our view, that the valuation of the claim of Kelsey-Hayes against Algoma in the sum of $1 is correct.

6 The more difficult question is whether the court has jurisdiction to authorize proceedings now that the plan of arrangement is in place. It is submitted that it does not, because of the need for commercial certainty and because to do so would be to amend the plan of arrangement (which extinguishes the claims of all designated unsecured creditors, of which Kelsey-Hayes is certainly one). The plan of

arrangement is a matter of contract, it is argued, and the court's jurisdiction is limited to sanctioning or refusing to sanction the arrangement arrived at contractually. There is much merit in this argument, but, in our view, it is not a complete answer.

7 Kelsey-Hayes does not deny that if the language of the plan of arrangement quoted above, extinguishing the claims of designated unsecured creditors, is unambiguous, as we believe it is, to grant the relief which it seeks would require an amendment by the court of the plan of arrangement. We accept the submission that, generally speaking, the plan of arrangement is consensual and the result of agreement and that if it is fair and reasonable (an issue for the court to decide) it is not to be interfered with by the court unless (a) the Act authorizes the court to affect the plan and (b) there are compelling reasons justifying the court's action. Generally speaking again, the court ought not to interfere where to do so would prejudice the interests of the company or the creditors. But where no prejudice would result and the needs of justice are to be met, the court may act if the C.C.A.A., properly interpreted, authorizes intervention. In this connection, it may be relevant that, although it is hardly conclusive, Algoma's management information circular to creditors, shareholders and employees, which accompanied the proposed plan of arrangement, advised those persons, under the heading "Court Approval of the Plan" as follows:

> The authority of the Court is very broad under both the CCAA and the OBCA — Algoma has been advised by counsel that the Court will consider, among other things, the fairness and reasonableness of the Plan. The Court may approve the Plan as proposed *or as amended in any manner that the Court may direct* and subject to compliance with such terms and conditions, if any, as the Court thinks fit.

[Emphasis added.] We agree that the circular's statement that the court may direct an amendment of the plan does not, as a matter of law, make it so. The C.C.A.A. must be the authority for the jurisdiction and the critical issue is whether there is any provision in the Act that fairly gives rise to a power in the court to amend. In our view, there is such a provision and that provision, s. 11(*c*), depending on the language of the plan itself, may by necessary inference, in an appropriate case, enable the court to make an order, the technical effect of which is that the plan is amended. The relevant portion of the section reads as follows:

> whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,
>
> . . . . .
>
> (*c*) make an order that no suit, action or other proceeding shall be proceeded with or commenced against the company *except with the leave of the court* and subject to such terms as the court imposes.

[Emphasis added.]

8 As we have already pointed out, an order in the terms of this provision was made early in the proceedings by Montgomery J. The effect of the enactment and the order is to empower the court to grant leave to take proceedings against Algoma in appropriate circumstances. It was submitted that this power, having regard to the commercial realities reflected by the C.C.A.A., is one that may be exercised only before the creditors have voted to accept the plan of arrangement. No authority could be cited to support such a circumscription of the court's jurisdiction, unqualifiedly conferred by the statute. Nor, as a matter of principle, is there any reason to suggest that the scheme created by the C.C.A.A. contemplates a role for the court as a mere rubber stamp or one that is simply administrative rather than judicial. On the other hand, we have no doubt that, given the primacy accorded by the Act to agreement among the affected actors, the jurisdiction of the court is to be exercised sparingly and in exceptional circumstances only, if the result of the exercise is to amend the plan, even in merely a technical way. In this case, for example, it would be an unacceptable exercise of jurisdiction if the effect of granting leave to Kelsey-Hayes to proceed against Algoma would be to render vulnerable to possible execution any assets other than insurance proceeds, if any, that may be available under the policy by which Royal insured Algoma against product liability. If the leave granted could be so limited, and that is the difficulty that must be addressed, the plan of arrangement which, in its terms, extinguishes the claims of designated unsecured creditors, would undergo amendment in an insignificant and technical way only, as far as the other creditors are concerned.

9 The concern of prejudice must now be considered and the question asked whether any interests would be affected detrimentally if Kelsey-Hayes were permitted to claim against Algoma to the extent only of recourse to the insurance proceeds. If to give leave had the effect of giving potential access to assets over and above the policy limits, there would indeed be prejudice to several interests and, moreover, the plan of arrangement would be significantly amended. On the premise that only the insurance proceeds were to be made potentially available to satisfy any judgment that Kelsey-Hayes may be awarded in its claim over against Algoma, it cannot be said that any interest is affected adversely except possibly that of Royal and that of Dofasco Inc. ("Dofasco"). It is to that issue that we now turn.

10 The potential liability of Royal to Kelsey-Hayes as insurer of Algoma arises out of the provisions of s.132(1) of the *Insurance Act*, which read as follows:

> Where a person incurs a liability for injury or damage to the person or property of another, and is insured against such liability, and fails to satisfy a judgment awarding damages against the person in respect of the person's liability, and an execution against the person in respect thereof is returned unsatisfied, the person entitled to the damages may recover by action against the insurer the amount of the judgment up to the face value of the policy, but subject to the same equities as the insurer would have if the judgment had been satisfied.

Royal is potentially answerable to Kelsey-Hayes, a third party with respect to Algoma's policy of insurance only by virtue of this statutory provision but, in any third party claim against it, its liability is "subject to the same equities as the insurer would have if the judgment had been satisfied." Prejudice, in a legal sense, as far as Royal is concerned is non-existent.

11 The question of prejudice to Dofasco is more difficult. Its interest arises in this way. As part of the comprehensive restructuring scheme, of which the plan of arrangement is the central part, Algoma's assets are to be transferred to a new corporate entity, referred to in argument as New Algoma, in which Algoma's shareholders and creditors (whose claims are being compromised and otherwise discharged) are to receive shares. The funds to make this possible are to be supplied by Dofasco in the sum of $30 million. In return, Dofasco is to obtain Algoma's tax loss in the sum of $150 million. The result of these transactions as contemplated by the comprehensive scheme is that Algoma is to become devoid of assets and creditors, in short, that Algoma is to be made a "clean corporation," or a mere shell with a tax loss carryforward. Dofasco filed no material, and on the appeal filed no factum, showing any prejudice which it might suffer if leave to proceed is granted. Instead, in oral argument, it submitted that any such order would impair the integrity of the plan of arrangement and reduce the certainty that was necessary for the plan's success. In our view, no impairment will occur if an order is made subject to sufficient safeguards to limit any possible recovery to the insurance proceeds. We think a safeguard can be provided. The difficulty is in the language of s. 132 of the *Insurance Act*, which requires, as a condition precedent to a direct action against the insurer, that an execution against the insured be returned unsatisfied.

12 This very requirement makes the purpose of the section clear. It is to provide direct access to an insurer, by a person incurring the liability referred to in the section, in a situation where the insured is judgment proof, thus circumventing the normal operation of insurance contracts, which is solely to indemnify the insured against loss. To interpret the section in such a way as to apply only in the narrow situation where the insured is judgment proof (and therefore almost certainly insolvent), but not in situations where either the insured or its creditors have taken proceedings pursuant to federal insolvency statutes, would be to frustrate its objectives in a large percentage of situations where it would otherwise apply.

13 If the plaintiff in this case were successful in the Missouri action against Kelsey-Hayes and Kelsey-Hayes were successful in a permitted claim over for indemnity or contribution from Algoma, there could be no question that, notionally, the condition precedent of an unsatisfied judgment would be met because, prior to the plan, Algoma was insolvent and the commencement of proceedings under the C.C.A.A. rendered it judgment proof. To secure the certainty of the integrity of the plan, which Dofasco argues it needs in order to discharge its role in the scheme, we make clear our intention that only any insurance proceeds that may become available to Algoma are to be the subject of any recovery against Algoma that Kelsey-Hayes may prove that it is entitled to. That is to be accomplished by providing in our order that neither the assets of Algoma (other than the insurance proceeds) nor the assets of any other corporation which may become responsible in any way for any liabilities of Algoma by virtue of the operation of the plan of arrangement or the more comprehensive scheme of restructuring, or any condition precedent thereto, shall be available to satisfy any judgment obtained as a result of any proceedings by Kelsey-Hayes against Algoma.

14 The justice of permitting an amendment to the plan as inconsequential as the one we permit in these exceptional circumstances is illustrated by the hypothetical case put in argument. Suppose a visitor had become quadriplegic as a result of an injury on the premises of Algoma under circumstances in which Algoma as occupier might be liable and suppose Algoma's potential liability was insured against by an appropriate insurance policy. To restrict the injured person, a known designated unsecured creditor under the terms of the plan of arrangement, to his or her compromised claim valued, without a trial, in a summary proceeding, would, in our view, be unacceptable. The actual situation before the court is analogous.

15 For these reasons, we grant leave to appeal, allow the appeal, set aside the order of Farley J. dated April 9, 1992, and grant leave to Kelsey-Hayes to proceed as it may be advised in the terms set out above.

Leave to appeal granted; appeal allowed; leave to proceed granted.

TAB 17

2005 ABQB 324
Alberta Court of Queen's Bench

Teragol Investments Ltd. v. Hurricane Hydrocarbons Ltd.

2005 CarswellAlta 587, 2005 ABQB 324, [2005] A.W.L.D. 2402, [2005] A.J. No. 497, 139 A.C.W.S. (3d) 670, 15 C.B.R. (5th) 154, 382 A.R. 383

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

And In the Matter of Hurricane Hydrocarbons Ltd. and Hurricane Overseas Services Inc.

Teragol Investments Ltd. (Plaintiff) and Hurricane Hydrocarbons Ltd. (Defendant)

Hurricane Hydrocarbons Ltd. (Plaintiff by Counterclaim) and Teragol Investments Ltd. (Defendant by Counterclaim) and Olga Elefteriadi (Defendant by Counterclaim)

Teragol Investments Ltd. (Plaintiff) and Hurricane Overseas Services Inc. (Defendant) Hurricane Overseas Services Inc. (Plaintiff by Counterclaim) and Teragol Investments Ltd. (Defendant by Counterclaim) and Olga Elefteriadi (Defendant by Counterclaim)

Romaine J.

Judgment: May 3, 2005
Docket: Calgary 9901-08144

Counsel: Christa Nicholson for Plaintiff / Defendant by Counterclaim
David R. Haigh, Q.C., Richard Steele for Defendants / Plaintiffs by Counterclaim

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

In April 1999, T Ltd. commenced action against H Ltd., alleging breaches of consulting agreement that T Ltd. had allegedly entered into with H Ltd. — On May 14, 1999, H Ltd. and H Overseas Ltd. applied for and received protection order pursuant to Companies' Creditors Arrangement Act — H Ltd. presented creditors with plan of compromise and arrangement — On February 28, 2000, H Ltd. creditors, including T Ltd., voted in favour of plan — Plan was sanctioned by court — On same day, T Ltd. entered into separate written agreement with H Ltd. and H Overseas Ltd. ("submission agreement") which was designed to secure T Ltd.'s favourable vote for plan — Under plan and submission agreement, T Ltd. agreed that, if action it had brought against H Ltd. and separate action it commenced against H Overseas Ltd. in June 2000 were not resolved within five years of plan implementation date, actions would be terminated ("drop dead provision") — Plan implementation date was March 31, 2000 — Date that actions would terminate was March 31, 2005 — T Ltd. applied for order extending drop dead date under plan of compromise and arrangement to actions in order to permit continued prosecution of actions — T Ltd. submitted that plan implicitly incorporated relief term with respect to drop dead provision — In alternative, T Ltd. submitted that court should exercise inherent jurisdiction to provide T

Ltd. with relief from provision — Application dismissed — Plan should not be interpreted to include implied term that T Ltd. could apply for relief from drop dead provision — While judicial amendments to plan of arrangement and compromise should not be conclusively foreclosed in every case, circumstances justifying amendment after sanction hearing ought to be truly exceptional in recognition of potential violence done to goal of commercial certainty — Circumstances did not justify amendment to plan as requested by T Ltd.

APPLICATION by creditor for order extending drop dead date under plan of compromise and arrangement to actions commenced by creditor against debtors.

***Romaine J.*:**

Introduction

1 Teragol Investments Ltd. applied for an order extending any drop dead date that may apply under a Plan of Compromise and Arrangement to certain actions commenced by Teragol against Hurricane Hydrocarbons Ltd. and Hurricane Overseas Services Inc., in order to permit the continued prosecution of these actions. I dismissed this application on March 29, 2005, and these are the reasons for my decision.

Background Facts

2 In April, 1999, Teragol commenced an action against Hurricane alleging breaches of a consulting agreement that Teragol had allegedly entered into with Hurricane. On May 14, 1999, Hurricane and Hurricane Overseas applied for and received a protection order pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, C. c- 36, as amended, and eventually presented creditors with a Plan of Compromise and Arrangement. On February 28, 2000, Hurricane's creditors, including Teragol, voted in favour of the Plan, and it was sanctioned by the Court. On the same day, Teragol and Ms. Olga Elefteriadi entered into a separate written agreement with Hurricane and Hurricane Overseas referred to as the Submission Agreement which was designed to secure Teragol's favourable vote for the Plan.

3 Under the Plan and the Submission Agreement, Teragol agreed that if the action it had brought against Hurricane and a separate action it commenced against Hurricane Overseas in June, 2000 were not resolved within five years of the Plan Implementation Date, the actions would be terminated. The Plan Implementation Date was March 31, 2000. The date the actions would terminate, therefore, was March 31, 2005.

4 The Submission Agreement provides, among other things, that:

a) Sections 5.4 and 5.6 of the Plan would apply;

b) Teragol would be bound by the Submission Agreement and the Plan;

c) each of the parties "agrees to proceed expeditiously" with the various claims;

d) in the event of any dispute between the parties relating to the Submission Agreement, any party could make application to the Court to resolve the dispute and for advice and directions; and

e) if there is any conflict between the Submission Agreement and the Plan, the Plan would govern.

5 Section 5.4 of the Plan provides that "(w)here at any date that is prior to the date that is the fifth anniversary of the Plan Implementation Date" a disputed claim is determined to be valid, either by settlement or through a final court judgment, it shall be paid by Hurricane or Hurricane Overseas. Section 5.6 of the Plan reads as follows:

> In the event that any Claims Creditor holding Disputed Claim Value as at the Plan Implementation Date fails to complete the resolution of its Disputed Claim Value . . . on or prior to the date that is the fifth anniversary of the Plan Implementation Date, all claims of such Claims Creditor with respect to such Disputed Claim Value then in existence pursuant to this Plan, shall be, and shall be deemed to be, forever cancelled, terminated, extinguished, discharged and released by such Claims Creditor, . . . with no compensation or participation being provided or payable thereon.

Teragol is a Claims Creditor holding Disputed Claim Value as defined under the Plan.

6 On February 28, 2000, the holder of another disputed claim, Marsa Aktiengesellschaft, also entered into an agreement with Hurricane similar to the Submission Agreement pursuant to negotiations that were mostly separate and distinct from the negotiations with respect to the Submission Agreement, although Teragol, Ms. Elefteriadi and Marsa are related in certain ways. Marsa and Teragol were represented by different counsel. The Marsa agreement and Section 5.7(b) of the Plan expressly grant Marsa the right to apply to the Court to extend the drop dead date referred to in Sections 5.4 and 5.6 of the Plan "on the grounds that it is fair and reasonable to do so." Counsel for Hurricane at the time of negotiations leading to the Marsa agreement has acknowledged that the extension provision was inserted into the Plan in order to give the Court jurisdiction to deal with an UNCITRAL arbitration proceeding that was to be commenced in Stockholm, Sweden. The Marsa claim was arbitrated pursuant to an arbitration clause in the Marsa consulting agreement. Subsequently, an arbitral award was rendered in Marsa's favour and was paid by Hurricane.

7 The Plan was implemented on March 31, 2000, and the Monitor was discharged. Hurricane and Hurricane Overseas have emerged from the CCAA proceedings.

8 The Teragol actions have not yet been tried. Some of the events that have occurred since the Plan was approved by the Court are set out as follows:

(a) On June 26, 2000, Teragol commenced its action against Hurricane Overseas and filed an Amended Statement of Claim in the Hurricane action;

(b) On October 6, 2000, Hurricane amended its Statement of Defence and brought a Counterclaim against Teragol in the Teragol/Hurricane action and Hurricane Overseas filed a Counterclaim against Teragol in the Teragol/Hurricane Overseas action. At the same time, Hurricane and

Hurricane Overseas added a new party to the actions, Ms. Elefteriadi;

(c) On October 17, 2000, Hurricane and Hurricane Overseas brought applications for orders to serve Ms. Elefteriadi *ex juris*. These applications were adjourned sine die by consent, and cross-examinations on affidavits occurred on December 22, 2000;

(d) On November 10, 2000, Hurricane and Hurricane Overseas applied for security for costs against Teragol. These application were subsequently adjourned sine die;

(e) On December 20, 2000, Teragol through its counsel provided Hurricane's counsel with draft letters requesting case management on December 20, 2000;

(f) Sulatycky, A.C.J. was appointed Case Management Judge on January 22, 2001 and a case management meeting was held;

(g) Satisfaction of undertaking responses from the examinations on affidavits continued into March, 2001;

(h) A further Case Management meeting was held in February 2001;

(i) On May 23, 2001, counsel for Hurricane provided counsel for Teragol with draft case management minutes. There was no response or further contact from counsel for Teragol with respect to these actions until July 11, 2002. The parties were occupied with the Marsa arbitration;

(j) The service *ex juris* applications were heard on September 13, 2002. They were opposed, and denied by Sulatycky, A.C.J. and the counterclaims against Ms. Elefteriadi were stayed;

(k) On October 30, 2002, Hurricane and Hurricane Overseas filed a Notice of Appeal of Sulatycky, A.C.J.'s order;

(l) Teragol brought applications returnable on November 5, 2003 seeking to have the counterclaims against Ms. Elefteriadi declared expired and struck out. These applications were dismissed by the case management justice;

(m) The appeal was heard on January 16, 2004 and allowed by decision dated January 29, 2004. The Court of Appeal remitted the service *ex juris* applications to a new justice;

(n) Counsel for Hurricane sent a form of judgment roll and bill of costs for the appeal to counsel for Teragol on January 21, 2004. Counsel for Teragol responded to the drafts on February 23, 2004. The final documents were sent to counsel for Teragol on February 24, 2004. A request for filed copies of the documents was made by Hurricane's counsel on April 1, 2004;

(o) No further contact was received by Hurricane's counsel from Teragol's counsel until February 10, 2005, when counsel for Teragol served counsel for Hurricane with the signed judgment roll and bill of costs, payment of costs and Teragol's Reply and Defence to Counterclaim in the actions, together with its Affidavits of Records.

(p) On February 17, 2005, Hurricane and Hurricane Overseas served Teragol with an Amended Counterclaim adding new causes of action. Teragol, in the same Notice of Motion pursuant to which it brought this application, applied to disallow the amendments;

(q) Teragol applied by Notice of Motion filed February 24, 2005 to Sulatycky, J. for a case timetable;

(r) At a case management hearing on March 3, 2005, Sulatycky, J. granted an order setting this application down to be heard, and setting out a timetable for further steps in the action;

(s) On March 16, 2005, Teragol renewed its applications to have the Elefteriadi counterclaims declared expired;

(t) Hurricane and Hurricane Overseas have taken no steps to re-apply for orders of service *ex juris*.

Issues

A. Should the Plan be interpreted to include an implied term that Teragol may apply for relief from the drop dead provisions set out in Sections 5.4 and 5.6 of the Plan?

B. If not, does the Court have the jurisdiction to amend the Plan? If so, do the circumstances justify the requested amendment?

Analysis

A. Should the Plan be interpreted to include an implied term that Teragol may apply for relief from the drop dead provisions set out in Sections 5.4 and 5.6 of the Plan?

9 It is Teragol's submission that the Plan should be interpreted to include an implied term in favour of Teragol similar to the express provision that applies to Marsa.

10 In *Horizon Village Corp., Canada, Re* (1991), 8 C.B.R. (3d) 25 (Alta. Q.B.) at para. 10, Wachowich, A.C.J. (as he then was) commented that courts will be reluctant to imply terms in a Plan of Arrangement that would alter contractual relations. In this case, the Submission Agreement does not include such a term, and it cannot credibly be argued that the conditions that should be satisfied for a term to be implied in a contract have been met: *Luxor (Eastbourne) Ltd. v. Cooper* (1940), [1941] 1 All E.R. 33 (U.K. H.L.), as quoted with approval in *Catre Industries Ltd. v. Alberta*, [1989] A.J. No. 903 (Alta. C.A.).

11 It is trite law that the courts do not rewrite contracts that have been entered into between sophisticated parties for consideration. The inclusion of a term allowing an application for an extension of the drop dead provisions similar to that negotiated between Hurricane and Marsa would be rewriting the Submission Agreement to include a term that cannot be implied.

12 Teragol submits that it is not necessary to amend the Submission Agreement, but only the Plan to

achieve the relief it requests. Whether implying a term in a Plan of Arrangement requires meeting the same standards as set out in the law of contract or some lesser standard, which is doubtful, there are no persuasive reasons to imply the type of term requested in the Plan.

13 This is not a case where the purposes of the CCAA will be defeated without such an implied term (*Horizon Village Corp., Canada* , supra). While it may be a principle of the CCAA that prejudice to creditors should be minimized and creditors' rights preserved where possible, a provision that allows a claimant five years to resolve a disputed claim is not contrary to that principle. The drop dead provisions are not an agreement to oust the Court's jurisdiction, but merely an agreement negotiated between the parties to limit Teragol's right to pursue its claim. Again, I do not decide that such a provision can never be subject to relief, but that it should not be relieved from in this case.

14 Teragol also submits that it is obvious that the Court can extend the drop dead provisions, and that therefore the ability to do so is a proper implied term. It is not at all obvious: Sections 5.4 and 5.6 of the Plan are silent with respect to the Court's ability to relieve from their application. The very presence of section 5.7(b) giving Marsa an express right to an application for relief leads to the conclusion that such a term should not be implied for the benefit of disputed claims generally. The presence of such a specific limited term leads to the inference that the parties addressed their minds to whether or not to include a broader provision, and rejected that approach.

15 I find that there is no implied term in either the Plan nor the Submission Agreement that would allow Teragol to apply for the relief it seeks.

B. If not, does the Court have the jurisdiction to amend the Plan? If so, do the circumstances justify the requested amendment?

16 While the Court may in appropriate cases have jurisdiction to amend a Plan, either pursuant to inherent jurisdiction or through its statutory jurisdiction under the CCAA, it is not necessary to decide that issue in this case, as, even if I have such jurisdiction, I would decline to exercise it to grant Teragol the relief it requests.

17 Teragol submits that, since the nature of the drop dead provisions is to cut off its ability to continue legal proceedings and its ability to recover judgment from Hurricane and Hurricane Overseas part way through the litigation process, sections 5.4 and 5.6 of the Plan contravene the Court's jurisdiction to control and regulate its own proceedings and fetter the Court's jurisdiction. While this is indeed the effect of sections 5.4 and 5.6 of the Plan, these provisions arise from an agreement negotiated between Teragol and the Hurricane corporations, the provisions of which were incorporated into the Plan and sanctioned by the Court. It is a misstatement of the concept of inherent jurisdiction to suggest that a court-approved Plan of Arrangement and Compromise can never include this kind of limitation, or to suggest that parties are unable to agree to limit their rights to pursue litigation in this manner in CCAA proceedings.

18 Teragol also suggests that Hurricane should be deprived of the right to rely on the drop dead

provisions because it failed to draw the Court's attention specifically to its interpretation of these sections during the fairness hearing on the Plan. Sections 5.4 and 5.6 of the Plan are not ambiguous, and fairness did not require Hurricane to give the Court an interpretation of relatively straight-forward provisions. The Court must be assumed to have read the Plan and been aware of its effect prior to giving its approval.

19 Teragol argues that the provisions are contrary to public policy, although it cites no clear authority for this submission in this type of circumstance, other than to suggest that removing actions from the court process "seriously impedes the due course of justice". The issue in this case, however, is not whether relief is ever available with respect to this type of provision, but whether it should be available in these circumstances.

20 Contrary to Teragol's submissions, the Plan and the Submission Agreement do in fact compromise Teragol's claim, limiting both the total amount of the claim and the time within which it must be resolved. Compromise and the reorganization of debt obligations are normal outcomes of the CCAA process and often essential to effect the goal of corporate survival for the benefit of both the company and its creditors.

21 In *Ontario v. Canadian Airlines Corp.* (2001), [2002] 3 W.W.R. 373 (Alta. Q.B.), at para. 61, I considered the decision of the Ontario Court of Appeal in *Algoma Steel Corp. v. Royal Bank* (1992), 11 C.B.R. (3d) 11 (Ont. C.A.) on the question of whether the Court has jurisdiction to amend a Plan of Arrangement, and commented that, while amendments to a Plan of Arrangement and Compromise should not be conclusively foreclosed in every case, circumstances justifying an amendment after a sanction hearing ought to be truly exceptional, in recognition of the potential violence done to the laudable goal of commercial certainty. In that case, the creditor in question had been deprived of an opportunity to present submissions at the fairness hearing by reason of procedural irregularities that did not arise from a lack of diligence or good faith.

22 There are no such exceptional circumstances in this case. The Submission Agreement and the wording of Sections 5.4 and 5.6 of the Plan were negotiated between Teragol and Hurricane, both represented by counsel. Teragol voted in favour of the Plan at the creditors' meeting, and had an opportunity to make submissions to the Court at the fairness hearing. While the Hurricane companies took steps that complicated and prolonged the litigation between the parties as it stood at the Plan Implementation Date, this is not a situation where Teragol made every effort to prosecute its claims in a timely manner within the five years allotted to it. There are long periods of inactivity on both sides of this litigation.

23 The circumstances in this case do not justify the amendment to the Plan requested by Teragol.

Application dismissed.

TAB 18

2013 ABQB 47
Alberta Court of Queen's Bench

677960 Alberta Ltd. v. Petrokazakhstan Inc.

2013 CarswellAlta 120, 2013 ABQB 47, [2013] 7 W.W.R. 163, [2013] A.W.L.D. 2474, [2013] A.W.L.D. 2475, [2013] A.W.L.D. 2489, [2013] A.W.L.D. 2615, 100 C.B.R. (5th) 212, 225 A.C.W.S. (3d) 990, 555 A.R. 128, 78 Alta. L.R. (5th) 317

677960 Alberta Ltd. Plaintiff and Petrokazakhstan Inc. Defendant

R.G. Stevens J.

Heard: June 24, 2011
Judgment: January 18, 2013
Docket: Calgary 0401-07521

Counsel: L.M. Sali, Q.C., K.J. Drozdowski for Plaintiff
A.J. Jordan, Q.C., C.M. Sutherland for Defendant

Subject: Civil Practice and Procedure; Restitution; Contracts; Insolvency

Headnote

Civil practice and procedure --- Pleadings — General requirements — Sufficiency

Plaintiff brought action against defendant in contract and quantum meruit or unjust enrichment — Defendant objected unjust enrichment on basis that plaintiff did not specifically plead unjust enrichment in its amended statement of claim — Action dismissed — Issue of unjust enrichment was allowed to proceed — Party must plead all material facts on which they intend to rely at trial; pleadings need not name specific cause of action — Amended statement of claim did not specifically plead unjust enrichment or make claim for quantum meruit — Pleadings tangentially referring to some of supporting facts for claim to unjust enrichment — Plaintiff failed to plead unjust enrichment in its statement of claim — While first and second elements of unjust enrichment may be gleamed from pleadings, plaintiff did not disclose sufficient facts to support final element of unjust enrichment analysis, lack of juristic reason for deprivation — Defendant was aware issue of unjust enrichment was on table and had ample opportunity to consider issue and reply to plaintiff's position — Defendant waited until close of submissions to raise issue that plaintiff had not pleaded unjust enrichment — It was not fundamentally unfair not to invite plaintiff to amend pleadings — Claim would not succeed in any event and it would therefore be pointless to invite amendment — Plaintiff's failure to plead was not fatal to issue of unjust enrichment.

Civil practice and procedure --- Pleadings — General requirements — Material facts

Plaintiff brought action against defendant in contract and quantum meruit or unjust enrichment — Defendant objected unjust enrichment on basis that plaintiff did not specifically plead unjust enrichment in its amended statement of claim — Action dismissed — Issue of unjust enrichment was allowed to proceed — Party must plead all material facts on which they intend to rely at trial; pleadings need not name specific cause of action — Amended statement of claim did not specifically plead unjust enrichment or make claim for quantum meruit — Pleadings tangentially referring to some of supporting facts for claim to unjust enrichment — Plaintiff failed to plead unjust enrichment in its statement of claim — While first and second elements of unjust enrichment may be gleamed from pleadings, plaintiff did not disclose sufficient facts to support final element of unjust enrichment analysis, lack of juristic reason for deprivation — Defendant was aware issue of unjust enrichment was on table and had ample opportunity to consider issue and reply to plaintiff's position — Defendant waited until close of submissions to raise issue that plaintiff had not pleaded unjust enrichment — It was not fundamentally unfair not to invite plaintiff to amend pleadings — Claim would not succeed in any event and it would therefore be pointless to invite amendment — Plaintiff's failure to plead was not fatal to issue of unjust enrichment.

Restitution and unjust enrichment --- General principles — Requirements for unjust enrichment — No juristic reason for enrichment

Plaintiff brought action against defendant in contract and quantum meruit or unjust enrichment — Defendant objected unjust enrichment on basis that plaintiff did not specifically plead unjust enrichment in its amended statement of claim — Action dismissed — Issue of unjust enrichment was allowed to proceed — Party must plead all material facts on which they intend to rely at trial; pleadings need not name specific cause of action — Amended statement of claim did not specifically plead unjust enrichment or make claim for quantum meruit — Pleadings tangentially referring to some of supporting facts for claim to unjust enrichment — Plaintiff failed to plead unjust enrichment in its statement of claim — While first and second elements of unjust enrichment may be gleamed from pleadings, plaintiff did not disclose sufficient facts to support final element of unjust enrichment analysis, lack of juristic reason for deprivation — Defendant was aware issue of unjust enrichment was on table and had ample opportunity to consider issue and reply to plaintiff's position — Defendant waited until close of submissions to raise issue that plaintiff had not pleaded unjust enrichment — It was not fundamentally unfair not to invite plaintiff to amend pleadings — Claim would not succeed in any event and it would therefore be pointless to invite amendment — Plaintiff's failure to plead was not fatal to issue of unjust enrichment.

Contracts --- Performance or breach — Breach — Miscellaneous

Plaintiff brought action against defendant in contract and quantum meruit or unjust enrichment — Defendant objected unjust enrichment on basis that plaintiff did not specifically plead unjust enrichment in its amended statement of claim — Action dismissed — There was no obligation by defendant to pay plaintiff — Issue of unjust enrichment was allowed to proceed — Party must plead all material facts on which they intend to rely at trial; pleadings need not name specific cause of action — Amended statement of claim did not specifically plead unjust enrichment or make claim for quantum meruit — Pleadings tangentially referring to some of supporting facts for claim to unjust enrichment — Plaintiff failed to plead unjust enrichment in its statement of claim — While first and second elements of unjust enrichment may be gleamed from pleadings, plaintiff did not disclose sufficient facts to support final element of unjust enrichment analysis, lack of juristic reason for deprivation — Defendant was aware issue of unjust enrichment was on table and had ample opportunity to consider issue and reply to plaintiff's position — Defendant waited until close of submissions to raise issue that plaintiff had not pleaded unjust enrichment — It was not fundamentally unfair not to invite plaintiff to amend pleadings — Claim would not succeed in any event and it would therefore be pointless to invite amendment — Plaintiff's failure to plead was not fatal to issue of unjust enrichment.

ACTION for breach of contract, quantum meruit or unjust enrichment.

***R.G. Stevens J.*:**

1 In March 1994, Canadian Occidental Petroleum Limited ("CanOxy") and Hurricane Hydrocarbon Ltd. ("HHL") acquired an oil and gas investment in the Republic of Kazakstan.

2 The parties have agreed to the essential facts as set out in Appendix A to this decision. The abbreviations used in the Appendix will be used in this decision.

3 In addition to agreed facts, there was *viva voce* evidence: on behalf of the Plaintiff. Mr. Werner Wenzel, President of Wega-D and 677; on behalf of the Defendant Mr. Bryan Emslie. There was also read-in evidence of certain examinations for discovery, on behalf of the Plaintiff: Mr. John Komarnicki, former president and chief executive officer of HHL; Mr. Richard Norris, former chief financial officer of HHL and Ms. Xin Zhonglin, the corporate representative of PKI. Not much if anything turns on this evidence. As such, I will discuss it only where applicable.

4 By way of background, in 1992 TPJE was formed under Kazak law to develop and produce oil and gas in Kazakstan. Four oil fields were involved: initially the opportunity included the Kzyl-Kiya, Aryskum and Maybulak ("KAM") fields and later the South Kumkol field.

5 The initial participants in TPJE were:

1. Wega-D, an Alberta corporation, controlled by Werner Wenzel which had a 25% interest;

2. Technoex, a Turks and Caicos Islands corporation, controlled by Werner Wenzel which had a 25% interest; and

3. Yuzneftegaz and Geologia, both Kazak legal entitles, which jointly owned a 50% interest.

6 In March 1994, CdnOxy and HHL acquired the interest of Wega-D and Technoex in TPJE. The transaction was implemented by Wega-D and Technoex assigning their interests in TPJE to TPCL. Each of CdnOxy and HHL caused subsidiaries to be incorporated in Cyprus. HHL's subsidiary, HECL acquired 20% of the shares of TCPL from Wega-D. The combined HHL/CdnOxy working interest in TPJE was 50% with the balance owned by Yuzneftegaz and Geologia.

7 In furtherance of the transaction, TPCL entered into two agreements in writing dated June 1, 1994 with Wega-D called the Net Profits Interest Agreement ("NPI Agreement") and the Success Fee

Agreement. These two agreements are the subject of this action.

8 By the NPI Agreement TPCL promised to pay Wega-D, 2.5% of the net profits attributable to TPCL's interest in TPJE.

9 Pursuant to the Success Fee Agreement, TPCL promised to pay a fee to Wega-D which was based upon the amount of crude oil production by TPJE and the price for which the crude oil was sold. The maximum fee payable pursuant to the Success Fee Agreement was six million dollars (US).

10 Each of the parent companies of the parties holding equity interests in TPCL, provided a guarantee of the obligations of its subsidiary in favour of Wega-D in the following terms:

> Canadian Occidental Petroleum Ltd. and Hurricane Hydrocarbons Ltd., severally, to the extent of their respective direct or indirect equity interests in Turan Petroleum Cyprus Limited, guarantee the due and punctual performance by Turan Petroleum Cyprus Limited of Turan Petroleum Cyprus Limited's covenants and obligations set forth in this Agreement.

11 Prior to the closing of the transaction Mr. Wenzel was the controlling shareholder and President of both Wega-D and 677. From June 1989 to April 1, 1999 he was a member of the board of directors of HHL.

12 By an Assignment and Novation Agreement dated March 21, 1996 Wega-D assigned its interests in the NPI Agreement to 677. Wega-D also assigned 60% of its interest in the Success Fee Agreement to 677, having previously assigned the remaining 40% interest to AOC.

13 By the end of 1996 the Republic of Kazakhstan withdrew or revoked the licences issued to TPJE to explore for or produce oil. The stated reasons were because of the failure of the licencee to comply with the conditions of the licences. No oil had been produced from any of the four fields licenced to TPJE and no payments had been made by TPCL to Wega-D or 677 pursuant to the NPI Agreement or the Success Fee Agreement.

14 In 1996, the Republic of Kazakhstan privatized Yuzneftegaz, one of the Kazakh participants in TPJE. A HHL subsidiary was the successful bidder and as such HHL acquired all of the voting shares in Yuzneftegaz.

15 Licences to the fields, which were subject of the TPJE licence revocations, were issued to Yuzneftegaz by the Republic of Kazakhstan.

16 In 1997, CdnOxy, HHL and its Cyprus subsidiaries entered into a settlement agreement whereby CdnOxy and its affiliates assigned all of shares in TPCL to HECL. As a result, HHL then owned the entire beneficial interest in the four fields.

17 In response to an inquiry from AOC regarding its entitlement to 40% of the proceeds of the Success Fee Agreement, 677 responded by letter dated September 23, 1997 advising:

Canadian Occidental et al did not bring these fields into production within a time period specified in the exploration licences granted by the government of Kazakhstan. The government of Kazakhstan thus revoked the development licences held by Turan Petroleum as per the attached decrees. We thus foresee no revenue accruing from the Success Fee Agreement.

18 The South Kumkol field has been in production since December 1997; the other fields went into production later: August 2000 (Kzyl-Kiya) and November 2002 (Aryskum and Maybulak).

19 On May 14, 1999 HHL sought protection from its creditors under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 ("*CCAA*"). By an order of this Court dated May 14, 1999 proceedings against HHL were stayed.

20 No notice of the *CCAA* proceedings was sent to either Wega-D or 667. Neither of the Defendants was listed as a creditor of HHL on any *CCAA* filing.

21 By an Order dated June 11, 1999 this Court made an Order in HHL's *CCAA* proceeding establishing a process and setting a deadline of June 30, 1999 for the proof of claims by creditors. The Order required publication of notice in various newspapers of the requirement to prove claims. The notices were published in accordance with the Order.

22 HHL submitted a Plan of Arrangement which was approved by the necessary majority of HHL creditors. By Order of February 28, 2000 this Court approved the Plan. All of the conditions required by the Plan to be effective were met and the Plan's effective date was established as March 31, 2000.

23 As at June 30, 1999 none of the obligations under either the NPI Agreement or the Success Fee Agreement had been triggered. There had been no production from the KAM fields and there had not been sufficient production of oil or gas at sufficiently high prices from the South Kumkol field to require payment to 677.

24 During the course of the *CCAA* proceedings, AOC submitted a proof of claim claiming entitlement to payment pursuant to its assignment from Wega-D of 40% of the Success Fee Agreement. HHL disputed AOC's claim.

25 AOC commenced proceedings in the Court to enforce its claim. AOC's claim was discontinued without costs by consent on October 7, 2005.

26 677 did not submit a proof of claim to HHL in the *CCAA* proceedings, did not appear in those proceedings and did not attend or vote at the meeting of creditors held to approve the Plan. Indeed Mr. Wenzel said he was unaware of the proceedings.

27 HHL's venture proved to be successful. After the *CCAA* proceedings were concluded, HHL was sold for in excess of four billion. The company's entire asset base was in Kazakhstan and as such, the name was changed to Petrokazakstan Inc. ("PKI"). HHL and PKI are the same legal entity.

28 The Plaintiff seeks judgment against PKI. The claim is founded in both contract and *quantum*

meruit or unjust enrichment.

Contract Obligations

Parties' Positions

29 The position of the Plaintiff is that the NPI Agreement and the Success Fee Agreement were never terminated, altered or amended at any time. Additionally the Agreements were not conditional upon the existence of the licences. Indeed, no licences were in existence when the Agreements were executed. The licences were negotiated later. Although the licences issued to TPJE were revoked, the licences to the four fields were re-issued to Yuzneftegaz.

30 The July 1997, Settlement Agreement between HHL and CdnOxy confirmed the two Agreements were existing whereas other Agreements were terminated. Nothing in the Settlement Agreement required 677 or Mr. Wenzel to release HHL from its obligations under the two Agreements and they did not.

31 The Plaintiff submits that the CdnOxy obligation under the two Agreements became the continuing obligations of HHL as the result of HHL acquiring 100% of the equity interest in TPCL. The evidence of John Komarnicki, the CEO of HHL was that at the time of the Settlement Agreement, HHL intended to honour the two Agreements and to guarantee 100% of TPCL's obligations as a result of the deal with CdnOxy. According to Mr. Wenzel he was never told that HHL would do anything other than honour the two Agreements as to 100%.

32 In summary, based on the evidence of Mr. Komarnicki and Mr. Wenzel the Plaintiff says its reasonable expectations were that HHL would fulfil its guarantees to the extent of 100% of TPCL's obligations.

33 The position of the Defendant is that as a result of the termination of the licences, TPJE no longer had any right to produce oil from the four fields. On the plain language of the NPI Agreement and the Success Fee Agreement, no obligation to pay has ever arisen. And so, there has never been a breach of the guarantees.

34 The Defendant objects to the evidence of Mr. Komarnicki and Mr. Wenzel regarding reasonable expectations. The Defendant submits that the obligations under the NPI Agreement and the Success Fee Agreement are clear and unambiguous. As such there is no need to rely on extrinsic evidence to determine the reasonable expectations of the parties arising out of the Agreements. See, *Wilde v. Archean Energy Ltd.*, 2007 ABCA 385, 422 A.R. 41 (Alta. C.A.) at para 43; *Dow Chemical Canada Inc. v Shell Canada Ltd* at para 20; *Bank of British Columbia v. Turbo Resources Ltd.* (1983), 46 A.R. 22 (Alta. C.A.) at para 31; *Amerada Minerals Corp. of Canada v. Mesa Petroleum (N.A.) Co.* (1986), 73 A.R. 172 (Alta. C.A.) at para 11.

Analysis

35 Both the NPI Agreement and Success Fee Agreement relate to a "Project" defined as "the petroleum exploration and development project for the Kzyl-Klya, Malbulak, Aryskum and South Kumkol fields conducted in the Republic of Kazakstan by Turan Petroleum J.E."

36 Wega-D's net profit interest was dependent upon TPJE earning "net profits attributable to its interest in the Project".

37 Wega-D's success fee interest was dependent upon a formula involving all oil sold by TPJE from the Project.

38 Both Agreements are clear and unambiguous. While it is true that neither agreement was terminated (subject to the possible impact of the *CCAA* proceedings), the Project ceased to exist when the licences were terminated. As such no obligation to pay the Plaintiff has arisen.

39 It is not necessary to consider the "reasonable expectation" evidence of Messrs. Komarnicki and Wenzel as the parties' intentions under the Agreements is clear.

40 Accordingly, the Plaintiff's claim based on contract fails.

Unjust Enrichment

Whether 677 can rely upon the equitable principal of unjust enrichment?

Parties' Positions:

41 The Plaintiff submits that if the Court rejects its claim in contract, the Court should make a finding of unjust enrichment. If the Court finds unjust enrichment, the Plaintiff claims that consideration should reasonably extend to that portion which HHL acquired from CdnOxy: 80%.

42 The Defendant denies the Plaintiff's claim for unjust enrichment on the basis that they did not raise the issue in its pleadings, the parties were not the same as those to the original contract, and the three essential elements of unjust enrichment are not present.

(a) Should the Plaintiff's claim for unjust enrichment be barred for failure to raise the issue in its pleadings?

Parties' Positions:

43 In closing arguments, counsel for the Defendant contested the Plaintiff's claim for unjust enrichment on the grounds that the Plaintiff did not specifically plead unjust enrichment in its Statement of Claim or its Amended Statement of Claim.

44 In response, counsel for the Plaintiff argued that the Defendant willingly responded to the issue in its written submissions, failed to object to the issue at trial and engaged in discussion regarding the issue during pretrial dialogue. As such, the Plaintiff should not now be prevented from pursuing the issue. In essence, the Plaintiff argues that the Defendant should be estopped from relying on the fact

that the Plaintiff did not specifically plead unjust enrichment as they acquiesced to the argument during the proceedings.

45 In support of its position, the Plaintiff directed the Court to para 54 of the Defendant's written submissions where the Defendant responds to the substantive merits of the Plaintiff's claim for unjust enrichment. Counsel pointed out that the Defendant not only engaged in the unjust enrichment discussion but the Defendant did not assert that the issue was not properly before the Court. It was not until closing arguments that the Defendant claimed that unjust enrichment should not be in play.

Law with respect to failure to plead:

46 A party must plead all the material facts on which he intends to rely at trial: *Wyman v. Vancouver Real Estate Board (No. 2)* (1957), 22 W.W.R. 133 (B.C. C.A.), at 135; see also *Klemke Mining Corp. v. Shell Canada Ltd.*, 2008 ABCA 257, 433 A.R. 172 (Alta. C.A.).

47 In *Parlee v. McFarlane* (1999), 210 N.B.R. (2d) 284 (N.B. C.A.) at para 33 the Court recognized the importance of pleadings by stating, "I cannot fathom a situation where a trial judge could properly decide the case before him or her on a basis not raised in the pleadings or at trial."

48 In *MDI Industrial Sales Ltd. v. McLean*, 2000 ABQB 521, 267 A.R. 394 (Alta. Q.B.) at para 7 Justice Action wrote:

> A pleading need only plead the facts which in law would create a certain cause of action. It need not name the cause of action, or name any cause of action, or give a legal conclusion, and may name a different cause of action, or the wrong cause of action: Fullowka v. Royal Oak Mines Inc. (1996), 147 D.L.R. (4th) 531 (N.W.T. C.A.) (leave denied [1997] 2 S.C.R. xvi (S.C.C.)); Canada (Attorney General) v. Becker (1998), 64 Alta. L.R. (3d) 292 at 319 (Alta. C.A.).

49 In *Bartlett v. Murphy*, 2011 NBQB 139 (N.B. Q.B.), a recent decision of the New Brunswick Court of Queen's Bench, the Court reviewed an unjust enrichment claim in the context of family law where unjust enrichment itself was not pleaded. The Court noted that a constructive and/or resulting trust was pleaded and determined "that "unjust enrichment" was the equitable cause of action pleaded, for a trust declaration is but one of the flexible remedies available if unjust enrichment is proven.": See *Sandhu v. Sandhu*, 2011 BCSC 294 (B.C. S.C.) at para 194 cited in *Bartlett* at para 57.

50 Conversely, in *Harelkin v. McKay*, 2009 SKQB 27 (Sask. Q.B.) at para 37, the Court rejected a claim for unjust enrichment where the pleadings specifically plead unjust enrichment but did not set out sufficient facts to support a claim for unjust enrichment. In particular, the pleadings failed to disclose how the applicants were enriched at the plaintiff's deprivation and no facts were pleaded to support the absence of any juristic reason.

51 Similarly, in *Morris v. Makos*, [2006] O.J. No. 2919 (Ont. S.C.J.), the Court found that there was no factual foundation for the claim in the pleadings and therefore struck the pleadings with leave to amend within 30 days.

52 Finally, in *Dancovich v. Rast*, 2002 ABQB 907 (Alta. Q.B.) at para 39 Justice Park found that a Plaintiff could not succeed in its claim for unjust enrichment where the pleadings were "bereft of any reference to the remedy of unjust enrichment." The Court noted that neither the Statement of Claim nor the Amended Statement of Claim made a claim for unjust enrichment. The parties did not amended the pleadings and did not cross-examine the witnesses on unjust enrichment or call its own evidence on the matter.

Analysis:

53 Although the law is clear that a party must plead all the material facts on which they intend to rely at trial, it is apparent that pleadings need not name the specific cause of action.

54 The Plaintiff's Amended Statement of Claim does not specifically plead unjust enrichment or make a claim for *quantum meruit*. However, the pleadings tangentially refer to some of the supporting facts for a claim to unjust enrichment. Paragraph 19 of the Amended Statement of Claim refers to the enrichment of the Defendant as a result of the Plaintiff's efforts. It reads:

> By virtue of the fact that Hurricane acquired its right, title, and interest through its subsidiaries in the Oil Fields solely as a result of the efforts and introduction by the Plaintiff, the Plaintiff is entitled to be paid monies equal to or equivalent to the success fees and net profits interest.

55 As for the second element of unjust enrichment, a corresponding deprivation to the Plaintiff, the Statement of Claim suggests, albeit weakly, a deprivation by virtue of the fact that the Plaintiff gave up a 20% equity interest in TPJE to HHL but has not received the additional payments owing under the Success Fee and NPI Agreements. In other words, they have only been partially compensated for its efforts and contributions.

56 While the first and second elements of unjust enrichment might be gleamed from the pleadings, the Plaintiff does not disclose sufficient facts to support the final element of the unjust enrichment analysis, a lack of juristic reason for the deprivation. In its written submissions, the Plaintiff argued that the lack of juristic reason arises from the expectations of the parties that HHL would perform the Contracts. I see no reference to such facts in the Statement of Claim nor the Amended Statement of Claim. In my view the Plaintiff failed to plead unjust enrichment in its Statement of Claim

Should the Defendant be estopped from objecting to the Plaintiff's failure to plead for failure to object sooner?

Law with respect to failure to object:

57 In *Robert McAlpine Ltd. v. Woodbine Place Inc.* (1998), 37 C.L.R. (2d) 38 (Ont. Gen. Div.) at para 220 varied on damages (2001), 7 C.L.R. (3d) 155 (Ont. C.A.), the Court found that there was no injustice where it was alleged that a party failed to properly plead a certain issue as it was clear from the outset of the trial that the issue was live.

58 In *Brophy v. Hutchinson*, 2003 BCCA 21, 9 B.C.L.R. (4th) 46 (B.C. C.A.), the British Columbia Court of Appeal considered whether the Plaintiff's failure to object to an issue at trial should prevent her from appealing on that same issue. At paras 50 and 51, the Court reviewed several authorities on the point. They noted that the courts have found that failure to object in a timely way to an alleged impropriety is a significant consideration in deciding whether to grant a new trial.

59 In particular, the Court cited *Sornberger v. Canadian Pacific Railway* (1897), 24 O.A.R. 263 (Ont. C.A.) for the principle that failure to object should be treated as a waiver of the right to object. In that case, the Court reasoned that if an objection was not raised, it must be accepted that the objection was not so serious at the time and the party should not then be allowed to raise the issue in light of a verdict with which they disagree.

60 The Court ultimately concluded that while failure to make a timely objection must remain an important consideration in determining whether there has been a miscarriage of justice, the Court should balance that consideration against "the nature and character of the irregularity or impropriety complained of": *Brophy v. Hutchinson* at para 55.

Analysis:

61 Having concluded that the Plaintiff's pleadings were deficient, I now turn to the question of whether its claim for unjust enrichment should be barred as a result.

62 While I find that the Plaintiff's pleadings were less than obvious on the point of unjust enrichment, I do not find that its failure to precisely and clearly plead unjust enrichment forecloses me from considering the merits of its claim.

63 The Defendant's written submissions reply at length to the substantive merits of the claim for unjust enrichment. Clearly, the Defendant was aware that the issue of unjust enrichment was on the table. Had ample opportunity to consider the issue and to reply to the Plaintiff's position. Yet despite this knowledge, it was not until closing submissions that the Defendant raised the issue that the Plaintiff had not pleaded unjust enrichment.

64 I find that there would be no prejudice to the Defendant in proceeding with the issue: see *Robert McAlpine Ltd.* at para 220 where the Court made a similar finding.

65 In *Brophy* the British Columbia Court of Appeal balanced the Plaintiff's failure to object with "the nature and character of the irregularity or impropriety complained of" to determine whether there would be prejudice in allowing an appeal. In my view, as the Defendant has not suffered as a result of the Plaintiff's failure to properly plead the issue, I find that the balancing of the Plaintiff's failure to plead and the Defendant's failure to make a timely objection must weigh in favor of allowing the issue of unjust enrichment to proceed.

Would it be fundamentally unfair not to invite the Plaintiff to amend its pleadings?

Law with respect to invitations to amend pleadings:

66 In *Young v. Saanich Police Department*, 2003 BCSC 926 (B.C. S.C.), the British Columbia Supreme Court decided not to invite a petitioner to amend its pleadings where the Court was convinced that the petitioners' claims would not succeed. At paras 71 and 72 Justice Macaulay wrote:

> Because the petitioners are self-represented, I considered inviting an application to amend: either to add the CRHC as a party or to allege that it was acting throughout on behalf of the CRD, which is indisputably a government actor. I then further considered referring any necessary factual issues to the trial list to avoid the problems associated with determining some aspects of the facts from conflicting affidavits.
>
> I decided not to take these steps as I am persuaded that the petitioners' claims cannot possibly succeed. Even assuming that the CRHC was to be added as a party and that it was a government actor, taking the most favourable view possible of the evidence from the petitioners' perspective, the Charter challenges are still doomed to fail.

67 The Court's decision against inviting the petitioner to amend was upheld on Appeal (leave to the Supreme Court of Canada refused: *Young v. Saanich Police Department*, 2004 BCCA 224, 26 B.C.L.R. (4th) 19 (B.C. C.A.). The British Columbia Court of Appeal stated:

> In my view, the appeal fails because the chambers judge did not err when he found the Capital Regional District was not responsible for the conduct of the employees of The Housing Corporation, and that there was no point in permitting the appellants to add The Housing Corporation as parties to the proceeding.: Young v Saanich Police Department, 2004 BCCA 224, 26 BCLR (4th) 19 at 17.

68 In *J. Michael Jensen Boat Sales Ltd. v. McAfee*, 2004 BCCA 48 (B.C. C.A.) at paras 3-5, the British Columbia Court of Appeal upheld the trial judge's decision to refuse, in the absence of such an application being put forward, to permit the Defendants to amend its pleadings in support of an argument of estoppel raised at the conclusion of the trial. During the opening statements, the Court had made it clear to the parties that they could not argue the issue of estoppel unless it had been pleaded or the parties undertook an application to amend. It was not in the pleadings and no such application to amend was filed.

69 In *Burgener v. Code Mortgage Investment Corp.*, 2008 ABQB 583 (Alta. Q.B.) at paras 38-40, Justice Lee found that the Plaintiff's failure to take steps to amend its pleadings after an issue had been pointed out to them was irresponsible.

Analysis:

70 The proper course of action in circumstances such as this where there is a deficiency in the pleadings would normally be to invite the Plaintiff amend its pleadings. However, it is not fundamentally unfair not to invite the Plaintiff to amend its pleadings. Though I turned my mind to this possibility, I am persuaded, as I discuss later, that the claim would not succeed in any event and that it

would therefore be pointless to invite an amendment.

71 In addition, I have found that the Plaintiff's failure to plead was not fatal to the issue of unjust enrichment. Therefore, an invitation to amend would not be necessary.

(b) Are the terms "unjust enrichment" and "quantum meruit" interchangeable?

Parties' Positions:

72 Counsel for the Plaintiff argued that "there was an express reference to *quantum meruit*" and that since *quantum meruit* and unjust enrichment are interchangeable, the reference to *quantum meruit* should suffice.

Law with respect to the terms "unjust enrichment" and "quantum meruit"

73 In *Atir Enterprises Ltd. v. Briault*, 2008 ABQB 520, 456 A.R. 1 (Alta. Q.B.) Justice Moen explained the meaning of *quantum meruit* at paras 15-16:

> Before addressing Atir's claim in unjust enrichment, I should clarify the law on *quantum meruit* for that is what was pled by Atir. *Quantum meruit* can be either contractual or restitutionary in nature. Contractual *quantum meruit* allows the court to determine reasonable remuneration for services provided under a contract that did not fix a precise sum for those services (Dome Construction Ltd. v. Solarsystems Industries Ltd., [1984] S.J. No. 59, 36 Sask. R. 136 (Sask. Q.B.) at para. 54).
>
> Restitutionary *quantum meruit* is a remedy available in an action in unjust enrichment (Peter v. Beblow, [1993] 1 S.C.R. 980 (S.C.C.) per McLachlin J. (as she then was) at para. 3 ("*Beblow*")). For the purpose of Atir's claim, only the contractual *quantum meruit* principle applies.

74 In *Kaiman v. Graham* (2007), 58 R.P.R. (4th) 305 (Ont. S.C.J.) at para 26, aff'd 2009 ONCA 77 (Ont. C.A.), the Court stated:

> It is arguable that a claim based on *quantum meruit* is somewhat different from a claim based on unjust enrichment. In *Consulate Ventures Inc. v. Amico Contracting & Engineering* (1992) Inc. (cited above), Madam Justice Cronk, in addressing whether a claim based on *quantum meruit* must be based on contractual relationships stated at para. 95:
>
> With respect, this misstates the test for establishing entitlement to restitutionary relief based on *quantum meruit*. Such a claim is not dependent on the existence of a valid contract. Rather, it is a discrete cause of action, separate and apart from claims grounded in contract or tort, which contemplates a remedy for unjust enrichment or unjust benefit: see Beatrice C. Deglman v. The Guaranty Trust Company of Canada (Administrator of the Estate of Laura Constantineau Brunet, Deceased), [1954] S.C.R. 725 at 234-35.

Analysis:

75 I am unable to find the express reference that the Plaintiff refers to. In any event I cannot agree with the submission that the terms *quantum meruit* and unjust enrichment are interchangeable. The terms unjust enrichment and *quantum meruit* are not synonymous. While the terms are certainly related, they are not the same.

76 Whereas *quantum meruit* is a remedy, unjust enrichment is a principle or a cause of action: See Peter D. Maddaugh and John D. McCamus, *The Law of Restitution*, (Aurora: Canada Law Book, 2010) at 2-14 & 2-15.

77 *Quantum meruit* can be either (1) contractual (where the court determines reasonable remuneration for services provided under a contract that did not specify a sum) or (2) restitutionary (where a remedy is available through unjust enrichment): see *Atir Enterprises Ltd.* The relationship between the two terms is that *quantum meruit* is one of the remedies to a claim for unjust enrichment.

(c) Whether the elements of unjust enrichment are present?

78 Now that I have determined that the claim of unjust enrichment can proceed I will consider the elements of the claim.

Parties' Positions:

Plaintiff's Position:

79 The Plaintiff argues that the three elements of unjust enrichment are present:

1) An enrichment or benefit to the Defendant - HHL was enriched by Wega-D as HHL would not have had the opportunity to explore and produce the KAM and South Kumkol fields in Kazakhstan without the support and guidance of the Plaintiff. The Plaintiff alleges that the Defendant began as a corporation valued at approximately $3 million dollars and grew to a value of $4.18 billion as a result of its work in Kazakhstan.

2) A corresponding deprivation of the Plaintiff - The Plaintiff suffered a corresponding deprivation as it gave up rights to the fields and to participation in TPJE yet received nothing as consideration in return and;

3) There is no juristic reason for the deprivation - Neither revocation of the licences nor the CCAA proceedings constitute a juristic reason for the deprivation. In addition to the contractual expectation that the parties would perform the Contracts, public policy considerations require that the Defendant not be permitted to avoid paying the Plaintiff for the opportunities that the Plaintiff provided.

Defendant's Position:

80 To begin, the Defendant rejects that Wega-D made a significant contribution to its success. While the Defendant prospered in Kazakhstan, its success was a direct result of its purchase of Yuzneftegaz

and its investments in the Yuzneftegaz properties, not the efforts of the Plaintiff. Furthermore, while HHL acquired shares in Yuzneftegaz, it is Yuzneftegaz, not HHL, that has legal rights in the fields. The Plaintiff played no role in the Defendant's acquisition of Yuzneftegaz.

81 The Defendant also denies that the Plaintiff has suffered a corresponding deprivation. The Plaintiff did not receive anything pursuant to the Success Fee and NPI Agreements because nothing became owing. It did however, receive $1 million dollars in cash and other consideration pursuant to the March 25, 1994 agreement with CdnOxy, Technoex and HHL.

82 Finally, the Defendant submits that the written agreements of the Plaintiff with CdnOxy and TPCL, together with the guarantees provided by HHL, provide a juristic reason and a complete answer to any benefit that HHL may have obtained. *Quantum meruit* should only be awarded where there is no contract or the contract is unenforceable at law. It should not be awarded where a contract simply results in an unfavourable outcome for one party.

Law with respect to the elements of unjust enrichment:

83 In order to make a finding of unjust enrichment the Court must find:

1. An enrichment or benefit to the Defendant;

2. A corresponding deprivation of the Plaintiff; and

3. The absence of a juristic reason for the enrichment.

See *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269 (S.C.C.).

84 A contract is among the enumerated categories of juristic reasons to deny recovery to a claimant based on an unjust enrichment: *Kerr*. The Alberta Court of Appeal has stated that "where the parties have occupied the field with contracts, the courts should be slow to find a gap to fill with unjust enrichment.": *Harris v. Nugent* (1996), 193 A.R. 113 (Alta. C.A.), leave to appeal dismissed [1997] S.C.C.A. No. 77 (S.C.C.) at para 40.

85 A *quantum meruit* award (given as a remedy to unjust enrichment) may be given in varying circumstances. In all cases, however, it is given to compensate for the value of work, goods, or services supplied where contractual provisions for such compensation do not exist, have been abandoned or have ceased to apply because of the rescission or termination of a contract: *Foundation Co. of Canada Ltd. v. United Grain Growers Ltd.* (1997), 34 B.C.L.R. (3d) 92 (B.C. C.A.).

Analysis:

86 I find that the Plaintiff does not have a strong argument on any of the three elements of unjust enrichment.

1. An enrichment or benefit to the Defendant.

87 While the Defendant may have benefited from the efforts of Wega-D in introducing the Defendants to the Kazakhstan market, the success of the Defendant cannot be attributed to the efforts of Wega-D. In 1999, the Defendant was verging on the point of bankruptcy. Since then, the Defendant has been very successful. Its success has been born under different licensing agreements than those envisioned in the Success Fee Agreement or the NPI Agreement. The Plaintiff has played no role in this period of success. Although the Defendant may have initially benefitted from the experience of the Plaintiff, I do not see how the Plaintiff's initial efforts could translate into a right to the Defendant's current profits.

2. A corresponding deprivation of the Plaintiff.

88 The Plaintiff has not suffered a corresponding deprivation. The Plaintiff was compensated for its initial contributions to the Defendant's business endeavors in Kazakhstan through a lump sum payment of $1,000,000 US dollars. They chose to delay the remaining part of its original compensation through the Success Fee and the NPI Agreements. In doing so, they took a calculated risk. If the oil fields had been a success, the Plaintiff would have greatly benefited. Unfortunately, its risk also opened the Defendants up to the possibility that the fields under the Agreements would not turn a profit. That is what happened. The equitable claim of unjust enrichment is not meant to provide a remedy to disappointing business ventures: *Harris* at para 40.

3. The absence of a juristic reason for the enrichment.

89 As evidenced by my discussion of the Plaintiff's calculated business decision, there is a juristic reason for the Plaintiff's "deprivation" - the contract.

90 While unjust enrichment can be found where there was a contractual relationship between the parties, the courts should be slow to intervene in a contractual relationship, *Harris* at para 40. To interfere, there must be evidence that the contract was deficient in its provision of compensation, was abandoned, or was terminated without reason: see *Foundation Co. of Canada Ltd.*. Absent these deficiencies, parties are free to arrange their contractual relationships as they wish and they should live with consequences of doing so.

91 In my view, the parties agreed to a contract based on specific oil fields licences in Kazakhstan. When those licences were no longer in existence, the contracts ceased to exist. The contract was not deficient in its provisions for compensating the Plaintiff and it was not unjustly terminated by the Defendant.

Companies' Creditors Arrangement Act ("CCAA")

92 As the Plaintiff has failed to establish its claim in contract or unjust enrichment it is not necessary to consider the impact of *CCAA* proceedings. However had the Plaintiff established a claim in contract I would have found the *CCAA* proceedings operated to terminate the claim. I will briefly outline some of my analysis of the *CCAA* issues.

Issue 1: Whether HHL's proceedings pursuant to the CCAA operated to terminate its obligations to 677?

Parties' Positions

93 The Plaintiff submits that its current claims under the Success Fee Agreement and the NPI Agreement are not barred by the *CCAA* proceedings. They argue that the Defendant did not provide them with adequate notice of the proceedings and they cannot be bound by the terms of an arrangement in which they did not have the opportunity to participate. They also submit that its claim could not have been properly dealt with by the *CCAA* process and therefore cannot be extinguished by it.

94 The Defendant argues that the Plaintiff's claims are barred by the final order of this Court in the *CCAA* proceedings. They submit that its obligations to the Plaintiff pursuant to the Success Fee Agreement and NPI Agreement ceased to exist in 1999 when the relevant fields licences were cancelled. As there was no contractual obligation, the Plaintiff was not a creditor and the Defendant had no obligation to provide them with notice of the *CCAA* proceedings. In the alternative, if the Defendants did have an obligation to provide notice, public notice was sufficient and the Plaintiff's claim should and could have been pursued through the *CCAA* proceedings.

Law with respect to CCAA proceedings in general:

95 The purpose of the *CCAA* is to facilitate compromises and settlements between a debtor company and its creditors so as to maintain the going viability of the debtor corporation. *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.B.R. (3d) 303, 14 C.P.C. (3d) 339 (Ont. Gen. Div.), at 309. The *CCAA* empowers the Court to make an order staying all proceedings against the debtor corporation in order to maintain the status quo and to allow the debtor to negotiate with and present a plan to all creditors having an interest in the debtor's affairs.

96 This purpose was described by the Ontario Court of Appeal in *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289 (Ont. C.A.) as follows at para 57:

> The legislation is remedial in the purest sense in that it provides a means whereby devastating, social and economic effects of bankruptcy or creditor-initiated detriments of ongoing business operations can be avoided while court-supervised attempt to reorganize the financial affairs of the debtor is made.

(a) Whether public notice in the form of newspaper advertisements of the proceedings was sufficient notice to the Plaintiff?

Parties' Positions:

97 The Plaintiff claims that they should have been provided with personal notice of the proceedings and that public notice in the form of newspaper advertisements was insufficient. They maintain that they were not aware of the *CCAA* proceedings and its financial interests cannot be terminated as a result

of a process that they had no knowledge of.

98 The Defendant submits that even if the Plaintiff was a creditor, which they do not admit, public notice in the newspapers was sufficient notice and the Plaintiff should not be allowed to reopen the debt issue simply because they were not personally served. If the Plaintiff wished to commence a claim, it should have done so pursuant to the *CCAA* process.

Law with respect to notice in CCAA Proceedings:

99 Section 11(5) of the *CCAA*, as it was at the time of those proceedings, stipulates that a monitor must send a copy of the initial order to every known creditor that has a claim against the debtor of more than $250.

100 In the circumstances of this case, the statutory notice requirement was augmented by the Claims Procedure Order granted June 11, 1999 ("CPO") which required the monitor to send notice to all "known creditors or potential creditors" and to place an advertisement announcing the proceedings in the Calgary Herald, Edmonton Journal and Globe & Mail or National Post: See CPO paras 4 & 10.

101 There is mixed case law as to the sufficiency of Notice where a creditor is not provided with personal notice in accordance with the CPO but announcements are placed in newspapers. In *Ivorylane Corp. v. Country Style Realty Ltd.*, [2004] O.J. No. 2662 (Ont. S.C.J. [Commercial List]) at paras 12-13; aff'd (2005), 7 B.L.R. (4th) 15 (Ont. C.A.) at paras 5, 11, 14 and 22, the Ontario Superior Court of Justice found that a newspaper advertisement did not constitute sufficient notice to bar the creditor's claim. The Court noted that the debtor could not escape breach of its notice obligations by pointing to the publication of the Notice to Creditors in the newspaper. Unless the newspaper notice was seen by the creditor, the prejudice caused by the failure of the debtor to provide adequate notice should fall upon the debtor, not the ill-informed creditor: *Ivorylane Corp.* at para 45.

102 By contrast, in *Lindsay v. Transtec Canada Ltd.* (1994), 99 B.C.L.R. (2d) 73 (B.C. S.C.), the British Columbia Supreme Court noted that a creditor who failed to see a newspaper advertisement regarding the proceedings would likely be considered bound by the plan. The Court made a finding of fact that the Claimant was aware of the *CCAA* proceedings and chose not to participate. The end result was that the creditor's claim was barred.

103 In *Noma Co., Re*, [2004] O.J. No. 4914 (Ont. S.C.J. [Commercial List]) at paras 57 & 83, the Ontario Superior Court of Justice found that a claim was barred where the Defendant sent notice to the Plaintiff by mail but the notice was not received and the Plaintiff failed to see the newspaper advertisements. The Court noted that the debtor had complied with the notice requirements.

Analysis:

104 The determination of whether the Defendant provided adequate notice to the Plaintiff hinges on the question of whether the *CCAA* and/or the CPO intended that someone in the position of the Plaintiff would be entitled to notice and if so, whether the notice provided was adequate.

105 For the reasons that follow, I find that the public notice provided was adequate in the circumstances.

106 Section 11(5) of the *CCAA* and paras 4 and 10 of the CPO required the Defendant to provide notice to creditors. In addition to general public notice in newspapers, the CPO explicitly required that notice be given "...to all known creditors or potential creditors of Hurricane".

107 Whether the Plaintiff qualified as a creditor or potential creditor must be considered in light of the objectives of the *CCAA* and the particular circumstances of this case.

108 The *CCAA* aims to facilitate compromises and settlements between a debtor company and its creditors so as to maintain the going viability of the debtor corporation. *Campeau* at 309.

109 *CCAA* plans of arrangement are final and its finality is essential to maintaining confidence in the *CCAA* process. Allowing creditors, without justifiable reason, to pursue claims after the final Plan has been established would erode the confidence of those creditors who participated and compromised its financial interests in the proper *CCAA* process. As such, creditors who wish to pursue *ex post facto* claims must provide good reasons for doing so.

110 The Plaintiff relies on the case of *Ivorylane Corp.*. While the facts of *Ivorylane Corp.* would appear to mirror the circumstances of the case before me, there is one pivotal difference on which I distinguish the case. In *Ivorylane Corp.*, the Court found that the creditor was an obvious, known creditor. The Court went so far as to say that there was "no doubt" that the Defendant knew that the Plaintiff was one of its creditors: see *Ivorylane Corp.* at para 37. Here, 677 was not an obvious creditor. The Defendant specifically considered it's notice obligations in relation to its prior relationship with the Plaintiff and concluded that the Success Fee Agreement and NPI Agreement were no longer operational at the time of the proceedings. As such, they reasonably believed that the Plaintiff was not a creditor and that personal notice was not required or appropriate.

111 In addition to the belief that the Success Fee Agreement and NPI Agreement were no longer operational, the relationship between the Defendant and the Plaintiff was not direct. 677 was assigned the rights to the Agreements by the original party, Wega-D.

112 Given the distant relationship between the parties and the reasonable belief on the part of the Defendant that there was no contractual relationship, the Defendant could not be expected to provide the Plaintiff with personal notice of its *CCAA* status. To do so would create an unreasonably high standard and an overburdensome requirement for *CCAA* companies to provide notice to an overly broad ambit of "creditors". The law does not expect a creditor to provide notice to every person with whom the debtor has had a prior business relationship.

113 Having found that the Plaintiff did not fall within the ambit of those entitled to personal notice, I now turn to the question of whether public notice in the form of newspaper advertisements was adequate.

114 In compliance with the CPO, the Defendant (via the Monitor) published advertisements in the Calgary Herald, the Edmonton Journal, and the National Post. The purpose of public notice is to provide notice to those creditors who fall outside the scope of those who deserve personal notice but who may nonetheless wish to assert an interest in the *CCAA* proceedings.

115 Mr. Wenzel testified that the Plaintiff company did not receive formal notice, did not see the public advertisements and was not otherwise aware of the Defendant's *CCAA* proceeding. Having resigned from his position as a director of HHL effective April 1, 1999, he was not aware of the proceedings through the director role. In addition to coping with ongoing health problems (including travel out of country for medical treatment), Mr. Wenzel did not subscribe to the Calgary Herald, the Edmonton Journal or the National Post and was not aware of any of the notices in these papers. I accept that Mr. Wenzel did not become aware of the *CCAA* proceedings until after the claims bar date.

116 However, while it is unfortunate that the Plaintiff did not see any of the advertisements published and did not otherwise receive word of the *CCAA* proceedings, this does not mean that the Court should now hold the Defendant responsible. The Defendant was required to provide public notice and they fulfilled this duty.

117 The Defendant relied upon the cases of *Lindsay* and *Noma Co., Re* to argue that public notice was sufficient. While I find in favour of the Defendant with respect to notice, I do not find the cases they submitted to be relevant.

118 In *Lindsay*, the Court found as a fact that the Plaintiff was aware of the *CCAA* proceedings despite not being provided with personal notice. That is not the case here.

119 In *Noma Co., Re*, the Court found that the Defendant made a good faith effort to send personal notice and to comply with the requirements of the CPO however the notice failed to be delivered. Here, the Defendant did not make an effort to send notice but rather concluded that personal notice was not required.

120 The Defendant turned its mind to the status of the Plaintiff and concluded that the Plaintiff was not a known or potential creditor. After giving careful consideration to the status of the Plaintiff, they went on to comply with the public notice requirements set out in the CPO. In so doing, they gave the Plaintiff the opportunity to file a Notice of Claim.

Conclusion

121 The Plaintiff's claim is dismissed against PKI.

122 Costs are awarded to PKI.

Action dismissed.

Appendix A

Agreed Statement of Facts

1. The Plaintiff ("677") and the Defendant ("PKI") enter into this agreement solely for the purpose of the trial of this action. This agreement may not be used in evidence or relied upon in any other action or proceeding without further agreement between the parties.

2. PKI was formerly known as Hurricane Hydrocarbons Ltd. ("HHL"). The acronyms PKI and HHL are used interchangeably in this agreement and refer throughout to the same legal entity.

3. 677 claims against PKI pursuant to guarantees of two agreements that were assigned to 677 by Powerprobe Geophysics Inc., formerly called Wega-D Geophysical Ltd. ("Wega-D").

Authenticity of Documents and Translations

4. The parties agree that documents described by the parties in the Affidavits of Records filed in this action are authentic. Where the document is or purports to be a copy of an original document, the parties agree that it is a true copy. If a document is in the form of a letter, memorandum or other message to a designated addressee, the letter or message was sent by its apparent author and received by its addressee(s) in the normal course of mail or other form of transmission.

5. When a document described by either of the parties in its Affidavit of Records or included in the documents produced by it in this action purports to be a translation of a document, the original of which was not in English, the parties agree that the translation is accurate; provided, however, that either party may object to the accuracy of a translation by giving notice to the other party not less than thirty days prior to the commencement of the trial of this action. Any such notice shall be in writing and be accompanied by a translation of the document which the party giving the notice intends to rely upon.

Description of Documents

6. Whenever in this agreement the contents of an agreement or other document are described, either party may put into evidence the entire agreement or document, in which case the description of the content thereof in this agreement shall be for convenience only and the Court shall have regard to the language of the agreement or other document.

Formation and Ownership of Turan Petroleum Joint Enterprise

7. Turan Petroleum Joint Enterprise ("TPJE") was formed as a legal entity pursuant to the laws of the Republic of Kazakhstan on July 29, 1992, by the issue of a Certificate of Registration by the Ministry of Finance of Kazakhstan.

8. The original participants in TPJE were:

(a) Production Association Yuzkazneftegaz, also known as Production Association Yuzneftegaz ("Yuzneftegaz");

(b) Production Geological Association Yuzkazgeologia ("Geologia");

(c) Technoex Limited, a corporation formed under the laws of Turks and Caicos Islands, BWI ("Technoex"); and

(d) Wega-D, a corporation formed under the laws of Alberta.

9. Yuzneftegaz and Geologia were legal entities formed under Kazakh law and both belonged to the Republic of Kazakhstan when TPJE was formed. In May, 1994, Yuzneftegaz became a state joint stock company.

10. When TPJE was formed, Yuzneftegaz and Geologia jointly owned a 50% interest in TPJE. Technoex and Wega-D each owned a 25% interest.

11. The major purpose for the formation of TPJE was the development and production of oil and gas from three fields in South East Kazakhstan called the Aryskum, Maybulak and Kzyl-Kiya fields.

12. In 1993 an agreement was entered into between TPJE and Yuzneftegaz regarding a fourth oil field called South Kumkol. Yuzneftegaz had the exclusive right to explore and develop the South Kumkol field. TPJE agreed to drill two exploratory wells and, if the wells were successful, the western partners (Wega-D and Technoex) would become entitled to 50% of the revenues from the South Kumkol field in exchange for providing 100% of the exploration and development financing. Yuzneftegaz would then be entitled to receive the other 50% of the revenues from South Kumkol.

13. Prior to the formation of TPJE and the addition of the South Kumkol field to the TPJE, exploration activities had been carried out in each of the four fields, including drilling by Yuzneftegaz in the Aryskum, Maybulak and Kzyl-Kiya fields. In the Kzyl-Kiya field, thirty-three wells had been drilled. Eleven oil and three gas wells had been cased, equipped, production tested and suspended pending the construction of infrastructure. Twenty wells had been drilled in the Aryskum field. Four were completed as oil wells. Seven exploration wells had been drilled in the Maybulak field. Three were completed as oil wells. By 1994, two wells in the South Kumkol field had been drilled and cased and were being tied into the Kumkol processing plant for treatment of the produced oil.

14. Mr. Wenzel, the President of Wega-D, was appointed by the directors of TPJE to be the President of TPJE. The directors also resolved to enter into an agreement with Wega-D to acquire rights to patented Wega-D PowerProbe geophysical technology in exchange for a payment of $10 million (U.S.) payable when TPJE became profitable.

Introduction of HHL and Canadian Occidental Petroleum Ltd. to TPJE

15. By letter agreement dated March 25, 1994 in the form of an offer from Canadian Occidental Petroleum Limited ("CdnOxy") to Wega-D, Technoex and HHL. CdnOxy offered to acquire a 40% beneficial interest in TPJE from Wega-D and Technoex, with HHL acquiring a 10% beneficial interest in TPJE.

16. This transaction was implemented by Wega-D and Technoex assigning its respective interests in TPJE to Turan Petroleum Cyprus Limited ("TPCL"), a company incorporated under the laws of Cyprus. Each of CdnOxy and HHL caused subsidiaries to be incorporated in Cyprus, being respectively CXY Cyprus Limited and Hurricane Energy Cyprus Limited. CXY Cyprus Limited acquired 80% of the shares of TPCL and Hurricane Energy Cyprus Limited acquired 20% of the shares of TPCL from Wega-D and Technoex.

17. The consideration promised by CdnOxy under the March 25, 1994 letter agreement included the following:

(a) The reimbursement to Wega-D and Technoex and an unrelated German company for documented past costs incurred in evaluating and acquiring the rights held by TPJE, not exceeding $2,162,617 up to March 31, 1994;

(b) Recognition of the payment by HHL of expenses related to the evaluation and acquisition of rights held by TPJE, not exceeding $967,868 up to March 31, 1994, such costs to be recognized as contributions of HHL to the expenditures of TPCL and TPJE;

(c) The payment of $2 million (U.S.) to Wega-D and Technoex;

(d) Causing TPCL to grant Wega-D and Technoex an aggregate 5% net profits interest in the profit of TPCL;

(e) Causing TPCL to pay Wega-D and Technoex an aggregate success fee based upon the quantity and value of oil produced to a maximum of $12 million (US);

(f) A commitment by CdnOxy to expend not less than $15 million (inclusive of the payments to be made under paragraphs (a) and (c) above) in the twelve month period following CdnOxy's acquisition of an interest in TPCL (subject to operational practicalities and factors beyond its reasonable control);

(g) Using its best efforts to cause TPJE to contract with Technoex for the utilization of the Power Probe technology and the provision of geophysical services for an amount not in excess of $10 million U.S.

18. It was a term of the March 25, 1994 agreement that each of the parent companies of the parties holding equity interests in TPCL would provide a guarantee of the obligations of its subsidiary.

Formation of Agreements

19. In furtherance of the March 25, 1994 letter agreement TPCL entered into two agreements in writing dated June 1, 1994 with Wega-D called the Net Profits Interest Agreement and the Success Fee Agreement. Those two agreements are the subject of this action. Substantially identical agreements were entered into between TPCL and Technoex.

20. By the Net Profits Interest Agreement TPCL promised to pay Wega-D 2 1/2 % of the net profits attributable to TPCL's interest in TPJE. Pursuant to the Success Fee Agreement, TPCL promised to pay a fee to Wega-D which was based upon the amount of crude oil production by TPJE and the price for which the crude oil was sold. The maximum fee payable pursuant to the Success Fee Agreement was $6 million (US).

21. HHL and CdnOxy guaranteed the obligations of TPCL to Wega-D under both the Net Profits Interest Agreement and the Success Fee Agreement in the following terms:

> Canadian Occidental Petroleum Ltd. and Hurricane Hydrocarbons Ltd., severally, to the extent of its respective direct or indirect equity interests in Turan Petroleum Cyprus Limited, guarantee the due and punctual performance by Turan Petroleum Cyprus Limited of Turan Petroleum Cyprus Limited's covenants and obligations set forth in this Agreement.

22. Wega-D entered into an additional separate agreement with CdnOxy, dated June 27, 1994, by which CdnOxy agreed and undertook that upon a transfer of its or its affiliate's interest in any of the four oil fields, CdnOxy would require the transferee to assume all outstanding obligations owing to Wega-D and Technoex under the March 25, 1994 letter agreement and the agreements contemplated therein, including the Success Fee Agreement and the Net Profits Interest Agreement. HHL was not a party to that agreement and did not enter into a similar agreement with Wega-D.

23. CdnOxy also entered into a separate undertaking to Wega-D and Technoex that if CdnOxy determined to surrender its interest in the undertaking referred to as the Turan Petroleum project, it would offer to assign it free of charge to Wega-D and Technoex. HHL agreed with CdnOxy's undertaking, but did not make the same undertaking.

24. CXY Cyprus Limited and Hurricane Energy Cyprus Limited entered into a unanimous shareholders' agreement pertaining to TPCL dated June 27, 1994. That agreement provided, inter alia, that TPCL would enter into a service contract with CdnOxy under which CdnOxy agreed to provide a variety of technical and management services to TPCL. That service contract was entered into as of June 1, 1994. In turn, TPCL entered into a service contract with TPJE of the same date under which TPCL agreed to provide the services of CdnOxy to TPJE.

25. Prior to the closing of the transactions required by the March 25, 1994 letter agreement Mr. Mr. Wenzel was at all material times the controlling shareholder and President of both Wega-D and 677. From June, 1989 to April 1, 1999 he was a member of the board of directors of HHL.

Area of Mutual Interest Agreement

26. On June 27, 1994 Hurricane Energy Cyprus Limited and CXY Cyprus Limited entered into an Area of Mutual Interest Agreement pertaining to an area described as the South Turgai Basin. The four oil fields to which the action relates are all in the South Turgai Basin, as are the Kumkol field (divided into Kumkol North and Kumkol South, which is a separate field from South Kumkol) and other fields in which Yuzneftegaz had interests, by itself or as a participant in various joint ventures.

27. The parties to the Area of Mutual Interest Agreement agreed that if either of them or its respective affiliates, as defined therein, acquired an "AMI Interest", as defined, it would offer to the other party a proportionate share of the interest so acquired, in proportion to the other party's shareholding in TPCL.

Assignments to 677 and Alberta Opportunity Company

28. By an Assignment and Novation Agreement dated March 21, 1996 Wega-D assigned its interests in the Net Profits Interest Agreement to 677. Wega-D also assigned 60% of its interest in the Success Fee Agreement to 677, having previously assigned the remaining 40% of its interest in the Success Fee Agreement to Alberta Opportunity Company ("AOC"). TPCL, HHL and CdnOxy agreed to the novation of AOC and 677 into the relevant agreements.

Privatization of Yuzneftegaz

29. In 1996, the Republic of Kazakhstan engaged in a process with a view to privatizing Yuzneftegaz, one of the participants in TPJE. HHL's subsidiary, Hurricane Kumkol Limited, was the successful bidder in the privatization process, as a result of which it acquired all of the voting shares, comprising approximately 90% of the equity, in Yuzneftegaz. The shares of Yuzneftegaz were subsequently assigned by Hurricane Kumkol Limited to HHL.

30. As part of the negotiations in respect of the privatization of Yuzneftegaz, the following provision was included in a resolution of the Inter-departmental Commission for the Privatization of Enterprises in the Oil and Gas Industry, dated August 8, 1996:

> The Government guarantees that on the date of the initial payment, as specified in paragraph 1, the Government shall instruct the Ministry of Geology to extend the validity of the YNS (sic) [Yuzneftegaz] licence, as well as the licences of the Joint Ventures of Kumkol-Lukoil, Turan Petroleum [the Joint Enterprise] and Kazgermunai. In case the Government, by its action which is independent of the agreement determines to revoke the licence of the YNG [Yuzneftegaz], the licence of Turan Petroleum Joint Venture [TPJE], the Government shall cause all rights and interests in that licence to be transferred to Hurricane as the successor in interest to YNG.

31. Hurricane Kumkol Limited entered into a Share Sale - Purchase Agreement with the Republic of Kazakhstan dated August 28, 1996 concerning the sale of the common shares of Yuzneftegaz. Included as a part of the agreement was a covenant contained in Article 2.7(b) which embodied and elaborated upon the resolution described in the previous paragraph.

32. At various times in 1996 and 1997 the relevant government agencies of the Republic of Kazakhstan issued decrees withdrawing or revoking the licences issued to TPJE to explore for or produce oil from the four fields. The stated reasons were because of the failure of the licencee to comply with the conditions of the licences.

33. The decree by the Prime Minister of Kazakhstan relating to the licences for the South Kumkol field was issued on or about October 1, 1996. This was prior to the closing of the purchase of the shares of

Yuzneftegaz by Hurricane Kumkol Limited, which took place on December 12, 1996.

34. The decrees relating to the licences granted to TPJE for the Aryskum, Kzyl-Kiya and Maybulak fields were issued on July 10, 1997.

35. At the time of the decrees affecting the licences, oil had not been produced from any of the fields licenced to TPJE, and no payments had been made by TPCL to Wega-D or 677 pursuant to the Net Profits Interest Agreement or the Success Fee Agreement.

36. Subsequent to the decrees referred to in paragraphs 33 and 34, certain licences were issued to Yuzneftegaz, which changed its name to Hurricane Kumkol Munai, by the Government of Kazakhstan pursuant to the obligation contained within the Share Sale - Purchase Agreement.

37. A licence for the South Kumkol field was issued to Yuzneftegaz on December 10, 1996. On April 21, 1997, the December 10, 1996 decision to grant a licence to Yuzneftegaz was confirmed.

38. A licence was issued on December 4, 1997 for the Maybulak field to Yuzneftegaz, by then called Hurricane Kumkol Munai. A resolution of the Government of Kazakhstan was made on August 29, 1998 to issue licences to Hurricane Kumkol Munai for the Aryskum and Kzyl-Kiya fields and those licences were issued on September 8, 1998.

39. The licences issued to Yuzneftegaz all required that the licencee negotiate and enter into a contract with the competent authority within a fixed time. The Hydrocarbon Exploration and Production Contract dated June 9, 1997 is an example of such a contract, for the South Kumkol field.

CdnOxy's Claim to South Kumkol

40. When HHL first contemplated making a bid to acquire shares of Yuzneftegaz it was as a participant in a joint bid to be made by subsidiaries of HHL, CdnOxy and Chevron Corp. CdnOxy and Chevron Corp. withdrew from the proposed joint bid and Hurricane Kumkol Limited proceeded to make a bid on its own, ultimately resulting in its purchase of the shares of Yuzneftegaz.

41. By letter of August 23, 1996, CXY Cyprus Limited wrote to Hurricane Energy Cyprus Limited asserting that an affiliate of Hurricane Energy Cyprus Limited was acquiring interests subject to the Area of Mutual Interest Agreement and saying that CXY Cyprus Limited intended to enforce rights under that Agreement.

42. By letter of May 19, 1997 Canadian Petroleum Cyprus Limited (formerly CXY Cyprus Limited), which was a party to the Area of Mutual Interest Agreement with Hurricane Energy Cyprus Limited, gave notice of the exercise of its rights under that agreement to acquire an interest in the licence granted to Yuzneftegaz for the South Kumkol field.

43. After negotiations, CdnOxy and Canadian Petroleum Cyprus Limited entered into a settlement agreement dated July 29, 1997 with HHL and Hurricane Energy Cyprus Limited (the "Settlement Agreement"). Pursuant to the terms of the Settlement Agreement CdnOxy and HHL and its respective

subsidiaries terminated its relationship regarding TPCL and TPJE, including the Area of Mutual Interest Agreement.

44. Included among the terms of the Settlement Agreement were:

(a) CdnOxy and its affiliates assigned all of its shares in TPCL to Hurricane Energy Cyprus Limited.;

(b) HHL and its affiliates exchanged releases with CdnOxy and its affiliates;

(c) 677, Technoex and Mr. Wenzel each released CdnOxy and Canadian Petroleum Cyprus Limited of any obligations those companies had under a number of agreements including the Success Fee Agreement and the Net Profits Interest Agreement. 677, Technoex and Mr. Wenzel also agreed to indemnify the released parties with regard to any claim against them by AOC.

45. HHL paid to CdnOxy the sum of $4 million (US) pursuant to a Sale of Notes Receivable Agreement, in exchange for notes payable by TPCL to Canadian Petroleum Cyprus Limited in the total principal amount of $24,327,600.

677's Correspondence to AOC

46. In response to an enquiry from AOC regarding its entitlement to 40% of the proceeds of the Success Fee Agreement, 677 responded by letter dated September 23, 1997 advising:

> Canadian Occidental et al did not bring these fields into production within a time period specified in the exploration licences granted by the government of Kazakhstan. The government of Kazakhstan thus revoked the development licences held by Turan Petroleum as per the attached decrees. We thus foresee no revenue accruing from the Success Fee Agreement.

Mr. Wenzel

47. At all material times Mr. Wenzel has been the President of Wega-D and 677. He was the President of TPJE from the time TPJE came into existence until June 27, 1994. He was a member of the board of directors of HHL from about June, 1989 until on or about April 1, 1999.

Hurricane Kumkol Munai's Development of the Four Fields

48. The South Kumkol field has been in production since December 1997. Kzyl-Kiya was put on production in August of 2000. Test production began on the Aryskum and Maybulak fields sometime in 2000 and both were producing by November, 2002.

CCAA Proceedings

49. On May 14, 1999 HHL and one of its subsidiaries (not relevant to this action) commenced proceedings in the Court of Queen's Bench of Alberta, Judicial District of Calgary, seeking protection from its creditors under the Companies' Creditors Arrangement Act ("CCAA"). By order of this Court dated May 14, 1999 proceedings against HHL were stayed.

50. As at June 30, 1999, there had been no production from the Kzyl-Kiya, Maybulak or Aryskum fields, and there had not been sufficient production of oil or gas at sufficiently high prices from the South Kumkol field to require payment to 677 under the Net Profits Interest Agreement or the Success Fee Agreement, assuming, without agreeing, that a continuing legal obligation pursuant to those agreements existed as at that date.

51. No notice of the CCAA proceedings was sent to either Wega-D or 667 and neither of them was listed as a creditor of HHL on any CCAA filings, including HHL's list of creditors.

52. By an order dated June 11, 1999, this court made an order in HHL's CCAA proceeding establishing a process and setting a deadline of June 30, 1999 for the proof of claims by creditors. The order required publication of a notice in various newspapers of the requirement to prove claims. The notices were published in accordance with the order.

53. HHL submitted a Fourth Amended and Restated Plan of Arrangement (the "Plan") to its creditors for approval. The Plan was approved by the necessary majority of HHL's creditors and was submitted to this Court for its approval.

54. By order of February 28, 2000 this court approved the Plan. All of the conditions required for the Plan to become effective were met, and the Plan effective date was established as March 31, 2000.

55. During the course of the CCAA proceedings, AOC submitted a proof of claim claiming to be entitled to payment pursuant to its assignment from Wega-D of 40% of the Success Fee Agreement. HHL disputed AOC's claim, and AOC's claim was treated as a disputed claim amount in the Plan.

56. AOC commenced proceedings in this court to enforce its claim, by a Statement of Claim.

57. AOC's claim was discontinued, without costs, by consent, on October 7, 2005.

58. AOC granted a release dated September 14, 2005 to PKI of its claim in respect of 40% of the proceeds payable by TPCL under the Success Fee Agreement.

59. 677 did not submit a proof of claim to HHL in the CCAA proceedings, did not appear in those proceedings and did not attend or vote at the meeting of creditors held to approve the Plan.

Legal Representation on behalf of HHL, Hurricane Kumkol Munai OJSC and Hurricane Energy (Cyprus) Limited

60. The law firm of Code Hunter Wittmann acted as counsel and/or legal advisor to HHL and/or HHL's subsidiaries, Hurricane Kumkol Limited and Hurricane Energy (Cyprus) Limited, from time to time in connection with the acquisition of the shares in Yuzneftegaz, with regard to the Settlement Agreement with CanOxy and in respect of HHL's CCAA proceedings.

TAB 19

1999 CarswellBC 1275
British Columbia Supreme Court

BCS Technology Inc., Re

1999 CarswellBC 1275, 12 C.B.R. (4th) 23

In the Matter of the Proposal of BCS Technology Inc.

Lowry J.

Heard: June 1, 1999
Judgment: June 8, 1999
Docket: Vancouver 11-182567/VA98

Counsel: *Christopher R. Ferguson*, for Applicant, Brian Baker.
Brenda J. Brown, for Respondent, BCS Technology Inc.
Kimberly Campbell, for Trustee in Bankruptcy, Smythe McMahon Inc.

Subject: Insolvency

Headnote

Bankruptcy --- Proposal — Approval by court — Appeal from order approving or rejecting proposal

Creditor brought application for order setting aside Registrar's approval of proposal to creditors of bankrupt on ground he was not given notice of either meeting of creditors or application for approval — Bankrupt and trustee opposed application — Application was dismissed — Creditor was employee of bankrupt and had brought action against bankrupt for unpaid commissions — Creditor's action was stayed when bankrupt made proposal to its creditors — Notice of meeting of creditors was sent to applicant creditor at appropriate address — Creditor purported to file proof of his claim with trustee but proof was deficient — Creditor did not receive notice of application for approval of proposal — Bankrupt was in process of complete reorganization — Failure to give notice required under Bankruptcy and Insolvency Act will not necessarily render proceeding void — Creditor fell short of establishing any sound basis for setting aside Registrar's approval of proposal — Creditor would have had no prospect of successfully opposing trustee's application — Voting support of 50 per cent of those attending creditors' meeting renders proposal accepted if their claims represent two-thirds of value of all claims — Creditor's claim would have represented only 13 per cent of value of 14 unsecured claims in existence at time approval was given — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3.

APPLICATION by creditor for order setting aside Registrar's approval of proposal to creditors of bankrupt on ground he was not given notice of meeting of creditors or application for approval.

***Lowry J.*:**

1 Brian Barker applies for an order setting aside the Registrar's approval of a proposal to the creditors of BCS Technology Inc. ("BCS") on the ground that he was not given notice of either the meeting of

creditors or the application for approval. His application is opposed by both the company and the trustee, Smythe McMahon Inc., on various grounds. Generally, notice of a court proceeding is critical to enforcing relief against a person affected by any order made, but that is not necessarily the case in bankruptcy proceedings such as these.

2 BCS is in the business of providing long distance telephone services at what are said to be discount rates. On May 22, 1998, BCS gave notice under section 50.4(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985 c. B-3 of its intention to make a proposal to its creditors. It did so because one secured creditor, Fonorola Inc. (subsequently acquired by Sprint Canada Inc.) had taken steps to realize on its security. The notice was received by Mr. Barker, and it had the effect of staying an action he was prosecuting against the company. Mr. Barker once worked for the company and maintains that he is entitled to unpaid, and for that matter undetermined, commissions on sales he made.

3 On July 21, 1998 the trustee gave notice of the proposal (25 cents on the dollar) and of the meeting of creditors which was held on July 31 to vote on it. The notice was sent to Mr. Barker at the appropriate address, but he maintains he heard nothing from the trustee until he initiated contact in October or November. I am, however, told that he requested, and it is clear that he received, a copy of the notice and the proposal in August. It does appear that he may well have received the notice prior to the meeting and simply chosen not to attend. The vote at the meeting was such that the proposal was recorded as having been accepted.

4 In December, Mr. Barker purported to file proof of his claim with the trustee which, if in compliance with the Act, would have entitled him to notice of the application to approve the proposal. His proof was, however, deficient in that it was unsigned and not supported by any documentary evidence of the basis on which he claims to be entitled to commissions.

5 The trustee sought court approval of the proposal and obtained such from the Registrar in April 1999. It is accepted that Mr. Barker did not receive notice of the application and that he moved promptly to have the approval set aside when he learned that it had been given.

6 Under new management since July 1998, BCS has now entered into an agreement to merge with Traxcom Systems Corporation ("Traxcom"). BCS is in the process of a complete reorganization and, with the benefit of substantial private financing as well as public financing of $1.2 million that is just now being arranged, it appears to again be entirely viable. The essence of the opposition to Mr. Barker's application is the contention that, if the Registrar's approval is set aside, the whole enterprise will be jeopardized. The required public financing may well be lost, and there will then be a real risk that the substantial private investments that have been made in contemplation of the merger will be put a risk with the distinct prospect that both BCS and Traxcom will fail leading to personal financial hardships if not bankruptcies.

7 Mr. Barker maintains that, if the Registrar's approval is set aside and a new hearing convened, he will have a chance of persuading the Registrar that the proposal should not be approved. He says this is so even though none of the other unsecured creditors, of which there are 13, opposed the trustee's

application for approval. His reasoning appears to be confined to the contention that Sprint Canada, which had the largest unsecured claim, may have made a "side" deal with BCS to the prejudice of the other creditors. He says this may be so because Fonorola which at the time of the creditor's meeting was being taken over by Sprint Canada, did not vote in favour of the proposal, but by the time the trustee applied for approval, Sprint Canada supported the proposal.

8 Mr. Barker brings his application under s. 187(5) of the Act which provides that the court may review, rescind, or vary any order made by it under its bankruptcy jurisdiction. But s. 187(9) provides that no proceeding in bankruptcy shall be invalidated by any formal defect or irregularity in the proceedings unless the court is satisfied that a substantial injustice has occurred that cannot be remedied. It has been held that a failure to give notice required under the Act will not necessarily render the proceeding void: *Markovina v. Coopers & Lybrand Ltd.* (1991), 7 C.B.R. (3d) 99 (B.C. C.A.). It is necessary to consider whether the failure works a substantial injustice having regard for all of the circumstances. The justification for this cautious approach to disturbing court orders made in a similar context was comprehensively reviewed by this court in *Lindsay v. Transtec Canada Ltd.* (1994), 28 C.B.R. (3d) 110 (B.C. S.C.) in relation to proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

9 In my view, Mr. Barker falls well short of establishing any sound basis for setting aside the Registrar's approval of the proposal which would limit his recovery to 25% of any claim he may be able to make out against BCS. His contention that he would have a chance of having the proposal rejected because there may have been a deal made with Sprint Canada is a matter of pure speculation with respect to which there is no evidence and none of the other unsecured creditors appear to have harboured his concern in this regard.

10 It appears to me that he would have had no prospect of successfully opposing the trustee's application. Under s. 54(2) (d) of the Act, the voting support of 50% of those attending the creditors' meeting renders a proposal accepted if their claims represent two-thirds of the value of all of the claims. Assuming Mr. Barker was able to establish liability, the trustee estimates his claim, on the basis for which he contends, at $53,000. It is evident that, if all of it were proven, it would represent only 13% of the value of the 14 unsecured claims there were at the time the approval was given.

11 While Mr. Barker did not receive notice of the trustee's application for approval, it is evident that from June 1998 onward he was aware that BCS intended to make a proposal and it is clear that he knew what it was by at least August if not before, yet by his own admission he took no steps to protect his interest until October or November and then, in December, he filed a deficient proof of claim. He now seeks to have the approval that was unopposed by any other creditor set aside notwithstanding the attendant risk that BCS as well as Traxcom will fail in which case any prospect he may have of effecting some recovery would evaporate.

12 I conclude that Mr. Barker's application should not succeed and it will be dismissed.

Application dismissed.

TAB 20

1994 CarswellBC 620
British Columbia Supreme Court

Lindsay v. Transtec Canada Ltd.

1994 CarswellBC 620, [1995] 2 W.W.R. 404, 28 C.B.R. (3d) 110, 50 A.C.W.S. (3d) 788, 5 C.C.P.B. 219, 99 B.C.L.R. (2d) 73

Re Company Act, R.S.B.C. 1979, c. 59; Re Business Corporations Act, R.S.A. 1981, c. B-15; Re Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36; Re ALBERTA-PACIFIC TERMINALS LTD., FRASER SURREY DOCKS, PACIFIC TERMINALS LIMITED, JOHNSTON MARINE TERMINALS LTD. and JOHNSTON INTERNATIONAL SERVICE (HONG KONG) (petitioners)

Re intended action between T. BARRIE LINDSAY and TRANSTEC CANADA LIMITED, 302290 B.C. LTD., TROJAN EQUITIES LTD., COMPLEAT HOLDINGS LTD., ALBERTA-PACIFIC TERMINALS LTD. and TRANSTEC CAPITAL LTD.

Huddart J.

Heard: February 10, April 13, June 22 and September 7, 1994
Judgment: October 7, 1994
Docket: Doc. Vancouver A903661

Counsel: *G. Dickson*, for applicant.
R.A. Millar, for petitioners and 8808 Investments Ltd.

Subject: Corporate and Commercial; Insolvency

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay of proceedings

Corporations — Arrangements and compromises — Companies' Creditors Arrangement Act — Claims — Leave to commence action — Company inadvertently failing to give applicant notice of CCAA proceedings — Applicant's application for leave dismissed upon finding that applicant qualified as creditor, had knowledge and understanding of CCAA proceedings and chose not to participate in reorganization — Unfair to allow applicant to take advantage of company's inadvertence — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

The applicant retired from his position as senior vice-president of a company in 1988. He and the company executed a retirement agreement under which the applicant was to receive a monthly supplemental pension of $2,100 from June15, 1990 until his death. AP and other related companies guaranteed the pension benefits. In 1993, the company defaulted under the agreement by failing to make the January payment. The applicant demanded payment from the company and all of the guarantors, but received nothing.

In 1991, AP and four related companies had applied for and been granted protection under the

Companies' Creditors Arrangement Act ("CCAA"). They had contacted what they believed to be all creditors and claimants. Through an oversight, the applicant was not notified. He did not participate in the re-organization process. His claim would have represented about one-third of the claims of the class of general creditors.

The evidence showed that, although the applicant had been aware of the CCAA proceedings and of the possibility that they would affect him, he took only one step before the date on which the court sanctioned the arrangement between AP and AP's group of companies and their creditors. He sent a registered letter to AP requesting copies of the application under the CCAA, of any court orders issued, and of any proposals submitted. His testimony was that, when he received no response, he believed that his future claim under the guarantee would not be affected by the CCAA arrangement. He did not file a proof of claim, although he was sent a copy of a court order, attached to which was the reorganization plan as approved by the court. He did not, however, receive a copy of a proof of claim form.

The applicant applied for leave to commence an action on the guarantee against AP. The issue was what effect a plan could have on an unsecured creditor who was not invited to participate in the process of compromise leading to the formation of the plan because of inadvertence, but who falls within a class for whom provision is made in the plan.

Held:

The application was dismissed.

It was the intention of the company and of the court that the company's plan cover all creditors and potential creditors. The applicant qualified as a creditor under the plan. A beneficiary under a guarantee by a debtor company may be made subject to a plan as a creditor with a "claim" as that word is defined in s. 12 of the CCAA. However, because the applicant did nothing between the date the plan was sanctioned and the date it became effective, he gave up the opportunity to re-open the arrangement. Because he did not file a proof of claim, he gave up the opportunity to share in the fund for general creditors. He was bound by the stay of proceedings that protected the plan, but his claim was not extinguished by the plan.

An applicant may be granted leave to commence an action, even where the action will have the effect of varying the plan. Factors to be considered by the court in deciding whether to exercise its discretion to lift the stay include: the extent of the creditor's actual knowledge and understanding of the proceedings, the economic effect on the creditor and the debtor company, fairness to other creditors, the scheme and purpose of the CCAA, and the terms of the plan.

The applicant had knowledge of the CCAA proceedings. That he did not receive a proof of claim form did not remove him from consideration as a "creditor" under the plan. The applicant should not be allowed to take advantage of AP's inadvertence. His subjective belief that the lack of response to his letter meant that he was not affected by the CCAA proceedings was not reasonable in the circumstances. He understood the nature of the proceedings and was experienced in business; his failure to obtain more information was a deliberate decision to rely on his interpretation of the CCAA and the plan.

The applicant's claim would have a major effect on AP. Had he filed a proof of claim, AP would have paid him between $80,000 and $100,000. That payment would have affected AP's perceived benefit in purchasing a continuing re-organized business. There would, however, be no effect on other creditors who settled their claims. The effect of an order granting the applicant leave to bring his action would be to require AP to pay him from its post-arrangement revenue or to find additional money to satisfy his claim.

It was fair and just to deny the applicant leave. While AP failed to include him, the failure was a result of inadvertence. The applicant had more than enough information to decide whether he should participate in the CCAA proceedings. He chose to stay out of the proceedings until it was too late.

Application for leave to commence action against companies having protection of *Companies' Creditors Arrangement Act*.

***Huddart J.*:**

1 T. Barrie Lindsay asks leave to commence an action on a guarantee of his supplementary pension benefits against Alberta-Pacific Terminals Ltd ("Alberta-Pacific"). The court's permission is required because Alberta-Pacific and four related companies ("the Alberta-Pacific Group") obtained the protection of this court under the *Companies' Creditors Arrangement Act* (the "CCAA") in 1990. Those proceedings began with an order on November 22, 1990, staying all proceedings against the Alberta-Pacific Group, and culminated in an order on November 14, 1991, sanctioning an arrangement between those debtor companies and their creditors and continuing the stay of proceedings (at 5) as follows:

> This Court further orders that except as provided herein, the stay of proceedings in the Order of The Honourable Mr. Justice Skipp pronounced herein November 22, l990 and this Order be and is hereby confirmed and continued in accordance with the terms of the Plan as at the Closing Date;

Unfortunately, Alberta-Pacific did not invite Mr. Lindsay to participate in the meetings leading to the arrangement, although he was an ordinary creditor under the CCAA.

The facts

2 When Mr. Lindsay retired from Transtec Canada Limited ("Transtec") as its Senior Vice-President on December 15, 1988, he reached an agreement with it ("the Retirement Agreement"), under which he was to receive a monthly supplemental pension in the amount of $2,100 from June 15, 1990 until his death. The pension was indexed at 4% annually commencing June 15, 1991, and it contained an acceleration provision on default. All of this Alberta-Pacific guaranteed, as did other companies formerly in what counsel called "the Johnston Group."

3 Transtec defaulted on its agreement when it failed to make the payment due January 15, 1993. On that day Mr. Lindsay valued the obligation at $415,601.58, the cost of providing an annuity in the

amount agreed. He has demanded payment from Transtec and all other guarantors. None of them have paid. Thus, Mr. Lindsay seeks to commence an action against Alberta-Pacific.

4 Alberta-Pacific cannot explain why it failed to include Mr. Lindsay among those invited to attend the meetings authorized by an order made June 24, 1991. Alberta-Pacific is a holding company whose only asset is shares in Fraser-Surrey Docks Ltd. ("FSD"). FSD operates the Fraser Surrey Terminal under a licensing agreement with the Fraser River Harbour Commission. Terrence Johnston, the chief operating officer of FSD who swore in the CCAA proceedings that all creditors and claimants of all the petitioners had been given notice, says that he believed that all of the creditors of all of the petitioners were disclosed. The obligation to Mr. Lindsay appears not to have been noted in the auditor's report on the financial statements of Alberta-Pacific.

5 The evidence persuades me that the failure to notify Mr. Lindsay was due to oversight on the part of Mr. Johnston, those advising him, and those keeping and reviewing the records of Alberta-Pacific. The oversight may be one of the results of the financial difficulties of the Alberta-Pacific Group and the demands being made on their limited staff during the reorganization process. The evidence does not support the view that Alberta-Pacific made a deliberate decision, either that contingent creditors could not be caught by the CCAA, or if they could, that they should not be included in the re-organization process. The reasons in *Re Quintette Coal Ltd.* (1991), (sub nom. Quintette Coal Ltd. v. Nippon Steel Corp.) 56 B.C.L.R. (2d) 80 (S.C.) affirming that contingent creditors were subject to the CCAA were released on April l2th and reported on July 29th.

6 It is absolutely clear that had Mr. Johnston become aware of Mr. Lindsay's claim before November 14, 1991, Mr. Lindsay would have been asked to participate in the reorganization process. His claim would have been valued for voting and participation purposes. He would have been invited to participate in the meeting of the General Creditors whose approximately 190 members were owed about $900,000. Under the arrangement members of that group received about 27% of the value of their debt. Without any discount for the contingency of payment by others, Mr. Lindsay's claim would have represented about one-third of the class. For the purposes of these reasons I will assume that Mr. Lindsay lost the opportunity to settle his claim for $80,000, and certainly no more than $100,000.

7 Mr. Lindsay, although aware of the CCAA proceedings and of the possibility they would affect him, took only one step before November 14 to ensure that Alberta-Pacific was aware of his claim as a creditor. After receiving legal advice, he sent a double registered letter to the Corporate Secretary of Alberta-Pacific which it received on May 24, 1991. It was brief:

> Guarantee Agreement, Dated December 15, 1988, Pursuant to Retirement Agreement Between Transtec Canada Limited and *T. Barrie Lindsay, Dated December 15, 1988*.
>
> I understand that this company has made an application under the Company [sic] Creditors Arrangement Act and that a court order has been issued. As a beneficiary of this guarantee I am a creditor of this company and entitled to copies of the application, any court orders issued and any proposals submitted pursuant to court orders.

> Please arrange to forward copies of such application and court orders to me forthwith and to forward any proposals as they are submitted.
>
> Thank you for your immediate response.

8 When he did not receive a reply he concluded "that my possible future claim under the Guarantee would not be included in or affected by the CCAA application." He did not contact Alberta-Pacific or anyone on its behalf during the next 6 months, although he knew all of the senior executives of the Alberta-Pacific Group because FSD had operated as a division of Transtec during his tenure as senior vice- president of that company.

9 Nor did he contact Alberta-Pacific or anyone on its behalf after he read a newspaper article on October 31 saying that meetings of creditors had been adjourned because a Hong Kong investor was interested in purchasing the company. He did seek the advice of his lawyers, who obtained a copy of the Plan and advised him that he was probably not included. On the same day I made an order approving the Plan he instructed his solicitors to advise Alberta-Pacific about his claim. He wanted to take advantage of the moment to negotiate a settlement with the Hong Kong purchasers. His solicitors' delay until December 20 before contacting Alberta-Pacific is unexplained. On December 17 8808 Investments Ltd. ("8808") acquired the shares of Alberta-Pacific. His solicitors would have known of this closing because they acted for 8807 Investments Ltd., the unrelated company which acquired the Alberta-Pacific debt.

10 8808 came along as a white knight in August 1991 to make the reorganization arrangement possible. Without the investment of 8808, unsecured creditors of Alberta-Pacific would have received nothing. Coopers & Lybrand valued the assets on a liquidation basis at about $1.8 million. The secured creditors were owed over $13 million. The Fraser River Harbour Commission had reason to terminate the licence. Claims in negligence were outstanding for many more millions, although partially insured. 8808 provided $250,000 to satisfy the claims of all creditors in the category of General Creditors. Those funds were disbursed after January 4, 1992, in accordance with the terms of the arrangement on a pro rata basis to those General Creditors who filed Proofs of Claim.

11 Mr. Lindsay did not file a Proof of Claim although Russell and DuMoulin sent a copy of the Plan to his solicitors on December 31 as a result of John Fraser's conversation about Mr. Lindsay's claim with Mr. Wesik of that firm on December 20. The letter was terse. It read in its entirety:

> As you are aware we are solicitors for Alberta-Pacific. Your Mr. Fraser inquired of our Mr. Wesik as to the intentions of Alberta-Pacific with respect to the guarantee granted in favour of Barrie Lindsay. We advise that we have no instructions at this time as to the position of Alberta-Pacific.
>
> Enclosed is a copy of the Order of the Honourable Madam Justice Huddart made November 14, 1991 which Order attaches the Reorganization Plan of Alberta-Pacific as approved by the Court.

A Proof of Claim form was not enclosed.

12 Because Alberta-Pacific did not invite Mr. Lindsay to participate in the CCAA process and because Mr. Lindsay did not pursue his unanswered request for information before November14, 1991, Mr. Lindsay lost the opportunity to oppose the arrangement. Because he did nothing between November 14 and December 5, the effective date of the Plan, he gave up the opportunity to re-open the arrangement. Because he did not file a Proof of Claim he gave up the opportunity to share in the fund for General Creditors. Now he wants leave to commence an action on a guarantee that may result in a judgment for twice the amount other general creditors received. This seems a high price for Alberta-Pacific to pay for a simple management error and unfair to others in Mr. Lindsay's class of creditors.

13 Indeed, Alberta-Pacific argues that it is unjust and inequitable that it should be burdened with the defence of such a claim and, if judgment is granted, with execution proceedings. FSD is its only source of income. Its spokesperson, Vincent Cheung, says that, although FSD has become profitable because of the arrangement and a new licensing agreement with the Fraser River Harbour Commission, the secured creditors of Alberta-Pacific still hold security well in excess of the value of the FSD shares, which are the only asset of Alberta-Pacific. He fears the action and subsequent execution proceedings would affect the security and licensing agreements.

14 It is difficult for Mr. Cheung and for this court to understand how Mr. Lindsay could have failed to pursue a response to his letter of May 24. He was aware of the financial and business difficulties of the Alberta-Pacific Group. He understood the importance of the CCAA proceedings and that he might be affected by them.

15 He explains that he formed his belief that Alberta-Pacific did not intend to include him in the Plan on the basis of the legal advice he received. In April he learned from his solicitors that it was unlikely that the CCAA included contingent creditors. However, by October 31, the decision in *Quintette*, supra, would have been known to the Bar and I had considered it in a decision in this matter. His solicitors had a copy of the Plan before November 13, perhaps before the November 5th meeting of creditors. They advised him that the Plan probably did not include him. His own reading of the Plan then and later confirmed that advice because it did not include the word "contingent" with regard to creditors.

16 While he may have concluded that the Plan would not affect his contingent claim, his letter and note of November 14 to his solicitor demonstrate his understanding that they had the potential to do so and his understanding that he was a creditor under the CCAA.

17 It would have been a simple matter for Mr. Lindsay to enquire from any one of the senior executives of Alberta-Pacific if he was included, and equally simple for his solicitors to enquire of Fraser Beatty or Russell & DuMoulin if they were aware of Mr. Lindsay's claim. He could have gone to the meeting of General Creditors. But he did nothing until he instructed his solicitors on November 14 to advise Alberta-Pacific of his claim. Then they did nothing until December 20, 3 days after they knew the closing had taken place. The post-script to his note to his solicitors shows his thinking precisely:

> On reflection after our telcon, I assume that the possible likely defence of Alta Pacific et al to the guarantee which is brought to their attention is to go back to Court and attempt to get an order

> specifically wiping out the Guarantee — and that would be our time to defend our position? On balance, seems much better to possibly defend our position now if necessary rather than "X" months or years out — at least we know where we stand.

18 I must conclude that Mr. Lindsay (or his solicitors on his behalf) made considered deliberate decisions not to again notify Alberta-Pacific of his claim until after the approval order and then not until after the closing of the share purchase agreement on December 17.

19 The only sensible conclusion I can reach on the basis of the evidence before me is that Mr. Lindsay preferred not to participate in the CCAA proceedings and to take his chances later based on his understanding of the CCAA and the Plan. I also accept that he would have pursued his claim more diligently if he had understood that contingent claims were included in the CCAA and that his claim was included in the Plan.

20 That conclusion is reinforced by the contents of a letter Mr. Mair wrote to Mr. Lindsay on January 7, 1992, after receiving the response of Russell & DuMoulin to the verbal notice given December 20. The second paragraph reads:

> I believe we agree that the Russell & DuMoulin letter accomplishes part of our purpose in having what we suspect to be the new owners of Alberta-Pacific be made aware of the existence of the guarantee. Some time in the future we may have to face the issue of whether or not the court order affects Alberta-Pacific's obligation. I will have some preliminary work done on this.

21 Mr. Lindsay accepts that his understanding of the CCAA was wrong. But he continues to take the position that he is not bound by the CCAA arrangement because he is not a "creditor" of Alberta-Pacific within the meaning of the Plan. If he is bound, then he seeks to be exempted from the continuing stay of proceedings because he did not receive notice of the meetings of the General Creditors and did not receive a Proof of Claim with the letter of December 31, 1991.

Is Mr. Lindsay a creditor under the plan?

22 His counsel concedes that the beneficiary of a guarantee by a debtor company may be subject to a plan as a creditor with a "claim" as defined in s. 12 of the CCAA, or, as she put it, that a plan can capture contingent liabilities. That concession is consistent with the view Thackray J. expressed in *Quintette Coal Ltd.*, supra, when he said (at p. 88): "'Claim' is visualized with a future prospect, i.e, 'would be a debt' and in my opinion clearly envisages giving potential creditors a role in the C.C.A.A. proceedings." However, she argues, the Alberta-Pacific plan does not do so.

23 I disagree. Alberta-Pacific told the court at the confirmation hearing that it intended all creditors and potential creditors to be included in the arrangements. I thought then and think now that the Plan captures creditors with contingent claims.

24 The relevant definitions from art. 2.01 of the Plan are these:

"Claim" means a claim for an amount alleged by a person to be owed to it by, or any obligation or cause of action against, the Companies, or any of them, as at May 30, 1991, either:

(a) as set forth in a Proof of Claim which has either:

(i) been admitted by the Companies for all purposes, or

(ii) been determined by a Court of competent jurisdiction to be a proper obligation of the Companies, or any of them;

(b) which has been determined by the Companies to be a proper obligation of the Companies, or any of them;

(c) for which a valid Proof of Claim could have been filed with the Companies, but which Proof of Claim was not so filed;

together with all accrued and accruing interest which is expressly declared to be payable under this Plan.

"Class" means that group of persons constituting any of the following: Alberta Creditors, General Creditors, Spill Claimants, Fire Claimants, Bondholders and Related Creditors.

"Creditor" means a person having a Claim.

"General Creditor" means a Creditor not falling within any other Class, except the Commission, a Cargo Claimant and a Related Creditor, and includes a person who is Related to the Companies and who provided goods and services to the Companies, for the fair value of those goods and services supplied.

"Proof of Claim" means a proof of claim form as distributed by the Companies, properly completed and executed by a Creditor and delivered to the Companies within the time limits set out in this Plan or the Information Circular.

Article 3.03 dealt with the General Creditors. It included these provisions:

f) In the event that a General Creditor does not file a Proof of Claim with the Companies within the time provided for above, it shall have no further claim, cause or right of action against the Companies or any of them;

g) The stay of proceedings as set out in the November 22, 1990 order in the Proceeding shall remain in full force and effect as against General Creditors after the Final Order, subject only to Article IV hereof.

25 Mr. Lindsay is a person who could have filed a Proof of Claim within 30 days of the acceptance by the Registrar of companies of the order sanctioning the plan for filing. I understand that the Registrar accepted the order on or about December 5.

26 I cannot accept that the receipt of a Proof of Claim form as approved by the court on June 24, 1991, was a pre-condition to Mr. Lindsay having a "claim" under the Plan. The suggestion that the failure to deliver a Proof of Claim form to Mr. Lindsay precluded him from being included as a "creditor" under the Plan and thus from sharing as a "General Creditor" requires an unduly technical interpretation of the provisions of the Plan. In my view anyone reading the Plan would consider that it included among those entitled to share as a General Creditor someone with a contingent claim capable of being valued as it would be on a bankruptcy.

27 The real issue in this application is what effect, if any, a plan can have on an unsecured creditor who is not invited to participate in the process of arriving at a compromise because of inadvertence, yet appears to fall within a class for whom provision is made in the plan. That question does not appear to have been considered by any court.

How does the plan affect Mr. Lindsay?

28 The final order sanctioning the Alberta-Pacific Plan provided that it was "binding upon the Petitioners, the Creditors, Claimants of the Petitioners and any person having a Claim in accordance with its terms." That order also included a declaration that "all requisite notices have been given and Meetings held for the purpose of consideration of the Plan by the Creditors and Claimants of the Petitioners." The requisite notices were those authorized by the order of June 24, 1991, in the exercise of discretion given this court by s. 4 of the CCAA.

29 The failure to adhere rigidly to such an authorizing order was considered fatal to a claim to bind an unsecured creditor in *Quebec Steel Products (Industries) Ltd. v. James United Steel Ltd.* (1969), 5 D.L.R. (3d) 374 (Ont. H.C.). In obiter (at p. 382) Parker J. held that "even if the plaintiff were an unsecured creditor, he would not be bound by the compromise because of the failure to give the notice required by statute." He appears to have read the requirements of the order made under s. 3 (now s. 4) of the CCAA as a "statutory requirement" requiring rigid adherence because there was no provision comparable to s. 71(5) of the *Bankruptcy Act*, that creditors without notice should be bound. He did not consider the purpose of the Act to be sufficient to import such a provision. Nor did he find sufficient protection for those inadvertently excluded from the process in the right under s. 13 (then s. 12), of "any person dissatisfied with an order or a decision made under this Act" to seek leave to appeal. There is no reference to the provisions of s. 11 of the CCAA which permit the court a continuing role in the supervision of the plan under which a debtor company, which has obtained the court's protection, is allowed to continue to operate although insolvent.

30 Section 11 provides:

> Notwithstanding anything in the *Bankruptcy Act* or the *Winding-up Act*, whenever an application has been made under this Act in respect of any company, the court, on the application of any person interested in the matter, may, on notice to any other person or without notice as it may see fit,
>
> (*a*) make an order staying, until such time as the court may prescribe or until any further order, all

> proceedings taken or that might be taken in respect of the company under the *Bankruptcy Act* and the *Winding-up Act* or either of them;
>
> (*b*) restrain further proceedings in any action, suit or proceeding against the company on such terms as the court sees fit; and
>
> (*c*) make an order that no suit, action or other proceeding shall be proceeded with or commenced against the company except with the leave of the court and subject to such terms as the court imposes.

31 Section 4 provides:

> Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

32 I have difficulty reading that provision as a "statutory requirement". A plain reading suggests simply the conferring on the court of a discretion to direct the manner in which a meeting may be called. Presumably a court is to exercise that discretion judicially, to take account of the purpose of the CCAA, to consider the variety of interests being served by the CCAA, and to arrive at a fair direction — one that will permit the debtor company and, inter alia, its unsecured creditors to meet to discuss its continuation, although insolvent, in their mutual best interests, but also in the interest of the broader community the CCAA was designed to serve. It cannot be fair to those who meet and reach a compromise that those who are inadvertently omitted from the process, but whose interests bring them within a class for which provision is made in the plan, can be allowed to make a claim that could endanger the continuing existence of the debtor company. It would be even more unfair if a creditor of whose existence the company might not be aware could make such a claim.

33 In *Quebec Steel* the applicant was seeking to sue on a contract which the receiver of the debtor company had repudiated (wrongfully in the opinion of Parker J.) on March 25, 1965, before the court ordered the debtor company to give notice to all unsecured creditors as of January 17, 1965. The debtor company had not given notice of the meeting of creditors to any person having a contract with it, who might have a claim for damages for breach of contract.

34 It may be that the failure to give notice to an entire class of unsecured creditors merits the result Parker J. reached. However, I cannot accept that the inadvertent failure to give notice of a meeting of creditors to one unsecured creditor should be allowed to endanger the continuing existence of a debtor company when the CCAA allows fairer solutions.

35 It is unfortunate that the process proposed by the Alberta-Pacific Group did not provide for notice to all unknown creditors by advertisement. Such a direction is commonly given, supplementary to an order providing for notice by prepaid mail to the known creditors. The process did provide for such

substitutional notice to those who were claiming in negligence. A creditor who failed to see such an advertisement would likely be considered bound by the Plan as would someone who did not receive a notice mailed to it. But could not such a creditor look to ss.11 and 13 to provide a vehicle for obtaining relief if the result was inequitable in all the circumstances? If such a creditor, why not an inadvertently uninvited creditor with knowledge of the proceedings?

36 As Mr. Justice Thackray reminded us in *Quintette*, the Western Canadian approach to interpretation of the CCAA is designed to arrive at an economically sensible result. In my view a strict application of the approach of Parker J. could lead to economically foolish results. The facts on this application provide an excellent example of how foolish.

37 The Ontario Court of Appeal is of the view that the supervising court has a broad discretion to make such exceptions to the order restraining proceedings against the debtor company as fairness demands, before and after an arrangement is sanctioned, although it also recognizes that a consensual agreement must be respected and not interfered with lightly. In *Algoma Steel Corp. v. Royal Bank* (1992), 11 C.B.R. (3d) 11, 8 O.R. (3d) 449, 93 D.L.R. (4th) 98, that court permitted a creditor with notice of the creditors' meetings, whose claim had been valued at $1, to commence proceedings against the debtor company, when its s. 12 (now s. 13) appeal of the valuation placed on its contingent claim failed. The court recognized that its order would affect a consensual plan that had been sanctioned by the court. It found in s. 11(*c*) the authority to do so when the reasons were compelling and an order could be structured that would not prejudice the interests of the company or the creditors. The effect of its order was to permit a tort claimant to access the debtor company's product liability insurance policy.

38 In reaching that conclusion, the court (C.B.R. at l8) considered a hypothetical situation suggested to it in argument and concluded:

> Suppose a visitor had become quadriplegic as a result of an injury on the premises of Algoma under circumstances in which Algoma as occupier might be liable and suppose Algoma's potential liability was insured against by an appropriate insurance policy. To restrict the injured person, a *known designated unsecured creditor* under the terms of the plan of arrangement, to his or her compromised claim valued, without a trial, in a summary proceeding, would, in our view, be unacceptable. The actual situation before the court is analogous.
>
> (emphasis added)

39 I suggest a similar result would have been reached had the hypothetical case concerned an unknown and unascertainable tort claimant.

40 The logical conclusion of the argument made for Mr. Lindsay is that any unknown or unascertainable creditor is not bound by any arrangement for the simple reason that such creditor did not receive notice. He considers that conclusion follows from the view taken of notice by Benoit J. in *Québec (Sous-ministre du Revenu) c. Wynden Canada Inc.* (1982), 47 C.B.R. (N.S.) 76 (Qué.) [hereinafter "*Wynden*"].

41 There, the provincial Crown, a preferred creditor whom Benoit J. found to be a secured creditor under the CCAA, was given leave to execute on a judgment it had obtained for unpaid deductions at source, and to initiate proceedings with respect to additional deductions at source which had come due subsequent to that judgment. The judgment was obtained on March 15, 1982; an order staying proceedings until May 18 was made on March 30; and an order approving an arrangement with the hypothecary creditors was approved on July 15. On that same day the judge ordered a further stay of proceedings and ordered the calling of a meeting of ordinary creditors. On July 27 the court approved an amended arrangement among the secured creditors and an arrangement among unsecured creditors and continued the stay of proceedings.

42 Wynden invited only the class of secured creditors constituted by its hypothecary creditors to a meeting. It sent a notice of the meeting of ordinary creditors to be held on July 23, 1982 to the Deputy Minister, who received it on July 29. Benoit J. concluded that Wynden's failure to invite the Deputy Minister to the meeting of secured creditors implied that the amounts due him would be paid when due. He held that a debtor company which wants to re-organize under the CCAA is responsible for analyzing its situation, preparing a proposal, and submitting it to those classes of creditors who have the capacity to prevent its continuing in business. Thus, when it fails to submit its proposal to a class of creditors, it is saying that it intends to meet its obligations to the members of that class. In his view, the order sanctioning the arrangement with the hypothecary creditors did not apply to the Deputy Minister because he was not such a creditor. Because he was not an ordinary creditor, the order sanctioning the arrangement among ordinary creditors did not apply to him.

43 In these circumstances Benoit J. said that he did not need to consider whether the Deputy Minister's vote would have prevented the approval of the proposal submitted to the ordinary creditors in deciding whether or not to grant leave to execute the judgment and commence proceedings for the additional amounts owing. He authorized the Deputy Minister to make claims for specific amounts against Wynden because neither plan applied to the Deputy Minister as a non-hypothecary secured creditor.

44 The *Wynden* case does not stand for the proposition that unknown and unascertainable creditors cannot be bound by an arrangement if they come within a class of creditors to which the plan applies. Rather, it says that the failure to make a proposal to a class of secured creditors, whether deliberate or inadvertent, necessarily implies that the arrangement does not apply to members of that class. The judge's comment, that he need not consider whether the Deputy Minister's vote could have changed the result at the meeting of ordinary creditors, undoubtedly refers to a question he might have considered had he agreed with Wynden that the Deputy Minister was an ordinary creditor who had received late notice.

45 Thus, he did not need to consider the issue before me: whether a creditor, a member of a class clearly contemplated by the Plan, inadvertently not invited to a meeting of that class, is bound by the provision in the Plan that is intended to extinguish his claim. Alberta-Pacific relies on arts.3.03(f) and (g) of the Plan, supra.

46 If Mr. Lindsay had been given proper notice of the meeting of ordinary creditors he would have been bound by the Plan and the consequence of his failure to file a Proof of Claim would have been the extinguishment of his debt. That appears to be the result of s. 6 of the CCAA and the terms of the Plan. That result fits the rule by majority consensus which is the essence of the CCAA.

47 Section 6 of the CCAA provides that an arrangement, once sanctioned by the court, is binding on "all the creditors or the class of creditors, as the case may be" and on the company:

> Where a majority in number representing three-fourths in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings ...

48 The section does not require that those not present be taken into account in determining either the majority in number or the three-fourths in value. It does not prevent those who fall within a "class of creditors" contemplated by the Plan, but who do not attend the meeting of that class from sharing in any benefit members of that class may obtain from the Plan. This result is not unreasonable. The known claimants will have considered the possibility of such unknown claims in deciding whether to vote to approve the Plan. The unknown claimant will be accepting a benefit under the Plan in full satisfaction of its claim. However, it is not reasonable that a plan approved at a meeting of which such an unknown claimant has not been given notice can extinguish that claimant's debt.

49 There is nothing in the CCAA to suggest that result. Such a result cannot be implicit in a statute that relies on consensus among creditors.

50 Mr. Lindsay is bound by the stay of proceedings which protects the Plan but his claim is not extinguished by the Plan. That stay of proceedings was included in the order of November 14, 1991, in these words:

> ... No person who is a member of any class shall have any claim, right or cause of action against the companies or any of them for any claim, act or omission occurring on or before May 30, 1991 other than as provided for in the plan and any such claim, right or cause of action shall be permanently stayed, save and except as otherwise provided in the plan ...

51 It is evident from my earlier comments that I am of the view that the court may give Mr. Lindsay leave to commence an action even where such an action will have the effect of varying the Plan. The question is whether or not the stay should be lifted for Mr. Lindsay. It is also evident from my earlier comments that I do not think it is necessarily inequitable for a company seeking to reorganize itself under the CCAA to try to protect itself from unknown and unascertainable claims, or that every inadvertence should be allowed to defeat an arrangement which permits a company to continue to operate, while insolvent.

52 The question is whether the facts of this case are such that Mr. Lindsay should be exempted from

the stay of proceedings that allows that continued operation, and if so, on what terms.

Should leave be granted under s. 11?

53 The interests of Alberta-Pacific, and therefore 8808, continue to be protected by the Plan and the order staying proceedings included in the sanction order. The authority for a court to stay the commencement of proceedings "on notice to any other person or without notice as it may see fit" comes with this proviso "except with the leave of the court and subject to such terms as the court imposes." Thus, a creditor will always be at liberty to seek leave of the court to commence an action against a debtor company in the face of a general stay of proceedings unless the debt has been satisfied by the Plan. Mr. Lindsay's debt has not been satisfied by the Plan.

54 Alberta-Pacific argues that any derogation from the stay of proceedings that affects the Plan must be governed by equitable principles, and that the equities that should be considered are those between the two innocent parties: 8808 and Mr. Lindsay. Mr. Lindsay says that only the position of Alberta-Pacific should be considered. In his view, the mistake of Alberta-Pacific should not be visited on him.

55 Counsel could not direct me to any authorities setting down the factors that should structure the exercise of my discretion. However, some can be discerned from those to which I have been directed for other purposes: the extent of the creditor's actual knowledge and understanding of the proceedings; the economic effect on the creditor and the debtor company; fairness to other creditors; the scheme and purpose of the CCAA; the terms of the Plan.

56 The first factor to be considered in this case is the actual knowledge and understanding Mr. Lindsay had of the proceedings under the CCAA. It is repugnant to the spirit of the CCAA that persons with knowledge and understanding of the proceedings can avoid the effect of an arrangement by seizing upon a lack of delivery of the notice authorized for whatever advantage they may gain over other creditors.

57 In *Quebec Steel* the decision not to notify persons who might have breach of contract claims was deliberate. The uninvited creditors had no knowledge of the CCAA proceedings. In *Wynden* the court was satisfied that the plan was not directed at the class of creditors to which the plaintiff belonged.

58 Alberta-Pacific agrees that the court may infer from a debtor company's deliberate decision not to give notice of a meeting to a creditor that such a creditor is not bound by the Plan, but says that inadvertence does not permit that inference to the court or to a creditor. That may be. But a creditor cannot know the reason he was not invited to participate in an arrangement unless he has reason to believe that he is included in the Plan.

59 Alberta-Pacific considers that Mr. Lindsay had sufficient knowledge and understanding of the proceedings to permit him to participate in them, that he made a deliberate choice not to do so after receiving legal advice from solicitors who had considered the Plan, and that there is no unfairness in requiring him to take the consequences of that choice.

60 It reminds the court that neither the CCAA nor the order of June 24, 1991, says anything about the effect of a failure to give or receive notice of meetings, but that there are strong reasons for favouring the policy made explicit in the *Bankruptcy Act*, that those without notice are bound. Counsel for Mr. Lindsay replies that the *Bankruptcy Act* requires that notice of the bankruptcy be advertised and that a debtor company seeking the protection of the CCAA has the option of giving notice by advertising, if the court approves. Alberta-Pacific did not ask for such an order with regard to General Creditors.

61 At the root of the problem in this case is Mr. Lindsay's subjective belief that the failure to reply to his May 24 letter was deliberate, a subjective belief I consider to have been unreasonable in the circumstances I described earlier, and a belief upon which most experienced business people are unlikely to have risked reliance when information could have been obtained and he could have participated so easily. This is particularly so because Mr. Lindsay was not an ordinary trade creditor. His evidence about his relationship with the senior officers and directors of Alberta-Pacific is inconsistent, but it is clear that he knew them well.

62 But his knowledge and understanding of the proceedings is only one fact among all the facts relevant to the equities that must be balanced in reaching a decision as to how to exercise the discretion given by s. 11. The economic effect on the creditor and the company must also be considered.

63 It was seen as fair in *Algoma Steel* to permit a person who had participated in the CCAA proceedings to make a further claim that would not affect the company or its creditors, but the Ontario Court of Appeal was firm that such claims would be permitted only for "compelling reasons" and only when the effect on the arrangement is "minor".

64 Mr. Lindsay's claim as now put forward will have a major effect on Alberta-Pacific. If his claim were restricted to the amount he would have recovered if he had filed a Proof of Claim, Alberta-Pacific would be required to pay between $80,000 and $100,000 more for the benefit it perceived in purchasing a continuing reorganized business. His claim would be subordinate to that of the secured creditors (8807) and might trigger the assertion of their rights. Unlike the situation before the court in *Algoma Steel*, Mr. Lindsay did not participate in the proceedings and have his claim valued at $1; nor is there insurance available to indemnify Alberta-Pacific for whatever may be found owing to him.

65 Alberta-Pacific argues that modern CCAA reorganization plans contemplate the acquisition by third parties of the re-organized debtor company, frequently to the benefit of general creditors, employees, and the general community. I accept that courts should recognize this development. Tax losses are purchased. Liabilities are assumed. There is a need for certainty that all claims have been compromised.

66 This is an important factor in this case because it is absolutely clear that no general creditor would have received anything on a bankruptcy or liquidation by a receiver. 8808's offer, founded on the proposition that all creditors were included in the Plan, came just in time to avert such a result. An extension of the stay of proceedings had been granted only to protect those claiming in tort. All parties

were aware that another extension of the stay was unlikely. In a sense 8808's offer gave value to Mr. Lindsay's contingent claim it would not otherwise have had, even as it gave value to the claims of other unsecured creditors.

67 In most situations this policy reason will not be as persuasive as considerations of fairness to creditors. Under the CCAA those who seek its protection have the responsibility of developing a process that gives their unknown creditors or those whom they have by inadvertence missed, an opportunity to consider a proposal that is directed at them. Notice by advertisement has been known to the insolvency bar for many years. It was used in this case with regard to the Spill Claimants.

68 In the circumstances of this case however this objective is of less importance. Had Mr. Lindsay been invited to participate in the process by advertisement he would have had no more information than that already in his possession. The only real difference is that he would not have been able to defend his position that he was not included in the Plan. Even Mr. Lindsay recognized on November 14 that the proposed purchasers would attempt to include him in the Plan if they became aware of his claim. Indeed, he seems to have weighed the possible consequences and opted to have his solicitors give that notice when his bargaining power was at its best, before the closing. However, what may have been in his mind at that time cannot be weighed with what happened. His solicitors waited until after the closing to tell the purchasers about this contingent claim.

69 Similarly, 8808 must accept the consequences and manner of its solicitors' delay in responding to the verbal information. Its solicitors could have responded that Mr. Lindsay's claim was included and enclosed a Proof of Claim. The letter of December 31 says that they have no instructions. It is somewhat surprising that instructions could not be obtained between December 20 and December 31 about a claim of such obvious importance to the Plan. At the very least one would have thought that a Proof of Claim form could have been enclosed. After all, the author of the letter was the very person who had appeared at the sanction hearing to ensure that the court understood that all unascertained claims were meant to be included. However, the letter was directed to lawyers, not to Mr. Lindsay. They would be aware that a Proof of Claim form could be obtained by simple request and they were in a position to form their own opinion as to the rights of Mr. Lindsay. Moreover, Mr. Mair's letter of January 7 is consistent with his not having drawn any conclusions from the December 31 letter.

70 In this case there will be no effect on other creditors who settled their claims. If Mr. Lindsay is granted leave to sue, the effect of the order will be to require Alberta-Pacific to pay from its post-arrangement revenue or to otherwise obtain additional money to satisfy Mr. Lindsay's claim and to deal with any problem that may arise with its secured creditors. This effect will be felt by the shareholders of Alberta-Pacific, the very persons who are responsible for any value Mr. Lindsay's claim may have.

71 The final factor to be considered is the amount of that claim. In the circumstances of this case, there is no justification for seeking the full amount of the claim. Had Mr. Lindsay's claim not been included in the Plan then leave might have been given to sue for the full amount. While I have found that Mr. Lindsay was included in the Plan, I have also concluded that he was not invited to participate in the proceedings by inadvertence, that he had full knowledge of the proceedings at the critical times, and

that he made a deliberate decision to rely on his interpretation of the Plan at all material times. These facts indicate that I need consider only the amount he lost by failing to participate in arriving at my conclusion as to whether or not to grant leave. While that amount remains to be determined, it is unlikely to exceed $80,000 plus whatever interest may seem appropriate in all the circumstances.

72 The conclusion I have reached after weighing these factors is that the fair and just result in this case must be the refusal to grant leave.

73 Those who participate in CCAA proceedings must be assured that there are not others waiting outside them for a mistake to be made of which they can take advantage. Those who purchase the reorganized companies must be assured of whatever certainty a court can ensure in its supervision of these voluntary proceedings.

74 While Alberta-Pacific can be criticized in some aspects of its behaviour in these proceedings, Mr. Lindsay had every bit of knowledge he needed to make a decision about whether or not to participate in them. He chose to remain outside the proceedings until December 20, 1991, and thereafter, until it was too late. I do not think it would be fair to Alberta-Pacific or to 8808 for him to be now allowed to participate beyond this application where he had the opportunity to defend the interpretation of the Plan on which he chose to rely in making his decisions. A CCAA proceeding is not a stage for an individual creditor to try to ensure the best possible position for himself. Whatever it may have been in past years, it is now a stage where creditors are to participate in the collective enterprise of keeping a company going for the benefit of employees, customers, and the general community, as well as the creditors. As in bankruptcy proceedings, it is not unfair that a creditor who attempts to gain an advantage for himself should find himself disentitled to recover anything.

75 Counsel may address the issue of costs at a mutually appropriate time.

Application dismissed.

TAB 21

1995 CarswellBC 77
British Columbia Court of Appeal

Lindsay v. Transtec Canada Ltd.

1995 CarswellBC 77, [1995] 4 W.W.R. 364, [1995] B.C.W.L.D. 707, 2 B.C.L.R. (3d) 304, 31 C.B.R. (3d) 157, 53 A.C.W.S. (3d) 992

Alberta-Pacific Terminal Ltd., Fraser Surrey Docks, Pacific Terminals Ltd., Johnston Marine Terminals Ltd., Johnston International Service (Hong Kong) Ltd. (Petitioners) and T. Barrie Lindsay (Plaintiff / Appellant)

Hollinrake J.A. [in Chambers]

Judgment: February 2, 1995
Docket: Doc. Vancouver CA019481

Counsel: *S. Schacter* and *K. Lu*, for appellant.
R.N. Millar, for respondent.

Subject: Corporate and Commercial; Insolvency

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay of proceedings

Corporations — Arrangements and compromises — Companies' Creditors Arrangement Act — Claims — Plaintiff creditor aware of, although not given proper notice of, reorganization proceedings — Plaintiff choosing not to participate in proceedings before court approving reorganization plan — Appeal court refusing leave to appeal decision of chambers judge refusing leave to sue — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Corporations — Arrangements and compromises — Companies' Creditors Arrangment Act — Stay of proceedings — Effect of stay — Order approving plan under Companies' Creditors Arrangement Act staying all "claims" — Plan defining "claim" as including "any obligation" — Policy and purpose of legislation requiring court to interpret "claim" to include both present and future obligations — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36. "claim" to include both present and future obligations — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

A Co. guaranteed certain pension benefits to the plaintiff. A Co. and four related companies sought protection under the *Companies' Creditors Arrangement Act*. The plaintiff was not served with the documentation leading to the meeting which in turn led to a plan under the Act. The order approving the plan stayed all "claims," which was defined to mean a claim for an amount alleged to be owed or "any obligation." The plaintiff applied for leave to commence an action against A Co. The application was dismissed and the plaintiff applied for leave to appeal.

Held:

The application was dismissed.

When one considers the policy and purpose of the Act, the words "any obligation" had to be interpreted to accord with that policy and purpose. To interpret the words in the definition of "claim" in the plan to not refer to the future as well as present obligations would be contrary to the purpose of the Act. As for the lack of service upon the plaintiff, it was open to the chambers judge to conclude as she did that the plaintiff preferred not to participate in the proceedings under the Act.

Application for leave to appeal judgment reported at (1994), 28 C.B.R. (3d) 110, 99 B.C.L.R. (2d) 73, [1995] 2 W.W.R. 404 (S.C.), dismissing application for leave to commence action against company granted protection under *Companies' Creditors Arrangement Act*.

***Hollinrake J.A.* [In Chambers] (orally):**

1 This is an application for leave to appeal a decision of a chambers judge [(1994), 28 C.B.R. (3d) 110 (B.C.S.C.)] in which she refused leave to the appellant to commence an action against Alberta-Pacific Terminals Ltd. Leave was required because Alberta-Pacific and four related companies obtained the protection of the Court under the *Companies' Creditors Arrangement Act* ("C.C.A.A.") in 1990.

2 The first order made in this matter was made on November 22, 1990 and contained this clause:

> THIS COURT FURTHER ORDERS THAT all proceedings taken or which might be taken against the Petitioners, or any of them, under the *Bankruptcy Act* (Canada) or the *Winding-Up Act* (Canada) shall be stayed until further order of this Court upon two days notice to the Petitioners and that further proceedings in any action, suit or proceeding commenced by any person, firm or corporation against any of the Petitioners be stayed until further Order of this Court upon two days notice to the Petitioners, that no action, suit or other proceeding may be proceeded with or commenced against any of the Petitioners by any person, firm or corporation except with leave of the Court upon two days notice to the Petitioners and subject to such terms as this Court may impose and that the right of any firm, firm or corporation to realize upon or otherwise deal with any right or property of the Petitioners be and the same is postponed on such terms and conditions as this Court may deem proper.

3 The order approving the plan under the C.C.A.A. was made November 14, 1991, and contained these clauses:

> THIS COURT FURTHER ORDERS THAT except as provided herein, the stay of proceedings in the Order of the Honourable Mr. Justice Skipp pronounced herein November 22, 1990 and this Order be and is hereby confirmed and continued in accordance with the terms of the Plan as at the Closing Date;
>
> . . . . .
>
> THIS COURT FURTHER ORDERS THAT, subject to the terms of any agreement between the

> Petitioners and the Alberta Creditors, after the Closing Date, no person who is a member of any Class shall have any claim, right or cause of action against the Companies, or any of them, for any Claim, act or omission occurring on or before May 30, 1991, other than as provided for in the Plan, and any such claim, right or cause of action shall be permanently stayed save and except as otherwise provided in the Plan, however these provisions shall not apply to any such claim, right or cause of action of the Fraser River Harbour Commission except as a Spill Claimant under the provisions of the Plan.

4 The definition of claim in the plan as approved by the Court is that it "means a claim for an amount alleged by a person to be owed to it by or any obligation ... (c) for which a valid proof of claim could have been filed ... but which proof of claim was not so filed."

5 In denying leave to Mr. Lindsay the chambers judge found that he was a creditor under the plan. That finding is attacked on this leave to appeal application as being wrong in law.

6 Mr. Lindsay says he is not now nor ever was a creditor under the plan and consequently cannot be bound by its terms. Thus, he says, he should be exempt from the blanket stay above referred to. What it comes down to on this issue is whether "any obligation" in the definition of "claim" in the plan encompasses future obligations. The fact is that when the plan was approved by the Court, Mr. Lindsay's principal debtor was not in default and his pension benefits were being paid to him. It was some months after the plan was approved that Mr. Lindsay's primary debtor defaulted on its payments to him at which time he looked to the guarantor, Alberta-Pacific Terminals Ltd. At no time did Mr. Lindsay file a proof of claim.

7 When one considers the policy and purpose of the C.C.A.A. I think the interpretation of the words "any obligation" must be such as to accord with that policy and purpose. I am satisfied that to interpret the words in the definition of "claim" in the plan to not refer to the future as well as present obligations would be contrary to the purpose of the C.C.A.A. and even more importantly would be contrary to the purpose of the plan itself as seen from the words in the plan. I conclude that the words "any obligation" in the definition of "claim" in the plan encompassed the claim Mr. Lindsay now asserts against Alberta-Pacific Terminals Ltd. as guarantor. I think the chambers judge was right in concluding that Mr. Lindsay was a creditor under the plan and bound by its terms.

8 A second ground of attack on the reasons of the chambers judge was her conclusion on the issue of the significance of Mr. Lindsay not being served — as he was not — with the documentation leading to the meetings which in turn led to the plan under the C.C.A.A. Mr. Lindsay says that not being served with the material that led to the plan he cannot as a matter of law be bound by it. The chambers judge approached this issue on the basis of the evidence leading her to conclude [p. 80] that "Mr. Lindsay preferred not to participate in the CCAA proceedings and to take his chances later based on his understanding of the CCAA and the Plan". The chambers judge approached this issue of service as one of notice and on the evidence I think it was open to her to do that and conclude as she did.

9 I can see nothing in the reasons of the chambers judge to conclude that there was any error in

principle in the conclusion she reached and the reasons she gave for those conclusions. With respect to the submissions of the appellant I am unable to see any ground that would permit this Court to interfere with the discretion exercised by the chambers judge in refusing leave as she did. I can see no error in principle which could lead to a conclusion that her discretion was wrongly exercised.

10 As can be seen by the above I have concluded this application for leave to appeal must be dismissed.

Application dismissed.

TAB 22

2016 ONSC 669
Ontario Superior Court of Justice [Commercial List]

Mid-Bowline Group Corp., Re

2016 CarswellOnt 1041, 2016 ONSC 669, [2016] O.J. No. 434, 262 A.C.W.S. (3d) 843

In the Matter of the Business Corporations Act, R.S.O. 1990, c. B.l6, as amended, Section 182

In the Matter of Rule 14.05(2) of the Rules of Civil Procedure

In the Matter of a proposed arrangement involving Mid-Bowline Group Corp., its shareholders and option holders, Shaw Communications Inc., and 1503357 Alberta Ltd

Newbould J.

Heard: January 25, 2016
Judgment: January 26, 2016
Docket: CV-15-11238-00CL

Counsel: Kent E. Thomson, Matthew Milne-Smith, for Applicant
Rocco DiPucchio, Lauren P.S. Epstein, for Catalyst Capital Group Inc.
Michael Schafler, Ara Basmadjian, for Shaw Communications Inc.
Robert A. Centa, for Brandon Moyse

Subject: Civil Practice and Procedure; Corporate and Commercial; Estates and Trusts

Headnote

Business associations --- Changes to corporate status — Arrangements and compromises — Under general corporate legislation

Company M Corp. owned subsidiary WIND, large wireless earner — C Inc. had claim against one of shareholders of M Corp., W Inc., claiming it acquired confidential information that belonged to C Inc., which it used to acquire interest in WIND — Proposed plan of arrangement contemplated that subsidiary of S Inc. would acquire all of outstanding shares of M Corp. for approximately $1.6 billion — Plan of arrangement provided that S Inc. would acquire shares of M Corp. free and clear of any claim against those shares, including shares of W Inc., but C Inc. continued to have right to claim against W Inc. for profits it earned from sale — M Corp. applied for approval of proposed plan of arrangement pursuant to s. 182 of Business Corporations Act — Application granted — Statutory procedures of s. 182 of Act had been met and application was put forward in good faith — C Inc. had purposely delayed its claim against W Inc. for tactical reasons — Sale to S Inc. clearly benefited M Corp. and its shareholders, as sale was at enormous price and if sale did not close there was no guarantee that another sale would come close to $1.6 billion — Selling W Inc.'s interest in M Corp. free of any constructive trust claim by C Inc. was required for sale to happen — Court had jurisdiction under s. 192 of Act to make order that compromised rights of C Inc., who was stakeholder and not equity owner at this time — So far no confidential information of C Inc. that was provided to W Inc. had been disclosed and claim of C Inc. appeared weak — Taking all interests into account, including those of C Inc., plan of arrangement was fair and reasonable.

APPLICATION by company for approval of proposed plan of arrangement.

***Newbould J.*:**

1 This is an application by Mid-Bowline Group Corp. pursuant to section 182 of the Ontario Business Corporations Act for approval of a proposed plan of arrangement. The arrangement contemplates that a subsidiary of Shaw Communications Inc. will acquire all of the outstanding shares of Mid-Bowline, the owner of WIND Mobile Corp., for approximately $1.6 billion.

2 WIND is a private Ontario company. It is Canada's fourth largest wireless earner, currently serving approximately 940,000 subscribers in British Columbia, Alberta and Ontario. WIND was formed in 2008. The majority of its voting shares were held by Globalive Capital Inc. ("Globalive Capital"), while the majority of its total equity was held by Orascom Telecom Holdings S.A.E. ("Orascom"). In 2011, Orascom's majority equity stake in the company was acquiredindirectlyby VimpelCom Ltd.("VimpelCom").

3 Mid-Bowline is an Ontario private, closely-held company that indirectly owns 100 percent of WIND. The shareholders of Mid-Bowline include, among others, funds managed by West Face Capital Inc. ("West Face"), Tennenbaum Capital Partners, LLC (Tennenbaum"), Globalive Capital and 64NM Holdings, LP (together the "Investors").

4 The plan is opposed by The Catalyst Capital Group Inc. by reason of its claim that one of the shareholders of Mid-Bowline, West Face, acquired confidential information belonging to Catalyst that was used by West Face in its acquisition of an interest in WIND through Mid-Bowline. Catalyst claims a constructive trust over the Mid-Bowline shares owned by West Face. The terms of the plan of arrangement would release any constructive trust claim that Catalyst has over the shares of Mid-Bowline owned by West Face that are being sold to Shaw.

5 The plan of arrangement, as amended, provides that Shaw shall acquire the shares of Mid-Bowline free of any claim against those shares, including the shares of West Face, but that Catalyst shall continue to have the right to claim against West Face the profits earned by West Face from the sale to Shaw. That is, the claim by Catalyst for a constructive trust over the shares of Mid-Bowline owned by West Face is released in order to permit Shaw to acquire the shares of Mid-Bowline free of any claim against those shares but the right of Catalyst to pursue its claims for the profit earned by West Face on those shares survives.

6 The only reason that this transaction is proceeding by way of plan of arrangement is to provide Shaw with clear title to the shares of WIND. Had this not been required because of the Catalyst claim, the shareholders of Mid-Bowline were prepared to proceed by a share purchase agreement without any requirement of Court approval. During negotiations with Shaw, Mid-Bowline disclosed the claim of Catalyst to a constructive trust over the shares of Mid-Bowline owned by West Face. Shaw made clear that it would not acquire WIND unless it acquired the shares free and clear of any claim to them.

7 So far as the requirements of section 182 of the OBCA are concerned, I am satisfied that the statutory procedures in section 182 have been met and that the application has been put forward in good faith. Trying to deal with the Catalyst claim in the manner proposed by Mid-Bowline in the circumstances of this case was not, as claimed by Catalyst, an exercise of bad faith. It was put forward in an open and transparent manner and designed to protect any legitimate right that Catalyst may have.

8 The third requirement of section 182 is that the arrangement is fair and reasonable. Catalyst says that it is not and that this Court has no authority under section 182 to exterminate the substantive or procedural rights of third parties.

The Catalyst claim and its background

9 In 2013, VimpelCom decided to divest its interest in WIND, and a number of interested potential buyers came forward. Ultimately, in September 2014, the Investors, acting through Mid-Bowline, acquired VimpelCom's debt and equity interest in WIND. The ownership structure of WIND was subsequently reorganized so that WIND became an indirect, wholly-owned subsidiary of Mid-Bowline.

10 Catalyst was a bidder for WIND and from July 23 to August 18, 2014 VimpelCom conducted exclusive negotiations with Catalyst for Catalyst to buy WIND. No agreement was reached.

11 The Catalyst litigation arises out of West Face's hiring of Brandon Moyse, then a 26 year-old junior analyst at Catalyst. Mr. Moyse applied for a job at West Face in March 2014 and received an offer of employment on May 26, 2014. He started work at West Face on June 23, 2014 and ceased working there three and a half weeks later, on July 16, 2014. Mr. Moyse was not recruited or otherwise solicited for employment by West Face. He applied to West Face on his own initiative.

12 At the time of Mr. Moyse's hiring, West Face had already been pursuing an acquisition or financing of WIND for over six months, since November 2013. It was well-known throughout the industry that VimpelCom wanted to sell its interest in WIND because of the well-publicized regulatory challenges it had faced as a foreign owner. West Face conducted due diligence and made a series of offers to VimpelCom before Mr. Moyse was ever hired.

13 Upon learning of Mr. Moyse's move to West Face, Catalyst immediately advised West Face of its position that Mr. Moyse was prohibited from working for West Face as a result of a non-competition clause in his employment agreement. Catalyst also advised West Face that Mr. Moyse had received access to confidential information regarding a "telecom file" during his employment with Catalyst. This was the first time, after it had already hired Mr. Moyse, that West Face learned that Catalyst had been pursuing what West Face assumed to be the WIND opportunity.

14 The evidence of Mr. Griffin of West Face, which has not been denied in any way, is that upon learning of Catalyst's objections to Mr. Moyse's hiring, West Face took the position that Mr. Moyse's non-competition covenant was unenforceable, and denied receiving any confidential information from Mr. Moyse. Out of an abundance of caution, given Catalyst's express concerns about the "telecom file", West Face nonetheless established strict firewalls around West Face's own work on WIND. Mr. Moyse

was denied access to computer files relating to that project, and all members of the WIND team at West Face were explicitly instructed not to speak to Mr. Moyse about that transaction.

15 Two days after Mr. Moyse's departure from West Face on July 18, 2014, the strategic partner with whom West Face had been working on a potential acquisition of WIND for the previous month backed out. The WIND deal that West Face had been pursuing while Mr. Moyse had worked there became a dead end.

16 The further evidence of Mr. Griffin, which has also not been denied, is that one week after Mr. Moyse left West Face, on July 23, 2014, VimpelCom informed West Face that it had entered into exclusive negotiations with another bidder, which West Face presumed to be Catalyst (and which Catalyst ultimately confirmed in this litigation). Nonetheless, West Face decided to join with a group of investors in the event that VimpelCom's preferred bidder was unable to reach an agreement during the period of exclusivity. This group ("New Investors") included Tennenbaum and 64NM who had themselves been pursuing the investment independently for a number of months.

17 The further evidence of Mr. Griffin, which has also not been denied, is that on August 6, 2014, uncertain as to when the exclusivity period would end, the New Investors, which did not include Globalive Capital, submitted an unsolicited offer for WIND. A more formal proposal followed the next day, August 7. The proposal left Globalive Capital's voting majority voting interest in WIND undisturbed. On August 7 however, Globalive Capital agreed to a support agreement with VimpelCom, which obliged Globalive Capital to support VimpelCom in its exclusive negotiations with Catalyst.

18 The further evidence of Mr. Griffin, which has also not been denied, is that upon the expiry of exclusivity, the New Investors revived their efforts with VimpelCom and, subject to VimpelCom's approval, with Globalive Capital. Ultimately a definitive purchase agreement was signed by all parties and the purchase of WIND closed on September 16, 2014 pursuant to which Mid-Bowline became the owner of WIND.

19 On June 25, 2014 Catalyst commenced an action against Brandon Moyse and West Face. It claimed injunctive relief, including preventing Mr. Moyse from disclosing confidential information. An interlocutory motion by Catalyst regarding Mr. Moyse was heard on October 27, 2014 by Mr. Justice Lederer who on November 10 granted an interlocutory injunction enjoining Mr. Moyse from disclosing any confidential information belonging to Catalyst, or competing with Catalyst until December 22, 2014 (being the date six months after he left Catalyst's employment).

20 On December 16, 2014, Catalyst delivered an Amended Statement of Claim in which it alleged that Mr. Moyse while employed by Catalyst was a member of the team studying the WIND opportunity and privy to Catalyst confidential information concerning that opportunity. It alleged that West Face obtained that confidential information to obtain an unfair advantage over Catalyst in its negotiations with VimpelCom regarding WIND and that but for the transmission of the confidential information West Face would not have successfully negotiated a purchase of WIND. Catalyst claimed a constructive trust over West Face's interest in WIND and an accounting of all profits earned by West Face as a result

of its misuse of confidential information obtained from Mr. Moyse.

Catalyst claims a need for a trial

21 Catalyst claims that it requires the full panoply of a trial process in its action against West Face, saying that the action it started in June, 2014 is at an early stage and that there has been no discovery or production of documents. It says that on this application its rights are being decided without any witnesses. This ignores the history of the action and what has occurred to date.

22 So far as the plan of arrangement application is concerned, a four day hearing was established on January 4, 2016 for four days beginning January 25, 2016. Catalyst had the draft material of Mid-Bowline in December and was served with the motion record on January 8, 2016 that included the affidavit of Mr. Griffin as well from the other investors in Mid-Bowline, being representatives of Globalive Capital, Tennenbaum and 64NM. Four days was scheduled for evidence and it was anticipated that the deponents of the affidavits at least would be examined and cross-examined. However, no evidence was filed by Catalyst to contradict the Mid-Bowline evidence, and no request was made by Catalyst to cross-examine any Mid-Bowline witness. As a result, the reporter was cancelled and the matter proceeded by oral argument on the material filed.

23 I adjourned the hearing on Monday January 5 until 2 pm to give Mr. DiPuccio a chance to get instructions from Catalyst. Later in the morning Mr. DiPuccio delivered an affidavit of James Riley of Catalyst sworn that morning. It contained a statement that Mr. Riley understood from Mr. DiPuccio that the Plan hearing would not be decided on its merits as originally scheduled pending a discussion on the terms on which the Plan might be amended so that West Face's proceeds from the sale to Shaw could be held in escrow pending an expedited trial of Catalyst's claim.

24 This statement was allegedly based on discussions held earlier in January in chambers in which the parties discussed trying to agree on a term that would allow the plan of arrangement to be approved on some terms that would protect Catalyst's rights. At that discussion counsel for Mid-Bowline made clear that it would not agree to hold the funds for West Face in escrow for reasons he explained. It was left that the parties would try to negotiate some other protection for Catalyst. However it was never discussed that the hearing scheduled for four days starting January 25 would be put off or that the plan approval application would not be heard on its merits at that time. The failure of Catalyst to file any evidence in opposition to the plan of arrangement was a decision of its own choosing. Its decision not to cross-examine on any of the affidavits filed by Mid-Bowline was also of its choosing.

25 There is a history of full document production by West Face in the claim against it by Catalyst and of cross-examination on affidavits. There has also been delay caused by Catalyst sitting on its hands.

26 On July 16, 2014 a consent order of Justice Firestone ordered Mr. Moyse to turn his computer over to his counsel for the taking of a forensic image of the data kept by him on his computer, to be conducted by a professional firm. On November 10, 2014 Justice Lederer ordered that the forensic images that had been created were to be reviewed by an independent supervising solicitor ("ISS"). The

ISS subsequently released a draft report on February 1 and its final report on February 17. As set out therein, the ISS found no evidence that Mr. Moyse had provided any of Catalyst's confidential information to West Face. It did, however, find evidence suggesting that Mr. Moyse had deleted his browser history.

27 On January 13, 2015, Catalyst commenced a motion for interlocutory relief against West Face for an order prohibiting West Face from playing any role in the management of WIND and an order requiring West Face to provide electronic images of all of its computers to the ISS for review. One of the stated purposes of Catalyst's motion for the imaging order was to determine "whether [Mr.] Moyse in fact communicated Catalyst's Confidential Information to West Face and what use West Face made of such information". Catalyst amended its notice of motion on February 6 to also seek an order jailing Mr. Moyse for contempt of the earlier interim consent order of Justice Firestone. (28] Catalyst's motion was heard by Justice Glustein on July 2, 2015. Although West Face delivered its responding motion record on March 10, 2015, 20 days after receiving Catalyst's materials, Catalyst did not deliver its reply materials until May 1, 2015, almost two months after receiving West Face's materials.

29 Justice Glustein rendered his decision five days after argument, on July 7, 2015, and dismissed Catalyst's motion in its entirety. With respect to the request that West Face provide electronic images of all of its computers to the ISS for review, Justice Glustein held that there was no evidence that West Face has failed to comply with its production obligations, let alone intentionally delete materials to thwart the discovery process or evade its discovery obligations. Justice Glustein noted that West Face had offered to turn over its own confidential information created, accessed or modified by Mr. Moyse to the ISS, but Catalyst has not accepted this offer. Regarding the productions of West Face, Justice Glustein stated:

> 56 Further, West Face has produced voluminous records relating to the allegations Catalyst has made, even before discovery, and in particular: (i) filed a four-volume responding motion record attaching 163 exhibits regarding WIND, the AWS-3 auction (since abandoned) and Callidus, (ii) produced a copy of the notebook Moyse used during his three and a half weeks at West Face, redacted only for information about West Face's active investment opportunities, (iii) produced all non-privileged, non-confidential emails sent to or from Moyse's West Face email account or known personal email accounts which were on West Face's servers, and (iv) produced 19 additional exhibits in response to undertakings given and questions taken under advisement at the cross-examination of Griffin on May 8, 2015.

30 There was filed on the motion before Justice Glustein five affidavits of Mr. Riley of Catalyst, affidavits of Mr. Moyse, two affidavits of Mr. Griffin of West Face, an affidavit of Mr. Dea of West Face, an affidavit of Mr. Burt-Gerrans who was the computer expert who imaged the West Face computer records and an affidavit of Mr. El Shanawany who was the corporate planning and control officer of WIND. There were also voluminous transcripts of the cross-examination of all of these persons.

31 After receiving Justice Glustein's decision on July 7, 2015, Catalyst appealed the decision to the Court of Appeal, even though Justice Glustein's decision was interlocutory. Within two days of receiving

the notice of appeal, on July 24, 2015 counsel to West Face immediately notified Catalyst's counsel that it was not entitled to appeal directly to the Court of Appeal. Catalyst ignored this advice, following which West Face served a notice of motion to quash Catalyst's appeal on August 5, and an amended notice of motion, factum and book of authorities on September 11, 2015. Catalyst never responded to this motion, but instead on November 5, 2015, consented to an order quashing the appeal. Catalyst then waited until December 10, 2015 to deliver a notice of motion to extend the time for it to seek leave to appeal to the Divisional Court.

32 Catalyst's motion to extend the time to appeal to the Divisional Court and the appeal were heard together by Justice Swinton on January 21, 2016 and dismissed the following day. Justice Swinton was critical of Catalyst for appealing the decision of Justice Glustein to the Court of Appeal as the law was clear that interlocutory orders are appealable to the Divisional Court and Catalyst was represented by experienced litigation counsel. She also held that Catalyst had not given a reasonable explanation for the lengthy delay given the state of the law with respect to appeals to the Court of Appeal and the facts of this case. As to the merits of an appeal, Justice Swinton held there were none.

33 I can only conclude that Catalyst has purposely delayed its claim against West Face for tactical reasons. As long as a claim for an order of a constructive trust against the shares of Mid-Bowline held by West Face is outstanding, Catalyst knows that West Face cannot realistically sell those shares. Catalyst had to understand that WIND might well be sold, taken the Canadian market for spectrum and the fact that Mid-Bowline is owned by financial interests and is not an operator in the wireless business. Catalyst has been deeply involved in that market, not only with its failed negotiations to acquire WIND from VimpelCom but also with its large financial position in Mobilicity, another regional wireless catTier that had filed for CCAA protection.

Fair and reasonable test

34 In *BCE Inc., Re*, [2008] 3 S.C.R. 560 (S.C.C.) the Supreme Court of Canada held that determining whether a plan of arrangement is fair and reasonable involves two inquiries:

(a) whether the arrangement has a valid business purpose; and

(b) whether the arrangement resolves the objections of those whose legal rights are being arranged in a fair and balanced way.

35 The valid-purpose inquiry is invariably fact-specific and the nature and extent of the evidence needed to satisfy this requirement will depend on the circumstances. See *BCE* at para.

146 The inquiry requires only the demonstration of a prospect of clearly identified benefits to the corporation that have a reasonable prospect of being realized if the proposed arrangement is implemented. See *Magna International Inc., Re* (2010), 75 B.L.R. (4th) 163 (Ont. Div. Ct.) at para. 50.

36 The s. 192 process is generally applicable to change of control transactions that share two characteristics: the arrangement is sponsored by the directors of the target company; and the goal of the

arrangement is to require some or all of the shareholders to surrender their shares to either the purchaser or the target company. See *BCE* at para. 126. This is precisely the situation here.

37 The benefit to Mid-Bowline and its shareholders is obvious. The sale to Shaw is at a tremendous price and if the sale does not close, there is no guarantee that another transaction would come along with a price of $1.6 billion. The purpose in being able to sell the interest of West Face in Mid-Bowline free of any constructive trust claim of Catalyst is required for the sale to occur.

38 Regarding the second part of the fair and reasonable test, whether the arrangement resolves the objections of those whose legal rights are being arranged in a fair and balanced way, it was stated in BCE:

> **147** The second prong of the fair and reasonable analysis focuses on whether the objections of those whose rights are being arranged are being resolved in a fair and balanced way.
>
> **148** An objection to a plan of arrangement may arise where there is tension between the interests of the corporation and those of a security holder, or there are conflicting interests between different groups of affected rights holders. The judge must be satisfied that the arrangement strikes a fair balance, having regard to the ongoing interests of the corporation and the circumstances of the case. Often this will involve complex balancing, whereby courts determine whether appropriate accommodations and protections have been afforded to the concerned parties. However, as noted by Forsyth J. in *Trizec*, at para. 36:
>
>> [T]he court must be careful not to cater to the special needs of one particular group but must strive to be fair to all involved in the transaction depending on the circumstances that exist. The overall fairness of any arrangement must be considered as well as fairness to various individual stakeholders.

39 I do not agree with Catalyst that there is no jurisdiction under section 192 to compromise rights of Catalyst. Section 192 is a flexible provision that has been broadly interpreted. In *BCE* it was stated:

> **124** In light of the flexibility it affords, the provision has been broadened to deal not only with reorganization of share capital, but corporate reorganization more generally. Section 192(1) of the present legislation defines an arrangement under the provision as including amendments to articles, amalgamation of two or more corporations, division of the business carried on by a corporation, privatization or "squeeze-out" transactions, liquidation or dissolution, or any combination of these.
>
> **125** This list of transactions is not exhaustive and has been interpreted broadly by courts. Increasingly, s. 192 has been used as a device for effecting changes of control because of advantages it offers the purchaser: C. C. Nicholls, *Mergers, Acquisitions, and Other Changes of Corporate Control* (2007), at p. 76....

40 In undertaking the fair and reasonableness inquiry, the interests of shareholders and other

stakeholders is to be considered. See *BCE* at para. 115.

41 In this case, the claim of Catalyst is that it is entitled to a constructive trust over the shares of Mid-Bowline owned by West Face. It is not an equity owner at the moment, but would be if a constructive trust were ordered in its favour. It is a stakeholder in West Face's interest in Mid-Bowline to that extent. To say that a Court is powerless to make any order compromising the rights of Catalyst would be to give Catalyst a veto over the plan of arrangement merely by reason of its claim.

42 The voluminous evidence filed by the parties on the previous motion before Justice Glustein and now on this application (which is largely the same as previously filed before Justice Glustein) has disclosed no confidential information of Catalyst regarding WIND provided by Mr. Moyse to West Face. It is clear that West Face has produced all of its relevant documents. The case of Catalyst at this stage looks weak.

43 The provision added to the plan of arrangement to protect the right of Catalyst to damages is as follows:

> From and after the Effective Time: (i) this Plan of Arrangement shall take precedence and priority over any and all Purchased Shares or Options issued prior to the Effective Time; (ii) the rights and obligations of the Former Shareholders and the former holders of Options shall be solely as provided for in this Plan of Arrangement; and (iii) all actions, causes of action, claims or proceedings (actual or contingent and whether or not previously asserted) based on or in any way relating to any Purchased Shares or Options shall be deemed to have been settled, compromised, released and determined without liability except as set forth herein; provided, however, that nothing in this section 4.5 shall be construed to extinguish the right of The Catalyst Capital Group Inc. to continue to assert its claims against West Face Capital Inc. in Ontario Superior Court of Justice Court File No.: CV-14-507120 (provided that the potential liability of West Face Capital Inc. is limited to the net profit of West Face Capital Inc. in respect of this Arrangement), with the exception of any constructive trust or equivalent remedy which shall be deemed to have been settled, compromised, released and determined without liability, along with all other claims in this section 4.5. (Underlining added).

44 Apart from releasing its constructive trust claim, Catalyst has a concern that this provision would prevent it from tracing money paid to West Face in the event it were entitled to a judgment against West Face. It also is concerned that the words "net profit" are unclear because what is meant by "net" is unclear. I would direct that the provision be amended to make clear that the provision does not prevent Catalyst from proceeding with a tracing claim of the money received by West Face from the sale of its share interest in Mid-Bowline. I would also direct that the word "net" be removed.

45 On the state of the record before me, and taking into account the interests of all concerned, including Catalyst, I am of the view that the plan of arrangement is fair and reasonable.

What should be done?

46 Although Catalyst has not produced any evidence on this application, a decision of its own making, I would give Catalyst one last chance to call evidence, so long as it is done quickly. Shaw hopes to close the transaction on March 1, 2016 but this may be unlikely. The outside date for the closing of the transaction is July 1, 2016.

47 Contrary to the argument of Catalyst, it does not have a right to a lengthy process leading to a trial. This is particularly the case when Catalyst has purposely delayed pursuing its claim against West Face and taken clearly inappropriate proceedings to appeal the interlocutory decision of Justice Glustein. Apart from that appeal process, it did nothing to further the action.

48 The Supreme Court of Canada has made it clear that a cultural shift in the civil process is required. In *Hryniak v. Mauldin*, [2014] 1 S.C.R. 87 (S.C.C.) Karakatsanis J. stated:

> 2 Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.
>
> 27 There is growing support for alternative adjudication of disputes and a developing consensus that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern reality and needs to be re-adjusted. A proper balance requires simplified and proportionate procedures for adjudication, and impacts the role of counsel and judges. This balance must recognize that a process can be fair and just, without the expense and delay of a trial, and that alternative models of adjudication are no less legitimate than the conventional trial.
>
> 28 This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible — proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.

49 The reality in this case is that the issue needs to be decided quickly for all concerned. The wireless industry in Canada is in a state of flux and whether Shaw is or is not entitled to acquire WIND is important to that industry. This issue raised by Catalyst must be decided quickly. In light of all that has gone on in the past year and a half in its case against West Face and Mr. Moyse, that can be accomplished while protecting the rights of the parties.

50 Taking into account appeal periods, a further hearing involving this application and the claim of Catalyst against West Face and Mr. Moyse should proceed quickly, and I set four days from February 22 to 26, 2016, with further steps in the interim as follows:

(i) The issue to be tried is whether Catalyst has a right to a constructive trust of the share interest of West Face in Mid-Bowline. Whether this includes the issue as to whether Catalyst has any claim for misuse of Catalyst confidential information is up to Mid-Bowline. Counsel are to attempt to agree on the language of the issue to be tried, failing which it shall be settled at a 9:30 a.m. appointment with me on February 1, 2016.

(ii) The pleadings to date will be used.

(iii) The affidavits to date in the Catalyst action against West Face and Mr. Moyse and in this application may be used at the hearing.

(iv) Any party may conduct further cross-examinations on the deponents of affidavits on matters not yet covered in the cross-examinations to date.

(v) Catalyst may cross-examine Messrs. Lockie, Burt and Leitner on their affidavits filed in this matter.

(vi) Mr. Moyse as a party has a right to participate.

(vii) Any further issues regarding the hearing are to be dealt with promptly at a 9:30 a.m. appointment with me.

Claim for inducing breach of contract

51 On Monday, in his affidavit sworn that morning, Mr. Riley made a statement indicating Catalyst intends to seek as relief in the action an order tracing all of the proceeds of the sale, relief that would involve amendments to the existing claim and that would "at first" glance be precluded by the proposed plan. His statement was that "In lieu of a claim for a constructive trust and an order holding the West Face proceeds of the Transaction in escrow, Catalyst intends to seek as relief in the Action an order tracing all of the proceeds of sale".

52 During argument, it became clear that the basis for this intended claim would be a claim for inducing breach of contract made against the parties that participated in the unsolicited bid to VimpelCom to acquire its interest in WIND during the period that Catalyst and VimpelCom were having exclusive discussions. Those parties apart from West Face were Tennenbaum and 64NM. This intended claim for tracing would be to trace all of the proceeds paid to all shareholder of Mid-Bowline and not just those paid to West Face. It would obviously require the addition of the other shareholders of Mid-Bowline.

53 Mr. Riley stated in his affidavit that the information giving rise to this new claim came from "information learned for the first time through the materials filed on this application". What information he was referring to was not stated. In argument it was stated that what he learned was that others were involved besides West Face in the unsolicited bid. However, it is quite clear that the information regarding the unsolicited bid was known by Mr. Riley early in 2015. It was contained in Mr.

Griffin's affidavit sworn March 7, 2015 in response to Catalyst's motion seeking interlocutory relief against West Face.

54 On his cross-examination on May 13, 2015 Mr. Riley, the chief operating officer of Catalyst, discussed the notion of inducing a breach of contract when it was put to him that Catalyst had not sued VimpelCom for breach of the exclusivity terms between VimpelCom and Catalyst. He would not agree that VimpelCom had not breached its exclusivity clause and said further:

> However, when a contract is breached, as I recall, there's two-you can-under the theory of Lumley and Guy, and I'm not trying to play lawyer, you can go after one of the two parties, the party breaching or the party inducing a breach.

55 Mr. Riley is a very experienced lawyer. He was aware of the case of *Lumley v. Gye* (1853), 118 E.R. 749 (Eng. Q.B.), a case in England in which an opera singer was induced by Covent Garden to leave another theatre at which the singer had an agreement to perform. It was in that case that the modern action for inducing breach of contract was established.

56 Although Catalyst was aware on March 13, 2015 of the facts that Mr. Riley now asserts he wants to use in this intended inducing breach of contract action, and was aware of the nature of a breach of contract action as disclosed on his cross-examination, it was only on Monday of this week that anything was first said by Catalyst about that[72] .

57 The reason I believe why this was said was that late last week Mid-Bowline delivered its amended plan to permit Catalyst to continue with its damage claim against West Face but removing the right to continue with its constructive trust claim against West Face. Such a claim would not allow the proposed plan of arrangement to proceed and would give Catalyst leverage in any negotiations with Mid-Bowline.

58 In his letter of January 6, 2016 written with prejudice, Mr. DiPuccio asserted that Catalyst was not interested in holding up a sale of the shares of WIND to Shaw. I have some doubts about that statement. The terms put in the letter to West Face were terms that Catalyst had to know would not be agreeable to West Face, and indeed Catalyst was told that shortly after the letter was sent. The proposed action now is also intended to interfere with the sale to Shaw. The vendors are all financial concerns with fund investors and to hold up the proceeds of the sale or to require their tracing in the hands of their fund investors that would be claimed in the claim against them for inducing a breach of contract is something that Catalyst has to know would not be agreeable to them.

59 This intended action has not been started. It could have been started in March, 2015 when the facts were disclosed and known to Catalyst. To lie in the weeds until the hearing of the application and assert such a right to stop the plan of arrangement is troubling indeed and not acting in good faith. Waiting and seeing how things are going in the litigation process before springing a new theory at the last moment is not to be encouraged. Apart from the statement of Mr. Riley that the information was first learned in the material in this application, which was not true, no evidence has

72. I do not accept Catalyst's contention that the letter of January 6, 2016 from Mr. DiPuccio to counsel for Mid-Bowline and Shaw disclosed any such intent. That letter dealt entirely with the claim of Catalyst against Mid-Bowline.

been given by Catalyst to explain why this new intended claim was not brought sooner.

60 The evidence on the record is that VimpelCom told the parties who made the unsolicited bid that it could not deal with it while under an exclusivity arrangement with Catalyst and it did not do so. The proposed claim of Catalyst looks weak on the strength of the record before me and Catalyst has done nothing to adduce evidence to support the intended claim.

61 In the circumstances, I disregard the statement of Mr. Riley as to the intended claim Catalyst says it will bring. It is too late in the process and the provision in the amended plan of arrangement that would prevent such a claim being made is fair and reasonable. The trial of the issue I have ordered is not to consider any such claim.

Application granted.

Footnotes1I do not accept Catalyst's contention that the letter of January 6, 2016 from Mr. DiPuccio to counsel for Mid-Bowline and Shaw disclosed any such intent. That letter dealt entirely with the claim of Catalyst against Mid-Bowline.

TAB 23

2018 ONSC 2443
Ontario Superior Court of Justice [Commercial List]

Crystallex International Corp. (Re)

2018 CarswellOnt 9950, 2018 ONSC 2443, 148 W.C.B. (2d) 381, 294 A.C.W.S. (3d) 693, 62 C.B.R. (6th) 303

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

In the Matter of a Plan of Compromise or Arrangement of Crystallex International Corporation (Applicant)

Hainey J.

Heard: March 28, 2018
Judgment: May 22, 2018
Docket: CV-11-9532-00CL

Counsel: James Doris, for Applicant, Crystallex International Corporation
David Byers, Lesley Mercer, for Monitor
Timothy Pinos, Ryan Jacobs, Shayne Kukulowicz, for DIP Lender
Aubrey G. Kauffman, for Robert Fung and Marc Oppenheimer
Clifton Prophet, Delna Contractor, for Ad Hoc Committee of Shareholders
Chris Armstrong, for Ad Hoc Committee of Noteholders

Subject: Civil Practice and Procedure; Corporate and Commercial; Criminal; Insolvency; Property

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay

Ad hoc committee of shareholders represented interests of shareholders who held almost 30 per cent of common shares of corporation — Corporation became subject of proceedings under Companies' Creditors Arrangement Act (CCAA) — Committee's claims with respect to alleged oppression of shareholders and breach of criminal interest rate provisions were stayed — Committee brought motion for order lifting stay of proceedings and varying previous orders to extent necessary to permit claims to be commenced and continued — Motion dismissed — Committee was aware of proceeding under CCAA and of website where information concerning motions to amend credit agreements and final orders were readily available — Committee took no steps to participate in this proceeding or challenge any orders despite having notice and many opportunities to do so — Committee now sought to overturn final orders long after applicable appeal periods had expired to serious detriment of lender who relied on orders in advancing significant amount of financing — There was no basis in law to vary final orders as committee sought to do.

Civil practice and procedure --- Judgments and orders — Amending or varying — After judgment entered — Miscellaneous

Ad hoc committee of shareholders represented interests of shareholders who held almost 30 per cent of common shares of corporation — Corporation became subject of proceedings under Companies' Creditors Arrangement Act — Committee's claims with respect to alleged oppression of shareholders and breach of criminal interest rate provisions were stayed — Committee brought motion for order lifting stay of proceedings and varying previous orders to extent necessary to permit claims to be commenced and continued — Motion dismissed — Court did not have inherent jurisdiction to review or vary final orders in manner requested by committee — Committee was not seeking to correct slip or error in expression of judgment; they were seeking to overturn key provisions of final orders — There were no allegations of fraud or new facts that would permit reopening and varying final orders under R. 59.06(2) of Rules of Civil Procedure — Motion was attempt to re-litigate merits of final orders based on arguments that could have been advanced when final orders were sought and granted many years ago — There was no basis to amend or vary final orders under R. 37.14 of Rules — Committee had sufficient notice concerning final orders and did not move "forthwith" as required by R. 37.14 — There were multiple legal barriers to variation of final orders.

Criminal law --- Offences against rights of property — Criminal interest rate

Ad hoc committee of shareholders represented interests of shareholders who held almost 30 per cent of common shares of corporation — Corporation became subject of proceedings under Companies' Creditors Arrangement Act — Committee's claims with respect to alleged oppression of shareholders and breach of criminal interest rate provisions were stayed — Committee brought motion for order lifting stay of proceedings and varying previous orders to extent necessary to permit claims to be commenced and continued — Motion dismissed — Committee's claim based upon criminal interest rate was bound to fail — In order for there to be offence, agreement or arrangement in question must, on its face, require payment of interest at criminal rate — Credit arrangement did not require, and in fact expressly prohibited, payment of interest at criminal rate — Claim for receipt of interest by lender at criminal interest rate was premature because no interest had yet been received.

MOTION by ad hoc committee of shareholders for order lifting stay of proceedings and varying previous orders to permit their claims to be commenced and continued.

***Hainey J.*:**

Overview

1 This is a motion by the Ad Hoc Committee of Shareholders of Crystallex International Corporation ("Ad Hoc Committee") for the following relief:

a) An order lifting the stay of proceedings to allow the Ad Hoc Committee to commence and continue the claims below with respect to alleged oppression of the shareholders of Crystallex International Corporation ("Crystallex") and a breach of the criminal interest rate provisions in the *Criminal Code of Canada*;

b) An order varying the following orders of Newbould J. (collectively "Final Orders") to the extent necessary to permit the claims to be commenced and continued:

(i) Order dated June 5, 2013 approving the terms of the Second Credit Agreement Amendment dated June 5, 2013;

(ii) Order dated April 14, 2014 approving the terms of the Third Credit Agreement Amendment dated April 16, 2014;

(iii) Order dated December 18, 2014 approving the terms of the Fourth Credit Agreement Amendment dated March 12, 2015; and,

(iv) Order dated December 18, 2014 approving the Net Arbitration Proceeds Transfer Agreement among the Applicant, the DIP Lender, Robert Fung and Marc Oppenheimer dated March 12, 2015.

2 The grounds for the motion are as follows:

Leave Motion

a) On June 5, 2013, Newbould J. directed that no party is to bring a motion in these proceedings without leave of the court after consultation with the Monitor;

b) On June 7, 2016, Newbould J. further directed that any party seeking to bring a motion in this proceeding is to provide draft motion material to counsel for the Applicant and request arrangements be made to appear at a chambers appointment to address the scheduling and hearing of the motion (the "Motion Protocol");

c) The Ad Hoc Committee has provided its draft motion material to counsel for the Applicant and has requested a scheduling attendance, in compliance with the Motion Protocol;

d) Crystallex's shareholders have an economic interest in the Applicant in view of the US$1,202 billion arbitration award ("Arbitration Proceeds") made in favour of Crystallex against the Bolivarian Republic of Venezuela ("Venezuela");

e) I approved a contract of Transaction and Settlement dated November 15, 2017 between the Applicant and Venezuela described by the Monitor in paragraph 27 of its Twenty-Second Report as providing "significant value to the Applicant over time beyond the quantum of asserted creditor claims against the Applicant";

f) As particularized in the Ad Hoc Committee's draft statement of claim, Crystallex's shareholders' interests have been diluted such that they currently represent a very small percentage of the Net Arbitration Proceeds ("NAP"), which are the Applicant's only remaining asset;

g) The dilution of Crystallex's shareholders' interests has been caused by DIP credit agreements that confer ever-increasing percentages of NAP on the DIP Lender. These arrangements were approved by the court without any effective notice to Crystallex's shareholders and in circumstances in which the Applicant, is directors and the DIP Lender acted in a manner that was oppressive, unfairly prejudicial to and in unfair disregard of the interests of Crystallex's shareholders;

h) Unless leave to bring this motion is granted to allow the claims set out in the Ad Hoc Committee's statement of claim to proceed, Crystallex's shareholders will have no opportunity to be heard in relation to the severe dilution of their interests and they will lose very significant value and be denied access to justice;

Lift Stay re Oppression Claim

i) The Ad Hoc Committee seeks to issue and proceed with a claim which alleges, among other things, that the granting of compensation to the DIP Lender in the form of percentage interests in the NAP that are very substantial, was oppressive, in unfair disregard of, and unfairly prejudicial to the interests of Crystallex's shareholders (the "Oppression Claim");

Lift Stay re Breach of Criminal Interest Rate

j) The Oppression Claim further alleges that the compensation provided to the DIP Lender is in breach of the *Criminal Code of Canada*.

Issue

3 The Ad Hoc Committee represents the interests of over 218 shareholders ("Complaining Shareholders") who together hold almost 30% of the common shares of Crystallex. According to the Ad Hoc Committee the fundamental question raised by this proposed motion is whether it is in the interests of justice for the court to vary the Final Orders.

4 I have concluded that the answer to this fundamental question is "no" for the following reasons.

Analysis

5 The Final Orders made over the last five years approving amendments to the DIP credit agreements were all declared to be fair, reasonable and appropriate by Newbould J. The DIP Lender relied upon these orders to advance and permit Crystallex to access over $75 million to pursue its claim against Venezuela. Its claim resulted in an arbitration award of approximately US$1.3 billion. This would not have occurred without the substantial financial support from the DIP Lender.

6 The Complaining Shareholders have been aware of this CCAA proceeding since early 2012. They were aware of the Monitor's website where information concerning the motions to amend the DIP credit agreements and the Final Orders was readily available. They took no steps to participate in this proceeding or to challenge any of the orders sought by the DIP Lender to amend the DIP credit agreements despite having notice and many opportunities to do so.

7 The Complaining Shareholders now seek to overturn the Final Orders long after the applicable

appeal periods have expired to the serious detriment of the DIP Lender who relied upon the orders in advancing a significant amount of financing so that Crystallex could pursue is claim against Venezuela.

8 In my view, in light of this background, the Final Orders, which were made following full hearings in court, and were issued and entered long ago, are a complete bar to the Ad Hoc Committee's proposed claim.

9 Further, I have concluded that there is no basis in law to vary the Final Orders as the Ad Hoc Committee seeks to do. The Supreme Court of Canada made it clear in *Doucet-Boudreau v. Nova Scotia (Department of Education)*, 2003 SCC 62 (S.C.C.) at paras. 115 and 116 that, "... subject to an appeal, parties are secure in the reliance on the finality of superior court decisions" and "only in strictly limited circumstances can a court revisit an order or judgment..."

10 The only "limited circumstances" available for varying a final, issued and entered order are the following:

a) The court's inherent jurisdiction to correct slips or errors in expression;

b) Rule 59.06(2) of the *Rules of Civil Procedure* (the "Rules"); and

c) Rule 37.14 of the Rules.

Inherent Jurisdiction

11 The power of a court to vary an order after it has been issued and entered is limited to making the order conform to the judgment pronounced or intended to be pronounced. The Complaining Shareholders are not seeking to correct a slip or an error in the expression of a judgment. Rather, they are seeking to overturn key provisions of the Final Orders. The applicable jurisprudence is clear that this court does not have the inherent jurisdiction to review or vary these Final Orders in the manner requested by the Ad Hoc Committee.

12 The fairness and reasonableness of the terms of the transactions contemplated by the original DIP credit agreement as amended by the Final Orders was determined at the time the orders were approved by the court. This was before the DIP Lender and Crystallex relied and acted upon those court approvals. A complaint that a shareholding interest that arguably had no value upon the CCAA filing in 2011 may be worth more now, following six years of DIP Lender support and effort by Crystallex to create value for stakeholders, is not evidence of an injustice to the Complaining Shareholders that warrants overturning the Final Orders.

13 For these reasons, I am not prepared to vary the orders on the basis of my inherent jurisdiction.

Rule 59.06(2)

14 There are no allegations that, if proved, would permit me to amend or vary the Final Orders pursuant to the limited exceptional circumstances under Rule 59.06(2) of the Rules.

15 The two limited exceptional circumstances under Rule 59.06(2) are: (i) fraud, or (ii) new facts that have arisen or have been discovered after the order was made.

16 The Ad Hoc Committee's motion does not make any allegations of fraud or of new facts that would permit me to reopen and vary the Final Orders under this rule. Instead, the motion is an attempt to re-litigate the merits of the Final Orders based on arguments that could have been advanced when the Final Orders were sought and granted many years ago. No new facts have arisen, or are alleged to have arisen, since the Final Orders were made.

17 I am, therefore, not prepared to vary the Final Orders on the basis of Rule 59.06(2).

Rule 37.14

18 There is also no basis to amend or vary the Final Orders under Rule 37.14 of the Rules. Under this Rule, the court may only vary an order where "no notice or insufficient notice" has been provided to an affected party and where the party affected by the order moves forthwith to vary the order.

Notice Effected

19 Service and notice in this CCAA proceeding were effected in compliance with the Initial Order and s. 23 of the CCAA. There is no requirement in the CCAA or the Initial Order to give any other specific notice to shareholders.

20 It was open to any one of the Complaining Shareholders to file a notice of appearance and to be added to the Service List. In fact, counsel for two shareholders were added to the Service List and, therefore, received notice of all subsequent proceedings, and made submissions at hearings dealing with the Final Orders now under attack by the Ad Hoc Committee.

21 The Complaining Shareholders did nothing to be added to the Service List. The motion material for the Final Orders was served upon everyone on the Service List. The Final Orders provide that no further service is required.

22 Mr. Justin Fine, who testified on behalf of the Ad Hoc Committee, confirmed that the Complaining Shareholders were aware of the proceedings shortly after the granting of the Initial Order. They also had various discussions with representatives of Crystallex and the Monitor and they were aware of the Monitor's website.

23 The Complaining Shareholders also knew or ought to have known about the Final Orders shortly after they were issued and entered. They were in a position to have known the amounts of the additional DIP loans and the percentage of the NAP to be earned by the DIP Lender. Each of the Final Orders was posted on the Monitor's website after being issued and entered. The Final Orders approving the Second and Third Credit Agreement Amendments contained the amounts of the additional DIP loans and the percentage of the NAP to be earned by the DIP Lender. The order approving the Fourth Credit Agreement Amendment contained a term allowing any creditor or shareholder to obtain a copy of the

relevant terms from Crystallex, on such terms as Crystallex and the Monitor agreed, or on further order of the court.

24 Accordingly, the Complaining Shareholders were in a position to obtain the necessary information to advance the allegations now asserted had they exercised modest due diligence in response to the Initial Order or following the dates on which any of the Final Orders were made.

25 I am, therefore, satisfied that the Complaining Shareholders had sufficient notice concerning the Final Orders.

Failure to Move "Forthwith"

26 The Complaining Shareholders did not move "forthwith", as required by Rule 37.14, despite the fact that they were aware, or could have been aware, of the Final Orders, prior to or at the time they were made, or at least shortly thereafter once posted on the Monitor's website.

27 Serving this motion in December 2017, seeking to vary the Final Orders that were issued, entered and posted publicly between June 2013 and December 2014, was clearly not done "forthwith".

28 I have concluded that the Complaining Shareholders' failure to move forthwith is also a bar to the variation of the Final Orders pursuant to Rule 37.14.

Legal Barriers to Variation

29 I have also concluded that the following legal barriers prevent the variation of the Final Orders sought by the Ad Hoc Committee:

a) a court will not disturb a final order if parties have acted and relied upon it;

b) the Ad Hoc Committee's claims are barred by s. 142 of the *Courts of Justice Act*;

c) the Ad Hoc Committee's claims are statute-barred pursuant to the *Limitations Act*; and

d) the Ad Hoc Committee's claim based upon a criminal interest rate is bound to fail.

Reliance on Final Orders

30 CCAA jurisprudence is consistent that final orders that have been relied upon by parties to the CCAA proceeding will not be disturbed. In *DBDC Spadina Ltd. v. Walton*, 2015 ONSC 870 (Ont. S.C.J. [Commercial List]), at para. 16, Newbould J. held that a court should be loath to vary an order if persons relying on the order would be materially prejudiced. With respect to CCAA initial orders, Farley J. commented on comeback motions in *Muscle tech Research and Development Inc., Re* 2006 ONSC 316 at para. 5 as follows:

> Comeback relief, however, cannot prejudicially affect the position of parties who have relied *bona fide* on the previous order in question.

31 More recently, in *Target Canada Co., Re*, 2016 ONSC 316 (Ont. S.C.J.), Morawetz R.S.J. rejected a plan of arrangement that would conflict with a final order made in the CCAA proceeding, stating as follows at para. 81:

> The CCAA process is one of building of blocks. In this [sic] proceedings, a stay has been granted and a plan developed. During these proceedings, this court has made a number of orders. It is essential that court orders made during CCAA proceedings be respected... Certain parties now wish to restate the terms of the negotiated orders. Such a development would run counter to the building block approach underlying these proceedings since the outset.

32 In this case Crystallex and the DIP Lender have relied in good faith on the Final Orders. In particular, the DIP Lender has advanced and permitted Crystallex to use in excess of US$75 million in reliance on the Final Orders.

33 In my view, to vary the Final Orders now would turn this entire CCAA proceeding into chaos, result in a default under the DIP credit agreement and the amendment agreements and undermine the commercial certainty and reliability of the DIP financing process in every future CCAA proceeding. I am not prepared to vary the Final Orders which have been relied upon by parties in good faith who have taken significant risks and expended substantial resources to maximize value. Particularly since throughout this proceeding the Complaining Shareholders chose to sit on the sidelines.

Claims Barred by the Courts of Justice Act

34 Section 142 of the *Courts of Justice* Act provides that a person is not liable for any act done in good faith in accordance with a court order. There is no allegation of bad faith here. At all times, the DIP Lender acted in good faith in reliance upon the Final Orders. In my view, it cannot now be liable for oppression for having done so.

Claims Barred by the Limitations Act

35 I have also concluded that the Ad Hoc Committee's claims for oppression and breach of s. 347 of the *Criminal Code* are statute-barred by the *Limitations Act*. A claimant is presumed to have known of the loss or damage on the day the act or omission on which the claim is based took place, unless the contrary is proved. To prove the contrary, the claimant must show that it was highly unlikely, if not impossible, with reasonable due diligence, to have obtained the necessary information within the limitation period. The Ad Hoc Committee has not demonstrated this.

36 As described above, the Complaining Shareholders knew or ought to have known about the Final Orders at the time they were made and posted on the Monitor's website or shortly thereafter. They had ample opportunity to challenge or oppose these terms but instead, failed to act forthwith or with reasonable diligence within the limitation period.

Claims regarding criminal interest rate are bound to fail

37 Section 347(1) of the *Criminal Code* provides that "every one who enters into an agreement or arrangement to receive interest at a criminal rate, or receive a payment or partial payment of interest at a criminal rate" is guilty of an offence.

38 In order for there to be an offence, the agreement or arrangement in question must, on its face, require payment of interest at a criminal rate. The DIP credit agreement does not require, and in fact expressly prohibits, the payment of interest at a criminal interest rate:

a) the parties to the DIP credit agreement specifically agreed to comply with enumerated and detailed procedures for the adjustment, if necessary, of interest payable under the DIP credit agreement in any given year to ensure that "no receipt by the [DIP] Lender of any payments to the [DIP] Lender hereunder would result in a breach of section 347 of the *Criminal Code (Canada)*"; and

b) the law is clear that where a payment that might be considered interest is not fixed, but is dependent upon future events (like the collection of the Arbitration Award) which may or may not cause it to exceed the criminal interest rate prohibition, the agreement is not contrary to s. 347(1) of the *Criminal Code*.

39 Further, the claim for receipt of interest by the DIP Lender at a criminal interest rate is premature because no interest has yet been received, A claim based on the alleged receipt of interest at a criminal rate is a "wait-and-see" cause of action. It cannot accrue until interest has actually been paid and its timing and quantum are known so as to permit the calculation of the effective rate of interest.

Conclusion

40 For all of these reasons the Ad Hoc Committee's motion is dismissed.

41 If the parties cannot agree on costs they may schedule a 9:30 a.m. attendance with me.

42 I thank counsel for their helpful submissions.

Motion dismissed.

TAB 24

2021 ONCA 201
Ontario Court of Appeal

Fram Elgin Mills 90 Inc. v. Romandale Farms Limited

2021 CarswellOnt 4369, 2021 ONCA 201

Fram Elgin Mills 90 Inc. (formerly Frambordeaux Developments Inc.) (Plaintiff) and Romandale Farms Limited, Jeffrey Kerbel, 2001251 Ontario Inc. and First Elgin Developments Inc. (Defendants / Respondent / Appellants)

Fram 405 Construction Ltd. and Bordeaux Homes Inc. (Plaintiffs) and Romandale Farms Limited, 2001251 Ontario Inc., First Elgin Developments Inc. and Jeffrey Kerbel (Defendants / Respondent / Appellants)

Romandale Farms Limited (Plaintiff / Respondent) and 2001251 Ontario Inc. (Defendant / Appellant)

2001251 Ontario Inc. (Plaintiff / Appellant) and Romandale Farms Limited (Defendant / Respondent)

Fram Elgin Mills 90 Inc. (formerly Frambordeaux Developments Inc.) (Plaintiff / Appellant) and Romandale Farms Limited, Jeffrey Kerbel, 2001251 Ontario Inc. and First Elgin Developments Inc. (Defendants / Respondent)

Fram 405 Construction Ltd. and Bordeaux Homes Inc. (Plaintiffs / Appellant) and Romandale Farms Limited, 2001251 Ontario Inc., First Elgin Developments Inc. and Jeffrey Kerbel (Defendants / Respondent)

Romandale Farms Limited (Plaintiff) and 2001251 Ontario Inc. (Defendant)

2001251 Ontario Inc. (Plaintiff) and Romandale Farms Limited (Defendant)

Gillese J.A., P. Lauwers J.A., and M.L. Benotto J.A.

Heard: September 8, 2020; September 9, 2020
Judgment: April 1, 2021
Docket: CA C67533, C67557

Proceedings: Reversed, 2019 CarswellOnt 16942, 2019 ONSC 5322, 311 A.C.W.S. (3d) 883, 11 R.P.R. (6th) 48 (Ont. S.C.J.); Varied, 2020 CarswellOnt 5321, 2020 ONSC 1621, 324 A.C.W.S. (3d) 480 (Ont. S.C.J.); Additional reasons, 2019 CarswellOnt 16942, 2019 ONSC 5322, 311 A.C.W.S. (3d) 883, 11 R.P.R. (6th) 48 (Ont. S.C.J.)

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Subject: Civil Practice and Procedure; Contracts; Property

Headnote

Civil practice and procedure
Estoppel

Real property

On appeal from the judgment of Justice Nancy J. Spies, of the Superior Court of Justice, dated September 13, 2019, with reasons reported at 2019 ONSC 5322, and from the costs order, dated April 2, 2020.

***Gillese J.A.*:**

1 These appeals involve competing claims to undeveloped lands in Markham, Ontario. They illustrate the perils associated with a landowner selling interests in the land to more than one party in more than one transaction.

2 The appeals raise many legal issues, one of which is the little-known equitable doctrine of estoppel by convention. In Canada, this doctrine finds its roots in Ryan v. Moore, 2005 SCC 38, [2005] 2 S.C.R. 53. As you will see, estoppel by convention plays a critical role in the resolution of these appeals.

I. OVERVIEW

3 Romandale Farms Limited ("Romandale") owned two neighbouring farms in Markham[73] known as the McGrisken Farm and the Snider Farm (the "Lands"). The Lands comprise approximately 275 acres of undeveloped land in the Elgin Mills Road and Warden Avenue area of Markham.

4 Initially, Romandale was the sole owner of the Lands. However, in 2003 and 2005, Romandale entered into agreements relating to the Lands, as a result of which much litigation has ensued.

5 In 2003, Romandale sold an undivided 5% interest in the Lands to Fram.[74] Romandale and Fram planned to obtain the necessary planning approval for the Lands so that they could be developed for residential use. It was their intention that Fram would build homes on the Lands, sell them, and share the profits with Romandale. Romandale and Fram entered into a number of agreements relating to the Lands, including co-owners agreements (the "*COAs*"). Under the COAs, subject to limited exceptions, neither party could dispose of its interest in the Lands. The COAs also contained a buy-sell mechanism that was generally available only after secondary planning approval ("*SPA*")[75] had been obtained for the Lands. SPA is required before the Lands can be developed.

6 In August 2005, Romandale entered into an agreement with Kerbel[76] (the "*2005 August Agreement*") consisting of several transactions respecting properties in Markham. One of the transactions was the sale of Romandale's 95% interest in the Lands to Kerbel. This was to be achieved in two steps. In the first step, Romandale sold Kerbel 5% of its interest in the Lands.[77] In the second step, Romandale agreed to sell its remaining interest in the Lands to Kerbel, conditional on either Fram's

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73. When the parties entered into the various agreements, Markham was still a town in Ontario. It did not become a city until 2012. For ease of reference, I will refer to the municipality simply as "Markham".

74. This term is explained in para. 19 below.

75. SPA is defined in s. 5.07 of the COAs as "an amendment of the official plan of the Town of Markham applicable to the Lands, obtained in accordance with the Planning Act (Ontario)".

76. This term is explained in para. 20 below.

77. Romandale's sale of 5% of its 95% interest in the Lands resulted in Kerbel acquiring a 4.75% undivided interest in the Lands.

consent to the sale or Romandale's exercise of the buy-sell provisions in the COAs. All of the transactions under the 2005 August Agreement have been completed with the exception of the sale of Romandale's remaining interest in the Lands to Kerbel.[78]

7 Whether Romandale is bound by the 2005 August Agreement — and its obligations respecting the sale of its remaining interest in the Lands — is the driving force behind these appeals.

8 In 2007, Fram sued Romandale and Kerbel, claiming that the 2005 August Agreement was an impermissible disposition of Romandale's interest in the Lands under the COAs (the "*2007 Action*").

9 In 2008, Fram and the development manager for the Lands sued Romandale and Kerbel. They alleged that the 2005 August Agreement amounted to a breach of the construction management agreements between Fram and Romandale respecting the Lands (the "*2008 Action*").

10 In 2009, government decisions significantly changed the timelines and development prospects for the Lands. Development of the Snider Farm was delayed until 2021-2031 and of the McGrisken Farm until 2031-2051. In addition, the Snider Farm was newly earmarked for employment use, which would prevent residential development.

11 The 2007 and 2008 Actions were scheduled for trial in the fall of 2010. In an attempt to settle them before trial, Fram, Kerbel and Romandale attended a judicial mediation in September 2010. At the mediation, the three parties reached an agreement in principle. That agreement included a statement of the parties' intention that the purchase and sale of Romandale's remaining interest in the Lands to Kerbel would take place after the Lands obtained SPA (the "*Statement*"). Romandale later withdrew from the settlement agreement. However, in December 2010, Fram and Kerbel settled the matters between them and entered into a settlement agreement (the "*Settlement Agreement*"). It is important to note that para. 5 of the Settlement Agreement contains the Statement.

12 In 2014, Romandale sued Kerbel claiming Kerbel breached the 2005 August Agreement by taking steps to reduce the amount of developable acreage on the Lands (the "*2014 Action*").

13 In 2015, Romandale changed legal counsel. For the first time, it took the position that, because of the Statement in the Settlement Agreement, Kerbel had repudiated the 2005 August Agreement. Romandale also announced that it considered itself no longer bound by the 2005 August Agreement. Accordingly, in 2016, Kerbel sued Romandale to compel it to perform its remaining obligation under the 2005 August Agreement (the "*2016 Action*").

14 The four actions involving the Lands were tried together in the fall of 2018.

15 By judgment dated September 13, 2019 (the "*Judgment*"), all four actions were resolved in favour of Romandale. The trial judge's key determination was that Kerbel repudiated the 2005 August Agreement when it entered into the Settlement Agreement because para. 5 of the Settlement Agreement stated the parties' intention that the purchase and sale of the Remaining Interest would take place after

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78. Romandale received over $16 million in immediate value from Kerbel under the 2005 August Agreement.

SPA. The trial judge found that Romandale had accepted the repudiation and concluded that the 2005 August Agreement was at an end. Accordingly, Romandale was excused from performing its remaining obligations under the 2005 August Agreement.

16 Both Fram and Kerbel (collectively, the "*Appellants*") appeal to this court. Their appeals were consolidated. The Appellants ask this court to, among other things, declare that the 2005 August Agreement is valid and enforceable, and make an order for specific performance requiring Romandale to perform its obligations under the 2005 August Agreement.

17 For the reasons that follow, I would allow the appeals and make the requested order for specific performance.

II. THE PARTIES

18 There are two sets of appellants in this appeal.

19 The Fram appellants consist of Fram Elgin Mills 90 Inc. and Fram 405 Construction Ltd. Fram Elgin Mills 90 Inc. is part of a group of companies known as the Fram Building Group. It was incorporated for the purpose of developing the Lands. Before 2010, it was named Frambordeaux Developments Inc. Frank Giannone is the president of Fram Elgin Mills 90 Inc. In deciding the issues in these appeals, it generally does not matter whether the Fram appellants were involved collectively or individually. For ease of reference, I use "Fram" when I refer to one or more of the Fram appellants. However, when the distinction matters, I use the individual party's name.

20 The Kerbel appellants consist of 2001251 Ontario Inc., First Elgin Developments Inc., and Jeffrey Kerbel. They are land developers and builders. Mr. Kerbel is the principal of the Kerbel group of companies. Again, for ease of reference, I use "Kerbel" when I refer to one or more of the Kerbel appellants but, when the distinction matters, I use the individual party's name.

21 Romandale is a corporation that has long owned properties in the Markham area, including the Lands. Helen Roman-Barber has been the principal of Romandale since 1988. The Roman family owns and operates Romandale. It also owned the Triple R Lands, an adjoining property to the Lands.

III. KEY DATES AND AGREEMENTS

22 Below you will find a summary of the key dates and most significant agreements. A more detailed chronology of events is contained in Schedule "A" to these reasons. In the analysis of the various issues, I rely on the detailed recitation of facts set out in that chronology. This section and the chronology in Schedule "A" are based on the factual findings in the trial judge's reasons (the "*Reasons*").

23 In Schedule "B" to these reasons, you will find the text of: the key contractual provisions in the COAs between Romandale and Fram; the 2005 August Agreement; and, the Settlement Agreement.

2003

24 Romandale sells Fram an undivided 5% interest in the Lands and the parties enter into two identical sets of agreements, one set for each farm property. Each set consisted of three documents: the *COA*, which sets out the terms and conditions on which Romandale and Fram, as co-owners, hold title to the Lands; the Construction Management Agreement ("*CMA*"), under which Fram was to construct and sell residential units on the Lands, once the Lands achieved SPA; and the Development Management Agreement ("DMA"), which governed the development process for the Lands. Bordeaux Developments (Ontario) Inc. ("*Bordeaux*") was also a party to the DMAs and, under its terms, Bordeaux was appointed the development manager responsible for the development requirements of the Lands.

25 Of these agreements, the COAs are the most significant for these appeals. The buy-sell provision in s. 5.07 of the COAs permits a co-owner, under certain conditions, to tender on the other an offer to sell its entire interest in the Lands and, at the same time, an offer to buy the other's entire interest in the Lands on the same terms as the offer to sell. The non-tendering party must choose whether to buy out the tendering party or sell its interest. The buy-sell is available once SPA is obtained for the Lands or the DMAs are terminated.

26 Section 6.02 of the COAs provides that if an event of default occurs and is continuing, the non-defaulting party has the right to, among other things, bring proceedings for specific performance and/or buy the defaulting party's interest in the Lands at 95% of fair market value.

27 Development of the Lands depended on obtaining planning approval, including appropriate amendments to the official plan. These changes are made to the secondary plan, which provides more detailed policies for the development of a specific area. The process of obtaining development approval for specific lands is known as SPA. This is reflected in s. 5.07(a) of the COAs which defines SPA as "an amendment of the official plan of the Town of Markham applicable to the Lands, obtained in accordance with the Planning Act (Ontario)".

28 When Romandale and Fram entered into these agreements in 2003, Romandale had not yet started the SPA process.

2004

29 With Fram's consent, Romandale borrows $6 million from the Bank of Nova Scotia ("*BNS*"), secured by a mortgage on the Lands.

2005

30 With Fram's consent, Romandale terminates the DMAs with Bordeaux.[79] The ongoing work to move the Lands through SPA continues through a new agreement between Fram and Romandale to co-manage development of the Lands.

31 BNS calls its $6 million mortgage. Romandale needs financing to repay the BNS loan by August

79. In response, Bordeaux sues Romandale and Fram, alleging the termination was invalid and of no force or effect. Romandale settled the Bordeaux litigation in 2014.

30, 2005. It also needs cash to make distributions to the Roman family. The solution is the 2005 August Agreement, which Romandale and Kerbel enter into on August 29, 2005.

32 In the 2005 August Agreement, Kerbel agrees to pay off the BNS mortgage and extend the same amount as a new loan to Romandale under the same security and Romandale agrees to: (1) sell Kerbel its 95% interest in the Lands for a fixed price of $160,000 per acre; (2) on behalf of the Roman family, sell Kerbel the adjoining Triple R Lands for $175,000 per acre, subject to a purchase price adjustment for non-developable acreage; and (3) grant Kerbel a right of second refusal over other lands, called the Elgin South Property. The sale of Romandale's interest in the Lands is to occur in two steps:

a. Step 1: an initial sale of 5% of Romandale's interest in the Lands; and

b. Step 2: the sale of Romandale's remaining interest in the Lands ("*Remaining Interest*"), conditional on:

i. Romandale buying out Fram's interest in the Lands pursuant to the buy-sell provisions in the COAs; or

ii. Fram consenting to the transaction.

33 I refer to the second step of the sale of Romandale's interest in the Lands to Kerbel as the "*Conditional Provision*".

34 All the transactions in the 2005 August Agreement have been completed, except the sale of Romandale's Remaining Interest to Kerbel under the Conditional Provision. Romandale received over $16 million in immediate value from Kerbel under the 2005 August Agreement: $6 million in new mortgage financing; $2,128,000 in cash for its 5% interest in the Lands; and, $8,575,000 for the Triple R Lands.

35 Paragraph 5 of the 2005 August Agreement empowers Kerbel to cause Romandale to trigger the buy-sell provision in the COAs following SPA being obtained for the Lands. Paragraph 5 also gives Kerbel exclusive control over the development of the Lands.

36 Ms. Roman-Barber tells Fram she reached an agreement with Kerbel under which she sold the Triple R Lands, assigned the BNS mortgage, and sold a 5% interest in the Lands. She does not disclose that Romandale also committed to sell its entire interest in the Lands through the Conditional Provision.

2007

37 Despite repeated requests that Romandale provide it with a copy of the 2005 August Agreement, it is only in April 2007 that Fram's counsel is permitted to read a copy.

38 Fram starts the 2007 Action against Romandale and Kerbel, alleging that the 2005 August Agreement was a prohibited disposition under the COAs. It also seeks an injunction restraining

Romandale from any further sale of its interest in the Lands. Further, it gives notice it will seek to exercise its remedy under the COAs to purchase Romandale's interest in the Lands at 95% of fair market value.

39 The injunction is ordered.

2008

40 Fram and Bordeaux start the 2008 Action against Romandale and Kerbel based on alleged breaches of the CMAs. Under the CMAs, Fram has the right to construct residences on the Lands once SPA is obtained.

41 Kerbel, as owner of the Triple R Lands, together with neighbouring landowners, form the North Markham Landowners Group ("*NMLG*") with the goal of engaging collectively with the relevant authorities about the development of their respective properties.

42 From 2008 onward, the NMLG retains consultants and commissions studies required for the development process and engages in that process with Markham. NMLG's development costs have been in the hundred of thousands of dollars. Until 2011, Kerbel reimbursed Romandale for all costs associated with the Lands, including Romandale's share of the NMLG "cash calls" that were made to fund the NMLG ongoing development activities.

2009

43 Government decisions change the anticipated development timeline for the Lands. As a result, development of the Snider Farm is delayed until 2021-2031 and of the McGrisken Farm until 2031-2051. In addition, the Snider Farm is proposed for employment use, which would prevent residential development.

44 At Kerbel's insistence, Romandale joins the NMLG.

2010

45 In the hope of resolving the 2007 and 2008 Actions before trial, Romandale, Fram, and Kerbel engage in settlement discussions at a judicial mediation in September 2010. The three parties reach an agreement in principle on the main settlement terms. One of the agreed settlement terms is that the sale of Romandale's Remaining Interest to Kerbel will occur after the Lands achieve SPA. The following day, counsel for Romandale writes to counsel for Fram and Kerbel and outlines the agreed points of settlement, including that sale of its Remaining Interest will occur when SPA has been obtained for the Lands.

46 Romandale withdraws from the settlement in October but Fram and Kerbel move forward and enter into the Settlement Agreement in December 2010.

47 The Settlement Agreement provides that if Romandale does not concur in it and the 2007 and

2008 Actions proceed to trial:

(1) Fram would discontinue its claims against Kerbel, not seek a declaration that the 2005 August Agreement is void, and restrict its claims against Romandale to damages;

(2) Kerbel would provide Fram with an option to purchase a 50% interest in Romandale's Remaining Interest, on the same terms and conditions as Kerbel might purchase Romandale's Remaining Interest;

(3) If Fram exercises the option, it and Kerbel would enter into a joint venture agreement to develop the Lands with (effectively) an equal sharing of costs;

(4) Fram does not consent to Romandale's sale of its Remaining Interest in the Lands to Kerbel; and

(5) Para. 5 of the Settlement Agreement includes the statement of Fram and Kerbel's intention that "the purchase and sale of Romandale's Remaining Interest in the Lands pursuant to these Minutes of Settlement will take place after [SPA] for the Lands has been obtained".

2011

48 By letter dated January 28, 2011, counsel for Romandale advises Fram and Kerbel that Romandale objects to Kerbel's land planner telling the NMLG that there was a change in the ownership of the Lands. The letter reiterates that Romandale conditionally sold the Lands to Kerbel under the 2005 August Agreement and "[t]he condition could only be satisfied by either a) secondary plan approval (which has not been achieved); b) or the consent of [Fram] to the transaction".

49 Romandale represents the Lands at the NMLG and instructs its planning consultant (and others working for it) to not share information with Kerbel's planner.

50 Kerbel's counsel sends a letter, dated February 17, 2011, to Romandale's counsel complaining that Ms. Roman-Barber's conduct is a breach of para. 5 of the 2005 August Agreement in which Romandale ceded control of the development process for the Lands to Kerbel. It demands that Romandale confirm to the NMLG that Kerbel's planning consultant has the sole authority to represent the Lands and threatens to commence proceedings if Ms. Roman-Barber does not comply with para. 5 of the 2005 August Agreement.

51 Romandale's counsel responds by letter, dated February 25, 2011, asserting that its client had "at all times acted in accordance" with the 2005 August Agreement and that it is considering whether the Settlement Agreement was a breach of the 2005 August Agreement.

2013

52 Meanwhile, Romandale and Kerbel are involved in litigation over the purchase price of the Triple R Lands (the "*Triple R Lands Litigation*"), one of the transactions in the 2005 August Agreement. In

February 2013, Romandale and Kerbel enter into a partial settlement in which they agree that if Kerbel is found to be entitled to a price adjustment, the determination of the non-developable lands is to be done "pursuant to the terms of the [2005 August Agreement] and the Amendment".[80]

53 Romandale leaves the NMLG.

2014

54 Romandale starts the 2014 Action against Kerbel, alleging that Kerbel fundamentally breached the 2005 August Agreement by taking steps to reduce the amount of developable acreage on the Lands. It seeks a declaration that the 2005 August Agreement is terminated or, alternatively, damages.

55 This court releases its decision in the Triple R Lands Litigation, finding in favour of Kerbel. It declares that Kerbel is entitled to a purchase price reduction in accordance with the 2005 August Agreement.

2015

56 Romandale retains new counsel and takes a new position: the buy-sell provisions in the COAs could be performed *before* SPA because the DMAs with Bordeaux had been terminated in February 2005.

57 Romandale obtains leave to amend its pleadings in the 2007 Action to allege, for the first time, that Kerbel repudiated the 2005 August Agreement by entering into the Settlement Agreement because it contained para. 5 which provides that the purchase and sale of Romandale's Remaining Interest in the Lands would occur after SPA. Also for the first time, in its amended pleading, Romandale asserts that it will not perform the 2005 August Agreement in any event.

2016

58 Kerbel starts the 2016 Action against Romandale, seeking specific performance of the 2005 August Agreement.

2017

59 Kerbel files a crossclaim in the 2007 Action seeking specific performance of the 2005 August Agreement and an order directing Romandale to comply with its terms.

60 Romandale files a defence to Kerbel's crossclaim in the 2007 Action and newly alleges that the 2005 August Agreement offends the rule against perpetuities.

2018

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80. The 2005 August Agreement was amended by an agreement dated March 14, 2006, to provide that any amount owing to Kerbel from a purchase price adjustment for non-developable acreage of the Triple R Lands, which was to be made at the end of the fifth year of the vendor takeback mortgage, would be set off against the eventual purchase price for the Remaining Interest in the Lands.

61 Shortly before the trial of the four actions begins in October 2018, Fram and Kerbel amend the Settlement Agreement to allow the sale of Romandale's Remaining Interest to close immediately, rather than after SPA, and Fram delivers its consent to that sale.

62 When the trial begins, SPA has not been obtained for the Lands.

IV. THE TRIAL REASONS

63 As the trial reasons are over 100 single-spaced pages in length, I will not attempt to summarize them here. Instead, I set out below a summary of the disposition of each of the four actions. Thereafter, I summarize the Reasons on the issues raised in these appeals.

Disposition of the Four Actions

64 The trial judge concluded that Romandale did not breach the COAs when it entered into the 2005 August Agreement and dismissed the 2007 Action accordingly. In reaching this conclusion, the trial judge held that: (1) the Conditional Provision was not a "Disposition" in breach of s. 5.03 of the COAs; (2) Romandale was not obliged to give Fram notice and a copy of the 2005 August Agreement so, if it did fail to disclose the same (which Romandale disputed), the failure was not a breach of the COAs; and, (3) Romandale did not breach the COAs by ceding control over the development of the Lands to Kerbel under the 2005 August Agreement (Reasons, at paras. 187-91, 204-05).

65 The trial judge concluded that Romandale's entry into the 2005 August Agreement did not amount to a breach of the CMAs because Romandale continued to own its Remaining Interest in the Lands and "for all practical purposes" continued to control the development of the Lands in the same way as before (Reasons, at para. 226). Accordingly, she dismissed the 2008 Action.

66 With respect to the 2014 Action, the trial judge declared that the 2005 August Agreement was "at an end and terminated" and she dismissed Kerbel's crossclaim seeking damages against Romandale. These orders flowed from the trial judge's determination that Kerbel repudiated the 2005 August Agreement by entering into the Settlement Agreement (Reasons, at paras. 346, 442).

67 Having found that Kerbel had repudiated the 2005 August Agreement and that Romandale accepted the repudiation, the trial judge dismissed Kerbel's 2016 Action for specific performance of the 2005 August Agreement (Reasons, at paras. 346, 442).

Estoppel (Reasons, at paras. 359-72)

68 At trial, both estoppel by representation and estoppel by convention were argued. The trial judge addressed estoppel by representation in the Reasons. However, she did not address estoppel by convention.

69 Quoting from para. 29 of Scotsburn Co-operative Services Ltd. v. W.T. Goodwin Ltd., [1985] 1 S.C.R. 54, the trial judge set out the following legal principles for estoppel by representation, at para. 359:

> ...The essence of estoppel is representation by words or conduct which induces detrimental reliance. A more exhaustive definition is offered in Spencer Bower and Turner, *The Law Relating to Estoppel by Representation* (3rd ed., 1977), at p. 4:
>
> > ...where one person ("the representor") has made a representation to another person ("the representee") in words or by acts or conduct, or (being under a duty to the representee to speak or act) by silence or inaction, with the intention (actual or presumptive), and with the result, of inducing the representee on the faith of such representation to alter his position to his detriment, the representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making, or attempting to establish by evidence, any averment substantially at variance with his former representation, if the representee at the proper time, and in the proper manner, objects thereto. [Emphasis in the Reasons.]

70 The trial judge described Fram and Kerbel's position on estoppel as follows. They argued that, prior to the Settlement Agreement and for a number of years following it, Romandale consistently took the position that: (1) the 2005 August Agreement was valid and enforceable; and (2) if Fram did not consent to Romandale's sale of its Remaining Interest to Kerbel, the buy-sell in the 2005 August Agreement would be performed after SPA. They asserted that Fram relied on Romandale's position in entering into the Settlement Agreement, thereby compromising its claim to the Lands by 50%, and that Kerbel also compromised its position in reliance on Romandale's position.

71 Romandale contended that Fram and Kerbel overstated its positions and stripped them of the context in which they were taken. The trial judge agreed, for the following reasons. In the 2007 Action, Romandale's primary position was that the 2005 August Agreement did not breach the COAs and, as a result, the 2005 August Agreement was valid. The trial judge acknowledged that Romandale did take the position that the buy-sell in the 2005 August Agreement would be triggered after SPA because the buy-sell in the COAs could only be triggered after SPA. However, she noted that Romandale's position on the buy-sell in the COAs was mistaken and the parties shared this mistaken understanding until 2015 when Romandale rectified its mistake and amended its pleadings. At that point, Romandale asserted that the 2005 August Agreement was unenforceable because Kerbel repudiated it by entering into the Settlement Agreement. However, the trial judge stated that this assertion did not change Romandale's primary position: Romandale continued to defend the 2007 Action on the basis that the 2005 August Agreement did not breach the COAs. She said that Romandale did not backtrack from its primary position: it was responding to new factual events that carried legal consequences.

72 On the issue of reliance, the trial judge said that Fram's only evidence was a "bald assertion" by Mr. Giannone that he relied on Romandale's position that the 2005 August Agreement was enforceable. She said this evidence was totally unreliable and could not be accepted.

73 In any event, the trial judge concluded, any reliance would have been "totally unreasonable" as Romandale objected to the Settlement Agreement before it was entered into. Therefore, Fram and Kerbel proceeded at their own risk.

Repudiation of the 2005 August Agreement (Reasons, at paras. 305-46)

74 The trial judge stated the legal principles governing repudiation as follows, at para. 305:

> The applicable law is not in dispute. A contract may be said to be repudiated when one party acts in a way, by words or conduct, that evinces an intent to no longer be bound by the contract. Only a very substantial breach will amount to a repudiation. As the court stated in *Jedfro Investments* at para. 21, "having 'little regard' for an agreement does not establish that a party is repudiating the agreement". Repudiation arises where the innocent party is deprived of substantially the whole benefit of its agreement. When faced with repudiation, the innocent party may elect to treat the contract as at an end, relieving the parties from further performance. [Citations omitted.]

75 She concluded that the Settlement Agreement materially and substantially changed the deal in the 2005 August Agreement for the following reasons. Because Kerbel was no longer at liberty to cause Romandale to trigger the buy-sell before SPA and Fram was no longer at liberty to consent before SPA, the result of the Settlement Agreement was to tie up the Lands until after SPA, then decades away or more, at a fixed price, without paying Romandale for the Lands and while leaving Romandale with all the risks and liabilities. She said this entirely devalued the Conditional Provision, given the time value of money, and that Kerbel shifted all of the risk of the Lands to Romandale by tying up the Lands indefinitely without any compensation to Romandale.

76 The trial judge also concluded that, by entering into the Settlement Agreement, Kerbel demonstrated an intent not to be bound by the ongoing performance of the 2005 August Agreement. It wanted instead to abide only by its new Settlement Agreement with Fram.

77 The trial judge determined that Kerbel's repudiation of the 2005 August Agreement deprived Romandale of substantially the whole benefit of that agreement. In making this determination, the trial judge considered each transaction in the 2005 August Agreement "on its own" and stated that there was no dispute that by the time of the Settlement Agreement, Romandale had not received any of the benefit of the Conditional Provision. She said that all of the transactions in the 2005 August Agreement were either of no benefit to Romandale or of relatively modest benefit when compared to the Conditional Provision. She concluded that performance of the other parts of the 2005 August Agreement could not "represent Romandale receiving substantially the whole of the benefit of that agreement" (at para. 336).

78 The trial judge found that Romandale had accepted Kerbel's repudiation. In making this finding, she said: (1) by February 2011, Kerbel knew that Romandale was no longer acting in accordance with the 2005 August Agreement; and (2) in a letter dated February 9, 2011, from counsel for Romandale to counsel for Kerbel, Romandale took the position that Kerbel "had breached" the 2005 August Agreement and it was "considering its rights" (at para. 338).

79 Having found that Romandale accepted Kerbel's repudiation, the trial judge concluded that the parties were relieved of their obligations under the Conditional Provision and it was at an end. Consequently, the Conditional Provision was not enforceable against Romandale.

80 The trial judge also concluded that Kerbel breached its duty of good faith and its fiduciary duty in acting as Romandale's agent, by fettering its discretion in the Settlement Agreement as to when to cause Romandale to trigger the buy-sell. Further, she was of the view that by entering into the Settlement Agreement, Kerbel breached the "time is of the essence" clause in the 2005 August Agreement and the clause stipulating that the conditions precedent were for the mutual benefit of the parties.

Frustration (Reasons, at paras. 347-49)

81 In light of the trial judge's determination on repudiation, it was not necessary that she consider Romandale's alternative argument that the 2005 August Agreement was rendered unenforceable on account of frustration. However, the trial judge stated, had it been necessary to consider it, she was persuaded that the 2005 August Agreement was frustrated.

82 Relying on Naylor Group Inc. v. Ellis-Don Construction Ltd., 2001 SCC 58, [2001] 2 S.C.R. 943, at para. 53, the trial judge said that frustration occurs when a situation has arisen for which the parties made no provision in the contract and performance of the contract becomes "a thing radically different from that which was undertaken by the contract" (at para. 348).

83 The trial judge said it was clear that when the 2005 August Agreement was entered into, both Ms. Roman-Barber and Mr. Kerbel expected that SPA was only years away, not decades away. Unforeseen planning changes resulted in SPA being delayed for decades and the farms being put on different development tracks. In addition, the Snider Farm could be developed only as employment lands, not for residential use. These changes were beyond the control of the parties and rendered the performance of the Conditional Provision radically different from that to which the parties agreed.

Mistake (Reasons, at paras. 350-53)

84 Romandale argued that if obtaining SPA was a prerequisite to triggering the buy-sell, the Conditional Provision was unenforceable because Kerbel and Romandale were mistaken, when entering into the 2005 August Agreement, as to the time horizon within which SPA could be achieved.

85 The trial judge accepted this argument and found the Conditional Provision void for mistake. She said the following, at para. 351:

> Both Romandale and Kerbel, in making a "time is of the essence" clause, fixing a purchase price of $160,000 per acre, and providing for the conditions precedent for their mutual benefit, without any sunset clause or otherwise set[ting] the closing date, were operating on the mistaken understanding that SPA would occur within a relatively short time period, and certainly not decades after the [2005 August Agreement] was entered into.

86 Citing Miller Paving Ltd. v. B. Gottardo Construction Ltd., 2007 ONCA 422, 86 O.R. (3d) 161, at para. 23, the trial judge set aside the 2005 August Agreement contract for common mistake as, in all the circumstances, it would be "unconscientious" for a contracting party to avail itself of the legal advantage it had obtained. She agreed with Romandale that it would be unconscionable and commercially absurd

to enforce the Conditional Provision or even consider it valid and enforceable since the parties would "never have agreed to its terms, especially the fixed price per acre of the Lands, had they known that the timeline for SPA would change so drastically and ... be pushed out decades in the future".

Kerbel's Claims were Time-Barred (Reasons, at paras. 400-07)

87 The trial judge found that even if Kerbel had a claim for specific performance of the 2005 August Agreement, its claim was barred by the expiration of the two-year limitation period under the Limitations Act, 2002, S.O. 2002, c. 24, Sched. B, (the "Limitations Act") and the equitable doctrine of laches.

88 The trial judge found that Kerbel was aware, as of 2011, that Romandale: viewed the Conditional Provision as being at an end; was no longer co-operating with Kerbel to advance the Lands through development as required by the 2005 August Agreement; and, was shutting Kerbel out for its own purposes. She said this conduct clearly revealed that Romandale intended to remain the owner of the Lands and, from its point of view, the Conditional Provision was dead.

89 Despite being aware of this, Kerbel took no material steps to enforce its rights and acquiesced to the state of affairs for years before asserting a claim for specific performance for the first time in the 2016 Action.

90 She rejected Kerbel's claim that it did not know until 2015 that Romandale intended to not perform the Conditional Provision, saying that this was undermined by the clear implications of Romandale's conduct since 2011.

91 Kerbel did not seek specific performance of the 2005 August Agreement until it commenced the 2016 Action. That was more than five years after it wrote to Romandale in 2011 asserting that Romandale was breaching the 2005 August Agreement, and threatening to commence litigation to affirm the breach. By 2016, Kerbel was outside the two-year statutory limitation period, had acquiesced to Romandale's conduct, and had permitted a state of affairs to exist where Romandale spent years investing significant time, effort, and money into the Lands.

Specific Performance (Reasons, at paras. 399, 408-23)

92 The trial judge held that Kerbel was not entitled to specific performance of the 2005 August Agreement because the Lands were not unique.

93 The trial judge found the Lands were not unique because Kerbel's only evidence of uniqueness was "a bald assertion from Mr. Kerbel" and because the expert evidence, including from Kerbel's expert, contradicted Kerbel's assertion. The experts called by all three parties used a "direct comparison" approach to provide their opinions on land values. The direct comparison approach determines value based on an analysis of sales of similar properties within a close time period and location. The trial judge concluded that because Fram and Kerbel's experts were able to use the "direct comparison" approach to value the Lands, "the Lands are not unique".

94 Further, the trial judge said, the Lands are not unique because they were "just an investment for Kerbel", there were suitable substitute properties that Kerbel could purchase, and it was possible to quantify the monetary equivalent of Kerbel's alleged future losses.

V. THE ISSUES ON THE APPEALS

A. Issues Raised by Fram

95 Fram says that the trial judge made numerous errors in her lengthy trial decision. To narrow its appeal, Fram focused on two issues. It submits that the trial judge erred in:

1. failing to find that Romandale was estopped, based on either estoppel by representation or estoppel by convention, from claiming that the Settlement Agreement breached the 2005 August Agreement; and

2. concluding that, by entering into the Settlement Agreement, Kerbel breached the 2005 August Agreement.

B. Issues Raised by Kerbel

96 In its appeal, Kerbel raises five issues. It submits that the trial judge erred in concluding that:

3. it repudiated the 2005 August Agreement by entering into the Settlement Agreement;

4. the 2005 August Agreement was frustrated;

5. the 2005 August Agreement was void for mistake;

6. its claim was limitation barred; and,

7. it was not entitled to specific performance of the 2005 August Agreement.

VI. ROMANDALE ALLEGES THRESHOLD FLAWS

97 Before turning to the issues raised on appeal, I will address Romandale's contention that the appeals suffer from two threshold flaws warranting their dismissal.

98 First, Romandale submits that Fram's appeal is improper because it is not an appeal from the dismissal of its 2007 and 2008 Actions but, rather, an attempt to appeal from the 2014 and 2016 Actions, to which Fram was not a party. It says that only a party to a proceeding below can appeal and the fact that multiple actions are ordered to be heard together does not alter the distinct identities of the parties.

99 Second, Romandale submits that the appeals are improper because they are founded on a new, never pleaded or asserted interpretation of the 2005 August Agreement: that it gave Kerbel an unfettered discretion to cause Romandale to trigger the buy-sell before or after SPA. Romandale

contends that this interpretation contradicts the one that Kerbel argued at trial: that the 2005 August Agreement required that it cause Romandale to trigger the buy-sell only after SPA. Romandale concludes on this alleged flaw by noting that, had the Appellants raised this new theory in their pleadings or at trial, the evidence "would have no doubt been different". Allowing Fram and/or Kerbel to now advance this theory, Romandale says, would be manifestly unfair.

100 For the following reasons, I do not accept that either alleged threshold flaw justifies dismissing the appeals.

A. The First Alleged Threshold Flaw

101 In my view, the direction that the four actions be tried together coupled with the way in which the trial was conducted are a full answer to the first alleged flaw.

102 In his capacity as the case management judge in these proceedings and pursuant to r. 6 of the Rules of Civil Procedure, R.R.O. 1990, reg. 194, Dunphy J. exercised his discretion and directed that the four actions be tried together in a single trial. He also gave directions about matters relating to the conduct of the trial. There can be no doubt about the wisdom of these directions.

103 Rule 6 provides that where two or more proceedings are pending in the court, an order may be made that they be tried together if it appears to the court that the proceedings have a common question of law or fact, the relief claimed in them arises out of the same transaction or series of transactions, or "for any other reason". An order under r. 6 is discretionary.

104 The purpose behind r. 6 is to avoid a multiplicity of proceedings and thereby prevent inconsistent dispositions, protect scarce judicial resources, and save expense to the parties. It also safeguards against a tactical decision to subject a party or parties to more than one action and, therefore, promotes fairness: see Wood v. Farr Ford Ltd., 2008 CanLII 53848 (Ont. S.C.), at para. 23; Mohamed Imran Hanif v. Ontario College of Pharmacists, Her Majesty the Queen in Right of Ontario and AGO, 2013 ONSC 6991, 315 O.A.C. 368 (Div. Ct.), at para. 18.

105 It is readily apparent that the preconditions to the application of r. 6 were met. The four actions had common questions of law and fact. And, the relief claimed in the actions arose out of one or more of the transactions relating to the Lands. As the trial judge noted, at para. 23 of the Reasons, the direction that the four actions be tried together was made because the actions "involve all of the current disputes between these three protagonists with respect to their interests in the Lands".

106 Further, the direction that the actions be tried together fulfilled the purpose which underlies r. 6. A single trial avoided a multiplicity of proceedings among the parties, prevented inconsistent dispositions relating to the Lands, protected scarce judicial resources, and saved the parties expense. In my view, it also does away with Romandale's contention that Fram was a party only to its actions and not to the proceeding below. The four actions were tried together and a single judgment was rendered in respect of those actions. The fact that the Judgment sets out the relief granted in respect of each action separately does not alter the fact that Fram was a party to the proceeding below and, thus, has the right

to appeal from the Judgment.

107 Furthermore, Romandale's position on the first alleged threshold flaw flies in the face of the way in which these actions proceeded at trial. Although the actions were not formally consolidated, the trial of the actions was effectively consolidated, with the evidence being used on all issues and argument permitted on all issues by all parties.

108 At trial, Fram was permitted to lead evidence and make argument on the same issues it now raises on appeal. The Reasons show that both Fram and Kerbel argued the issues raised in the appeals; the trial judge repeatedly refers to Fram's position on the issues and she often refers to Fram's and Kerbel's positions interchangeably. Had Romandale wished to take issue with Fram making argument and adducing evidence on the issues at trial, it was incumbent on Romandale to object at trial, which would have given Fram the opportunity to request to be added as a party. Having stayed silent at trial, Romandale cannot now take the position that Fram does not have standing on this appeal to raise and argue the issues it is pursuing.

109 Finally, I note that Romandale did not question the propriety of Fram's appeal before the case management judge of this court who issued the order consolidating the appeals. It does not now lie in Romandale's mouth to suggest that Fram is not entitled to pursue its appeal.

110 For these reasons, Fram's appeal is not improper.

B. The Second Alleged Threshold Flaw

111 Romandale's second alleged threshold flaw is based on the new interpretation of the 2005 August Agreement it says that Fram and/or Kerbel advance on appeal. In my analysis of Issue #1, below, I explain that because of estoppel by convention, Romandale is barred from asserting that the buy-sell provisions in the COAs and the 2005 August Agreement could be utilized pre-SPA. The trial judge interpreted the 2005 August Agreement on the basis that the buy-sell provision could be utilized pre-SPA (Reasons, para. 291). That is, she interpreted it in a way that is impermissible because of the operation of estoppel by convention. Consequently, her interpretation of the 2005 August Agreement cannot stand and it is unnecessary to decide Issue #2. The allegedly new interpretation was made in the context of Issue #2. As it is unnecessary to decide Issue #2, it is also unnecessary to decide whether the Appellants committed the second threshold flaw as Romandale alleges.

112 Thus, the second alleged threshold flaw does not warrant the dismissal of these appeals.

VII. ANALYSIS OF FRAM'S ISSUES

Issue #1: Did the trial judge err in failing to find that Romandale was estopped, based on estoppel by representation or by convention, from claiming that the Settlement Agreement breached the 2005 August Agreement?

A. The Parties' Positions

Fram

113 Fram contends that, before 2015, Romandale repeatedly made two representations: (1) under the COAs, the buy-sell could not be exercised until after SPA; and (2) under the 2005 August Agreement, Kerbel could not cause Romandale to trigger the buy-sell in the COAs until after SPA (the "*Representations*"). It says that Romandale made the Representations and statements consistent with them in: its pleadings; Ms. Roman-Barber's affidavits; its solicitors' letters, both before and after the Settlement Agreement; and, Ms. Roman-Barber's discovery evidence. Fram submits that the Representations formed the basis of a shared common understanding among the parties, and para. 5 was incorporated into the Settlement Agreement in reliance on the Representations and with Romandale's full knowledge. It will be recalled that para. 5 of the Settlement Agreement states the parties' intention that the purchase and sale of the Remaining Interest would take place after SPA.

114 Fram argues that estoppel by representation and estoppel by convention both operate to bar Romandale from reversing its position and claiming that para. 5 of the Settlement Agreement is a breach of the 2005 August Agreement. It contends that the trial judge made a palpable and overriding error in refusing to apply estoppel on the basis that Fram and Kerbel had not relied on the Representations or, if they did, that their reliance was unreasonable.

115 In terms of reliance, Fram says that the trial judge erred in dismissing its and Kerbel's evidence that they relied on the Representations on the basis the evidence was simply "bald assertions". Fram argues there is nothing "bald" about the change in course of action it and Kerbel took in entering into the Settlement Agreement. It contends that as a result of the Settlement Agreement, it gave up seeking specific performance of its contractual remedies and limited its damages claim against Romandale to 50% of the Lands, while Kerbel gave up 50% of its rights under the 2005 August Agreement. They did so based on the common understanding — perpetuated by Romandale and its lawyers — that post-SPA closing was consistent with the COAs and the 2005 August Agreement.

116 Further, Fram contends, there was nothing unreasonable about it and Kerbel's reliance on Romandale's Representations. Those Representations were made in a litigation context — through pleadings, affidavits, solicitors' letters, and examination testimony. The very purpose of the Representations was to allow the courts and other parties to rely on them for notice and the truth of their contents. For example, when Ms. Roman-Barber swore her affidavit in 2007, she intended the court to rely on it in the injunction proceeding. The court did exactly that: Forestell J. accepted Ms. Roman-Barber's evidence that the "original intent of the [2005 August Agreement] was that the sale to [Kerbel] of the remaining interest of Romandale in the Lands would not occur until some time after SPA". If the court was entitled to rely on Romandale's representation of its position Fram argues it was surely reasonable for Fram and Kerbel to do the same.

117 Fram says the trial judge erred in concluding that reliance was "totally unreasonable" in light of Romandale's objection to the Settlement Agreement, because Romandale's objection was not based on the timing of the buy-sell.

118 In terms of detriment, Fram submits that it would be unjust and unfair to permit Romandale to resile from the mutual assumptions or Representations. In 2010, Kerbel and it entered into the Settlement Agreement with the assistance of a judicial mediation and, at that time, all three parties agreed that the 2005 August Agreement would close post-SPA. Five years later in 2015, knowing the state of the Settlement Agreement, Romandale "upended the playing field" and changed its position to make an uncontroversial term in 2010 (i.e. para. 5) an allegedly repudiatory breach of the 2005 August Agreement. This, Fram contends, is unfair because it threatens to take away Fram and Kerbel's entire economic interest in the 2005 August Agreement.

Kerbel

119 On these appeals, Kerbel repeats and relies on Fram's submissions on estoppel. However, because the trial judge did not deal with estoppel by convention, it falls to this court to decide that matter *de novo*. Consequently, I will set out a summary of Kerbel's trial position on that issue.

120 At trial, Kerbel argued that estoppel by convention applied to bar Romandale from contending that, because of para. 5 in the Settlement Agreement, Kerbel breached the 2005 August Agreement by entering into the Settlement Agreement. It referred to the principles governing estoppel by convention, as set out in Ryan v. Moore, and argued that those principles squarely applied.

121 Kerbel identified the following as its shared understanding with Romandale when they entered into the 2005 August Agreement: because the sale of Romandale's Remaining Interest would close after SPA, the 2005 August Agreement did not breach the COAs between Romandale and Fram (the "*Shared Understanding*"). Romandale repeatedly expressed the Shared Understanding after the 2005 August Agreement was entered into. This includes in the fall of 2010, during which time all three parties — Romandale, Fram and Kerbel — participated in the judicial mediation that took place in respect of the 2007 and 2008 Actions. Kerbel argued that was evidence that all three parties held and operated under the Shared Understanding.

122 Kerbel also pointed to the fact that even after Romandale resiled from the Settlement Agreement, it knew that Fram and Kerbel were continuing to discuss settlement on the basis of the Shared Understanding. It was only months after the Settlement Agreement was executed that Romandale, for the first time, took the position that by entering into the Settlement Agreement, Kerbel breached the 2005 August Agreement. Kerbel argued that Romandale was obliged to warn it, before the Settlement Agreement was executed, that it intended to change its position on the Shared Understanding.

123 Kerbel also contended that it would suffer detriment if Romandale were allowed to resile from the Shared Assumption. It had already given Romandale over $16 million in value under the 2005 August Agreement and, through the Settlement Agreement, it compromised its rights under that agreement. If Romandale were allowed to resile from the Shared Assumptions, Kerbel would lose the opportunity to close its purchase of the Remaining Interest under the 2005 August Agreement and develop the Lands.

Romandale

124 Romandale says that Fram's submissions on estoppel are premised on an erroneous oversimplification of the equitable doctrine of convention. It contends that, even if there was a shared assumption that the buy-sell could not be triggered under the 2005 August Agreement until after SPA, there was no transaction or dealing between Romandale and either Fram or Kerbel for which this shared assumption formed the basis. In making this argument, Romandale relies on para. 4 of Ryan v. Moore, in which the Supreme Court of Canada states:

> Estoppel by convention operates where the parties have agreed that certain facts are deemed to be true and to form the basis of the transaction into which they are **about** to enter. If they have acted upon the agreed assumption, then, as regards **that transaction**, each is estopped **against the other** from questioning the truth of the statement of facts so assumed if it would be unjust to allow one to go back on it. [Citations omitted; emphasis as added by Romandale.]

125 Thus, Romandale argues, neither Fram nor Kerbel can use estoppel by convention against Romandale to protect the Settlement Agreement. Because the Settlement Agreement was entered into between Fram and Kerbel only, estoppel by convention "may apply as between them but not [to] Romandale".

126 As well, Romandale submits that Fram's argument on estoppel starts with a misstatement about the nature and character of its position prior to the Settlement Agreement. It says that it made no representation upon which Fram or Kerbel could rely, nor did the parties have a shared assumption for the purposes of estoppel.

127 Its position in the 2007 Action was that the 2005 August Agreement was not a breach of the COAs. It says that the timing of the triggering of the buy-sell was irrelevant to whether Romandale had breached the COAs. To the extent Romandale asserted that the buy-sell in the 2005 August Agreement would be triggered after SPA, "this was just another way of Romandale asserting that the buy-sell under the [2005 August Agreement] could only be triggered when it was triggerable under s. 5.07 of the COAs, coupled with the mistake the parties and counsel had made about s. 5.07". Given that the mistake was of no consequence to the matters in dispute in the 2007 Action, it went unnoticed, was not something the parties deliberated on, joined issue on, or turned their minds to. It did not form the basis of any of their dealings nor were they all of the mind that it would govern their future affairs.

128 Romandale also argues that the trial judge did not err in concluding that Fram and Kerbel had not established reliance. It says that the trial judge correctly gave no weight to either Mr. Giannone's self-serving assertion of reliance in his affidavit evidence or to the recital in the Settlement Agreement. It contends that the evidence made clear that Fram and Kerbel were not relying on Romandale at all but, rather, crafted the Settlement Agreement to carry out a scheme in which they would immediately assume control over the development of the Lands for their benefit while putting off their purchase of the Lands for at least decades.

129 Furthermore, Romandale says, the trial judge did not err in finding that any reliance by Fram and Kebel was unreasonable. Just because a statement is made in the course of litigation does not mean it can automatically be relied on for the purposes of estoppel. It depends on the circumstances. Fram and Kerbel cannot have reasonably relied on Romandale's assertions regarding the timing of the buy-sell in the 2005 August Agreement because that issue was not in dispute in the litigation prior to the Settlement Agreement being entered into.

130 Romandale also points to its objection to the Settlement Agreement, arguing that it does not matter whether its objection was based on para. 5 of that agreement. Its objection put Fram and Kerbel on notice that it would object to any settlement between them. Thus, they proceeded at their own risk.

131 Romandale also says that, given their position on these appeals, Fram and Kerbel could not have reasonably relied on a shared assumption that the buy-sell could only be triggered after SPA when entering into the Settlement Agreement. Their position on appeal is that Kerbel had an unfettered discretion to trigger the buy-sell in the 2005 August Agreement either before or after SPA. Thus, Romandale contends, they cannot be heard to say it was reasonable for them to rely on a clearly wrong and now abandoned interpretation.

132 Romandale also says Fram has not established that it would be unjust to allow it to correct its mistake or that Fram and Kerbel suffered any detriment. It cannot be unjust for a party to correct a mistake that is patently obvious on the express words of the contracts, to which all parties had access. Furthermore, Fram and Kerbel's entry into the Settlement Agreement was a deliberate and inequitable scheme to tie up and control the Lands to Romandale's exclusion while putting off their purchase for decades.

133 Moreover, Romandale submits that neither Fram nor Kerbel suffered any relevant detriment in entering into the Settlement Agreement. To the extent Fram suffered detriment by giving up 50% of its claim against Romandale, that detriment is moot because Fram's claims in the 2007 and 2008 Actions were dismissed and are not being appealed. And, Kerbel presented no evidence of detriment. Romandale says that granting Fram an option to buy 50% of the Lands is not detriment: Kerbel granted the option in exchange for Fram giving up its claims against Kerbel. It was Kerbel's choice to assign some litigation risk to being sued by Fram and to mitigate that risk by striking a deal with Fram. That Fram ultimately lost and Kerbel "paid" for nothing is irrelevant.

B. Estoppel by Representation

(1) Governing Legal Principles

> 134 In Canadian Superior Oil Ltd. v. Paddon-Hughes Development Co., [1970] S.C.R. 932, at pp. 939-40, the Supreme Court stated that the essential factors giving rise to estoppel by representation are:
>
> > (1) a representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made;

> (2) an act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation is made; and
>
> (3) detriment to such person as a consequence of the act or omission.

135 More recently in Ryan v. Moore, at para. 5, the Supreme Court referred to its much earlier decision in Page v. Austin(1884), 10 S.C.R. 132, at para. 164, to describe the doctrine of estoppel by representation as follows:

> Estoppel by representation requires a positive representation made by the party whom it is sought to bind, with the intention that it shall be acted on by the party with whom he or she is dealing, the latter having so acted upon it as to make it inequitable that the party making the representation should be permitted to dispute its truth, or do anything inconsistent with it.

(2) Application of the Law

136 I agree with the trial judge that Fram and Kerbel fail in their claim of estoppel by representation. However, I do so for different reasons than those of the trial judge.

137 It will be recalled that, at trial, Fram and Kerbel argued that they entered into the Settlement Agreement in reliance on Romandale's representation that the 2005 August Agreement was valid and that the buy-sell provision in it was to be performed or completed after SPA. The trial judge concluded that estoppel by representation was not made out because Fram and Kerbel had not proven that they relied on the representation and, if they had, their reliance was unreasonable. That is, the trial judge concluded that Fram and Kerbel failed to prove the second essential factor giving rise to estoppel by representation.

138 In my view, however, Fram and Kerbel fail on the first essential factor giving rise to estoppel by representation.

139 *Canadian Superior Oil Ltd.* describes the first essential factor as a representation "intended to induce a course of conduct" on the part of the person to whom the representation was made. In Ryan v. Moore, this factor is expressed as the requirement that a positive representation be made "with the intention that it shall be acted on" by the party to whom the representation is made. On the facts, Romandale did not make a representation with the intention that Fram and Kerbel should act on it.

140 In the fall of 2010, Fram, Kerbel, and Romandale were attempting to settle the 2007 and 2008 Actions. After reaching a settlement agreement in principle, the parties continued to negotiate the terms of the settlement. During that process, Fram and Kerbel were made aware that Romandale continued to maintain its position that the 2005 August Agreement was valid and the buy-sell provisions in it and in the COAs could not be utilized until SPA had been achieved for the Lands.

141 However, knowledge of Romandale's position and the fact its position remained unchanged from

the time that it entered into the 2005 August Agreement until December 2010, when Fram and Kerbel entered into the Settlement Agreement, is not tantamount to Romandale representing that it would not change its position going forward.

142 Further and in any event, Fram and Kerbel's knowledge of Romandale's position does not meet the requirement in the first essential element that Romandale made a representation of its position *with the intention of inducing* Fram and Kerbel to enter into the Settlement Agreement or otherwise act on it.

143 Consequently, Fram and Kerbel failed to prove the first essential factor giving rise to estoppel by representation. For these reasons, I agree with the trial judge that estoppel by representation was not made out.

C. Estoppel by Convention

(1) Governing Legal Principles

144 At para. 59 of Ryan v. Moore, the Supreme Court states that the following criteria form the basis of the doctrine of estoppel by convention:

> (1) The parties' dealings must have been based on a shared assumption of fact or law: estoppel requires manifest representation by statement or conduct creating a mutual assumption. Nevertheless, estoppel can arise out of *silence* (impliedly). [Emphasis in original.]
>
> (2) A party must have conducted itself, i.e. acted, in reliance on such shared assumption, its actions resulting in a change of its legal position.
>
> (3) It must also be unjust or unfair to allow one of the parties to resile or depart from the common assumption. The party seeking to establish estoppel therefore has to prove that detriment will be suffered if the other party is allowed to resile from the assumption since there has been a change from the presumed position.

145 On the first criterion — which the Court refers to as "Assumption Shared and Communicated" — the Court provides the following additional guidance, at paras. 61-62:

> The crucial requirement for estoppel by convention, which distinguishes it from the other types of estoppel, is that at the material time both parties must be of "a like mind". The court must determine what state of affairs the parties have accepted, and decide whether there is sufficient certainty and clarity in the terms of the convention to give rise to any enforceable equity.
>
> While it may not be necessary that the assumption by the party raising estoppel be created or encouraged by the estopped party, it must be shared in the sense that each is aware of the assumption of the other. Mutual assent is what distinguishes the estoppel by convention from other types of estoppel. ... Thus, it is not enough that each of the two parties acts on an assumption not communicated to the other. Further, the estopped party must have, at the very least, communicated

to the other that he or she is indeed sharing the other party's (ex *hypothesi*) mistaken assumption. [Citations omitted.]

146 The court also offers further guidance on the second and third criteria, namely, reliance and detriment. It notes that the requirement of detrimental reliance lies at the heart of true estoppel and that detrimental reliance encompasses two distinct, but interrelated concepts: reliance and detriment: at paras. 68-69.

147 Reliance requires a finding that the party seeking to establish the estoppel changed its course of conduct by acting, or abstaining from acting, in reliance upon the assumption, thereby altering its legal position: at para. 69.

148 In terms of detriment, the Court offers this guidance, at para. 73 of Ryan v. Moore Once the party seeking to establish estoppel shows that it acted on a shared assumption, it must prove detriment. For the plea to succeed, it must be unjust or unfair to allow a party to resile from the common assumption. A change from the presumed legal position will facilitate the establishment of detriment "because there is an element of injustice inherent within the concept of the shared assumption — one party has acted unjustly in allowing the belief or expectation to 'cross the line' and arise in the other's mind": at para. 73, citing Sean Wilken, *Wilken and Villiers: The Law of Waiver, Variation and Estoppel*, 2nd ed. (Oxford: Oxford University Press, 2002), at p. 228.

(2) Application of the Law

149 Unlike estoppel by representation, I must approach the issue of estoppel by convention on a *de novo* basis. I do so because, while the parties expressly raised and argued the issue of estoppel by convention at trial, the trial judge did not address it.

150 I will address each of the three criteria that form the basis of estoppel by convention: (a) assumption shared and communicated; (b) reliance; and (c) detriment.

(a) Assumption Shared and Communicated

151 The first criterion for estoppel by convention requires that the parties' dealings were based on a shared assumption of fact or law: *Ryan v. Moore*, at para. 59. Thus, I must determine what state of affairs the parties accepted and decide whether there was sufficient certainty and clarity in the shared assumptions to give rise "to an enforceable equity": *Ryan v. Moore*, at para. 61.

152 I deal first with whether the alleged shared assumptions are sufficiently certain and clear.

153 In the fall of 2010, when Fram, Kerbel, and Romandale were trying to settle the 2007 and 2008 Actions, the parties based their dealings on two assumptions: (1) the buy-sell provision in the COAs could not be triggered until after SPA had been achieved for the Lands;[81] and (2) under the 2005 August

81. The parties were mistaken on this matter. Under s. 5.07 of the COAs, the buy-sell could have been exercised when the DMAs were terminated. Romandale terminated the DMAs in February 2005. Therefore, the buy-sell in the COAs could have been exercised as early as February 2005.

Agreement, Kerbel could not cause Romandale to trigger the buy-sell under the COAs until after SPA[82] (the "*Shared Assumptions*"). There is no ambiguity or lack of clarity about the Shared Assumptions: they have sufficient certainty and clarity to satisfy that requirement in the first criterion of estoppel by convention.[83]

154 It is worth recalling at this point that I did not find statements to the same effect as the Shared Assumptions to amount to representations within the meaning of estoppel by representation. That is because a common or shared assumption, as that term is used in estoppel by convention, is not the same thing as a representation. As the Supreme Court explained, at para. 62 of Ryan v. Moore, an assumption need not be created or encouraged by the estopped party: it must simply be shared, in the sense that each party is aware that the assumption is held by the other(s). As the Supreme Court stated, "Mutual assent is what distinguishes the estoppel by convention from other types of estoppel".

155 Having found the Shared Assumptions were sufficiently certain and clear, I must now determine whether the parties were of "a like mind". In making this determination, I must consider whether the three parties: (1) held the Shared Assumptions at the material times; (2) communicated to the others that they held the Shared Assumptions; and (3) based their dealings on them: Ryan v. Moore, at paras. 61-62. In my view, the following documents establish these three matters. Thus, the first criterion for estoppel by convention is met.

(i) The Settlement Agreement and Drafts Leading to It

156 The final Settlement Agreement is clear evidence that Fram and Kerbel held the Shared Assumptions, communicated that to one another, and based their dealings on them. This is evident from the first, second, and sixth preambles, and para. 5 of the Settlement Agreement:

- The first preamble recites that Fram and Romandale are co-owners of the Lands and parties to the COAs and, under the COAs, each has a buy-sell right in respect of the other's interest but that right "may only be exercised after [SPA] has been obtained for the Lands".

- The second preamble recites that Romandale and Kerbel are parties to the 2005 August Agreement under which Romandale agreed to sell to Kerbel its Remaining Interest "at such time as Romandale could exercise its buy-sell rights under the Buy-Sell Provisions of the [COAs]".

- The sixth preamble recites that Fram and Kerbel "have agreed to settlement so that the right of [Kerbel] to acquire Romandale's Remaining Interest in the Lands pursuant to the [2005 August Agreement] may be exercised 60 days after [SPA] for the Lands is obtained".

- Paragraph 5 provides that "[i]t is the intention of [Fram and Kerbel] that the purchase and sale of

82. This may or may not have been a mistaken assumption. Whether, under the 2005 August Agreement, Kerbel could have required Romandale to trigger the buy-sell in the COAs before SPA is a point of contractual interpretation. As I have concluded that estoppel by convention applies to bar Romandale from contending that it could have been triggered pre-SPA, this point of contractual interpretation need not be decided.
83. As discussed below, the communications in *Ryan v. Moore* are an example of alleged shared assumptions that do not have sufficient clarity and certainty to satisfy the first criterion.

Romandale's Remaining Interest in the Lands pursuant to these Minutes of Settlement will take place after [SPA] for the Lands has been obtained".

157 Though Romandale was not a party to the final Settlement Agreement, its conduct in the fall of 2010 up to and including when Fram and Kerbel executed the Settlement Agreement demonstrates that it too held the Shared Assumptions, communicated that to Fram and Kerbel, and based its dealings with them on the Shared Assumptions.

158 It will be recalled that in September of 2010, the three parties came to an agreement in principle at the judicial mediation. Based on the agreement in principle, counsel for Fram prepared "very preliminary" draft minutes of settlement and sent the draft to counsel for Romandale under cover of a letter dated September 8, 2010. The preliminary draft was short; it consisted of four preambles and seven paragraphs. The fourth preamble and para. 6 of that draft reflect the Shared Assumptions.

• The fourth preamble reads as follows:

> **WHEREAS** the parties have agreed to settlement so that the right of [Kerbel] to acquire Romandale's Remaining Interest in the Lands pursuant to the [2005 August Agreement] shall be exercised 60 days after [SPA] for the Lands is obtained ...

• Paragraph 6 provides:

> [Fram] does not by this agreement consent to the transaction referred to in paragraph 2 of the [2005 August Agreement]. Romandale hereby acknowledges that this settlement agreement does not constitute [Fram's consent] ... and that it is the intention of the parties that the purchase and sale of Romandale's entire Remaining Interest in the Lands pursuant to these Minutes of Settlement will take place 60 days after [SPA] for the Lands has been obtained.

159 After the preliminary draft was circulated, counsel for the three parties continued to exchange draft settlement agreements and discuss other possible provisions that might be included.

160 In a letter dated September 24, 2010, counsel for Romandale wrote to counsel for Kerbel and Fram and set out the areas on which the parties were in agreement, including "[t]hat the sale of each parcel will take place when that particular parcel achieves Secondary Planning Approval".

161 Under cover of a letter dated September 29, 2010, counsel for Fram sent Romandale's counsel (with a copy to Kerbel's counsel) a proposed final draft. The letter stated that if the draft was acceptable, the "draft stamp" would be removed and it would be circulated for signature. The proposed final draft settlement agreement contained essentially the same fourth preamble as that in the preliminary draft (set out above) and, of a total of seven paragraphs, three reflect the Shared Assumptions.

• Paragraph 1 provided that "the injunction ordered by Forestell J. July 26, 2007 shall continue in respect of each of the two parcels comprising the Lands ... until 60 days after [SPA] has been granted in respect of that particular parcel of the Lands".

• Paragraph 4 provided that "Fram Kerbel and Romandale shall complete the sale of the entire Remaining Interest of Romandale in the Lands on the terms described in paragraph 2 of the [2005 August Agreement], 60 days after [SPA] has been obtained for each of the two parcels comprising the Lands".

• Paragraph 7 provided that "*[t]he parties hereby acknowledge* that in making these minutes of settlement, it is *their common intention that the purchase and sale of the Romandale's Remaining Interest in the Lands pursuant to these Minutes of Settlement shall take place* in respect of each of the two parcels of the Lands *after [SPA] for each parcel has been obtained*, and that the closing of the purchase and sale for each parcel shall take place 60 days after [SPA] for that particular parcel of the Lands has been obtained. [Emphasis added.]

162 In response, by letter dated September 30, 2010, counsel for Romandale provided comments on the draft and asked that the final settlement agreement include, among other things, a provision explicitly requiring the parties to do nothing to hinder or delay the obtaining of SPA for the Lands. He wrote, "As we were specifically advised at the mediation that this would not be a problem, the wording should be inserted in the Minutes". As well, counsel for Romandale asked that a "drop-dead" date for the contemplated sale of the Lands be inserted in case the Lands never achieved SPA:

> At present, there exists the possibility that one or both parcels may not receive [SPA]. Such a failure to address that point may call into question the validity of the agreements or at least pose a practical problem for the parties if [SPA] is not achieved (at least in our lifetimes) for either of the parcels.

163 The parties continued to communicate about the draft settlement agreement for some weeks. In October 2010, Romandale began taking issue with the draft agreements, which I discuss in more detail below. Ultimately, in a letter dated November 12, 2010, Fram's counsel wrote to Romandale's counsel (with a copy to Kerbel's counsel), stating that it appeared Romandale was resiling from the settlement agreement so steps would be taken to reschedule the trial of the 2007 and 2008 Actions. Fram's counsel enclosed a copy of the draft settlement agreement that Fram and Kerbel intended to enter into. The enclosed agreement was substantially the same as the final Settlement Agreement, including the provisions that reflected the Shared Assumptions.

164 Never once during the judicial mediation or in the period that followed leading up to the Settlement Agreement — despite the many communications among counsel which reflected the Shared Assumptions — did Romandale ever object to the Shared Assumptions or the terms in the drafts that reflected them. On the contrary, during that period, Romandale expressly affirmed the parties' shared understanding that the sale and purchase of Romandale's Remaining Interest would occur after SPA — as, for example, in its counsel's letters of September 24 and September 30, 2010, described above.

165 In my view, what transpired among the three parties during this period alone satisfies the requirements of the first criterion for estoppel by convention. The following documents reinforce this conclusion.

(ii) Letters between Counsel

166 In a letter dated September 22, 2009, Romandale's corporate counsel wrote to Kerbel's counsel to address the matter of participation in the NMLG. He stated that, under the 2005 August Agreement, Kerbel was to act as Romandale's agent and attorney "for the purposes of taking the steps necessary to proceed to [SPA] and thereby trigger the buy-sell rights under the [COAs]". This is communication by Romandale to Kerbel of its belief in the Shared Assumptions.

167 Romandale also communicated its belief in the Shared Assumptions to Fram. By letter dated January 28, 2011, counsel for Romandale wrote to counsel for Fram stating:

> [Romandale] was and is the registered owner of 90% of the [Lands]. It conditionally sold those lands to [Kerbel] by way of an agreement dated August 2005. The condition could only be satisfied by either a) secondary plan approval (which has not been achieved); b) or the consent of [Fram] to the transaction.

168 This letter was sent more than a month after Fram and Kerbel entered into the Settlement Agreement. It demonstrates that Romandale continued to believe the Shared Assumptions even after the Settlement Agreement was executed.

(iii) Pleadings and Evidence at Trial

169 The pleadings and evidence at trial further demonstrate that all three parties held the Shared Assumptions in the relevant time period. In addition, they show that each party made manifest representations of its belief in the Shared Assumptions and communicated that to the other parties.

170 At trial, Fram and Kerbel's positions rested on the Shared Assumptions. Their pleadings — including Fram's Fresh as Amended Reply and Kerbel's Statement of Defence and Crossclaim in the 2007 Action — reflect their shared belief that SPA was required before the buy-sell provision in the COAs and the 2005 August Agreement could be triggered.

171 Romandale's Statement of Defence in the 2007 Action (before it was amended in 2015), its Statement of Defence in the 2008 Action, and its Notice of Motion to stay the 2007 Action all explicitly stated that the buy-sell provision in the 2005 August Agreement could not be triggered until after SPA was obtained for the Lands.

172 Furthermore, Ms. Roman-Barber's affidavits sworn July 11, 2007, and August 23, 2007, and her discovery evidence in February 2009 communicated -to Fram, Kerbel, and beyond — her (and therefore, Romandale's) belief that the sale of the Remaining Interest under the 2005 August Agreement was conditional on SPA being obtained for the Lands.

(b) Reliance

173 Having established that the first criterion for estoppel by convention is met, I must now determine whether Fram and Kerbel acted in reliance on the Shared Assumptions. For the purpose of

estoppel by convention, reliance requires a finding that the party seeking to establish estoppel changed its course of conduct by acting (or abstaining from acting) in reliance on the shared assumption, thereby altering its legal position: *Ryan v. Moore*, at para. 69.

174 In my view, Fram and Kerbel satisfy the reliance criterion. Paragraph 5 of the Settlement Agreement is based on the Shared Assumptions. Fram and Kerbel entered into the Settlement Agreement in reliance on the Shared Assumptions. As a result of having entered into the Settlement Agreement, their respective legal positions under the COAs and the 2005 August Agreement were altered. An overview of the alteration to their legal positions that resulted from having entered into the Settlement Agreement is as follows.

175 Before entering into the Settlement Agreement, Fram's legal position in respect of the Lands was governed by the COAs between it and Romandale. In the 2007 Action, it claimed that Romandale had breached the prohibition against Disposition in the COAs by entering into the 2005 August Agreement. If Fram succeeded in its claim, Fram was entitled to, among other things: a declaration that the offending agreement (i.e., the 2005 August Agreement) was void under s. 5.03 of the COAs; bring proceedings for specific performance under s. 6.02(b) of the COAs; and purchase Romandale's interest in the Lands at 95% of their fair market value under s. 6.02(d) of the COAs. As a result of entering into the Settlement Agreement, Fram gave up those rights: pursuant to s. 1 of the Settlement Agreement, Fram agreed that it would not seek a declaration that the 2005 August Agreement was void and that it would limit its damages claims against Romandale to 50% of the Lands.

176 Before entering into the Settlement Agreement, Kerbel's legal position in respect of the Lands was governed by the 2005 August Agreement between it and Romandale. The Conditional Provision in that agreement gave Kerbel the opportunity to acquire 100% ownership of the Lands. After entering into the Settlement Agreement, that changed. Pursuant to para. 2 of the Settlement Agreement, if Kerbel acquired ownership of the Lands, Kerbel was obliged — at Fram's option — to allow Fram to acquire a 50% undivided interest in the Lands on the same terms and conditions as Kerbel had acquired the Remaining Interest from Romandale.

177 Thus, it can be seen, Fram and Kerbel's legal positions were altered as a result of relying on the Shared Assumptions.

178 I do not view my determination that Fram and Kerbel meet the reliance criterion for estoppel by convention as running afoul of the trial judge's determination of no reliance on the part of Fram and Kerbel or, if there was reliance, it was unreasonable. That is because the trial judge made her reliance determination based on the legal principles governing estoppel by representation whereas I decided reliance in accordance with the legal principles governing estoppel by convention. The two legal frameworks are different, the test for reliance in each is different, and, therefore, the determination of reliance under each may be different without being inconsistent.

179 However, if, as Romandale urges, the trial judge's determination on reliance is a finding of fact for which deference must be shown, I would set it aside on the basis that it is the result of palpable and

overriding error.

180 On the evidence set out above, it is clear that Fram and Kerbel relied on the Shared Assumptions in entering into the Settlement Agreement. A plain reading of the Settlement Agreement alone shows that. A contrary finding -namely, that Fram and Kerbel did not rely on the Shared Assumptions in entering into the Settlement Agreement — is simply not available on the evidence. Thus, such a finding would be the result of palpable and overriding error.

181 The trial judge also made a palpable and overriding error in determining that, if there was reliance, it was unreasonable. In making this determination, the trial judge accepted that Romandale put Fram and Kerbel on notice that it objected to any settlement agreement between them in respect of the Lands without its consent: Reasons, at para. 129. Romandale says that it objected "clearly and unequivocally" to the Settlement Agreement "including Fram and Kerbel deferring the closing of the 2005 August Agreement by decades rather than carrying it out immediately in 2010, as Romandale expressly asked them to do". In support of this argument, it relies on its letter to Fram, dated October 25, 2010.

182 I do not agree. The relevant portions of Romandale's letter of October 25, 2010, are as follows:

> More importantly, your correspondence only confirms our client's belief that the relationship contemplated by the proposed Minutes of Settlement cannot work. Simply put, the benefit of the August 2005 Agreement cannot be assigned in whole or in part to your client without our client's consent. In order to give that consent, not only would real estate counsel have to draft extensive documentation, but there remain at present simply some points to which our client cannot agree, in particular, the registration of the injunction against title to the lands for which Romandale continues to hold legal title: and arbitration over a process which Romandale has effectively controlled without objection from any party for 5 years now.
>
> To avoid these problems, your client, together with Mr. Kerbel, can formulate an offer to purchase our client's interest in the lands immediately. Failing that, we should appear before Justice Moore and request a trial date to adjudicate all issues. If you and [counsel for Kerbel] believe that a settlement of the August 2005 Agreement can be effected without the consent of the 90% land holder, then that issue will likely also form the subject matter of the trial.
>
> [Emphasis added.]

183 Nothing in this letter suggests that Romandale objected to the Settlement Agreement because of para. 5. That is, there is nothing in the letter to indicate that Romandale objected to the expressed intention in para. 5 that the purchase and sale of the Remaining Interest was to take place after SPA. Instead, the letter shows that Romandale resiled from the Settlement Agreement over matters such as registration of the injunction on title to the Lands and arbitration.

184 Further, Romandale's call to Fram and Kerbel to "formulate an offer to purchase [Romandale's] interest in the lands immediately" does not indicate that Romandale believed the buy-sell provisions in

the COAs and the 2005 August Agreement could be triggered at any time, pre or post-SPA. The parties all knew Fram could consent to the sale of Romandale's Remaining Interest before SPA and, with that consent, the purchase and sale of Romandale's Remaining Interest could proceed immediately. Romandale's call to Fram and Kerbel to make an immediate purchase is merely a request that the parties proceed with the sale under Fram's consent. It says nothing about Romandale's assumptions regarding the buy-sell provisions.

185 Until 2015, Romandale never retracted its communications on the Shared Assumptions and never purported to. In fact, as I describe above, Romandale confirmed in writing its belief in the Shared Assumptions in a letter in January 2011 — after Fram and Kerbel executed the Settlement Agreement — when it again made manifest that the sale of its Remaining Interest under the 2005 August Agreement could not take place until after SPA or with Fram's consent.

186 As Romandale did not communicate to Fram and Kerbel that it no longer held the Shared Assumptions until 2015, in the circumstances of this case, it was not unreasonable for Fram and Kerbel to rely on the Shared Assumptions when they entered into the Settlement Agreement in 2010. As Fram points out, the court relied on Romandale's assertions to the same effect in the injunction proceeding. In light of that, it can scarcely be said to be unreasonable that Fram and Kerbel also relied on them.

(c) Detriment

187 The third criterion for establishing estoppel by convention is detriment. As the parties seeking to establish estoppel by convention, Fram and Kerbel must prove that if Romandale were allowed to resile from the Shared Assumptions, they would suffer detriment since there had been a change from their presumed legal positions: Ryan v. Moore, at paras. 59, 69. To succeed in proving detriment, Fram and Kerbel must show that it would be unjust or unfair to allow Romandale to resile from the Shared Assumptions: Ryan v. Moore, at paras. 59, 73 and 74. A change from their presumed legal positions will facilitate the establishment of detriment: *Ryan v. Moore*, at para. 73.

188 As I have explained, Fram and Kerbel entered into the Settlement Agreement in reliance on the Shared Assumptions and thereby altered their legal positions under the COAs and the 2005 August Agreement respectively. While the change in their legal positions facilitates the establishment of detriment, it remains their burden to show that it would be unjust or unfair to allow Romandale to resile from the Shared Assumptions: *Ryan v. Moore*, at para. 74. One need only consider what transpired at the trial below and the resulting Judgment to find they satisfy that burden.

189 Paragraph 5 of the Settlement Agreement reflects the parties' Shared Assumptions that the purchase and sale of Romandale's Remaining Interest would take place after SPA had been obtained. The trial judge accepted Romandale's submission that para. 5 was a breach of the 2005 August Agreement on Kerbel's part. In so doing, the trial judge permitted Romandale to resile from the Shared Assumptions. Having determined that Kerbel was in breach, the trial judge declared the 2005 August Agreement at an end and excused Romandale from performance of its obligations under that agreement. Thus, it can be seen, if Romandale had not been permitted to resile from the Shared

Assumptions, Kerbel would not have been found to have been in breach of the 2005 August Agreement and it would not have lost the right to compel Romandale to fulfill its obligations under that agreement. In the circumstances of this case, it was unjust and unfair to Kerbel that Romandale was permitted to resile from the Shared Assumptions.

190 It was also unfair and unjust to Fram. In accordance with the Settlement Agreement, Fram discontinued its claims against Kerbel in the 2007 and 2008 Actions and gave up significant claims against Romandale under the COAs. However, the *quid pro quo* under the Settlement Agreement was that Fram would have the opportunity to acquire 50% ownership of the Lands once Kerbel bought Romandale's Remaining Interest. Because Romandale was permitted to resile from the Shared Assumptions and was consequently excused from performance under the 2005 August Agreement, Romandale was no longer obliged to sell its Remaining Interest to Kerbel. Thus, Fram gave up its claims for nothing.

191 Accordingly, in my view, it would be unjust and unfair to allow Romandale to resile from the Shared Assumptions. In reaching this conclusion, I reject Romandale's submission to the contrary.

192 Romandale makes two arguments in support of its submission that it would be neither unjust nor unfair to allow it to resile. First, it argues that it cannot be unjust or unfair that it be allowed to correct the mistaken Shared Assumptions because the mistake as to the timing of the buy-sell provisions was "patently obvious" on the express words of the contracts to which all parties had access. Second, it argues that Fram and Kerbel's entry into the Settlement Agreement "was a deliberate and inequitable scheme to tie up and control the Lands (to Romandale's exclusion) while putting off their purchase for at least decades".

193 Respectfully, Romandale's first argument misunderstands the detriment criterion in the doctrine of estoppel by convention. Detriment is not about the correctness of the Shared Assumptions or how obviously incorrect they might have been. Detriment is a question of whether it would be unjust or unfair to allow Romandale to resile from the Shared Assumptions — regardless of whether the Shared Assumptions were correct or were patently incorrect.

194 Romandale's second argument is that if it was not permitted to resile, Fram and Kerbel would get away with their "deliberate and inequitable scheme" to tie up the Lands for decades without having to pay for them. This argument does not withstand scrutiny. Before trial, Fram gave its consent to Kerbel's purchase of Romandale's Remaining Interest. Accordingly, had Romandale wished, it could have completed the sale of its Remaining Interest to Kerbel right then. In short, by the time of trial, there was no threat that, as a result of the Settlement Agreement, the Lands would be tied up for decades without Romandale being paid for its Remaining Interest in them.

195 At all material times during its dealings with Fram and Kerbel, Romandale manifestly represented to Fram and Kerbel that it held the Shared Assumptions. Fram and Kerbel then relied on the Shared Assumptions and entered into the Settlement Agreement. As a result of that, Fram and Kerbel's legal positions were altered. In the circumstances, it would be unjust and unfair to permit

Romandale to resile from the Shared Assumptions. Consequently, Fram and Kerbel have met their burden on the detriment criterion.

(d) Romandale's Overriding Submission on Estoppel by Convention

196 Before finally determining whether estoppel by convention applies, I must address Romandale's overriding submission that Fram and Kerbel cannot avail themselves of the doctrine because there was no contract between it and either Fram or Kerbel based on the Shared Assumptions — only Fram and Kerbel were parties to the Settlement Agreement.

197 It will be recalled that Romandale relies on para. 4 of Ryan v. Moore for this submission. For ease of reference, I set out para. 4 again, below.

> Estoppel by convention operates where the parties have agreed that certain facts are deemed to be true and to form the basis of the transaction into which they are **about** to enter. If they have acted upon the agreed assumption, then, as regards **that transaction**, each is estopped **against the other** from questioning the truth of the statement of facts so assumed if it would be unjust to allow one to go back on it. [Citations omitted; emphasis as added by Romandale.]

198 I accept that the language in para. 4 of Ryan v. Moore may be seen as suggestive of a contractual relationship among the parties. However, the facts of Ryan v. Moore show that the doctrine of estoppel by convention is not limited to such situations.

199 Ryan v. Moore concerned a three-vehicle accident that took place in 1997. Peter Ryan (the "Plaintiff") and Rex Gilbert Moore were two of the drivers involved in the accident. Soon after the accident happened, the Plaintiff began corresponding with the adjuster assigned by Mr. Moore's insurer.

200 Mr. Moore died in 1998 from causes unrelated to the accident. Letters of Administration were granted to his administratrix in February 1999.

201 The Plaintiff started a personal injury action against Mr. Moore in October 1999. That claim was within the two-year limitation period in the Limitations Act, S.N.L. 1995, c.L-16.1.

202 The insurer learned of Mr. Moore's death in May 2000; the Plaintiff learned of it in September 2000. In November 2000, the insurer refused to settle the Plaintiff's claim on the basis it was outside the limitation period in the Survival of Actions Act, R.S.N.L. 1990, s. S-32, which imposes a six-month limitation period from the granting of Letters of Administration. The insurer then applied to have the action struck as being out of time. The trial judge dismissed the application.

203 An appeal and cross-appeal were taken to the Newfoundland Court of Appeal. A majority of the Court of Appeal held that estoppel by convention barred the insurer and Mr. Moore's estate from pleading that Mr. Moore died in 1998 or that Letters of Administration were granted in February 1999. Thus, they could not invoke the shorter limitation period in the *Survival of Actions Act*.

204 The insurer and Mr. Moore's estate appealed to the Supreme Court. The Supreme Court allowed

the appeal and struck the Plaintiff's statement of claim because it had been brought outside the six-month period prescribed by the *Survival of Actions Act*.

205 The Supreme Court held that the doctrine of estoppel by convention had not been made out. It found that none of the letters exchanged by the Plaintiff and the insurer with respect to the Plaintiffs personal injury claim proved the existence of a common assumption. The mere fact that communications occurred between the parties did not establish that they assumed that Mr. Moore was alive. And, the fact the parties were conferring without regard to the limitation period did not establish a shared assumption that the limitation period defence would not be relied on. There was never any discussion by the Plaintiff of the limitation period.

206 Thus, while the Supreme Court in Ryan v. Moore refers to the Plaintiff, the insurer, and Mr. Moore's estate as "parties", they were not parties to a contract. Despite that, the Supreme Court considered whether the doctrine of estoppel by convention operated. In fact, estoppel by convention was the central legal point on which the appeal hinged. Further, when the Supreme Court concluded that the doctrine was inapplicable, it made no mention of the absence of a contract among the parties. Rather, the Court found the doctrine to be inapplicable because the correspondence among the parties did not prove the existence of a shared assumption among the parties. It found that such things as the subject line in the correspondence, which read "Your Insured: Rex Moore", lacked sufficient clarity and certainty to demonstrate a common belief that he was alive. It further found that even if one could conclude that there was a common assumption, the Plaintiff had never communicated that he shared it.

207 Accordingly, the applicability of the doctrine of estoppel by convention does not depend on the parties having entered into a contract with one another. Rather, as the Supreme Court states in para. 59 of Ryan v. Moore, the question is whether the "parties' dealings" were based on a shared assumption of fact or law. In this case, while Romandale was not a party to the Settlement Agreement, it was actively involved in the negotiations leading up to that agreement. As I explain above, during that period, the parties' correspondence (among other things) clearly demonstrate that their "dealings" were based on the Shared Assumptions.

(e) Conclusion on Estoppel by Convention

208 In the judicial mediation in September 2010, Fram, Kerbel, and Romandale communicated to one another their common belief in the Shared Assumptions. They reached a settlement agreement in principle which reflected those assumptions. The Shared Assumptions were manifest in the preliminary draft settlement agreement and all the drafts that followed through to the final Settlement Agreement. Romandale participated in ongoing negotiations of the Settlement Agreement and received copies of all the drafts, even after it resiled from that agreement. Never once during that process did Romandale dispute the validity of the Shared Assumptions. Rather, at several points it expressly reiterated the Shared Assumptions in communications it sent to Fram and Kerbel.

209 When Fram and Kerbel entered into the Settlement Agreement, they relied on their unqualified understanding that all three parties and their counsel held the Shared Assumptions. As a result of

having entered into the Settlement Agreement, their legal positions were altered. Allowing Romandale to resile from the Shared Assumptions years after the Settlement Agreement was concluded would cause detriment to both Fram and Kerbel.

210 As Fram and Kerbel satisfied the three criteria that form the basis for doctrine of estoppel by convention, Romandale was estopped from resiling from the Shared Assumptions and the trial below should have been conducted accordingly.

Issue #2: Did the trial judge err in determining that, by entering into the Settlement Agreement, Kerbel breached the 2005 August Agreement?

211 After Romandale terminated the DMAs with Bordeaux in early 2005, Bordeaux responded with an action against Romandale and Fram, alleging the termination was invalid and of no force and effect. The litigation was ongoing in August 2005 when Romandale and Kerbel entered into the 2005 August Agreement. The trial judge interpreted the 2005 August Agreement as permitting Kerbel to delay triggering the buy-sell provisions until after SPA only if the Bordeaux litigation dragged on (emphasis added) (the "*Interpretation*"). Based on the Interpretation, the trial judge concluded that Kerbel repudiated the 2005 August Agreement by entering into the Settlement Agreement because, as a result of para. 5 of the Settlement Agreement, the purchase and sale of the Remaining Interest could not take place until after SPA.

212 Fram argues that the trial judge's Interpretation is erroneous. It contends that she made four extricable errors of law in reaching the Interpretation: (1) failure to give the text of the 2005 August Agreement primacy; (2) accepting impermissible subjective evidence as factual matrix evidence; (3) misinterpreting the "time is of the essence" clause in the 2005 August Agreement; and (4) failing to look at commercial reasonableness at the time of contract execution and from the viewpoint of both parties.

213 In light of my conclusion on the doctrine of estoppel by convention, Romandale is barred from asserting that the buy-sell provisions in either the COAs or the 2005 August Agreement could be exercised before SPA. Because the trial judge's Interpretation permits for the buy-sell provision in the 2005 August Agreement to be exercised before SPA, the Interpretation is contrary to the Shared Assumptions and cannot stand. Consequently, I need not address the errors in contractual interpretation that Fram contends the trial judge made.

214 While I need not address the alleged errors in contractual interpretation, nothing in these reasons is to be taken as approving the trial judge's interpretation of the 2005 August Agreement or her application of the principles of contractual interpretation.

VIII. ANALYSIS OF KERBEL'S ISSUES

Issue #3: Did the trial judge err in concluding that Kerbel repudiated the 2005 August Agreement?

215 In addition to finding that Kerbel breached the 2005 August Agreement by entering into the

Settlement Agreement with Fram, the trial judge also found that, by entering into the Settlement Agreement, Kerbel failed to act in good faith, breached the fiduciary duty she found Kerbel owed Romandale, breached the "time is of the essence" clause in the 2005 August Agreement, and repudiated the 2005 August Agreement. As I have explained, estoppel by convention operates to bar Romandale from attacking the validity of para. 5 of the Settlement Agreement. As para. 5 of the Settlement Agreement was the basis on which the trial judge concluded that Kerbel repudiated the 2005 August Agreement, that conclusion must fall. Accordingly, it is not necessary to address the issues (and related sub-issues) that Kerbel raises respecting the trial judge's conclusion that by entering into the Settlement Agreement, Kerbel repudiated the 2005 August Agreement.

216 However, nothing in these reasons is to be taken as approving the trial judge's determination that Kerbel repudiated the 2005 August Agreement by entering into the Settlement Agreement, her application of the principles governing repudiation, her finding that Kerbel owed a fiduciary duty to Romandale and breached it, her finding that Kerbel breached its contractual duty of good faith, or her analysis and conclusion that, as a result of the Settlement Agreement, Romandale was deprived of substantially the whole benefit of the 2005 August Agreement.

Issue #4: Did the trial judge err in concluding that the 2005 August Agreement was frustrated?

A. The Parties' Positions

Kerbel

217 Kerbel's overarching position on appeal rests on this foundational legal proposition: the general rule is that it is not the function of the court to rewrite a contract for the parties nor is it the court's role to relieve one of the parties against the consequences of an improvident contract: Pacific National Investments Ltd. v. Victoria (City of), 2004 SCC 75, [2004] 3 S.C.R. 575, at para. 31. Kerbel says that the trial judge violated this general rule and, after determining that enforcement of the 2005 August Agreement was not in Romandale's interests, allowed that conclusion to drive her reasoning. However, Kerbel says, the question for the trial judge was not whether the 2005 August Agreement turned out to be a good deal for Romandale but, rather, whether the defences Romandale asserted to the enforcement of the 2005 August Agreement were tenable in law and fact.

218 In terms of frustration specifically, Kerbel submits that the trial judge erred when she concluded, at para. 349 of the Reasons, that the 2005 August Agreement was frustrated because "unforeseen planning changes resulted in SPA not only being delayed for decades but also putting the two farms on different development tracks". Kerbel says that the doctrine of frustration does not apply for two reasons.

219 First, it notes that frustration applies when a supervening event alters the nature of the parties' obligations to such an extent that to compel performance would require a party to do something "radically different" than what they had agreed to under their contract. It says that the change in the

development timeline for the Lands did not fundamentally alter what the parties contracted for under the 2005 August Agreement. The parties had agreed that Romandale would sell and Kerbel would buy its Remaining Interest in the Lands. The thing the parties bargained for has not changed — only the timing of the closing of the transaction has.

220 Second, Kerbel says that a contract is not frustrated if the supervening event was contemplated by the parties at the time of contracting and was provided for, or deliberately chosen not to be provided for, in the contract. It argues that to the parties' knowledge, the planning and development process is fluid, unpredictable, and outside the parties' control. There was never any certainty as to the development timeline for the Lands and the fact that governmental decisions altered the timetable was within the parties' contemplation. They point to this court's decision in the Triple R Lands Litigation, in which that precise point is made: First Elgin Mills Developments Inc. v. Romandale Farms Limited, 2014 ONCA 576, 324 O.A.C. 153, at para. 32.

221 Further, Kerbel argues, contrary to the trial judge's finding, the parties' agreement to a fixed purchase price in this context does not lead to a "commercial absurdity". The parties deliberately chose to enter into an agreement for a fixed purchase price of the Remaining Interest that was significantly above market value. In doing so, Romandale assumed the risk of what a delay in closing would entail.

Fram

222 Fram adopts Kerbel's position on all issues it raises on appeal. To avoid repetition, on the balance of the issues, I will not reiterate Fram's position.

Romandale

223 Romandale submits that Kerbel has not demonstrated any palpable and overriding errors in the trial judge's finding that the 2005 August Agreement was frustrated when unforeseen planning changes delayed SPA for decades and put the Lands on different development tracks. It makes two key arguments in support of this submission.

224 First, it says that Kerbel is wrong that the change in the development timeline did not fundamentally change the nature of the contract because it simply delayed closing. The trial judge found that a short closing horizon was part of the "pith and substance" of the contract and, in any event, that SPA was at most years away, not decades. A delay of decades is "radically different" than what the parties agreed to. Further, Romandale says Kerbel failed to address the trial judge's finding on frustration based on the farms being placed on different development tracks.

225 As well, Romandale says Kerbel is wrong that legislative changes cannot frustrate a contract. Relying on Capital Quality Homes Ltd. v. Colwyn Construction Ltd.(1975), 61 D.L.R. (3d) 385 (Ont. C.A.) and Focal Properties Ltd. v. George Wimpey (Canada) Ltd.(1975), 73 D.L.R. (3d) 387 (Ont. C.A.), it says that changes in law or policy will frustrate a contract and relieve the parties of performance where the "common venture" is frustrated. The trial judge found that the parties' "common venture" of providing for the most expedient sale of the Lands, without breaching the COAs, was no longer

attainable.

226 Romandale says that proof of a delayed timeline for development and separate development tracks for the farms resulted in radically different circumstances than those contemplated in the 2005 August Agreement. It argues this is apparent from the terms of the that agreement: it was silent on how to close if the Lands achieved SPA at different times; the farms were treated as a single property; there were no terms on how to treat the farms individually; and, it made no commercial sense when closing was decades in the future. This, Romandale argues, would result in an irreconcilable divergence of interests when the express terms of the 2005 August Agreement provide it is conditional for the benefit of both parties.

227 Second, Romandale says that Kerbel is wrong that the parties contemplated the planning changes when entering into the 2005 August Agreement or deliberately did not provide for such changes. It argues that Kerbel's reference to this court's 2014 decision regarding the Triple R Lands is misleading. Even if the parties were aware that the process of developing the Lands was fluid, unpredictable, and would take time, this does not mean they contemplated SPA being deferred for decades and that the Lands would be put on separate development tracks.

228 Romandale contends that the trial judge's factual findings are important -that when the 2005 August Agreement was made, the parties expected the Lands would achieve SPA by 2010 or soon thereafter and not decades later or with the farms on separate development tracks. It says these are "radical" changes in the planning law and process and Kerbel has not challenged them.

B. Governing Legal Principles

229 A contract is frustrated when — without the fault of either party — a supervening event alters the nature of a party's obligations under the contract "to such an extent that to compel performance despite the new and changed circumstances would be to order [the party] to do something radically different from what the parties agreed to under [their] contract": Naylor Group Inc. v. Ellis-Don Construction Ltd., 2001 SCC 58, [2001] 2 S.C.R. 943, at para. 55; Perkins v. Sheikhtavi, 2019 ONCA 925, 16 R.P.R. (6th) 42, at para. 15.

230 However, a contract is not frustrated if the supervening event results from a voluntary act of one of the parties or if the parties contemplated the supervening event at the time of contracting and provided for, or deliberately chose not to provide for, the event in the contract: *Perkins* , at para. 16; Capital Quality Homes, at p. 626.

231 The party claiming frustration bears the burden of proving the constituent elements necessary to establish frustration: *Perkins* , at para. 17.

C. Application of the Law

232 The trial judge concluded that the 2005 August Agreement was frustrated because unforeseen planning changes resulted in SPA being delayed by decades and put the Snider and McGrisken Farms

on different development tracks. She said these matters rendered performance of the Conditional Provision "radically different from that which the parties agreed to": at para. 349. In my view, the trial judge erred in law in so concluding: the planning changes do not amount to a "supervening event", as that term is used in the doctrine of frustration.

233 As previously noted, at para. 55 of *Naylor Group* , the Supreme Court stated that a contract is frustrated when — without the fault of either party — a supervening event alters the nature of a party's obligations under the contract to such an extent that to compel performance would be to order the party to do something "radically different" from that to which it had agreed under the contract. Neither the change to the timing of the development of the Lands nor the fact that the development paths of the two farms now diverge render Romandale's obligations under the 2005 August Agreement radically different from that to which it agreed. Therefore, the planning changes are not a supervening event and the agreement is not frustrated.

234 This conclusion follows inescapably from a consideration of the 2005 August Agreement as a whole, including the Conditional Provision. When Romandale and Kerbel entered into the 2005 August Agreement, all of their obligations under it were to be performed in short order with one exception: their obligations under the Conditional Provision. Those obligations were clearly spelled out: Romandale was to sell its Remaining Interest in the Lands to Kerbel at a price of $160,000 per acre: (1) with Fram's consent to the transaction or (2) through Romandale's exercise of the buy-sell provision in the COAs, after the Lands achieved SPA. The parties specified the two methods by which the transaction could be completed — rather than simply setting a date for its completion — because they wanted to ensure that the 2005 August Agreement did not run afoul of Romandale's pre-existing legal obligations to Fram under the COAs.

235 While the planning changes altered the timing horizon for the development of the Lands and the development paths of the Snider and McGrisken Farms, those changes did not radically alter what the parties had agreed to under the 2005 August Agreement. In fact, the planning changes did not alter the parties' obligations under the Conditional Provision in any way. What changed were the parties' expectations about when SPA would be obtained for the Lands. Romandale remained obliged to sell its Remaining Interest to Kerbel, either by obtaining Fram's consent to the transaction or by using the buy-sell provisions in the COAs, once SPA for the Lands was achieved. And Kerbel remained obliged to pay Romandale $160,000 per acre for the Remaining Interest. The fact that the expected timing for SPA changed did not alter those obligations — and nothing in the 2005 August Agreement suggests otherwise. For example, there is no "drop-dead date" provision in the agreement. With due respect to the trial judge, the boiler-plate statement at para. 7(c) of the 2005 August Agreement that "time is of the essence" cannot be construed to mean that a "short closing horizon" was part of the "pith and substance" of the contract. Further and in any event, if Romandale was troubled by the prospect of a lengthy delay in closing based on SPA, it could have sought Fram's consent to the transaction. On the record, Romandale took no steps in that regard, despite having expressly undertaken in the Conditional Provision "to use reasonable best efforts to obtain" Fram's consent.

236 Because the parties' obligations under the Conditional Provision are not altered by the planning changes, it cannot be said that compelling performance of the 2005 August Agreement would be to order Romandale to do something "radically different" from that to which it agreed. In short, in the circumstances of this case, the planning changes do not amount to a supervening event.

237 Further, even if the planning changes were to amount to a supervening event, the 2005 August Agreement is not frustrated because the supervening event was within Romandale and Kerbel's contemplation when they entered into the agreement and they did not provide for it: Perkins, at para. 16. Of this there can be no doubt, given this court's findings in *First Elgin Mills* .

238 It will be recalled that *First Elgin Mills* dealt with the transaction in the 2005 August Agreement in which Kerbel purchased the Triple R Lands from Romandale (acting on behalf of the Roman family). The purchase price for the Triple R Lands was calculated on the basis that the land was all developable. However, the land was not all developable so Kerbel sought an adjustment to the purchase price in accordance with the terms of the 2005 August Agreement. Romandale resisted, saying that the purchase price adjustment clause had expired. The matter was litigated. This court ultimately found in favour of Kerbel. At paras. 31-32 of *First Elgin Mills* , Lauwers J.A. writing for the court, stated:

> The process of moving raw land through the land development process, is complex, time consuming, and expensive. The outcome is frequently uncertain. ...
>
> The parties to this litigation are sophisticated and experienced land developers and were legally represented throughout the proceedings. The principals' affidavits show that, when they entered into the [2005 August Agreement], they were aware that the process of developing the [Lands] would be fluid and the outcome somewhat unpredictable, and that it would take time — perhaps years — to finalize the [Lands'] development potential. There were provincial, regional, and local requirements to be met, any of which could affect the [Lands'] development potential...

239 Thus, it can be seen, this court found that Romandale and Kerbel were aware of the vagaries of the planning process when they entered into the 2005 August Agreement. That is, the possibility of planning changes was within the parties' contemplation when they entered into the 2005 August Agreement. Despite that, they made no provision for such a possibility — as, for example, through the insertion of a "drop-dead" provision. Therefore, even if the planning changes were a supervening event, the 2005 August Agreement is not frustrated.

240 I conclude on this issue by noting that, while Romandale is correct that legislative changes can frustrate a contract, this applies when the legislation destroys the very foundation of the agreement: *Capital Quality Homes* , at para. 29. As I have explained, that is not this case.

Issue #5: Did the trial judge err in concluding that the 2005 August Agreement was void for mistake?

A. The Parties' Positions

Kerbel

241 Kerbel submits that the trial judge erred in law in finding that the 2005 August Agreement was void for mistake because the parties were operating on the mistaken understanding that SPA would occur "within a relatively short time period", not decades after the agreement was entered into.

242 It argues that the doctrine of common mistake requires the plaintiff to show that, as a result of the common mistake, the subject matter of the contract became something essentially different from what it was believed to be. Moreover, on the theory that the mistake destroys the consensual nature of the bargain, the mistake must have existed at the time that the contract was made. However, Kerbel says, there was no mistake in this case. Both parties considered SPA to be years away when they executed the 2005 August Agreement. The fact that an assumption turns out to be incorrect, as a result of subsequent events, does not affect the consensus at the time the contract was made.

243 In any event, Kerbel says, the change to the development timeline did not fundamentally change the subject matter of the contract.

Romandale

244 Romandale submits that Kerbel has not articulated a basis for disturbing the trial judge's conclusions on mistake. It says that Kerbel is referring to the common law doctrine of mistake in its submissions to this court whereas the trial judge relied on the equitable doctrine of mistake.

245 Romandale contends that the trial judge found that the parties were mistaken as to the time horizon for achieving SPA and that change in the development timeline did fundamentally alter the subject matter of the contract.

B. Governing Legal Principles

246 At common law, a contract will be void for mistake when the parties were under a common mistake that changes the subject matter of the contract into something essentially different from what the parties believed it to be: Miller Paving Ltd. v. B. Gottardo Construction Ltd., 2007 ONCA 422, 86 O.R. (3d) 161, at paras. 22, 30. The mistake must have existed at the time the contract was made: Zeitel v. Ellscheid(1991), 85 D.L.R. (4th) 654 (Ont. C.A.), at para. 44, aff'd [1994] 2 S.C.R. 142.

247 In equity, the court may relieve for common mistake when it would be "unconscientious", in all the circumstances, to allow a contracting party to avail itself of the legal advantage it had obtained and granting relief can be done without injustice to third parties. The contract is liable to be set aside if the parties were under a common misapprehension as to the facts or their respective rights, provided the mistake was fundamental and the party seeking to set aside the contract was not at fault: *Miller Paving* , at para. 23.

C. Application of the Law

248 In my view it matters not whether the trial judge decided this issue based on the common law or

equitable principles governing mistake. Mistake is not made out under either.

249 At common law, the court's jurisdiction to set aside a contract for mistake arises when the parties are under a common mistake that changes the subject matter of the contract into something "essentially different" from what the parties believed it to be: *Miller Paving* , at para. 30. As I explain above on the issue of frustration, that is not this case. The parties' obligations were clearly spelled out in the 2005 August Agreement: Romandale was to sell its Remaining Interest to Kerbel at a price of $160,000 per acre, either with Fram's consent or through Romandale's exercise of its buy-sell rights under the COAs. The planning changes made to the development of the Lands did not alter those obligations. The parties were aware of the vagaries of the planning process when they entered into the 2005 August Agreement. They knew that the process of developing the Lands was fluid and the outcome unpredictable. The fact that events did not play out according to the parties' initial time estimates does not somehow elevate those estimates into a common mistake such as to vitiate their consent to the deal in the 2005 August Agreement. As the subject matter of the 2005 August Agreement remained essentially the same as what the parties believed it to be when they entered into the agreement, mistake is not made out at common law.

250 In equity, the court may set aside a contract for common mistake when it would be "unconscientious", in all the circumstances, to allow a contracting party to avail itself of the legal advantage it obtained, provided it can be done without injustice to third parties. I address the issues of unjustness and unfairness above, in my discussion of estoppel by convention. I will not repeat myself. The considerations set out in that analysis show why, even if Kerbel could be seen to have obtained a legal advantage because of the changes in the planning process, it is not "unconscientious" to enforce the 2005 August Agreement. In any event, there was no fundamental mistake upon which to base common mistake in equity.

251 I conclude on the equitable doctrine of common mistake by observing that the court is to take into consideration "all of the circumstances" when deciding whether it would be unconscientious to enforce the contract. The circumstances at the time of trial included the fact that Fram had provided its consent to the transaction in the Conditional Provision. Consequently, the transaction could have closed immediately. The trial judge did not take that into consideration. This is evident from her conclusion that enforcing the 2005 August Agreement would be unconscionable because the transaction had been put off "for decades". In the face of Fram's consent, the transaction could have closed immediately. Thus, it was a palpable and overriding error to find that the transaction had been put off for decades. Moreover, in my view, the trial judge erred in law in failing to take into account the relevant consideration of Fram's consent when determining whether it would be unconscionable to enforce the 2005 August Agreement. For these reasons, Romandale failed to make out the requirements for common mistake in equity and the trial judge erred in finding otherwise.

Issue #6: Did the trial judge err in finding Kerbel's claim was limitation-barred?

A. The Parties' Positions

Kerbel

252 Kerbel submits that the trial judge made palpable and overriding errors of fact and law in finding that its claim was limitation-barred. It makes three arguments in support of this submission.

253 First, until 2015, Romandale alleged that the 2005 August Agreement was terminated by Kerbel's breach in reducing the net developable acreage of the Lands; it sought damages in the alternative. It was only in 2015 that Romandale claimed it would not comply with the 2005 August Agreement in any event, and Kerbel started the 2016 Action shortly thereafter.

254 Second, the trial judge's finding that Kerbel discovered its claim in 2011 ignores Master Graham's ruling on December 21, 2012.[84] In that ruling, Master Graham dismissed Romandale's motion for leave to amend its pleadings to allege that Kerbel had breached the 2005 August Agreement by entering into the Settlement Agreement. Kerbel says it was entitled to rely on the ruling and that the trial judge's reasoning leads to an anomalous and unreasonable result. In order to bring its action in time, Kerbel would have had to commence an action by 2013 for a declaration that the Settlement Agreement did not breach the 2005 August Agreement but, in 2012, Master Graham had already reached that conclusion.

255 Third, even if Kerbel was aware in 2011 that Romandale viewed the 2005 August Agreement to be at an end, the trial judge erred in law in finding that the limitation period began to run as of that date. At its highest, Romandale's statement to Kerbel that it was not going to comply with the 2005 August Agreement amounted to an anticipatory breach of contract, not an actual breach of contract. An anticipatory breach does not terminate or discharge the contract. Where the innocent party does not accept the anticipated breach and continues to treat the contract as subsisting, it does not "discover" its claim for the purposes of the Limitations Act—and the limitation period does not begin to run — until the breach has occurred and the innocent party has suffered some damage. In this case, Kerbel made it clear that it did not accept Romandale's anticipatory breach of the 2005 August Agreement and considered the agreement to continue in effect. Therefore, the limitation period did not begin to run as of 2011.

Romandale

256 Romandale says that Kerbel's submission that it had no reason to commence an action until 2015 is contradicted by the evidence, as is Kerbel's assertion that it did not accept Romandale's "anticipated repudiation" and continued to treat the agreement as subsisting. As the trial judge found, by 2011 Romandale was no longer acting in accordance with the 2005 August Agreement. Under para. 5 of that agreement, Romandale was obliged to cede control over development to Kerbel but it was not complying with that obligation. Kerbel's counsel sent a letter in February 2011 asserting that Romandale was breaching the agreement and its conduct was actionable. Romandale did not comply even after that letter. The manner in which Romandale was breaching the 2005 August Agreement demonstrated that it did not ever intend to sell the Lands to Kerbel. The conduct was not ambiguous: Kerbel was on notice that if it wanted specific performance it could not sit on its rights.

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84. It will be recalled that Kiteley J. upheld this ruling on June 20, 2014.

257 Furthermore, Romandale argues, Kerbel was not entitled to rely on the decisions of Master Graham and Kiteley J. in the pleadings motion to prevent the running of the limitation period. Those decisions did not reach a conclusion on the merits of the impact of the Settlement Agreement on the 2005 August Agreement. All that was decided was that Romandale's proposed amendment was not tenable in law.

B. Governing Legal Principles

258 An anticipatory breach of contract occurs when one party to a contract, by express language or conduct, or as a matter of implication from what it has said or done, repudiates its contractual obligations before they fall due: Ali v. O-Two Medical Technologies Inc., 2013 ONCA 733, 118 O.R. (3d) 321, at para. 22, citing G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Toronto: Carswell, 2011), at p. 585.

259 An anticipatory breach does not, in itself, terminate the contract. Once the offending party shows its intention not to be bound by the contract, the innocent party has a choice. The innocent party may accept the breach and elect to sue immediately for damages, in which case the innocent party must "clearly and unequivocally" accept the repudiation to terminate the contract. Alternatively, the innocent party may choose to treat the contract as subsisting, continue to press for performance, and bring the action only when the promised performance fails to materialize. However, by choosing the latter option, the innocent party is bound to accept performance if the repudiating party decides to carry out its obligations: *Ali* , at para. 24.

260 Section 4 of the Limitations Act provides that "a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered." Section 5(1)(a) sets out the factors for determining when a party discovers a claim. However, where the innocent party does not accept the repudiation of the contract, the limitation period does not begin to run until the breach actually occurs: *Ali* , at paras. 26-27.

C. Application of the Law

261 The trial judge found that the two-year limitation period governing Kerbel's claim for specific performance began running in February 2011 because, by that time, Romandale's conduct showed that it "intended to remain the owner of the Lands" and "from its point of view, the "Conditional [Provision] was dead" (Reasons, at para. 403). That is, the trial judge concluded that Romandale had repudiated the 2005 August Agreement by February 2011 and Kerbel knew that. Consequently, the trial judge held that the 2016 Action was brought out of time. In my view, the trial judge made a palpable and overriding error in finding that the two-year limitation period began running in 2011. To explain why, we must review the situation between Romandale and Kerbel in February 2011 and the trial judge's findings on their conduct at that time.

262 Under para. 5 of the 2005 August Agreement, Romandale gave Kerbel "exclusive control" over the development process for the Lands. Nonetheless, by 2011, Ms. Roman-Barber (and, at her direction,

those working for her) was actively attempting to shut Kerbel out of the development planning process. In a letter dated February 17, 2011 ("*Kerbel's February 2011 Letter*"), from Kerbel's counsel to Romandale's counsel, Kerbel complained about Romandale's conduct, stated it was a breach of the 2005 August Agreement, demanded that Romandale confirm to the NMLG that Kerbel's planning consultant had the sole authority to represent the Lands, and threatened to commence proceedings if Ms. Roman-Barber did not comply with the terms of para. 5 of the 2005 August Agreement.

263 By letter dated February 25, 2011, Romandale's counsel responded to Kerbel's February 2011 Letter (the "*Responding Letter*"). In the Responding Letter, counsel for Romandale denied that Ms. Roman-Barber had breached the 2005 August Agreement and asserted that his client had, at all times, complied with the terms of that agreement. The Responding Letter also stated that Romandale was considering whether Kerbel's "purported settlement with [Fram] is in breach of the [2005 August] Agreement".

264 At para. 146 of the Reasons, the trial judge summarized what transpired between Kerbel and Romandale in the relevant time period (i.e. December 2010 to February 2011). Her summary includes references to Kerbel's February 2011 Letter and the Responding Letter. Paragraph 146 ends with the trial judge's conclusion that the evidence was clear "that Romandale continued to exclude Kerbel from participation in the development of the Lands and Kerbel took no action as threatened in its letter of February 17, 2011" (the "*First Finding*").

265 Based on a consideration of precisely the same conduct as that which she considered in making the First Finding, the trial judge found, at para. 403 of the Reasons, that Kerbel was aware that Romandale "intended to remain the owner of the Lands and that from its point of view the Conditional [Provision] was dead" (the "*Second Finding*").

266 The two findings are very different. The First Finding is specific and limited: in February 2011, Romandale was excluding Kerbel from participation in the development of the Lands. The Second Finding is that Romandale's conduct put Kerbel on notice that Romandale had repudiated the Conditional Provision by acting as if it "was dead".

267 Thus, the question becomes: are the two findings reconcilable? They are not, either on the facts or the law.

268 Factually, the Second Finding cannot stand in light of Romandale's Responding Letter. In that letter, Romandale's counsel denied that his client was in breach of the 2005 August Agreement and also stated that Romandale was considering whether the Settlement Agreement was a breach of the 2005 August Agreement. Clearly, the Responding Letter contains no express repudiation of its obligations under the Conditional Provision. On the contrary, in the Responding Letter, Romandale affirms that the 2005 August Agreement is operating, that it is complying with it, and that it is considering its position under the 2005 August Agreement as a result of Kerbel having entered into the Settlement Agreement.

269 In terms of the law, the Second Finding was not open to the trial judge either. In the Reasons on

this issue, when the trial judge makes the Second Finding, she does not explicitly refer to anticipatory breach or the legal principles that govern it. However, based on the parties' positions on this issue, it appears that she made the Second Finding based on those principles. On that assumption, the trial judge was considering Romandale's language and conduct in the relevant period to determine whether it could be construed as a repudiation of its obligations under the Conditional Provision before they became due for performance. In other words, the trial judge was considering whether Romandale had committed an anticipatory breach of the 2005 August Agreement by indicating that it would not comply with its obligations under the Conditional Provision. Romandale made no express assertion to that effect. Therefore, the Second Finding must have been based on Romandale's conduct. However, as I have just explained, in light of the Responding Letter in which Romandale affirmed the 2005 August Agreement, its conduct cannot be so construed.

270 Thus, there was no anticipatory breach by Romandale of its obligations under the Conditional Provision in 2011 and the limitation clock did not begin ticking.

271 Romandale's anticipatory repudiation of the 2005 August Agreement occurred for the first time in 2015 through its express statement to that effect by its new counsel. As the innocent party, Kerbel had the choice whether to accept the repudiation or treat the 2005 August Agreement as subsisting. It elected to accept the anticipatory breach and commenced the 2016 Action, which was within the two-year limitation period.

272 I note that Romandale points to other findings the trial judge made regarding Romandale's conduct after Fram and Kerbel entered into the Settlement Agreement, which Romandale says demonstrate that it treated the 2005 August Agreement as dead. These findings relate to events that occurred after February 2011. As the trial judge based her determination on Kerbel having discovered its claim by February 2011, it is unnecessary to consider Romandale's conduct falling after that time.

273 I conclude on this issue with the following two points. First, it is trite law that not every breach of a contract amounts to a repudiation. By February 2011, Kerbel was aware that Romandale was in breach of para. 5 of the 2005 August Agreement because of its conduct respecting the development process for the Lands. However, that breach was not a repudiation of the Conditional Provision. Second, even if Romandale's conduct could be construed as a repudiation of the Conditional Provision, it was an anticipatory breach. As such, the limitation period did not begin running unless Kerbel accepted the repudiation (*Ali* , at paras. 26-27) and that Kerbel did not do. On the contrary, as discussed above, Kerbel protested Romandale's conduct in its February 2011 Letter and affirmed the validity of the 2005 August Agreement. Kerbel then continued its work with the NMLG in the development process and maintained its position in the various lawsuits that the 2005 August Agreement was valid and enforceable. Thus, Romandale's breach of its obligations relating to the development process by February 2011 could not have started the limitation clock running.

Issue #7: Did the trial judge err in concluding that Kerbel was not entitled to specific performance of the 2005 August Agreement?

A. The Parties' Positions

Kerbel

274 Kerbel submits that the trial judge erred in law in rejecting its claim for specific performance because she ignored the uniqueness of the Lands to Kerbel. Instead, the trial judge focused entirely on whether the Lands were capable of valuation and whether substitute properties were available.

275 Kerbel gives five reasons for its contention that the Lands have a peculiar or special value to it.

276 First, Kerbel already owns a 4.75% undivided interest in the Lands. It purchased that interest with the express intention that it would become the owner of all of the Lands. For that reason, Romandale and it never contemplated what a co-owner relationship would look like (unlike Romandale and Fram which entered into COAs). If specific performance is not ordered, Romandale and Kerbel will be forced to remain as co-owners of the Lands, a relationship that neither expected nor wanted. Granting specific performance, however, would allow the parties to put an end to their "fraught — and highly litigious — relationship".

277 Second, in light of this court's ruling in the Triple R Lands Litigation, Kerbel is entitled to set off the purchase price adjustment for those lands from the purchase price it is to pay Romandale for the Remaining Interest. Such a price reduction is not available for any other property that might come on the market and gives the Lands a quality that cannot be duplicated.

278 Third, Kerbel has already made significant investments — in time, money, and expertise — in the development of the Lands and surrounding properties.

279 Fourth, Kerbel entered into all of the transactions in the 2005 August Agreement with a view to its long-term plan to secure large tracts of undeveloped land for the purposes of development and construction. The transactions in the 2005 August Agreement included its purchase of the Triple R Lands, which adjoins the Lands, and a right of second refusal on the Elgin South Property.

280 Fifth, Kerbel is not seeking specific performance of a purely executory contract. It is seeking performance of a contract which it has already substantially performed. The transactions in the 2005 August Agreement were intertwined and formed part of a package. Kerbel has upheld its end of the bargain by assuming the BNS mortgage, purchasing the initial 4.75% interest in the Lands, and purchasing the Triple R Lands.

281 Kerbel also submits that the trial judge erred in finding its claim for specific performance was barred by laches. It says that, in determining whether there has been delay amounting to laches, the main considerations are acquiescence on its part and any change of position by Romandale arising from reasonable reliance on Kerbel's acceptance of the status quo. Kerbel says neither of those considerations applied. It never acquiesced and, as the trial judge found, there was no change to the status quo after the Settlement Agreement.

282 Finally, Kerbel takes issue with the trial judge's statement at para. 406 of the Reasons that, because Romandale had spent years investing significant time, effort, and money into the Lands, it would be "unjust" to disrupt that by granting specific performance. It notes that the 2005 August Agreement required Romandale to cooperate in the development of the Lands and there is no injustice or prejudice that follows from compliance with its legal obligations. To the extent that Romandale incurred development costs, it can seek reimbursement from Kerbel under the terms of the 2005 August Agreement, just as it did in the past.

Romandale

283 Romandale submits that this court owes a high degree of deference to the trial judge's exercise of discretion in refusing to grant specific performance. It argues that the trial judge did not ignore the uniqueness of the Lands to Kerbel — she rejected Kerbel's claim of uniqueness because she found Mr. Kerbel's own expert evidence contradicted his bald assertion that the Lands were unique and because the Lands were "just an investment" for Kerbel.

284 Further, Romandale says, the trial judge considered whether substitute properties were available and concluded that the undeveloped Lands were not unique to Kerbel, a developer engaged in a profit-seeking venture, and there were plenty of substitute properties available. Romandale says that Kerbel has not articulated any palpable and overriding errors in the trial judge's conclusion.

285 As for the five arguments that Kerbel advances for why the Lands are special and unique to it, Romandale says they are simply re-argument, which the trial judge was entitled to reject, as she did. Romandale says that Kerbel has not pointed to a palpable and overriding error in the trial judge's determination, therefore it must stand.

286 On laches, Romandale says that the trial judge found both acquiescence and reliance and Kerbel has not cited any evidence to show the findings were the result of palpable and overriding error.

B. Governing Legal Principles

287 Specific performance is not to be ordered for breach of contract unless damages are inadequate. When damages are found to be inadequate, it is generally because of the unique nature of the property bargained for. It is for this reason that specific performance has historically been granted in cases involving the purchase and sale of real property: Erie Sand & Gravel Ltd. v. Series' Farms Ltd., 2009 ONCA 709, 97 O.R. (3d) 241, at paras. 110-11.

288 However, it cannot be assumed that damages for breach of contract for the purchase and sale of real estate will be an inadequate remedy in all cases. Specific performance should not be granted absent evidence "the property is unique to the extent its substitute would not be readily available": Semelhago v. Paramadevan, [1996] 2 S.C.R. 415, at para. 22. Whether a substitute is readily available depends on the facts of the particular case. Therefore, uniqueness is a fact-specific inquiry: Di Millo v. 2099232 Ontario Inc., 2018 ONCA 1051, 430 D.L.R. (4th) 296, at para. 67, leave to appeal refused, [2019] S.C.C.A. No. 55.

289 Laches is an equitable doctrine that offers a defence to delayed equitable claims. Mere delay is insufficient to trigger laches. The party asserting laches must establish one of two things: (1) acquiescence on the claimant's part; or (2) a change of its position arising from reasonable reliance on the claimant's acceptance of the *status quo:* Manitoba Metis Federation Inc. v. Canada (Attorney General), 2013 SCC 14, [2013] 1 S.C.R. 623, at paras. 145-47; Intact Insurance Company of Canada v. Lombard General Insurance Company of Canada, 2015 ONCA 764, 128 O.R. (3d) 658, at paras. 8-11.

C. Application of the Law

290 The trial judge declined to order specific performance largely because she concluded that the Lands were not unique to Kerbel. In my view, she erred in three ways in reaching that conclusion.

291 First, the trial judge erred in law in relying on the evidence of the experts called to provide a value for the Lands to find that the Lands were not unique to Kerbel. The experts had used the direct comparison approach to value the Lands. That approach required the experts to find comparable properties with similar characteristics to the Lands. While the direct comparison approach is an accepted method for valuing land, it does not speak to whether a property is "unique" in the legal sense. Put another way, because the direct comparison approach does not address the legal requirements for determining whether land is unique, it cannot be used as a proxy for that purpose. It was an error in law to do so.

292 Second, it was a palpable and overriding error for the trial judge to find that the only evidence on uniqueness was Mr. Kerbel's "bald assertion" to that effect. In so doing, the trial judge neglected to consider the following points:

(1) Kerbel already owns a 4.75% undivided interest in the Lands and fully owns the adjoining property, the Triple R Lands. No other property has both these characteristics;

(2) In light of this court's ruling in the Triple R Lands Litigation, Kerbel is entitled to set off the purchase price adjustment for the Triple R Lands from the purchase price it is to pay Romandale for the Remaining Interest. Such a price reduction is not available for any other property that might come on the market and gives the Lands a quality that cannot be duplicated;

(3) Kerbel has already made significant investments — in time, money, and expertise — in the development of the Lands;

(4) With Romandale's full knowledge and consent, Kerbel entered into the package of intertwined transactions in the 2005 August Agreement in order to secure a large tract of undeveloped land for the purposes of development and construction. The transactions in the 2005 August Agreement include Kerbel's purchase of the Triple R Lands, which adjoins the Lands, and a right of second refusal on the Elgin South Property; and,

(5) Kerbel is not seeking specific performance of a purely executory contract. It is seeking performance of a contract which it has already substantially performed. On the trial judge's

findings, Romandale received over $16.7 million of immediate value under the 2005 August Agreement. The "upfront" money Kerbel paid Romandale was to satisfy Romandale's need for liquidity. Kerbel has upheld its end of the bargain by assuming the BNS mortgage, purchasing the initial 4.75% interest in the Lands, and purchasing the Triple R Lands.

293 Third, a property is unique if there is no readily available substitute property: *Semelhago* , at para. 22. One method of proving that there is no readily available substitute is to show that the property has a quality that cannot be readily duplicated elsewhere: *Erie Sand* , at paras. 115-16. The above considerations establish that the Lands have qualities that cannot be readily — if at all — duplicated elsewhere. They also show that, contrary to the trial judge's finding, the Lands are not merely an investment for Kerbel with any number of suitable substitutes available. The Lands are unique to Kerbel.

294 While the trial judge's analysis focused on the uniqueness of the Lands, I also view her to have fallen into error in failing to consider the effects of refusing to grant specific performance. In this case, if specific performance is not ordered, Romandale and Kerbel will remain co-owners of the Lands. As Kerbel points out, that situation was not expected, wanted, or provided for in the 2005 August Agreement. And, as the events of the past 12 years have shown, the situation is unworkable. This consideration militates in favour of finding that damages are an inadequate remedy.

295 The trial judge gave laches as a further reason for refusing to grant specific performance. In my view, she erred in law in this regard because Romandale made out neither of the two requirements enunciated in *Manitoba Metis Federation* .

296 First, Kerbel did not acquiesce in Romandale's attempts to shut it out of the development process. As discussed above, counsel for Kerbel wrote to counsel for Romandale in February 2011, complaining about this conduct, stating it was a breach of Romandale's obligations under the 2005 August Agreement, and demanding that Romandale confirm to the NMLG that Kerbel's planning consultant had the sole authority to represent the Lands. Moreover, despite Romandale's attempts to shut Kerbel out of the development process, Kerbel continued to be actively involved in the development process through the NMLG. Kerbel also continued to maintain that the 2005 August Agreement was in force until — in response to Romandale's declaration in 2015 that it would not perform its obligations under the 2005 August Agreement — it started the 2016 Action.

297 Second, Romandale did not change its position in reliance on Kerbel's alleged acceptance of the status quo. The trial judge found, at paras. 118-19 and 339 of the Reasons, that there was no change in Romandale's behavior and the "status quo did not change" after Kerbel and Fram entered into the Settlement Agreement.

298 Further, to the extent that the trial judge found reliance based on Romandale's investment of time, money and effort into the Lands' development, in my view she erred. Under the terms of the 2005 August Agreement, Romandale was obliged to cooperate with Kerbel in development of the Lands. Reliance cannot be claimed when it is a matter of compliance with one's legal obligations. And, in any

event, Romandale can seek reimbursement for development costs from Kerbel under the terms of the 2005 August Agreement, just as it did in the past.

IX. FRAM'S CLAIM FOR DAMAGES

299 Fram asks that it be awarded damages of $11,997,500 "for its loss respecting 50% of the Lands that go to Kerbel under the Settlement Agreement". Its very brief submissions are as follows. The 2005 August Agreement was a breach of the prohibition against Dispositions in s. 5.03 of the COAs. Upon breach, pursuant to s. 6.02(d) of the COAs, Romandale was obliged to sell the Lands to Fram for 95% of fair market value. As Romandale refused to do that, Fram is entitled to the difference in the market value of the Lands between then and trial. Fram says it mitigated its losses by entering into the Settlement Agreement and withdrawing its challenge to the validity of the 2005 August Agreement. Because Romandale's actions were responsible for Fram giving up its 50% interest in the Lands, Fram should be compensated in damages.

300 The foundation for Fram's claim to damages is that Romandale breached the prohibition against Dispositions in s. 5.03 of the COAs when it entered into the 2005 August Agreement. However, the trial judge found against Fram on that matter. In paras. 168-90 of the Reasons, the trial judge gives a thorough explanation for her determination that Romandale did not breach the prohibition against Dispositions in s. 5.03 of the COAs by entering into the 2005 August Agreement (the "*Determination*"). In its appeal, Fram did not challenge the Determination. Therefore, the Determination stands and Fram's claim to damages must necessarily fail.

X. THE COSTS APPEAL

301 By order dated April 2, 2020 (the "Costs Order”), the trial judge ordered costs in favour of Romandale in the amount of $2,708,651.57. Costs were awarded on a substantial indemnity basis and made payable on a joint and several basis by Fram and Kerbel.

302 Both Fram and Kerbel seek leave to appeal the Costs Order.

303 The general principle is that when an appeal is allowed, the order for costs below is set aside and the appellant is awarded costs below and on appeal: St. Jean v. Cheung, 2009 ONCA 9, 45 E.T.R. 3(d) 171, at para. 4; Climans v. Latner, 2020 ONCA 554, 449 D.L.R. (4th) 651, at para. 85. As I would allow the appeals, the general principle applies and the Costs Order is set aside. Thus, it is unnecessary to determine whether leave to appeal the Costs Order should be granted and, if so, whether the appeals against that order should be allowed.

304 Based on the parties' brief submissions on this matter at the oral hearing of the appeals, I understand that all three agree that if the appeals are allowed, costs below should be awarded on a partial indemnity basis. However, they disagree on the basis by which those costs should be determined. Fram and Kerbel argue that this court should fix those costs at 60% of the full indemnity request contained in the bills of costs they submitted at trial. Romandale contends that, if the parties are unable to agree on the quantum of partial indemnity costs, costs should be assessed.

305 Romandale also challenges Fram's entitlement to costs below. It submits that Fram has no appeal but, rather, only an "economic interest" in the outcome of Kerbel's appeal. Consequently, if the appeals are allowed, Romandale says that Fram is not entitled to costs below.

306 For the reasons given in my determination of Romandale's first alleged threshold flaw, I reject Romandale's submission that Fram is disentitled to costs below.

307 The oral submissions do not provide the court with an adequate basis on which to quantify the costs below for Fram and Kerbel. I trust that the foregoing provides the parties with sufficient guidance that they can resolve the quantum of costs below among themselves. If they are unable to do that, as indicated in the disposition below, the parties may have recourse to this court to resolve the matter.

XI. A COMMENT ON THE CONCURRING REASONS

308 My reasons do not address the first proposition set out in my colleague's concurring reasons because no party raised or argued the legal effect of Fram's consent.

309 In terms of the second proposition — estoppel by convention — no party raised or argued the legal issues addressed by my colleague in his concurring reasons. Consequently, my reasons do not address those legal issues.

310 Accordingly, nothing in my reasons should be taken as approving of those parts of the concurring reasons relating to the first and second propositions.

XII. DISPOSITION

311 Accordingly, I would allow the appeals and declare that the 2005 August Agreement is valid and enforceable, and I would order specific performance of Romandale's obligations under the 2005 August Agreement.

312 Counsel for the parties advised that they had resolved the matter of costs of the appeals and that no order was required in that regard. Thus, I would make no order as to costs of the appeals.

313 In terms of costs below, if the parties are unable to resolve that matter, I would permit them to make written submissions to a maximum of 5 double-spaced pages. I would give the Appellants 14 days from the date of release of this judgment to file their written submissions and Romandale 21 days.

314 Neither Fram nor Kerbel specified what changes should be made to the Judgment if the appeals were successful. In light of that and the complexity of the pleadings, I will leave it to the parties to resolve that matter. I offer the following comments as guidance:

i. because I would dismiss Fram's request for damages and no appeals were taken in respect of the 2007 Action and the 2008 Action, I would make no change to paras. 1 and 2 of the Judgment to the extent it dismisses those actions. However, that part of para. 1 of the Judgment dismissing Kerbel's crossclaim may need to be altered to reflect the result of these appeals;

ii. I would set aside para. 3 of the Judgment and substitute an order dismissing the 2016 Action;

iii. I would set aside para. 5 of the Judgment and substitute an order declaring that the 2005 August Agreement is valid and enforceable and an order for specific performance of Romandale's obligations under it; and,

iv. I would set aside para. 6 of the Judgment.

***M.L. Benotto J.A.*:**

I agree.

Schedule "A" — CHRONOLOGY OF EVENTS

2003

[1] Romandale sells Fram an undivided 5% interest in two neighbouring farms in Markham known as the McGrisken Farm and the Snider Farm (the "*Lands*") and the parties enter into two identical sets of agreements, one set for each farm property: the Co-Owners Agreement ("*COA*"), which sets out the terms and conditions on which Romandale and Fram, as co-owners, hold title to the Lands; the Construction Management Agreement ("*CMA*"), under which Fram is to construct and sell residential units on the Lands, once they achieve Secondary Plan Approval ("*SPA*"); and the Development Management Agreement ("*DMA*"), which governs the development process for the Lands. Bordeaux Developments (Ontario) Inc. ("Bordeaux") is also a party to the DMAs and, under its terms, is appointed the development manager. When the parties enter into these agreements, they expect to obtain SPA for the Lands around 2010.

[2] Of these agreements, the COAs are the most significant for these appeals. The buy-sell provision in s. 5.07 of the COAs permits either co-owner, under certain conditions, to tender on the other an offer to sell its entire interest in the Lands and, at the same time, an offer to buy the other's entire interest in the Lands on the same terms as the offer to sell. The non-tendering party must choose whether to buy out the tendering party or sell its interest. The buy-sell is available once SPA is obtained for the Lands or the DMA is terminated.

[3] Section 6.02 of the COAs provides that if an Event of Default occurs and is continuing, the non-defaulting party can, among other things, bring proceedings for specific performance and/or buy the defaulting party's interest in the Lands at 95% of fair market value.

[4] Development of the Lands depends on obtaining planning approval, including appropriate amendments to the official plan. These changes are made to the secondary plan, which provides more detailed policies for the development of a specific area. The process of obtaining development approval for specific lands is known as SPA. This is reflected in s. 5.07(a) of the COAs, which defines SPA as "an amendment of the official plan of the Town of Markham applicable to the Lands, obtained in accordance with the Planning Act (Ontario)".

[5] When Romandale and Fram enter into these agreements in 2003, Romandale has not yet started the SPA process.

2004

[6] With Fram's consent, Romandale borrows $6 million from the Bank of Nova Scotia ("*BNS*") secured by a mortgage on the Lands.

2005

[7] With Fram's consent, Romandale terminates the DMAs with Bordeaux.

[8] In response, Bordeaux brings an action against Romandale and Fram, alleging the termination was invalid and of no force and effect.

[9] The ongoing work to move the Lands through SPA continues through a new agreement between Fram and Romandale to co-manage development of the Lands.

[10] BNS calls the $6 million mortgage. Romandale needs financing to repay the BNS loan by August 30, 2005. It also needs cash to make distributions to the Roman family. The solution is an agreement which Romandale and Kerbel enter into on August 29, 2005 (the "*2005 August Agreement*").

[11] In the 2005 August Agreement, Kerbel agrees to pay off the BNS mortgage and extend the same amount as a new loan to Romandale under the same security and Romandale agrees to: (1) sell to Kerbel its 95% interest in the Lands, at a fixed price of $160,000 per acre; (2) sell to Kerbel (on behalf of the Roman family) the Triple R Lands for $175,000 per acre, subject to a price adjustment for non-developable acreage; and (3) grant Kerbel a right of second refusal over other lands called the Elgin South Property. The sale of Romandale's interest in the Lands is to occur in two steps:

a. an initial sale of 5% of Romandale's interest in the Lands; and

b. the sale of Romandale's remaining interest in the Lands ("*Remaining Interest*"), conditional on:

   i. Romandale buying out Fram's interest in the Lands pursuant to the buy-sell provisions in the COAs; or

   ii. Fram consenting to the transaction.

[12] The second step of the sale of Romandale's interest in the Lands to Kerbel is referred to as the "*Conditional Provision*".

[13] All the transactions in the 2005 August Agreement have been completed, except the sale of Romandale's Remaining Interest to Kerbel under the Conditional Provision.

[14] Paragraph 5 of the 2005 August Agreement empowers Kerbel to cause Romandale to trigger the buy-sell provision in the COAs following SPA being obtained for the Lands. It also gives Kerbel full

control over the development of the Lands.

[15] When the parties entered into the 2005 August Agreement, Romandale expected the Lands would advance through the planning process by approximately 2010 and Kerbel hoped that SPA might take only seven to ten years to unfold.

[16] Ms. Roman-Barber tells Fram she reached an agreement with Kerbel under which Keel bought the Triple R Lands, assumed the BNS mortgage, and bought 5% of Romandale's interest in the Lands. She does not disclose that Romandale has committed to sell its entire interest in the Lands through the Conditional Provision.

2007

[17] In January, Romandale discloses to Fram that it sold its entire interest in the Lands to Kerbel. Fram's repeated requests for a copy of the 2005 August Agreement are refused. Fram's counsel is shown a copy of the agreement in April, on conditions.

[18] In June, Romandale attempts to sell a further 7% interest in the Lands to Kerbel on the same terms as the 2005 August Agreement. This time it notifies Fram, which issues a notice of default for a prohibited disposition.

[19] In July, Fram starts an action against Romandale and Kerbel, alleging that the 2005 August Agreement was a prohibited disposition under the COAs, and seeking an injunction restraining Romandale from any further sale of its interest in the Lands (the "*2007 Action*").

[20] Fram also gives notice it will seek to exercise its remedy under the COAs to purchase Romandale's interest in the Lands at 95% of fair market value.

[21] In July, Ms. Roman-Barber produces a copy of the 2005 August Agreement as an exhibit to her affidavit on the injunction motion. This is the first time that Fram is provided with a copy of the agreement.

[22] In her affidavit, Ms. Roman-Barber swears that "The Agreement of August 29, 2005 is conditional upon [SPA]" and "The Buy/Sell Provisions are only exercisable after what is commonly known as [SPA]".

[23] Justice Forestell grants the injunction restraining Romandale from making any disposition of the Lands or any part of its interests in them, stating "[t]he original intent of the [2005 August Agreement] was that the sale to [Kerbel] of the [Remaining Interest] would not occur until some time after SPA".

2008

[24] Fram and Bordeaux start an action against Romandale and Kerbel based on alleged breaches of the CMAs (the "*2008 Action*"). Under the CMAs, Fram had the right to construct residences on the Lands once SPA is obtained.

[25] Kerbel, as owner of the Triple R Lands, together with neighbouring landowners, form the North Markham Landowners Group ("NMLG") with the goal of engaging collectively with the relevant authorities about the development of their respective properties.

[26] From 2008 onward, the NMLG retains consultants and commissions studies required for the development process and engages in that process with Markham. NMLG's development costs have been in the hundreds of thousands of dollars. Until 2011, Kerbel reimbursed Romandale for all costs associated with the Lands, including Romandale's share of the NMLG "cash calls" that were made to fund the NMLG ongoing development activities.

2009

[27] The anticipated development timeline for the Lands changes because of government decisions. As a result, development of the Snider Farm is delayed until 2021-2031 and of the McGrisken Farm until 2031-2051. In addition, the Snider Farm is proposed for employment use, which would prevent residential development.

[28] Ms. Roman-Barber makes further statements during examinations that the buy-sell would be triggered after SPA.

[29] The 2007 and 2008 Actions are set down for trial in July. In November, they are consolidated.

2010

[30] The parties attend pre-trial conferences, following which the trial is adjourned and the parties engage in settlement discussions.

[31] At a judicial mediation in September 2010, the parties reach an agreement in principle on the main settlement terms. One of the agreed settlement terms is that the sale of Romandale's Remaining Interest to Kerbel will occur after the Lands achieve SPA.

[32] In a letter dated September 24, 2010, from Romandale's counsel to counsel for Kerbel and Fram, he set out areas on which the parties had agreed, including "That the sale of each of parcel will take place when that particular parcel achieves [SPA]".

[33] Various drafts are exchanged among counsel for the three parties, all of which include a provision to the effect that purchase and sale of Romandale's Remaining Interest will take place after SPA.

[34] Romandale withdrew from the settlement in October for reasons that include disagreement over registration of the injunction against the Lands. Its reasons do not include an objection to the provision that purchase and sale will take place after SPA.

[35] Fram and Kerbel move forward with settlement and enter into final minutes of settlement, (the "*Settlement Agreement*") in December 2010. It provides that if Romandale does not concur in it and the 2007 and 2008 Actions proceed to trial:

1) Fram would discontinue its claims against Kerbel and restrict its claims against Romandale to damages;

2) Kerbel would grant Fram an option to purchase a 50% interest in Romandale's Remaining Interest in the Lands, on the same terms and conditions as Kerbel might purchase Romandale's Remaining Interest;

3) If Fram exercises the option, it and Kerbel would enter into a joint venture agreement to develop the Lands with (effectively) an equal sharing of costs;

4) Fram did not consent to Romandale's sale of its Remaining Interest in the Lands to Kerbel; and

5) It is Fram and Kerbel's intention that "the purchase and sale of Romandale's Remaining Interest in the Lands pursuant to these Minutes of Settlement will take place after [SPA] for the Lands has been obtained".

2011

[36] By letter dated January 28, 2011, counsel for Romandale advises Fram and Kerbel that Romandale objects to Kerbel's land planner telling the North Markham Landowners Group ("*NMLG*") that there was a change in the ownership of the Lands. The letter reiterates that Romandale conditionally sold the Lands to Kerbel under the 2005 August Agreement and "[t]he condition could only be satisfied by either a) secondary plan approval (which has not been achieved); b) or the consent of [Fram] to the transaction".

[37] Romandale represents the Lands at the NMLG and instructs its planning consultant (and others working for it) to not share information with Kerbel's planner.

[38] Kerbel's counsel sends a letter, dated February 17, 2011, to Romandale's counsel complaining that Ms. Roman-Barber's conduct was a breach of para. 5 of the 2005 August Agreement in which Romandale ceded control of the development process for the Lands to Kerbel. It demands that Romandale confirm to the NMLG that Kerbel's planning consultant has the sole authority to represent the Lands and threatens to commence proceedings if Ms. Roman-Barber did not comply with para. 5 of the 2005 August Agreement.

[39] Romandale's counsel responds by letter, dated February 25, 2011, asserting that its client had "at all times acted in accordance" with the 2005 August Agreement and was considering whether the Settlement Agreement was a breach of the 2005 August Agreement.

2012

[40] In February, Romandale seeks payment from Kerbel of invoices and expenses incurred pursuant to the 2005 August Agreement.

[41] In June, Romandale moves to amend its pleadings in the 2007 and 2008 Actions and for leave to

commence claims against Kerbel, alleging the Settlement Agreement fundamentally breached the 2005 August Agreement.

2013

[42] Master Graham dismisses Romandale's amendment motion, finding that the Settlement Agreement did not amount to a breach of the 2005 August Agreement "because whatever the Kerbel defendants do with the [L]ands once Romandale's interest in them is conveyed ... is none of Romandale's concern". Accordingly, he said, Romandale's argument that the 2005 August Agreement was breached is not tenable at law.

[43] Romandale appeals Master Graham's order.

[44] Meanwhile, Romandale and Kerbel were involved in litigation over the Triple R Lands (the "*Triple R Lands Litigation*"), one of the transactions in the 2005 August Agreement. Under the 2005 August Agreement, Kerbel purchased the Triple R Lands for $175,000 per developable acre, subject to a purchase-price rebate calculated in reference to developable acreage. The parties disagreed about whether and how much rebate was owed. In February 2013, Romandale and Kerbel enter into a partial settlement in which they agree that if Kerbel is found to be entitled to a price adjustment, the determination of the non-developable lands is to be done "pursuant to the terms of the [2005 August Agreement] and the Amendment".

[45] Romandale leaves the NMLG.

2014

[46] Romandale brings an action against Kerbel, alleging Kerbel breached the 2005 August Agreement by taking steps to reduce the amount of potential developable acreage on the Lands. It seeks a declaration that the 2005 August Agreement was terminated or, alternatively, damages (the "*2014 Action*").

[47] Justice Kiteley dismisses Romandale's appeal of Master Graham's order.

[48] This court releases its decision in the Triple R Lands Litigation. It finds in favour of Kerbel, declaring that Kerbel was "entitled to a purchase price reduction in accordance with the [2005 August Agreement]".

[49] NMLG enters into a funding agreement with Markham for the purpose of funding the municipality's studies and reports related to future development of lands in north Markham. Kerbel pays all of the costs associated with the Lands under the funding agreement.

2015

[50] Romandale retains new counsel and takes a new position. For the first time it claims that the buy-sell provisions in the COAs could be performed *before* SPA because the DMAs with Bordeaux had been

terminated in February 2005.

[51] Romandale obtains leave to amend its pleadings in the 2007 Action to allege, for the first time, that Kerbel repudiated the 2005 August Agreement by entering into the Settlement Agreement because the latter included a provision that the purchase and sale of its Remaining Interest would occur after SPA. Also for the first time, in its amended pleadings, Romandale asserts that it will not perform the 2005 August Agreement in any event. Until then, Romandale's position in the 2007 Action mirrored its position in the 2014 Action: that it was entitled to damages from Kerbel if the court did not find that the 2005 August Agreement was terminated.

[52] Justice Dunphy orders that Kerbel be added as a party to the 2007 Action, that the injunction be dissolved, and that Romandale be permitted to amend its pleadings to argue repudiation.

2016

[53] Kerbel starts an action against Romandale seeking specific performance of the 2005 August Agreement (the "*2016 Action*").

2017

[54] Kerbel files a crossclaim in the 2007 Action seeking specific performance of the 2005 August Agreement and an order directing Romandale to comply with its terms.

[55] Romandale files a defence to Kerbel's crossclaim in the 2007 Action alleging that the 2005 August Agreement offends the rule against perpetuities.

2018

[56] Shortly before the trial of the four actions begins in October 2018, Fram and Kerbel amend the Settlement Agreement to allow the sale of Romandale's Remaining Interest to close immediately, rather than after SPA. The stated basis for this is to militate against the risk that the 2005 August Agreement could offend the rule against perpetuities.

[57] Fram delivers its consent to Romandale to close the sale of its Remaining Interest under the 2005 August Agreement.

[58] The trial of the four actions begins in October. SPA had not been obtained for the Lands.

Schedule "B" — KEY CONTRACTUAL PROVISIONS

1. Key Provisions in the COAs

Section 1.01 Definitions:

Unless the subject matter or context otherwise requires:

[...]

(s) "Disposition" means the sale (including judicial sale), assignment, exchange, transfer, lease, mortgage, hypothecation, pledge, encumbrance, devise, bequeath or other disposition or agreement for such by a Co-Owner of the whole or part of its Co-Owner's Interest, and a Disposition shall include an amalgamation, a transfer by arrangement, conversion, exchange, sale, assignment or trust of the Equity Shares or the issue of any treasury shares which in any case would result in a change of Control of a Co-Owner;

Section 5.03 Dispositions:

Save for those Dispositions expressly permitted in this Agreement neither Co-Owner shall make or permit a Disposition without the consent of the other Co-Owner (which consent may be unreasonably or arbitrarily withheld) and any attempt to do so shall be void and the other Co-Owner shall, in addition to all other rights and remedies in law and in equity, be entitled to a decree or order restraining and enjoining such Disposition and the offending Co-Owner shall not plead in defence thereto that there would be an adequate remedy at law it being recognized and agreed that the injury and damage resulting from such default would be impossible to measure monetarily. Notwithstanding anything in this Agreement contained no Disposition may be made if:

(t) as a result thereof, the other Co-Owner or its Co-Owner's Interest shall be subject to any taxation to which it was not theretofore subject or to any governmental controls or regulations to which it was not subject prior thereto by reason solely of the nationality or residence of the transferee; or

(u) the Disposition is not permitted by law or any term of any Permitted Encumbrance or any agreement or document affecting the Co-Owners or the Lands unless any approval required by such Permitted Encumbrance, agreement or document has been obtained and is in effect; or

(v) the Disposition is for less than all of the Co-Owner's Interest; or

(w) such Co-Owner or any Affiliate of such Co-Owner is a Defaulting Party hereunder,

and any Disposition which would procure such result shall be void. The Co-Owners shall use their reasonable best efforts to obtain the consents of any third parties to any Disposition which would otherwise be permitted hereunder (provided, however, that a Co-Owner shall not be obligated to expend any funds, incur any liabilities or amend any agreements in order to obtain any such consent).

Notwithstanding anything herein contained, no Disposition may be made unless the transferee enters into an agreement with any continuing Co-Owner (and satisfactory to its counsel acting reasonably) whereby the transferee shall be bound by and entitled to the benefit of this Agreement to the extent of the Co-Owners Interest which is the subject of the Disposition.

Section 5.07 Buy-Sell Provisions:

(a) Provided that what is commonly called secondary plan approval (that is an amendment of the official plan of the Town of Markham applicable to the Lands, obtained in accordance with the Planning Act (Ontario)) (the "*Secondary Plan Approval*") has been obtained for the Lands, or if the Management Agreement has been terminated, then a Co-Owner who is not then a Defaulting Party (the "*Initiating Party*") may, at any time thereafter tender on the other party (the "*Recipient Party*"), not less than two (2) copies of an agreement combining a separate offer to sell the Initiating Party's full title to all (but not less than all) of its Co-Owner's Interest in the Lands to the Recipient Party (the "Sale Offer") and an offer to purchase all (but not less than all) of the Recipient Party's Co-Owner's Interest in the Lands (the "Purchase Offer") at a price and upon such terms and conditions as may be set by the Initiating Party except that the purchase price must be paid by cash and the assumption of the assumable Permitted Encumbrances affecting the applicable co-Owner's Interest and save and except that the price and terms as to payment with respect to the Sale Offer for each one percent (1%) interest must be equal to and identical to the price and terms as to payment with respect to the Purchase Offer for each one percent (1%) interest and that the closing of the transaction resulting from the acceptance of the Sale Offer or the Purchase Offer Shall take place no earlier than 30 days and no later than 90 days after the expiration of the 100 day period referred to in Subsection 5.07(b). On the completion date of the transaction contemplated in the Sale Offer the purchasing Co-Owner shall pay to the selling Co-Owner the balance of the purchase price by cash or certified cheque.

(b) One business day after receipt of the Purchase Offer by the Recipient Party, the Initiating Party shall deliver to the Recipient, as a deposit, a certified cheque or bank draft in an amount equal to five percent (5%) of the purchase price stipulated in the Purchase Offer and such cheque or bank draft shall be payable to the Recipient Party's counsel, in trust. The Recipient Party shall have 100 days following the receipt of the Sale Offer and the Purchase Offer in which to elect either to accept the Purchase Offer or the Sale Offer.

(c) If the Recipient Party shall elect to accept the Sale Offer it shall return to the Initiating Party its deposit (by way of certified cheque or bank draft) together with one (1) fully executed copy of the Sale Offer accompanied by the Recipient Party's certified cheque or bank draft as a deposit equal to 5% of the purchase price stipulated in the Sale Offer payable to the Initiating Party's counsel, in trust. If the Recipient Party shall not accept the Sale Offer it shall accept the Purchase Offer within the time limited. Failure of the Recipient Party to accept the Sale Offer or the Purchase Offer shall be deemed to mean that the Recipient Party has accepted the Purchase Offer.

(d) To the extent not stated or contradicted in any Purchase Offer or Sale Offer, the closing thereof shall be completed in accordance with the terms and conditions referred to in Section 8.01 hereof.

Section 5.10 Romandale's Right to Sell:

Subject only to the provisions of Section 5.03(a), (b) and (d) but notwithstanding any other provision in this Agreement to the contrary, Romandale may upon 20 days notice to Frambordeaux, accompanied with a copy of a bona fide arm's length offer to purchase (the "Offer"), elect to sell in one or more transactions up to but not in excess of an undivided 39% interest in the Lands payable only in cash and by assumption of existing assumable Permitted Encumbrances, provided that any purchaser of such interest shall agree in writing that following such purchase and sale the Co-Owners Committee shall remain the same and that the representative of Romandale shall also be the representative of the purchaser that all decisions and actions of Romandale and the purchaser under or pursuant to this Agreement (including the exercise of all rights hereunder) shall be made by Romandale alone. Frambordeaux may, at any time within 10 days from receipt of the aforesaid notice, by written notice to Romandale, elect to sell all or part of its Co- Owner's Interest on the same terms and conditions as contained in the Offer (except that the consideration shall be adjusted in accordance with the ratio of Frambordeaux's Co-Ownership Proportion to Romandale's Co-Ownership Proportion) provided that if Frambordeaux elects to sell only a part of its Co-Owner's Interest, it shall retain at least an undivided 2% Co-Owner's Interest and if Frambordeaux elects to sell all or part of its Co- Owner's Interest, Romandale or the purchaser shall be obligated to complete the purchase of Frambordeaux's Co-Owner's Interest pursuant to this Section 5.10.

Section 6.02 Remedies Available to a Non-Defaulting Party:

If an Event of Default has occurred and is continuing, a Non-defaulting Party shall have the right to:

(a) remedy such Event of Default and any event of default of the Defaulting Party under any other agreements Approved by the Co-Owners, and shall be entitled upon demand to be reimbursed by the Defaulting Party for any monies expended to remedy any such Event of Default and any other expenses incurred by such Non-defaulting Party, together with interest (calculated and payable monthly) at the lesser of the rate of 4% per annum in excess of the Prime Rate or the maximum rate then permitted at law from the date such monies were expended or such expenses were incurred to the date of repayment thereof; and/or

(b) bring any proceedings in the nature of specific performance, injunction or other equitable remedy, it being acknowledged by the parties hereto that damages at law may be an inadequate remedy for a default or breach of this Agreement; and/or

(c) bring any action at law as may be necessary or advisable in order to recover damages; and/or

(d) arrange, upon written notice to the Defaulting Party, for a determination of the Fair Market Value (as determined pursuant to Section 6.03) of the Defaulting Party's Co-Owner's Interest as at the date of such notice and shall deliver written notice to the other Co-Owner of such Fair Market Value, and either contemporaneously with such first written notice or such second written notice, a Non-defaulting Party shall have the right to give written notice ("Notice of Exercise") to the Defaulting Party that such Non-defaulting Party elects to purchase the Defaulting Party's Co-Owner's Interest at a price equal to ninety-five (95%) per cent of the Fair Market Value thereof payable only in cash and by the assumption of assumable Permitted Encumbrances affecting the Defaulting Party's Co-Owner's Interest and to purchase such interest at such price in which event the Defaulting Party shall sell and the Non-defaulting Party shall purchase such interest on the terms set forth in Subsections 6.03 and 6.04 hereof.

2. The 2005 August Agreement

WHEREAS:

A. Romandale, as to an undivided 95% interest, and Frambordeaux Developments Inc. ("FDI"), as to an undivided 5% interest, are the owners of the lands and premises consisting of 278 acres, more or less, described as part of Lot 25 in Concessions 4 and 5, Town of Markham (having P.I.N. 03055-0008 (LT) (the "Snider Property") and 03056-0052 (LT) (the "McGrisken Property")) (collectively, the "Snider/McGrisken Property") which are subject to a mortgage in favour of The Bank of Nova Scotia (the "Bank") in the original principal amount of $6,000,000 registered as Instrument No. YR479080 (the "BNS Mortgage");

B. The amount outstanding under the BNS Mortgage is scheduled to become due and payable on August 30, 2005 and Romandale has requested 2001251 to acquire the mortgagee's interest under the BNS Mortgage and such of the Bank's additional security provided by Romandale in connection therewith as may be required in order to ensure that the BNS Mortgage is a good and valid first charge against title to the Snider/McGrisken Property (collectively, the "Security") and thereafter extend its terms for repayment;

C. Romandale has agreed to sell its interest in the Snider/McGrisken Property to 2001251 on the terms herein set out;

D. Romandale and parties affiliated with Romandale are the owners of the lands and premises described as part of Lot 26, Concession 4, Town of Markham (having PIN 03055-0009 (LT)) (the "Triple R Property") and Romandale has agreed to cause the sale of such property to 2001251 on the terms herein set out;

E. Romandale is the owner of the lands and premises described as part of Lot 24, Concession 5, Town of Markham (being PIN 03056-0199 (LT)) (the "Elgin South Property") and has agreed to grant to 2001251 a right of refusal to purchase such property on the terms herein set out;

NOW THEREFORE THIS AGREEMENT WITNESSES that, in consideration of 2001251 agreeing to acquire the BNS Mortgage and extend the term for repayment thereunder and in consideration of the other covenants contained herein, the parties agree as follows:

1. BNS Mortgage

(a) 2001251 or its affiliate shall acquire the mortgagee's interest under the Security, including without limitation, the BNS Mortgage on or before the amount outstanding thereunder becomes due and payable. 2001251 and/or its designate shall be at liberty to contact the Bank at any time hereafter for the purposes of settling the terms and conditions in respect of the purchase of the BNS Mortgage. 2001251 shall receive a mortgage statement from the Bank setting out the current outstanding balance under the BNS Mortgage. Thereafter, the parties to the BNS Mortgage shall enter into an amending agreement whereby: (i) the term is extended such that all amounts secured thereby shall become due and payable upon the earlier of (A) the date that is three (3) years from the date of closing of 2001251's purchase of the BNS Mortgage and (B) the date upon which Romandale conveys the Remaining Portion (as hereinafter defined) of the Snider/McGrisken Property to 2001251 and (ii) the interest rate chargeable thereunder shall be 8% per annum payable interest only monthly in arrears.

(b) Romandale shall pay the sum of $20,000 to 2001251 on the execution of this agreement to reimburse it for its costs and expenses incurred to date, and it shall pay to 2001251 all further costs and expenses of 2001251 incurred in connection with the BNS Mortgage acquisition on the date that the mortgage assignment and amending agreement is executed by the parties an registered on title. Notwithstanding the foregoing, the parties agree that Romandale shall only be responsible up to the sum of $10,000 in respect of legal fees incurred in connection with 2001251's acquisition of the BNS Mortgage.

(c) In connection with the acquisition of the BNS Mortgage by 2001251, Romandale shall cause its counsel Berkow Cohen LLP (Jack Berkow) and Gowling Lafleur Henderson LLP (John Whyte) (collectively, "Romandale Counsel"), to provide opinions in favour of 2001251 (collectively, the "Opinions"), which shall be in forms acceptable to 2001251 and its counsel, Aird & Berlis LLP (Hayden Solomons), acting reasonably, and which shall include, without limitation, opinions that the BNS Mortgage is a good and valid first fixed mortgage registered against title in the Snider/McGrisken Property and that the BNS Mortgage and this Security has been validly assigned to 2001251, that there are no other financial encumbrances affecting title to the Snider/McGrisken Property and that acquisition and amendment by 2001251 of the BNS Mortgage on the terms and conditions as herein set out shall not constitute a transaction (including, without limitation, a "Disposition" as defined under the Co-Owner Agreement dated May 29, 2003 in respect of the Snider Property (the "Snider Co-Owner Agreement") and as defined under the Co-Owner Agreement dated May 29, 2003 in respect of the McGrisken Property (the "McGrisken Co-Owner Agreement") (collectively, the Snider Co-Owner Agreement and the McGrisken Co-Owner Agreement are referred to herein as the "Co-Owners Agreements", and any amendments thereto) that requires the consent of FDI pursuant to the said Co-Owners Agreements.

2. Sale of the Snider/McGrisken Property

Romandale shall sell 5% of its interest (the "Initial Interest") in the Snider/McGrisken Property (being 4.75% of the total 100% ownership in the Snider/McGrisken Property (e.g. 95% Romandale and 5% FDI as of the date of this agreement) and, of FDI if it so desires, to 2001251 or its affiliate on the terms herein set out. Romandale shall sell its remaining interest in the Snider/McGrisken Property, being 95% of its interest in the Snider/McGrisken Property (the "Remaining Interest") also on the terms herein set out save that the sale of the Remaining Interest is conditional for the benefit of the vendor and the purchaser on the valid exercise of the buy-sell rights under the Buy-Sell Provisions (as defined in paragraph 5 of this Agreement) and the completion of the buy-out of the interest of FDI, or, in the alternative, the consent of FDI to the transaction and save that financial figure shall be adjusted pro-rata to represent the said Remaining Interest. In respect of the foregoing, Romandale covenants to use reasonable best efforts to obtain the consent of FDI in respect of the sale of the Remaining Interest to 2001251 or its affiliate as aforesaid. For clarification, the following terms are applicable in respect of the Initial Interest but would be adjusted to reflect the aforesaid Remaining Interest at the time that Romandale is able to sell the Remaining Interest to 2001251 or its affiliate as aforesaid:

(a) The purchase price shall be based on the sum of $160,000 per acre which price will be calculated using the existing most recent survey of the subject property which Romandale represents and warrants accurately describes the subject property. With respect to the purchase of the Initial Interest, an initial deposit of $100,000 shall be paid immediately, and the balance of the purchase price shall be paid by certified cheque or bank draft on the closing of such transaction. With respect to the purchase of the Remaining Interest, the purchase price shall be reduced at the end of the 5 year of the term of the VTB #1 Mortgage (as hereinafter described) by the amount that the acreage of the non-developable land (being land prohibited from development by law) subject to environmental protection requirements, wood lots, land below top-of-bank and the set-backs from top-of-bank, streams and floodplain, existing easements, but not including up to half of the existing lake on the subject property to a maximum of two acres (the "ND Land") exceeds 15% of the total acreage. The parties shall each retain their own consultant to determine the acreage of the ND Land and both parties shall agree upon a third independent qualified consultant to determine the acreage of the ND Land in the event that their own consultants cannot agree upon such acreage. In the event of such disagreement, the amount of the ND Land shall be deemed to be the average of the amounts determined by the 3 consultants. Such determination of the amount of acreage of the ND Land shall be final and binding upon the parties, with no rights of appeal therefrom. The parties shall each bear the cost of their own consultant and 50% of the cost of the third consultant.

(b) The purchase price in respect of the purchase of the Remaining Interest shall be paid to the extent of 35% thereof by certified cheque on closing and the balance by way of a vendor take-back mortgage (the "VTB #1 Mortgage") with a term of 7 years, bearing no interest, with two balloon principal payments of $9,500,000 each to be paid at the end of the 3 year of the term and at the end of the 5 year of the term, respectively, with the price adjustment described in section 2(a) hereof to be applied at the time of such [later] payment. Notwithstanding the above, however, the parties further agree that the aggregate of the amount paid on closing and the two balloon principal payments shall not exceed 75% of the overall purchase price as adjusted pursuant to section 2(a) hereof.

(c) The closing of the sale of the Initial Interest shall take place on the 31 day of January, 2006. The closing of the sale of the Remaining Interest shall take place sixty (60) days (or the next business day following such sixtieth (60) day after the earlier of: (1) Romandale obtaining the consent of FDI pursuant to the Co-Owners Agreements to the sale of the Remaining Interest to

2001251 pursuant to the terms and conditions hereof, or (2) Romandale closing the purchase of FDI's co-ownership interest in the Snider/McGrisken Property pursuant to its rights under the Buy-Sell Provisions (as defined in paragraph 5 of this Agreement).

(d) The occupants approved by Romandale (the "Superintendents") shall be entitled to occupy the residence on the Snider/McGrisken Property as Superintendents and caretakers to maintain and supervise the property, and they are to pay all maintenance, utilities and fire and liability insurance costs (which insurance shall be obtained by them and with the owner noted on all insurance policies for the above coverages as loss payee). The Superintendents' right to occupy the property shall automatically terminate on the earlier of the 5 anniversary of the closing of the purchase and sale of the Initial Interest or Secondary Plan Approval being obtained for the Snider/McGrisken Property.

(e) In the event of any final judgment or order or any execution in favour of Bordeaux, FDI or any third party which attaches to or creates an interest in or affects title to the Snider/McGrisken Property, then in such case, the purchase price hereunder for Romandale's interest in the Snider/McGrisken Property shall be reduced by the value of such judgment, order or execution as follows: (1) in the event that the purchase transaction in respect of the Initial Interest has not yet closed, a reduction in the cash component of the said purchase price, (2) in the event that the purchase transaction in respect of the Remaining Interest has not closed then the purchase price in respect thereof shall be reduced by a reduction first in the cash component of the said purchase price and the balance, if any, resulting in a reduction of the principal amount owing under the VTB #1 Mortgage, or (3) in the event that such purchase transaction in respect of the Remaining Interest has closed, a reduction in the principal balance, owing under the VTB #1 Mortgage. The parties covenant and agree to notify the other of the details of any such judgment, order or execution forthwith following first becoming aware of such judgment, order or execution.

3. Sale of the Triple R Property

Romandale shall sell, or shall cause the owners to sell, the Triple R Property to 2001251 or its affiliates on the terms herein set out:

(a) The purchase price shall be based on the sum of $175,000 per acre which price will be calculated using the existing most recent survey of the subject property which Romandale represents and warrants accurately describes the subject property. The purchase price shall be reduced at the end of the 5 year of the term of the VTB #2 Mortgage (as hereinafter described) by the amount that the acreage of the ND Land within the Triple R Property exceeds 20% of the total acreage. The determination of the amount of acreage of such ND Land shall be made in the same manner as that described in section 2 (a) hereof;

(b) The purchase price shall be paid to the extent of 70% thereof by certified cheque on closing and the balance by way of a vendor take-back mortgage (the VTB #2 Mortgage) with a term of

7 years, bearing no interest, with a balloon principal payment of $1 million at the end of the 3 year of the term. The price adjustment described in section 3(a) hereof shall be applied at the end of the 5 year of the term, and 50% of the balance owing under the VTB #2 Mortgage shall be paid at the end of the 6 year of the term and the balance at the end of the 7 year of the term;

(c) The Superintendents shall be entitled to occupy the residence on the Triple R Property as Superintendents and caretakers to maintain and supervise the property, and they are to pay all maintenance, utilities and fire and liability insurance costs (which insurance shall be obtained by them and with the owner noted on all insurance policies for the above coverages as loss payee). The Superintendents' right to occupy the property shall automatically terminate on the earlier of the 5 anniversary of closing or Secondary Plan Approval being obtained for the Triple R Property.

(d) 2001251 shall immediately provide a deposit to Romandale in the amount of $100,000 in respect of its obligations to purchase the Triple R Property pursuant to the terms hereof, together with an interest-free loan of $1,000,000 evidenced by a promissory note signed by Romandale which shall be repayable on the closing of the sale of the Triple R Property to 2001251 or its affiliates.

(e) The closing of such sale shall take place on the date that is 70 days following the closing date of the transactions described in section 1 hereof (or the next business day thereafter in the event that such 70 day is not a business day).

4. Elgin South Property

The Elgin South property is subject to an existing right of first refusal in favour of Angus Glen Farm (1996) Limited. On the closing of the acquisition of the BNS Mortgage, Romandale shall grant to 2001251 or its affiliate a right of second refusal to purchase such property on the same terms as contained in any offer to purchase that Romandale is prepared to accept. The form of such grant shall be in the same form as the existing agreement with Angus Glen Farm (1996) Limited. 2001251 shall be permitted to register notice of the aforesaid right of second refusal against title to the Elgin South Property. Romandale covenants and agrees to execute such further documents and to do all such further acts and things from time to time as requested by 2001251, to more effectively confirm and evidence the right of second refusal.

5. Irrevocable Appointment

Romandale hereby agrees that, on consideration of entering of this agreement by 2001251, other good and valuable consideration and the sum of Ten Dollars ($10.00) paid by 2001251 to Romandale, the receipt and sufficiency of all of which is hereby acknowledged, Romandale hereby irrevocably appoints 2001251 as its exclusive true and lawful attorney and agent having full power of substitution, and 2001251 is hereby fully authorized as such to act on behalf of and/or give binding instructions to Romandale solely in connection with the exercise of the buy-sell rights pursuant to the Buy-Sell Provisions (as hereinafter defined). Romandale agrees that any and all decisions, operations, conduct and actions relating to the development of the Snider/McGrisken Property shall be within the exclusive control of 2001251 and Romandale shall assist in facilitating such control to comply with Section 5.10 of the Co-Owners Agreements over all decisions, operations, conduct and actions exercisable by Romandale relating to the development and obtaining of development approvals for the Snider/McGrisken Property. Prior to the closing of the sale of the Remaining Interest, Romandale acknowledges and agrees that it may not transfer, sell, encumber or otherwise deal with or dispose of all or any part of the Snider/McGrisken Property without the prior written consent of 2001251. Romandale covenants and agrees to execute such further documents and to do all such further acts and things from time to time as requested by 2001251, to more effectively confirm and evidence the said attorney as it relates to the buy-sell rights. Romandale and 2001251 shall cooperate in getting the Snider/McGrisken Property included under the Town of Markham urban envelope for development purposes, and Romandale shall make all reasonable steps to reduce land wastage to as small an amount as possible, using Joanne Burnett, Jeff Kerbel and/or his designate to act on behalf of Romandale in taking such steps. Romandale further acknowledges that the foregoing rights of 2001251 are intended, without limitation, to permit 2001251 to cause Romandale to trigger Romandale's buy-sell rights under section 5.07 of each of the Co-Owners Agreements in respect of the Snider/McGrisken Property (collectively, the "Buy-Sell Provisions") following Secondary Plan Approval being obtained for the Snider/McGrisken Property such that Romandale acquires the co-ownership interest of FDI in the Snider/McGrisken Property and then conveys such interest to 2001251 in accordance with this Agreement and to restrict Romandale from dealing with the Remaining Interest or any part thereof in the Snider/McGrisken Property in any way whatsoever, subject to the terms and conditions of the Co-Owners Agreement.

6. Development Costs

Romandale shall not be responsible for development costs incurred by 2001251 Ontario Inc.

7. General

(a) This agreement shall be a binding agreement between the parties hereto save that it shall be conditional upon compliance with the Planning Act.

(b) Any notice given hereunder shall be in writing and given by personal delivery or by fax to the addresses set out on the signing page hereof. Such notice shall be deemed to have been given on the day of delivery or transmission if such was completed by 5:00 p.m. failing which it shall be deemed to have been given on the next day.

(c) Time shall be of the essence hereof.

(d) Romandale shall take all actions so as to ensure that all property interests conveyed pursuant to this agreement shall be good and marketable, free of all mortgages, liens and encumbrances.

(e) This agreement may be executed and delivered by counterparts and by facsimile transmission, and if so executed and delivered, each document shall be deemed to be in original, shall have the same effect as if each party so executing and delivering this agreement had executed the same copy of this agreement and all of which copies when taken together shall constitute one and the same document.

3. The Settlement Agreement

WHEREAS Frambordeaux Developments Inc. ("Frambordeaux") and Romandale Farms Limited ("Romandale") are co-owners of two parcels of land which are the subject of these actions (the "Lands") and are parties to Co-Owners Agreements governing their rights and obligations respecting their ownership of the Lands (the "Co-Owners Agreements") which provide, *inter alia*, that each Co-Owner has a right of first refusal respecting an offer to purchase the other Co-Owner's interest (the "Right of First Refusal") and each Co-Owner has a buy-sell right in respect of the other Co-Owner's interest (the "Buy-Sell Provision"), but that in both cases the rights may only be exercised after secondary plan approval has been obtained for the Lands, and that save for those dispositions expressly permitted by the Co-owners Agreements (whereby Romandale was permitted under certain conditions to sell up to 39% interest in the Lands), neither Co-Owner is permitted to dispose of its interest in the Lands without the consent of the other Co-Owner;

AND WHEREAS Romandale and 2001251 Ontario Inc. ("2001251") made an agreement dated August 29, 2005 (the "August 29, 2005 Agreement") whereby Romandale agreed, inter alia, in respect of the Lands: to sell 5% of its interest (the "Initial Interest") in the Lands (being 4.75% of the total 100% ownership in the Lands) on the terms set out therein and originally scheduled to close January 31, 2006; and to sell its Remaining Interest in the lands (being 95% of its interest representing 90.25% of the total 100% ownership in the Lands) on the terms set out therein and at such time as Romandale could exercise its buy-sell rights under the Buy-Sell Provisions of the Co-Owners Agreements or Frambordeaux consented to the transaction;

AND WHEREAS pursuant to the August 29, 2005 Agreement, Romandale transferred 5% of its interest in the Lands (being 4. 75% of the total Lands) to First Elgin Mills Developments Inc. ("First Elgin"), an affiliate of 2001251, on or about June 6, 2006;

AND WHEREAS Romandale and First Elgin made a further agreement dated June 25, 2007, (the "June 25, 2007 Agreement"), whereby Romandale agreed to sell a further 7% of its original 95% interest in the Lands (being 6.65% of the total 100% ownership in the Lands) to First Elgin for the same purchase price of $160,000 per acre subject to adjustment for net developable acreage as provided in the August 29, 2005 Agreement;

AND WHEREAS Frambordeaux sought and obtained an interlocutory injunction July 26, 2007 enjoining the defendants until further order of the Court from making any disposition of the Lands or any part of the interest of Romandale in the Lands;

AND WHEREAS the Plaintiffs and the Defendants 2001251, First Elgin and Jeffrey Kerbel have agreed to settlement so that the right of 2001251 or its affiliate to acquire Romandale's Remaining Interest in the Lands pursuant to the August 29, 2005 Agreement may be exercised 60 days after Secondary Plan Approval for the Lands is obtained, and upon such acquisition the entire Lands shall at Frambordeaux' option be beneficially owned equally between 2001251 and Frambordeaux thereafter, so that a 50% undivided interest therein shall be beneficially owned by 2001251 or its nominee, and a 50% undivided interest therein shall be owned beneficially by Frambordeaux or its nominee.

THE PARTIES HERETO agree as follows:

1. In the event Romandale will not concur in this settlement and these actions proceed to trial, Frambordeaux, Fram 405 Construction Ltd. and Bordeaux Homes Inc. shall not seek any relief against 2001251, First Elgin or Jeffrey Kerbel and shall not seek a declaration that the August 29, 2005 Agreement is void nor that the June 6, 2006 transfer is invalid, but may pursue its claims against Romandale otherwise, including its claims for damages for breach of contract, misrepresentation and damages in lieu of specific performance, and all claims in these actions against 2001251, First Elgin and Jeffrey Kerbel shall be discontinued, with such discontinuance being an absolute defence for those defendants to any subsequent actions arising out of the circumstances pleaded.

2. 2001251 hereby grants an option to Frambordeaux to purchase a 50% interest in Romandale's Remaining Interest in the Lands to be acquired by 2001251 as described in paragraph 2 of the August 29, 2005 Agreement, on the same terms and conditions as 2001251 may purchase Romandale's Remaining Interest in the Lands, at such time or times as 2001251 may exercise its right to purchase all or part of Romandale's Remaining Interest, provided that in the event Frambordeaux exercises its option hereby granted, the respective interests of Frambordeaux and 2001251 shall be adjusted so that each of Frambordeaux and 2001251 (including their affiliates and related parties) beneficially hold an exactly equal percentage ownership interest (being an undivided 50% interest each) in the Lands.

3. In the event Frambordeaux exercises its option described in paragraph 2 hereof, and all or part of Romandale's Remaining Interest shall have been purchased, 2001251, First Elgin and Frambordeaux shall assign all of their right, title and interest in the Lands to Fram First Elgin Developments Inc. which shall hold in trust for 2001251 or its nominee and for Frambordeaux or its nominee, each as to a 50% beneficial interest therein.

4. 2001251 and Frambordeaux, or their nominees, together with First Elgin Mills Developments Inc. and Fram First Elgin Developments Inc. shall enter into the form of joint venture agreement attached as Schedule "A" hereto and agree to share equally all costs relating to the acquisition of the Remaining Interest from Romandale, and all development costs incurred by either of them relating to the Lands since August 29, 2005 and going forward, and to make all decisions concerning the

development and/or the exercise of all rights and obligations respecting the Lands, on a joint basis. Any disputes or disagreements shall be resolved by arbitration before a single arbitrator as the parties may agree, or failing such agreement, as may be appointed by a judge of the Ontario Superior Court.

5. Frambordeaux does not by this settlement agreement or otherwise consent to the transaction referred to in paragraph 2 of the August 29, 2005 Agreement. It is the intention of the parties hereto that the purchase and sale of Romandale's Remaining Interest in the Lands pursuant to these Minutes of Settlement will take place after Secondary Plan Approval for the Lands has been obtained.

6. The parties acknowledge that the legal description of the Lands is as set out in Schedule "B" appended hereto and that Notice of this Agreement pursuant to the Land Titles Act, R.S.O. 1990, c.L.5 may be registered against their respective undivided interest in the Lands and that Notice of Security Interest in respect of the option granted by this Agreement may be registered pursuant to the Personal Property Security Act, R.S.O. 1990, c. P. 10.

Dated: December 3, 2010

***P. Lauwers J.A.* (concurring):**

315 I would reach the same destination as my colleague, dismissal of the appeal, but by a different route. We part company on the role of estoppel by convention. I adopt my colleague's short forms in these reasons.

A. OVERVIEW

316 I summarize my view of this appeal in the following propositions:

1) When Fram consented to the sale of Romandale's Remaining Interest in the Lands to Kerbel under the 2005 August Agreement on August 22, 2018, any estoppel against Romandale ceased to have practical effect and was therefore spent. It plays no further legal role in the contractual relations among the parties. Those relations are entirely structured and governed by their respective agreements.

2) In any event, on the facts of this case, estoppel by convention does not arise.

3) By entering into the Settlement Agreement, Kerbel did not breach the 2005 August Agreement.

4) Kerbel did not repudiate the 2005 August Agreement.

5) Kerbel is entitled to specific performance of the 2005 August Agreement.

317 I will explain each of these propositions in turn, after restating the contractual context.

B. THE CONTRACTUAL CONTEXT

318 The COAs between Fram and Romandale respecting the McGrisken and Snider Farms were signed in 2003. The COAs structure the relationship between Fram and Romandale.

319 The 2005 August Agreement between Kerbel and Romandale was signed in 2005. It included not only the McGrisken Farm and the Snider Farm, but also the Triple R Lands and the Elgin South Property, both of which were owned by or subject to the direction of Romandale. The 2005 August Agreement structures the relationship between Kerbel and Romandale. It has been fully performed except for the sale of Romandale's Remaining Interest in the McGrisken and Snider Farms to Kerbel.

320 Fram and Kerbel signed the Settlement Agreement on December 3, 2010. The Settlement Agreement structures the relationship between Fram and Kerbel. Romandale was not a party to the Settlement Agreement. Romandale had participated in the September 2010 judicial mediation but withdrew in October 2010. (I observe that calling the exercise a judicial mediation gives it unwarranted gravity.) In the end, the Settlement Agreement was a business deal between Kerbel and Fram to which Romandale was not a party.

321 Romandale first raised the possibility that the Settlement Agreement breached the 2005 August Agreement in February 2011 but did not allege that by entering it Kerbel repudiated the 2005 August Agreement until 2015.

322 As I will explain, these three agreements remain in full force and effect and govern the parties to them.

C. ANALYSIS

(1) Any Estoppel Ceased to Have Practical Effect When Fram Consented to the Sale of Romandale's Remaining Interest on August 22, 2018

323 The estoppel by convention raised by Kerbel and Fram against Romandale arises from the Settlement Agreement. Romandale argues that Kerbel repudiated the 2005 August Agreement by entering into the Settlement Agreement, which provided that the sale of Romandale's Remaining Interest would take place only after the Lands obtained SPA. Kerbel, in turn, seeks an order for specific performance of the 2005 August Agreement. Kerbel and Fram, together, argue that Romandale is estopped from resiling from Romandale's earlier position that the buy-sell in the COAs could only be triggered upon SPA. That position was reflected in earlier representations to that effect made by all three parties, as my colleague has detailed at paras. 156-172. But for Fram's 2018 consent, giving effect to this position would have the effect of extending the likely date for closing the COAs, and perforce the 2005 August Agreement, for many years, until after SPA.

324 My colleague defines the "Shared Assumptions" that underpin the estoppel by convention, at para. 153:

> (1) the buy-sell provision in the COAs could not be triggered until after SPA had been achieved for the Lands; and (2) under the 2005 August Agreement, Kerbel could not cause Romandale to trigger

the buy-sell under the COAs until after SPA.

She finds that Romandale is estopped from resiling from these Shared Assumptions. In her analysis, the estoppel continues to operate and prevents Romandale from resisting on order for specific performance of the 2005 August Agreement on the basis that it was fundamentally breached and repudiated by Kerbel's entry into the Settlement Agreement.

325 However, as my colleague notes, the assumption that the buy-sell provision in the COAs could not be triggered until after SPA was a mistaken reading of s. 5.07 of the COAs. Romandale could have triggered the buy-sell under the COAs at any time after the DMAs were terminated in February 2005. Because the 2005 August Agreement was tied to the COAs, Kerbel could have caused Romandale to pull the trigger at any time after it signed that agreement. This understanding of the true trigger date is now common ground.

326 In August 2018, a few months before the trial started, Fram consented to the sale of Romandale's Remaining Interest in the McGrisken and Snider Farms to Kerbel, pursuant to the 2005 August Agreement. Under para. 2(c) of that agreement, "The closing of the sale of the Remaining Interest shall take place sixty (60) days... after... Romandale obtaining the consent of [Fram]... to the sale of the Remaining Interest". Fram's consent removed any obstacle to the closing of that transaction.

327 The alleged estoppel prevented Romandale from insisting on an earlier closing date than after SPA, which by 2010 was projected to be years if not decades into the future. But this purpose of the estoppel was rendered redundant by Fram's 2018 consent. In my view, assuming the estoppel was founded and was enforceable against Romandale, it ceased to have practical effect and plays no further legal role in the contractual relations among the parties. Fram's consent could not have revived the 2005 August Agreement if it had been repudiated by Kerbel but, as I explain below, Kerbel did not repudiate that agreement.

328 The relations among the contracting parties are entirely structured and governed by their respective agreements, which also govern the disposition of this appeal.

329 If I am mistaken in concluding that the estoppel was effectively spent in 2018, I next set out my reasons for holding that there was no estoppel by convention on the facts of this case.

(2) Estoppel by Convention Is Not Made Out

330 I begin with the governing principles of estoppel by convention, review the evidence, and then apply the principles to the facts.

(a) The Principles Governing Estoppel by Convention

331 The law on estoppel by convention, at least in Canada, is under-theorized. There has been little jurisprudence. The most authoritative statement is that of the Supreme Court in Ryan v. Moore, 2005 SCC 38, [2005] 2 S.C.R. 53. Bastarache J. set out the criteria that form the basis of the doctrine, at para.

59, which I repeat here for convenience:

> (1) The parties' dealings must have been based on a shared assumption of fact or law: estoppel requires manifest representation by statement or conduct creating a mutual assumption. Nevertheless, estoppel can arise out of *silence* (impliedly). [Emphasis in original.]
>
> (2) A party must have conducted itself, i.e. acted, in reliance on such shared assumption, its actions resulting in a change of its legal position.
>
> (3) It must also be unjust or unfair to allow one of the parties to resile or depart from the common assumption. The party seeking to establish estoppel therefore has to prove that detriment will be suffered if the other party is allowed to resile from the assumption since there has been a change from the presumed position.

332 Note the reference by Bastarache J. to the requirement for a "manifest representation". This expression must be read in context. The key difference between estoppel by representation and estoppel by convention is that in estoppel by representation, one party must make a representation to the other party on which the other party relies, whereas, in estoppel by convention, neither party need have made a representation to the other party so long as they both proceeded on a shared assumption and were each aware of the other's assumption: see Ryan v. Moore, at paras. 54, 62.

333 In Grasshopper Solar Corporation v. Independent Electricity System Operator, 2020 ONCA 499, leave to appeal refused, [2020] S.C.C.A. No. 360 and No. 361, Huscroft J.A. made explicit another element of the test that I believe was implicit: the party's reliance on the shared assumption must have been reasonable. Huscroft J.A. noted, at para 54:

> Although the doctrine of estoppel cannot vary the terms of a contract, it may operate to prevent a party from relying on the terms of the contract to the extent necessary to protect the reasonable reliance of the other party. Thus, the doctrine has the potential to undermine the certainty of contract and must be applied with care, especially in the context of commercial relationships between sophisticated parties represented by counsel. Estoppel is a fact specific doctrine and the concern noted by Bastarache J. in *Moore*, at para. 50 remains apposite: "estoppels are to be received with caution and applied with care". [Emphasis added, citation omitted.]

334 Huscroft J.A. added, at para. 55, that estoppel by convention "is a relatively rare form of estoppel," and, at para. 56, "Estoppel exists to protect *reasonable* reliance: it must be reasonable to adopt a particular assumption and reasonable to act in reliance on it" (emphasis in original, citations omitted).

335 This orientation anchors estoppel by convention in the root principle of the common law of contract, which is to give effect to the reasonable expectations of contracting parties as set out in the text of their contract: see Martin v. American International Assurance Life Co., 2003 SCC 16, [2003] 1 S.C.R. 158, at paras. 12, 16; Ledcor Construction Ltd. v. North bridge Indemnity Insurance Co., 2016 SCC 37, [2016] 2 S.C.R. 23, at para. 5; Onex Corp. v. American Home Assurance Co., 2013 ONCA 117, 114 O.R.

(3d) 161, at paras. 106, 108, leave to appeal refused, [2013] S.C.C.A. No. 178; and Dumbrell v. The Regional Group of Companies Inc., 2007 ONCA 59, 85 O.R. (3d) 616, at paras. 51-53.[85]

336 Parol evidence figures in this case. Evidence of what a party said or did is often admissible as part of the narrative of a contractual dispute. It is undoubtedly admissible to found an estoppel, as stated in Chartbrook Limited v. Persimmon Homes Limited, [2009] UKHL 38, at para. 42:

> The rule excludes evidence of what was said or done during the course of negotiating the agreement for the purpose of drawing inferences about what the contract meant. It does not exclude the use of such evidence for other purposes: for example, to establish that a fact which may be relevant as background was known to the parties, or to support a claim for rectification or estoppel. These are not exceptions to the rule. They operate outside it.
>
> [Emphasis added.]

337 Such evidence is also available, by necessary implication, to challenge the veracity of an estoppel.

(b) The Evidence

338 As the trial judge explained, the mistaken view of the trigger date appears to have originated in some correspondence from counsel for Fram in February 2007. It was then perpetuated in many statements, as my colleague outlines at paras. 156-172. Often, these statements were made by Romandale's own representatives. This mistake was apparently not discovered until 2015 when Romandale's new counsel pointed it out and it became the factual backbone to Romandale's litigation strategy.

339 The trial judge described the situation, at paras. 103-105:

> It is Romandale's position that "amidst the to-ing and fro-ing" of Fram and Romandale's counsel in respect of Romandale's alleged breach of the COAs, Fram's counsel set in motion a mischaracterization of the availability of the Buy-Sell in s. 5.07 of the COAs that pervaded subsequent pleadings and affidavits relied on by the parties and that was ultimately identified and rectified by Romandale in 2015 when it changed counsel. It is alleged that this began in a letter dated February 26, 2007, when counsel for Fram wrote to counsel for Romandale alleging a breach of the COAs and asserting:
>
> > The Elgin Mills Lands have not received Secondary Plan Approval, as defined in Section 5.07(a) in each of the Co-ownership Agreements. Therefore, the provisions dealing with Dispositions set out in Section 5.04, 5.05 and 5.07 are inapplicable.
>
> Whether or not this was the first time this incorrect position was stated or not, this position was

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85. Angela Swan and Jakub Adamski point out that courts have not always adopted an approach consistent with this principle: "Contractual Interpretation in the Supreme Court: Confusion Reigns Supreme" in Matthew Harrington, ed., *Private Law in Canada: A 150-Year Retrospective* (Toronto: LexisNexis, 2017) p. 115. See also Edward J. Waitzer and Douglas Sarro, "Protecting Reasonable Expectations: Mapping the Trajectory of the Law" (2016) 57:3 Can. Bus. L.J. 285.

> clearly wrong in that as I have already stated, the Buy-Sell could also be triggered after termination of the DMAs, even before SPA, which I have found occurred in February 2005. This error in summarizing the Buy-Sell provisions of the COAs as only being available after SPA was also taken up by Kerbel and Romandale. For example, in the first recital to the Settlement Agreement the COAs are referred to, and with respect to the Buy-Sell provisions it is stated that "the rights may only be exercised after secondary plan approval has been obtained for the Lands ..."
>
> [emphasis added].
>
> When Ms. Batner was retained by Romandale in 2015, Romandale was granted leave to amend its Statement of Defence to correct the mischaracterization that had pervaded the pleadings and tainted the parties' evidence until that time. As already stated, this error explains the evidence of Mrs. Roman-Barber and the positions of Romandale's former counsel in the period from 2007 to the time Ms. Batner was retained.

340 My colleague identifies the assumption that the buy-sell provision in the COAs could not be triggered until after SPA as the shared assumption on which estoppel by convention arises. This assumption, in her view, was held by all of the parties in 2010 when the Settlement Agreement was negotiated. Candidly, I doubt the veracity of this assertion, at least as it relates to Kerbel and Fram, and particularly to Mr. Kerbel.

341 The trial judge found that Mr. Kerbel knew he could have caused Romandale to trigger the buy-sell under the COAs at any time, because the DMAs had been terminated in February 2005:

> In his affidavit Mr. Kerbel swore that he and Mrs. Roman-Barber deliberately agreed to defer triggering the Buy-Sell in the August 2005 Agreement until after SPA because of Mr. Kerbel's reluctance to being dragged into the existing Bordeaux litigation regarding the DMAs and that their lawyers drafted the August 2005 Agreement to provide for this. He testified that he and Mrs. Roman-Barber and their lawyers agreed "and we specifically took [the DMAs] out of our deal because no judge had said [Bordeaux] was terminated".
>
> Romandale argues that this was false evidence and I agree. First of all, Mr. Kerbel abandoned that position during his cross-examination, when he admitted he could have caused Romandale to trigger the Buy-Sell before SPA under the August 2005 Agreement, and indeed that he would have when the Bordeaux litigation resolved:
>
>> Q: [...I]f the Bordeaux litigation settled, you would have caused Romandale to trigger the buy/sell. You recall I asked you that question?
>>
>> A: Yes. I'm going to say I would have.
>>
>> Q: Pardon?
>>
>> A: I am going to say I would have.

Q: You would have?

A: Yes.

[...]

Q: And you wanted to be the decider on the timing and the amount of the buy/sell that Romandale would trigger with Fram.

A: Well, the timing was as soon as I could. but the amount, yeah.

Q: So when you say the timing was "as soon as I could", that just goes back to our last discussion. As soon as possible, as soon as you were satisfied that the Bordeaux litigation wasn't a problem, you would have caused Romandale to trigger the buy/sell.[86]

A: Yes. I would have. [Emphasis added by the trial judge.]

342 The trial judge stated, at para. 314, that the "pith and substance" of the 2005 August Agreement was an "expedient land sale (Kerbel gets the Lands and Romandale gets the equity it required) without breaching the existing Land agreements [with Fram]." She noted accurately: "There was zero benefit to Romandale in putting off closing."

343 What changed for all the participants was the development horizon. The trigger date acquired new saliency in 2009, when government decisions introduced a long delay in the development horizon. From development approvals that were, in 2005, anticipated in a few years, the development horizon went out many years, perhaps decades. The likely land use designations also changed, with the Snider Farm proposed for employment use, not residential development, reducing both the value of the Lands and Fram's incentive as a home builder.

344 I noted in this court's decision in First Elgin Mills Developments Inc. v. Romandale Farms Limited, 2014 ONCA 573, 324 O.A.C. 153, at paras. 31-32: "The process of moving raw land through the land development process is complex, time consuming, and expensive." I added: "The outcome is frequently uncertain." This is known to experienced land developers like Kerbel and Fram and experienced owners of development lands like Romandale. The agreements between the parties were built around these uncertainties, which came to pass in this case.

345 Because of the changes in the development horizon and the likely development permissions, both Kerbel and Fram had a substantially reduced appetite to complete the transactions contemplated by the COAs and the 2005 August Agreement. The trial judge explained:

> Both Mr. Giannone and Mr. Kerbel acknowledged at trial that these developments concerned them. They both admitted that they would have preferred shorter development timelines and a residential designation for the Snider Farm, as residential use would have made for a significantly better investment. Fram would have preferred residential land use rather than employment land use as

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86. The Bordeaux action was settled in October 2014.

> the real way that Fram was to make money was largely tied to its homebuilding rights under the CMAs, which would be dead if the Lands remained employment lands.
>
> Mr. Kerbel admitted that by 2009 as a result of these developments, he was no longer in the mindset of closing with Romandale as soon as possible. Mr. Giannone admitted that by 2010 the Lands were a materially "different product". Mr. Giannone also admitted that because of his concerns about the real estate market, when he entered into the Settlement Agreement with Kerbel, he was not committed to buying half of Romandale's remaining interest in the Lands. He wanted to have that option in the future. He was careful to ensure that by entering into the Settlement Agreement it could not be construed a consent under the Conditional Agreement because if Fram had consented, the deal between Romandale and Kerbel could have closed.

346 I make several observations about where things stood upon execution of the Settlement Agreement by Kerbel and Fram. It was drafted by Kerbel and Fram to reflect their interests. It was an advantageous deal for two canny land developers, entirely at the risk and cost of the majority landowner, Romandale. The Settlement Agreement states that, under the COAs, the buy-sell could only be exercised after SPA had been obtained and that Romandale would sell its Remaining Interest to Kerbel under the 2005 August Agreement when the buy-sell could be exercised or when Fram consented. The Settlement Agreement goes on to provide that the sale of Romandale's Remaining Interest to Kerbel "will take place after" SPA is obtained. Effectively, under the terms of the Settlement Agreement, Kerbel agreed not to cause Romandale to trigger the buy-sell provision under the COAs as it was empowered to do under the 2005 August Agreement. This elongation of time spared both Kerbel and Fram the obligation to come up with the money to finance the acquisition of land whose value had become uncertain, until SPA, when its value could be ascertained.

347 This allowed Kerbel to put off paying Romandale the fixed price of $160,000 per acre, negotiated in 2005, for many years, perhaps decades. With inflation over the ensuing years, the constant dollar value of the land would decline over that time at the sole expense of Romandale.

348 This also saved Fram, for the same period of time, from having to respond to the buy-sell provision in the COAs. Fram instead acquired a solid development partner, in Kerbel, with whom to share acquisition and development costs, and risks. And both Fram and Kerbel, being formidable adversaries, eliminated litigation risk and cost between them by settling their actions against each other.

(c) The Principles Applied

349 In my view, the invocation by Kerbel and Fram of estoppel by convention fails. Any application of estoppel by convention in this case requires this court to account for the role that the supposedly shared but mistaken assumption regarding the interpretation of the COAs actually played in the formation of the Settlement Agreement.

350 Given Mr. Kerbel's evidence that he knew the buy-sell could be triggered after the termination of the DMAs, and before SPA, as quoted by the trial judge and repeated at para. 341, above, it is very

unlikely that Kerbel in particular, and Fram by implication, shared in Romandale's mistaken interpretation of the trigger date in the COAs. I infer that it is much more likely that they knowingly took advantage of Romandale's mistaken view, which had been repeated on many occasions. Ignorance of the true trigger date on the part of Kerbel and Fram, two savvy land developers, is highly implausible. Kerbel and Fram used the trigger date as a vehicle to put off payment to Romandale indefinitely.

351 My colleague alludes to the fact that none of the parties to this appeal resisted the claim that they had all shared in the mistaken assumption that the buy-sell could only be triggered after SPA.

352 It is true that estoppel by convention was not resisted on this basis. However, the trial judge found, at para. 87, that "Mr. Kerbel knew that [the buy-sell] could be triggered before SPA after termination of the DMAs". At para. 89, she found Mr. Kerbel's evidence that he had forgotten this fact "disingenuous". A finding that Kerbel shared in the mistaken shared assumption that my colleague identifies is inconsistent with the trial judge's findings, to which I would defer as factual determinations of credibility. The inferences I have drawn from these determinations are inescapable.

353 Further, "estoppels are to be received with caution and applied with care": *Ryan v. Moore*, at para. 50. Because "the doctrine has the potential to undermine the certainty of contract [it] must be applied with care, especially in the context of commercial relationships between sophisticated parties represented by counsel": *Grasshopper Solar* , at para. 54, *per* Huscroft J.A. Applying due caution and care, I cannot find an estoppel by convention where, given the evidence, one does not arise on the facts and the law, however argued by parties whose concern is less for the law than for their individual advantage. Here, the claimed estoppel by convention cannot survive Mr. Kerbel's knowledge, when the Settlement Agreement was negotiated, that the shared assumption was mistaken. This can be seen in two ways.

354 First, given the fact of Mr. Kerbel's knowledge, I have difficulty accepting that the assumption that the buy-sell could not be triggered until after SPA was shared in the manner required for estoppel by convention. Bastarache J. notes that the "crucial requirement for estoppel by convention, which distinguishes it from the other types of estoppel, is that at the material time both parties must be of 'a like mind'": *Ryan v. Moore*, at para. 61 (citations omitted). Further, estoppel by convention requires "mutual assent": *Ryan v. Moore*, at para. 62. Where one party knows that the other party is mistaken and chooses to acquiesce in their mistake rather than correct it, they were plainly not of like minds nor did they mutually assent.

355 Second, Mr. Kerbel's knowledge that the assumption was incorrect renders unreasonable any reliance by Kerbel and Fram on the mistaken trigger date. Mr. Kerbel was under no illusion that this reading was not correct, as the trial judge found. Nor had he forgotten what the correct reading was, as she also found. As noted above, I would defer to those findings as factual determinations of credibility. They also comport with the commercial realities. It was not reasonable of Kerbel and Fram to rely on Romandale's interpretation of the trigger date, knowing that it was mistaken.

356 These two reasons are sufficient to dismiss the estoppel by convention arguments put forward by

Kerbel and Fram. I conclude that the legal basis for estoppel by convention is not made out on the facts of this case. This conclusion obliges me to consider whether Kerbel repudiated or breached the 2005 August Agreement, a task that my colleague was spared by her view of estoppel, and to which I now turn.

(3) Kerbel Did Not Breach the 2005 August Agreement by Entering Into the Settlement Agreement with Fram

357 It is necessary to put the 2005 August Agreement in its proper context or factual matrix before assessing whether the trial judge properly assessed Kerbel's alleged breaches.

(a) The Context

358 The court must survey the contractual landscape in this case with a clear eye. In my view, the trial judge's manifest sympathy for Romandale was misplaced. Romandale did not occupy the moral high ground in this bruising corporate battle, as I will explain.

359 It is a truism that contracting parties seek their own ends. An important aspect of contractual design, as Swan and Adamski observe, at p. 148, is allocating risk between the contracting parties:

> [M]uch contract drafting is focused on the allocation of risk, on the need to make clear just how the risks associated with an activity or the actual operation of the contractual relation, are not only allocated but understood to be allocated. It is bizarre for a court to be — or to appear to be — unaware of this role, one performed by the majority of members of the legal profession. Solicitors would be aghast if a court, in interpreting a contract, were to focus on the parties' "intentions" and ignore the efforts of one party to shape the other's expectations, in the light of what the first party was prepared to do. Such "intentions" are nothing but a judicial construct, a chimera, and wholly fanciful.

360 The root contractual documents in this case are the 2003 COAs between Romandale and Fram. Romandale was looking for a land developer to assist it in bringing the Lands to the point at which they could be used for residential purposes. Fram became Romandale's business partner for this purpose. As the trial judge found:

> The plan was that Romandale and Fram would own the Lands and Bordeaux would manage the requirements for the development of the Lands, so they could be designated for residential use following [SPA], a stage of the municipal planning approvals process, Fram would then buy lots at market value and build homes and share the profits with Romandale.

361 The COAs, and the buy-sell provision in particular, were carefully designed to allow each party to extract the maximum value for its interest in the Lands at the point that either party chose to force the other to buy its interest.

362 By entering the COAs, Romandale got money (by selling the five percent interest in the Lands to

Fram) and Fram got an exclusive option to purchase Romandale's remaining interest. The key problem with the COAs was that Romandale was effectively stuck with Fram as a partner in developing the Lands. The COAs permitted Romandale to sell its remaining interest in the Lands to another developer, but only with Fram's consent. Crucially, Fram's consent, per s. 5.03 of the COAs, "may be unreasonably or arbitrarily withheld," giving it control over any large disposition of the Lands by Romandale. (This provision was not unbalanced because it permitted Romandale to refuse consent to a disposition by Fram of its interest on the same basis.)

363 When Romandale's need and appetite for money grew, it asked Fram to increase its interest in the Lands but Fram declined. Romandale's need for more money, coupled with Fram's reluctance to invest more, drove Romandale into a deal with Kerbel.

(b) The 2005 August Agreement Favoured Kerbel

364 The 2005 August Agreement was cleverly designed to accomplish Romandale's end of getting cash without breaching the COAs with Fram. Romandale did get more money. But Kerbel drove a careful bargain, recognizing both Romandale's need for cash and the difficult and complex situation that the COAs posed for Kerbel with respect to Fram's interest.

365 The 2005 August Agreement was drafted in Kerbel's favour. This is not a surprise. Romandale had a strong need for funds and Kerbel was the able funder. As the trial judge stated, at para. 69, "Romandale needed to refinance a $6,000,000 Bank of Nova Scotia ("BNS") mortgage on the Lands and wanted cash to make distributions to Romandale and Roman family members." She noted, at para. 329, "Romandale actually received $16,703,000 of immediate value from Kerbel: $6,000,000 in new mortgage financing to retire the BNS Mortgage, $2,128,000 cash on the sale of 5% of the Elgin Mills Lands owned by Romandale, and $8,575,000 cash was paid on the sale of the Triple R Lands."

366 The text of the 2005 August Agreement ceded a large measure of control to Kerbel, although it was constrained by Romandale's need and obligation to continue to comply with the COAs. The agreement appointed Kerbel as "attorney and agent" for Romandale in material and specific respects. Section 5 was entitled "Irrevocable Appointment" and provides in part:

> ... Romandale hereby irrevocably appoints [Kerbel] as its exclusive true and lawful attorney and agent having full power of substitution, and [Kerbel] is hereby fully authorized as such to act on behalf of and/or give binding instructions to Romandale solely in connection with the exercise of the buy-sell rights pursuant to the Buy-Sell Provisions (as hereinafter defined). Romandale agrees that any and all decisions, operations, conduct and actions relating to the development of the Snider/McGrisken Property shall be within the exclusive control of [Kerbel] and Romandale shall assist in facilitating such control to comply with Section 5.10 of the Co-Owners Agreements over all decisions; operations, conduct and action exercisable by Romandale relating to the development and obtaining of development approvals for the Snider/McGrisken Property.... Romandale and [Kerbel] shall cooperate in getting the Snider/McGrisken Property included under the Town of Markham urban envelope for development purposes, and Romandale shall take all reasonable steps

> to reduce land wastage to as small an amount as possible, using Joanne Burnett, Jeff Kerbel and/or his designate to act on behalf of Romandale in taking such steps.
>
> [Emphasis added.]

367 The control that Romandale granted to Kerbel was related to compliance with the COAs, as the trial judge found at para. 202. She noted, at para. 203, that Romandale continued to exercise control of the development process throughout.

368 The trial judge correctly observed, at para. 202: "The opening sentence provides that Romandale appoints [Kerbel] as its agent 'solely' in connection with the Buy-Sell provisions in the COAs." The trial judge added: "This makes sense as it was Kerbel's intention to buy Romandale's remaining interest in the Lands and so it would want control over *when* Romandale triggered the Buy-Sell" (emphasis added). I agree.

369 It is noteworthy that the 2005 August Agreement did not bind Kerbel to a date by which it was required to pull the buy-sell trigger in the COAs. Although Mr. Kerbel testified to his reluctance to trigger the provision while Romandale was litigating with Bordeaux, nothing in the 2005 August Agreement required him to pull the trigger when that litigation ended, even though, as the trial judge observed, the Bordeaux litigation was expressly referred to in s. 2(e). (Recall that the Bordeaux litigation was settled in October 2014.)

370 Only Fram's consent to the sale of Romandale's Remaining Interest to Kerbel under the 2005 August Agreement could force Kerbel to close.

371 Despite finding that Kerbel would have wanted control over the timing of the triggering of the buy-sell, the trial judge later found, somewhat inconsistently, at paras. 299-300, that the intention of the parties was to close as soon as possible and Kerbel's discretion on when the buy-sell would be triggered was "not so broad as to allow it to transform a deal that was intended to close as soon as possible into a deal that was not to close until decades away". She relied on the "time is of the essence clause" in para. 7 (c) of the 2005 August Agreement for this finding.

372 I agree with my colleague's statement, at para. 233, that the "time is of the essence" clause "cannot be construed to mean that a 'short closing horizon' was part of the 'pith and substance of the contract'." With respect, the trial judge misapprehended the purpose and role of a "time is of the essence" clause in commercial contracts. Such a clause is engaged where a time limit is stipulated; it "does not serve to impose a time limit but rather dictates the consequences that flow from failing to comply with a time limit stipulated in an agreement": see Di Millo v. 2099232 Ontario Inc., 2018 ONCA 1051, 430 D.L.R. (4th) 296, at paras. 31-37, leave to appeal refused, [2019] S.C.C.A. No. 55. Benotto J.A. noted, in *Di Millo* , at para. 37:

> Notably, while the option clause includes two time limits, it is silent as to the time limit for exercising the option. However, the application judge found, that "providing notice to the Respondent that complies with the Agreement, 6 months after the option first arose, does not

> comply with the time is of the essence clause". In my view, he erred in finding that the "time is of the essence" clause was engaged where no time was stipulated in the contract for exercising the option and in finding that there was non-compliance with the "time is of the essence" clause. Those errors tainted his finding that the option had expired by the time the appellant gave notice.

Those words apply here with necessary modifications. The trial judge's reliance on the "time is of the essence" clause was an error of law.

373 Mr. Kerbel testified that, in the early days when the development process looked like it would move quickly to a happy outcome, he wanted to close quickly. But the trial judge misapprehended this evidence to impose a contractual obligation on Kerbel to close as soon as possible, regardless. There is no express obligation in the 2005 August Agreement to close as soon as possible and there is no legal basis for implying one. Implying such an obligation is neither necessary to give business efficacy to the contract, nor would it pass the "officious bystander test": see Energy Fundamentals Group Inc. v. Veresen Inc., 2015 ONCA 514, 388 D.L.R. (4th) 672, at paras. 30-31; M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd., [1999] 1 S.C.R. 619, at para. 27; Canadian Pacific Hotels Ltd. v. Bank of Montreal, [1987] 1 S.C.R. 711, at p. 775.

374 The 2005 August Agreement provided Kerbel with other advantages. The fixed-price of $160,000 per acre to be paid to Romandale on closing was above the 2005 current market value for the McGrisken and Snider Farms but the fact that it was a fixed-price contract minimized the risk to Kerbel and capped Romandale's return. In other words, Romandale gave up its right to share in any increases in the value of the Lands, to Kerbel's benefit. Had the development horizon contemplated by the parties in 2005 been met, then Romandale's return would have been limited to the fixed-price; any increase in the value of the Lands thereafter would have been enjoyed by either Kerbel or Fram. One of them would have ended up with the Lands at a higher price through the buy-sell mechanism in the COAs, if they did not come to some other agreement.

375 The 2005 August Agreement gave Romandale the opportunity to carry out an end run on Fram and its exclusive option to buy the rest of the Lands. The agreement was cleverly designed but it put Fram and Kerbel on a collision course.

(c) The Settlement Agreement

376 As noted earlier, the development horizon changed substantially. By 2010, Kerbel and Fram were in lawsuits with each other. Neither was anxious to acquire all of the Lands immediately through the operation of the buy-sell provision, nor did they wish to give up their interests in the land. Their way out of the impasse was the Settlement Agreement, by which they ended up sharing costs. This was a practical outcome for experienced land developers.

(d) Kerbel's Alleged Breaches of the 2005 August Agreement

377 Romandale's revised litigation strategy targeted s. 5 of the Settlement Agreement:

> [Fram] does not by this settlement agreement or otherwise consent to the transaction referred to in paragraph 2 of the August 29, 2005 Agreement. It is the intention of the parties hereto that the purchase and sale of Romandale's Remaining Interest in the Lands pursuant to these Minutes of Settlement will take place after Secondary Plan Approval for the Lands has been obtained.

378 The trial judge found that Kerbel breached the 2005 August Agreement, at para. 310: "By entering into the Settlement Agreement, Kerbel totally fettered its discretion as to when to cause Romandale to trigger the Buy-Sell just because it no longer wanted to close the purchase of Romandale's Remaining Interest quickly."

379 First, the trial judge found, at para. 319, that Kerbel had a fiduciary duty to Romandale that it breached by entering into the Settlement Agreement.

380 There is no scope for the imposition of fiduciary duties on Kerbel. That would oblige Kerbel to act solely in the best interests of Romandale, which is the antithesis of the self-interest that contracting parties in commercial contracts are generally entitled to pursue. In Hodgkinson v. Simms, [1994] 3 S.C.R. 377, [1994] S.C.J. No. 84, the court said, at p. 414, para. 38:

> Commercial interactions between parties at arm's length normally derive their social utility from the pursuit of self-interest, and the courts are rightly circumspect when asked to enforce a duty (i.e., the fiduciary duty) that vindicates the very antithesis of self-interest.... [T]he law does not object to one party taking advantage of another *per se*, so long as the particular form of advantage taking is not otherwise objectionable. [Citations omitted.]

381 As noted, the wording of the 2005 August Agreement was in Kerbel's favour in order to avoid any such subordination either to Romandale entirely or to some notional conception of their "mutual best interests", as Romandale argues.

382 It is possible for a contracting party to accept a fiduciary duty. Romandale submits that because the 2005 August Agreement explicitly made Kerbel Romandale's "lawful attorney and agent" for some purposes, that principle is applicable here. But this misconstrues the purpose of Kerbel's appointment as Romandale's attorney and agent, which was to leave the timing of the triggering of the buy-sell under the COAs in Kerbel's sole control without any further dependence on Romandale. Kerbel, as the funder, wanted to control all aspects of the exercise of the buy-sell provisions in the COAs. As the trial judge herself stated, this made sense.

383 I would set aside the trial judge's holding that Kerbel owed Romandale a fiduciary duty as an error in law.

384 Second, the trial judge found, at para. 310, that Kerbel breached its duty of good faith to Romandale under the 2005 August Agreement:

> ... By entering into the Settlement Agreement with Fram, Kerbel acted in its own self-interest, to the detriment of Romandale's interests. Kerbel undermined the entire value of the August 2005

Agreement for Romandale. Without a doubt Kerbel did not act in good faith.

385 The trial judge invoked the "the duty to act in good faith" citing Bhasin v. Hrynew, 2014 SCC 71, [2014] 3 S.C.R. 494, at para. 65, and the expectation that a party exercising discretion is required to do so in good faith, citing Greenberg v. Meffert(1985), 50 O.R. (2d) 755 (C.A.), at paras. 18 and 26, leave to appeal refused, [1985] 2 S.C.R. ix. Had the authorities been available, the trial judge would likely have invoked CM. Callow Inc. v. Zollinger, 2020 SCC 45, and Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District, 2021 SCC 7, for the same propositions.

386 I do not agree. It is not obvious to me what role the doctrine of good faith in contractual performance should play in this complex commercial setting. Courts should be very reluctant to interfere in the dealings of hard-headed business people pursuing their competitive goals. This pursuit is not forbidden in a market economy: it is expected, as the Supreme Court observed in Hodgkinson, at p. 414, para. 38, quoted earlier.

387 The parties were sophisticated, resourced and professionally advised throughout. No doubt both Fram and Kerbel have deeper pockets but there is no scope for invoking the concept of unequal bargaining power in this context without, by necessary implication, imperilling any larger corporation's ability to engage in commerce with smaller entities. The language in all of the agreements was carefully negotiated and chosen to allocate the parties' respective risks and responsibilities, benefits and burdens.

388 This case illustrates operations in the real world. To achieve its ends, in negotiating the Settlement Agreement with Fram, Kerbel essentially pulled the same move on Romandale that Romandale had pulled on Fram in entering into the 2005 August Agreement with Kerbel.

389 Seen through the good faith lens, Romandale could be criticized for defeating Fram's exclusive option to the Lands via the 2005 August Agreement with Kerbel. But all Romandale was doing was pursuing its own ends within the limits of the contractual language in the COAs in order to raise cash by extracting value from all of its lands, including the McGrisken and Snider Farms. (I note that by entering into the 2005 August Agreement, Romandale did not breach the COAs, contrary to Fram's assertions in the 2007 and 2008 actions. The trial judge dismissed those actions and Fram did not appeal the dismissals.)

390 Similarly, by entering into the Settlement Agreement, all Kerbel was doing was pursuing its own ends within the limits of the contractual language in the 2005 August Agreement in order to reduce its exposure to the land and to the risks posed by the litigation with Fram.

391 The text of a contract matters in discerning the parties' reasonable expectations. Kerbel never undertook to perform its obligations under the 2005 August Agreement for Romandale's benefit, or even for their "mutual benefit," as Romandale argues. The parties reasonably expected that the commercial realities would pressure all sides to move with alacrity. But Kerbel did not bind itself to do so, wisely in retrospect, given how the commercial realities have changed. This is not unusual in the fraught sphere of land development in Ontario, and particularly in the area surrounding Toronto. What

"gutted" the transactions was not the Settlement Agreement but the changed development horizon that affected all the parties adversely.

392 Nor is it clear to me what the invocation of good faith performance would contribute in this setting. I note the submission, recorded by the trial judge, at para. 326:

> Romandale submits that it need not point to a specific date on which Kerbel must have caused it to trigger the Buy-Sell, nor does this Court need to pinpoint a date, in order to find that a fiduciary duty existed or to find that there has been a repudiatory breach arising from Kerbel's breach of same (among other contractual obligations).... In this case, it is clear the line was crossed when Kerbel settled with Fram in 2010 and deliberately ensured the Buy-Sell would never be triggered before SPA (if at all), in furtherance of its own self-interests and in complete contravention of Romandale's interests.

393 Romandale's refusal to specify a date is noteworthy because if the date does not comport with Kerbel's best business interests, as permitted by the 2005 August Agreement, it would be purely arbitrary. I note in passing that the earliest date would be after the Bordeaux litigation settled, which was in October 2014.

394 Nor is it clear to me that, had Kerbel and Fram never entered into the Settlement Agreement and had Fram not consented to the sale, there would be any obligation on Kerbel even *today* to cause Romandale to trigger the buy-sell provision in the COAs.

395 Finally, I note that if there is a "right" date for the transfer of Romandale's Remaining Interest to Kerbel, it would be sixty days after Fram consented to that transaction in 2018, as that is precisely what is stipulated in the 2005 August Agreement.

396 To conclude, the trial judge erred in finding that Kerbel breached the 2005 August Agreement and its duty of good faith performance by entering into the Settlement Agreement with Fram. I do not find any basis here for judicial tweaking via the doctrine of good faith performance, or for any judicial interference in the ordinary operation of these carefully negotiated contracts, which embody the reasonable expectations of the parties and which are fully capable of execution on their precise terms.

397 If Kerbel breached the 2005 August Agreement by entering into the Settlement Agreement with Fram, then that breach would have to be taken into account in the exercise of discretion as to whether to order specific performance. The behaviour of the parties is a relevant consideration in deciding whether to order specific performance: Matthew Brady Self Storage Corporation v. InStorage Limited Partnership, 2014 ONCA 858, 125 O.R. (3d) 121, at para. 32, leave to appeal refused, [2015] S.C.C.A. No. 50; Paterson Veterinary Professional Corporation v. Stilton Corp. Ltd., 2019 ONCA 746, 438 D.L.R. (4th) 374, at para. 31, leave to appeal refused, [2019] S.C.C.A. No. 420. But here there is no such breach.

(4) By Entering Into the Settlement Agreement, Kerbel Did Not Repudiate Its Obligations Under the 2005 August Agreement

398 Because I have found that Kerbel did not breach the 2005 August Agreement, on that ground alone, there is no basis for finding that Kerbel repudiated that agreement.

399 However, in my view the trial judge's approach to the repudiation issue was wrong in principle and requires comment. Recall that Romandale argued that it is not required to close the 2005 August Agreement because Kerbel had repudiated that agreement by entering into the Settlement Agreement. The trial judge agreed and refused Kerbel's request for an order compelling Romandale to specifically perform the 2005 August Agreement.

400 The trial judge deconstructed the 2005 August Agreement into constituent parts. This approach was wrong in principle. She extracted the conveyance of the McGrisken and Snider Farms from the 2005 August Agreement in order to deem that part of the agreement repudiated. This approach is not consistent with the holistic approach courts must take to carefully negotiated commercial agreements. Just as a court interpreting a contract must read the contract as a whole, a court analyzing whether a fundamental breach amounting to repudiation has occurred should consider both the alleged breach, and the obligations the breaching party has performed, in relation to the breaching party's obligations under the whole contract: Sattva Capital Corp. v. Creston Moly Corp., 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 47; 1193430 Ontario Inc. v. Boa-Franc Inc.(2005), 260 D.L.R. (4th) 659 (Ont. C.A.), at para. 50, leave to appeal refused, [2006] S.C.C.A. No. 2.

401 I conclude that the trial judge erred in recruiting the doctrine of repudiation, because of the substantial prior performance on Kerbel's part, which was valued by the trial judge at about $16 million. There is no basis upon which it could be said that Romandale was deprived of substantially all of the benefit it contracted for under the 2005 August Agreement: *Boa-Franc Inc.* , at para. 50; Majdpour v. M&B Acquisition Corp.(2001), 206 D.L.R. (4th) 627 (Ont. C.A.), at para. 31; Hunter Engineering Co. v. Syncrude Canada Ltd., [1989] 1 S.C.R. 426, at p. 499, per Wilson J.

402 Contrary to the submissions of Romandale and the trial judge's determination, Kerbel did not repudiate the 2005 August Agreement by entering into the Settlement Agreement, largely because much of the 2005 August Agreement had been performed to the benefit of both parties. It is simply too late for the proverbial egg to be unscrambled. It is too late for repudiation to play a useful role in analyzing the contractual relationships between Romandale and Kerbel.

(5) Kerbel Is Entitled to Specific Performance of the 2005 August Agreement

403 I agree with my colleague's analysis, at paras. 290-298, and with her conclusion that Kerbel is entitled to specific performance of the 2005 August Agreement.

Footnotes1When the parties entered into the various agreements, Markham was still a town in Ontario. It did not become a city until 2012. For ease of reference, I will refer to the municipality simply as "Markham".2This term is explained in para. 19 below.3SPA is defined in s. 5.07 of the COAs as "an amendment of the official plan of the Town of Markham applicable to the Lands, obtained in accordance with the Planning Act (Ontario)".4This term is explained in para. 20 below.5Romandale's sale of 5% of its 95% interest in the Lands resulted in Kerbel acquiring a 4.75% undivided interest in the

Lands.6Romandale received over $16 million in immediate value from Kerbel under the 2005 August Agreement.7In response, Bordeaux sues Romandale and Fram, alleging the termination was invalid and of no force or effect. Romandale settled the Bordeaux litigation in 2014.8The 2005 August Agreement was amended by an agreement dated March 14, 2006, to provide that any amount owing to Kerbel from a purchase price adjustment for non-developable acreage of the Triple R Lands, which was to be made at the end of the fifth year of the vendor takeback mortgage, would be set off against the eventual purchase price for the Remaining Interest in the Lands.9The parties were mistaken on this matter. Under s. 5.07 of the COAs, the buy-sell could have been exercised when the DMAs were terminated. Romandale terminated the DMAs in February 2005. Therefore, the buy-sell in the COAs could have been exercised as early as February 2005.10This may or may not have been a mistaken assumption. Whether, under the 2005 August Agreement, Kerbel could have required Romandale to trigger the buy-sell in the COAs before SPA is a point of contractual interpretation. As I have concluded that estoppel by convention applies to bar Romandale from contending that it could have been triggered pre-SPA, this point of contractual interpretation need not be decided.11As discussed below, the communications in Ryan v. Moore are an example of alleged shared assumptions that do not have sufficient clarity and certainty to satisfy the first criterion.12It will be recalled that Kiteley J. upheld this ruling on June 20, 2014.13Angela Swan and Jakub Adamski point out that courts have not always adopted an approach consistent with this principle: "Contractual Interpretation in the Supreme Court: Confusion Reigns Supreme" in Matthew Harrington, ed., Private Law in Canada: A 150-Year Retrospective (Toronto: LexisNexis, 2017) p. 115. See also Edward J. Waitzer and Douglas Sarro, "Protecting Reasonable Expectations: Mapping the Trajectory of the Law" (2016) 57:3 Can. Bus. L.J. 285.14The Bordeaux action was settled in October 2014.

TAB 25

1970 CarswellAlta 101
Supreme Court of Canada

Canadian Superior Oil Ltd. v. Hambly

1970 CarswellAlta 101, 1970 CarswellAlta 144, [1970] S.C.R. 932, [1970] S.C.J. No. 48, 12 D.L.R. (3d) 247, 74 W.W.R. 356

Canadian Superior Oil Ltd. et al v. Hambly et al

Martland, Judson, Ritchie, Hall and Spence, JJ.

Judgment: May 25, 1970

Counsel: *J. D. Arnup, Q.C.* and *D. O. Sabey*, for appellants.
W. B. Gill, Q.C. and *J. B. Ballem, Q.C.*, for respondents.

Subject: Contracts; Natural Resources; Property

Headnote

Estoppel --- What constitutes
Oil and Gas --- Oil and gas lease — Termination of lease

Mines and Minerals — Oil and Gas Lease — Expiry of Lease — Whether Revived by Lessor's Subsequent Conduct — Estoppel.

Appeal from the judgment of the Appellate Division of the Supreme Court of Alberta (1969) 67 W.W.R. 525, 3 D.L.R. (3d) 10, dismissing an appeal from the judgment of Riley, J. (1968) 65 W.W.R. 461. Appeal dismissed.

Appellants sought a declaration that a certain oil and gas lease was a valid and subsisting lease, in full force and effect. Drilling under the lease had commenced just prior to the expiry of the primary term and had come to an end some seven weeks after the expiry date. The lease by virtue of its terms could only continue in force after the cessation of drilling if there was production, actual or constructive, but there was none. It was not seriously contended that the lease did not terminate when drilling ceased but the appellants argued that by reason of his conduct the respondent lessor was estopped from denying that the lease continued in full force and effect.

It was *held, per curiam*, that the appeal must be dismissed; upon the termination of the lease on August 6, 1958, the legal relationship which had theretofore existed between the parties came to an end, and the lease thereafter could only be revived by agreement for consideration between them; subject to the equitable rule as to acquiescence, a cause of action could not be founded on estoppel: *Low v. Bouverie*, [1891] 3 Ch. 82, at 101, 105, 60 LJ Ch 594; *Combe v. Combe*, [1951] 2 K.B. 215, 95 Sol J 317, [1951] 1 All E.R. 767 applied. The principle of promissory estoppel enunciated in *Central London Property Trust Ltd. v. High Trees House Ltd.*, [1947] K.B. 130, [1947] LJR 77, 62 T.L.R. 557, assumed the existence of a legal relationship between the parties, but in the case at bar that relationship had come to an end before any of the alleged representations upon which appellants based their plea were made.

The judgment of the Court was delivered by *Martland, J.*:

1 The appellants in this case seek a declaration that a petroleum and natural gas lease, dated June 17, 1948, between the respondent Ralph Hambly, hereinafter referred to as "Hambly", as lessor, and the appellant Canadian Superior Oil Ltd., hereinafter referred to as "Superior", formerly known as Rio Bravo Oil Company Limited, as lessee, is a good, valid and subsisting lease. In these proceedings the legal position of the other appellant is the same as that of Superior and the legal position of the other respondent is the same as that of Hambly. We are concerned, in this appeal, with the legal relations of Hambly and Superior in respect of that lease.

2 The appellants' action was dismissed at trial (1968) 65 W.W.R. 461, and their appeal from the trial judgment was dismissed by unanimous decision of the Appellate Division of the Supreme Court of Alberta (1969) 67 W.W.R. 525, 3 D.L.R. (3d) 10.

3 The lease was for a primary term of 10 years and related to all of sec. 17, tp. 38, rge. 2, W. 5 M. in the Province of Alberta.

4 The provisions of the lease which were material to this action provide as follows:

> 2. Subject to the other provisions herein contained, this lease shall be for a term of Ten (10) Years from this date (called 'primary term') and as long thereafter as oil, gas or other mineral is produced from said land hereunder, or as long thereafter as Lessee shall conduct drilling, mining or reworking operations thereon as hereinafter provided and during the production of oil, gas or other mineral resulting therefrom.
>
> 3. The royalties reserves by Lessor are:
>
> . . . . .
>
> (b) On gas, including casinghead gas or other gaseous substance, produced from said land and sold or used off the premises or in the manufacture of gasoline or other product therefrom, the market value at the well of one-eighth of the gas so sold or used, provided that on gas sold at the wells the royalty shall be one-eighth of the amount realized from such sale; where gas from a well producing gas only is not sold or used, Lessee may pay as royalty $100.00 per well per year, and if such payment is made it will be considered that gas is being produced within the meaning of Paragraph 2 hereof;
>
> . . . . .
>
> 12. If Lessee shall commence to drill a well within the term of this Lease or any extension thereof, Lessee shall have the right to drill such well to completion with reasonable diligence and dispatch, and if oil or gas be found in paying quantities, this lease shall continue and be in force with like effect as if such well had been completed within the term of years herein first mentioned.

5 The lease provided that Superior should commence drilling operations on the leased land on or

before one year from its date, but provided for annual postponements of the drilling commitment, during the primary term of the lease, by payment by Superior to Hambly of a delay rental of $640. There were no drilling operations commenced until June 10, 1958. The learned trial Judge found that drilling operations ceased on August 6, 1958, and this finding was not attacked in this Court. Prior to that date, on July 23, 25 and 26, tests had disclosed gas flows in three formations, and had established that gas "in paying quantities" could be produced from the well. There was at that time no available market for it, and Superior was aware that the well would not be put into production. This situation had been provided for in par. 3 (b) under which Superior had the option, but was under no duty, to pay a royalty of $100 per year in respect of that well. If it made such payment, it would be considered that gas was being produced, within the meaning of par. 2.

6 Under the lease, a gross royalty of 12 $/_2$ per cent was reserved to Hambly. On May 25, 1951 Hambly executed four royalty trust agreements, each relating to one quarter section of the leased land, whereby he assigned to Prudential Trust Company Limited, as trustee, the royalties payable to him under the provisions of the lease, in trust, to be disbursed among the holders of royalty units purchased by them.

7 On August 13, 1958, a week after drilling operations had ceased, a cheque for $100 was sent to the trust company, as a payment in lieu of production, which cheque was received the following day. The accompanying letter referred to No. 2 gross royalty trust agreement, this being the agreement relating to the quarter section on which the drilling had occurred. This payment was distributed among the holders of royalty units under that agreement. Hambly did not have any interest in any unit under that agreement.

8 The lease in question here is in the same form as that which was under consideration in this Court in *Can. Superior Oil of Calif. Ltd. v. Kanstrup and Scurry-Rainbow Oil Ltd.* (1964) 49 W.W.R. 257, [1965] S.C.R. 92, 47 D.L.R. (2d) 1, affirming (1964) 47 W.W.R. 129, 43 D.L.R. (2d) 261, and, in the light of that decision, the conclusion reached by the Courts below, that the lease terminated on August 6, 1958, is correct. The only material factual difference between the *Kanstrup* case and the present one is that, in the present case, the drilling of a well had commenced just prior to the end of the primary term, and par. 12 came into operation.

9 Under that paragraph, Superior had the right to drill the well to completion (which it did), and if oil or gas was found in paying quantities (and it was) the lease would continue with like effect as if the well had been completed during the primary term. If the well had been completed during the primary term, and produced oil or gas in paying quantities, that term would be extended, under par. 2, beyond the primary term "as long thereafter as oil, gas or other mineral is produced". The latter part of par. 2, after providing for an extension of the primary term for as long as Superior conducted drilling, mining or reworking operations, goes on to provide for the continuance of the extension "during the production of oil, gas or other mineral resulting therefrom".

10 The result is that, under par. 2, extension of the term of the lease depends upon there being production either at the time the primary term ends, or, if par. 12 becomes applicable, on the completion of the drilling of a well commenced before the primary term ends. In either case, failure to

produce results in the termination of the lease.

11 In the present case, the commencement of the drilling of the well, shortly before the expiration of the primary term, extended the term until drilling was completed (August 6, 1958). At that time, the term of the lease could only continue as a result of production, actual or constructive, and there was none. Accordingly the lease terminated on that date.

12 This conclusion was not seriously challenged in argument before this Court. The contention of the appellants was that Hambly was estopped from taking the position that the lease had terminated on August 6, 1958 and, in support of this submission, reliance was placed upon his conduct, on different occasions, as constituting a representation by him to Superior that the lease was still in effect. All of these occasions occurred after the lease had terminated on August 6, 1958.

13 Without attempting finally to determine the matter, I have serious doubt as to whether the issue of estoppel can properly be raised in the circumstances of this case. The appellants, as plaintiffs, seek a declaration that the lease is a good, valid and subsisting lease. For the reasons already given, it appears that the lease in question had terminated. It could not be revived thereafter except by agreement, for consideration, between the parties. To say that subsequent representations by Hambly could recreate the legal relations between the parties would be to say that such representations could create a new cause of action for Superior. But, subject to the equitable rule as to acquiescence, which has sometimes been described as estoppel by acquiescence, and to which I will refer later, a cause of action cannot be founded upon estoppel: *Low v. Bouverie*, [1891] 3 Ch. 82, at 101, 105, 60 LJ Ch 594; *Combe v. Combe*, [1951] 2 K.B. 215, 95 Sol J 317, [1951] 1 All E.R. 767; *Spencer Bower and Turner* on *Estoppel by Representation*, 2nd ed., p. 279, par. 289.

14 The doctrine of promissory estoppel, enunciated by Lord Denning in Central London Property Trust Ltd. v. High Trees House Ltd., [1947] K.B. 130, [1947] LJR 77, 62 T.L.R. 557, was considered by this Court in *Conwest Exploration Co. v. Letain*, [1964] S.C.R. 20, 41 D.L.R. (2d) 198. Judson, J., speaking for the majority, at p. 28, expressed the view that Lord Denning's statement did not do anything more than to restate the principle propounded by Lord Calms in *Hughes v. Metro. Ry.* (1877) 2 App. Cas. 439, at 448, 46 LJQB 583:

> ... it is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results — certain penalties or legal forfeiture — afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties.

15 This principle assumes the existence of a legal relationship between the parties when the representation is made. It applies where a party to a contract represents to the other party that the former will not enforce his strict legal rights under it. In the present case, however, the contractual rela

tionship between the parties had come to an end before any representation is alleged to have been made. There is no allegation that Hambly, while the lease still subsisted, had ever represented that its provisions would not be enforced strictly.

16 We do not have here evidence to support an allegation of fraud, of the kind which was defined by Fry, J., when dealing with the equitable defence of acquiescence, in his well-known statement in Willmott v. Barber (1880) 15 Ch D 96, at 105, 49 LJ Ch 792:

> It has been said that the acquiescence which will deprive a man of his legal rights must amount to fraud, and in my view that is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud of that description? In the first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it, but, in my judgment, nothing short of this will do.

17 Part of the above passage was cited by Johnson, J.A., who delivered the reasons of the Appellate Division. He went on to say this at p. 531:

> There can be no doubt that the respondent Hambly did not know that he had the right to treat the petroleum and natural gas lease as terminated. It was only after two parties had tried to obtain copies of his lease that he began to suspect that something might be wrong. It is significant that even after he granted a new petroleum and natural gas lease to the respondent, Paddon-Hughes Development Co. Ltd., he expressed his opinion to a representative of Kerr-McGee that the new lessees were wasting their money in paying him the consideration for signing the lease. The relationship created by the document relied upon by the appellants is not one which imports a duty in Hambly to disclose to the appellants that their lease had been terminated: *B.A. Oil Co. v. Kos* (1964) 46 W.W.R. 141, [1964] S.C.R. 167, at 176, 42 D.L.R. (2d) 426, affirming (1964) 46 W.W.R. 36, 36 D.L.R. (2d) 422.
>
> The appellants, from their knowledge of the drilling records which Hambly did not possess, were, at all times, in a better position to know the facts upon which their right to continue the lease depended.

18 I do not propose to consider this aspect of the case any further, because, in any event, I am in agreement with the concurrent findings of the Courts below that no estoppel was proved. The appellants adopted, in argument, the legal principles stated in *Greenwood v. Martins Bank*, [1933] A.C. 51, at 57, 101 LJKB 623.

19 The essential factors giving rise to an estoppel are, I think: (1) A representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made; (2) An act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation is made; (3) Detriment to such person as a consequence of the act or omission.

20 The learned trial Judge reviewed the evidence respecting the appellants' allegations as to representations made by Hambly to Superior and reached the following conclusion at p. 473:

> In the case at bar there is no basis for estoppel. The plaintiffs were aware at all times as to the possible invalidity of the lease. ... No detriment has been proved.

21 Johnson, J.A., after reviewing the evidence, expressed the following opinion at p. 534:

> In my opinion, there was no representation by word or conduct by the respondent, Hambly, on which a defence of estoppel could be founded. That being so, it is unnecessary to consider whether the appellants suffered prejudice, which is another element that must be considered when estoppel is pleaded.

22 As I am in agreement with their conclusion that the evidence in this case did not support a plea of estoppel, I do not think that it would serve any useful purpose for me to review that evidence.

23 In my opinion the appeal should be dismissed with costs.

TAB 26

1999 CarswellBC 2012
British Columbia Supreme Court

Canacemal Investment Inc. v. PCI Realty Corp.

1999 CarswellBC 2012, [1999] B.C.J. No. 2029, 24 B.C.T.C. 355, 90 A.C.W.S. (3d) 964

Canacemal Investment Inc., Plaintiff and PCI Realty Corp., Hudson's Bay Company, Fields Stores Limited and Hudson's Bay Company (Fields Stores Division), Defendants

Melnick J.

Judgment: August 26, 1999
Heard: July 26, 1999
Heard: July 27, 1999
Docket: Vancouver C966373

Counsel: *P. Sullivan* and *L. Walsh* (Articled Student), for Plaintiff.
M. Pockey and *V. Allard* (Articled Student), for Defendant, Hudson's Bay Company.
P. Tugwood (Watching Brief Only), for Third Party, PCI Realty Corp.

Subject: Property; Contracts

Headnote

Landlord and tenant --- Premises — Payment of taxes — In relation to rent

Landlord and tenant entered into lease whereby landlord would calculate and tenant would pay its proportionate share of taxes — Term of lease required landlord to make any necessary adjustments to tax costs as soon as possible after end of rental year — Landlord and tenant later entered into surrender agreement and tenant surrendered lease — Term of lease concerning adjustments was incorporated into surrender agreement — Landlord discovered that it had miscalculated tenant's tax costs and brought action to recover amount owing — Action allowed — Past conduct of parties not relevant as term of lease was clear that there was no time limit on when adjustments could be made and term was included in surrender agreement without time limit.

Estoppel --- Estoppel in pais — Elements — Detrimental reliance — Necessity for prejudice

Landlord and tenant entered into lease whereby landlord would calculate and tenant would pay its proportionate share of taxes — Landlord and tenant later entered into surrender agreement and tenant surrendered lease — Landlord discovered that it had miscalculated tenant's tax costs and brought action to recover amount owing — Action allowed — Parties were subject to common mistake as both assumed that original calculation of tenant's tax costs was correct — No evidence that tenant would have closed its store earlier had it not operated under mistake — Tenant specifically agreed that term allowing for adjustments be included in surrender agreement and tenant should have foreseen that it may owe money — Tenant not permitted to rely on estoppel by convention.

Estoppel --- Estoppel in pais — Elements — Intentions of representor

Landlord and tenant entered into lease whereby landlord would calculate and tenant would pay its proportionate share of taxes — Landlord and tenant later entered into surrender agreement and tenant surrendered lease — Landlord discovered that it had miscalculated tenant's tax costs and brought action to recover amount owing — Action allowed — Mistake in calculating tenant's tax costs was not intended by landlord to induce course of conduct in tenant — Tenant did not rely on mistake in tax costs to its detriment — Tenant not permitted to rely on estoppel by conduct.

ACTION by landlord for recovery of monies owing under lease.

***Melnick J.*:**

1 This is an application for judgment by a landlord for certain monies allegedly owing by a tenant pursuant to a lease (and a surrender agreement) of a retail premises in a shopping centre. The action is defended on the basis that the claim is precluded pursuant to the terms of the surrender agreement and, in any event, the plaintiff is estopped from advancing its claim on the basis of estoppel by convention.

I. Background

2 At the material times, Canacemal Investment Inc. (Canacemal) owned commercial property known as the Westminster Mall in New Westminster. The shopping centre was managed on behalf of Canacemal by PCI Realty Corp. (PCI), a property management company. Hudson's Bay Company (HBC) carried on business as Fields Stores and leased space from Canacemal in the Westminster Mall. The lease relevant to this action was entered into on July 15, 1990. Subsequent to negotiations between Canacemal and HBC, the lease was surrendered by HBC on December 31, 1994 pursuant to a surrender agreement.

3 The lease obligated HBC to pay a proportionate share of the municipal property taxes levied against the shopping centre. Calculation of HBC's "proportionate share" was provided for pursuant to the lease by way of a complicated formula. The formula required determining, among other factors, the "aggregate of the rentable area of the ground floor of the Shopping Centre" [cl. 1.01 (n)].

4 During the life of the lease, PCI prepared estimates and statements concerning HBC's proportionate share of common tax costs. HBC made payments on the basis of PCI's estimates and statements and Canacemal accepted the payments.

5 In 1994, Canacemal and HBC executed a surrender agreement whereby HBC surrendered its interest in the leasehold. The surrender agreement provided that charges payable by HBC under the lease would be adjusted; however, it specifically exempted common tax costs, and made adjustments to those costs subject to the relevant terms of the lease [surrender agreement cl. 2]. Additionally, the surrender agreement provided for the termination of rights and obligations under the lease except for those obligations arising on or prior to the surrender date [surrender agreement cl. 5]. As noted, the surrender was effective December 31, 1994.

6 In 1996, Canacemal commenced a small claims action against HBC over its alleged failure to

remove certain electrical ballasts from the premises. HBC counterclaimed for what it alleged to be an overpayment of its proportionate share of the common tax costs. This counterclaim was based on a statement provided by PCI some months after the surrender of the lease. It had been the practice of PCI to provide an estimate of the taxes that HBC would have to pay for any given year of the lease, for HBC to pay monthly instalments on account of the taxes, and for PCI to provide an adjusting reconciliation statement some months after the actual taxes became known to Canacemal with any under or overpayment being adjusted between the parties. With respect to the final reconciliation statement provided by PCI, it noted that HBC had actually made an overpayment of some thousands of dollars. Although the overpayment had been noted in the reconciliation statement, it had actually never been paid to HBC by Canacemal, thus the basis of the counterclaim.

7 However, as a result of the counterclaim, Canacemal reviewed its records and discovered that the estimates and statements prepared by PCI throughout the term of the lease had been incorrect. HBC had paid less than its proportionate share of the common tax costs *as required by the lease* for the period of January 1, 1991 through December 31, 1994. This underpayment resulted from PCI having incorrectly determined the aggregate of the rentable area of the ground floor of the shopping centre. Realizing the error of PCI, Canacemal then claimed from HBC the difference between the amounts that had actually been paid and the amounts which HBC should have paid had PCI made the correct calculations. It is common ground that that which Canacemal now claims is based upon the actual formula provided in the lease. The parties agree that the terms of the lease are valid and enforceable and are binding on Canacemal and HBC.

8 For the purposes of this action, the significant clauses of the lease and surrender agreement are as follows:

Lease:

3.08 Additional Rent for Common Tax Costs. The Tenant will pay to the Landlord as Additional Rent the Tenant's Proportionate Share of Common Tax Costs in addition to the Basic Rent. The Tenant will pay such amount to the Landlord in equal monthly instalments in advance commencing on the Commencement Date and thereafter on each day fixed for the payment of Basic Rent to and including the first day of the last month in the Rental Year immediately following the Commencement Date. Prior to the commencement of each ensuing Rental Year of the Term, the Landlord will deliver to the Tenant a statement setting forth the Landlord's Common Tax Costs for such ensuing Rental Year and thereafter during such Rental Year the Tenant will pay to the Landlord monthly in advance on each day fixed for the payment of Basic Rent an amount equal to one-twelfth of the Tenant's Proportionate Share of such estimated Common Tax Costs for the ensuing Rental Year, provided that in the Rental Year in which the Term expires the Tenant's Proportionate Share of Common Tax Costs in respect of that Rental Year will be paid proportionately reduced to reflect the shorter length of the last Rental Year.

3.09 Reporting on Tenant's Proportionate Share of Common Tax Costs. As soon as reasonably practical following the end of each Rental Year of the Term, the Landlord will deliver to the Tenant a statement showing the actual amount of the Tenant's Proportionate Share of Common Tax Costs setting forth in reasonable detail the Common Tax Costs incurred by the Landlord during such period. If an over-payment of the Tenant's Proportionate Share of Common Tax Costs has been made by the Tenant, the Landlord will credit such amount to the Proportionate Share of Common Tax Costs for the next ensuing period and, if there is no ensuing period, such amount will be paid to the Tenant. If an amount remains owing to the Landlord in respect of the Tenant's Proportionate Share of Common Tax Costs, the Tenant will pay such amount forthwith to the Landlord. The covenants contained in this Article 3.09 will survive the termination or expiration of this Lease.

Surrender Agreement:

2. Adjustment. The Landlord and Tenant will adjust the rent, additional rent and other charges payable by the Tenant under the Lease to and including the Surrender Date and any payment to be made by the Landlord to the Tenant or by the Tenant to the Landlord as a result of such adjustment, other than for Common Tax Costs (as defined in the Lease), will be made on the Surrender Date. Any necessary adjustment with respect to Common Tax Costs will be made in the manner contemplated by Article 3.09 of the Lease.

3. Consideration for Surrender. In consideration of the Tenant assigning and surrendering as aforesaid, the Landlord will pay to the Tenant the sum of $91,500 by solicitor's trust cheque on the Surrender Date. The Landlord will pay that sum to its lawyers, Bull, Housser & Tupper, in trust no later than October 31, 1994, and shall instruct such solicitors to pay those monies to the Tenant, or as the Tenant may direct, upon the Tenant delivering up possession of the Premises to the Landlord. As further consideration for the Tenant assigning and surrendering as aforesaid, the Landlord hereby forgives, releases and forever discharges the Tenant from the Landlord's outstanding claim against the Tenant for reimbursement of charges for electricity consumed in the Premises prior to 1994.

5. Obligation. From and after the day following the Surrender Date, all rights and obligations of the Landlord and Tenant under the Lease will cease and determine, other than with respect to matters arising on or prior to the Surrender Date.

9 Cl. 1.01(f) of the lease defines common tax costs, cl. 1.01(m) defines the premises and cl. 1.01(n) provides the formula for calculating HBC's proportionate share of the municipal taxes. Given that it is common ground that PCI did not calculate the amounts of municipal taxes owing by HBC to Canacemal according to the formula provided in the lease, and there is no dispute as to what PCI did calculate HBC's tax obligation to be (and what it should have calculated it to be), I have not felt it to be necessary to reproduce those clauses here.

10 It is also common ground that, at the time they negotiated the terms of the surrender agreement, neither Canacemal nor HBC were aware of the error made by PCI and the fact that HBC had underpaid its proportionate share of the municipal taxes on the shopping centre.

11 In the time period leading up to the execution of the surrender agreement, HBC had approached Canacemal requesting a reduction in its rent. In fact, at that time, HBC was losing money on its Fields Store operation in the Westminster Mall. This was not a fact made known to Canacemal. A short time later, Canacemal approached HBC asking if it was interested in surrendering the lease. Canacemal had determined that it could use the space being occupied by HBC more profitably. Negotiations between representatives of HBC and Canacemal ensued resulting in the surrender agreement which provided for, *inter alia*, a lump sum payment by Canacemal to HBC to secure HBC's surrender of the lease. Undoubtedly, this was a fortuitous turn of events for HBC. In part, HBC now relies on the fact of Canacemal wishing to secure the surrender of the lease to suggest that had HBC been made aware of its true tax liability, given the circumstances it likely could have negotiated a better deal with Canacemal (such as Canacemal forgiving all or part of the outstanding tax obligation). HBC suggests further that had the proper tax calculation been used by PCI throughout, it may well have made the decision to cease doing business in the location sooner and thus (potentially) avoided incurring greater losses than it did incur. I will comment on these positions of HBC later in the judgment.

12 For the purposes of this judgment, I conclude that PCI and Canacemal effectively acted as one and the same entity at all material times.

II. Is Canacemal's Claim Precluded by Cl. 3.09 of the Lease?

13 Canacemal and HBC have agreed that the terms of the lease are enforceable and are binding on them. Thus, it is not necessary to consider whether cl. 3.09 of the lease is void for uncertainty or whether it is unenforceable for any other reason.

14 Canacemal contends that cl. 3.09 of the lease remained effective subsequent to the termination of the lease by virtue of para. 2 of the surrender agreement. HBC does not take issue with the fact that the lease and surrender agreement provide for the continued operation of cl. 3.09.

15 Canacemal's position is that cl. 3.09 obligates HBC to pay its share of the common tax costs calculated in accordance with the agreed formula. Since the agreed formula was not applied or was incorrectly applied, Canacemal says that HBC has failed to pay the proper amount and is now liable pursuant to the lease for the difference between what was actually paid and what is owed pursuant to the terms of the lease.

16 For its part, HBC maintains that the requirement in cl. 3.09 that Canacemal deliver to it a statement showing the actual amount of its proportionate share of common tax costs "... as soon as reasonably practical following the end of each rental year of the term" precludes Canacemal from now advancing its claim. HBC submits that the meaning of "as soon as reasonably practical following the end of each rental year of the term" is to be gleaned from an examination of the parties' conduct during the life of the lease and during the surrender negotiations. The parties' conduct, according to HBC, indicates that the property taxes were to be reconciled very quickly after the execution of the surrender agreement. Thus, since Canacemal's claim for the tax cost underpayment was brought one and one-half years after the end of the final rental year, HBC submits that Canacemal is in breach of the above-stated

proviso in cl. 3.09.

17 Canacemal replies that cl. 3.09 contemplates the possibility that all or part of HBC's proportionate share of common tax costs would remain outstanding subsequent to HBC's receipt of the tax statements. Neither the lease nor the surrender agreement imposes a time limit upon the recovery of such outstanding amounts.

18 The effect of cl. 3.09 must be determined in accordance with the rules of contractual interpretation.

19 The meaning of a contract or a contractual clause is to be determined by reference to the language used in the document, since it is presumed that the language reflects the parties' intentions. The language is to be given its literal meaning, unless the literal meaning results in absurdity. In construing a written agreement, the court is entitled to take into account the surrounding circumstances of the creation of the agreement in order to assist in determining the parties' intentions. Nevertheless, if the intentions of the parties can be ascertained on the basis of the document alone, the court ought to give effect to the intentions by drawing the necessary inferences and rejecting absurdities. *Langley Lo-Cost Builders Ltd. v. 474835 B.C. Ltd.* (June 17, 1995), Doc. Kelowna C26507 (B.C. S.C.); G.H.L. Fridman, *The Law of Contract in Canada*, (Toronto: Carswell, 1994) at p. 454.

20 Extrinsic evidence can only properly be taken into account in interpreting a contract where the language of the agreement is ambiguous. Ambiguity for this purpose has been defined as "equivocal language causing doubt or uncertainty as to the meaning and application of a term": *Langley Lo-Cost Builders Ltd. Ltd.*, at p. 46. The three sources of extrinsic evidence are: (1) the conduct and statements of the parties prior to the making of the written agreement; (2) the conduct of the parties contemporaneous to the making of the agreement; and (3) the conduct of the parties after the agreement has been reduced to writing: *Langley Lo-Cost Builders Ltd.*; G.H.L. Fridman, *The Law of Contract in Canada*.

21 HBC submits that the interpretation of cl. 3.09 requires an examination of the parties' conduct subsequent to the formation of the agreement. This assumes that ambiguity is present and, accordingly, extrinsic evidence is properly taken into account.

22 In my view, the language of cl. 3.09 is sufficiently clear and evidence of the parties' conduct subsequent to the formation of the contract is therefore not properly considered. When the clause is taken as a whole, it is clear that the parties contemplated the possibility that HBC would over or underpay its share of common tax costs. I infer from this that the parties foresaw that revisions to the amount of HBC's share of common tax costs might be required and, accordingly, the parties intended for revisions to be made where necessary. It is also significant that the parties have clearly indicated their intention that cl. 3.09 continue in effect following the termination of the lease. Therefore, in my view, to interpret "as soon as reasonably practical following the end of each Rental Year" as precluding a revision of the amounts paid in these circumstances is to downplay or even ignore the parties' intention to permit revisions and to give continued effect to cl. 3.09.

23 Additionally, the phrase "as soon as reasonably practical following the end of each Rental Year" is contained in the clause's first sentence, which concerns delivery of the tax costs statement. The possibility of over or underpayments is dealt with in later sentences. Thus, in my view, the parties did not intend "as soon as reasonably practical following the end of each Rental Year" to govern the correction of over or underpayments.

24 Finally, cl. 3.09 has been incorporated into the surrender agreement. As such, the terms providing for the incorporation of cl. 3.09 are properly considered in interpreting "as soon as reasonably practical following the end of each Rental Year". Cl. 2 of the surrender agreement provides that "adjustments" to the common tax costs "will be made in the manner contemplated by Article 3.09." All other matters requiring adjustment and resulting in payment by one party to the other are to be completed by the surrender date. Again, in my view, this indicates the parties' intention to leave open the question of over or underpayment of the tenant's share of common tax costs. Significantly, by the terms of article 2 of the surrender agreement, the parties imposed a fixed time limit (ie: the surrender date) upon the resolution of all adjustments *except* adjustments to common tax costs. Thus, although time limits were contemplated, adjustments to common tax costs were expressly made exempt from the time limit and no other time limit was imposed.

25 For the foregoing reasons, I conclude that the language of cl. 3.09 is not equivocal such that doubt or uncertainty as to the meaning and application of the clause is created. Specifically, the phrase "as soon as reasonably practical following the end of each Rental Year" as it is used in cl. 3.09 does not create ambiguity in relation to the landlord's and tenant's obligations concerning the under or overpayment of common tax costs. Given the language of cl. 2 of the surrender agreement and of cl. 3.09 of the lease, I find that the parties specifically intended, where necessary, to revise and correct common tax cost payments and did not intend such revisions and corrections to be subject to the phrase "as soon as reasonably practical following the end of each Rental Year". Thus, in the circumstances of this case, Canacemal's claim is not advanced in breach of an express or implied contractual time limit.

III. Estoppel

26 The defence of estoppel is advanced on two bases. First, HBC submits that since the parties were both mistaken as to the value of the aggregate rentable area of the ground floor of the shopping centre for the purposes of the common tax costs formula, the doctrine of "mutual mistake" or "estoppel by convention" precludes Canacemal's claim. Second, HBC submits that Canacemal is estopped by its conduct from pursuing its claim.

27 In its reply, Canacemal submits that for the defence of estoppel to succeed regardless of how it is characterized, HBC must establish that it changed its position in reliance upon the conduct or state of affairs which Canacemal is now attempting to retreat from. Canacemal submits that, in the case at bar, HBC has not discharged this onus.

28 While counsel for HBC characterized the parties' mistake concerning the aggregate rental area as a "mutual mistake", I am of the view that it is more properly termed a "common mistake". Parties to a

contract are mutually mistaken where both are in error, but their errors are different. Parties are commonly mistaken where their respective errors are the same: see G.H.L. Fridman, *The Law of Contract* supra, at p. 258. Here, both parties believed the aggregate rental area had been correctly determined, when in fact it had not been. Nonetheless, since I take the view that the issue here turns on analyses of estoppel by convention and estoppel by conduct, nothing turns on this mischaracterization.

29 HBC suggests that the terms "mutual mistake" and "estoppel by convention" are interchangeable; strictly speaking, however, this is not accurate. "Mutual mistake" encompasses a range of circumstances and may, in some circumstances, avoid the contract. In other circumstances, however, estoppel may operate to prevent a party from invalidating a contract on the basis of mutual mistake. Thus, estoppel can operate as part of mutual mistake. Estoppel by convention is a specific type of estoppel and has been characterized as a version of common law estoppel: see G.H.L. Fridman, *The Law of Contract* supra, p. 129. In my view, HBC has put its case specifically on, first, estoppel by convention and, second, estoppel by conduct; thus, the analysis will be focused accordingly.

A. Estoppel by Convention

30 There is little Canadian jurisprudence on the doctrine of "estoppel by convention"; however, it was recently considered in some detail by this court in *32262 B.C. Ltd. v. Companions Restaurant Inc.* (1995), 17 B.L.R. (2d) 227 (B.C. S.C.). There, the plaintiff leased a commercial sign to the defendant. The defendant ceased operations shortly after entering into the lease, and the plaintiff sued under the acceleration provisions of the lease. After the defendant ceased operations, but before the plaintiff commenced the action, the sign was removed. At that time, the account was up to date, although no payments had been made under the acceleration provisions. Discussions between the parties ensued and the defendant alleged at trial that, as a result of the discussions, the parties were under a common assumption that the plaintiff had removed the sign. It was later discovered that the municipality had removed and subsequently replaced the sign. The defendant submitted that the common assumption that the plaintiff removed the sign amounted to the joint acceptance of a set of facts and therefore supported the application of estoppel by convention.

31 Esson C.J.S.C. (as he then was), reviewed a number of authorities and texts and endorsed the formulation of the doctrine as set out by Spencer Bower and Turner, *Estoppel by Representation*, 3d ed. (1977). At para. 17, Chief Justice Esson cites the authors as follows:

> [An estoppel by convention] is founded, not on a representation of fact made by a representor and believed by a representee, but on an agreed statement of facts the truth of which has been assumed, by the convention of the parties, as the basis of a transaction into which they are about to enter. When the parties have acted in their transaction upon the agreed assumption that a given state of facts is to be accepted between them as true, then as regards that transaction each will be estopped against the other from questioning the truth of the statement of facts so assumed.

32 The Chief Justice elaborated further in his own words, at para. 18:

> The authorities require a considerable degree of formality or, at the least, conscious dealing between the parties in order to create a convention to replace the actual facts as the basis of the transaction.

33 It is also clear from the Chief Justice's analysis that the defence of estoppel by convention cannot succeed absent proof of detrimental reliance. Indeed, Chief Justice Esson relies upon *Litwin Construction (1973) Ltd. v. Kiss* (1988), 52 D.L.R. (4th) 459 (B.C. C.A.) for this requirement. Additionally, it seems clear that detrimental reliance was required by Mr. Justice Taylor in *291953 B.C. Ltd. v. Canada Safeway Ltd.* (December 14, 1998), Doc. Vancouver A970747 (B.C. S.C.), which the defendant relies upon. I recognize that Mr. Justice Taylor does not deal there expressly with the doctrine of estoppel by convention.

34 In the result, the defence of estoppel by convention failed in *32262 B.C. Ltd. v. Companions Restaurant Inc.*, since the defendant did not establish detrimental reliance. Essentially, the defendant claimed that as a result of its belief that the plaintiff removed the signs, it did not assign the sign lease to the purchaser of the business. Chief Justice Esson found that this was nothing more than a possibility and, as such, fell short of establishing detrimental reliance. Because the case was decided on this basis, it appears that the Chief Justice did not arrive at a factual conclusion concerning whether the parties had assumed the existence of the given state of facts alleged by the defendant.

35 Thus, in summary, estoppel by convention has two general requirements. First, there must be an agreed assumption that a given state of facts is to be accepted by the parties to a contract as true. For this, some conscious dealing or formality between the parties evidencing an acceptance of the assumed state of facts is required. Where a party knows or has reason to know of the inaccuracy of the assumed facts, the doctrine, in my view, cannot be available since the party can no longer fairly assume the truth of the facts. Second, there must be proof of detrimental reliance on the part of the party asserting the estoppel defense.

36 I have little difficulty concluding that the parties here dealt with each other on the agreed assumption that Canacemal (PCI) was correct in its calculation of the aggregate rentable area of the ground floor of the shopping centre. In other words, both parties assumed as true the fact that PCI's calculation of the aggregate rentable area was correct. During the course of the four rental terms at issue here, there is no evidence that either party questioned the calculation of the aggregate rentable area, even though it was clear to both parties that this would and did fluctuate from term to term. Both parties stood equally to be advantaged or disadvantaged by the discovery of a calculation error. This assumption operated during four years of dealings between the parties. (However, it is true HBC was not positioned, as was Canacemal, to determine the correctness of the calculation directly, since it was not privy to the fluctuation in the aggregate rentable area [agreed statement of facts, para. 24]).

37 My view is not affected by my earlier finding that, by the terms of the lease, the parties contemplated the possibility of the tenant over or underpaying its proportionate share of common tax costs. There are numerous possible reasons for an over or underpayment by the tenant. The estoppel by convention issue here is not whether the parties agreed to assume the general correctness of

Canacemal's statements of HBC's proportionate share of common tax costs or, for that matter, the general correctness of HBC's payments; rather, it is whether the parties assumed as true the fact that Canacemal's calculation of the aggregate rentable area of the ground floor of the shopping centre pursuant to cl. 1.01(n) was correct.

38 It remains to be considered whether HBC has relied to its detriment upon Canacemal's calculation of the aggregate rentable area. As earlier noted, HBC submits that it relied detrimentally upon Canacemal's calculations when it negotiated the surrender agreement. In essence, HBC says that, had it known about the underpayment of its share of the common tax costs, it would have taken this into account in determining the amount required to be paid by Canacemal to secure the surrender of the lease. Second, HBC submits that detrimental reliance is proved by the fact that, had it known about the miscalculations, it would have closed its store earlier than it did.

39 For its part, Canacemal raises a number of points which it says HBC should have addressed if it had indeed suffered detriment. These points include HBC's failure to tender evidence from its executives of its negotiating position and strategy and its previous experience in negotiating lease surrender agreements. In short, Canacemal says HBC has failed to discharge the onus of showing detrimental reliance.

40 I have little difficulty rejecting the second submission made by HBC. There simply is insufficient evidence before me to permit the conclusion that, but for the improper calculation of the aggregate rentable area of the ground floor, HBC would have closed its store. There are simply too many other factors which enter into this type of decision; to find one factor to be determinative is overly speculative.

41 HBC's first submission also fails, for two reasons. First, HBC agreed pursuant to the surrender agreement to the continued operation of cl. 3.09 of the lease. As was seen, lease cl. 3.09 specifically contemplates the possibility of correction of under and overpayments of common tax costs. Thus, in my view, at the time the negotiations over the surrender agreement occurred, HBC foresaw, or ought to have foreseen, the possibility of under or overpayments having been made and, accordingly, the possibility of it being reimbursed for overpayments or being liable for underpayments. It was open to HBC to attempt to preclude this possibility during negotiations by refusing to agree to the continued operation of cl. 3.09. It did not do so. Since HBC foresaw, or ought to have foreseen, the possibility of adjustments to common tax costs and since it agreed to this, it cannot now say it relied on the common tax costs (as miscalculated by PCI) remaining unchanged.

42 Second, Canacemal's position has merit. Based upon the evidence, I am of the same view here that Chief Justice Esson was of in *32262 B.C. Ltd. v. Companions Restaurant Inc.*: HBC has shown nothing more than a possibility that it could have negotiated a better arrangement if it had known of the error. This falls short of establishing detrimental reliance.

B. Estoppel by Conduct

43 The requirements for estoppel by conduct - a form of equitable estoppel - are well established.

> In summary, estoppel by conduct requires: (a) conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made; (b) an act or omission resulting from the representation by the person to whom the representation is made; (c) detriment to such person as a consequence of the act or omission. See *Cadboro Investments Ltd. v. Canada West Insurance Co.* (1987), 19 B.C.L.R. (2d) 352 (B.C. C.A.); *Greenwood v. Martins Bank Ltd.* (1932), [1933] A.C. 51 (U.K. H.L.).

44 Given my conclusion that HBC did not rely to its detriment upon Canacemal's miscalculation, the requirements of estoppel by conduct cannot be satisfied. Nevertheless, in the event I am incorrect in this finding, I conclude that estoppel by conduct fails in any event for the following reasons.

45 I am unable to see how Canacemal's mistake as to the calculation of the aggregate rentable area of the ground floor of the shopping centre was a representation intended to induce a course of conduct on the part of HBC. Generally, equitable estoppel is based upon an intentional alteration of legal relations: *Conwest Exploration Co. v. Letain* (1963), [1964] S.C.R. 20 (S.C.C.), at 28. As such, where both parties act under a mistake as to one party's legal rights, courts have refused to give effect to equitable estoppel on the basis that the mistake does not amount to a representation intended to affect the legal relations between the parties: see *Calvan Consolidated Oil & Gas Co. v. Manning* (1957), 22 W.W.R. 433 (Alta. S.C.); *Weyburn Security Co. v. Sohio Petroleum Co.* (1970), [1971] S.C.R. 81 (S.C.C.).

46 Here, I am satisfied that Canacemal did not, by its conduct, intend to induce HBC to rely on the correctness of its calculations of the aggregate rentable area. As I have found, both parties were operating under the erroneous assumption that the calculation required by cl. 1.01(n) was correct.

IV. Conclusion

47 I therefore conclude that the defences of HBC to the claim of Canacemal cannot succeed. Thus, Canacemal is entitled to judgment against HBC in the amount of $44,843.86.

48 Para. 30 of the agreed statement of facts details a breakdown of Canacemal's claim as among the four years of the term of the lease prior to its surrender as well as applicable Goods and Services Tax. Without detailing that breakdown here, court order interest is payable at registrar's rates on the proportionate amount owing for each rental year from a date two months after the conclusion of that rental year to date of judgment. I leave it to the parties to allocate the Goods and Services Tax among the four years proportionately. If there is any difficulty with respect to this direction, there is liberty to apply.

49 Canacemal is entitled to its costs on Scale 3.

Action allowed.

TAB 27

2011 CarswellOnt 9096
Ontario Superior Court of Justice

PBM Realty Holdings Inc. v. Little

2011 CarswellOnt 9096, 206 A.C.W.S. (3d) 819

PBM Realty Holdings Inc., Plaintiff and John Little, o/a Nautilus North Fitness Centre and Nautilus North Fitness Centre Inc., Defendants

Donald J. Lange D.J.

Heard: June 17, 2011
Judgment: August 25, 2011
Docket: SC10-123-0000

Counsel: J. Farr (Paralegal), for Plaintiff
N.B. Roche, for Defendants

Subject: Property; Civil Practice and Procedure; Contracts; Restitution

Headnote

Real property --- Landlord and tenant — Premises — Alterations and improvements — By tenant — Landlord's obligation to pay

Tenant leased commercial premises from predecessor of landlord — Tenant converted premises from car dealership to fitness facility — Tenant had spent about $60,000 on leasehold improvements — Tenancy became month to month after predecessor of landlord failed to execute renewal lease — Landlord purchased premises and never executed new lease with tenant — Tenant's share of maintenance expenses increased — Tenant eventually went into arrears and vacated premises — Landlord brought action for payment of arrears — Tenant brought counterclaim for compensation for leasehold improvements — Action allowed; counterclaim dismissed — Landlord was awarded $8,468.44 for arrears as claimed — Tenant failed to establish any basis for compensation for leasehold improvements — Initial lease provided improvements were to be made at tenant's expense — Law was well established that leasehold improvements became property of landlord in absence of any provision in lease to contrary — Lease in this case did not contain any provision to contrary — Leasehold improvements had not arisen from any wrongdoing on part of predecessor of landlord.

Real property --- Landlord and tenant — Rent — Obligation to pay — Variation in amount of rent

Tenant leased commercial premises from predecessor of landlord — Tenant paid $490 per month for its share of maintenance and other expenses — Tenancy became month to month after predecessor of landlord failed to execute renewal lease — Landlord purchased premises and never executed new lease with tenant — Tenant's share of expenses increased to $850 in December 2007, $1,050 in January 2009, and $1,250 in October 2009 — Tenant had protested in December 2008 but had made payments until July 2009 — Tenant went into arrears and vacated premises — Landlord brought action for payment of arrears — Action allowed — Landlord was awarded $8,468.44 for arrears as claimed — It was clear from lease that tenant was aware maintenance and other expenses were not fixed but reviewable yearly for possible increases — Tenant had continued to pay its share of expenses after becoming month to month tenant — Tenant had also paid increased expenses up to July 2009 — Estoppel by conduct applied to payments made without protest prior to December 2008 — For increases imposed after December 2008, tenant was still liable to pay them since it enjoyed use of premises and should pay its fair share.

Real property --- Landlord and tenant — Premises — Repairs — By tenant — Under covenant

Tenant leased commercial premises from predecessor of landlord — Tenant converted premises from car dealership to fitness facility — Tenancy became month to month after predecessor of landlord failed to execute renewal lease — Landlord purchased premises and never executed new lease with tenant — Tenant's share of maintenance expenses increased — Tenant eventually went into arrears and vacated premises — Landlord brought action for payment of arrears and for repair costs — Action allowed in part — Landlord was awarded $8,468.44 for arrears only — Tenant was not liable for repairs to premises — Tenant's obligation to repair was based on condition of premises at beginning of lease and not after tenant had improved them — Premises had been car dealership before tenant converted them to fitness facility at its own expense — Tenant was not obliged to maintain condition of fitness facility in these circumstances.

ACTION by landlord for payment of arrears and repair costs; COUNTERCLAIM by tenant for compensation for leasehold improvements.

***Donald J. Lange D.J.*:**

1 The plaintiff is a landlord with offices in Barrie, Ontario. It is in the business of renting premises in buildings zoned industrial and has twelve buildings in its portfolio. In August 2007, it purchased a building located at 34 EP Lee Drive in Bracebridge which had space for five tenants. The defendant, Nautilus North Fitness Centre Inc. ("Nautilus"), was an existing tenant in the building when it was purchased. It was in the business of providing gym and fitness services to its member. The defendant, John Little, was the president of Nautilus and a shareholder and director.

2 In March 2004, Nautilus entered into an agreement entitled "Agreement to Lease" with the previous owner of the building which sets out the terms of rent and tenant expenses, among other things.[87] Nautilus raised the issue at trial that this agreement was not a lease but only an agreement to lease because it was accepted subject to the execution of a formal lease.[88] No formal lease was signed but the agreement to lease provided that "[s]hould the leases [sic] not be signed, then this offer shall stand as binding at the option of the Landlord" and that it was to be considered a binding agreement once executed.[89] In my view, the agreement to lease contains all of the essential terms of the lease and

87. Exhibit 1, tab 1, pp. 1-6.
88. Exhibit 1, tab 1, p. 5.
89. Exhibit 1, tab 1, p. 3, clauses 13, 19.

effectively became the lease for the parties. See the detailed discussion of the case law in *Hashem v. 2069513 Ontario Ltd.*, [2009] O.J. No. 1202 (Ont. S.C.J.).

3 The term of the lease was for a period of two years from April 1, 2004 with an option to renew for five years. The plaintiff attempted to obtain an executed lease renewal from the previous landlord but none was provided to the plaintiff.[90] Mr. Little testified that there was no renewal of the lease with the previous landlord. The plaintiff also attempted to have Nautilus sign a new lease but the new lease was never signed. Accordingly, I find that Nautilus was a month to month tenant with the previous landlord from April 1, 2006 and a month to month tenant with the plaintiff after it purchased the building. By letter dated November 30, 2009,[91] the plaintiff gave Nautilus notice to vacate the premises by December 31, 2009 for alleged breaches. Mr. Little testified that Nautilus moved out of the premises on December 29, 2009.

4 The plaintiff has two claims in this action. The first claim is for payment of arrears of base rent and for MITU charges, namely charges for maintenance, insurance, taxes, and utilities. The arrears are for the period of October (in part) to December 2009. The claim is for $10, 218.44 as set out in the receivable summary provided and supporting invoices[92] less $1,750.00 representing last month's rent for a total claim of $8,468.44.

5 Following the purchase of the building, it became apparent to the plaintiff that the maintenance of the building had been neglected by the previous landlord. Peter Moore, the president and owner of the plaintiff, gave evidence on the maintenance issue, as well as Denise Gariepy, the plaintiff's property administrator. A description of the maintenance work performed is summarized by Mr. Moore in a letter dated November 7, 2008[93] addressed to Nautilus:

> Only after we purchased this property did we come to realize how poorly it had been maintained by the former owners resulting in us having to spend a lot of time and money cleaning up the property, repairing HVAC units, installing fire prevention equipment as ordered by the Bracebridge Fire Department, removing obsolete signage and equipment on the roof and making repairs to the roof membrane.
>
> As to the condition of the parking lot we have a quotation of $40,000 to repair it but decided to put off having done it till next year in order to keep your MITU increases as low as possible.

In the evidence of Mr. Moore and Ms. Gariepy, they noted that Nautilus had complained about pot holes in the parking lot.[94] There are also emails from Mr. Little about the condition of parking lot: "Our driveway is still like the surface of the moon with all of its potholes."[95] "[C]lients are not coming into our parking lot for fear of bottoming out the undercarriage on their cars."[96] Mr. Moore testified that the

90. Exhibit 1, tab 2, p. 7.
91. Exhibit 1, tab 3, p. 19.
92. Exhibit 1, tab 6, pp. 33-37.
93. Exhibit 1, tab 2, p. 13.
94. See also exhibit 1, tab 2, p. 10.
95. Exhibit 1, tab 2, p. 12.

parking lot was paved, rather than repaired, in 2009 at a cost of $125,000[97] which the plaintiff amortized over fifteen years dividing the difference among the tenants in the building in their MITU charges.

6 Ms. Gariepy testified that, when the plaintiff became the owner of the building, Nautilus was paying its previous landlord $490.00 for monthly MITU charges. This amount is set out in clause 22 of the lease. Because of the maintenance improvements, the monthly MITU charges for Nautilus increased from $490.00 to $850.00 in December 2007, to $1,050.00 in January 2009, and to $1,250.00 in October 2009. The increase in October 2009 was due to the paving of the parking lot.

7 Nautilus resists the claim for rental arrears in the amount of $8,468.44 with two defences. The first is the defence of set-off. Mr. Little and his contractor, Gordon Sisco, testified that Nautilus spent some $60,000 to renovate the premises when it first rented it in 2004 because it had been a car dealership and not suitable for its gym and fitness business. The statement of defence pleads that "[t]he Defendants state that they expended over $65,000.00 in leasehold improvements since taking possession of the property which has occurred to the benefit of the Plaintiff herein." There is no plea of set off in the statement of defence in regard to these leasehold improvements. It was only raised in closing argument at trial. In my view, the material facts have been pleaded sufficiently in the statement of defence to warrant a plea of set off.

8 Sally Sisco testified on behalf of Nautilus. She was the real estate agent for Nautilus when negotiating the lease agreement in 2004 with the previous owner. She drafted the OREA agreement to lease form and the Schedule A attached to it[98] and witnessed the signature of Mr. Little on the form. Through negotiations, Nautilus received three months free rent to renovate the premises. The OREA form states: "The Landlord and Tenant agree that the Tenant shall be entitled to access the Premises rent free from April 1, 2004 to June 30, 2004 for the purpose of leasehold improvements to open his business." The form contains a lengthy clause about the leasehold improvements asserting that they were to be done at the tenant's expense. There is also a clause stating that Nautilus's signage and advertising material was to remain the property of the tenant at the expiration of the lease should the tenant wish to remove the signage and advertising material. Neither the OREA form nor the 2004 "Agreement to Lease" addresses the ownership of the leasehold improvements.

9 The law of ownership of leasehold improvements between a landlord and tenant, in the absence of any express covenant in a lease, is well settled. In *Wiwsonski v. Wiwsonsky*, [1991] M.J. No. 157 (Man. Q.B.), Ferg J. stated that "[n]ormally, leasehold improvements made by a tenant become, without compensation, the property of the landlord." As well, in *Baywest Properties Ltd. v. Stratheden Properties Ltd.*, [1990] B.C.J. No. 2641 (B.C. S.C.), Wong J. stated that "[u]nder ordinary circumstances tenants improvements revert to the landlord at the end of the term." In *Dodds-Parker v. White*, [1985] N.J. No. 315 (Nfld. T.D.), the Newfoundland Supreme Court dealt with a claim by a tenant for compensation for leasehold improvements. Steele J. stated:

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96. Exhibit 1, tab 2, p. 10.
97. See also the invoice in exhibit 1, tab 6, pp. 30-32.
98. Exhibit 2, first document.

[12] I accept as good law the following statement by Lord Cranworthy, C., in *Ramsden v. Dyson* (1866), L.R. 1 H.L. 129, 14 W.R. 926:-

> If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. But to raise such an equity two things are required - first, that the person expending the money should suppose himself to be building on his own land; and, secondly, that the real owner, at the time of the expenditure, knows that the land belongs to him, and not to the person expending the money in the belief that he is owner. For if a stranger builds on my land knowing it to be mine, there is no principle of equity which would prevent my claiming the land, with the benefit of all the expenditure made on it. It follows, as a corollary from these principles - or perhaps it would be more accurate to say it forms part of them - that if my tenant builds on land which he holds under me, he does not thereby, in the absence of special circumstances, acquire any right to prevent me from taking possession of the land and buildings when the tenancy has determined. He knew the extent of his interest, and it was his folly to expend money upon a title which he knew would or might soon come to an end.

[13] Williams & Rhodes Canadian Law of Landlord & Tenant (5th Ed.), volume 2, para. 13:1:7 reduced the statement by the Lord Chancellor to the following concise proposition:-

> [*page255] "A tenant who builds on the demised land does not thereby, in the absence of special circumstances, acquire any right to prevent the landlord from taking possession of the land and buildings at the end of the tenancy. But if he builds in a genuine belief that he thereby acquires a title to claim a lease of the land, and the landlord knowingly permits him to do so, it seems that the landlord would be compelled to grant a lease."

[14] ... The issue is whether there are special circumstances existing whereby in law or equity the lessor ought to be prevented from taking possession of the land together with all the improvements and additions, or in the alternative, if the lessor is to have possession whether the tenant (White) is to be compensated for his expenditures over and above his obligation by covenant to keep in good repair. What are the "special circumstances" that would make possible the granting of the remedy or relief now requested by White?

[15] I am not aware of any technical legal meaning to be attached to the phrase "special circumstances". I feel sure that when Lord Cranworthy used the phrase he did so with the intention of permitting great flexibility and wide discretion to the interpretor. As expected the facts of each situation become critical. In my opinion an occupier would be entitled to relief by way of reduction of rent or compensation where he carried out the improvements, in the absence of any express covenant or agreement, while acting upon a misrepresentation, fraudulent or otherwise or upon any deceit by the landlord calculated to induce the tenant to build improvements and additions which he otherwise would not have done. This was not the case here.

The Nova Scotia Court of Appeal quoted *Dodds-Parker* with approval in *Carabin v. Offman*, [1988] N.S.J. No. 434 (N.S. C.A.). It stated that a tenant's claim for compensation is based upon the equitable jurisdiction of the court and must, therefore, be founded upon some wrongdoing on behalf of the landlord which led to the tenant's loss.

10 Nautilus, in the case at bar, defends the claim for rental arrears by way of equitable set-off. The law concerning the jurisdiction of the Small Claims Court to grant equitable relief was unsettled until the recent case of *Hodgins v. Grover*, [2011] O.J. No. 310 (Ont. C.A.). At par. 49, Epstein J.A., for the court, held "that the Small Claims Court has jurisdiction to award legal or equitable relief where the relief requested is a monetary payment under the limit of $25,000 or the return of personal property valued within that limit." At the time that Nautilus did the leasehold improvements in 2004, the plaintiff was not the landlord. The previous landlord gave Nautilus three month's free rent to perform the leasehold improvements. Nautilus entered into a two year lease at that time with an option to renew for five years. Nautilus must be taken to have understood the extent of its interest in the premises at that time and that its only right was to make use of those improvements during the two year term of the lease, or during the five year term of a renewal of the lease. It failed to exercise its option to renew which would have given it extended use of the lease improvements for another five years. It failed to enter into a new lease with the plaintiff which would have given it extended use of the lease improvements. It became a month to month tenant with the previous landlord under whom it had performed the leasehold improvements and it chose to continue as a month to month tenant with the plaintiff. It then received a notice to vacate for alleged breaches and vacated the premises.

11 Based upon the evidence before this court of what occurred between Nautilus and the previous landlord at the leasehold improvement stage, I find that there was no conduct of wrongdoing on behalf of the previous landlord which led Nautilus to make the leasehold improvements. It is my view that there were no special circumstances at that stage that would now entitle Nautilus to compensation for the leasehold improvements by way of equitable set off even if the plaintiff could now be said to be open to liability by virtue of purchasing the building and becoming the successor landlord of Nautilus. I conclude that the defence of set-off fails.

12 The plaintiff relies upon the terms of the lease[99] in regard to its claim for the increased MITU charges which is the main contention between the parties in the rental arrears claim. Nautilus had a copy of the lease which it provided to the plaintiff by email dated April 14, 2008.[100] A relevant excerpt in regard to the MITU charges[101] states:

> The Tenant shall pay monthly to the Landlord along with each rent payment to be paid, an amount currently estimated by the Landlord to be $490.00 to reflect the Tenant's proportionate share of Common Area maintenance costs. The parties agree that this amount shall be reviewed yearly after the commencement date to this Lease.

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99. Exhibit 1, tab 1, pp. 2-3, clause 12 and 22.
100. Exhibit 1, tab 2, p. 10.
101. Exhibit 1, tab 1, p. 4.

It is clear from the lease that Nautilus was aware of the MITU charges and that they were not fixed but reviewable yearly for possible increases. The evidence also shows that Nautilus continued to pay the MITU charges when it became a month to month tenant with the previous landlord from April 1, 2006 until the plaintiff became the landlord in August 2007 and it continued to pay the MITU charges after that time.

13 The plaintiff also relies upon the conduct of Nautilus during the different stages of the MITU increases. Ms. Gariepy testified that Nautilus paid for the first monthly increase from $450.00 to $850.00 in December 2007 without objection. In mid-2008, the plaintiff provided to Nautilus its yearly MITU reconciliation for the period of August 2007 to July 21, 2008 which showed a required additional MITU payment of $1,446.04. Nautilus objected to the payment of this additional amount, but it did pay it, stating to the plaintiff by email dated December 30, 2008 that "[w]e do not view this payment as anything we have contracted with your company for but are simply not interested in a legal battle at this time."[102] However, prior to that email statement, Nautilus was paying its monthly MITU charge of $850.00 for one year from December 2007 to December, 2008 and, then following the email statement, paying its second increase of monthly MITU charges of $1,050.00 from January 2009 to July 2009.[103]

14 Nautilus's second defence in regard to the rental arrears claim, and specifically the MITU arrears, is that it is not bound by the terms of the lease because it was a month to month tenant and, therefore, not bound to pay the MITU arrears. The statement of defence pleads that "[t]here was no Agreement with the Plaintiff that the Defendants would pay any costs for taxes, maintenance and G.S.T. as set out in the 2004 Agreement." While the increased maintenance costs were highlighted in the evidence at trial, it is only one component of Nautilus's MITU charges. Other MITU charges were for utilities and taxes. The breakdown in the MITU charges for 2009 was not tendered in evidence but they are in evidence for 2008. Nautilus's hydro costs for November were $303.29 and for December $301.24. Nautilus's heating costs for November were $148.33 and for December $300.90. Nautilus's taxes for each month were $294.26. All of these costs were paid by Nautilus in 2008. Having failed in its defence of set-off, Nautilus must now be taken to argue that it should have the hydro and heat free of charge in November-December 2009 and not have to pay the taxes. And that it should not have to pay the base rent while it was carrying on business in November and December 2009. The amount of the base rent was $2,000.00 per month for the months of November and December. When asked in cross-examination whether Nautilus owed the base rent, Mr. Little testified that it did not owe the $4,000.00. The denial of liability for the base rent was no doubt made on the basis of the defence of set-off which has been rejected.

15 The requirements of estoppel by conduct, a form of equitable estoppel, are well established. Estoppel by conduct requires: (a) conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made; (b) an act or omission resulting from the representation by the person to whom the representation is made; (c) detriment to such person as a consequence of the act or omission. See, for example, *Canacemal*

102. Exhibit 1, tab 2, p. 14.
103. Exhibit 1, tab 6, p. 38.

> *Investment Inc. v. PCI Realty Corp.*, [1999] B.C.J. No. 2029 (B.C. S.C.) at par. 43. I am satisfied that Nautilus is liable to the plaintiff based upon estoppel by conduct for the utilities, taxes, and base rent. I am not satisfied that Nautilus is liable to the plaintiff based upon estoppel by conduct for the increased maintenance charges because it made itself clear to the plaintiff, when making one of the increased payments, that it was making the payment under protest to avoid a "legal battle."

16 The Small Claims Court is governed, in part, by section 25 of the *Courts of Justice Act* which states that the court "may make such order as is considered just and agreeable to good conscience." Separate and distinct from the doctrine of estoppel by conduct, Nautilus, in my opinion, is liable for all of the rental arrears in the amount of $8,468.44, including the maintenance increases, as a matter of "good conscience" and based on principles of equity. Simply put, it enjoyed heat and hydro for the period in question. It enjoyed the use of the premises to conduct its business for the period in question without paying rent or taxes. Its customers used a newly paved parking lot and exercised at the fitness centre with upgraded HVAC units, both reasons for maintenance increases. Further and in the alternative, if there is no juristic reason for the benefits received by Nautilus, the doctrine of unjust enrichment applies, in my view. The Supreme Court of Canada defined the doctrine of unjust enrichment in *Garland v. Consumers' Gas Co.*, [2004] S.C.J. No. 21 (S.C.C.). At par. 30, Iacobucci J., for the court, stated: "As a general matter, the test for unjust enrichment is well established. The cause of action has three elements: (1) an enrichment of the defendant; (2) a corresponding deprivation by the plaintiff; and (3) an absence of juristic reason for the enrichment ..."

17 The second claim is for compensation for repairs to the premises. The plaintiff claims $7,551.79 to replace the flooring in the premises.[104] The flooring was carpet and replaced by vinyl tile. It also claims $2,149.88 for other repairs to the premises, such as drywall work and electrical repairs.[105] The total amount claimed is $9,701.67. For this claim, the plaintiff relies upon clause 12 (e) of the terms of the lease[106] where it states that the tenant's expenses include the "[c]ost of cleaning, decorating and maintaining in good repair the Leased Premise and its content."

18 The damages to the premises are described in the evidence of Phillip Moore, the plaintiff's property manager, in his inspection report,[107] and in the many photographs taken by Mr. Moore at the inspection conducted on January 8, 2010.[108] Phillip Moore testified that, when he inspected the premises after the purchase in 2007, the premises were in "good order." Peter Moore testified that, when he inspected the premises before and after the purchase in 2007, he described it as a "nice unit" and that the drywall and carpet were in good condition. Both witnesses described the premises after Nautilus vacated as in terrible condition as if there had been "malicious damage." They stated that the premises were unrentable in the condition that they were. The plaintiff tried to salvage the carpet but it was not able to do so. Evidence was filed by the plaintiff at the trial by way of affidavit that the carpet was not salvageable.[109] The evidence is by Diane Kennedy, the owner of Kennedy Carpet Centre. She

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104. Exhibit 1, tab 6, p. 26, exhibit 3.
105. Exhibit 1, tab 6, pp. 27-29.
106. Exhibit 1, tab 1, p. 2.
107. Exhibit 1, tab 4, pp. 20-22. It is incorrectly dated as 2009.
108. Exhibit 1, tab 7, pp. 40-56.

testified:

> I am currently the owner of Kennedy Carpet Centre for 20 years. It is my professional opinion that the damage caused to the carpet flooring by Nautilus North is beyond the normal wear and tear of a normal Lease. It appears that no care was taken when removing the exercise equipment which resulted in the carpet being torn, stained and ruined. The carpet is not salvageable. Full replacement is required and I have provided PBM Realty Holdings Inc. with a quote dated January 18, 2010 which is attached.

The quote referred to in the foregoing statement was in the amount of $7,698.00. Nautilus did not call Diane Kennedy as a witness at trial to cross-examine her. Although the traditional procedure for qualifying Ms. Kennedy as an expert, as set out in *Dulong v. Merrill Lynch Canada Inc.*, [2006] O.J. No. 1146 (Ont. S.C.J.), was not followed by the plaintiff, the affidavit is admissible under rule 18.02 (2) of the Rules of the Small Claims Court. In view of the expert evidence of Ms. Kennedy, I reject the testimony of Mr. Little that the carpet did not have to be replaced.

19 In regard to this claim, the defendant also relies up the doctrine of set-off which I have already found to be not available to the defendant. However, the defendant also defends this claim on the basis that when it rented the premises it was a car dealership. The layout of the dealership was obviously not suitable for a gym and fitness centre. As already noted, Mr. Little testified that extensive renovations were made to the premises to make it workable for his business. Northern River Design was the general contractor for the renovation. Gordon Sisco, the owner of Northern River Design, gave detailed testimony of the nature and extent of the renovations. The documentary evidence of the renovations is found in exhibit 2.

20 The defendant relies upon the often quoted case of Krever J. in *Norbury Sudbury Ltd. v. Noront Steel (1981) Ltd.*, [1984] O.J. No. 3310 (Ont. H.C.). I quote the following excerpts from par. 18. Krever J. stated:

> "... in Ontario, a tenant's covenant to repair does not require the tenant to put the premises in repair if they were not in that condition at the beginning of the term of the lease."
>
> "... in determining whether the defendant was in breach of the tenant's covenants to which I have referred, the comparison must be between the condition of the premises at the beginning of the term of the lease ... and the condition of the premises when the defendant yielded up possession of them to the plaintiff ..."

Assuming that Nautilus had a covenant to repair with the plaintiff and that the repairs were necessary because they were beyond the level of reasonable wear and tear, the defendant argues that it is not required to pay for the repairs because of the condition of the premises at the beginning of the lease. Nautilus leased a premises which operated as a car dealership. It had to transform the premises into a gym and fitness centre. I agree with Nautilus's submission that it was not required to perform repairs even if there was a covenant to repair and a need to repair the premises. I, therefore, find that the claim

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109. Exhibit 1, tab 5, pp. 23-25.

for damages for repairs to the premises is dismissed.

21 The plaintiff will, therefore, have judgment against the Nautilus in the amount of $8,468.44. Prejudgment interest pursuant to the *Courts of Justice Act* will run from April 6, 2010, the date of the issued claim, and post-judgment interest pursuant to the *Courts of Justice Act*. The plaintiff may address the issue of costs, in writing, within 15 days of receiving this judgment from the Clerk of the Small Claims Court. The defendant will have 15 days to respond to the costs submissions of the plaintiff. All costs submissions are to be sent to each party and filed with the Clerk of the Small Claims Court with proof of service. At the opening of trial, the plaintiff discontinued its claim against the defendant, John Little, o/a Nautilus North Fitness Centre. The defendant reserved its right to make costs submissions in regard to the discontinuance. The plaintiff is also entitled to address the discontinuance in its costs submissions.

Action allowed in part; counterclaim dismissed.

Footnotes1Exhibit 1, tab 1, pp. 1-6.2Exhibit 1, tab 1, p. 5.3Exhibit 1, tab 1, p. 3, clauses 13, 19.4Exhibit 1, tab 2, p. 7.5Exhibit 1, tab 3, p. 19.6Exhibit 1, tab 6, pp. 33-37.7Exhibit 1, tab 2, p. 13.8See also exhibit 1, tab 2, p. 10.9Exhibit 1, tab 2, p. 12.10Exhibit 1, tab 2, p. 10.11See also the invoice in exhibit 1, tab 6, pp. 30-32.12Exhibit 2, first document.13Exhibit 1, tab 1, pp. 2-3, clause 12 and 22.14Exhibit 1, tab 2, p. 10.15Exhibit 1, tab 1, p. 4.16Exhibit 1, tab 2, p. 14.17Exhibit 1, tab 6, p. 38.18Exhibit 1, tab 6, p. 26, exhibit 3.19Exhibit 1, tab 6, pp. 27-29.20Exhibit 1, tab 1, p. 2.21Exhibit 1, tab 4, pp. 20-22. It is incorrectly dated as 2009.22Exhibit 1, tab 7, pp. 40-56.23Exhibit 1, tab 5, pp. 23-25.

TAB 28

2005 SCC 38, 2005 CSC 38
Supreme Court of Canada

Ryan v. Moore

2005 CarswellNfld 157, 2005 CarswellNfld 158, 2005 SCC 38, 2005 CSC 38, [2005] 2 S.C.R. 53, [2005] R.R.A. 694, [2005] S.C.J. No. 38, 139 A.C.W.S. (3d) 1089, 18 E.T.R. (3d) 163, 247 Nfld. & P.E.I.R. 286, 254 D.L.R. (4th) 1, 25 C.C.L.I. (4th) 1, 32 C.C.L.T. (3d) 1, 334 N.R. 355, 735 A.P.R. 286, J.E. 2005-1188, EYB 2005-91679

Cabot Insurance Company Limited and Rex Gilbert Moore, deceased, by his Administratix, Muriel Smith, Appellants v. Peter Ryan, Respondent

McLachlin C.J.C., Major, Bastarache, LeBel, Deschamps, Abella, Charron JJ.

Heard: December 7, 2004
Judgment: June 16, 2005[110]
Docket: 29849

Proceedings: reversing in part *Ryan v. Moore* (2003), 2003 NLCA 19, 2003 CarswellNfld 109, 50 E.T.R. (2d) 8, 224 Nfld. & P.E.I.R. 181, 669 A.P.R. 181 (N.L. C.A.); reversing in part *Ryan v. Moore* (2001), 2001 CarswellNfld 277, 205 Nfld. & P.E.I.R. 211, 615 A.P.R. 211, 41 E.T.R. (2d) 287, 19 M.V.R. (4th) 120, 18 C.P.C. (5th) 95 (Nfld. T.D.)

Counsel: Sandra Chaytor, Jorge Segovia, for Appellants
Ian F. Kelly, Q.C., Gregory A. French, for Respondent

Subject: Civil Practice and Procedure; Insurance; Estates and Trusts; Torts; Contracts

Headnote

Civil practice and procedure --- Limitation of actions — Estates — Claim against estate — In tort

Vehicles operated by plaintiff, driver and another person were involved in accident in 1997 — Driver died in 1998 of causes unrelated to accident — Letters of Administration were granted to driver's administratrix in February 1999 — In October 1999, plaintiff issued statement of claim — Insurer applied to have action dismissed — Trial judge determined that plaintiff's action was not statute-barred — On appeal, it was determined that estoppel by convention had been established — Insurer and administratrix were estopped from pleading that driver had died or that letters of administration were granted prior to May 2000 in order to invoke shorter Survival of Actions Act limitation period — Insurer and driver's estate by his administratrix appealed — Appeal allowed — Statement of claim was struck at all levels of court — Plaintiff met prescribed limitation period in Limitations Act — Section 5 of Survival of Actions Act prohibits action brought six months after letters of probate or administration of estate of deceased have been granted and after expiration of one year from date of death — Judge-made discoverability rule did not apply to extend period legislature prescribed — By using specific event as

110. Corrigenda issued by the court on September 9, 2005 and September 27, 2005 respectively have been incorporated herein.

starting point for "limitation clock", legislature was displacing discoverability rule in all situations to which Survival of Actions Act applied — Driver's subsequent death had no impact whatsoever on accrual of plaintiff's cause of action — Survival of Actions Act was itself legislative exception to common law rule and it would displace intention of legislature to stretch limitation period.

Civil practice and procedure --- Limitation of actions — Actions in tort — Statutory limitation periods — When statute commences to run — Continuing torts

Vehicles operated by plaintiff, driver and another person were involved in accident in 1997 — Driver died in 1998 of causes unrelated to accident — Letters of Administration were granted to driver's administratrix in February 1999 — In October 1999, plaintiff issued statement of claim — Insurer applied to have action dismissed — Trial judge determined that plaintiff's action was not statute-barred — On appeal, it was determined that estoppel by convention had been established — Insurer and administratrix were estopped from pleading that driver had died or that letters of administration were granted prior to May 2000 in order to invoke shorter Survival of Actions Act limitation period — Insurer and driver's estate by his administratrix appealed — Appeal allowed — Statement of claim was struck at all levels of court — Plaintiff met prescribed limitation period in Limitations Act — Section 5 of Survival of Actions Act prohibits action brought six months after letters of probate or administration of estate of deceased have been granted and after expiration of one year from date of death — Judge-made discoverability rule did not apply to extend period legislature prescribed — By using specific event as starting point for "limitation clock", legislature was displacing discoverability rule in all situations to which Survival of Actions Act applied — Driver's subsequent death had no impact whatsoever on accrual of plaintiff's cause of action — Survival of Actions Act was itself legislative exception to common law rule and it would displace intention of legislature to stretch limitation period.

Civil practice and procedure --- Limitation of actions — Actions in tort — Statutory limitation periods — When statute commences to run — General

Survival of Actions Act — Vehicles operated by plaintiff, driver and another person were involved in accident in 1997 — Driver died in 1998 of causes unrelated to accident — Letters of Administration were granted to driver's administratrix in February 1999 — In October 1999, plaintiff issued statement of claim — Insurer applied to have action dismissed — Trial judge determined that plaintiff's action was not statute-barred — On appeal, it was determined that estoppel by convention had been established — Insurer and administratrix were estopped from pleading that driver had died or that letters of administration were granted prior to May 2000 in order to invoke shorter Survival of Actions Act limitation period — Insurer and driver's estate by his administratrix appealed — Appeal allowed — Statement of claim was struck at all levels of court — Plaintiff met prescribed limitation period in Limitations Act — Section 5 of Survival of Actions Act prohibits action brought six months after letters of probate or administration of estate of deceased have been granted and after expiration of one year from date of death — Judge-made discoverability rule did not apply to extend period legislature prescribed — By using specific event as starting point for "limitation clock", legislature was displacing discoverability rule in all situations to which Survival of Actions Act applied — Driver's subsequent death had no impact whatsoever on accrual of plaintiff's cause of action — Survival of Actions Act was itself legislative exception to common law rule and it would displace intention of legislature to stretch limitation period.

Civil practice and procedure --- Limitation of actions — Actions in tort — Statutory limitation periods — Suspension and interruption of statute — Confirmation of cause of action

Accident involving three vehicles took place in 1997 — Driver died in 1998 of causes unrelated to accident — Letters of Administration were granted to driver's administratrix in February 1999 — In October 1999, plaintiff issued statement of claim — Insurer applied to have action dismissed — Trial judge determined that plaintiff's action was not statute-barred — On appeal, it was determined that estoppel by convention had been established — Insurer and administratrix were estopped from pleading that driver had died or that letters of administration were granted prior to May 2000 in order to invoke shorter Survival of Actions Act limitation period — Insurer and driver's estate by his administratrix appealed — Appeal allowed — Statement of claim was struck at all levels of court — Section 16 of Limitations Act could only apply to limitation period which limits time during which action can be taken — Since limitation period which arises under Survival of Actions Act superseded first limitation period of Limitations Act, and did not create or revive action, s. 16 could not apply.

Estoppel --- Estoppel in pais — Elements — Detrimental reliance — Sufficiency of prejudice

Accident involving three vehicles took place in 1997 — Driver died in 1998 of causes unrelated to accident — Letters of Administration were granted to driver's administratrix in February 1999 — In October 1999, plaintiff issued statement of claim — Insurer applied to have action dismissed — Trial judge determined that plaintiff's action was not statute-barred — On appeal, it was determined that estoppel by convention had been established — Insurer and administratrix were estopped from pleading that driver had died or that letters of administration were granted prior to May 2000 in order to invoke shorter Survival of Actions Act limitation period — Insurer and driver's estate by his administratrix appealed — Appeal allowed — Statement of claim was struck at all levels of court — Mutual assent distinguished estoppel by convention from other types of estoppel — Exchanged letters did not prove existence of common assumption — Court of Appeal erred by giving weight to subject line of letters — Fact that parties were conferring without regard to limitation period did not establish shared assumption that limitation defence would not be relied on — Not only did plaintiff not rely on alleged assumption but his conduct did not show intention to affect legal relations between parties — There were no reasons based on estoppel, or any other legal doctrine, to preclude driver's estate or insurer from relying on Survival of Actions Act limitation period.

Procédure civile --- Prescription des actions — Successions — Réclamation contre la succession — En matière de responsabilité délictuelle

Véhicules conduits par le demandeur, le conducteur et une autre personne ont été impliqués dans un accident en 1997 — Conducteur est décédé en 1998 de causes non liées à l'accident — Lettres d'administration ont été délivrées à l'administratrice de la succession du conducteur en février 1999 — Demandeur a déposé une déclaration en octobre 1999 — Assureur a demandé le rejet de l'action — Premier juge a estimé que l'action du demandeur n'était pas prescrite — Il a été décidé, en appel, que l'on avait démontré l'existence de la préclusion par convention — Assureur et administratrice étaient préclus d'invoquer le délai de prescription plus court fixé par la Survival of Actions Act en faisant valoir que le conducteur était décédé ou que des lettres d'administration avaient été délivrées avant le mois de mai 2000 — Assureur et administratice, au nom de la succession du conducteur, ont interjeté appel — Pourvoi accueilli — Déclaration a été radiée à toutes les instances judiciaires — Demandeur satisfaisait au délai de prescription prévu par la Limitations Act — Article 5 de la Survival of Actions Act interdit l'action intentée plus de six mois après la délivrance des lettres d'homologation ou d'administration de la succession du défunt et après l'expiration d'un an suivant la date du décès — Règle prétorienne sur la possibilité de découvrir le dommage ne pouvait permettre d'allonger le délai de prescription prévu par le législateur — En désignant un fait particulier comme élément déclencheur du « compte à rebours de la prescription », le législateur se trouvait à écarter la règle de la possibilité de découvrir le dommage dans tous les cas où la Survival of Actions Act s'appliquait — Décès subséquent du conducteur n'avait absolument aucune incidence sur la naissance de la cause d'action du demandeur — Survival of Actions Act constituait en soi une exception législative à la règle de common law; prolonger le délai de prescription aurait pour effet d'écarter l'intention du législateur.

Procédure civile --- Prescription des actions — Actions en responsabilité délictuelle — Délais de prescription prévus par la loi — Point de départ du délai de prescription — Délits civils continus

Véhicules conduits par le demandeur, le conducteur et une autre personne ont été impliqués dans un accident en 1997 — Conducteur est décédé en 1998 de causes non liées à l'accident — Lettres d'administration ont été délivrées à l'administratrice de la succession du conducteur en février 1999 — Demandeur a déposé une déclaration en octobre 1999 — Assureur a demandé le rejet de l'action — Premier juge a estimé que l'action du demandeur n'était pas prescrite — Il a été décidé, en appel, que l'on avait démontré l'existence de la préclusion par convention — Assureur et administratrice étaient préclus d'invoquer le délai de prescription plus court fixé par la Survival of Actions Act en faisant valoir que le conducteur était décédé ou que des lettres d'administration avaient été délivrées avant le mois de mai 2000 — Assureur et administratice, au nom de la succession du conducteur, ont interjeté appel — Pourvoi accueilli — Déclaration a été radiée à toutes les instances judiciaires — Demandeur satisfaisait au délai de prescription prévu par la Limitations Act — Article 5 de la Survival of Actions Act interdit l'action intentée plus de six mois après la délivrance des lettres d'homologation ou d'administration de la succession du défunt et après l'expiration d'un an suivant la date du décès — Règle prétorienne sur la possibilité de découvrir le dommage ne pouvait permettre d'allonger le délai de prescription prévu par le législateur — En désignant un fait particulier comme élément déclencheur du « compte à rebours de la prescription », le législateur se trouvait à écarter la règle de la possibilité de découvrir le dommage dans tous les cas où la Survival of Actions Act s'appliquait — Décès subséquent du conducteur n'avait absolument aucune incidence sur la naissance de la cause d'action du demandeur — Survival of Actions

Act constituait en soi une exception législative à la règle de common law; prolonger le délai de prescription aurait pour effet d'écarter l'intention du législateur.

Procédure civile --- Prescription des actions — Actions en responsabilité délictuelle — Délais de prescription prévus par la loi — Point de départ du délai de prescription — En général

Survival of Actions Act — Véhicules conduits par le demandeur, le conducteur et une autre personne ont été impliqués dans un accident en 1997 — Conducteur est décédé en 1998 de causes non liées à l'accident — Lettres d'administrations ont été délivrées à l'administratrice de la succession du conducteur en février 1999 — Demandeur a déposé une déclaration en octobre 1999 — Assureur a demandé le rejet de l'action — Premier juge a estimé que l'action du demandeur n'était pas prescrite — Il a été décidé, en appel, que l'on avait démontré l'existence de la préclusion par convention — Assureur et administratrice étaient préclus d'invoquer le délai de prescription plus court fixé par la Survival of Actions Act en faisant valoir que le conducteur était décédé ou que des lettres d'administration avaient été délivrées avant le mois de mai 2000 — Assureur et administratice, au nom de la succession du conducteur, ont interjeté appel — Pourvoi accueilli — Déclaration a été radiée à toutes les instances judiciaires — Demandeur satisfaisait au délai de prescription prévu par la Limitations Act — Article 5 de la Survival of Actions Act interdit l'action intentée plus de six mois après la délivrance des lettres d'homologation ou d'administration de la succession du défunt et après l'expiration d'un an suivant la date du décès — Règle prétorienne sur la possibilité de découvrir le dommage ne pouvait permettre d'allonger le délai de prescription prévu par le législateur — En désignant un fait particulier comme élément déclencheur du « compte à rebours de la prescription », le législateur se trouvait à écarter la règle de la possibilité de découvrir le dommage dans tous les cas où la Survival of Actions Act s'appliquait — Décès subséquent du conducteur n'avait absolument aucune incidence sur la naissance de la cause d'action du demandeur — Survival of Actions Act constituait en soi une exception législative à la règle de common law; prolonger le délai de prescription aurait pour effet d'écarter l'intention du législateur.

Procédure civile --- Prescription des actions — Actions en responsabilité délictuelle — Délais de prescription prévus par la loi — Suspension et interruption de la prescription — Confirmation de la cause d'action

Accident impliquant trois véhicules a eu lieu en 1997 — Conducteur est décédé de causes non liées à l'accident en 1998 — Lettres d'administration ont été délivrées à l'administratrice du conducteur en février 1999 — Demandeur a déposé une déclaration en octobre 1999 — Assureur a demandé le rejet de l'action — Premier juge a estimé que l'action du demandeur n'était pas prescrite — Il a été décidé, en appel, que l'on avait démontré l'existence de la préclusion par convention — Assureur et administratrice étaient préclus d'invoquer le délai de prescription plus court fixé par la Survival of Actions Act en faisant valoir que le conducteur était décédé ou que des lettres d'administration avaient été délivrées avant le mois de mai 2000 — Assureur et administratice, au nom de la succession du conducteur, ont interjeté appel — Pourvoi accueilli — Déclaration a été radiée à toutes les instances judiciaires — Article 16 de la

Limitations Act n'était applicable qu'au délai de prescription qui restreint le délai dans lequel l'action peut être intentée — Article 16 ne pouvait s'appliquer, étant donné que le délai de prescription prévu par la Survival of Actions Act supplantait le délai de prescription prévu par la Limitations Act et ne pouvait créer l'action ou la faire vivre à nouveau.

Préclusion --- Préclusion en raison de la conduite — Éléments — Acte de confiance préjudiciable — Suffisance du préjudice

Accident impliquant trois véhicules a eu lieu en 1997 — Conducteur est décédé de causes non liées à l'accident en 1998 — Lettres d'administration ont été délivrées à l'administratrice du conducteur en février 1999 — Demandeur a déposé une déclaration en octobre 1999 — Assureur a demandé le rejet de l'action — Premier juge a estimé que l'action du demandeur n'était pas prescrite — Il a été décidé, en appel, que l'on avait démontré l'existence de la préclusion par convention — Assureur et administratrice étaient préclus d'invoquer le délai de prescription plus court fixé par la Survival of Actions Act en faisant valoir que le conducteur était décédé ou que des lettres d'administration avaient été délivrées avant le mois de mai 2000 — Assureur et administratice, au nom de la succession du conducteur, ont interjeté appel — Pourvoi accueilli — Déclaration a été radiée à toutes les instances judiciaires — Assentiment réciproque distingue la préclusion par convention des autres types de préclusion — Lettres échangées n'établissaient pas l'existence d'une présupposition commune — Cour d'appel a commis une erreur en accordant de l'importance à la mention de l'objet de ces lettres — Fait que les parties se soient entretenues sans tenir compte du délai de prescription n'établissait pas non plus l'existence d'une présupposition commune que la prescription ne serait pas invoquée comme moyen de défense — Non seulement le demandeur ne s'est pas fondé sur la présupposition alléguée, mais son comportement ne démontrait pas d'intention d'affecter les rapports juridiques entre les parties — Aucuns motifs fondés sur la préclusion, ou fondés sur toute autre doctrine juridique, n'existaient pour empêcher la succession du conducteur ou l'assureur de celui-ci d'invoquer le délai de prescription prévu par la Survival of Actions Act.

Vehicles operated by the plaintiff, the driver and another person were involved in an accident in November 1997. Correspondence was exchanged between the plaintiff and the adjuster assigned by the driver's insurer. The plaintiff forwarded his hospital chart to the adjuster and was reimbursed. In December 1998, the driver died of causes unrelated to the accident. In January 1999, the adjuster wrote to the plaintiff and referred to the driver as "Our Insured". Letters of Administration were granted to the driver's administratrix in February. A cheque for payment of a medical report was forwarded by the adjuster and the driver was referred to as "Our Insured". The plaintiff issued his statement of claim in October 1999. The plaintiff wrote to the adjuster referring to the driver as "Your Insured". The adjuster learned of the driver's death in May 2000. The plaintiff learned of the driver's death in September 2000. In November 2000, the insurer refused to settle the plaintiff's claim because the action was outside the limitation period.

The insurer applied to intervene in the proceedings and sought an order striking out the statement of claim as being out of time. The plaintiff applied to amend the description of the driver in the statement of claim. The applications judge dismissed the application to have the action dismissed. The insurer appealed and the plaintiff cross-appealed. The majority of the Court of Appeal allowed, in part, both the appeal and the cross-appeal. The applications judge's order to permit the intervention of the insurer and the amendment of the statement of claim was affirmed. The majority held that the applications judge had erred in holding that the cause of action against the driver was a cause of action to which the Survival of Actions Act did not apply. The majority held that the applications judge had erred in holding that the confirmation provisions of the Limitations Act also applied to the limitation period under the Survival of Actions Act. The majority held that the driver's estate and the insurer were barred by the principle of estoppel from relying on the fact of the driver's death and the granting of letters of administration. As a result, nullity could not be established and the statement of claim was amended to name the driver's administratrix as defendant in the action. The insurer and the driver's estate by his administratrix appealed.

Held: The appeal was allowed and the statement of claim struck at all levels of court.

The situation was governed by two limitation periods: s. 5 of the Limitations Act and s. 5 of the Survival of Actions Act. The plaintiff met the prescribed limitation period in the Limitations Act. Section 5 of the Survival of Actions Act prohibits an action brought six months after letters of probate or administration of the estate of the deceased have been granted and after the expiration of one year from the date of death. Pursuant to the Survival of Actions Act, the limitation period is triggered by the death of the defendant or the granting by a court of the letters of administration or probate. The Survival of Actions Act does not establish a relationship between these events and the injured party's knowledge. The judge-made discoverability rule did not apply to extend the period the legislature had prescribed. By using a specific event as the starting point of the "limitations clock", the legislature was displacing the discoverability rule in all situations to which the Survival of Actions Act applied. The plaintiff's cause of action arose prior to the driver's death and the plaintiff was aware of his cause of action before the driver's death and before the expiration of the Survival of Actions Act limitation period. The plaintiff did not need to have knowledge of the death to prove his claim or to issue and serve the statement of claim. The driver's subsequent death had no impact whatsoever on the accrual of the plaintiff's cause of action. The Survival of Actions Act was itself a legislative exception to a common law rule. It would displace the intention of the legislature to stretch the limitation period.

Section 16 of the Limitations Act can only apply to a limitation period which limits the time during which an action may be taken. Since the limitation period which arises under the Survival of Actions Act supersedes the first limitation period of the Limitations Act, and does not create or revive an action, s. 16 cannot apply to it.

Mutual assent is what distinguishes estoppel by convention from other types of estoppel. It is not enough that each of the two parties acts on an assumption not communicated to the other. The estopped party must have communicated to the other that he or she was indeed sharing the other party's mistaken assumption. None of the letters exchanged by the plaintiff and the adjuster with respect to the plaintiff's personal injury claim proved the existence of a common assumption. The mere fact that communications occurred between the parties did not establish that they both assumed that the driver was alive. The Court of Appeal erred by giving weight to the subject line of the letters which, properly interpreted, provided no evidence of a mutual assumption that the driver was alive. The fact that the parties were conferring without regard to the limitation period did not establish a shared assumption that the limitation defence would not be relied on. Even if one were to assume the existence of a communicated common assumption between the parties, there was no evidence that the plaintiff relied upon this assumption. The plaintiff never put his mind to the shorter Survival of Actions Act limitation period. From the date of the accident to the date of the expiry of the Survival of Actions Act limitation period, there was never any discussion by the plaintiff of the limitation period. Not only did the plaintiff not rely on this alleged assumption, but his conduct did not show an intention to affect the legal relations between the parties. Given that there was no shared assumption or reliance, the detriment criterion did not need to be addressed.

Silence or inaction would be considered a representation if a legal duty was owed by the representor to the representee to make a disclosure or to take steps the omission of which was relied upon as creating an estoppel. There was no duty on the insurer or the administratrix, who were at the time only potential defendants, to advise the plaintiff of a limitation period, to assist him in the prosecution of the claim or to advise him of the consequences of the death of one of the parties. There was no representation, no duty to speak, no intention to affect legal relations and no reliance. There were no reasons based on estoppel, or any other legal doctrine, to preclude the driver's estate or the insurer from relying on the Survival of Actions Act limitation period.

Les véhicules conduits par le demandeur, le conducteur et une autre personne ont été impliqués dans un accident en novembre 1997. Des lettres ont été échangées entre le demandeur et l'expert en sinistres nommé par l'assureur du conducteur. Le demandeur a envoyé à l'expert en sinistres son dossier hospitalier et a été remboursé. Le conducteur est décédé de causes non liées à l'accident en décembre 1998. En janvier 1999, l'expert en sinistres a écrit au demandeur, faisant référence au conducteur comme « Notre assuré ». Les lettres d'administration ont été délivrées à l'administratrice de la succession du conducteur en février. L'expert en sinistres a envoyé un chèque pour payer pour la copie du rapport médical et le conducteur y était indiqué comme étant « Notre assuré ». Le demandeur a déposé sa déclaration en octobre 1999. Il a écrit à l'expert en sinistres en indiquant que le conducteur était « Votre assuré ». L'expert en sinistres a été informé du décès du conducteur en mai 2000. Le demandeur a été informé du décès du conducteur en septembre 2000. En novembre 2000, l'assureur a refusé de payer la réclamation du demandeur au motif que son action était prescrite.

L'assureur a demandé la permission d'intervenir dans les procédures et a demandé une ordonnance radiant la déclaration parce que prescrite. Le demandeur a demandé la permission de modifier la description du conducteur dans la déclaration. La demande de rejet de l'action a été rejetée par le juge qui en était saisi. L'assureur a interjeté appel et le demandeur a fait un pourvoi incident. Les juges majoritaires de la Cour d'appel ont accueilli en partie le pourvoi et le pourvoi incident. Ils ont confirmé l'ordonnance du premier juge permettant l'intervention de l'assureur et la modification de la déclaration. Ils ont par ailleurs estimé que le premier juge s'était trompé en concluant que la cause d'action contre le conducteur était une cause d'action non visée par la Survival of Actions Act. Ils ont conclu que le premier juge avait commis une erreur en statuant que les dispositions de la Limitations Act relatives à la confirmation s'appliquent également au délai de prescription fixé par la Survival of Actions Act. Ils ont estimé que la règle de la préclusion empêchait la succession du conducteur et l'assureur d'invoquer le décès du conducteur et la délivrance des lettres d'administration. Par conséquent, la nullité ne pouvait être établie et la déclaration a été modifiée afin de désigner l'administratrice de la succession du conducteur comme partie défenderesse dans l'action. L'assureur et l'administratrice, au nom de la succession du conducteur, ont interjeté appel.

Arrêt: Le pourvoi a été accueilli et la déclaration a été radiée à toutes les instances.

La situation était régie par deux délais de prescription: l'art. 5 de la Limitations Act et l'art. 5 de la Survival of Actions Act. Le demandeur a respecté le délai de prescription prévu par la Limitations Act. Par ailleurs, l'art. 5 de la Survival of Actions Act prévoit qu'aucune action ne peut être intentée après les six mois qui suivent la délivrance de lettres d'homologation ou d'administration de la succession du défunt et après l'expiration d'un délai d'un an suivant la date du décès. Selon la Survival of Actions Act, le délai de prescription commence à courir à partir du décès du défendeur ou de la délivrance, par le tribunal, des lettres d'administration ou d'homologation. La Survival of Actions Act n'établit aucun lien entre ces faits et le moment où la partie lésée en prend connaissance. La règle prétorienne de la possibilité de découvrir le dommage ne s'appliquait pas pour prolonger le délai fixé par le législateur. En désignant un fait particulier comme élément déclencheur du « compte à rebours de la prescription », le législateur se trouvait à écarter la règle de la possibilité de découvrir le dommage dans tous les cas où la Survival of Actions Act s'appliquait. La cause d'action du demandeur a pris naissance avant le décès du conducteur; le demandeur était bien au fait de sa cause d'action tant avant le décès qu'avant l'expiration du délai de prescription fixé par la Survival of Actions Act. Le demandeur n'avait pas besoin d'être au courant du décès pour établir le bien-fondé de sa réclamation ou pour déposer et signifier sa déclaration. Le décès subséquent du conducteur n'avait absolument aucune incidence sur la naissance de la cause d'action du demandeur. La Survival of Actions Act constituait en soi une exception législative à une règle de common law. Prolonger le délai de prescription aurait pour effet d'écarter l'intention du législateur.

L'article 16 de la Limitations Act ne peut s'appliquer qu'au délai dans lequel une action peut être intentée. Il ne pouvait s'appliquer, parce que le délai de prescription prévu par la Survival of Actions Act supplantait le délai de prescription prévu par la Limitations Act et ne pouvait créer l'action ou la faire vivre à nouveau.

C'est l'assentiment réciproque qui distingue la préclusion par convention des autres types de préclusion. Il ne suffit pas que chacune des deux parties agisse sur la foi d'une présupposition non communiquée à l'autre. La partie précluse doit avoir informé l'autre qu'elle partageait effectivement sa présupposition erronée. Aucune des lettres échangées par le demandeur et l'expert en sinistres, relativement à la réclamation du demandeur pour le préjudice corporel subi, n'établissait l'existence d'une présupposition commune. Le simple fait que les parties aient communiqué entre elles n'établissait pas le fait qu'elles avaient toutes deux présupposé que le conducteur était en vie. La Cour d'appel a commis une erreur en accordant de l'importance à la mention de l'objet de ces lettres qui, interprétée correctement, n'établissait pas l'existence d'une présupposition commune que le conducteur était vivant. Le fait que les parties se soient entretenues sans tenir compte du délai de prescription n'établissait pas non plus l'existence d'une présupposition commune que la prescription ne serait pas invoquée comme moyen de défense. Même si l'on pouvait présumer l'existence d'une présupposition commune entre les parties, rien n'établissait que le demandeur s'était fondé sur cette présupposition. Le demandeur ne s'est jamais préoccupé du délai de prescription plus court prévu par la Survival of Actions Act. Entre la date de l'accident et celle de l'expiration du délai de prescription fixé par la Survival of Actions Act, le demandeur n'a jamais abordé la question du délai de prescription. Non seulement le demandeur ne s'est pas fondé sur la présupposition alléguée, mais son comportement ne démontrait aucune intention d'affecter les rapports juridiques entre les parties. Étant donné l'absence de présupposition commune ou d'acte de confiance, il n'est pas nécessaire d'examiner le critère du préjudice.

Le silence ou l'inaction seront considérés comme une assertion si l'auteur de l'assertion avait envers le destinataire de celle-ci une obligation légale de divulguer ou de prendre des mesures, et que l'omission de le faire est invoquée comme donnant lieu à la préclusion. Ni l'assureur ni l'administratrice, qui étaient à l'époque des défendeurs éventuels, n'avaient l'obligation d'informer le demandeur de l'existence d'un délai de prescription, de l'aider à intenter son action ou de l'informer des conséquences du décès d'une partie. Il n'y avait aucune assertion, aucune obligation de parler, aucune intention de modifier les rapports juridiques ni aucun acte de confiance. Aucuns motifs fondés sur la préclusion, ou fondés sur toute autre doctrine juridique, n'existaient pour empêcher la succession du conducteur ou l'assureur de celui-ci d'invoquer le délai de prescription prévu par la Survival of Actions Act.

APPEAL by insurer and driver's estate by his administratrix from judgment reported at *Ryan v. Moore* (2003), 2003 NLCA 19, 2003 CarswellNfld 109, 50 E.T.R. (2d) 8, 224 Nfld. & P.E.I.R. 181, 669 A.P.R. 181 (N.L. C.A.), allowing appeal from dismissal of application for dismissal of action.

POURVOI de l'assureur et de l'administratrice, au nom de la succession du conducteur, à l'encontre de l'arrêt publié à *Ryan v. Moore* (2003), 2003 NLCA 19, 2003 CarswellNfld 109, 50 E.T.R. (2d) 8, 224 Nfld. & P.E.I.R. 181, 669 A.P.R. 181 (N.L. C.A.), qui a accueilli le pourvoi à l'encontre du jugement rejetant la demande visant à obtenir le rejet de l'action.

***Bastarache J.*:**

1 We are asked to decide whether or not a shortened limitation period under s. 5 of the Survival of Actions Act, R.S.N.L. 1990, c. S-32 (see Appendix A), applicable upon the death of one of the parties to an action, can be enforced against a party who had no knowledge of the death until after the limitation period had expired. The respondent, Peter Ryan ("Ryan"), argues that the answer should be no; he invoked in front of our Court and in the courts below a number of legal principles which I shall address: discoverability, confirmation, estoppel by convention and estoppel by representation. The issue of estoppel was raised for the first time by the Court of Appeal itself.

2 The discoverability rule dictates that a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence (*Central & Eastern Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 (S.C.C.), at p. 224).

3 Section 16(1) of the Limitations Act, S.N.L. 1995, c. L-16.1 (see Appendix A), prescribes that confirmation of a cause of action occurs when a person acknowledges the cause of action of another person or makes a payment in respect of that cause of action. Thus, at that moment, the limitation clock is restarted, and the time before the date of the confirmation will not be counted.

4 Estoppel by convention operates where the parties have agreed that certain facts are deemed to be true and to form the basis of the transaction into which they are about to enter (G. H. L. Fridman, *The Law of Contract in Canada* (4th ed. 1999), at p. 140, note 302). If they have acted upon the agreed assumption , then, as regards that transaction, each is estopped against the other from questioning the truth of the statement of facts so assumed if it would be unjust to allow one to go back on it (S. Bower, *The Law Relating to Estoppel by Representation* (4th ed. 2004), at pp. 7-8).

5 Estoppel by representation requires a positive representation made by the party whom it is sought to bind, with the intention that it shall be acted on by the party with whom he or she is dealing, the latter having so acted upon it as to make it inequitable that the party making the representation should be permitted to dispute its truth, or do anything inconsistent with it (*Page v. Austin* (1884), 10 S.C.R. 132 (S.C.C.), at p. 164).

6 None of these doctrines can find application in the present case. I will address each of these doctrines and in most cases adopt the reasons of the Court of Appeal with mere comment. One legal concept requires more attention from this Court, given that it is being asked to develop a legal test with regard to its application: estoppel by convention.

I. Background

A. Facts

7 On November 27, 1997, three vehicles were involved in an accident. They were operated by the respondent, Ryan, the appellant, Rex Gilbert Moore, and a third party (not involved in this matter), David Crummey. Ryan decided to pursue a personal injury claim against Moore. He was unaware that, on December 26, 1998, Moore had died of causes unrelated to the accident. On February 16, 1999, Letters of Administration were granted to Moore's administratrix, Muriel Smith. On October 28, 1999, Ryan issued his statement of claim; it was within the two-year limitation period prescribed by the *Limitations Act*, but outside the applicable six-month limitation period from the granting of the letters of administration under the *Survival of Actions Act*. Ryan argues that the appellant is estopped from relying upon the shorter limitation period. Alternatively, he argues that the discoverability principle or the confirmation rule apply to extend this shorter limitation period.

8 As this case is centred on issues related to limitation periods, it is important to recollect the

important events leading up to this litigation:

November 27, 1997	The accident
November 28, 1997	Cabot Insurance Co. ("Cabot Insurance") appoints adjuster Brian Lacey to look after the claim against its insured Moore.
December 1997 - December 1998	Ryan retains counsel who contacts the adjuster advising of his retainer and that Ryan, while his injuries are being assessed, will pursue his property damage claim directly with the adjuster. Cabot Insurance pays Ryan's property damage claim directly to him. Correspondence is exchanged between Ryan's counsel and the adjuster concerning Ryan's medical condition, the adjuster seeking documentation and updates on Ryan's condition, and the counsel providing the information requested. The counsel forwards Ryan's hospital chart to the adjuster, for which Cabot Insurance reimburses counsel the $40 fee.
December 26, 1998	Moore dies at age 75 from causes unrelated to the accident.
January 25, 1999	The adjuster writes to Ryan's counsel seeking medical information and reiterating that the insurer would pay a reasonable fee for a medical report. He refers to Moore as "Our Insured".
February 16, 1999	Letters of Administration of the Estate of Rex Moore are granted to Muriel Smith.
April 5, 1999	Ryan's counsel forwards to the adjuster an invoice for a medical report of Ryan's examination by an orthopaedic surgeon.
July 29, 1999	The adjuster forwards to Ryan's counsel a cheque for payment of the medical report. The cheque is payable to Dr. Landells. He refers to Moore as "Our Insured".
August 16, 1999	Six months have passed since the grant of letters of administration of Moore's estate.
October 28, 1999	The statement of claim is issued naming Rex Moore as defendant.

February 10, 2000	Ryan's counsel writes to the adjuster seeking payment for the cost of obtaining the chart from Ryan's family physician. He refers to Moore as "Your Insured"
March 2, 2000	Ryan's counsel writes to the adjuster requesting payment for the chart of another physician. He refers to Moore as "Your Insured".
May 18, 2000	The adjuster learns of Moore's death.
September 22, 2000	Ryan's counsel learns of Moore's death after attempting to serve the statement of claim.
October 24, 2000	Ryan's counsel suggests to Cabot Insurance's claims examiner, Valerie Moore, in a meeting (to discuss claims unrelated to this case) that there might be a problem with the limitation period.
November 9, 2000	Cabot Insurance refuses to settle Ryan's claim because the action is outside the limitation period.

9 Cabot Insurance applied to intervene in the proceedings and sought an order striking out the statement of claim for being out of time. It further claimed that the statement of claim naming a dead person as defendant was a nullity and was not capable of being amended. Ryan also filed an application to amend the statement of claim to describe the defendant as "Rex Moore, Deceased, by his administratrix, Muriel Smith".

B. Supreme Court of Newfoundland and Labrador ((2001), 205 Nfld. & P.E.I.R. 211 (Nfld. T.D.))

10 At the Supreme Court of Newfoundland and Labrador, Orsborn J. denied Cabot Insurance's application to have the action dismissed. First, he held that the discoverability rule did not apply to postpone the running of the *Survival of Actions Act* limitation period, since the fact of death was not an element of the cause of action and was not required to complete the cause of action (paras. 50-51). Second, Orsborn J. held that the confirmation provisions of s. 16 of the Limitations Act are not expressly confined to the limitation periods fixed by the *Limitations Act*. He saw no reason in principle why a cause of action continued under the *Survival of Actions Act* could not be confirmed and the limitation period fixed by that Act thus continued. He concluded that Cabot Insurance's payment for the medical report on July 29, 1999 constituted a confirmation of Ryan's cause of action. Since the action was commenced within six months of this payment, the proceeding was still within the short *Survival of Actions Act* limitation period and was not statute barred (paras. 52-63). Third, Orsborn J. concluded that in any event, on the facts of this case, the cause of action against Moore was not a cause of action to which the *Survival of Actions Act* applies. The *Survival of Actions Act* permits a cause of action to survive "for the benefit of or against" an estate (s. 2(b)). The *Survival of Actions Act* deals with the potential acquisition or dissipation of estate assets. However, in this case, Ryan's claim poses no risk to

the assets of the estate. Instead, the risk lies on the insurer. Moore was a defendant in name only, and the real party to the action was the insurer. Thus, Ryan's cause of action was not extinguished on Moore's death (paras. 66-76). Fourth, Orsborn J. held that if Ryan's cause of action had not been confirmed and if the *Survival of Actions Act* was indeed applicable (which he held it was not), then the action would have been a nullity for being commenced outside the limitation period. However, as this was not the case, the plaintiff was not statute barred.

C. Court of Appeal of Newfoundland and Labrador ((2003), 224 Nfld. & P.E.I.R. 181, 2003 NLCA 19 (N.L. C.A.))

(1) Wells C.J. (for the majority)

11 The majority of the Court of Appeal allowed, in part, both the appeal and cross-appeal. The applications judge's order to permit the intervention of Cabot Insurance and the amendment of the statement of claim was affirmed. Wells C.J. held that the applications judge made no error in considering the existence of insurance in determining whether or not the action posed a financial risk to the estate. He nevertheless held that the applications judge erred in holding that the cause of action against Moore is a cause of action to which the *Survival of Actions Act* did not apply. The court explained that unless the *Survival of Actions Act* applies, the action will be a nullity. The right to institute a tort action after death, or continue an action after death, derives from the statute. Without such a statute, this right does not otherwise exist.

12 The majority agreed with the applications judge that the discoverability rule does *not* apply to postpone the running of the limitation period under the *Survival of Actions Act*. Concluding that the limitation period in the statute runs from an event that occurs without regard to the injured party's knowledge, the majority deemed that allowing the application of the discoverability rule would disrupt the exception to the common law rule, the courts thereby intruding into the legislature's jurisdiction.

13 The majority disagreed with Orsborn J.'s holding that the confirmation provisions of the *Limitations Act* also apply to the limitation period under the *Survival of Actions Act*. Wells C.J. held that s. 16 of the Limitations Act provides confirmation of a cause of action and not of the right to commence it. The majority pointed out that the nature of the cause of action, or whether it is confirmed, is not relevant to the date of death or of grant of probate which triggers the limitation period created by the *Survival of Actions Act*. Confirmation did not arise in relation to the limitation period stemming from the *Limitations Act* because the statement of claim was issued within two years of the collision, i.e. within the prescribed delay.

14 Turning to the last issue, the majority held that Moore's estate and Cabot Insurance were barred by the principle of estoppel from relying on the fact of Moore's death and the granting of letters of administration. The particular form of estoppel invoked was estoppel by convention. Wells C.J., having reviewed Canadian and foreign authorities and decisions, concluded that estoppel by convention was established (para. 79). The majority held that detrimental reliance was not required. Consequently, Cabot Insurance and Moore were estopped from pleading that Moore died or that letters of

administration were granted prior to May 2000 in order to invoke the shorter *Survival of Actions Act* limitation period. As a result, nullity could not be established and the statement of claim was amended to name the administratrix of Moore as defendant in the action.

(2) Cameron J.A. (dissenting)

15 In dissenting reasons, concurred in by Welsh J.A., Cameron J.A. disagreed with the estoppel analysis and held that it did not apply to the case at bar. After analysing case law and doctrine, she concluded that mutual misunderstanding (both parties assuming that Moore was alive) did not amount to a common assumption. The dissenting judges did not find that the letters sent by Cabot Insurance to Ryan's counsel referring to "Our Insured — Rex Moore" formed the basis on which the parties governed their conduct. The failure to commence the action within the *Survival of Actions Act*'s limitation period was *not* due to any arrangement between the parties, and consequently, there was no reliance on any convention. Therefore, this principle did not apply. Ryan's action was therefore time barred. The dissenting judges would have allowed the appeal.

II. Analysis

A. Discoverability

(1) Statutory Limitation Periods

16 The situation here is governed by two limitation periods: s. 5 of the Limitations Act (see Appendix A) and s. 5 of the Survival of Actions Act. The limitation period in s. 5 of the Limitations Act applies initially. Section 5 of the Survival of Actions Act superimposes itself on s. 5 at a later point of time, but does not eliminate it. This follows from the fact that the *Survival of Actions Act* does not create a new cause of action, as will be explained later.

17 Pursuant to s. 5 of the Limitations Act, a person can bring an action for damages in respect of injury based on contract or tort within two years of the date on which the right to do so arose. Ryan, by issuing a statement of claim on October 28, 1999, naming Rex Moore as the defendant, therefore, met the prescribed limitation period in the *Limitations Act*. Nevertheless, unknown to the parties, Rex Moore had died on December 26, 1998, altering the fact scenario.

18 As stated by the Court of Appeal, it is well known that at common law a personal action in tort is extinguished on the death of the victim or the wrongdoer: *actio personalis moritur cum persona* (see G. Mew, *The Law of Limitations* (2nd ed. 2004), at p. 253). Being unable to sue the estate of a deceased tortfeasor was particularly severe as it left injured survivors of motor vehicle accidents without any means of recovery. This led legislatures to enact statutes to diminish the hardship of the common law rule. The Fatal Accidents Act, R.S.N.L. 1990, c. F-6, and the *Survival of Actions Act* were such statutes. Under the *Fatal Accident Act*, the estate of a person who died as a result of the accident, or the survivors of that person, are accorded the right to maintain an action for death by wrongful act. Also, pursuant to s. 2 of the Survival of Actions Act, (see Appendix A) an action vested in or existing against a person who has died can be maintained by or against the deceased person's estate. However, s. 5 of the Survival of

Actions Act prohibits an action brought six months after letters of probate or administration of the estate of the deceased have been granted, and after the expiration of one year from the date of death. Hence, the provision is meant to keep the action "alive" for a specific period of time. The *Survival of Actions Act* imposes an additional limitation period. As eloquently affirmed by Orsborn J., the *Survival of Actions Act* does not create a cause of action. It grafts its provision onto an existing cause of action, one which is complete in all of its elements before the operation of the *Survival of Actions Act* (para. 45).

19 In the case at bar, the *Survival of Actions Act* has the effect of shortening the time period within which the action could be taken because "an action founded in tort may only be taken by or against the estate of a deceased person if it is commenced within that period of time that is common to both limitations periods": Wells C.J., at para. 37.

20 Ryan argues that the *Survival of Actions Act* contemplates that a cause of action can arise under the *Survival of Actions Act*. I fail to see how the expression "[c]auses of action under this Act" or "an action ... under this Act" found in ss. 8(1) and 5 respectively can be seen to indicate the *creation* of a new cause of action. The *Survival of Actions Act* expressly contemplates the *survival* of causes of action *existing* against a person who has died (s. 2). I take that to mean that the cause of action existed prior to the application of the *Survival of Actions Act*. The survival of a cause of action for a time and its creation are two different things.

(2) Discoverability: The Judge-Made Rule

21 The debate concerning the use of the discoverability principle in tort actions has been settled by this Court in *Nielsen v. Kamloops (City)*, [1984] 2 S.C.R. 2 (S.C.C.), *Central Trust* and *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6 (S.C.C.).

22 The discoverability principle provides that "a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence": *Central Trust*, at p. 224. In some provinces, the discoverability rule has been codified by statute; in others, it has been deemed redundant because of other remedial provisions.

23 While discoverability has been qualified in the past as a "general rule" (*Central Trust*, at p. 224; *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549 (S.C.C.), at para. 36), it must not be applied systematically without a thorough balancing of competing interests (*Peixeiro*, at para. 34). The rule is an interpretative tool for construing limitation statutes. I agree with the Manitoba Court of Appeal when it writes:

> In my opinion, the judge-made discoverability rule is nothing more than a rule of construction. Whenever a statute requires an action to be commenced within a specified time from the happening of a specific event, the statutory language must be construed. When time runs from "the accrual of the cause of action" or from some other event which can be construed as occurring only when the injured party has knowledge of the injury sustained, the judge-made discoverability rule applies.

> But, when time runs from an event which clearly occurs without regard to the injured party's knowledge, the judge-made discoverability rule may not extend the period the legislature has prescribed. [Emphasis added.]

(*Fehr v. Jacob* (1993), 14 C.C.L.T. (2d) 200 (Man. C.A.), at p. 206). See also *Peixeiro*, at para. 37; *Snow (Guardian ad litem of) v. Kashyap* (1995), 125 Nfld. & P.E.I.R. 182 (Nfld. C.A.).

24 Thus, the Court of Appeal of Newfoundland and Labrador is correct in stating that the rule is "generally" applicable where the commencement of the limitation period is related by the legislation to the arising or accrual of the cause of action. The law does not permit resort to the judge-made discoverability rule when the limitation period is explicitly linked by the governing legislation to a fixed event unrelated to the injured party's knowledge or the basis of the cause of action (see Mew, at p. 55).

(3) Discoverability Principle Does Not Apply to the Survival of Actions Act

25 Ryan submits that the discoverability rule applies to the limitation period contained in s. 5 of the Survival of Actions Act. He argues that the limitation period should not begin to run until he knew, or ought reasonably to have known, the material facts which determine (i) his cause of action under the *Survival of Actions Act* and (ii) the limitation period. In sum, Ryan claims that the death of Moore is integral to the cause of action and that the limitation period should not start to run until he knew that he had a cause of action against the estate of Rex Moore. The appellants submit that the discoverability rule does not apply to the *Survival of Actions Act* as it would transcend the logic of statutory interpretation and the scheme enacted by the legislature. In addition, they say that the rule does not apply where time runs from a fixed event.

26 Like the Court of Appeal, I am of the view that the appellants' position is correct. For ease of reference, I reproduce s. 5 of the Survival of Actions Act:

> **5.** An action shall not be brought under this Act unless proceedings are started within 6 months after letters of probate or administration of the estate of the deceased have been granted and proceedings shall not be started in an action under this Act after the expiration of 1 year after the date of death of the deceased.

27 Pursuant to the *Survival of Actions Act*, the limitation period is triggered by the death of the defendant or the granting by a court of the letters of administration or probate. The section is clear and explicit: time begins to run from one of these two specific events. The Act does not establish a relationship between these events and the injured party's knowledge. I agree with the appellants that knowledge is not a factor: the death or granting of the letters occurs regardless of the state of mind of the plaintiff. We face here a situation in respect of which, as recognized by this Court in *Peixeiro*, the judge-made discoverability rule does not apply to extend the period the legislature has prescribed. Thus, I agree with the Court of Appeal that by using a specific event as the starting point of the "limitation clock", the legislature was displacing the discoverability rule in all the situations to which the *Survival of Actions Act* applies.

28 A number of the appellate courts have dealt with the question of discoverability in the context of actions by or against estates of deceased persons. The appellants rely extensively on *Payne v. Brady* (1996), 140 D.L.R. (4th) 88 (Nfld. C.A.), leave to appeal refused, [1997] 2 S.C.R. xiii (S.C.C.). While the facts of that case are very similar to the present, it is not clear whether the Court of Appeal of Newfoundland and Labrador decided that the rule of discoverability did not apply because death is always a possibility or because the appellant Payne had ample time after she became aware of the death of Brady to commence her action. What is clear is the point advanced by O'Neill J.A.: the death of a prospective defendant and the possibility of a shortened period to commence an action is a reality that claimants and their counsel have to guard against: *Payne*, at p. 94.

29 The Nova Scotia Court of Appeal decision in *Burt v. LeLacheur* (2000), 189 D.L.R. (4th) 193 (N.S. C.A.), is invoked by the respondent. However, the reasoning of that case cannot be applied in the case at bar. In *Burt*, the Court of Appeal held that the discoverability rule applied to s. 10 of the Fatal Injuries Act, R.S.N.S. 1989, c. 163. The Nova Scotia Court of Appeal stated its position in the following manner (at p. 208):

> If the discoverability rule applies to a limitation period running from "when the damages were sustained" (*Peixeiro*) and from "the final determination of the action against the insured" (*Grenier*), I think it is not unreasonable to apply it to the period one year after the death so as to start time running only when the claimant knows or ought to know that the death might be a wrongful one. This, having in mind the statutory scheme of the Fatal Injuries Act, is no greater a stretch of the language than was made by the courts in *Peixeiro, Grenier* and other cases, all for the purpose of preventing a potential injustice.
>
> We must avoid the accusation of usurping the role of the Legislature, but in my opinion to apply the discoverability rule here is consistent with what has already been done before. On the true consideration of s. 10 of the Fatal Injuries Act, time does not run simply from a fixed event, but from constituent elements of the cause of action created by the statute. [Emphasis added.]

30 In *Burt*, the death of a person for which an action can be brought under the Fatal Injuries Act does not merely refer to the time of death as provided in the *Survival of Actions Act*, but to a "wrongful death". It is not an event totally unrelated to the accrual of the cause of action. Hence, the death of the person there is in fact a "constituent elemen[t] of the cause of action", contrary to the present case.

31 In my view, the case that best assists this Court in the present matter is the one giving rise to the Ontario Court of Appeal's decision in *Waschkowski v. Hopkinson Estate* (2000), 47 O.R. (3d) 370 (Ont. C.A.). The court had to determine the possible application of the discoverability rule to s. 38(3) of the Trustee Act, R.S.O. 1990, c. T.23, the statutory provision in Ontario permitting an action in tort by or against the estate of a deceased person and limiting the period during which such actions may be commenced. Abella J.A., as she then was, concluded, at para. 16, that the discoverability rule did not apply to the section since the state of actual or attributed knowledge of an injured person in a tort claim is not germane when a death has occurred. She explained at paras. 8-9:

> In s. 38(3) of the Trustee Act, the limitation period runs from a death. Unlike cases where the wording of the limitation period permits the time to run, for example, from "when the damage was sustained" (*Peixeiro*) or when the cause of action arose (*Kamloops*), there is no temporal elasticity possible when the pivotal event is the date of a death. Regardless of when the injuries occurred or matured into an actionable wrong, s. 38(3) of the Trustee Act prevents their transformation into a legal claim unless that claim is brought within two years of the death of the wrongdoer or the person wronged.
>
> The underlying policy considerations of this clear time limit are not difficult to understand. The draconian legal impact of the common law was that death terminated any possible redress for negligent conduct. On the other hand, there was a benefit to disposing of estate matters with finality. The legislative compromise in s. 38 of the Trustee Act was to open a two-year window, making access to a remedy available for a limited time without creating indefinite fiscal vulnerability for an estate. [Emphasis added.]

See also *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*, [2003] O.J. No. 5669 (Ont. C.A.), and *Edwards v. Law Society of Upper Canada* (2000), 48 O.R. (3d) 321 (Ont. C.A.).

32 Ryan's cause of action arose prior to Moore's death and Ryan was well aware of his cause of action both before Moore's death and before the expiration of the *Survival of Actions Act* limitation period. In fact, the day following the accident, Ryan retained a solicitor to pursue a claim for damages against Moore for injuries alleged to have resulted from the accident. At that point, Ryan could have sued Moore as all the elements of his cause of action were known. He did not need to have knowledge of the death in question to prove his claim or issue and serve the statement of claim. Moore's subsequent death had no impact whatsoever on the accrual of Ryan's cause of action. Consequently, I agree with the conclusion of the applications judge, at para. 50:

> The fact of death is of no relevance to the cause of action in question. It is not an element of the cause of action and is not required to complete the cause of action. Whatever the nature of the cause of action, it is existing and complete before the *Survival of Actions Act* operates, in the case of a death, to maintain it and provide a limited time window within which it must be pursued. The fact of the death is irrelevant to the cause of action and serves only to provide a time from which the time within which to bring the action is to be calculated.

33 A further reason for the non-application of the discoverability rule is the evident impact such a rule would have on the distribution of assets to the beneficiaries. Without a time limit, an executor or an administrator would not feel free to distribute the assets of an estate until all reasonable possibilities of claim had been addressed. This would be cumbersome and unrealistic. "An estate should not be held to ransom interminably by the advancement of claims which are not proceeded with in a timely manner": *MacKenzie v. MacKenzie* (1992), 84 Man. R. (2d) 149 (Man. Q.B.), para. 18, cited in *J. (A.) v. Cairnie Estate* (1993), 105 D.L.R. (4th) 501 (Man. C.A.), p. 510.

34 The *Survival of Actions Act* is itself a legislative exception to a common law rule. Thus, it would

displace the intention of the legislature to "stretch" the limitation period. Borrowing the words of Marshall J.A. in *Snow (Guardian ad litem of)*, at para. 43, to apply the rule of construction of reasonable discoverability to such a provision would be tantamount to mounting a fiction transcending the limits of logical statutory interpretation. Hence, it would constitute an impermissible incursion into the legislative process.

(4) Special Circumstances

35 Ryan submits, as an alternative, that if the discoverability rule does not apply, the limitation period should be extended because of the "special circumstances" principle. He claims that, pursuant to this principle, fairness and justice require that an innocent plaintiff should not be deprived of compensation through no fault of his own. This argument was not invoked in front of the applications judge or the Court of Appeal, and is not supported by any evidence; under these circumstances, it is, in my view, without merit.

B. Confirmation

36 Ryan claims that the confirmation of the cause of action pursued under s. 16 of the Limitations Act applies to extend the limitation period contained in s. 5 of the Survival of Actions Act. He argues that the correspondence exchanged between Cabot Insurance's adjuster and his previous counsel, the payment made by Cabot Insurance for his property damage claim, as well as a payment of $500 to his previous counsel for a medical report, prove acknowledgment (as contemplated by the *Limitations Act*) and therefore confirmation.

37 The appellants submit that s. 16 of the Limitations Act does not apply to the *Survival of Actions Act*. They claim that any confirmation of the cause of action would have no effect on the *Survival of Actions Act* limitation period because the *Survival of Actions Act* does not create a cause of action but simply confers a right to pursue a claim notwithstanding the fact that one of the parties has died. Finally, they argue that there was no confirmation of the cause of action in this case as there was no admission of liability through the letters nor the payments made.

38 I agree with the appellants' position as accepted by the Court of Appeal.

39 The relevant portions of s.16 of the Limitations Act provide:

> **16.** (1) A confirmation of a cause of action occurs where a person
>
> (a) acknowledges that cause of action, right or title of another person; or
>
> (b) makes a payment in respect of that cause of action, right or title of another.
>
> (2) Where a person against whom an action lies confirms that cause of action, the time before the date of that confirmation shall not count when determining the limitation period for a person having the benefit of the confirmation against the person bound by that confirmation.

(3) Subsection (2) applies only to a right of action where the confirmation is given before the expiration of the limitation period for that right of action.

. . . . .

(5) In order to be effective a confirmation must be in writing and signed by

(a) the person against whom that cause of action lies; or

(b) his or her agent

and given to the person or agent of the person having the benefit of that cause of action.

40 When a person acknowledges the cause of action of another person or makes a payment in respect of that cause of action, a confirmation of that cause of action occurs. Consequently, the time accrued before the date of that confirmation shall not be considered when determining the limitation period (s. 16(2)). Confirmation must, of course, be made prior to the expiration of the limitation period (s. 16(3)).

41 Section 16 can only apply to a limitation period which limits the time during which an action may be taken. Since the limitation period which arises under the *Survival of Actions Act* supersedes the first limitation period of the *Limitations Act*, and does not create or revive an action, but merely permits it to continue, s. 16 cannot apply to it as found by the Court of Appeal (para. 67).

42 Even if this were not the case, the facts here do not support a finding of confirmation on the part of the appellants. I will address this issue briefly as a matter of principle.

43 In order to establish confirmation, one of two events must be proven: 1) that the party acknowledged the cause of action; or 2) that there was a payment made in respect of the cause of action (see Mew, at p. 115).

44 The term "acknowledges" as used in s. 16(1)(a) of the Limitations Act has been described by Lord Denning in *Good v. Parry*, [1963] 2 All E.R. 59 (Eng. C.A.), at p. 61, as requiring an "admission". While care must be shown when applying English case law, as the English *Limitation Act*, 1939, 2 & 3 Geo. 6, c. 21, does not provide for the acknowledgment of the "cause of action" but the acknowledgment of the "claim", it is still persuasive authority for the present interpretation.

45 Thus, a party can only be held to have acknowledged the claim if that party has in effect admitted his or her liability to pay that which the claimant seeks to recover (see *Surrendra Overseas Ltd. v. Sri Lanka* (1976), [1977] 2 All E.R. 481 (Eng. Q.B.)). As the British Columbia Court of Appeal concluded in *Podovinikoff v. Montgomery* (1984), 14 D.L.R. (4th) 716 (B.C. C.A.), at p. 721, a person can acknowledge as a bare fact that someone has asserted (by making a claim) a cause of action against him, without acknowledging any liability. Simple acknowledgment of the "existence" of a cause of action is insufficient to meet the requirements of s. 16(1)(a). Acknowledgment must involve acknowledgment of some liability.

46 Consequently, the letters from the adjuster to Ryan's counsel (i.e., letters of November 18, 1998 and January 25, 1999) do not restart the clock as they do not constitute an admission of liability on the part of Cabot Insurance. These were obviously only requests for information and part of the normal investigation process. As submitted by the appellants, if mere investigation of claims were to constitute confirmation, then potential defendants, in order to protect limitation defence, would have no choice but to refuse to investigate until a statement of claim is issued. This would destroy the possibility of early settlements and lead to increased litigation and costs.

47 The same conclusion applies to the second way that confirmation can occur, through payment. Of importance is the fact that both payments mentioned by Ryan, payments for Ryan's medical chart and Dr. Landells' medical report, were not evidence of liability by Cabot Insurance; nor did they indemnify Ryan, at least in part, for damages caused by the accident. Thus, they cannot be payments in respect of the "cause of action". Ryan relies on the Newfoundland and Labrador Court of Appeal decision in *Wheaton v. Palmer* (2001), 205 Nfld. & P.E.I.R. 304 (Nfld. C.A.), for the proposition that a payment made to a physician, but sent to the plaintiff's solicitor will constitute confirmation. With respect, I am of the view that the Court of Appeal erred in this determination. I prefer the contrary position of the British Columbia Court of Appeal in *MacKay v. Lemley* (1997), 44 B.C.L.R. (3d) 382 (B.C. C.A.), at para. 21. Payment for a medical report with a cheque payable to a physician, but sent to the plaintiff's solicitor, does not constitute confirmation of the plaintiff's cause of action:

> The mere fact that the payment, although made payable to the doctor, was directed through the lawyer's office for forwarding does not, in my view, bring the payment into the express wording of the section. The payment here, as in *Germyn*, was intended to pay to the doctor. The doctor was not a person through whom the appellant could claim. This was not a reimbursement to anyone for having paid for the medical report but a direct payment to the doctor by [the Insurance Corporation of British Columbia].

48 The purpose for which these types of payments and correspondence are made is critical. In this case, they were not intended as admissions of liability, but only to promote investigation and early resolution of certain aspects of the claim.

C. Estoppel

49 Moore's estate and Cabot Insurance submit that the majority of the Court of Appeal erred when it concluded that they were estopped from relying on the fact of Moore's death and the granting of letters of administration, thus preventing them from arguing that Ryan's action was outside the *Survival of Actions Act* limitation period. They claim that neither estoppel by convention nor estoppel by representation applies to the facts of the present case. Ryan argues that the appellants are precluded or estopped from relying on the limitation period in the *Survival of Actions Act* because of the application of either of these two types of estoppel.

50 While the principle of estoppel is often referred to in connection with cases of waiver, election, abandonment, acquiescence and laches, in the context of commercial and contractual relationships, the

case law in Canada on this subject is not as abundant as that in the United Kingdom. It is therefore useful for this Court to address the issue in some detail, especially where it has long been accepted that estoppels are to be received with caution and applied with care (see *Harper v. Cameron* (1893), 2 B.C.R. 365 (B.C. C.A.), at p. 383).

51 The state of the law of estoppel was articulated by Lord Denning in *Amalgamated Investment & Property Co. (In Liquidation) v. Texas Commerce International Bank Ltd.* (1981), [1982] Q.B. 84 (Eng. C.A.), at p. 122, as follows:

> The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption — either of fact or of law — whether due to misrepresentation or mistake makes no difference — on which they have conducted the dealings between them — neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.

52 The jurisprudence discloses six types of estoppel: estoppel by representation of fact, proprietary estoppel, promissory estoppel, estoppel by convention, estoppel by deed and estoppel by negligence (see Bower, at pp. 3-9). I will examine here the ones at the centre of this dispute, estoppel by convention and estoppel by representation.

(1) Estoppel by Convention

(a) Definition and Principles

53 The origin of the doctrine of estoppel by convention can be traced to estoppel by deed for which sealing and delivery were essential, and for which the foundation of duty lay not in the agreement itself, or any reliance thereon, but in the formal solemnity of the deed, reflecting the concern of ancient jurisprudence with form as opposed to substance. The modern rule has evolved enormously (see Bower, at pp. 179-80; T. B. Dawson, "Estoppel and obligation: the modern role of estoppel by convention" (1989), 9 *L.S.* 16)

54 Spencer Bower defines the modern concept of estoppel by convention as follows (p. 180):

> An estoppel by convention, it is submitted, is an estoppel by representation of fact, a promissory estoppel or a proprietary estoppel, in which the relevant proposition is established, not by representation or promise by one party to another, but by mutual, express or implicit, assent. This form of estoppel is founded, not on a representation made by a representor and believed by a

> representee, but on an agreed statement of facts or law, the truth of which has been assumed, by convention of the parties, as a basis of their relationship. When the parties have so acted in their relationship upon the agreed assumption that the given state of facts or law is to be accepted between them as true, that it would be unfair on one for the other to resile from the agreed assumption, then he will be entitled to relief against the other according to whether the estoppel is as to a matter of fact, or promissory, and/or proprietary.

55 S. Wilken, *Wilken and Villiers: The Law of Waiver, Variation and Estoppel* (2nd ed. 2002), at p. 223, affirms that estoppel by convention will occur where:

> (i) the parties have established, by their construction of their agreement or a common apprehension as to its legal effect, a convention basis;
>
> (ii) on that basis the parties have regulated their subsequent dealings;
>
> (iii) one party would suffer detriment if the other were to be permitted to resile from that convention.

See also *Chitty on Contracts* (29th ed. 2004), vol. 1, at p. 283.

56 The Court of Appeal of Newfoundland and Labrador, after a review of the case law in the United Kingdom and in Canada, formulated the following four elements which need to be proven (para. 79):

> (i) The evidence establishes an assumption in common between the parties as to a state of facts;
>
> (ii) The parties have adopted the common assumption as the conventional basis for a transaction into which they have entered;
>
> (iii) The dispute in respect of which the estoppel by convention is asserted arises out of that transaction; and,
>
> (iv) A detriment would flow to the party asserting the estoppel if the other party is permitted to resile from the assumed stated facts.

These requirements were accepted by the respondent.

57 The appellants submit that there are six requirements for the estoppel by convention. They cite as support the New Zealand Court of Appeal decision in *National Westminster Finance NZ Ltd. v. National Bank of NZ Ltd.*, [1996] 1 N.Z.L.R. 548 (New Zealand C.A.), at p. 550. In fact, they simply advocate a more detailed description of the requirements also found in other foreign cases.

58 The jurisprudence in the United Kingdom is indeed abundant in contrast to that in Canada (see, e.g., India v. India Steamship Co. Ltd., [1998] 1 Lloyd's Rep. 1 (U.K. H.L.), at p. 10; K. Lokumal & Sons (London) Ltd. v. Lotte Shipping Co. Pte. Ltd., [1985] 2 Lloyd's Rep. 28 (Eng. C.A.), at pp. 34-35;

Norwegian American Cruises A/S v. Paul Mundy Ltd., [1988] 2 Lloyd's Rep. 343 (Eng. C.A.), at pp. 349-53).

59 This Court is not bound by any of the above analytical frameworks. After having reviewed the jurisprudence in the United Kingdom and Canada as well as academic comments on the subject, I am of the view that the following criteria form the basis of the doctrine of estoppel by convention:

> 1) The parties' dealings must have been based on a shared assumption of fact or law: estoppel requires manifest representation by statement or conduct creating a mutual assumption. Nevertheless, estoppel can arise out of silence (impliedly).
>
> 2) A party must have conducted itself, i.e. acted, in reliance on such shared assumption, its actions resulting in a change of its legal position.
>
> 3) It must also be unjust or unfair to allow one of the parties to resile or depart from the common assumption. The party seeking to establish estoppel therefore has to prove that detriment will be suffered if the other party is allowed to resile from the assumption since there has been a change from the presumed position.

See Wilken, at pp. 227-28; *Canacemal Investment Inc. v. PCI Realty Corp.*, [1999] B.C.J. No. 2029 (B.C. S.C.), at para. 35; *Capro Investments Ltd. v. Tartan Development Corp.*, [1998] O.J. No. 1763 (Ont. Gen. Div.), at para. 31.

(b) Application of the Law

60 The majority of the Court of Appeal held that estoppel by convention applied in the circumstances of this case. It concluded that there was an assumption between the parties as to a state of facts, namely: that Moore was alive; that the parties adopted this assumption as the basis upon which their transactions relating to Ryan's claim were to be conducted; that the dispute in respect of which the estoppel was asserted arose out of the transactions between the parties in dealing with Ryan's claim; and that detriment would flow to Ryan if Moore's estate or the insurer were permitted to resile from the common assumption. As will be evidenced from the analysis below, I cannot agree with this conclusion.

(i) Assumption Shared and Communicated

61 The crucial requirement for estoppel by convention, which distinguishes it from the other types of estoppel, is that at the material time both parties must be of "a like mind" (*Troop v. Gibson*, [1986] 1 E.G.L.R. 1 (Eng. C.A.), at p. 5; *London Borough of Hillingdon v. Arc Ltd.*, [2000] E.W.J. No. 3278 (Eng. C.A.), at para. 49). The court must determine what state of affairs the parties have accepted, and decide whether there is sufficient certainty and clarity in the terms of the convention to give rise to any enforceable equity: *Troop*, at p. 6; see also *Baird Textile Holdings Ltd v. Marks & Spencer Plc*, [2002] 1 All E.R. (Comm) 737 (Eng. C.A.), at para. 84.

62 While it may not be necessary that the assumption by the party raising estoppel be created or

encouraged by the estopped party, it must be shared in the sense that each is aware of the assumption of the other (*John v. George*, [1995] E.W.J. No. 4375 (Eng. C.A.), at para. 37). Mutual assent is what distinguishes the estoppel by convention from other types of estoppel (Bower, at p. 184). The courts have described communications complying with this requirement as "crossing the line". In *K. Lokumal & Sons (London) Ltd.*, at pp. 34-35, Kerr L.J. held that

> [a]ll estoppels must involve some statement or conduct by the party alleged to be estopped on which the alleged representee was entitled to rely and did rely. In this sense all estoppels may be regarded as requiring some manifest representation which crosses the line between representor and representee, either by statement or conduct. It may be an express statement or it may be implied from conduct, e.g. a failure by the alleged representor to react to something said or done by the alleged representee so as to imply a manifestation of assent which leads to an estoppel by silence or acquiescence. Similarly, in cases of so-called estoppels by convention, there must be some mutually manifest conduct by the parties which is based on a common but mistaken assumption....
>
> There cannot be any estoppel unless the alleged representor has said or done something, or failed to do something, with the result that — across the line between the parties — his action or inaction has produced some belief or expectation in the mind of the alleged representee, so that, depending on the circumstances, it would thereafter no longer be right to allow the alleged representor to resile by challenging the belief or expectation which he has engendered. To that extent at least, therefore, the alleged representor must be open to criticism. [Emphasis added.]

See also *Norwegian American Cruises A/S*, at p. 350. Thus, it is not enough that each of the two parties acts on an assumption not communicated to the other (*India*, at p. 10). Further, the estopped party must have, at the very least, communicated to the other that he or she is indeed sharing the other party's (ex *hypothesi*) mistaken assumption (*John*, at para. 81; Bower at p. 184).

63 In the present case, the record discloses fourteen letters exchanged by Ryan's counsel and the adjuster with respect to the respondent's personal injury claim (A.R., Vol. II, at pp. 150-70). However, none of these prove the existence of a common assumption. The letters lack clarity and certainty. The mere fact that communications occurred between the parties does not establish that they both assumed that Moore was alive. It is unlikely the question of whether Moore was alive or dead crossed the minds of either the appellants or the respondent. The fact that Ryan's counsel had originally diarized the claim as having a two-year limitation period under the *Limitations Act* shows that he had not turned his mind to the possibility of a shorter limitation period under the *Survival of Actions Act*. Effectively, this Court is in the presence of mutual ignorance, not mutual assumption.

64 Ryan submits, and it was agreed by the Court of Appeal, that the subject line in the letters exchanged between his counsel and the adjuster which read "Your Insured: Rex Moore" or "Our Insured: Rex Moore" is self-explanatory and indicates an assumption by both parties, that Moore was alive. I strongly disagree. This is an unrealistic interpretation of the subject line in the letters. Such an expression can mean one thing only: the named insured under the automobile insurance policy was Rex

Moore. The words are a mere identification of the file the undersigned is dealing with. The Court of Appeal erred by giving weight to the subject line of these letters, which, properly interpreted, provide no evidence of a mutual assumption that Moore was alive.

65 Nor did the fact that the parties were conferring without regard to the limitation period establish a shared assumption that the limitation defence would not be relied on. The letters contain limited and simple requests for details of the claim, and do not establish a convention between the parties (see *Hillingdon London Borough*, at paras. 57 and 60; *Seechurn v. Ace Insurance SA NV*, [2002] 2 Lloyd's Rep. 390 (Eng. C.A.), at p. 396). In fact, the matter did not proceed beyond the preliminary stage of investigating the merits of the personal injury claim. There were no negotiations or settlement discussions, no admission of liability, and no agreement to forego a possible limitation defence.

66 Even if one could conclude that there was a mutual assumption between the parties, I am of the view that it cannot realistically be asserted that the respondent communicated to the appellants that he indeed shared the mistaken assumption. In this regard, I agree with the dissenting members of the Court of Appeal when they affirm (at para. 108):

> It is true that both parties assumed Mr. Moore was alive. That, as noted above, is not sufficient to establish estoppel by convention. Prior to Mr. Moore's death, any reference to him implying he was alive was a reflection of the truth at that time. That cannot be said to be a communication which becomes the basis of a convention that they will proceed on the assumption that Mr. Moore is alive, even beyond his death. There is no direct or circumstantial evidence which would lead to such a conclusion. The question becomes: could any agreement have arisen after Mr. Moore's death? The two letters written by the adjuster after Mr. Moore's death were in error when they said "Our insured — Rex Moore" but there is no communication to the other party and acceptance that they are to govern their future conduct on that basis.

(ii) Detrimental Reliance

67 The appellants submit that detrimental reliance is a requirement that must be proven in order to find convention estoppel. I agree. The Court of Appeal erred in finding this condition fulfilled by simple proof that a detriment would flow to the party asserting the estoppel if the other party were permitted to resile from the assumed stated facts, without a finding of reliance.

68 The jurisprudence and academic comments support the requirement of detrimental reliance as lying at the heart of true estoppel (see Bower, at pp. 6 and 184; *John*, at para. 86; *Hillingdon London Borough; K. Lokumal & Sons (London) Ltd.*, at p. 35; *Litwin Construction (1973) Ltd. v. Kiss* (1988), 52 D.L.R. (4th) 459 (B.C. C.A.), at pp. 469-70; *Canacemal*, at paras. 33-35; *Vancouver City Savings Credit Union v. Norenger Development (Canada) Inc.*, [2002] B.C.J. No. 1417, 2002 BCSC 934 (B.C. S.C.), at para. 74; 32262 *32262 B.C. Ltd. v. Companions Restaurant Inc.* (1995), 17 B.L.R. (2d) 227 (B.C. S.C.), at pp. 235-36.

69 Detrimental reliance encompasses two distinct, but interrelated, concepts: reliance and

> detriment. The former requires a finding that the party seeking to establish the estoppel changed his or her course of conduct by acting or abstaining from acting in reliance upon the assumption, thereby altering his or her legal position. If the first step is met, the second requires a finding that, should the other party be allowed to abandon the assumption, detriment will be suffered by the estoppel raiser because of the change from his or her assumed position (see Wilken, at p. 228; *Grundt v. Great Boulder Property Gold Mines Ltd.* (1937), 59 C.L.R. 641 (Australia H.C.), at p. 674).

70 Returning to the case at bar, even if one were to assume the existence of a communicated common assumption between the parties, there is no evidence that the respondent relied on this assumption. The evidence suggests that the respondent never put his mind to the shorter *Survival of Actions Act* limitation period. First, Ryan's counsel diarized the matter as a two-year limitation period. Second, the issue of estoppel by convention was raised for the first time by the Court of Appeal itself and was never discussed before the applications judge. Moreover, in the affidavit of Ryan's counsel, nowhere does he state that he believed that the adjuster intended him to act or refrain from acting in reliance on any agreement (A.R., Vol. II, at pp. 137-46). From the date of the accident, November 27, 1997, to the expiry of the *Survival of Actions Act* limitation period, August 16, 1999, there was never any discussion by the respondent of the limitation period. On October 24, 2000, when Ryan's counsel indicated for the first time to Cabot Insurance's claim examiner that there might be a problem with the limitation period, he did not refer to a mutual understanding that Moore was to be treated as being alive for the purposes of Ryan's claim, nor did he raise the existence of an agreement.

71 It was not open to Ryan's counsel to refrain from bringing an action against Rex Gilbert Moore based solely on the limited communications between counsel. The letters relied upon were limited to the collection of medical information and documentation about Ryan's alleged injuries — nothing more. I have already spoken about the subject line; one cannot disregard the fact that all negotiations/communications were also done on a "without prejudice" basis.

72 Consequently, I agree with the dissenting members of the Court of Appeal that the respondent not only did not rely on this alleged assumption, but his conduct does not show an intention to affect the legal relations between the parties. The record does not disclose that the respondent changed in any way his position on the basis of this alleged mutual assumption.

(iii) Detriment

> 73 Once the party seeking to establish estoppel shows that he acted on a shared assumption, he must prove detriment. For the plea to succeed, it must be unjust or unfair to allow a party to resile from the common assumption (Wilken, at p. 228). It is often said that the fact that there will have been a change from the presumed legal position will facilitate the establishment of detriment: "This is because there is an element of injustice inherent within the concept of the shared assumption — one party has acted unjustly in allowing the belief or expectation to 'cross the line' and arise in the other's mind": Wilken, at p. 228.

> 74 This final requirement of estoppel has been described as proving that it would be "unjust", "unconscionable" or "unfair" to permit a party to resile from the mutual assumption (see, e.g., Bower, at p. 181; *John; India; Norwegian American Cruises A/S*). However, it may be preferable to refrain from using "unconscionable", in order to avoid confusion with this last concept which has developed a special meaning in relation to inequality of bargaining power in the law of contracts (where we speak of unconscionable transactions, for instance) (see *Litwin Construction*, at p. 468).

75 In the case at bar, given that there was no shared assumption or reliance, the detriment criterion does not need to be addressed. I would note, however, that a detriment is not established by a reduced limitation period, as suggested by the respondent. Limitation periods and prescriptions, in the diverse areas of the law, have the similar effect and impact. The *Survival of Actions Act* has provided a benefit not available at common law; this benefit cannot legitimately be characterized as unfair and unjust.

(2) Estoppel by Representation

> 76 Where there is no shared assumption, as in the present case, there can be no estoppel by convention, no matter how unjust the other party's conduct may appear to be. However, in some circumstances, the party seeking to establish estoppel may be able to rely on estoppel by representation, an alternative here advocated by the respondent. The added difficulty in such a case is that an estoppel by representation cannot arise from silence unless a party is under a duty to speak. Silence or inaction will be considered a representation if a legal duty is owed by the representor to the representee to make a disclosure, or take steps, the omission of which is relied upon as creating an estoppel: see Wilken, at p. 227; Bower, at pp. 46-47.

77 Ryan submits that in the present case silence constituted a representation grounding estoppel because there was a duty to disclose relevant information as it would be unfair for the appellants to benefit from non-disclosure. I disagree. In the present case, there was no duty on the appellants, who were at the time only potential defendants, to advise Ryan of a limitation period, to assist him in the prosecution of the claim, or to advise him of the consequences of the death of one of the parties. There is no fiduciary or contractual relationship here (contrast with *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 (S.C.C.)). The appellants had no duty to exercise reasonable care, nor to divulge any information.

78 Hence, there was no representation, no duty to speak, no intention to affect legal relations and no reliance in this case.

III. Conclusion

79 The legislature created an exception to the common law rule by enacting the *Survival of Actions Act*. It extended the rights of the parties to permit them to continue an action against a deceased. The relevant provision modifies the common law. It is not this Court's role to interfere with the scheme established by the legislature.

80 There are no reasons based on estoppel, or any other legal doctrine, to preclude Moore's estate or Cabot Insurance from relying on the *Survival of Actions Act* limitation period. Accordingly, I would

allow the appeal on the issue of estoppel, affirm the decision of the Court of Appeal on the other issues, and strike the statement of claim, with costs throughout, at all levels of court.

Appeal allowed.

Pourvoi accueilli.

Appendix A

Limitations Act, S.N.L. 1995, c. L-16.1

[Limitation period 2 years]

5. Following the expiration of 2 years after the date on which the right to do so arose, a person shall not bring an action

(a) for damages in respect of injury to a person or property, including economic loss arising from the injury whether based on contract, tort or statutory duty;

. . . . .

[Confirmation]

16. (1) A confirmation of a cause of action occurs where a person

(a) acknowledges that cause of action, right or title of another person; or

(b) makes a payment in respect of that cause of action, right or title of another.

(2) Where a person against whom an action lies confirms that cause of action, the time before the date of that confirmation shall not count when determining the limitation period for a person having the benefit of the confirmation against the person bound by that confirmation.

(3) Subsection (2) applies only to a right of action where the confirmation is given before the expiration of the limitation period for that right of action.

. . . . .

(5) In order to be effective a confirmation must be in writing and signed by

(a) the person against whom that cause of action lies; or

(b) his or her agent

and given to the person or agent of the person having the benefit of that cause of action.

Survival of Actions Act, R.S.N.L. 1990, c. S-32

[Causes of action to survive]

2. Actions and causes of action

(a) vested in a person who has died; or

(b) existing against a person who has died,

shall survive for the benefit of or against his or her estate.

[Limitation of action]

5. An action shall not be brought under this Act unless proceedings are started within 6 months after letters of probate or administration of the estate of the deceased have been granted and proceedings shall not be started in an action under this Act after the expiration of 1 year after the date of death of the deceased.

Footnotes*Corrigenda issued by the court on September 9, 2005 and September 27, 2005 respectively have been incorporated herein.

TAB 29

2011 SKQB 95
Saskatchewan Court of Queen's Bench

Shore Gold Inc. v. De Beers Canada Inc.

2011 CarswellSask 208, 2011 SKQB 95, 199 A.C.W.S. (3d) 696, 368 Sask. R. 296, 85 B.L.R. (4th) 42

Shore Gold Inc., Applicant and De Beers Canada Inc., Respondent

G.M. Currie J.

Judgment: February 28, 2011
Docket: Saskatoon Q.B.G. 1492/10

Counsel: Christopher C. Boychuk, Q.C., for Applicant
Robert G. Kennedy, Q.C., for Respondent

Subject: Contracts; Civil Practice and Procedure; Corporate and Commercial; Public

Headnote

Estoppel --- Estoppel in pais — Elements — Detrimental reliance — Necessity for prejudice

Applicant and respondent participated in joint venture — Applicant brought application for appointment of arbitrator to determine issue relating to overhead charges in joint venture — Respondent brought application to strike applicant's arbitration notice — Respondent's application granted and applicant's dismissed — With respect to issue of estoppel, respondent was estopped from denying that arbitration was appropriate procedure — Respondent represented to applicant that applicant had engaged appropriate procedure for addressing issue — Respondent did so by its conduct, in participating in search for arbitrator, and by its words, by expressly affirming that applicant had engaged arbitration process pursuant to joint venture agreement — Letters from respondent established respondent's intention that applicant, in reliance on conduct and words of respondent, would proceed on basis that arbitration was appropriate procedure — Applicant proceeded on basis that arbitration was appropriate procedure — Detriment to applicant resulting from its reliance on respondent's representation was loss, through passage of time, of right to use appropriate procedure — Respondent was not estopped, however, from denying that issue in question was arbitrable issue — In face of respondent's silence as to whether issue in question was arbitrable, applicant did not alter its position to its detriment — There was no prejudice.

Alternative dispute resolution --- Practice and procedure — General principles

Applicant company and respondent company participated in joint venture — Under joint venture agreement, operator, here respondent, was to be compensated for overhead expenses at rate of 15 per cent of certain expenses — Statement of intent indicated, inter alia, that it was intended that operator should neither gain nor lose financially as result of acting as operator — Following respondent's departure from joint venture, applicant formed view that respondent had gained financially from receiving 15 per cent for overhead expenses — Applicant initiated audit, and eventually sent letter to respondent addressing topic of arbitration — Applicant brought application for appointment of arbitrator to determine issue relating to overhead charges in joint venture — Respondent brought application to strike applicant's arbitration notice — Respondent's application granted and applicant's dismissed — Applicant's letter to respondent included notice of arbitration — Respondent was estopped from denying that arbitration was appropriate procedure, but was not estopped or otherwise prevented from disputing that there was arbitrable issue — Question of whether there was arbitrable issue would be determined by interpreting joint venture agreement — Interpretation of agreement was question of law, so question of whether there was arbitrable issue was properly determined by court rather than arbitrator — Joint venture agreement did not provide that historical gain or loss arising from 15 per cent overhead payment was to be remedied — No remedy was available to applicant even if it established that respondent gained financially from 15 per cent overhead payment — There being no point in determining financial gain issue, there was no "difference or dispute" to be resolved by arbitration under agreement.

Business associations --- Powers, rights and liabilities — Contracts by corporations — Miscellaneous

Applicant company and respondent company participated in joint venture — Under joint venture agreement, operator, here respondent, was to be compensated for overhead expenses at rate of 15 per cent of certain expenses — Statement of intent indicated, inter alia, that it was intended that operator should neither gain nor lose financially as result of acting as operator — Following respondent's departure from joint venture, applicant formed view that respondent had gained financially from receiving 15 per cent for overhead expenses — Applicant initiated audit, and eventually sent letter to respondent addressing topic of arbitration — Applicant brought application for appointment of arbitrator to determine issue relating to overhead charges in joint venture — Respondent brought application to strike applicant's arbitration notice — Respondent's application granted and applicant's dismissed — Applicant's letter to respondent included notice of arbitration — Respondent was estopped from denying that arbitration was appropriate procedure, but was not estopped or otherwise prevented from disputing that there was arbitrable issue — Question of whether there was arbitrable issue would be determined by interpreting joint venture agreement — Interpretation of agreement was question of law, so question of whether there was arbitrable issue was properly determined by court rather than arbitrator — Joint venture agreement did not provide that historical gain or loss arising from 15 per cent overhead payment was to be remedied — No remedy was available to applicant even if it established that respondent gained financially from 15 per cent overhead payment — There being no point in determining financial gain issue, there was no "difference or dispute" to be resolved by arbitration under agreement.

APPLICATION by applicant for appointment of arbitrator; APPLICATION by respondent to strike applicant's arbitration notice.

***G.M. Currie J.*:**

1 Shore Gold Inc. asks for the appointment of an arbitrator to determine an issue relating to overhead charges in a joint venture. De Beers Canada Inc. asks that Shore's arbitration notice be struck.

Circumstances

2 Shore and De Beers participated in a joint venture. For about seven years, ending September 28, 2006, De Beers was the Operator of the joint venture, a position that was defined and described in the joint venture agreement. Pursuant to the agreement De Beers charged the joint venture monthly for expenses related to the operation of the joint venture, and De Beers was paid monthly for those expenses from a joint venture account.

3 The expenses to be so charged and paid are identified in Article 2 of Schedule "D" to the agreement. Expenses directly relating to the joint venture operations are detailed at Sections 2.01 through 2.13 of that article. Section 2.14 further provides for payment to the Operator of "Indirect Charges", which are described in subsection 2.14(a) as "overhead charges":

> **2.14 Indirect Charges**
>
> (a) The Operator shall charge the Joint Account with overhead charges which will cover the Operator's principal business office expenses and other general and administrative expenses which cannot be identified as being directly incurred for the benefit of the Joint Venture. Subject to any adjustments that may be required from time to time in order to comply with the Statement of Intent indicated at the beginning of this Schedule, the overhead charge rate will be 15% for exploration work, and the base for the overhead charge for exploration work will be the total of the costs incurred under Sections 2.01 to 2.13 hereof inclusive.

4 Thus the Operator, in this case De Beers, was to be compensated for overhead expenses at the rate of 15% of the total of the expenses set out at Sections 2.01 through 2.13. The 15% overhead charge rate could be adjusted from time to time so as to comply with the Statement of Intent.

5 The Statement of Intent appears at the beginning of Schedule "D":

> **STATEMENT OF INTENT**
>
> The purpose of these Accounting and Financial Procedures is to establish methods for determining charges and credits applicable to any Program, which should prove fair and equitable as between the Parties and the Operator, it being intended that the Operator should neither gain nor lose financially as a result of it acting as Operator.
>
> [Emphasis added]

6 Following De Beers' departure from the joint venture as both the Operator and a participant (arising from the sale of its interest in the joint venture), Shore reviewed the joint venture documents. Shore formed the view that De Beers had gained financially from receiving 15% for overhead expenses. Shore then initiated an audit pursuant to the provisions of the agreement, identifying the purpose of the audit (the "financial gain issue") in its November 16, 2006 letter to De Beers:

> While the Section 2.14 of the Accounting Procedure prescribes an overhead rate of 15% for

> exploration work, the clear and express intent of the Agreement is that the overhead charge operate to reimburse the Operator for expenses incurred. The initial results of our review suggest that the prescribed rate may have had the unintended effect of defeating the overall purpose and intent of the parties to the Agreement.
>
> As such, we intend to appoint an independent audit firm to audit the 15% overhead charge compared to your head office costs to determine whether the 15% overhead charge did not inadvertently result in financial gains (or losses) to the Operator in contravention of the clear intent of the Agreement.
>
> [Emphasis added]

7 De Beers subsequently made documents available to Shore's auditor. The audit proceeded. Shore and De Beers engaged in discussions in an attempt to resolve the financial gain issue. In those discussions Shore advanced the position that De Beers had gained over $2.9 million from January 1, 2004 to September 28, 2006 as a result of receiving the 15% overhead payment. Shore's calculations went back only to January 1, 2004 because of time limits for review that are set out in the agreement.

8 Eventually Shore concluded that it was not going to reach an agreement with De Beers on the matter, and in its August 22, 2008 letter to De Beers it addressed the topic of arbitration:

> ... In light of our extreme differences in our approachs [*sic*] to project cost allocations, please accept this letter as written notice to the Operator and all other Parties regarding our desire to commence arbitration proceedings in accordance with Article XVI of the JVA.

9 Article XVI of the joint venture agreement is entitled "Dispute Resolution". The pertinent parts of Section 16.01 of that Article provide:

> **Section 16.01 SETTLEMENT OF DISPUTES**
>
> In the event any difference or dispute shall arise between the Parties in respect of this Agreement ... such difference or dispute shall be submitted to arbitration under and pursuant to The Arbitration Act, 1992 of the Province of Saskatchewan. Such arbitration may be initiated by any Party by giving written notice to the Operator and all other Parties and failing the agreement of the Parties upon a suitable arbitrator within thirty (30) calendar days after receipt of the aforesaid notice by all Parties, then an arbitrator shall be named by a Judge of the Court of Queen's Bench as provided in The Arbitration Act, 1992. ...

10 Arbitration and Article XVI are referred to also in Schedule "D", in Article 1. Subsection 1.04(a) of that Article addresses the initiation of audits by joint venture participants who are Non-Operators, the kind of audit that was initiated by Shore. Subsection 1.04(a)(vi) provides:

> (vi) The Operator and Non-Operators shall make every reasonable effort to resolve all audit claims. Any unresolved audit claim shall be referred to a firm of chartered accountants mutually acceptable

to the Parties to act as arbitrator under Article XVI of the Agreement. ...

11 Time passed as the parties attempted to agree on an arbitrator. Concurrently, the parties continued discussion in an effort to resolve the matter without proceeding to arbitration. Eventually, though, Shore wrote to De Beers by a June 3, 2010 letter:

> Upon conclusion of our review of DeBeers' final schedule of cost allocations, we have determined to proceed with the arbitration that we originally notified you of in our letter dated August 22, 2008.
> ...

12 Shore and De Beers did not agree on an arbitrator, and Shore served notice of its application for the appointment of an arbitrator. In response, De Beers served notice of its application to strike the arbitration notice.

Issues on the application to strike the arbitration notice

13 The application by De Beers must be addressed before the application by Shore is addressed. There is no point in addressing the appointment of an arbitrator if I determine that there is no arbitration.

14 De Beers says that the arbitration notice should be struck because:

(a) Arbitration is not the appropriate procedure.

(b) The August 22, 2008 letter from Shore did not constitute a notice of arbitration, and the time for giving such notice had passed before Shore wrote its June 3, 2010 letter.

(c) The financial gain issue is not an arbitrable issue.

(d) Whatever procedure is appropriate, Shore initiated these proceedings after all periods for doing so had passed.

The appropriate procedure

15 De Beers says that arbitration under Section 16.01 of the agreement is not the appropriate procedure for addressing the financial gain issue. De Beers says that the appropriate procedure is an expert determination as described in subsection 1.04(c) of Schedule "D":

> **(c) Expert Determination**
>
> If any Non-Operator takes written exception pursuant to this Section 1.04 in respect of any matter, whether before or after audit, the Parties shall promptly meet to negotiate in good faith the subject matter of the exception and, failing agreement within ninety (90) days from the taking of such written exception, the Non-Operator proposing an adjustment pursuant to the exception may refer the matter for decision by an independent recognized national chartered accounting firm (the "Expert") other than any firm which acts for any of the interested Parties to the dispute. ...

16 De Beers observes that the period within which Shore could have engaged the operation of subsection 1.04(c) has passed, so that once this arbitration is struck (because it is the wrong procedure) Shore will be left with no right to pursue the financial gain issue.

17 Shore insists that arbitration is the correct procedure. In any event, it observes that De Beers did not object to arbitration as the appropriate procedure until Shore served notice in 2010 of its application for appointment of an arbitrator. Until then, De Beers had conducted itself as though arbitration was the proper procedure. This conduct included De Beers actively participating in efforts aimed at agreeing on an arbitrator, and it included the express statement of De Beers that arbitration was the proper procedure. The conduct included, as well, De Beers' reference to subsection 1.04(a)(vi) (the provision referring to arbitration under Section 16.01) as the applicable provision even before Shore delivered its August 22, 2008 letter.

18 The following examples illustrate the conduct of De Beers:

(a) In response to Shore's July 7, 2008 letter asserting that the audit had established that De Beers had gained financially from receiving the 15% overhead payment, De Beers wrote in its July 31, 2008 letter to Shore:

> I have received Mr. DeRosier's letter dated July 7 and note the points made therein.
>
> It is not immediately clear from the PDF attachment the net effect of your proposed adjustments to the management fee given the open ended nature of the queries and commentary on the expenditure line items. As such it would make sense for us to talk to gain an understanding of the analysis, this in keeping with the 'reasonable efforts' provision of Schedule "D", Article 1, Section 1.04(a)(vi) of the joint venture agreement. ...
>
> [Emphasis added.]

(b) In its September 19, 2008 letter in response to Shore's August 22, 2008 letter, De Beers wrote:

> We are in receipt of Mr. DeRosier's letter of August 22, 2008.
>
> Since that letter contains a notice of an intention to arbitrate, both parties should try to reach agreement on the appointment of an arbitrator. We would propose the appointment of ....
>
> [Emphasis added.]

(c) In its July 10, 2009 letter to Shore, De Beers wrote:

> I would like to arrange a conference call or meeting in order to discuss our respective positions regarding the above matter and to determine what it would take to satisfactorily resolve this issue. This is a material item for both companies and Shoregold's reversion to the arbitration process, although in line with the contract terms, has proved problematic due to the lack of willing candidates to fulfill the role of arbitrator. That is not to imply that we cannot reinstitute

this process and search again for an eligible appointee, if we cannot reach a mutually satisfactory position.

[Emphasis added.]

. . . . .

19 In short, Shore says that De Beers is estopped by its conduct from denying that arbitration is the appropriate procedure. The nature of such estoppel, referred to as estoppel by representation, was discussed by the Supreme Court of Canada in *Meduk v. Soja*, [1958] S.C.R. 167 (S.C.C.), at 175:

> The general rule as to estoppel by matter *in pais* is satisfactorily stated in Halsbury's Laws of England, 3rd ed., vol. 15 (1956), s. 338, p. 169, as follows:
>
> > Where one has either by words or conduct made to another a representation of fact, either with knowledge of its falsehood, or with the intention that it should be acted upon, or has so conducted himself that another would, as a reasonable man, understand that a certain representation of fact was intended to be acted on, and that the other has acted on the representation and thereby altered his position to his prejudice, an estoppel arises against the party who made the representation, and he is not allowed to aver that the fact is otherwise than he represented it to be.

20 In *Montreal Trust Co. v. Williston Wildcatters Corp.*, 2001 SKQB 360, [2001] S.J. No. 636 (Sask. Q.B.), Chief Justice Gerein (as he then was) noted the extension of estoppel by representation to a promise about the future, and at paragraph 68 he distilled the elements of the principle into four elements, which were adopted on appeal by Madam Justice Gerwing (*Montreal Trust Co. v. Williston Wildcatters Corp.*, 2002 SKCA 91, [2002] 10 W.W.R. 633 (Sask. C.A.)). As set out by Justice Gerwing at paragraph 28, the elements of estoppel by representation are:

> **28** ...
>
> 1. a representation of an existing fact or promise about the future;
>
> 2. an intention, or reasonable presumption of an intention, that the representation be acted upon;
>
> 3. reliance upon the representation; and
>
> 4. alteration of position to the party's detriment.

21 Here De Beers represented to Shore that Shore had engaged the appropriate procedure for addressing the financial gain issue. De Beers did so by its conduct, in participating in the search for an arbitrator, and by its words, by expressly affirming that Shore had engaged the arbitration process pursuant to the joint venture agreement. In both ways De Beers went beyond a mere "passive course of conduct" as discussed by the Court of Appeal in *Montreal Trust Co. v. Williston*

Wildcatters Corp. at paragraph 34.

22 The letters from De Beers establish De Beers' intention that Shore, in reliance on the conduct and words of De Beers, would proceed on the basis that arbitration was the appropriate procedure.

23 Shore did proceed on the basis that arbitration was the appropriate procedure. The conduct and words of De Beers led Shore to the conclusion that the procedure being used was not disputed. In light of De Beers' conduct, the question of the appropriate procedure was off of Shore's list of live issues.

24 Shore could have reviewed its choice of procedure, within the appropriate periods set out in the agreement, if the question had remained on its list of live issues. Now, though, De Beers says that because of the passage of time, the proper procedure is no longer available to Shore. The detriment to Shore resulting from its reliance on De Beers' representation is the loss, through the passage of time, of the right to use the appropriate procedure.

25 The elements of estoppel are established. Whether De Beers is correct in asserting that arbitration is not the appropriate procedure, De Beers is estopped from denying that it is. Accordingly, the first ground advanced by De Beers fails.

The notice to arbitrate

26 The starting point for Shore's application for appointment of an arbitrator is its August 22, 2008 letter. It is that letter, Shore says, that initiated these arbitration proceedings. De Beers says, though, that the letter did not constitute a notice to arbitrate. Rather, says De Beers, the letter presented only an indication of Shore's intention to deliver a notice to arbitrate in the future. De Beers says that it was not until June 3, 2010 that Shore gave notice to arbitrate, and that the period for doing so (as set out in the agreement) had expired before that date, so that the notice to arbitrate should be struck for being out of time.

27 The relevant part of the August 22, 2008 letter is:

> ... In light of our extreme differences in our approachs [*sic*] to project cost allocations, please accept this letter as written notice to the Operator and all other Parties regarding our desire to commence arbitration proceedings in accordance with Article XVI of the JVA.

28 The first impression created by this sentence is that, in the sentence, Shore was engaging the arbitration provisions of the joint venture agreement. De Beers, however, points to the use of the word "desire". This word, argues De Beers, indicates that Shore was simply stating that it wished to commence proceedings but was not yet doing so. Taking the sentence in context, though, I conclude that Shore's reference to "desire" was simply a matter of Shore using polite language to communicate its engagement of the arbitration provisions.

29 The meaning asserted by De Beers also is not consistent with Shore's statement in the letter that

the letter constituted written notice to the joint venture participants. There was no point in Shore giving written notice of what it wished to do in the future. In saying that the letter constituted written notice, though, Shore communicated to De Beers that a formal step was being taken. The phrase "written notice" is significant because it signals a formal step, as opposed to being a mere expression of intention to do something in the future.

30 Further, the phrase "written notice to the Operator and all other Parties", appearing in the August 22, 2008 letter, appears also in Section 16.01, the arbitration provision of the agreement:

> ... Such arbitration may be initiated by any Party by giving written notice to the Operator and all other Parties ....

31 One reasonably may conclude that Shore drew the phrase "written notice to the Operator and all other Parties" from Section 16.01. As well, one reasonably may conclude that on receiving the letter and seeing this formal language, drawn *verbatim* from the agreement, De Beers would have been alerted to Shore having engaged the arbitration procedure.

32 The August 22, 2008 letter included notice of arbitration. The objection of De Beers on this point does not succeed.

Whether De Beers may dispute that there is an arbitrable issue

33 The financial gain issue identified by Shore for determination in these proceedings, set out in Shore's letter of November 16, 2006, is:

> ... whether the 15% overhead charge did not inadvertently result in financial gains (or losses) to the Operator in contravention of the clear intent of the Agreement.

34 De Beers says that this is not an arbitrable issue. Before addressing De Beers' reasons for saying so, Shore points out that De Beers did not raise this objection until Shore served notice of its application to the court in 2010. De Beers has conducted itself in the early arbitration proceedings without objecting that the issue is not an arbitrable issue.

35 In short, Shore says that De Beers is estopped also from denying that there is an arbitrable issue. This situation differs from the matter of whether arbitration is the appropriate procedure, though. On that topic, Shore relied on De Beers' conduct to Shore's prejudice, being the loss of the right to use the appropriate procedure because of the passage of time. On the topic of whether there is an arbitrable issue, though, there is nothing that De Beers did, or could have done, to lead to Shore being prejudiced.

36 During the time in which Shore and De Beers sought an arbitrator, in which they engaged in discussions, and in which De Beers did not object that there was no arbitrable issue, no event occurred to prejudice Shore on that subject. If De Beers had objected sooner, Shore would not have been in any better position on that subject than it is today. Even if the first three elements of estoppel are established on this subject, the fourth is not. In the face of De Beers' silence as to whether the financial

gain issue was arbitrable, Shore did not alter its position to its detriment. There has been no prejudice. Accordingly, De Beers is not estopped from denying that the financial gain issue is an arbitrable issue.

37 Shore says further that De Beers has agreed that the financial gain issue is an arbitrable issue, and Shore asks that De Beers be held to that agreement. That agreement, says Shore, is found in two letters from De Beers:

(a) In its September 19, 2008 letter De Beers wrote:

> Since that letter contains a notice of an intention to arbitrate, both parties should try to reach agreement on the appointment of an arbitrator. ...

(b) In its July 10, 2009 letter De Beers wrote:

> ... Shoregold's reversion to the arbitration process, although in line with the contract terms ....

38 In asserting that De Beers agreed that the financial gain issue is an arbitrable issue, Shore relies on subsection 1.04(c) of Schedule "D" to the agreement:

> By Mutual agreement, the Parties may agree to refer a dispute arising out of an audit exception to arbitration in accordance with Section 16.01 of the Agreement to which this Schedule is attached, which shall apply mutatis mutandis.

39 Having agreed in its letters to refer the financial gain issue to arbitration, says Shore, De Beers may not now dispute that the issue is arbitrable. In fact, though, De Beers did not agree to refer the issue to arbitration within the meaning of subsection 1.04(c). That subsection contemplates the parties together initiating an arbitration process. Here, the arbitration process was initiated by Shore alone. De Beers agreed that arbitration was the appropriate procedure, but accepting the procedure chosen by the other side is not the same as participating in a mutual agreement to initiate the procedure.

40 Further, the statements of De Beers in its letters of September 19, 2008 and July 10, 2009 communicated only that De Beers accepted arbitration as the appropriate procedure. De Beers did not communicate, in those letters, that it accepted the financial gain issue as arbitrable. The parties to an arbitration process can dispute that there is an arbitrable issue without disputing that, if it turns out that there is an arbitrable issue, arbitration is the appropriate procedure. That is what occurred here. De Beers acknowledged that, if there is an arbitrable issue, arbitration is the appropriate procedure. De Beers did not acknowledge, though, that the financial gain issue is arbitrable.

41 De Beers is not estopped or otherwise prevented from disputing that there is an arbitrable issue.

Determination of the question by the court rather than by the arbitrator

42 In some circumstances a question should be left for determination by the arbitrator rather than being determined by the court. A question of law, though, is to be determined by the court. The Supreme Court of Canada made this observation, in the context of a question of an arbitrator's jurisdiction, in

Union des consommateurs c. Dell Computer Corp., [2007] 2 S.C.R. 801 (S.C.C.) at para. 84:

> 84 First of all, I would lay down a general rule that in any case involving an arbitration clause, a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator. A court should depart from the rule of systematic referral to arbitration only if the challenge to the arbitrator's jurisdiction is based solely on a question of law. This exception is justified by the courts' expertise in resolving such questions, by the fact that the court is the forum to which the parties apply first when requesting referral and by the rule that an arbitrator's decision regarding his or her jurisdiction can be reviewed by a court. It allows a legal argument relating to the arbitrator's jurisdiction to be resolved once and for all, and also allows the parties to avoid duplication of a strictly legal debate. ...

43 This approach is not restricted to cases involving the arbitrator's jurisdiction. Questions of law have been reserved to the courts for determination also in cases involving other issues. In *Autoweld Systems Ltd. v. CRC-Evans Pipeline International Inc.*, 2009 ABCA 366, [2009] A.J. No. 1214 (Alta. C.A.), Justice Slatter of the Alberta Court of Appeal said at paragraph 2:

> 2 ... Where there is a pure question of law on a threshold issue the chambers judge is not compelled to sent it to the arbitrator.

44 In *Suncor Energy Products Inc. v. Howe-Baker Engineers Ltd.*, 2010 ABQB 310, 32 Alta. L.R. (5th) 390 (Alta. Q.B.), Justice Hawco of the Alberta Court of Queen's Bench said at para. 21:

> 21 ... The preliminary issue is whether there is anything to be submitted to arbitration. Suncor does not seek to oust the jurisdiction of an arbitrator. It maintains that there is nothing to be submitted. On the reasoning set forth above in The Plan Group [2009 ONCA 548] and Autoweld Systems [2009 ABCA 366], I am satisfied that this Court is the appropriate forum to determine the issue of whether there is a dispute to be submitted to arbitration.

45 Here, the question of whether there is an arbitrable issue will be determined by interpreting the joint venture agreement. Interpretation of an agreement is a question of law. Thus, the question of whether there is an arbitrable issue is properly determined by the court, rather than by an arbitrator.

Whether there is an arbitrable issue

46 De Beers argues that there is no arbitrable issue because, even if De Beers is shown to have gained from receiving the 15% overhead payment, there is no provision in the joint venture agreement for repayment of that gain. Rather, the agreement provides only for a prospective adjustment to the 15% overhead charge rate, so that future payments would not result in a gain. That being the case, says De Beers, the question of an historical gain by De Beers is moot. There is no remedy to be implemented even if the gain is established. Thus there is no arbitrable issue.

47 The reference to adjusting the 15% overhead charge rate appears in subsection 2.14(a) of Schedule "D" to the joint venture agreement:

> ... Subject to any adjustments that may be required from time to time in order to comply with the Statement of Intent indicated at the beginning of this Schedule, the overhead charge rate will be 15% ....

48 Shore acknowledges that any such adjustment to the 15% overhead charge rate would be prospective only. Shore says, though, that De Beers is mistaken in asserting that this circumstance leaves Shore without a remedy even if a gain is established. To the contrary, Shore argues that the arbitrator would enforce the Statement of Intent of Schedule "D". Everything in Schedule "D", including the provision for the 15% overhead charge rate, is expressly subject to the following provision in the Statement of Intent:

> ... it being intended that the Operator should neither gain nor lose financially as a result of it acting as Operator.

49 Shore says that if the operation of subsection 2.14(a) of Schedule "D" has led to De Beers gaining financially as a result of it acting as Operator, then the Statement of Intent must be enforced by remedying that situation. Since payment of the 15% overhead charge already has been made, Shore says that the remedy must be a direction from the arbitrator for repayment of the appropriate amount. Only by such a direction can the provisions of the agreement be enforced. Enforcement of the provisions of an agreement, Shore observes, is available at common law whether it is referred to in the agreement or not.

50 Shore does not say that De Beers has breached the agreement. De Beers, after all, did precisely what the agreement dictated, namely calculating 15% of the total of the expenses described in Sections 2.01 through 2.13 and charging that amount to the joint venture. Rather, Shore says that by operation of one provision of the agreement (subsection 2.14(a)), a second provision (the Statement of Intent) has been breached — and the first provision is intended to be subordinate to the second provision. Shore argues that in order for both provisions of the agreement to have meaning, as the parties must be assumed to have intended, the operation of the first provision must be remedied so that it conforms with the operation of the second provision. The remedy must take the form of reversing the offending operation of the first provision.

51 So the analysis turns to a determination of the intention of the parties to the joint venture agreement, as reflected in the agreement. The question is what those parties intended to be the consequences if the Operator was discovered to have been gaining or losing from the overhead payment of 15%. It is established that those parties intended that in that case the 15% overhead charge rate could be adjusted prospectively. What must be determined is what those parties intended with respect to the payments that already had been made — specifically whether the Operator would be required to repay the gain to the joint venture, or the joint venture would be required to make additional payment to the Operator to cover the loss, as the case may be.

52 In determining the intention of those parties, I must consider not only specific provisions of the agreement. I must consider also the agreement overall, so that I do not interpret a particular provision in a manner that is inconsistent with the overall tenor of the agreement. Representative of the many

court decisions that have applied this approach is *Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust* (2007), 85 O.R. (3d) 254 (Ont. C.A.), at paragraph 24:

> 24 ... a commercial contract is to be interpreted:
>
> (a) as a whole, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective;
>
> (b) by determining the intention of the parties in accordance with the language they have used in the written document and based upon the "cardinal presumption" that they have intended what they have said;
>
> (c) with regard to objective evidence of the factual matrix underlying the negotiation of the contract, but without reference to the subjective intention of the parties; and (to the extent that there is any ambiguity in the contract),
>
> (d) in a fashion that accords with sound commercial principles and good business sense, and that avoid a commercial absurdity.

53 Neither Shore nor De Beers was an original party to the joint venture agreement. The parties to the agreement at the time of its execution were Cameco Corporation, Uranerz Exploration and Mining Limited, Monopros Limited and Kensington Resources Ltd. These original participants crafted a sophisticated agreement that reveals itself to have been prepared thoroughly and carefully.

54 In the agreement the original participants addressed a wide range of possibilities, and they dictated the consequences to flow from such possibilities. On the face of the agreement it is evident that, where the original participants identified a possible event for which they intended a particular result, they included an appropriate provision in the agreement. It was this approach to the preparation of the agreement that led to the inclusion of two forms of dispute resolution, arbitration and expert determination. It was this approach that led to the inclusion of provisions for referral to one or the other of these forms of dispute. It was this approach that led to the inclusion of the provision for adjustment, from time to time, of the 15% overhead charge rate in the event that 15% was causing a financial gain or loss to the Operator.

55 Against that background, the absence of a provision "remedying" an historical gain or loss arising from the 15% overhead payment is instructive. Having identified the possibility of such a gain or loss, the original participants agreed to provide for an adjustment of the overhead rate for the future, but they did not include in the agreement any remedy of historical gain or loss.

56 One may speculate that the original participants intended such a remedy, and that they decided not to include provision for it in the agreement because they were confident that such a remedy could be agreed to or could be addressed under the common law. That speculation, however, is inconsistent with the thoroughness and care that the original participants brought to the preparation of the agreement. No reason presents itself for the original participants to have selected this intended result — remedy of

historical inequity — for exclusion from the agreement.

57 If the original participants had intended a remedy of the historical inequity, including such a provision in Schedule "D" would have been easily done and would have been consistent with their approach to preparation of the agreement otherwise. I conclude that the original participants did not include such a provision in the agreement for the reason that they did not intend such a provision. In preparing the agreement, the original participants identified the possibility of the 15% overhead charge operating to give the Operator either a gain or a loss, and they agreed that in that event an adjustment could be made to the 15% overhead charge rate for future operations. That is, the original participants agreed that the operation of subsection 2.14(a) contrary to the Statement of Intent would be remedied by way of the prospective adjustment. They did not agree that the gain or loss that had been discovered would be repaid or compensated for.

58 The joint venture agreement does not provide that an historical gain or loss arising from the 15% overhead payment is to be remedied. No remedy is available to Shore even if Shore establishes that De Beers gained financially from the 15% overhead payment. Thus, there is no point in determining the financial gain issue. There being no point in determining the financial gain issue, there is no "difference or dispute" to be resolved by arbitration under Section 16.01 of the agreement. The arbitration notice will be struck.

Limitation periods

59 De Beers raises several time limitation arguments arising from the provisions of the joint venture agreement and from limitation statutes. Since I have decided that there is no arbitrable issue, there is no need for me to address those arguments.

Conclusion

60 The application of De Beers is granted, and Shore's arbitration notice is struck. The application of Shore for appointment of an arbitrator is dismissed. De Beers will have the costs of both applications.

Respondent's application granted and applicant's dismissed.

TAB 30

2012 SKCA 16
Saskatchewan Court of Appeal

Shore Gold Inc. v. De Beers Canada Inc.

2012 CarswellSask 90, 2012 SKCA 16, 212 A.C.W.S. (3d) 624, 385 Sask. R. 238, 536 W.A.C. 238, 95 B.L.R. (4th) 183

Shore Gold Inc., Appellant and De Beers Canada Inc., Respondent

Klebuc C.J.S., Lane, Smith JJ.A.

Heard: February 13, 2012
Judgment: February 13, 2012
Docket: CACV2078

Proceedings: affirming *Shore Gold Inc. v. De Beers Canada Inc.* (2011), 2011 CarswellSask 208, 2011 SKQB 95, 368 Sask. R. 296, 85 B.L.R. (4th) 42 (Sask. Q.B.)

Counsel: Christopher Boychuk, Q.C., for Shore Gold Inc.
Robert Kennedy, Q.C., for De Beers Canada Inc.

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Public

Headnote

Alternative dispute resolution --- Practice and procedure — General principles

S Inc. and D Inc. entered into joint venture agreement (JVA) — JVA provided that operator, D Inc., was to be compensated for overhead expenses at rate of 15 per cent of certain expenses, but JVA statement of intent indicated that parties intended that operator should neither gain nor lose financially as result of acting as operator — D Inc. left joint venture and S Inc. formed view that respondent had gained financially from receiving 15 per cent for overhead expenses — S Inc. initiated audit, and eventually sent letter to D Inc. addressing topic of arbitration — S Inc. brought application for appointment of arbitrator pursuant to ss. 7 and 11 of Arbitration Act for order appointing arbitrator — D Inc. brought application to strike S Inc.'s arbitration notice — Chambers judge struck S Inc.'s arbitration notice on basis that there was no arbitral issue as JVA made no provision for remedy even if it was established that D Inc. gained financially from 15 per cent overhead payment — S Inc. appealed — Appeal dismissed — Chambers judge correctly decided material issues before him.

Business associations --- Powers, rights and liabilities — Contracts by corporations — Miscellaneous

S Inc. and D Inc. entered into joint venture agreement (JVA) — JVA provided that operator, D Inc., was to be compensated for overhead expenses at rate of 15 per cent of certain expenses, but JVA statement of intent indicated that parties intended that operator should neither gain nor lose financially as result of acting as operator — D Inc. left joint venture and S Inc. formed view that respondent had gained financially from receiving 15 per cent for overhead expenses — S Inc. initiated audit, and eventually sent letter to D Inc. addressing topic of arbitration — S Inc. brought application for appointment of arbitrator pursuant to ss. 7 and 11 of Arbitration Act for order appointing arbitrator — D Inc. brought application to strike S Inc.'s arbitration notice — Chambers judge struck S Inc.'s arbitration notice on basis that there was no arbitral issue as JVA made no provision for remedy even if it was established that D Inc. gained financially from 15 per cent overhead payment — S Inc. appealed — Appeal dismissed — Chambers judge correctly decided material issues before him.

APPEAL from judgment reported at *Shore Gold Inc. v. De Beers Canada Inc.* (2011), 2011 CarswellSask 208, 2011 SKQB 95, 368 Sask. R. 296, 85 B.L.R. (4th) 42 (Sask. Q.B.).

***Klebuc C.J.S.* (orally):**

1 Shore Gold and De Beers Canada were participants in the Fort a la Corne Joint Venture ("FLC JV"), which had been established for the purpose of exploring and producing minerals within Saskatchewan. In connection therewith, they and others entered into a comprehensive agreement dated January 1, 1995, called the "Fort a la Corne Joint Venture Agreement ("the JVA"). It set out the manner in which the operations of the FLC JV were to be conducted.

2 De Beers Canada was appointed the "Operator" of the FLC JV in accordance with the provisions of the JVA. As the Operator, it was entitled to recover its general and administrative expenses from the FLC JV, and did so until it resigned from the position of Operator in September 2006.

3 A dispute subsequently arose between Shore Gold and De Beers Canada as to whether De Beers Canada had charged and collected substantially more than its actual general and administrative expenses and, therefore, was obligated to refund the amount it was overpaid. When a settlement of the issue could not be negotiated, Shore Gold served a notice to arbitrate on De Beers Canada pursuant to s. 16.01 of the JVA and subsequently applied to the Court of Queen's Bench pursuant to ss. 7 and 11 of *The Arbitration Act, 1992*, S.S. 1992, c. A-24.1 for an order appointing an arbitrator. De Beers Canada responded by applying for an order striking the notice to arbitrate by Shore Gold on the ground that the aforementioned issue was not arbitral.

4 The Chambers judge dismissed Shore Gold's application on the basis that the issue of whether De Beers Canada had been overpaid was not an arbitral issue under s. 16.01 of the JVA. He further struck the notice to arbitrate made by Shore Gold.

5 In our view, the Chambers judge correctly decided the material issues before him, as reflected in his reasons for judgment. Based on those reasons, we dismissed the appeal.

6 The Respondent shall have its costs in the usual manner.

Appeal dismissed.

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TAB 31

1945 CarswellAlta 102
Alberta Supreme Court, Appellate Division

Morgan v. Boles

1945 CarswellAlta 102, [1945] A.J. No. 26, [1946] 1 W.W.R. 1, [1946] 1 D.L.R. 471

Morgan (Plaintiff) Appellant v. Boles (Defendant) Respondent

Ford, Ewing and Parlee, JJ.A.

Judgment: November 23, 1945

Counsel: *C. H. Russell, K.C.*, for plaintiff, appellant.
J. S. McCormick, K.C., for defendant, respondent.

Subject: Contracts; Torts; Property

Headnote

Agency --- Real estate agents — Rights of agent — Commission
Estoppel --- Estoppel in pais — Estoppel by conduct — Standing by and silence (where positive duty to speak)

Estoppel by Representation — Essential Factors of.

Agency — Real-Estate — Agent Estopped from Claiming Commission.

It is not necessary in order to create an estoppel that the person whose acts or declarations induced another to act in a particular way must have been under no mistake himself or must have acted with the intention to mislead or deceive. What the law mainly regards is the position of the person who was induced to act, and the principle upon which the doctrine is based is that it would be inequitable and unjust if, after another person by a representation, or by conduct amounting to a representation, has induced him to act as he would not otherwise have done, said other person were allowed to deny or repudiate the effect of his statement, to the loss and injury of the person who acted upon it; Sarat Chunder Dey v. Gopal Chunder Laha (1892) L.R. 19 Ind. App. 203, quoted in *Craine v. Colonial Mutual Fire Insur. Co. Ltd.* (1920) 28 Comm. L.R. 305, at 327.

Applying said principle, *held* that the plaintiff, a real-estate agent, was estopped from successfully asserting a claim for a commission. By admitting or agreeing that the person who bought the property in question was the defendant's buyer he led the defendant to believe that he was not claiming a commission, with the result that if the Court were to allow the claim the defendant would incur a loss caused by the plaintiff's representations and conduct.

Maritime Electric Co. Ltd. v. General Dairies Ltd. (1934) 8 M.P.R. 67, restored by [1937] 1 W.W.R. 591 (P.C.), 1937 Can. Abr. 420, 802; Greenwood v. Martins Bank Ltd., [1933] A.C. 51, at 57, 101 L.J.K.B. 622, also referred to.

Appeal by plaintiff from a judgment by Dubuc, C.J.D.C. Appeal dismissed with costs.

The judgment of the Court was delivered by *Parlee, J.A.*:

1 The plaintiff's action for commission for selling the defendant's farm was dismissed by His Honour, Chief Judge Dubuc, who gave the following reasons:

> I believe the evidence of Mr. Boles and his wife, and I find that Morgan did not have a contract at all.
>
> The case will be dismissed with costs.

2 From this judgment the plaintiff appeals.

3 In the light of the reasons for judgment, counsel for the appellant, in support of the appeal, quite properly relied solely on the evidence of the defendant and his wife. I will do the same except where the evidence of the plaintiff supports the story of the defendant.

4 The defendant says that, at the urgent request of the plaintiff, he gave him the right to sell his farm, but under certain definite conditions. I think it is better to give the defendant's own evidence as to what authority he gave the plaintiff:

> A. I told him, I said 'Morgan I don't think you are a better salesman that I am, if you think you can get $560.00 on the place, well ... go out and get it, these people are not any more fools than we are.'
>
> Q. Did you make a proposal to him? A. Not for a while yet, we talked half an hour, he was begging me to give him a chance, 'here' he said 'I am closer than these fellows, you give me a chance,' 'No,' I said, 'Morgan you won't sell it and you won't be satisfied.'
>
> Q. Did you make him a proposal? A. Not yet. I wanted to make sure that he understood the agreement between him and I. I said 'Now Morgan, I don't think you can get in on this at all, you had better not bother with it at all; but here is one way you can get in it, I am building on the place on one quarter, and I don't know the price myself, because I am building, and the price of lumber, shingles and one thing and another, labour and so on, you can't tell the price, I will sell it for the same price as last Fall if I get a buyer for the 560 acres, but now, you come to me and get my price and add your commission and go and sell it, I won't interfere, but remember, if a buyer comes in that gate without you he is my buyer and I don't want you monkeying with him.'

5 The plaintiff did interest one William Emery McWade and in November, 1944, arranged with McWade to go with him to see the defendant's farm. McWade, who gave evidence at the trial, went himself, on November 27, 1944, to see the property and there met the defendant and made an inspection and obtained from the defendant his price of $9,500 for the farm. Next day, that is on November 28, the plaintiff, with McWade, visited the defendant's farm.

6 I pause here to say that, subsequently, McWade and his brother did purchase the farm from the defendant at the sum of $9,500 and it would be my view that, but for the facts to be related, the plaintiff would be entitled to his commission, in light of the decision of the Supreme Court of Canada in *Stratton*

v. Vachon and Wilson (1911) 44 S.C.R. 395.

7 I do not propose to discuss this phase of the action any further as I think other principles must prevail, having regard to what took place between the parties.

8 When the plaintiff and McWade met the defendant on the farm, on November 28, the plaintiff said to the defendant, speaking of McWade, "Here is a prospective buyer," to which the defendant replied, speaking to the plaintiff, "Well Dave, this man was here yesterday, he is really my buyer," whereupon the plaintiff said, "Go ahead and sell it to him."

9 After McWade had made a further inspection of the farm he then endeavoured to obtain from the defendant a lesser price than $9,500. The defendant refused to take any lesser sum and the price was then agreed at the said sum of $9,500, but subject to the approval of Mrs. Boles. The three men then went into the house and the defendant's wife agreed although, apparently, Mrs. Boles had the sum of $10,000 in mind.

10 Following these negotiations, McWade paid $30 on account and, as the parties say, they shook hands signifying they had reached a bargain and it was arranged that the parties were to meet in Ponoka in two or three weeks to complete the necessary documents.

11 The plaintiff was present during all of the above negotiations and apparently made no comment. I think there could be no doubt that the plaintiff knew at the time that the defendant was selling at a price that he wanted for the farm net to him and with no expectation of paying any commission, nor was there any commission included in the sale price.

12 It is significant that the plaintiff, who apparently was an experienced real-estate agent, took no further part in the sale or in the preparation or the execution of the necessary agreements. I think that this attitude was because the plaintiff at the time did not expect any commission and was thus not further interested.

13 Subsequent to the events just related, but before the agreements were signed, the defendant heard that the plaintiff was claiming that he had sold the farm. The defendant met the plaintiff in Ponoka and mentioned what he had heard to the plaintiff, and the latter suggested that he should be paid $100 as commission for his services, which the defendant refused to pay, and stated that he would return to McWade the $30 paid by him and sell the farm to another buyer, who he said was waiting. To this the plaintiff replied, "Go ahead and fix up the papers, I want McWade to have the place." The plaintiff admits some such discussion and when asked on his discovery what he meant said:

> Q. The statement Boles made with regard to the conversation that took place in Ponoka, is there anything to that, where you waived your commission, or you gave him to understand that. Is there anything to that? A. I told him we would let it go.
>
> Q. What do you mean? A. I will explain it this way. The deal was, well, the papers had to be signed up, and McWade was paying so much money, and I said 'let it go,' I wanted the deal completed.

> Q. You were lying low, is that it, you were lying low, let them go ahead and make the deal and then you would come in for a commission. Is that right? A. I wanted the deal completed.
>
> Q. Am I correct? Your plan was, having talked to Boles, you wouldn't do anything more, you would let them go ahead and sign up the papers and then you would come in and claim a commission. Is that right, is that correct? A. Yes.

14 The question now presents itself: Is the plaintiff at liberty to assert a claim for commission or is he estopped by his conduct and his representations to the defendant? Or to put the question another way: Did the plaintiff waive his commission or acquiesce in the sale by the defendant without regard to his claim? I think that, no matter what label one may use as to his representations or conduct, it amounts to a question of estoppel or no estoppel — in other words, the principle of the doctrine of estoppel must be applied.

15 I have not any doubt that, in view of the defendant's authority to the plaintiff to sell his farm (quoted *supra*) the plaintiff knew, when the defendant asserted that McWade was his buyer, that the defendant meant there was no commission to be payable to the plaintiff and that he acquiesced in the defendant's understanding, and the plaintiff's subsequent statements and conduct support such a conclusion. The plaintiff may have had a mental reservation — if not at the beginning, at some time — that after the deal was completed he would make a claim on the defendant. For the Court to allow such a claim would result in a loss to the defendant which was caused by the representations and conduct of the plaintiff.

16 In the recent case from New Brunswick of *Maritime Electric Co. Ltd. v. General Dairies Ltd.*, the doctrine of estoppel received a careful and comprehensive consideration. I refer to this case as many of the leading authorities are canvassed and because the decision of The Honourable Mr. Justice Richards at the trial was endorsed by the Privy Council. The judgment of the trial Judge will be found in 8 M.P.R. 67, and was affirmed by the Court of Appeal of New Brunswick, 8 M.P.R. at 82, [1934] 4 D.L.R. 436. On appeal to the Supreme Court of Canada the judgment was reversed, [1935] S.C.R. 519, 44 C.R.C. 43, but the judgment of Mr. Justice Richards was restored by the Privy Council. See [1937] 1 W.W.R. 591, [1937] A.C. 610, 106 L.J.P.C. 81, [1937] 1 All E.R. 748.

17 Mr. Justice Richards in 8 M.P.R. 72, commences his discussion of the doctrine of estoppel by quoting from the decision of Lord Denman in *Pickard v. Sears, infra*. Mr. Justice Richards says:

> Lord Denman in 1837, in the well known case of Pickard v. Sears (1837) 6 Ad. & E. 469, at p. 474, 112 E.R. 179, laid down the principle of estoppel in these words:
>
> > The rule of law is clear, that, where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.

18 He then, at p. 73, sets out in full the four recognized propositions of an estoppel *in pais* as

delivered by Brett, J. (afterwards Lord Esher) in the leading case of *Carr v. L. & N.W. Ry.* (1875) L.R. 10 C.P. 307, at 316, 44 L.J.C.P. 109.

19 I do not set out these rules at length preferring to adopt the course of Mr. Justice Baxter (now Chief Justice) who (8 M.P.R. at p. 87) preferred the restatement of the principles of estoppel set out in a more simplified form in Greenwood v. Martins Bank Ltd., [1933] A.C. 51, at 57, 101 L.J.K.B. 622, where it is stated that the essential factors giving rise to estoppel are:

> (1) A representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made.
>
> (2) An act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation is made.
>
> (3) Detriment to such person as a consequence of the act or omission.

20 It would appear clear to me, from the above rules, that when the plaintiff admitted or agreed that McWade was the defendant's buyer he was estopped from claiming any commission; that such an acquiescence, his silence when he should have spoken and his representations, led the defendant to believe that the plaintiff was not claiming any commission and that the defendant acted to his detriment.

21 Mr. Spencer Bower on *The Law Relating to Estoppel by Representation* says in the preface to his book, in part, as follows:

> ... it is submitted that 'estoppel by deed,' the so-called 'estoppel by negligence' the so-called 'equitable estoppel' and the various rules relating to 'election,' 'waiver,' 'encouragement,' 'acquiescence,' 'approbation and reprobation,' and the like, are essentially (though not always so nominated in express terms) neither more nor less examples, applications, corollaries, or off-shoots, of that great central doctrine of estoppel by representation ....

22 In my view there is a clear principle applicable to the acts, representations and conduct of the plaintiff in this case, which will not allow him to successfully assert his claim against the defendant. That principle is set out in a quotation from Lord Shand in Sarat Chunder Dey v. Gopal Chunder Laha (1892) L.R. 19 Ind. App. 203, quoted in *Craine v. Colonial Mutual Fire Insur. Co. Ltd.* (1920) 28 Comm. L.R. 305, at 327, where Lord Shand (speaking for Lord Watson, Lord Morris and Sir Richard Couch) said:

> The law of this country gives no countenance to the doctrine that in order to create estoppel the person whose acts or declarations induced another to act in a particular way must have been under no mistake himself, or must have acted with an intention to mislead or deceive. What the law and the Indian statute mainly regard is the position of the person who was induced to act; and the principle on which the law and the statute rest is, that it would be most inequitable and unjust to him that if another, by a representation made, or by conduct amounting to a

> representation, has induced him to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it.

23 In my opinion the appeal fails and the same should be dismissed with costs.

TAB 32

2010 ONCA 440
Ontario Court of Appeal

Feather v. Bradford West Gwillimbury (Town)

2010 CarswellOnt 3986, 2010 ONCA 440, 190 A.C.W.S. (3d) 596, 268 O.A.C. 239, 320 D.L.R. (4th) 228, 71 M.P.L.R. (4th) 1

Michael Feather (Applicant / Respondent) and The Corporation of the Town of Bradford West Gwillimbury and Jack Tosta, in his capacity as Chief Building Official (Respondents / Appellants)

Robert J. Sharpe, Paul Rouleau, Gloria Epstein JJ.A.

Heard: February 12, 2010
Judgment: June 16, 2010
Docket: CA C51137

Proceedings: reversing *Feather v. Bradford West Gwillimbury (Town)* (2009), 2009 CarswellOnt 5484, 64 M.P.L.R. (4th) 234 (Ont. S.C.J.)**Proceedings: additional reasons at *Feather v. Bradford West Gwillimbury (Town)* (2010), 2010 CarswellOnt 630, 2010 ONSC 859 (Ont. S.C.J.)**

Counsel: Patricia A. Foran, Patrick Harrington for Appellants
James S.G. Macdonald for Respondent

Subject: Public; Property; Civil Practice and Procedure; Municipal

Headnote

Municipal law --- Zoning — Legal non-conforming use — Discontinuance — Onus of proving discontinuance

MD owned property abutting river with boathouse — On October 27, 1958, By-law 1009 zoned property agricultural, permitting cottage (undefined) not occupied for more than six months in calendar year (undefined) fronting on public road — On October 25, 1961, EAL and KEL bought property, and boathouse had sink, hotplate, toilet, and sleeping area — While no building permit was located, by 1963 bungalow was built and EAL and KEL resided there full time — EAL died in July 1966, KEL moved out and got federal government's consent to sell property as "Real Estate - house and premises", and boat was kept in boathouse — On March 19, 1968, DAA bought property, used boathouse and lived there full time until 1991 — On October 12, 1971, By-law 2263 permitted owner's dwelling in agricultural zone — In 1980's, property began to sink, and while neighbours remedied situation, DAA moved out in 1991, continuing to shore up home until he died January 1, 1994 — On May 17, 1994, BPD bought property, continually tried to raise bungalow, put in tent trailer, and used property recreationally — By 1995 bungalow was 70 per cent under water, so BPD knocked down boathouse and used wood to support bungalow — On May 14, 2004, PB and DG bought property intending residential use, and rented out bungalow roof as dock and deck to tenants — On July 26, 2005, MF bought property, and started raising building on February 20, 2006 until stop work order issued — Municipality refused to issue building permit for non-compliance with zoning — MF successfully applied for declarations and entitlement to building permit — Application judge found that property was used as residential cottage, subject to six-month occupancy limitation, and for boat docking, on date By-law 2263 was passed, and use was not discontinued — Municipality appealed — Appeal allowed — Even if use amounted to residential use, it could not revive legal nonconforming use lost over course of preceding 10 years — Evidence fell far short of active intention consistent with spirit of s. 34(9) of Planning Act — While boats were docked on property, this did not mean that MF had right to erect new structures for that purpose, unless they conformed with current zoning by-law.

APPEAL by municipality from judgment reported at *Feather v. Bradford West Gwillimbury (Town)* (2009), 2009 CarswellOnt 5484, 64 M.P.L.R. (4th) 234 (Ont. S.C.J.).

***Paul Rouleau J.A.*:**

1 This appeal concerns a cottage structure that has been submerged and uninhabited for over 14 years. The respondent now seeks to obtain a building permit to raise the building out of the water and renovate it. The appellants maintain that the proposed repairs and resumption of use of the building as a cottage are not permitted by the zoning bylaws of the town nor are they allowed as a nonconforming use.

2 The central legal issue raised by this case is whether the intention of successive parties to carry out the required remedial work is sufficient to preserve the legal nonconforming use status of the cottage for the 14 years that it remained uninhabitable. A secondary issue is whether the land in question may be used for the purpose of boat docking.

The Facts

3 The subject property is located on the western bank of the Schomberg River. The property fronts onto a private roadway known as "Private Drive".

4 In 1958, the property was owned by Maurice Delight. On the site, he built a twostorey boathouse with a loft equipped with a sink, hot plate, cupboard, toilet and sleeping area. In 1961, the property was sold to Ernest Luff who, in 1963, built the now submerged cottage. Mr. Luff resided in the cottage, used the boat house to store personal property, and docked two boats on the property from 1963 until his death in 1966.

5 The property was then sold to Douglas Alder in 1968. The cottage began to sink sometime in the 1980. Despite this, Mr. Alder resided in the cottage until 1991, by which time the building had sunk into the mud to the point that Mr. Alder had to wear rubber boots while in the cottage. While residing on the property, Mr. Alder, who owned a boat, also used the boathouse. In 1991, Mr. Alder's sister convinced him to move out of the cottage and reside with her.

6 After moving out, Mr. Alder periodically attended at the cottage and placed sand around it in an attempt to shore it up. After a period of illness, Mr. Alder passed away in January 1994.

7 Mr. Alder's estate did not have the resources necessary to raise the cottage and therefore opted to sell the property to Brian Davey in May 1994 for $2.00.

8 Mr. Davey used the land recreationally, placing a tent trailer there as well as docking his and his family's boats. He stated that over the 10-year period that he owned the property he "never gave up trying to find affordable techniques to raise the house" but that he simply did not have enough money. During the course of his ownership, the boathouse was demolished.

9 In 2004, Mr. Davey sold the property to Donald Grant for $20,000. Mr. Grant's common-law partner intended to use the land residentially but, in the interim, leased the land to tenants who moored their houseboat to the sunken cottage and used the roof of the sunken cottage as a sort of deck.

10 The respondent purchased the property in July 2005. Prior to selling the property, Mr. Grant's common-law partner wrote to the Lake Simcoe Conservation Authority requesting permission to upgrade the cottage's support pilings.

11 Because the property is within the regulatory flood plain of a provincially significant wetland, the respondent Corporation of the Town of Bradford West Gwillimbury and the Conservation Authority have concurrent jurisdiction over it.

12 The Conservation Authority responded to the inquiry in August 2005 indicating that a permit from it was not required for the proposed work. A copy of this response was sent to the town.

13 In December 2005, the respondent wrote to the Conservation Authority requesting a site clearance for the property. In the letter the respondent indicated that "work to be done to existing building is to replace wood negatively affected by mold and decay due to moisture."

14 The respondent was advised that a permit from the Conservation Authority was not required for the proposed work and the town was copied with the Conservation Authority's response.

15 In February 2006, the respondent started to raise the submerged cottage. In late March 2006, representatives of the town went to the property in response to a complaint and advised the respondent to stop his work as he had not obtained a building permit. A stop work order followed shortly thereafter. The respondent complied.

16 In September 2006, the respondent applied for a building permit. The town's chief building official, the appellant Jack Tosta, denied the application because, in his view, the proposed work did not comply with the town's zoning bylaw and, as the cottage had been abandoned, it was no longer allowed as a legal nonconforming use.

17 In response to the refusal, the present application was brought.

The Zoning Bylaws

18 The zoning bylaws respecting the use of the subject property have changed over time. In 1958,

when the boathouse and loft were built, Bylaw 869 was in effect. Pursuant to this bylaw, no dwelling or accessory building could be erected on a lot having "street frontage" of less than 40 feet.

19 In 1963, when the cottage was built, Bylaw 1009 was in effect. It zoned the property as agricultural but allowed for the construction of a cottage on such lands provided that the cottage fronted on a public street or highway and was not occupied more than 6 months in any calendar year. It also permitted buildings used for, amongst other things, the storage of boats.

20 In 1971, Bylaw 2263 came into force. Pursuant to that bylaw, the land continued to be zoned agricultural, however, a person could not use the land or erect or use a building or structure except for listed agricultural uses. The listed uses did not include building or using a cottage building or using a property for docking a boat.

21 The application judge found that, as of the date that Bylaw 2263 came into effect, the land, cottage and boathouse had always been lawfully used by the property owners and these uses had not been abandoned or otherwise discontinued within the meaning of the law. Consequently, the current owners had a legal nonconforming use with respect to the property and buildings.

Issues

22 On appeal, the appellants argue that:

1. the property was never lawfully used for residential purposes and, when it was built, the construction and residential use of the cottage was not lawful; and

2. in any event, the use of the property and cottage for residential purposes has not been continuous since Mr. Alder vacated the cottage in 1991, and, as a result, any status as legal nonconforming use was lost.

23 For the reasons that follow, I am of the view that the application judge erred in concluding that any legal nonconforming use of the cottage that may have existed when Bylaw 2263 was adopted has continued to the present day. As a result, I need not address the first issue raised by the appellants and will assume, without deciding, that the use in 1971 of the cottage was lawful. However, I am also of the opinion that the respondent does enjoy a right to use the property for the purpose of docking boats, though they do not have a right to erect any new structures for this purpose.

Discussion

24 It is accepted by the parties that the property's current zoning prohibits the construction of a cottage and prohibits the use of any building located on the property as a cottage.

25 The issue, therefore, is whether the respondent is entitled to carry out the remedial work on the sunken structure on the basis that the status of the building as a legal nonconforming use was never lost.

26 Legal nonconforming uses constitute exceptions to the requirement that property owners must

comply with municipal zoning bylaws. Provision for nonconforming uses is made in s. 34(9) of the Planning Act, R.S.O. 1990, c. P.13. It reads as follows:

Excepted lands and buildings

34. (9) No by-law passed under this section applies;

(a) to prevent the use of any land, building or structure for any purpose prohibited by the by-law if such land, building or structure was lawfully used for such purpose on the day of the passing of the by-law, so long as it continues to be used for that purpose; or

(b) to prevent the erection or use for a purpose prohibited by the by-law of any building or structure for which a permit has been issued under subsection 8(1) of the Building Code Act, 1992, prior to the day of the passing of the by-law, so long as the building or structure when erected is used and continues to be used for the purpose for which it was erected and provided the permit has not been revoked under subsection 8(10) of that Act.

27 In order to prove a legal nonconforming use, a party must prove that:

1. the use of the land, building or structure was lawful at the time of the enactment of the relevant zoning restriction; and

2. the previously lawful use has continued thereafter.

See *Rotstein v. Oro-Medonte (Township)* (2002), 34 M.P.L.R. (3d) 266 (Ont. S.C.J.), at para. 35.

28 As set out in Ian MacFee Rogers & Alison Scott Butler, *Canadian Law of Planning and Zoning*, 2d ed., looseleaf (Toronto: Carswell, 2009), at para. 6.2.1:

> The general intention of planning legislation is eventually to eliminate non-conforming uses and replace them with permitted uses; thus the council may be said to zone out such uses. This is based on the premise that such a use is undesirable because it is incompatible with the existing permitted uses but is to be tolerated because it was a lawful use prior to its prohibition by by-law. It has been said that gradual elevation of a district is an end towards which progress should always be made.

29 As indicated earlier, I will, for purposes of this decision, assume that the original construction and use of the now-sunken cottage constituted a permitted use at the time that Bylaw 2263 was enacted. I will also assume that the use continued at least until Mr. Alder moved out in 1991. The remaining issue, therefore, is whether the legal nonconforming use status was lost in the period between 1991 and 2005.

30 The respondent maintains that the legal nonconforming use status of the cottage was not lost. In support of his submission he argues that, as found by the application judge, there was continuous use of the property for residential purposes and, even if the use for residential purposes was discontinued as a result of the cottage sinking into the water and mud, each of the successive owners intended to return the cottage to use. Such an ongoing intention serves to preserve the legal nonconforming use status of

the building.

31 The critical period for analysis is from 1991 when Mr. Alder moved out of the cottage until 2005, when the respondent purchased the property. It is uncontested that during this period the cottage was uninhabitable as it was largely submerged in the Schomberg River. In the absence of actual habitation, was the intention to use the cottage enough to prevent the loss of the nonconforming use during this period?

32 To establish a legal nonconforming use s. 34(9) of the Planning Act provides that the respondent must establish both an intention to use and the continuation of the actual use so far as possible in the circumstances.

33 The application judge found that both elements of the test were satisfied for the relevant period. Specifically, the court found that even though the cottage was uninhabitable during that period, Mr. Alder did not have the funds to carry out the repairs, Mr. Davey had maintained the residential use of the property as far as possible through his regular use of a tent trailer and Mr. Grant's common-law partner maintained the use to the extent possible by renting the property to tenants who used the cottage as a place to dock their houseboat. With respect to the 10 years of ownership by Mr. Davey, the application judge accepted Mr. Davey's testimony that he always intended to raise the cottage and use it as a residence but that he was impecunious.

Was the cottage used?

34 In my view, the application judge erred by conflating the use of the land for a purpose such as parking his tent trailer with the use of the cottage. The central issue is the respondent's ability to raise the cottage out of the mud and water, reconstruct it and put it back into use and the application judge's order requiring the issuance of the required building permit.

35 In 1971 when Bylaw 2263 was passed, Mr. Alder was residing in the cottage and, in addition, was using the balance of the property for recreational purposes such as the docking of his boat. The Bylaw restricted both the use of the property and the erection and use of any structure, except for certain listed agricultural uses. Residential or recreational uses were not allowed.

36 Bylaw 2263 provided that:

> Nothing in this Bylaw shall prevent the continuance in any Zone of a use existing on the date of the passage of this Bylaw, including the repair and renovation of existing buildings subject to the provisions of this Bylaw respecting setback, yard requirements and height, so long as it continues to be used for the same purpose.

37 In the bylaw, "use" is defined as "the purpose for which *a lot or building or structure or any combination thereof* is designed, arranged, occupied or maintained" (emphasis added). The definition therefore clearly makes a distinction between the lot and the building or structures erected thereon. This distinction is consistent with s. 34(9) of the Planning Act where the same distinction is made in para. (a)

between use of land, a building, or a structure. As a result, the use made of the lots and existing buildings should be looked at separately from erecting or rebuilding a structure when considering nonconforming uses.

38 With this distinction in mind, I turn now to a brief review of the relevant facts as they relate to the use of the cottage structure. Until 1991, Mr. Alder lived full time in the cottage. As it sunk into the mud and water he attempted to shore up the building and continued to use it until the water in the cottage became too deep. Although he left the cottage in 1991, he maintained an intention to fix the problem and return to live in the cottage. He did not have the money to raise the cottage, but he did periodically place sand around the building in an attempt to stop its sinking. He later became ill and died in 1994 without having carried out the intended repairs.

39 By 1994, after Mr. Alder's death, the estate became concerned about the potential liability with respect to the property as it could not afford to retain someone to take down or secure the boathouse or cottage.

40 As a result, in 1994, the estate decided to sell to a neighbour, Lorraine Davey. Because Davey did not want the property to merge with neighbouring properties that she owned, she decided that her son Brian Davey would purchase it. Mr. Davey then purchased the property for $2. As a result of this purchase the Davey family now owned four properties on Private Drive: The subject property No. 27, as well as No. 37, No. 41 and No. 47. Lorraine Davey resided seasonally at No. 37 and her mother resided seasonally at No. 47. From the record it is not clear who, if anyone, resided at No. 41. The structures at No. 37 and 47 had also previously begun to sink into the mud. They were raised and placed onto new piles in the 1980s.

41 Brian Davey deposed that he and his mother "enjoyed the use of our family's properties on Private Drive over the years" and, with respect to the subject property "I docked my boats on the property as well as my family's other boats. I placed a tent trailer on the land and resided in it when I was present on the land, which was a very quiet and scenic location next to the river." Mr. Davey also used a backhoe to create parking spaces on the property that were used for his and his family members' vehicles.

42 The four Davey properties on Private Drive appear, therefore, to have operated as a type of family compound with the subject property being used as a place to dock family boats and park family cars.

43 Brian Davey's use of the property, to dock boats and occasionally to stay in a tent trailer is of little relevance to the continued use of the cottage structure. On the evidence, it is clear that from 1994 to 2004, use of the cottage structure for the purpose for which it had been built had been wholly discontinued.

44 Further, the fact that in 2004 and 2005 the property was rented to tenants who docked the houseboat to the roof of the cottage and who used the cottage roof as a deck does not, in my view, constitute use of the cottage for the purpose for which the building was designed, arranged, occupied or maintained as required by the bylaw. It cannot be maintained that docking a house boat on the roof of

the cottage falls within the properly defined scope of the original nonconforming use; it is not a change in intensity, but rather a change in kind: see *Saint-Romuald (Ville) c. Olivier*, [2001] 2 S.C.R. 898 (S.C.C.). It cannot, therefore, amount to the "residential use of the bungalow" as the application judge found. In any event, even if it amounted to residential use, it could not revive a legal nonconforming use if that use had been lost over the course of the preceding 10 years.

Was the intention to repair the cottage sufficient to preserve the right?

45 The respondent argues that Mr. Davey's intention to raise the cottage out of the mud and water and renovate it was sufficient to preserve the legal nonconforming use even if use of the cottage had been wholly discontinued during that period. I disagree.

46 In *Haldimand-Norfolk (Regional Municipality) v. Fagundes* (2000), 11 M.P.L.R. (3d) 1 (Ont. C.A.), this court quoted with approval the Ontario Municipal Board's decision in *572989 Ontario Inc. v. North York (City) Committee of Adjustment*, [1997] O.M.B.D. No. 976 (O.M.B.) wherein the Board found, at para. 10, that "In all the cases of vacancy where the Court or the Board found that the use had continued despite the vacancy, there was some reasonable explanation for the vacancy or some circumstance at least partially outside the owner's control that temporarily prevented the use" and that "if intention was determinative, the intention was at least an active intention consistent with the spirit of the provision."

47 In my view, the evidence in this case falls far short of the active intention consistent with the spirit of s. 34(9) of the Planning Act.

48 Although the application judge relied on Mr. Davey's impecuniosity to explain his failure to undertake the work necessary to raise the cottage and render it habitable, in my view, a lack of funds cannot justify inaction in the circumstances of this case for such an extensive period. Impecuniosity may well be a valid consideration for Mr. Alder who had been residing in the cottage for many years prior to its sinking into the mud and water. His lack of funds and illness were circumstances truly beyond his control, and his continued genuine intention to use the cottage and the steps he took to try and shore up the cottage may well have preserved the nonconforming use during his tenure.

49 The situation, however, is quite different for Mr. Davey. He purchased the property for $2 fully aware of the need to raise the cottage if the nonconforming use was to be preserved. The fact that he did not have the funds to do so cannot, in light of his informed choice to purchase the property, preserve the nonconforming use status of the cottage for the 10 years that he owned it. A purchaser of a property in circumstances such as these needs to do more than simply maintain an intention to resume use of the property. The intention to resume a use must be coupled with reasonable steps to resume that use. Keeping in mind the general intention of the planning legislation to eventually eliminate nonconforming uses, it is neither unfair nor inequitable to require that Mr. Davey, as purchaser, act within a reasonable time to resume the use in question. He simply cannot justify such an extensive delay by reference to costs he knew or ought to have known would have had to be incurred when he made the decision to purchase.

Use of the Land for Boat Docking

50 While the residential use of the cottage has been lost, I am of the view that the respondent continues to enjoy a right to use the land generally for the docking of boats.

51 The affidavit of John Luff indicated that, as early as 1953, boats had been docked at the subject property. A photograph taken in 1953 and attached as an exhibit to his affidavit shows a docked boat on the river at 27 Private Drive. During this period, the property was zoned under Bylaw 869. While this bylaw prohibited a "garage or other outbuilding" from being used as a "residence or living quarters" and regulated the erection of a "dwelling or accessory building", it neither prohibited the docking of boats nor barred the erection of a dock on the subject property.

52 The application judge found that Luff, Alder, Davey and Grant each docked boats or allowed boats to be docked on the land during their respective periods of ownership. These activities could, as I have noted, be traced back to the docking of boats on the property in 1953, even prior to the erection of the boathouse by Maurice Delight around the spring of 1958, and certainly prior to the passage of Bylaw 1009.

53 While the appellants argue that the boathouse was never lawfully erected as it violated the "street frontage" requirements contained in Bylaw 869, in my view, this does not affect the legality of the docking of boats that occurred in the 1950s. As I have already noted, Bylaw 869 did not prohibit the erection of a dock, nor did it prohibit the use of land for boat docking purposes. This use of 27 Private Drive was a permitted use from 1953-1958, and the owners of the subject property have continuously put the property to this use ever since.

54 Although the practical ability to use the land to dock boats may be limited by the destruction of the boathouse and the inability to raise the cottage, I see no reason to interfere with the application judge's finding that such activities occurred since before the passage of Bylaw 869. It follows that in all of the circumstances, this particular nonconforming use continues to this day. However, as I have noted previously, a use referable to the land does not automatically give rise to a right to erect or rebuild new structures or buildings. While the respondent may continue to dock boats on the property, this does not mean that he has a right to erect new structures for that purpose, unless they conform with the current zoning Bylaw.

Estoppel

55 The respondent takes the position that the letters sent to the conservation authority put the Municipality on notice as to his plans to raise the cottage, and by their silence, they have become estopped from opposing his attempts to do so. Although the respondent argued estoppel before the application judge, the application judge made no finding in that regard. The respondent asks that, in the event the appeal is granted, the matter be remitted to the court of first instance to consider the issue of estoppel. I see no reason to do so.

56 The general principle of estoppel by representation is aptly stated in Jill E. Martin, *Hanbury*

and Martin: Modern Equity 16th ed. (London: Sweet & Maxwell, 2001), at p. 891:

> [A] person who makes an unambiguous representation, by words, or by conduct, *or by silence*, of an existing fact, and causes another party to act to his determent in reliance on the representation will not be permitted subsequently to act inconsistently with that representation.
>
> [Emphasis added.]

57 Where a party seeks to invoke estoppel on the basis of silence, they must show that the party to be estopped was under a duty to make a statement, in the sense that in all of the circumstances their failure to communicate the actual state of affairs to the other party is dishonest: see *Fung Kai Sun v. Chan Fui Hing*, [1951] A.C. 489 (Hong Kong P.C.), at p. 501.

58 The estoppel argument is based, almost exclusively, on the fact that a copy of two pieces of correspondence from the Conservation Authority were sent to the town. Both documents simply state that "[t]he type of work shown on the attached plan does not require a permit from the Conservation Authority." It did not indicate or even suggest that the work did not require approval by the chief building official of the town.

59 The fact that the town received a copy of these letters did not impose a duty on the town to advise the respondent of his obligations under the law or to otherwise act in response to their receipt. The town's silence could not reasonably be said to constitute a "dishonest" assertion that the respondents did not require a *municipal* building permit. At its highest, the Municipality might be estopped from arguing that a permit from the conservation authority was required. This argument has never been relied upon by the respondent.

Conclusion

60 In conclusion, I would allow the appeal, set aside the application judge's decision and substitute therefore a declaration allowing for the continued nonconforming use of the land for the purpose of docking boats, without the ability to erect new buildings or structures. I would award the appellants their costs of the appeal fixed at $10,000 and of the application below also at $10,000, both inclusive of disbursements and GST.

***Robert J. Sharpe J.A.*:**

I agree.

***Gloria Epstein J.A.*:**

I agree.

Appeal allowed.

TAB 33

2019 BCSC 1704
British Columbia Supreme Court

Kochar v. Gadhri Holdings Ltd.

2019 CarswellBC 2894, 2019 BCSC 1704, 310 A.C.W.S. (3d) 887

Arvindervir Singh Kochar (Plaintiff) And Gadhri Holdings Ltd., Gadhri Investments Ltd. and Sandher Homes Ltd. (Defendants)

J.J. Steeves J.

Heard: May 2, 2019
Judgment: October 4, 2019
Docket: New Westminster S180583

Counsel: V.S. Chahal, for Plaintiff
W.J. McMillan, J.R. Wolfe, for Defendants

Subject: Civil Practice and Procedure; Contracts; Property

Headnote

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

Three vendors owned three properties that they agreed to sell collectively to assignor — Assignor assigned agreement to purchaser, but transaction did not close — Purchaser brought action against vendors for specific performance — Two tax judgments against one vendor were registered on title to properties, and federal Attorney General obtained order for sale of that vendor's interest — Other two vendors brought application for summary judgment dismissing purchaser's action — Application dismissed — Fact that purchaser could not obtain specific performance of entire agreement was not valid basis for denying specific performance, and there was no abuse of process or acquiescence arising from failure to oppose Attorney General's petition — It was open to purchaser to argue at trial that specific performance was applicable to part of agreement — Question would be whether that remedy would frustrate reasonable expectations of parties or distort what had been intended — In addition, resolving that question would require weighing of evidence, something that was not appropriate under R. 9-6 of Supreme Court Civil Rules — Purchaser could not be said to have chosen to allow Attorney General to take conduct of sale of one-third interest in each property, and failure to assert claim in petition did not prevent purchaser from asserting claim for specific performance.

APPLICATION by two of three vendors for summary judgment dismissing purchaser's action for specific performance.

***J.J. Steeves J.*:**

A. INTRODUCTION

1 The parties are involved in litigation about the sale of real property. The plaintiff/application

respondent Arvindervir Singh Kochar ("Kochar") filed a notice of civil claim on May 25, 2016. Among other things, he seeks an order for specific performance to complete the contract between the parties and the transfer of the properties in dispute to him.

2 The current application was filed March 18, 2019 by the defendants/ applicants Gadhri Investments Ltd. ("Gadhri") and Sandher Homes Ltd. ("Sandher"). They rely on Rule 9-6 and they submit that there is no genuine issue for trial with respect to the claim for specific performance. The applicants also rely on Rule 9-6(5)(a) which states that if the Court finds there is no genuine issue for trial with respect to a claim, the Court must pronounce judgment or dismiss the claim accordingly. The applicants also raise issues of abuse of process, and acquiescence, and they seek the cancellation of a certificate of pending litigation ("CPL") (and a caveat) filed by the respondent.

3 Gadhri Holdings Ltd. ("Gadhri Holdings") is not a named applicant (or respondent) in the current application and did not appear at the hearing of the application. Counsel for Gadhri and Sandher advised the Court that he was told by a representative of Gadhri Holdings that Gadhri Holdings supports this application. In any event, Gadhri Holdings was given notice of the application.

4 At the hearing of this application on May 2, 2019, I concluded that further submissions on the legal issues were required. The applicants' submission is dated May 27, 2019, the respondent's submission is dated July 12, 2019 and a reply submission from the applicants is dated July 19, 2019. All three submissions were filed in court on July 29, 2019.

B. BACKGROUND

5 Kochar is a businessman, the plaintiff in the underlying action and the respondent in this application.

6 The defendants Gadhri, Sandher and Gadhri Holdings are companies registered under the laws of British Columbia. They own three properties, located at 11338, 11340 and 11342 River Road, City of Surrey, British Columbia (the "Properties").

7 As above, Gadhri and Sandher are the applicants in the subject application. Gadhri Holdings is not participating, but I have been told Gadhri Holdings supports the application.

8 In December 2015, there was a contract of purchase and sale between the applicants and Gadhri Holdings and Nano Developments Ltd. ("Nano") to purchase the Properties. There was a single price for all three properties.

9 Subsequently, there was a dispute about the dates for removal of subjects and whether the removal dates had been extended to January 22, 2016. There may also be a claim of breach of contract.

10 In January 2016, Nano assigned its interest in the contract of purchase and sale of the Properties to the plaintiff, Kochar.

11 The December 2015 contract of purchase and sale of the Properties to Nano did not complete and

Kochar, the plaintiff and application respondent, filed the underlying claim in this application (the "Contract Claim"). Among other things, Kochar claims that the Properties are unique to him. An order for specific performance was sought as follows:

> 2. An order for specific performance for the Defendants to complete the Contract and transfer title for the Properties to the Plaintiff.

12 The respondent Kochar also filed a CPL against the Properties.

13 In April and June 2017, the Attorney General of Canada ("Attorney General") obtained two judgments against Gadhri Holdings for a tax debt. They were registered on the title of the Properties in June 2016 and July 2017. The amount of the judgments totalled about $420,000 as of August 2017.

14 On September 5, 2017, the Attorney General commenced a petition against Gadhri Holdings to sell its interest in the Properties in order to satisfy the two judgments. All parties to the Contract Claim were given notice of the Petition (the "Tax Litigation").

15 On December 12, 2017, the respondent Kochar filed his response to the petition. It said that he would be taking no position on the relief sought by the Attorney General.

16 On March 15, 2018, the Attorney General filed an application seeking an order for the sole conduct of sale of the Properties. On April 5, 2018, counsel for the applicants Gadhri and Sandher wrote to the Attorney General outlining their position that the application was overly broad. The position of Gadhri and Sandher was that their interests were entirely separate from Gadhri Holdings and their interests in the Properties should not be sold. In April 2018, Justice Macintosh ordered that Gadhri Holdings' one-third interest in the Properties be offered for sale, with the Attorney General having sole conduct of sale.

17 The Contract Claim was scheduled for hearing on March 4, 2019, but was removed from the trial list because the plaintiff had not filed a notice of trial. New dates have not been scheduled and discoveries are not yet complete. The CPL remains on the Properties.

C. ANALYSIS

18 In the current application, filed March 18, 2019, the applicants seek the dismissal of the claim for specific performance made by the plaintiff/respondent in the Contract Claim. Rule 9-6 and 9-6(5)(a) are relied on by the applicants.

19 The applicable parts of Rule 9-6 are as follows:

> 9-6 (4) In an action, an answering party may, after serving a responding pleading on a claiming party, apply under this rule for judgment dismissing all or part of a claim in the claiming party's originating pleading.
>
> (5) On hearing an application under subrule (2) or (4), the court,

(a) if satisfied that there is no genuine issue for trial with respect to a claim or defence, must pronounce judgment or dismiss the claim accordingly

20 With respect to Rule 9-6(4), the question on this application is whether, on the pleadings and evidence presented, the plaintiff is bound to lose (*Montroyal Estates Ltd. v. D.J.C.A. Investments Ltd.* (1984), 55 B.C.L.R. 137 (B.C. C.A.) at 139 as cited in *J.A. Brink Investments Inc. v. B.C.R Properties Ltd.*, 2015 BCSC 144 (B.C. S.C.) at para. 24). The onus of establishing that there is no genuine issue for trial is on the applicants/defendants. If a court is left in doubt about whether there is a triable issue, the application must be dismissed (*North Island Insultech (2017) Ltd. v. Cain*, 2019 BCSC 159 (B.C. S.C.) at para. 1).

21 As can be seen above, Rule 9-6(5)(a) requires a court to dismiss an application under that provision where "there is no genuine issue for trial with respect to a claim or defence." This is the same as the "*bona fide* triable issue" standard under the old rule and, for an application to be successful, it "must be manifestly clear that there is no matter to be tried" (*Haghdust v. British Columbia Lottery Corp.*, 2011 BCSC 1627 (B.C. S.C.) at para. 15).

22 In their application filed March 18, 2019, the applicants relied on the law relating to specific performance, abuse of process and acquiescence. Submissions at the hearing on May 2, 2019 dealt primarily with specific performance and the subsequent written submissions dealt only with this issue. The applicants made a very brief reference to removing the CPL in their written submissions dated May 2, 2019.

23 The issue of removal of the CPL filed by the respondent was discussed primarily as being the result of the applicants being successful on the issue of specific performance. There is a reference in the orders sought section of the application to the CPL being cancelled with either an undertaking as to damages or the posting of appropriate security.

24 I will consider these issues in turn.

(a) Specific performance

25 By the time the parties filed written submissions after the May 2, 2019 hearing, the primary issue between them was whether there can be specific performance for only a part of a contract.

26 This began at the May 2, 2019 hearing with the submission of the applicants that specific performance should not be ordered where a "performance of the whole contract cannot be enforced" (*Fry on Specific Performance*, 6th ed., p. 497, para. 1062, as cited in counsel's submissions in *Roy v. Kloepfer Wholesale Hardware & Automotive Co.*, [1952] 2 S.C.R. 465 (S.C.C.) at 467). As I understand it, the part of the contract referred to by the applicants that the respondent/plaintiff is seeking specific performance on is what would be left after the sale of the Properties by the Attorney General against the one-third interest of Gadhri Holdings, as set out in the April 2018 order.

27 It appears that, at one time, there was authority for specific performance for only the whole

contract, not a part of one. As discussed in a leading text this is no longer the situation (The Honourable Mr. Justice Robert J. Sharpe, *Injunctions and Specific Performance*, Looseleaf ed. (Toronto: Canada Law Book, 2016):

> 11.200 . . . sweeping dicta to the effect that "when the Court cannot compel specific performance of the contract as a whole, it will not interfere to compel specific performance of part of the contract" [*Ryan v. Mutual Tontine Westminster Chambers Association*, [1893] 1 Ch. 116 (C.A.) at 123] are entirely misleading. There are, in fact, many situations in which specific relief will be granted in respect of only part of a contract and where the court will in effect order piecemeal performance. The essential criterion here is . . . that the remedy selected should foster rather than frustrate the reasonable expectations of the parties. In certain cases, specific relief in respect of part of the contract may distort what was intended and will on that account be refused. In other cases, specific relief of one aspect of the agreement may safely be ordered notwithstanding the inappropriateness of specific relief for other aspects.

28 Justice Sharpe states further that specific relief for part of a contract may be appropriate where it can be seen as "independent of, and severable and separate from that portion of the obligation which cannot" be severed (para. 11.210). The concern is that "mechanical formulations are bound to produce awkward results" (para. 11.210). And, the cases reflect "an effort on the part of the courts to identify the true intentions and expectations of the parties and to measure the impact of specific relief for part of the contract against those interests" (para. 11.210). As well (at para. 11.210):

> This is a difficult exercise as the contract rarely states what is to happen if only part of it can be performed, and it requires careful examination of the overall purpose of the contract.

29 According to the applicants, the remedy of specific performance is no longer available to the respondent as a result of the April 2018 order that Gadhri Holdings' one-third interest in the Properties be offered for sale (with the Attorney General having sole conduct of sale). Further, the claim for specific performance has been rendered moot and should be dismissed under Rule 9-6, according to the applicants.

30 I am not persuaded that result follows as directly or as forcefully from the authorities as asserted by the applicants. As above, it is open to the respondent to argue at trial that specific performance is applicable to part of the contract in dispute between the parties. The question will be whether that remedy would frustrate the reasonable expectations of the parties or distort what was intended.

31 In addition, resolving that question will require the weighing of evidence, something that is not appropriate under Rule 9-6. For example, the parties probably have differing views about what was intended and they certainly disagree about what was to happen upon the apparently unforeseen filing of judgments for tax debts against the Properties. I note in passing that no one here is claiming frustration of the contract between them.

32 A related matter is that, in their recent written submissions, the applicants say that specific

performance is unavailable to the respondent because he did not assert his interest in the Properties in the Tax Litigation. He made a "calculated business decision" that he would not assert his interest in the Properties. And his intent is to acquire the Properties at a lower cumulative price than agreed to by the respondent under the disputed contract.

33 It is true that the respondent took no position on the Tax Litigation. However, I do not agree that this means the current complications between the parties are the result of the deliberate actions of the respondent.

34 What happened is that the defendant Gadhri Holdings had tax debts that the Attorney General ultimately obtained judgments on, and these judgments were enforced through Gadhri Holdings' interest in the Properties. The April 2018 order then gave the Attorney General sole conduct of sale for the Properties. None of this was the doing of the respondent. Put another way, without the tax problems of Gadhri Holdings, the Contract Claim, including the claim for specific performance on the issues of the removal of subjects and breach of contract, would proceed to trial. It follows that I do not agree with the applicants that the respondent "chose" to allow the Attorney General to take conduct of the sale of a one-third interest in each property.

35 I also do not agree with the applicants that the failure of the respondent to assert his claim as part of the Tax Litigation prevents him from asserting any claim for specific performance. As above, that is not consistent with the law that permits specific performance for part of a contract in some circumstances. And I do not agree that somehow the respondent was at fault for the circumstances that arose from the judgments applied to the Properties as a result of the Tax Litigation. The issue of acquiescence is discussed below.

36 It also appears to be the case that the respondent intends to claim specific performance of the applicants' two-thirds interest in the Properties. He has stated that, if he is successful, he can then either partition the Properties under the *Partition of Property Act*, R.S.B.C. 1996, c. 347, or he could attempt to acquire the one-third interest of Gadhri Holdings through a court-ordered sale. The applicants say this is simply a "gamble" by the respondent in order to obtain all of the Properties and the respondent is "candidly unprepared to fulfill his contractual obligations." However, in my view, the respondent is considering his options in light of the changed circumstances occasioned by the tax debts of Gadhri Holdings. He is adapting to changed circumstances that he did not create.

37 The parties rely on a number of authorities. Both parties rely on *Gaspari v. Creighton Holdings Ltd.* (1984), 52 B.C.L.R. 30 (B.C. S.C.) and the significance of this case appears to be the statement that a court of equity can order specific performance of part of a contract and damages for the remainder in some cases (at 58-59). The applicants also emphasize that the courts will not create a contract that the parties did not make themselves, but this is not controversial (Gerald H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Toronto: Carswell, 2011) at 17-18, is cited, among other authorities). Two older judgments are relied on by the applicants (*Hunt v. Spencer*, [1867] O.J. No. 231 (U.C. Ch.) at paras. 19-20; *Roberts v. Hall* (1882), 1 O.R. 388 (Ont. C.A.) at 401, but they appear to have been overtaken by the approach described in Justice Sharpe's text above.

38 More specifically, I have not been given cases analogous to the circumstances in the subject application. That is, a situation where an interest in land may be affected by judgments for tax debts and whether a previous claim for specific performance is affected by those judgments.

39 In the result, I am unable to find that the respondent/plaintiff's claim for specific performance is bound to lose. In my view there are triable issues as to whether specific performance is applicable to part of the contract in dispute between the parties and whether specific performance against the Properties applies to the original Contract Claim with the addition of the Tax Litigation consequences. At this stage in the litigation process, I am unable to say that it is manifestly clear there is no matter to be tried. To be clear, I make no comment on the merits of the plaintiffs' claim; I only say there is an issue to go to trial. And I have not been asked to make a decision about the respondent's claim of uniqueness in the Properties and I do not do so.

(b) Abuse of process

40 The doctrine of abuse of process is intended to prevent misuse of court procedures in a way that would bring the administration of justice into disrepute. The doctrine may be invoked where a party knowingly takes irreconcilable or diametrically opposed positions in different proceedings (*Este v. Esteghamat-Ardakani*, 2018 BCCA 290 (B.C. C.A.) at paras. 83, 93-94). I generally accept the applicants' point that the behaviour of taking diametrically opposed positions in different proceedings violates the principles of judicial economy, consistency and the integrity of the administration of justice.

41 According to the applicants, the respondent has taken irreconcilable positions in the Contract Claim and in the Tax Litigation. In the former, he is seeking specific performance of the contract between the parties. In the latter, he did not oppose the sale of the one-third interest of Gadhri Holdings or even raise his claim for specific performance in that litigation.

42 In the second affidavit of the respondent (sworn April 30, 2019), he provides an explanation for his actions. He deposes that after reviewing the application by the Attorney General for conduct of sale of the Properties:

> 15. . . . I took no position on the application for several reasons. At no point have I ever waivered from wanting the Properties. I thought it would be extremely difficult to prevent CRA from collecting on the debt it was owed, but it also presented me with an opportunity to purchase the 1/3 interest of Gadhri Holdings Ltd. Given that the only parties that would be interested in a 1/3 interest in the Properties were myself, Gadhri Investments Ltd. and Sandher Homes Ltd., I decided not to oppose the Conduct Application.
>
> 16. Also, I thought trial in this action would take place in July 2018 and would likely be sooner than CRA moving forward on its conduct of sale. We were not in a position to proceed with trial in July as we were not prepared and did not file a trial brief. Examinations for discovery of the defendants Gadhri Investments Ltd. and Sandher Homes Ltd. were not completed as both Defendants have failed to provide availability to move this matter forward.

> 17. I also believed that regardless of Gadhri Holdings Ltd. 1/3 interest, being able to complete on the remaining 2/3 interest would allow me to obtain the entirety of the Properties.
>
> 18. Since CRA obtained conduct of sale for Gadhri Holdings Ltd.'s 1/3 interest in the Properties, I have made an offer to buy that 1/3 interest.

43 As with my discussion about specific performance above, I can find no legal problem with this explanation. Again, the respondent was responding to the new circumstances of the tax debt of Gadhri Holdings and the court ordered sale of its one-third interest in the Properties. I do not see a conflict with seeking specific performance in the Contract Claim and then not opposing the Attorney General's petition against Gadhri Holdings, which comprises the Tax Litigation. The applicants complain that this was a business decision and that appears to be the case. However, it has not been demonstrated how a business decision made in light of changing circumstances in this case creates legal problems.

(c) Acquiescence

44 The defence of acquiescence is an equitable defence which applies when a claim has been released or waived and the balance of justice warrants its application. Acquiescence is a synonym for estoppel (*Erschbamer v. Wallster*, 2014 BCSC 2171 (B.C. S.C.) ("*Erschbamer*") at para. 34 citing *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6 (S.C.C.) ("*M.(K.)*") at para. 100). A plaintiff cannot stand by, watch the deprivation of his rights and do nothing (*Erschbamer* at para. 34 citing *M.(K.)* at para. 100). To establish the defence of acquiescence it must be shown that a party had knowledge of his legal rights, the party did not take action and it can be reasonably inferred that the party acquiesced to their infringement (*Erschbamer* at para. 37).

45 In the subject case, the applicants say that the respondent knew or should have known that a court-ordered sale of Gadhri Holdings' interest in the Properties would affect the respondent's legal claim for specific performance; that the respondent stood by and watched the infringement of his claim while doing nothing; and it can be reasonably inferred that the respondent acquiesced to his claim for specific performance being infringed.

46 As above, I accept the affidavit evidence from the respondent explaining his actions. In my view, he did not acquiesce to the court-ordered sale of the Properties. Again, the Properties are subject to sale as a result of actions by Gadhri Holdings, not the respondent's actions. And the respondent has maintained his claim for specific performance and the CPL he filed on the Properties.

(d) Certificate of pending litigation

47 As above, the respondent/plaintiff has filed a CPL against the Properties. As the applicants/defendants point out, it has been in place for about three years.

48 In the materials and submissions of the applicants, the primary basis for removing the CPL has been the assertion that the respondent's claim for specific performance should be dismissed. It is not clear to me how removing the claim for specific performance would result in the removal of the CPL. In

any event, as above, I do not agree that the claim for specific performance can be dismissed under Rule 9-6.

49 In their application, the applicants make an alternative claim that they would be agreeable to providing an undertaking as to damages to have the CPL cancelled. The applicants make a further alternative claim that they will provide security in an amount and manner fixed by the court to have the CPL cancelled.

50 The difficulty here is that the proposal of security or of an undertaking has not been fully argued. There is evidence as to the value of the properties (from the respondent), but there is no indication from the applicants about the amount of security they would deposit. Nor is there a submission from the respondent on this point. Presumably, the court would have to decide the specific amount, but some assistance from the parties as what is an appropriate amount is required.

51 In light of the lack of information about any security or undertaking, the applicants' application for relief from the CPL is adjourned generally. I am not seized of any subsequent application.

D. SUMMARY

52 The respondent/plaintiff has commenced a claim against the applicants/defendants with respect to a contractual dispute about real property. The property is owned by the three defendants. Part of the respondent's claim is for specific performance.

53 After the claim was filed, tax judgments were obtained by the Attorney General against the defendant Gadhri Holdings. The Attorney General then obtained conduct of sale of the Properties to recover the tax debt of Gadhri Holdings. The applicants say this means that only part of the Properties are available. There is no tax debt for Gadhri or Sandher.

54 The primary basis of the current application to strike the respondent's claim for specific performance is that specific performance is not available for part of a contract. However, while that appears to have been the law some time ago, it is no longer the law.

55 On the law and the facts on this application, there is a genuine issue as to whether the tax judgments against the Properties (and sale of Gadhri Holdings' one-third interest) will result in failure of the respondent's claim for specific performance. That will be decided at trial.

56 The application that the respondent's claim should be struck under Rule 9-6 is dismissed.

57 For the reasons given above, the applicants' application that the CPL on the Properties should be cancelled is adjourned generally.

58 The respondent has been substantially successful and is entitled to Scale B costs against the applicants.

Application dismissed.

TAB 34

1985 CarswellBC 251
British Columbia Supreme Court

57134 Manitoba Ltd. v. Palmer

1985 CarswellBC 251, [1985] B.C.W.L.D. 2427, [1985] B.C.W.L.D. 2436, [1985] B.C.W.L.D. 2469, [1985] B.C.J. No. 3069, 30 B.L.R. 121, 32 A.C.W.S. (2d) 473, 65 B.C.L.R. 355, 7 C.P.R. (3d) 477, 8 C.C.E.L. 282

57134 MANITOBA LTD. v. PALMER, SMITH PAPER LTD. and CLASSIC PACKAGING CORPORATION

Spencer J.

Heard: December 3-7, 10-14, 17, 18, 1984 and March 11-15, 18-22, 1985
Judgment: June 7, 1985
Docket: Vancouver No. C795190

Counsel: *R. B. Fraser*, for plaintiff.
G. J. Harris and *A. R. Kuchta*, for defendants Palmer and Classic Packaging Corporation.
D. Critchley and *G. N. Severide*, for defendant Smith Paper Ltd.

Subject: Intellectual Property; Employment; Corporate and Commercial; Property

Headnote

Choses in Action --- Assignability — Cause of action — In tort
Choses in Action --- Assignability — Cause of action — In contract

Master and servant (employment) law — Duties of servant — After resignation — Defendant P. resigning from plaintiff's employ to work for defendant S. Ltd. — P. persuading other employees to leave plaintiff to work for S. Ltd. — P. copying plaintiff's client records and actively soliciting plaintiff's customers — P. in breach of fiduciary duty — S. Ltd. held party to P.'s breach — Company formed by P. after leaving S. Ltd. continuing breach of fiduciary duty owed by P. — Principles of liability.

Damages — Damages in contract — Specific cases — Breach of fiduciary duty — Damages for breach of employee's fiduciary duty to employer assessed either by quantifying profit gained by wrongdoer and ordering accounting or by quantifying plaintiff's loss of profit — Plaintiff entitled to higher figure where evidence supports both methods of calculation.

Damages — Exemplary or punitive damages — Employee in breach of fiduciary duty to employer by soliciting employer's customers and using employer's confidential information after resigning — Punitive damages awarded against employee.

Choses in action — Assignability — Assignment of cause of action incidental to property right not contrary to public policy — Action maintainable by assignee.

The defendant P. had been continuously employed by the plaintiff as a sales co-ordinator in the retail packaging business since 1970. His working title never changed but he gradually assumed a managerial position as the plaintiff expanded its business in western Canada. By 1979 he was the senior employee in Vancouver and was responsible for the Vancouver branch. In that year he was advised that the Vancouver branch would have to be trimmed back because it was losing money. Shortly thereafter P. decided to resign. During the 30 days after he had given notice, but before his resignation became effective, P. joined the defendant S. Ltd. and induced some of his fellow employees to do the same. He and two of those employees copied and removed some of the plaintiff's client lists and order records; he diverted maturing business opportunities to S. Ltd. and, after joining that company, embarked on a systematic course of soliciting the plaintiff's customers for the benefit of S. Ltd. A year later, he left S. Ltd. and formed a new company, the defendant C. Co. which took over the business brought from the plaintiff to S. Ltd. The plaintiff brought an action against all of the defendants for damages.

Held:

Judgment for plaintiff.

The defendant P. was in a managerial position such that a fiduciary duty was owed to the plaintiff. His activities both before the time when his resignation became effective and thereafter were in breach of that duty. The totality of the evidence showed a systematic attack on the plaintiff's business. S. Ltd. could not plead ignorance of the law that P.'s fiduciary duty prevented him from direct solicitation of the plaintiff's customers and while it did know that P. had copied the plaintiff's records, it was a party to P.'s breach of fiduciary duty.

The plaintiff was entitled to damages calculated either by quantifying the profit gained by the wrongdoer and ordering him to account for it as a trustee, or by quantifying the plaintiff's loss of profits and awarding damages to compensate for it. Where there is evidence to support both calculations, the plaintiff is entitled to take advantage of whichever yields the higher figure. There being no reliable evidence to form the basis of accounting, it was more appropriate to assess damages by reference to the loss suffered by the plaintiff. The plaintiff's losses were $210,325 plus $1,967 spent in mitigation of that loss. S. Ltd. was jointly and severally liable with P. to the extent of $45,984, reflecting the loss incurred during P.'s employment with S. Ltd. The defendant C. Co. was jointly and severally liable with P. for losses accruing to the plaintiff after its incorporation, namely, $167,777. P.'s whole course of conduct warranted punitive damages of $5,000.

P.'s employer had been M. Ltd. and the events giving rise to the cause of action were in respect of that company. Subsequently, M. Ltd. split up its operations after this cause of action arose and assigned its retail packaging business to the plaintiff, a company formed for that purpose. The assignment of the cause of action by M. Ltd. to the plaintiff was incidental to a property right — the right to carry on the retail packaging business. Such an assignment was not contrary to public policy and did not savour of champerty or maintenance. Accordingly, the action was maintainable by the plaintiff.

Action for damages for wrongful interference with plaintiff's business and breach of fiduciary duty.

***Spencer J.*:**

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1

The Background

2 The plaintiff is the successor of Mayers Limited. It sues for damages for wrongful interference with its business, which it says took a number of forms. The defendant Palmer was one of its employees until he gave one month's notice of resignation on 6th April 1979. He promptly joined the defendant Smith's Paper Corporation (hereafter referred to as "Smith"), one of Mayers' competitors. The plaintiff alleges that, while he was still employed by Mayers, Palmer wrongfully induced some of his fellow employees to resign and join Smith; that he and two of his fellow employees, Carolynn Erickson and Steve Ironside, copied and removed some of Mayers' business records; that he enticed Mayers' commission agent, Mr. Guskin, to terminate his agency and become an agent for Smith; that he wrongfully diverted maturing business opportunities to Smith and that after he joined Smith, he embarked upon a systematic course of soliciting Mayers' customers so that they transferred their business from Mayers to Smith. The plaintiff alleges that Palmer unfairly used confidential information which he learned in his employment with Mayers for the benefit of himself and Smith, and that he spread false stories to Mayers' customers that it was going out of business. Smith is alleged to have participated in most of Palmer's breaches and to be vicariously responsible for Palmer's activities while he was its employee. In 1980 Palmer left Smith and formed his own company, Classic Packaging Corporation (hereafter called "Classic"), which took over the retail packaging business which Palmer had brought from Mayers to Smith. It is alleged that Classic is vicariously responsible for Palmer's activities from 1980 onwards.

3 Palmer's duty to Mayers and to the plaintiff as its successor, will depend upon the nature of his employment with Mayers. Absent a restrictive covenant, a mere employee may quit and go to work in competition with his former employer with few restrictions upon what he may do. By contrast, a former employee who held a management position owes a fiduciary duty to the former employer even after his employment is terminated and is more restricted in what he may do. So it becomes important first to decide what position Palmer held with Mayers.

4 The leading case in Canada is *Can. Aero Service Ltd. v. O'Malley*, [1974] S.C.R. 592, 11 C.P.R. (2d) 206, 40 D.L.R. (3d) 371. At p. 381 Laskin J. (as he then was), writing for the court, categorized the defendants' positions as being not mere employees but "top management". In W.J. Christie & Co. v. Greer, [1981] 4 W.W.R. 34, 14 B.L.R. 146, 59 C.P.R. (2d) 27, 121 D.L.R. (3d) 472, 9 Man. R. (2d) 269, the Manitoba Court of Appeal imposed a fiduciary duty upon the defendant whom it described as "key management". In *G.T. Precision Welding (Ont.) Ltd. v. Nelligan* (1984), 45 C.P.C. 194, 3 C.P.R. (3d)511 (Ont. H.C.), a fiduciary duty was imposed upon an employee who had a "substantial management function". In the many cases cited tome by counsel in which a fiduciary duty has been imposed upon a former employee, the duties, responsibilities, remuneration, and nominal positions of the various defendants have varied. I am of the opinion that the imposition of the sort of fiduciary duty found in *Can. Aero Service Ltd. v. O'Malley*, supra, is not to be tested so much by what the defendant did *not* do with the former employer, as suggested by defence counsel before me, but rather by what he did. Nominal titles are not determinative. The court must examine the actual level of functions and responsibility held by the employee. The point is well demonstrated by the decision in *State Vacuum Stores of Can. Ltd. v. Phillips*, 12 W.W.R. 489, [1954] 3 D.L.R. 621 (B.C.C.A.). There, a number of former employees who each had different levels of responsibility with the plaintiff were sued for breach of duty owed to the plaintiff. They ranged in level from the area manager down to a branch sales supervisor. All were regarded by the court as [p. 625] "top men in the company's executive positions in western Canada" and a duty of good faith was found against them all. I respectfully adopt what was said by Lambert J.A. in *Moore Int. (Can.) Inc. v.* Carter (1984), 56 B.C.L.R. 207 at 210-11, 1 C.P.R. (3d) 171 (C.A.), as follows:

> The decision in *Can. Aero* indicates that each case must reach the appropriate compromise for that case between the exacting punctiliousness of complete disassociation in the service of the new employer from all business opportunities considered by the former employer, on the one hand, and unrestricted use of all information in the interests of free and open competition, on the other hand. In each particular case the whereabouts of the compromise line will depend on a variety of circumstances. In some cases it may be at one end of the spectrum, in others at the other end, and sometimes it will be in between. The line will not necessarily be drawn at the same place in every case. In this connection, I refer to these passages from the reasons of Laskin J. in *Can. Aero*, at pp. 619-20:
>
>> As in other cases in this developing branch of the law, the particular facts may determine the shape of the principle of decision without setting fixed limits to it ...

> In holding that on the facts found by the trial judge, there was a breach of fiduciary duty by O'Malley and Zarzycki which survived their resignations I am not to be taken as laying down any rule of liability to be read as if it were a statute. The general standards of loyalty, good faith and avoidance of a conflict of duty and self-interest to which the conduct of a director or senior officer must conform, must be tested in each case by many factors which it would be reckless to attempt to enumerate exhaustively.

5 Palmer first joined Mayers in Winnipeg in 1967 as manager in charge of paper bag production. He left for approximately one year to go into business for himself but rejoined in 1970 as sales co-ordinator. In 1972 he was sent to Vancouver to open up new sales territory in British Columbia and later added Northern Alberta to his territory. At that time he was Mayers' only employee in British Columbia. His role was to obtain sales orders to be supplied from Winnipeg. He operated from his own home. Eventually the business thrived so much that his basement became crowded with stock and he persuaded Mayers to move to a small office in a public warehouse in Vancouver. The business prospered still and in 1976 moved to rented premises on Pemberton Avenue in North Vancouver where it had a small warehouse, office and showroom. In 1978 a second warehouse was added. By 1979 Palmer still spent at least half of his time on the road and was responsible for approximately 80 percent of the Vancouver branch's sales. By then there were two other outside salespersons, Carolynn Erickson and Steven Ironside, an independent sales agent, Leo Guskin, an inside salesman, Ed Chiasson, and two warehousemen. The plaintiff's nominal title had never changed — indeed, he was never given one — but his job had gradually evolved to include certain non-sales functions. As senior employee in Vancouver, he was responsible for the running of the Vancouver branch. He selected premises and signed interim rental agreements, although the lease contracts were executed by the owners in Winnipeg. He bought some but not all of the stock for the company both for its Vancouver and Winnipeg operations. He made sales trips with Mr. LaChaine, a Winnipeg employee, to research and develop contacts with suppliers in Toronto, the United States and the Far East. He went to annual sales development meetings in Winnipeg where he, Mr. LaChaine and Norman Tatelman, one of the owners, discussed new products and marketing strategies for the forthcoming year. He hired some but not all of the Vancouver branch employees. He fired some of those whom he had hired and recommended the firing of others who had been hired by the owners. He made recommendations for salary increases for the Vancouver staff and on every occasion those recommendations were implemented by the owners. He had a cash float of $3,500 per month for Vancouver expenses but the larger expenses for payroll, stock purchases and lease payments were made from the Winnipeg head office. On one occasion, against the judgment of the owners, he bought a forklift for the Vancouver warehouse and the invoice for it was paid by the owners who left the final decision, whether or not to purchase, up to him. He assisted in the preparation of Mayers' price lists but based on formulae which were developed in Winnipeg. He selected and appointed Leo Guskin as an independent sales agent for Mayers and negotiated his commission rate with him.

6 There were a number of management functions which Palmer did not perform. He prepared no budgets or cash flow statements. He was not privy to the company's financial affairs. He did not approve credit for his various customers although the Winnipeg credit office looked to him for recommendations about his own customers. Some Vancouver staff was hired by Martin Tatelman from Winnipeg and on

one occasion a Mr. Scully was hired as a salesman without any reference to Palmer. Palmer found out when Scully introduced himself and told him what his salary was. In March 1979 the owners called Palmer to Winnipeg and told him that the Vancouver overhead was excessive, the inventory too high and that the branch would make a loss on the year. I shall discuss this in more detail later but suffice it to say that Palmer had certain strategic management decisions imposed upon him. He was told the branch had to be trimmed back, but I accept Norman Tatelman's evidence that some of the tactical decisions about how and where to trim it back were left to Palmer.

7 Occasionally, Palmer signed documents on behalf of the company under the title of general manager. These included correspondence with a customer, a workers' compensation claim and a letter to the Unemployment Insurance Commission. Palmer explained these as occasions when the addressee would pay little attention to a document signed by a salesman. He said he adopted the title for the purpose of dealing with the particular situation only. I do not think the use of the title adds much to the case. It is the function rather than the name which must be examined.

8 In deciding what level of position Palmer had at Mayers, I am in effect deciding whether or not he was under a fiduciary duty to that company which limited how he could compete with it after resigning. I am to balance the need of a company to impose a fiduciary duty upon its management employees, recognized in *Can. Aero Service Ltd. v. O'Malley*, supra, against the need of the individual to earn a living after he leaves the employer and the need of society to have that individual in productive employment. Mr. Critchley argued forcefully that Palmer was primarily a salesman and that the law ought not to attach a fiduciary duty to him simply because he was the senior employee in Mayers' Vancouver office. He pointed out that when Palmer sought employment from Smith what he had to offer were not management skills but sales skills. I am satisfied on the evidence that Palmer was not possessed of sophisticated management skills when he worked for Mayers. His experience and inclination were to push sales without any great regard for profit. As a salesman he wanted an extensive inventory to be able to supply his customers' needs. He did not have a manager's training or inclination to control inventory to keep the overhead down. Nonetheless, he was more than merely a salesman for Mayers. He was responsible for management of the branch to at least the level of responsibility exercised by the defendant Sparks in the *State Vacuum Stores of Can. Ltd.* case, supra. Sparks was included in this description, in the majority judgment at p. 625, which aptly fits Palmer:

> The importance of the positions occupied by the defendants should be noted. They are not manual labourers as is the case in several of the authorities. They were the top men in the company's executive positions in western Canada; far from the head office in Toronto; and therefore enjoyed a measure of special confidence.

The fact that Palmer was in constant touch with the owners in Winnipeg by telephone, telex and mail does not weaken the comparison with the *State Vacuum Stores of Can. Ltd.* case. Responsibility for the day-to-day functions of the Vancouver office and its sales staff was left to Palmer and in addition he carried out important purchasing and product research functions for the company. His functions can be equated with those of the defendant in *White Oaks Welding Supplies v. Tapp* (1983), 42 O.R. (2d) 445, 73 C.P.R. (2d) 98, 149 D.L.R. (3d) 159 (H.C.), which were described as follows at p. 162:

> The defendant was, in fact, almost entirely responsible for sales and had a day-to-day managerial responsibility for that side of the company's business. Though this was not a large company, it was substantial and the defendant reported directly to Arthur, the owner. In my opinion, on the whole of the evidence he was the kind of senior officer upon whom a fiduciary duty is laid.

Palmer aptly fits the description used in *Can. Aero Service Ltd. v. O'Malley*, supra, at p. 381, where Laskin J. (as he then was) wrote:

> Although they were subject to supervision of the officers of the controlling company, their positions as senior officers of a subsidiary, which was a working organization, charged them with initiatives and with responsibilities far removed from the obedient role of servants.

Palmer's Fiduciary Duties

9 The extent of a management employee's fiduciary duty was described in the *Can. Aero Service Ltd.* case at pp. 381-82 as follows:

> It follows that O'Malley and Zarzycki stood in a fiduciary relationship to Canaero, which in its generality betokens loyalty, good faith and avoidance of a conflict of duty and self-interest. Descending from the generality, the fiduciary relationship goes at least this far: a director or a senior officer like O'Malley or Zarzycki is precluded from obtaining for himself, either secretly or without the approval of the company (which would have to be properly manifested upon full disclosure of the facts), any property or business advantage either belonging to the company or for which it has been negotiating; and especially is this so where the director or officer is a participant in the negotiations on behalf of the company.

That duty was said to continue even after the employee's resignation [p. 382]:

> ... where the resignation may fairly be said to have been prompted or influenced by a wish to acquire for himself the opportunity sought by the company, or where it was his position with the company rather than a fresh initiative that led him to the opportunity which he later acquired.

In *White Oaks Welding Supplies v. Tapp*, supra, the defendant's role with the employer was less important but a similar duty was imposed upon him because of his encyclopaedic knowledge of the employer's customers, his unrestricted access to customer lists and information, and his personal contact with and responsibility for a large proportion of the plaintiff's customers. I am hesitant to agree that a fiduciary duty necessarily flows from encyclopaedic knowledge alone. I think it depends upon the position and responsibility enjoyed by the employee. Palmer's situation was, in my opinion, at least as senior as that of Tapp.

10 Mr. Harris drew my attention to the case of *309925 Ont. Ltd. v. Tyrrell* (1981), 127 D.L.R. (3d) 99 (Ont. H.C.). There, the defendant, a former manager, was permitted to compete for the plaintiff's

customers, including competition by advertising. The learned judge distinguished the case from *Can. Aero Service Ltd. v. O'Malley*, supra, on the basis that Tyrrell had been driven to his resignation by the employer. Two of the hallmarks of the *Can. Aero Service Ltd.* case were absent. Tyrrell's resignation could not be fairly said to have been prompted or influenced by a wish to acquire for himself the business opportunity sought by his employer, and it was not a case where Tyrrell used his former position to obtain business. Instead, he obtained it through a fresh initiative taken after he resigned.

11 I make a finding of fact that until Mayers' owners dropped a bombshell on Palmer by calling him to Winnipeg and telling him the Vancouver branch must be trimmed back because it was losing money, he had no intention of resigning. He had tendered a resignation in 1978 but that was not serious. It was withdrawn within hours. There was a conflict in the evidence about what the owners told Palmer he should do during the Winnipeg meetings. I accept the Tatelmans' evidence that they never told him the branch was to close but that they told him, in strong terms, that the overhead and inventory must be cut and the staff trimmed. He was told to close the Welsh Street warehouse. I reject Palmer's evidence that he was told the business must operate from his basement. The expression "basement operation" was probably used by Norman Tatelman, but as a figure of speech. I am satisfied there was no intention to close the Vancouver branch, but only to find ways and means of making it profitable, because Norman and Martin Tatelman's evidence is borne out by the steps they took and the money they spent over the ensuing five years to continue the Vancouver branch and get back the accounts lost to the defendants. Even on Norman Tatelman's evidence, however, Palmer was given radical choices to make about the future shape of the Vancouver branch. His staff, his method of operation and his salary structure were all to be changed. I am satisfied that until he was confronted by the owner's demands Palmer had no intention of leaving Mayers. The evidence of his arrangements to join Smith includes Mr. Mulhern's early evidence that their first discussion was on 20th February 1979, before the Winnipeg meeting with Norman Tatelman. Subsequently, Mr. Mulhern found an expense slip which showed his meeting with Palmer at which his employment was confirmed was 6th April 1979, later than Mulhern had first testified. He said that put him in doubt about the correctness of the date of the first meeting. Palmer testified that he never began to look around for another position until after the Winnipeg meetings. Mr. Campbell, to whom Palmer first spoke for another job, was unable to put an accurate date on their conversation. In the absence of other evidence I conclude that Palmer had no intention of resigning before about 10th March 1979 and that shortly thereafter he began looking for alternative employment and negotiated a position with Mulhern at Smith. Therefore, this is not a case of Palmer's resignation being prompted by a wish to join a new company or found one of his own for the purpose of acquiring Mayers' business opportunities, but it is a case of Palmer obtaining Mayers' business opportunities by virtue of his position at Mayers rather than by any fresh initiative.

12 Had Palmer sought legal advice in March 1979, it is possible that it could have treated Mayers' actions as a constructive dismissal. I need not decide that question, however, because he resigned and his defence throughout has been based upon resignation and not dismissal. The *Tyrrell* case, supra, can be readily distinguished. Trainor J. found that Tyrrell was not in breach of his fiduciary duty as a former management employee. He pointed to Laskin J.'s restriction in his judgment in *Can. Aero Service Ltd.*, supra, where he remarked that O'Malley and Zarzycki had deliberately set up their new company for the

specific purpose of obtaining for themselves the same contract that they had worked for on behalf of Can. Aero. Tyrrell did not do that. He had served his former employer faithfully to the last day of his employment and had resigned, not to set up in competition, but as a reaction to his employer's insulting behaviour. Upon joining a new employer, Tyrrell advised his former customers that he had changed his employment. Trainor J. ruled that a management employee is not without all rights to compete with his former employer. At p. 107, he wrote:

> I have concluded that the defendant's resignation did not arise from any selfish desire on the employee's part to capture a developing economic opportunity sought by his employer ...
>
> Even a senior management employee has the right, in the absence of agreement, or statutory restriction, to enter business in direct competition with his former employee [sic] and to advertise the change, including the availability of his services.
>
> In my view there is no evidence that would lead me to draw the inference that the defendant embarked on a programme of commencing a new business by appropriation to itself, of the commission earnings formerly enjoyed by the plaintiff.

The facts in *Tyrrell* are clearly distinguishable from those before me. Before turning to the evidence of what Palmer did here, however, I should first point out that he resigned from Mayers, giving one month's notice on 6th April 1979. The evidence shows that he was paid by the month in advance. He was, therefore, Mayers' employee at least until 30th April 1979. His notice, such as it was, did not expire until 6th May. Whether or not he continued as Mayers' employee beyond 30th April raises an interesting question because he was not paid beyond that date, but perhaps Mayers had no obligation to pay him because by that time he was in breach of his duty as an employee. I need not decide the point because much of what Palmer proceeded to do in breach of his duty to Mayers was done before 30th April. Having given his notice, Palmer proceeded to take vacation time that was due to him from Mayers. During that vacation time, which continued to 30th April, he went to work for Smith. Mr. Harris argued that Palmer was free to do what he wanted during his vacation. I disagree with that proposition to this extent, that I think an employee is not free to do anything which conflicts with his duty of fidelity to his employer so long as the contract of employment lasts. The duty of fidelity subsists even during the employee's spare time. See Hivac Ltd. v. Park Royal Scientific Instruments Ltd., [1946] Ch. 169, [1946] 2 All E.R. 250 (C.A.), per Lord Greene M.R. at p. 178, and per Morton L.J. at p. 180. The fact that Palmer proceeded to breach his fiduciary duty to the plaintiff while he was still its employee is not the sole ground for my findings of liability in this case because, as will be seen, I also find that Palmer was in breach of that duty by reason of some of his actions taken after his employment with Mayers terminated.

The Findings Against Palmer

13 I find that Palmer engaged in the following types of behaviour which distinguish this from the *Tyrrell* case. First, while still an employee of Mayers, he persuaded a junior employee, Ironside, to leave Mayers and join Smith. Palmer himself gave one month's notice of resignation on 6th April. Ironside's

application for employment at Smith, Ex. 120, is dated 10th April. I accept Ironside's evidence that he applied there at Palmer's suggestion. That evidence is corroborated by Mulhern's evidence that Palmer proposed Ironside as an employee and by the budget drawn up by Palmer for Mulhern, Ex. 136, dated 31st March 1979, which shows a second salary identical to Ironside's salary while at Mayers. The dates of those two exhibits satisfy me that Ironside's evidence that he was persuaded to join Smith while still employed by Mayers, and that Palmer persuaded him to do it before he left Mayers, is correct.

14 Secondly, Palmer persuaded Mayers' agent, Mr. Guskin, to terminate his agency with Mayers while Palmer was still an employee. Although Guskin was not called by the plaintiff, upon whom lies the burden of proof, and although Palmer himself testified that he simply told Guskin that he was leaving Mayers and going to Smith, I am satisfied there was probably persuasion on Palmer's part. The totality of the evidence shows a systematic attack by Palmer on Mayers' business. The alacrity with which Guskin resigned after a single meeting with Palmer satisfies me that Palmer persuaded him.

15 Thirdly, Palmer diverted maturing orders from Mayers to Smith. I am satisfied that this happened with respect to the three customers, Peter Wolf Clothing Ltd., E. A. Lee Ltd. and Suzy Cream Cheese Boutique Ltd. As originally placed with Mayers, those orders specified that Mayers should warehouse part of the stock for later delivery at its own cost. Mayers' head office instructed Palmer to try and change that term as a cost-cutting measure. Palmer testified that when he proposed it to those customers they simply cancelled the orders and that he did nothing to negotiate any compromise for Mayers. The size of the Cream Cheese account, in particular, persuades me that it was never Mayers' intention to reject the orders out of hand if the customers insisted on warehousing, and I reject Palmer's evidence that his instructions from head office were inflexible. In each case Palmer shortly afterwards obtained similar orders for Smith.

16 Fourthly, Palmer counselled Ironside to divert orders to Smith where he could. Ironside's evidence was strongly attacked by Mr. Harris and, indeed, deserves close scrutiny. However, two of the examples Ironside gave are corroborated by other witnesses, whose evidence I accept. Norman Tatelman testified that he caught Ironside removing an order from Treacher's records from the office. Mrs. Irving, a customer, corroborated the evidence of Ironside's persuasion to cancel her order for Mandy's Childrens' Wear and to replace it by an order at Smith. With respect to the allegations of diverted orders, I find Mulhern's evidence supportive. He testified that although he never instructed Palmer or Ironside to try and get customers to cancel their orders from Mayers and replace them with orders from Smith, he may have overheard it being done.

17 Fifthly, I find that Palmer copied Mayers' customer cards which gave him the name and address of each customer and full details of past orders. Those records contained valuable information showing the sort of product each customer had used and its cycle of ordering. They would be an extremely useful tool to anyone setting out to compete with Mayers. The direct evidence of copying comes only from Ironside and is flatly denied by Palmer. Again, Ironside's credibility is hotly challenged. He was originally a co-defendant but the action against him was discontinued after his examination for discovery. At that examination, on 18th June 1981, when he was no longer employed by Palmer at Classic Packaging

Corporation, he denied copying or removing any documents from Mayers. At trial he recanted that evidence and said he had lied on oath at the instigation of Palmer, who counselled him also to withhold information about what they had done from their solicitor. He swore, too, that in December 1979, when this action was commenced, Palmer telephoned him and said he had been served with a writ. He said at Palmer's suggestion they both went to Smith's offices and removed the xerox copies of Mayers' customer cards. He said he had a witness to his dumping of them in a garbage container in the West End, but that witness was not called. He testified that he kept back a key to his company car when he was dismissed from Mayers and later gave it to Palmer when Palmer wanted to break into the car and remove Mayers' new salesman's records. Palmer denied all of those allegations and attributed the theft from the car to Ironside. He said he refused to have anything to do with the stolen records when Ironside offered them to him.

18 Such serious allegations of criminal behaviour require strong probitive evidence before they should be believed. Ironside by his own admission has lied, whether at his discovery or at trial before me. I formed the opinion that he was an aggressive witness, prone to editorialize in favour of the plaintiff. But I can discover no reason why he should admit to perjury except, as he testified, because he had concluded, with the help of advice from friends, that he ought not to continue in his lie but should go to Mayers' solicitor and confess. The following factors persuade me to accept Ironside's trial evidence. Since both Ironside and Palmer's discovery evidence supported each other in denying any copying of Mayers' records, there was no real risk that Ironside's lies would be discovered and therefore no motive for him to confess to Mayers' solicitor except the pressure of conscience. Palmer denied Ironside's evidence that he told him to divert orders, yet Ironside did so, as corroborated by Norman Tatelman and Mrs. Irving. He was a junior salesman and unlikely to do so without suggestion. Palmer clearly diverted orders himself and I have found that he made no attempt to preserve them for Mayers as he should have done. Palmer testified he did not approach Ironside to resign from Mayers and join Smith until after he began his own employment there on 15th April 1979 but, as I have already found, Ironside applied for employment there on 10th April. Ironside testifed that three people were involved in xeroxing and removing copies of Mayers' records: himself, Palmer and Carolynn Erickson, who was, and remains, Palmer's wife. She is a shareholder and employee with Palmer at Classic Packaging Corporation. She was not called on behalf of Palmer to deny that together they xeroxed the records, although she was apparently available to come and testify. There is no reason on the evidence to suggest that she is not favourably disposed to Palmer as his wife and fellow shareholder. I draw an inference adverse to Palmer that her evidence on that point would have contradicted him. The grounds for drawing such an inference are much more compelling than in the case of Ironside's unnamed witness to his trashing of the records in December 1979.

19 A sixth distinction between this case and the *Tyrrell* case, supra, is that Palmer directly solicited the Mayers' customers he had formerly dealt with by calling upon them personally to ask for their business and to take orders. The volume of business successfully obtained from Mayers, coupled with the evidence of Norman Tatelman, Mr. Wostenholme and Palmer himself that a personal contact with the customer is by far the most effective way of obtaining business, strongly suggests that Palmer embarked on a campaign of visiting Mayers' customers. Palmer admitted that in fact he began calling on

customers in early May 1979 and there is evidence from Mr. Mulhern that he was doing it in late April. Seventhly, I find that Palmer carried away and made use of Mayers' price lists. The speed with which Palmer and Ironside were able to set about obtaining orders once they joined Smith and the full range of products they purported to offer satisfies me that they probably made use of those lists as testified to by Ironside, although Mulhern and McDowell officers of Smith, may not have been aware of it.

20 There were other allegations of breach of fiduciary duty which I find have not been proved against Palmer on the balance of probabilities. First was the allegation that Palmer made improper use of confidential information about Mayers' secret trade discount from Reed Ltd. While I find that was an abuse of confidential information, I am also satisfied that the discount was illegal under the term of s. 34(1)(a) of the Combines Investigation Act. I shall deal with this matter again when I come to deal with the claim for damages. Suffice it to say for the present that I accept Mr. Mattern's evidence that Palmer asked him specifically for the discount. Palmer does not deny it but only says he cannot recall the conversation with Mr. Mattern. He testified, however, that he had never heard of the discount while he was at Mayers. In the face of Mr. Mattern's evidence, I reject Palmer's denial that he knew of the discount.

21 The plaintiff also complained that by contacting its suppliers Palmer was in breach of his fiduciary duty. I do not accept that argument. I am of the view that by going to many of the same suppliers and by making use of pricing and routing knowledge he had learned while at Mayers, Palmer was doing something which the law permits. He was simply putting to use his ordinary knowledge of the trade gained during his working life at Mayers. The plaintiff also alleged that Palmer wrongfully told its customers it was going out of business in British Columbia. No evidence of that was brought home to Palmer, but only to Ironside. Ironside's evidence that Palmer counselled him fell short of saying that Palmer told him to lie. He was merely encouraged to downplay the change-over to Smith. Finally, the plaintiff alleged that Palmer copied its production design and advertising. The examples produced in evidence appear to be common forms available to any competitor. The plaintiff does not claim damages for passing off. I am satisfied Palmer was entitled to use the designs and the form of advertising.

Damages

22 As a result of Palmer's actions, Mayers suffered a substantial loss of business. Miss Johnson's review in evidence of documents produced by Smith and Classic shows that within a year of Palmer's departure Smith had sold to 301 of Mayers' former customers. Of them, 193 became Classic customers after Smith gave up the repackaging business in February 1980, and Classic acquired another 83 of Mayers' customers when it began business after that date. Some customers may have left Mayers anyway after Palmer resigned. Some may have found him at Smith or at Classic and resumed business with him of their own accord. But the extent of the business transfer leaves no doubt that whether or not it was Mr. Mulhern's original plan, Palmer, both when employed at Smith and at Classic, carried on a deliberate campaign of concentrating on Mayers' customers in an attempt to pre-empt its business connection, first for Smith and later for Classic. I reject Mr. Harris' argument that the fact that Smith was an independent firm and not Palmer's creature distinguishes this case from cases such as *Can. Aero*

Service Ltd. Certainly, that was a case where the defendants deliberately set out to divert the plaintiff's business to their own company, but I think it can make no difference that Palmer at first set out to divert Mayers' business to Smith. He did it for his own advantage. His employment at Smith was bound to be affected by the amount of business he could bring and most of that business he got from Mayers on the strength of his unlawful conduct which I have enumerated above in these reasons.

23 Damages for this type of wrongful behaviour may be measured in one of two ways, either by quantifying the profit gained by the wrongdoer and by ordering him to account for it as a trustee, or by quantifying the plaintiff's loss of profit, and awarding damages to compensate for it: see *Moore Int. (Can.) Ltd. v. Carter*, supra, at p. 213. Before me the plaintiff led extensive evidence in support of both methods of calculating damages. It is entitled to take advantage of whichever method shows the higher damages, but I have to decide whether the evidence supports either method of calculation. I have concluded that it would be unsafe on the evidence before me to quantify damages by making the defendants account for the profit they have made. While the evidence shows the gross sales made by Smith and Classic to Mayers' former customers, it does not establish a proper basis for determining the cost of sales, overhead and profit. In particular, Smith was in this business too briefly to show a historical profit margin. I accept Mr. Mulhern's evidence that Smith abandoned the business because there was no profit in it at all and that if a proper portion of Smith's overhead costs were attributed to the retail packaging sales, Smith would have shown a loss position. I am satisfied that because of that Smith began making plans to abandon the business before Mayers began this action. The evidence of Classic's income and expense statements from 1980 onwards includes income from customers who were never customers of Mayers. The plaintiff is not entitled to that. I shall therefore assess damages by reference to the loss suffered by Mayers, which probably yields a higher figure in any event.

24 The plaintiff claims damages for the period of five years since Palmer left and also into the future. It has been unable to get back a substantial number of the customers Palmer wrongfully took and does not expect to recover them over the next several years. In the meantime, however, it has turned its energies to other areas of business, including retail packaging sales to drug stores and jewellery stores and sales of store fixtures and clothes racks. Martin Tatelman testified that by doing so it expects to have made up its lost sales ground some time in 1985. Had Palmer stayed and had Mayers cut back its staff and overhead as the Tatelmans wished to do, I think it probable it would not have developed that business. Therefore, I think it would be wrong to treat the newly developed business as additional to the old business, but rather it should be viewed in substitution for the old business. It is in mitigation of the plaintiff's loss. Damages should therefore be assessed up to and including the year end, 30th September 1985, only.

25 Mr. Martin Tatelman presented Ex. 186, which purports to show an estimate of the income, expenses and profit which Mayers would have made during those years but for Palmer's actions. The exhibit also includes the loss actually suffered in each of those years. The figures are for the Vancouver branch only but, since Northern Alberta sales were handled through Vancouver, the sales and expense projections must include projections for Northern Alberta also. According to Norman Tatelman, the Northern Alberta territory was successfully protected by placing a new salesman in Edmonton in August

1979. That was before Smith or Palmer began raiding the Northern Alberta customers, but Ex. 246 lists 19 of those customers who were obtained by Smith and another 25 who were obtained by Classic. In spite of Martin Tatelman's evidence and in spite of the elaborate calculations offered to me in argument by Mr. Fraser, I do not think it is possible to arrive at an accurate mathematical calculation of the plaintiff's damages. Instead, damages should be assessed, but they should be assessed with reference to the trends shown by the accounting evidence. This is not a case like *Can. Aero Service Ltd. v. O'Malley*, where a single specific business opportunity was wrongfully obtained from the plaintiff. The repeating nature of the plaintiff's business from year to year and the vagaries of commerce and customer connection require that damages be assessed rather than calculated.

26 In making an assessment of damages, I keep these sometimes conflicting factors in mind:

27 (1) The burden of proof of loss is on the plaintiff;

28 (2) It is the defendant's wrongful acts which have caused the plaintiff's loss and made it difficult to quantify the loss;

29 (3) As time progresses, the plaintiff's damages are attributable less to an actual loss of business and more to a loss of an opportunity to compete from an advantageous position;

30 (4) But for Palmer's wrongful acts, Mayers' competitive position would have made it relatively secure against any substantial loss of business;

31 (5) In 1979 Mayers' Vancouver branch, under Palmer's guidance, was moving back into a loss position. The planned reorganization would have reduced overhead, but with a loss of staff available to service customers, Mayers would probably have experienced a larger than average customer attrition rate;

32 (6) That had Palmer not committed any of the wrongful acts I have found, he would have been free to go into competition with Mayers. As time went by, some of his former customers would probably have switched to him in any event. With Palmer gone from Mayers, others of them would probably have drifted to other suppliers. The impact of Palmer's departure and of his lawful competition would have had an increasing effect on Mayers as time passed;

33 (7) Exhibit 117 summarizes Mayers' increased sales volume elsewhere in Canada. Based on it, I accept Martin Tatelman's projections of how sales would have increased if Palmer had not left, as shown in Ex. 186;

34 (8) That leading up to April 1979, Mayers' historical average cost of sales was 74 percent and the historical relationship of Winnipeg expenses attributable to the Vancouver branch was 3.6 percent of gross sales. I base those figures on Ex. 186 which covers the years 1977 to 1979.

35 Applying the factors I have outlined above, I have adjusted Martin Tatelman's loss calculations contained in Ex. 186 to produce the following assessment of the plaintiff's losses. In each case the

percentage of total loss applied to produce an annual damage figure is chosen to allow for an approximate amount of business Mayers would probably have lost to lawful competition without Palmer to represent them, and to allow an appropriate deduction for business Mayers would have done for new customers in respect of whom Palmer could have competed without any breach of fiduciary duty. In each case the difference between the percentage chosen and 100 percent represents my opinion of the amount of its sales Mayers would probably have lost to lawful competition from Palmer and others. The percentage reaches its peak in the five months ending 30th September 1981 because, in my judgment, by that time Mayers' replacement staff would have become familiar enough with the customers to have prevented further attrition to Palmer.

```
1st May 1979 to 30th April 1980
-------------------------------
                                                                          Annual Damages
                                                                             Assessed
                                                                          --------------
Gross sales                   $  762,240.00
Less cost of sales at
  74 percent                     564,057.60
                                 ----------
Gross profit                     198,182.40
Less expenses                    139,365.00
                                 ----------
                                  58,817.40
Less Winnipeg expenses at
  3.6 percent sales               27,440.00
                                 ----------
Operating income                  31,377.40
Plus direct loss
  (Ex. 186)                       28,687.00
                                 ----------
                                  60,064.40  X 85 percent = $51,054.74
1st May 1980 to 30th April 1981
-------------------------------
Gross sales                   $  872,011.00
Less cost of sales at
  74 percent                     645,288.00
                                 ----------
Gross profit                     226,723.00
Less expenses                    153,301.00
                                 ----------
                                  73,422.00
Less Winnipeg expenses
  at 3.6 percent sales            31,392.00
                                 ----------
Operating income                  42,030.00
Plus direct loss
  (Ex. 186)                       24,136.00
                                 ----------
                                  66,166.00  X 65 percent = $43,007.90
Five months to 30th September 1981
----------------------------------
Gross sales                   $  415,658.00
Less cost of sales at
  74 percent                     307,586.92
                                 ----------
Gross profit                     108,071.00
Less expenses                     70,262.00
```

```
                                  ----------
                                   37,809.00
Less Winnipeg expenses
  at 3.6 percent                   14,963.00
                                  ----------
Operating income                   22,846.00
Plus direct loss
  (Ex. 186)                        11,400.00
                                  ----------
                                   34,246.08  X 60 percent = $20,547.48
1st October 1981 to 30th September 1982
---------------------------------------
                                                        Annual Damages
                                                           Assessed
                                                        --------------
Gross sales                   $  997,580.00
Less cost of sales at
  74 percent                      738,209.00
                                  ----------
Gross profit                      259,371.00
Less expenses                     174,763.00
                                  ----------
                                   84,608.00
Less Winnipeg expenses
  at 3.6 percent sales             35,912.00
                                  ----------
Operating income                   48,696.00
Plus direct loss
  (Ex. 186)                        27,699.00
                                  ----------
                                   76,395.00  X 60 percent = $45,837.00
1st October 1982 to 30th September 1983
---------------------------------------
Gross sales                 $  1,130,258.00
Less cost of sales at
  74 percent                      836,390.00
Gross profit                      293,868.00
Less expenses                     192,234.00
                                  ----------
                                  101,634.00
Less Winnipeg expenses
  at 3.6 percent sales             40,689.00
Operating income                   60,945.00
Less actual profit
  (Ex. 186)                        21,074.00
                                  ----------
                                   39,871.00  X 60 percent = $23,922.00
```

```
1st October 1983 to 30th September 1984
---------------------------------------
Gross sales                  $  1,280,582.00
Less cost of sales at
  74 percent                      947,630.00
                                  ----------
Gross profit                      332,952.00
Less expenses                     211,457.00
                                  ----------
                                  121,495.00
Less Winnipeg expenses
  at 3.6 percent                   46,100.00
                                  ----------
Operating income                   75,395.00
Less actual profit
  (Ex. 186)                        32,135.00
                                  ----------
                                   43,260.00  X 60 percent = $25,956.00
                                                             ----------
                                                            $210,325.12
                                                            -----------
```

36 In addition to Mayers' loss of profit, it has additional expenses incurred in an effort to mitigate its loss. I accept Norman Tatelman's evidence that Mayers lost the value of the Pemberton Avenue warehouse improvements in the amount of $1,967.38. I reject the cost of advertising to its customers, since that is probably already included in the calculation of actual losses incurred by the Vancouver branch, carried forward by Martin Tatelman into Ex. 186. I accept some of the travel expenses incurred by Mr. LaChaine in an effort to protect the Northern Alberta territory. Those included in Exs. 158, 159, 160 and 164 appear to be costs which would have been incurred in the ordinary course of Mayers' business. Those contained in Exs. 161, 162 and 163 appear to have been incurred only because of Palmer's departure and his wrongful actions. They total $1,469.19. Costs expended in an attempt at mitigation, therefore, total $3,436.57.

Punitive Damages

37 In addition to damages as assessed above, the plaintiff seeks punitive damages. These were awarded in *H. L. Weiss Forwarding Ltd. v. Omnus*, [1976] 1 S.C.R. 776, 20 C.P.R. (2d) 93, 63 D.L.R. (3d) 654, 5 N.R. 511, on appeal to the Supreme Court of Canada. Laskin C.J.C. awarded punitive damages because of the defendant's tortious conduct there, which was aimed at putting an end to the plaintiff as a going concern. I am of the view that Palmer's whole course of conduct here warrants punitive damages. However, the figure for punitive damages should not be so great as to be vindictive. Palmer's tax returns, filed as exhibits, suggest that he has far less ability to pay punitive damages than did the defendant in the Weiss case. In addition, although his conduct was clearly tortious, I find that until the plaintiff's owners imposed drastic management decisions upon him in March 1979, he had no intention of leaving the plaintiff or of setting up in competition with it. I award punitive damages of

$5,000 against him.

The Reed Paper Discount

38 I have already mentioned that the plaintiff also claimed damages for the loss of a secret price discount formerly extended to it by a supplier, Reed Ltd., but discontinued when Palmer, working for Smith, asked the supplier for the benefit of the same discount. The defendants argue that the discount was illegal under s. 34 of the Combines Investigation Act and that if the court were to award damages for its loss that would countenance an illegality and be contrary to public policy. Counsel told me that they could find no record of any prosecution under the section anywhere in Canada. It has been discussed by text writers who have drawn attention to the elements necessary to constitute the offence. See Stikeman and Elliott, Doing Business in Canada (1984), s. 20.10. In my judgment the discount to Mayers was illegal under the Act. I reach that conclusion based upon the evidence of Mr. Mattern and of Norman Tatelman that it was secret and on the evidence of Mr. Mattern that once Smith knew of it Reed had to cancel it because the preference to Mayers could not be justified to other customers. Although Reed hoped to get more business from Mayers because of the discount, there is no evidence to suggest that it was a volume discount. If there had not been the elements of the offence present, there would have been no need for Reed to have kept the discount secret. Whatever financial loss flowed to the plaintiff from the cancellation of the discount I agree that it would be against public policy for the court to award damages for that loss and thus, inferentially, to approve an arrangement which was contrary to the plain purpose of the section. It does not matter that Mayers, as purchaser, may not have been committing an offence itself. The evidence does not go so far as to show that it was conspiring with Reed to bring about the giving of the discount. The court will not lend itself to assist the plaintiff in taking advantage of another's illegal act, nor will it give damages to the plaintiff for the loss of an advantage founded upon an illegal act. The plaintiff is unable to establish this branch of its claim without relying upon the unlawful conduct of Reed Ltd.

The Liability Of Smith Paper Ltd.

39 Mr. Critchley argued that when Mr. Mulhern hired Palmer for Smith he treated him as an ordinary salesman free to leave one employer and go to work for another. Had he been an ordinary salesman, Palmer would have been free to call upon his former customers on behalf of Smith. Therefore Mr. Critchley urged that Smith was guilty of no wrongdoing at all. I cannot accept that view of the evidence. It is true that Mulhern did not seek out Palmer but that Palmer was referred to him by Mr. Campbell. Mulhern had contemplated beginning a retail packaging division for some years and Palmer gave him that opportunity. But in his examination, at QQ. 40-42, Mulhern admitted that Palmer explained to him what experience he had had in the business. Although Mr. Mulhern denied that Palmer told him he was Mayers' manager, I cannot think that explanation did not make Mulhern aware that he was dealing with a manager. When Palmer joined Smith he was paid less than Smith's other managerial staff but he was hired specifically to set up and run the retail packaging division. Mulhern testified that until Palmer came, no one at Smith had the knowledge to do that. I find Smith hired Palmer because of his managerial experience at Mayers. I am prepared to accept that Mr. Mulhern did not know that Palmer

and Ironside had copied and were wrongfully using Mayers' confidential records, but he knew and intended that Palmer should solicit his former customers. Smith cannot plead ignorance of the law that Palmer's fiduciary duty to Mayers prevented him from direct solicitation of them. It was a party to Palmer's breach of fiduciary duty to Mayers: see *MacMillan Bloedel v. Binstead* (1983), 22 B.L.R. 255, 14 E.T.R. 269 (B.C.S.C.). Moreover, Palmer's wrongful solicitation and wrongful use of Mayers' confidential documents and his wrongful diversion of some of Mayers' orders to Smith's account, completed when Palmer was at Smith, were tortious acts done in the course and scope of Palmer's employment by Smith. Smith gained benefit from them. Smith is therefore vicariously liable for Palmer's actions while he was employed by it. See *Lloyd v. Grace, Smith & Co.*, [1912] A.C. 716 (H.L.); *Sheppard Publishing Co. v. Press Publishing Co.* (1905), 10 O.L.R. 243 (C.A.). Smith is therefore jointly and severally liable with Palmer for the damage suffered by Mayers to 29th February 1980, when Palmer left to set up Classic Packaging Corporation. The financial evidence does not apportion Mayers' 1979-80 loss between the various months but, to recognize the fact that Palmer was no longer working for Smith after February 1980, I limit the damages for which Smith is liable under this heading to five sixths of Mayers' loss in its year ending 30th April 1980, amounting to $42,547.45. The cost of mitigation had all been incurred by 29th February so Smith will be liable also for the amount of $3,436.57. Since Smith is not shown to have been privy to all of Palmer's unlawful behaviour, and since it did not seek out Palmer to attack Mayers' market position, there will be no punitive damages against it.

The Liability Of Classic Packaging Corporation

40 In February 1980 Palmer left his position with Smith and started his own business under the name of Classic Packaging Corporation. Classic took over most, but not all, of the old Mayers accounts which had been acquired by Smith as retail packaging customers. The evidence satisfies me that although Palmer is not the only shareholder in Classic, he is the company. His actions are the actions of the company, not only in the vicarious sense, but in the way that Lord Haldane described the acts of Mr. Lennard in Lennard's Carrying Co. v. Asiatic Petroleum Ltd., [1915] A.C. 705 at 713-14 (H.L.). Although this case can be distinguished from the *Can. Aero Service Ltd.* case, supra, and other cases where a fiduciary has deliberately planned to leave his employer's service and to steal his business, and has set up a company specifically for that purpose, I do not think the fact that Palmer incorporated Classic only after he had worked for Smith should produce a different result in law. When Palmer left Mayers' employ he had no thought of establishing Classic, but he has used Classic as the vehicle for continuing the damages to Mayers which he began through the wrongful acts I have already enumerated after Smith was no longer available to him. Classic is therefore liable to the plaintiff for the damages I have assessed, commencing with Mayers' fiscal year, 1st May 1980. To that should be added the deduction I have allowed from Smith's liability to represent March and April 1980 of $8,509.50. Since the punitive damages I have assessed against Palmer apply primarily to his activities which occurred before Classic was incorporated, Classic will not be liable for those. They are assessed against Palmer only.

Smith Paper Ltd.'s Liability For The Actions Of Classic Packaging Corporation

41 Mr. Fraser argued that Smith could be made jointly and severally liable for the losses suffered by Mayers, even after Palmer began doing business through Classic. I find as a fact that late in 1979 Mr. Mulhern concluded that the retail packaging business did not fit well with Smith's other business, and decided to terminate it. At his insistence, Palmer set up Classic and began business for himself. Smith, through Mr. Mulhern, assisted him to do that by helping him make his presentation to the bank for loan capital. Smith guaranteed Classic's operating and inventory loans, the latter of which is still outstanding. From time to time Smith has lent Classic money. It sometimes acts as Classic's purchasing agent to secure price discounts. When Classic began business, Smith co-operated by transferring to it many of the customer accounts diverted from Mayers and by a joint announcement to customers: Ex. 180. On the authority of *MacMillan Bloedel v. Binstead*, supra, and *Morrison v. Coast Fin. Ltd.* (1965), 54 W.W.R. 257, 55 D.L.R. (2d) 710 (B.C.C.A.), Mr. Fraser argued that Smith must share liability for Classic's continuing breach of Palmer's fiduciary duty to Mayers after February 1980. He argued that Smith placed Classic in a position to commit new fiduciary breaches, knowing that they would probably be committed by the continued direct solicitation of Mayers' customers. However, that was not the case that was pleaded against Smith and the case which Smith therefore had to meet. Paragraph 20 of the statement of claim, which went through several amendments, alleges that only Palmer continued to divert Mayers' business through the medium of Classic, and para. 26 limited the claim of vicarious liability against Smith to the time when Palmer was its employee. Mr. Critchley relied upon this in his argument and no application was made, even at that late date, to amend the pleadings. I do not say that I would have granted such an amendment had it been sought because I have not heard the point argued. The pleadings must govern the course of the action and they do not claim that Smith is liable for any loss suffered by the plaintiff through the operation of Classic. Smith's liability in damages will therefore be limited to the sums I have already awarded against it in these reasons for judgment.

Mitigation And Acquiescence

42 The defendants argued that Mayers acquiesced in Palmer's actions and in Smith's competition based on those actions. It is true that Norman Tatelman did not do much to persuade Palmer to stay when he learned he had given notice. He did not take it seriously and expected Palmer to telephone and withdraw the notice. That had happened in 1978. Eventually, he telephoned Palmer to ask what was happening but the conversation on Palmer's side was abrupt and Norman Tatelman finished the conversation saying words to the effect, "I'll see you in the market place". Mr. Critchley, for Smith, relied on Mr. Tatelman's failure to protest Palmer's and Smith's actions to Mr. Mulhern as evidence that Mayers acquiesced, but Mr. Mulhern admitted he had already learned through Mr. Mattern that Mayers was upset at Smith's role and he telephoned Mr. Tatelman himself in May 1979 to explain his position. Norman Tatelman testified that at first he did not know Mayers had a cause of action against Palmer and that it was not until later on that he realized the extent to which Palmer and Smith were raiding Mayers' customers. I do not regard the fact that Norman Tatelman had taken a law degree some 30 years ago, but never practised, as being likely to make him aware of Mayers' rights in this field of the law so that he should be expected to have commenced litigation immediately against Palmer and Smith. The action against Palmer was commenced in December 1979, but Smith was not made a defendant until approximately 1 $/_2$ years later.

43 Although the defendants argued that Mayers' conduct amounted to acquiescence, the doctrine of estoppel probably fits the defendants' case more accurately. Acquiescence is a branch of the doctrine of estoppel which finds its application in disputes over title where an owner, either directly or by abstaining from asserting his right, encourages another to expend money or energy in the purported enjoyment of a mistaken title. The principles lying behind estoppel and acquiescence are not dissimilar. The burden is on the defendants to show that Mayers, with knowledge of what Palmer and Smith were doing and knowledge of its right to prevent it, encouraged Palmer and Smith in their actions. In my opinion, the defendants have not met the burden upon them. I am satisfied that Mayers did not realize the extent of the raiding on its customers and the theft by copying of its business records until Palmer and Smith were well entrenched in their new business. Norman Tatelman's telephone remark to Palmer cannot amount to an estoppel, except perhaps with respect to the short notice which Palmer gave, because when it was said Mr. Tatelman had no inkling of what Palmer was doing or planned to do. The delay of 1 /$_2$ years before joining Smith as a defendant cannot establish an estoppel because it had already decided to terminate its retail packaging business in November 1979, and in fact terminated it by 29th February 1980. From that point on it did nothing in reliance upon any expressed or implied acceptance of its activities by Mayers. From May 1979 onwards Mr. Mulhern knew from Mr. Mattern that Mayers was upset by its actions.

44 Mitigation raises different issues. The defendants say that Mayers' efforts to sustain its market position were half-hearted and that it ought to have competed more strongly against them. I do not think it lies in the mouth of those who enjoyed the benefit of unfair competition to complain that Mayers could have done better and prevented them from taking the business and its attendant profit. Mayers moved quickly to replace Palmer, Ironside and Erickson. It did not keep Mr. Chiasson, but I am satisfied on the evidence that he was not a suitable person to try and retain the outside sales. The two people who were brought in, Mr. Byers and Mrs. Nairne, were unable to hold the business. Mayers might have been wise to have kept a warehouse in Vancouver, but the heart of its problem was that its remaining experienced staff were already employed in sales from its Winnipeg office. The evidence of Norman Tatelman, Mr. Wostenholme, Mr. Mulhern and Mr. Palmer, and the evidence of a customers' representative, Mrs. Low, is all to the same effect, that the single most important element in obtaining business in this industry is the personality and experience of the individual salesmen. Once Palmer and Smith decided that Palmer should go after his former customers without any interruption after leaving Mayers, I am of the view that there was little that Mayers could have successfully done to have prevented the attrition of its business.

Was Mayers Responsible For Its Own Misfortune?

45 Mr. Harris argued that Mayers cannot complain about what happened to it because, whatever Palmer's role with it was, it treated him scandalously when the owners suddenly called him to Winnipeg and told him that his branch was losing money and that the overhead must be cut back drastically. I have already indicated that, in my view, Palmer was not told literally that he must work out of his basement again. In my opinion, the imposition of the owners' demands upon Palmer did not justify him

in the actions he took and are not a ground for refusing to award damages to the plaintiff. Authority for that position is to be found in Alberts (E. T.) Ltd. v. Mountjoy (1977), 16 O.R. (2d) 682 at 693, 2 B.L.R. 178, 36 C.P.R. (2d) 97, 79 D.L.R (3d) 108 (H.C.), where Estey C.J.H.C. (as he then was) wrote:

> Honest intention is in this branch of the law no defence; nor is justification on the grounds of the real or imaginary mistreatment accorded or threatened by the new management of the plaintiffs.

46 If Palmer had a grievance at law against Mayers, it was open to him to have sued for constructive dismissal. He did not do this. Instead, he accepted the owners' right to impose conditions upon his management and gave notice of his resignation. That course of action persuades me that at the time the owners' actions did not appear as drastic to Palmer as he now says they were. His fiduciary duty arising from his position as a manager continued to bind him after his resignation.

The Assignment Of The Cause Of Action

47 Throughout these reasons for judgment I have referred to Mayers Ltd., but the plaintiff is 57134 Manitoba Ltd. The evidence satisfies me that Mayers split up its operations after this cause of action arose and assigned its retail packaging business to the plaintiff, a company newly formed for that purpose. The assignment was made Ex. 188. During the course of the trial the defendants objected to the plaintiff having status to sue and I overruled the objection. I was satisfied that this was a cause of action which could properly be assigned to the plaintiff. It was the assignment of a cause of action incidental to the assignment of a property right — in this case, the right to carry on the original retail packaging business. Such an assignment is not contrary to public policy: see *Pigott & Pigott Const. Co. v. Nesbitt, Thomson & Co.*, [1939] O.R. 66, [1938] 4 D.L.R. 593, where the court referred to the rule that a right incidental and subsidiary to the ownership of property is assignable where it does not savour of champerty or maintenance. In that case another company originally subscribed to shares in an underwriting pursuant to a prospectus which contained false statements. It assigned its beneficial interest in the shares to the plaintiff, which brought the action in question. Judgment in favour of the plaintiff was sustained by the Court of Appeal and again in the Supreme Court of Canada at [1941] S.C.R. 520, [1941] 4 D.L.R. 353. The fact that this cause of action was assigned to 57134 Manitoba Ltd. after the writ was issued does not appear to be material, provided that the assignment was not for the purpose of continuing needless strife or litigation: see *Amacher v. Erickson* (1963), 42 W.W.R. 348, 40 D.L.R. (2d) 251 (B.C.S.C.). In this case the plaintiff has taken the cause of action by assignment as part and parcel of its assumption of part of the original business of Mayers Ltd. In my opinion, the plaintiff has status to continue this action.

Summary

48 By way of summary, the plaintiff will have judgment against Mr. Palmer as follows:

```
General damages                                   $  210,325.12
Cost of mitigation                                     3,436.57
Punitive damages                                       5,000.00
                                                  -------------
                                                  $  218,761.69
                                                  =============
```

49 The plaintiff will have judgment against Smith Paper Ltd. as follows:

```
General damages                                    $  42,547.45
Cost of mitigation                                     3,436.57
                                                   ------------
                                                   $  45,984.02
                                                   ============
```

The judgment against Smith will be joint and several with the judgment against Palmer for that amount.

50 The plaintiff will have judgment against Classic Packaging Corporation as follows:

```
General damages                                   $  167,777.67
                                                  =============
```

The judgment against Classic will be joint and several with the judgment against Palmer for that amount.

51 The plaintiff will have prejudgment interest upon the award at rates used by district registrars from time to time, but it would clearly be unjust to permit interest to be calculated on the whole award from the date when the cause of action first arose. Although I have awarded general damages, they have been assessed in relationship to the particular fiscal periods in which they arose. Interest will be calculated on the punitive damages from 15th April 1979, the date when Palmer began work for Smith. Interest on the cost of mitigation will be calculated from 15th April 1980, which is the end of the second six-month period after the cause of action arose. It was during those second six months that the mitigation costs I have allowed, represented by Exs. 161, 162 and 163, were incurred. With respect to the general damages which I have apportioned from fiscal period to fiscal period, the evidence does not enable me to say when, during those fiscal periods, any part of the damages accrued. To do justice between the parties, I therefore direct that the interest calculations be made with respect to each of the subtotals set out in these reasons which make up the total general damage award of $210,325.12, from a date halfway through the fiscal period with respect to which each item of damages is assessed.

52 The plaintiff is entitled to its costs of this action.

Judgment for plaintiff.

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TAB 35

1989 CarswellBC 87
British Columbia Court of Appeal

57134 Manitoba Ltd. v. Palmer

1989 CarswellBC 87, [1989] B.C.W.L.D. 1543, [1989] C.L.D. 844, [1989] B.C.J. No. 810, 26 C.P.R. (3d) 8, 37 B.C.L.R. (2d) 50, 44 B.L.R. 94

57134 MANITOBA LTD. v. SMITH PAPER LIMITED, PALMER and CLASSIC PACKAGING CORPORATION

Hinkson, Macdonald and Esson JJ.A.

Heard: April 20 and 21, 1989
Judgment: May 9, 1989
Docket: Vancouver No. CA004370

Counsel: *D.A. Critchley*, for appellant.
R.B. Fraser and *E.J. Adair*, for respondent.

Subject: Intellectual Property; Corporate and Commercial; Property

Headnote

Employment — Duties and liability of employer — Torts of employees — Scope of employment — Employee resigning to work for another company and persuading other employees to do same — Employee copying former employer's client records and actively soliciting its customers being in breach of duty of good faith to former employer — New employer obtaining benefit of employee's activities liable to former employer for losses sustained as result of employee's conduct, whether or not it had knowledge of that conduct or its illegal nature — New employer not liable for losses sustained by former employer after employee started his own company, where new employer's assistance in setting up new company not provided with view to earning profit.

The defendant P. worked for the plaintiff in a sales capacity from 1971 to 1979. Over time he took on some managerial duties as business expanded in western Canada and by 1979 he was responsible for the plaintiff's Vancouver branch, although subject to considerable head office control. After being advised that the Vancouver branch would have to be trimmed back in order to improve its profitability, P. gave 30 days' notice of resignation. During that period he joined the defendant S. Ltd. and induced some of his fellow employees to do the same. He copied and removed some of the plaintiff's client lists and order records; diverted maturing business opportunities to his new employer and, after joining that company, embarked on a systematic course of soliciting the plaintiff's customers. Ten months later, P. left S. Ltd. and formed a new company, the defendant C. Co., which took over the business the plaintiff had taken to S. Ltd. The plaintiff brought an action against all of the defendants for damages. The trial judge found that P. had breached his fiduciary duty to the plaintiff, and held S. Ltd. liable for the damages suffered by the plaintiff while P. was in its employ. No award was made for the loss of a secret discount which a supplier had terminated after P. had requested the same discount for S. Ltd. S. Ltd. appealed the judgment and the plaintiff cross-appealed on damages.

Held:

Appeal and cross-appeal dismissed.

Having regard to the totality of his activities after leaving the plaintiff, P. was clearly in breach of his general duty of good faith to that company. By any standard, his activities were unfair. Without regard to the question whether he was a fiduciary, he thus rendered himself liable for the damage which he thereby caused to his former employer.

Assuming that S. Ltd. was unaware of any conduct on the part of P. which was in breach of his obligations to the plaintiff, and also that it was not right to hold S. Ltd. liable on the basis of being a party to P.'s breach of fiduciary duty, the trial judge was nevertheless correct in finding that S. Ltd. was vicariously liable for P.'s actions while he was employed by it. The employer's lack of knowledge of P.'s conduct, and of its illegal nature, did not relieve it from liability. It was clear that S. Ltd. received the benefit of those activities.

With respect to the cross-appeal on damages, the plaintiff had not pleaded that S. Ltd. should be held liable for any of the losses sustained after P. left the employ of S. Ltd. Even if an amendment to the pleadings were granted, it was unlikely that such further liability could be imposed. Although S. Ltd. cooperated with P. in starting and transferring business to P.'s own company it did so because it was desirous of ridding itself of the packaging supply business and not with a view to earning any profit. As to the plaintiff's loss of the secret discount from a supplier, the trial judge was correct in finding that the discount was in breach of the Combines Investigation Act and that, in any event, P. had breached no duty to the plaintiff in requesting the discount for his new employer.

Appeal and cross-appeal from judgment of Spencer J., 65 B.C.L.R. 355, 7 C.P.R. (3d) 477, 8 C.C.E.L. 282, awarding damages for former employee's breach of fiduciary duty.

The judgment of the court was delivered by *Esson J.A.*:

1 The plaintiff is successor to Mayers Packaging Ltd. to which I will generally refer as Mayers. The defendant Palmer was a trusted employee of Mayers for a number of years until he abruptly resigned to enter the employment of the appellant Smith Paper Ltd., to which I will refer as Smith. The issues arise from Mr. Palmer's activities in competition to his former employer while in the employment of Smith and, after he left that company, when he carried on business through the defendant, Classic Packaging Corporation, a company controlled by him.

2 Mr. Justice Spencer found Palmer to have breached his fiduciary duty to Mayers [65 B.C.L.R. (2d) 355, 7 C.P.R. (3d) 477, 8 C.C.E.L. 282]. He awarded damages of some $200,000 against Palmer, $168,000 against Classic and $46,000 against Smith, the award against Smith being limited to the period of about 10 months during which Palmer was in its employ. Neither Palmer nor Classic has appealed.

3 Mayers is a relatively small company which began business in the early 1950s in Winnipeg where it

has always had its head office and principal place of business. By 1971, when Mr. Palmer entered its employment, it was owned and operated by two brothers, Norman and Martin Titelman. It ran two separate businesses, one concentrating on the manufacture of paper rolls and the other on the merchandising of packaging products to retail stores. Mr. Palmer's employment was only in the retail packaging division. In 1972 he was sent by the company from Winnipeg to Vancouver to open a branch. It started on a very small scale, operating out of the basement of his home but, by 1979, had grown to the point where there were seven other employees, a showroom and two warehouses. Palmer was always in charge of the British Columbia branch, reporting directly to the Titelmans. That branch was a significant part of the total company operations, having almost as many employees as the head office at Winnipeg.

4 Mr. Palmer's position had no formal title but he sometimes referred to himself as general manager and that seems a fair enough description of his position by 1979. He continued to devote much of his time and effort to "call on the trade", spending at least half of his time on the road and being responsible for getting about 80 per cent of the branch's sales. His income by 1979 approached $3,000 per month, of which about 25 per cent was earned by sales commissions. So far as the employees and customers were concerned, he was the man in charge. The Titelmans rarely visited Vancouver but exercised a very substantial measure of day to day control, mainly by telephone. In financial matters, their control was complete. Palmer had no responsibility for budgets or cash flow statements and was not privy to the financial affairs of the company. He had no authority to approve credit.

5 Palmer resigned in April 1979 after the Titelmans, at a meeting in Winnipeg, delivered what he saw as a "bombshell" by telling him that the scope of the operation would have to be cut back in order to improve its profitability and that he would no longer be paid on commission, although there was some assurance that his income would not be reduced. He was told to come back with a plan for cutting back the operation. He never did so but, almost immediately after returning to Vancouver, gave 30 days' notice of resignation. He entered the employment of Smith during the notice period so that, for some part of it, he was in the employment of both companies.

6 Smith was a larger company than Mayers. It was involved in various aspects of the paper business. It had not previously been in the field of providing packaging to retail stores, which was the specialized area in which Mayers was engaged. Its principal was Mr. Mulhern.

7 The trial judge found that Palmer, after deciding to leave Mayers, did these things:

8 1. While still in Mayers' employ, he persuaded a junior employee, Ironside, to leave Mayers and join Smith;

9 2. He persuaded Mayers' outside agent in Vancouver, Mr. Guscin, to terminate his agency with Mayers;

10 3. He carried out a systematic attack on Mayers' business. Beyond persuading Ironside and Guscin to leave Mayers, he diverted three "maturing orders" from Mayers to Smith;

11 4. He told Ironside to divert orders to Smith where he could;

12 5. He copied Mayers' customer cards which gave him the name and address of each customer and full details of past orders — these were vitally important documents to Mayers and most useful to anyone seeking to compete with Mayers;

13 6. He directly solicited those Mayers' customers with whom he had formerly dealt. He personally called on them to ask for their business and to take orders. This was of particular significance in that calling on customers is the primary selling tool in this kind of business;

14 7. He carried away and made use of Mayers' price lists.

15 Other employees in the Vancouver branch, including Palmer's wife, left Mayers to go to work at Smith in what was, in effect, a new division of Smith's operation headed by Palmer, devoted to precisely the kind of business that Mayers had carried on.

16 The effect was to deal a staggering blow to the business of Mayers. Only two junior employees were left. As a small family company with its headquarters in Winnipeg, its owners found it very difficult to reorganize the operation and it had, for a time, to be drastically reduced. Palmer's raiding of its customers was very effective — he took away all or a substantial part of the business of over 300 accounts.

17 Although the new packaging division of Smith was successful enough in terms of gross sales and profitability, it did not fit well with other aspects of Smith's business and, about the end of 1979, Mr. Mulhern decided to terminate it. As a result, Palmer incorporated Classic Packaging Corporation to take over that business from Smith. Mr. Mulhern assisted Palmer in various ways to set up the new company, including helping to negotiate a line of credit from the bank and providing support by way of guarantee. Neither he nor his company had any continuing relationship beyond being a guarantor and providing advice and moral support.

18 The trial judge found that Palmer's position with Mayers was such that he was a fiduciary and thus under a higher duty to limit his competitive activities than if he had been a mere employee. He found each of the activities listed earlier to have been in breach of that fiduciary duty. Having found it impractical to make an award on the basis of an accounting, he awarded damages in respect of the entire period of Palmer's activity from April 1979 to the date of trial in 1984. He held Smith liable for the damages incurred in the approximately 10-month period during which Palmer had been in the employment of that company. Palmer was held liable for all damages to the date of trial. Classic was held liable for the damages incurred after it took over the business from Smith.

19 On appeal, Smith contends that the trial judge erred in holding Palmer to have been under a fiduciary duty and, in any event, for holding Smith liable for any of the damage sustained by Mayers. As an alternative, it submits that it should not have been held liable for all the damage sustained in the 10-month period but only for that which flowed from certain of Palmer's activities, excluding those which took place before he was actually employed by Smith and those of which Smith had no

knowledge.

20 The question whether Palmer was under a fiduciary duty revolves around the line of cases which begins with the decision of the Supreme Court in *Can. Aero Service Ltd. v. O'Malley*, [1974] S.C.R. 592, 11 C.P.R. (2d) 206, 40 D.L.R. (3d) 371 [Ont.]. That case laid down that those who are "top management" or "senior officers" rather than "mere employees" occupy a position of a fiduciary character which imposes upon them a "strict ethic" which disqualifies them from usurping to themselves or directing to someone else a "maturing business opportunity which [the employer] is actively pursuing". The language in quotation marks is taken from the reasons of Laskin J. (later C.J.C.) for the court at p. 382 (D.L.R.).

21 The position of Mayers is:

22 (a) Palmer was top management and thus subject to the strict ethic;

23 (b) Each of the continuing accounts which Palmer had serviced on behalf of Mayers in the course of his employment are to be regarded as maturing business opportunities which Mayers was actively pursuing;

24 (c) Palmer was therefore disqualified from usurping those accounts for himself or directing them from Mayers to Smith.

25 I doubt whether either of the premises or the conclusion is correct. It is clear that, in the early years of his employment with Mayers, Palmer was a mere employee — a typical drummer serving the territory. By 1979 he had acquired managerial responsibilities and yet he continued to spend more than half his time on the road doing what he had always done. It is doubtful that the point was ever reached where he could be categorized as top management or a senior officer, particularly in relation to his work as a drummer.

26 I also think it doubtful that, assuming he did become subject to the strict ethic of the fiduciary, he would have been precluded from soliciting Mayers' customers after he went to work for a competitor had he done that fairly. A clear statement on the point is to be found in one of the American authorities referred to in the judgment of Laskin J. in *Can. Aero,* Raines v. Toney, 313 S.W. 2d 802 (Ark. S.C., 1958). The passage quoted by Laskin J. at pp. 386-87 deals with the responsibilities of "corporate fiduciaries" who resign to form a competing enterprise. The concluding statement in that passage is:

> But they can use in their own enterprise the experience and knowledge they gained while working for their corporation ... They can solicit the customers of their former corporation for business unless the customer list is itself confidential.

27 I do not suggest that Laskin J. in *Can. Aero* adopted that statement of the law but, on the other hand, I cannot read his judgment as rejecting it. The passage was quoted by Laskin J. without disapproval although, as appears in the last paragraph on p. 387, he thought that the trial judge in *Can. Aero* had erred in referring to it as supporting the view that the liability of directors or senior officers is

limited to contracts obtained " 'in the course of their duties as such' ".

28 It is true, as Mr. Fraser submits, that a number of later decisions in other provinces provide some support for his submission. Some of those cases have found employees of humble degree, although none perhaps as humble as Mr. Palmer, to be subject to the "strict ethic" and have found those employees to have breached their duty by soliciting the customers of their former employer for business. The most prominent of those cases is the decision of Estey C.J.H.C. (as he then was) in *Edgar T. Alberts Ltd. v. Mountjoy* (1977), 16 O.R. (2d) 682, 2 B.L.R. 178, 36 C.P.R. (2d) 97, 79 D.L.R. (3d) 108. An appellate decision which takes somewhat the same approach is W.J. Christie & Co. v. Greer, [1981] 4 W.W.R. 34, 14 B.L.R. 146, 59 C.P.R. (2d) 127, 121 D.L.R. (3d) 472, 8 Man. R. (2d) 269, a decision of the Court of Appeal of Manitoba.

29 None of the decisions relied on by Mr. Fraser on this question are binding on this court but this is not the right case in which to decide whether they should be followed. The point simply does not arise. It does not matter whether Mr. Palmer was in that select group subject to the rule of the strict ethic. As with any employee, he was subject to the general duty of good faith owed by any employee to his employer. The scope of that duty is discussed in the judgment of the Court of Appeal in *Faccenda Chicken Ltd. v. Fowler*, [1986] 3 W.L.R. 288, [1986] 1 All E.R. 617. In general, unless there is an express term, it is a matter of an implied term in the contract. The matter is summed up thus in the headnote at p. 618:

> The general duty of good faith owed by an employee to his employer during the currency of his employment will be broken if the employee makes, copies or deliberately memorises a list of the employer's customers for use after his employment has ceased, notwithstanding that, except in special circumstances, there is no general restriction on ex-employees canvassing or doing business with customers of former employers.

30 Having regard to the totality of his activities after leaving Mayers, Palmer was clearly in breach of his general duty of good faith towards that company. Assuming he had the right to solicit customers, he only had the right to do so fairly. By any standard, his activities were unfair. It is therefore futile to consider whether, had he acted fairly towards Mayers, he would have been nevertheless restricted from soliciting its customers. He clearly breached the most plainly recognized obligations and used the information gained thereby in his solicitation. Without regard to the question whether he was a fiduciary, he thus rendered him self liable for the damage which he thereby caused to his former employer.

31 The basis of liability in this case is not significantly different from that applied by this court in *State Vacuum Stores of Can. Ltd. v. Phillips*, 12 W.W.R. 489, [1954] 3 D.L.R. 621. Sidney Smith J.A., for the court, said this at p. 493:

> The plaintiff alleges that their mode of procedure was in breach of their duty of fidelity to their employer. It may be well to say at once that the plaintiff company was not entitled to be protected against mere competition *per se*. But it was at all times entitled to such a degree of good faith on the

> part of its employees as would ensure stability in its business; and to be protected from such dislocation as the adoption of the policy followed here would have entailed. The importance of the positions occupied by the defendants should be noted. They are not manual labourers as is the case in several of the authorities. They were the top men in the company's executive positions in Western Canada, far from the head office in Toronto, and therefore enjoyed a measure of special confidence.
>
> The principle that an unfaithful employee may be answerable in damages is well established in the decided cases although, as Lord Greene, M.R., points out in Hivac Ltd. v. Park Royal Scientific Instruments Ltd., [1946] Ch. 169, 115 LJ Ch 241, [1946] 2 All E.R. 350, this branch of the law may not yet have been fully explored in its remoter aspects.

32 The reference to the remoter aspects of this branch of the law may have been prescient of the uncertainties created by the decision in *Can. Aero*. However that may be, this case does not require exploration of the remoter aspects.

33 I turn then to the question whether Smith was properly held liable for the wrongs which Palmer inflicted upon Mayers while in the employment of Smith. The trial judge dealt with that issue in this way [pp. 377-78]:

> ... I am prepared to accept that Mr. Mulhern did not know that Palmer and Ironside had copied and were wrongfully using Mayers' confidential records, but he knew and intended that Palmer should solicit his former customers. Smith cannot plead ignorance of the law that Palmer's fiduciary duty to Mayers prevented him from direct solicitation of them. It was a party to Palmer's breach of fiduciary duty to Mayers: see *MacMillan Bloedel v. Binstead* (1983), 22 B.L.R. 255, 14 E.T.R. 269 (B.C.S.C.). Moreover, Palmer's wrongful solicitation and wrongful use of Mayers' confidential documents and his wrongful diversion of some of Mayers' orders to Smith's account, completed when Palmer was at Smith, were tortious acts done in the course and scope of Palmer's employment by Smith. Smith gained benefit from them. Smith is therefore vicariously liable for Palmer's actions while he was employed by it. See *Lloyd v. Grace Smith & Co.*, [1912] A.C. 716 (H.L.); *Sheppard Publishing Co. v. Press Publishing Co.* (1905), 10 O.L.R. 243 (C.A.). Smith is therefore jointly and severally liable with Palmer for the damage suffered by Mayers to 29th February 1980, when Palmer left to set up Classic Packaging Corporation.

34 I will assume, for the sake of argument, that the trial judge erred in holding that Palmer's fiduciary duty prevented him from direct solicitation of Mayers' former customers. I will also assume that neither Mr. Mulhern nor his company was aware of any conduct on the part of Palmer which was in breach of his obligations to Mayers, and also that it was not right to hold Smith liable on the basis of being a party to Palmer's breach of fiduciary duty. Assuming all that, there remains the trial judge's finding that Smith is vicariously liable for Palmer's actions while he was employed by it. The employer's lack of knowledge of the conduct of Palmer, and of its illegal nature, does not relieve it from liability. It is clear that Smith got the benefit of those activities. The obtaining of such a benefit has generally been considered as militating in favour of the imposition of vicarious liability. The absence of knowledge of the illegality of

the acts does not militate against such liability.

35 In *United Services Funds (Trustees of) v. Richardson Greenshields of Can. Ltd.*, [1988] B.C.W.L.D. 1070, B.C.S.C. No. C860975, 29th January 1988 (not yet reported), Southin J. (now J.A.) discussed at some length at pp. 21-29 the subject of the basis for imposing vicarious liability. In that passage, Southin J. (now J.A.) quoted at length from Broom's Legal Maxims. For present purposes, I take the law to be correctly stated in this excerpt quoted at p. 23 of her reasons:

> It is not only for the negligence of his servant while acting within the scope of his employment that a master is liable; for the rule is that 'the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved,' and 'no distinction can be drawn between fraud and any other intentional wrong' (*Barwick v. English J.S. Bank*, L.R. 2 Ex. 259, at p. 265; see also *Mackay v. Commercial Bank*, L.R. 5 P.C. 394; Swire v. Francis, 3 App. Cas. 106; *Houldsworth v. Glasgow Bank*, 5 App. Cas. 317, at p. 326) ...

36 Mr. Critchley for the appellant sought to distinguish the authorities cited in that passage on the basis that they all relate to a "general duty" to not act negligently or fraudulently or otherwise in breach of a "general duty"; whereas the duty which was breached by Mr. Palmer in this case was a private duty which has its foundation in his contract with Mayers. He could point to no authority holding that vicarious liability should not be imposed for breach of a "private duty" of that kind. I see no basis in principle for giving effect to this submission.

37 An authority which, at first blush, offers some support to the appellant's submission is *Bendix Home Systems Ltd. v. Clayton*, [1977] 5 W.W.R. 10, 33 C.P.R. (2d) 230 (B.C.S.C.). In that case Macfarlane J. (now J.A.) found that the two individual defendants, who had occupied responsible positions with the plaintiff, were in breach of their fiduciary duty to it by having used their positions of trust in starting a new company which took other employees from the plaintiff and having diverted the goodwill of dealers which it had been their duty to attract for the plaintiff. Macfarlane J.A. refused to impose liability upon the company which they had incorporated. That decision rested primarily on the finding that the company, which had been incorporated three months after the dismissal of the two individuals from the plaintiff, was a "fresh initiative" which was never controlled by the two defendants and which was conceived and incorporated only after they had exhausted other possible employment opportunities. No issue of vicarious liability was considered. In my view, the decision does not assist the appellant.

38 The remaining submission of the appellant is that the trial judge erred in holding it liable for the whole of the damages sustained by Mayers during the period of Palmer's employment. That is based on the fact that some of the wrongful acts committed by Palmer, such as persuading Ironside to leave Mayers' employment, diverting specific maturing orders from Mayers to Smith, and the copying of the confidential records, took place before Palmer entered Smith's employment. On the other hand, those acts took place in contemplation of entering Smith's employment and, more significantly, were inextricably connected to the activities which took place after entering that employment. It was not the

copying of the records which damaged Mayers, it was the use which was made of them. That use was made in the employment of Smith and for the benefit of Smith. The distinction which is sought to be made is, in the circumstances, not realistic. I would reject this ground of appeal.

The cross-appeal

39 The plaintiff has cross-appealed on damages. It says that the trial judge erred in two respects:

40 1. In limiting the damages against Smith to losses suffered by Mayers during the period of Palmer's employment with Smith;

41 2. In disallowing the claim by Mayers for the loss of a secret discount given it by one of its major suppliers, but terminated when Palmer requested the same discount on behalf of Smith.

42 It will be recalled that Palmer left the employment of Smith about 10 months after leaving the employment of Mayers and that thereafter he competed with Mayers through the vehicle of his own company, the defendant Classic. The plaintiff concedes that Smith cannot be vicariously liable for the actions of Palmer after that 10-month period. But it asserts that, because those actions constituted a breach of fiduciary duty, and because Smith cooperated with Palmer in various ways including providing support for its bank loan by way of guarantee, it should be held liable as a "party", or "accomplice", or on a theory of conspiracy. The trial judge refused any such relief, holding that no such claim had been pleaded.

43 I agree with the trial judge that nothing in the plaintiff's pleadings could be taken to give notice of any claim against Smith in respect of the activities of Classic. The appellant submits that this was an unfairly rigorous application of the rules of pleading because, it says, the defendant Smith had ample notice through discoveries, counsel's opening at trial and a written statement of issues delivered before the beginning of trial. Mr. Critchley, on the other hand, states that he was not aware before the final argument that any such claim was being made against his client and that, if he had, he would have called further evidence.

44 The opening at trial, as I read it, gives no notice of any claim against Smith through Classic. The statement of issues has one sentence which asserts that the plaintiff seeks to hold Smith liable for all damages suffered by Mayers but that appears in a rather vague and extremely broadly worded passage which cannot overcome the absence of a proper pleading of this far reaching and unusual claim. Perhaps most important is the reaction of the trial judge who, having presided over this long trial, was of the view that the plaintiff should be held to the claim as pleaded. In relation to this kind of issue, the trial judge has an advantage rather like that which he has in assessing credibility. It has about it elements of atmosphere which can be best assessed by one who was there.

45 The respondent asked that this court grant an amendment to the pleadings "to conform with the evidence". Such amendments have been granted on occasion although it is not always clear what good purpose is served by doing so. If the party who relies on the inadequacy of the opposite pleadings was not prejudiced at trial by that inadequacy, the pleadings point should not avail it. I cannot say this is

such a case. Were an amendment now to be granted, that would merely tend to obscure the true purpose of pleadings which is to govern the course of the action to the end of the trial.

46 In any event, I doubt that the difficulties confronting the plaintiff on this issue could be remedied by any amendment to the pleadings. It is clear that, by the end of 1979, Smith was desirous of ridding itself of the packaging supply business brought to it by Palmer and that, by the end of the 10-month period, it had done so. It accomplished that in a friendly way, cooperating with Palmer to get the new company started and in an orderly transfer of the business from Smith to Classic. We have been referred to no case which would support the view that such activities, none of which appear to have been of any particular benefit to Smith from the point of view of earning profit, would provide a basis for holding it to be a party to any continuing breach of fiduciary duty by Palmer. In this context, it is of some significance that it was not until many months after Classic began business that Mayers raised any issue as to the propriety of Smith having competed with Mayers or, for that matter, of the propriety of Palmer's activities. In other words, there is no basis for believing that Smith, in assisting Palmer to start up Classic, had any reason to think that any legal wrong was being done to Mayers. Mr. Mulhern knew, of course, that Classic would continue to serve the former customers of Mayers but, given the finding that he had no knowledge of any other wrong done by Palmer to Mayers, I see no basis for holding his company jointly liable with Classic for the continuing activities of Palmer.

47 The second issue on the cross-appeal arises out of a substantial price discount which, for many years, had been granted to Mayers by one of its major suppliers. Shortly after Palmer went to work for Smith, he asked that the same discount be given to Smith. The supplier responded by refusing the discount to Smith and immediately terminating the discount arrangement with Mayers. The trial judge refused to award any damages to Mayers for the loss of the discount. He held that it had been given in breach of s. 34 [now s. 50] of the Combines Investigation Act, R.S.C. 1970, c. C-23 [now R.S.C. 1985, c. C-34]; and that it would therefore be against public policy for the court to award damages for such a loss, and thus to impliedly approve an arrangement contrary to the plain purpose of the section.

48 I see no error in that conclusion but would add that the refusal to allow damages on this head can be supported on a basis which has no adverse implications for the supplier. The trial judge, at an earlier point in his reasons, held that Palmer had not been in breach of his duty to Mayers in going to Mayers' suppliers on behalf of Smith and, in dealing with them, in making use of pricing and routing knowledge which he had learned while with Mayers. In light of that finding, I can see no basis for holding that Palmer breached his duty to Mayers by asking this supplier for the same discount which he knew had been given to Mayers.

49 It follows that I would dismiss the appeal and cross-appeal.

Appeal and cross-appeal dismissed.

TAB 36

2014 ONCA 237
Ontario Court of Appeal

Clarke v. Johnson

2014 CarswellOnt 3804, 2014 ONCA 237, [2014] W.D.F.L. 1929, [2014] O.J. No. 1481, 239 A.C.W.S. (3d) 788, 318 O.A.C. 186, 371 D.L.R. (4th) 618, 42 R.P.R. (5th) 1, 96 E.T.R. (3d) 210

Donald Clarke, Plaintiff (Respondent) and Martha Johnson, Victoria Johnson and Westley Clarke, Defendants (Appellant)

K.M. Weiler, Epstein[111], S.E. Pepall JJ.A.

Heard: September 11, 2013
Judgment: March 28, 2014
Docket: CA C55945

Proceedings: affirming *Clarke v. Johnson* (2012), 2012 ONSC 4320, 2012 CarswellOnt 9341, R.D. Gordon J. (Ont. S.C.J.)

Counsel: David S. Steinberg, Andrea M. Bolieiro, for Appellant
Richard Guy, for Respondent

Subject: Civil Practice and Procedure; Contracts; Estates and Trusts; Family; Property; Restitution; Torts

Headnote

Real property --- Easements — Miscellaneous

Revocation of licence — Defendant owner MJ was one-third owner of island, and her brother-in-law and sister-in law each owned one-third — Plaintiff occupier DC was married to owner's daughter (defendant wife VJ) and built camp on owner's section of island — Following occupier's separation from wife 20 years ago, occupier and their children, including defendant son WC, enjoyed exclusive use of camp — Occupier and son's relationship became strained and occupier refused to allow son to use camp — Owner then took steps to prevent occupier from using camp — Occupier's action to determine his rights was allowed — Trial judge held that owner owned camp — Trial judge held that occupier was entitled to use of camp during his lifetime — Owner appealed on ground that, inter alia, as licensor, she revoked occupier's licence on reasonable notice — Appeal dismissed — Trial judge properly concluded that occupier's use was at instance of owner and could be terminated by her unless there was equitable remedy available to him — Trial judge correctly focused on merits of occupier's equitable claims and whether they stopped owner from revoking licence.

Estoppel --- Estoppel in pais — Estoppel by conduct — Acquiescence — Miscellaneous

Defendant owner MJ was one-third owner of island — Plaintiff occupier DC was married to owner's daughter (defendant wife VJ) and built camp on owner's section of island, using loan from wife's father

111. Epstein J.A. took no part in the reasons for judgment.

— Following occupier's separation from wife 20 years ago, occupier and their children, including defendant son WC, enjoyed exclusive use of camp — Occupier and son's relationship became strained and occupier refused to allow son to use camp — Owner then took steps to prevent occupier from using camp — Occupier's action to determine his rights was allowed — Trial judge held that occupier made out claim for proprietary estoppel — Trial judge held that it would be unconscionable to deny occupier benefit after having been allowed to develop emotional attachment over decades, and having directed personal and financial resources to property in reasonable belief that it would continue — Owner appealed — Appeal dismissed — Trial judge correctly concluded that occupier had established claim for proprietary estoppel — Trial judge expressly identified and applied modern approach to proprietary estoppel and properly identified three elements required to establish claim for proprietary estoppel — Owner's submission that her conduct could be considered unconscionable only if occupier had reasonably expected to be able to deny his children access to camp was rejected.

Restitution and unjust enrichment --- General principles — Requirements for unjust enrichment — No juristic reason for enrichment

Defendant owner MJ was one-third owner of island — Plaintiff occupier DC was married to owner's daughter (defendant wife VJ) and built camp on owner's section of island, using loan from wife's father — Following occupier's separation from wife 20 years ago, occupier and their children, including defendant son WC, enjoyed exclusive use of camp — Occupier and son's relationship became strained and occupier refused to allow son to use camp — Owner then took steps to prevent occupier from using camp — Occupier's action to determine his rights was allowed — Trial judge held that occupier's claim for unjust enrichment was made out — Owner appealed — Appeal dismissed — Trial judge correctly concluded that occupier's unjust enrichment claim precluded owner from revoking his licence to use camp — There was evidence to support trial judge's finding that owner's enrichment and occupier's deprivation exceeded amount loaned to occupier — There was reasonable expectation that occupier's use would continue until his death — Owner did not establish that it was condition of occupier's licence that he would share camp with children and that denial of unregulated access to his son constituted breach of licence — It would not be just for owner to retain benefit of occupier's contributions merely because she expected his son would always be welcome.

Family law --- Division of family property — Determination of ownership of property — Application of trust principles — Resulting and constructive trusts — Constructive trusts generally

Defendant owner MJ was one-third owner of island — Plaintiff occupier DC was married to owner's daughter (defendant wife VJ) and built camp on owner's section of island — Following occupier's separation from wife 20 years ago, occupier and their children, including defendant son WC, enjoyed exclusive use of camp — Occupier and son's relationship became strained and occupier refused to allow son to use camp — Owner then took steps to prevent occupier from using camp — Occupier's action to determine his rights was allowed — Trial judge held that occupier made out claim for unjust enrichment and proprietary estoppel — Trial judge found that monetary damages were inadequate given significant emotional attachment — Trial judge held that appropriate remedy was imposition of constructive trust to reflect occupier's interest in camp by way of licence — Owner appealed — Appeal dismissed — Trial judge made no error in exercise of discretion in confirming personal licence granted to occupier and making it exclusive — Consistent with expectations, occupier could use and regulate use during his lifetime or until he could no longer attend at camp — Trial judge carefully crafted appropriate and minimally intrusive equitable remedy so as to do justice in difficult familial circumstances.

APPEAL by defendant owner of camp from judgment reported at *Clarke v. Johnson* (2012), 2012 ONSC 4320, 2012 CarswellOnt 9341 (Ont. S.C.J.), allowing plaintiff occupier's action for equitable right to use camp.

S.E. Pepall J.A.:

Introduction

1 A cottage, a camp, a cabin, a country house, a ranch: these are the different names given to second homes across Canada. No matter the description, Canadians' affinity for their recreational properties is deep, abiding and renowned. This appeal involves such a recreational property, a camp located on Lake Panage near the city of Sudbury in Northern Ontario. The appellant, Martha Johnson, owns the camp. Her former son-in-law, the respondent Donald Clarke, occupies the camp. He contributed funds and resources to the camp and, over the course of decades, has become emotionally attached to it. When he sought to bar his son from the camp, his mother-in-law sought to bar him. The trial judge determined that the appellant owns the camp but that the respondent has an equitable right to use the camp during his lifetime.

2 This appeal considers whether equitable remedies were properly available to the respondent and whether the remedy that the trial judge granted was appropriate.

3 For the reasons that follow, I am of the view that the trial judge's conclusions were available to him and that the appeal should be dismissed.

Facts

4 The appellant and her late husband, William Johnson, purchased an island in 1971 for $2,100. In 1979, a third of the island was transferred to each of William's brother and sister and their respective spouses for a total of $1,400 ($700 per couple). The couples held their one-third interests as tenants-in-common. By informal agreement, each family was assigned use of a particular portion of the island. It was also agreed that ownership of the island would not pass to anyone other than a blood relative of the Johnson family.

5 The appellant and William had a daughter, Victoria Johnson. She married the respondent. Together, they had two children: Misty, who was born in 1976; and Westley, who was born in 1977.

6 In about 1974, with the blessing of Victoria's parents, the respondent and Victoria built an A-frame

structure on a portion of the island allocated to Victoria's parents. In 1988, they had a pre-fabricated unit delivered to the camp site. The respondent was instrumental in actually assembling and finishing the camp.

7 The pre-fabricated unit was bought for $15,471.46. The respondent claims he contributed $5,700 from RRSPs and Victoria's father lent the respondent and Victoria $17,000. The respondent, Victoria, and the two children used the camp in the summer and often in the winter as well.

8 Victoria and the respondent separated in 1991. Their separation agreement made no reference to the camp. The respondent had custody of the two children. He continued to use the camp with the children after the separation. The respondent's uninterrupted use continued for more than 20 years. Victoria was not interested in the camp and has not been there since her separation from the respondent.

9 William and the respondent worked together at the dairy business that William operated and partially owned. They were good friends. One day, the respondent raised the issue of his significant financial obligations and the loan which he and Victoria owed to William. William forgave the loan. This is not contested.

10 Misty grew up and moved away. So did Westley. He moved to Western Canada and was absent for about 10 years.

11 The respondent continued his uninterrupted use of the camp. He maintained and improved the camp as though it were a permanent structure. For more than 20 years, he has paid the bills including hydro, insurance, and property taxes, and has made improvements. These include building a new dock, a new shed, a gazebo, reconstruction of the sauna, a new roof and a new porch. He has used the camp without charge. From the record, it appears that the camp is insured for approximately $120,000. The respondent is now retired and approximately 61 years of age.

12 William died in February 2009.

13 Having lived out west for about ten years and having separated from his spouse, Westley decided to move back east in 2009. According to his mother, Victoria, he suffers from post-traumatic stress disorder and was committed to a hospital when he returned to Ontario.

14 Like his father, Westley also wished to use the camp. The respondent had no difficulty with Westley using the camp from time to time provided it did not conflict with plans he had already made for its use. Unfortunately, he and Westley were unable to come to terms. Their relationship became strained. Misty, with whom Westley resided when he moved back east, maintained that he has a 'Jekyll and Hyde' personality and there was no way that anybody could share the camp with Westley. Ultimately, the respondent refused to allow his son to use the camp.

15 It was the appellant's view that the respondent's use of the camp was premised on his willingness to share it with his children. The appellant was content for the respondent to stay at the camp so long as

he stayed there with the children and they had a place at the lake to enjoy their summers.

16 Once the respondent refused to make the camp available to Westley, the appellant advised him that Westley was entitled to use the camp and the respondent could not exclude him. The appellant sent the respondent two letters to this effect and advised that if the respondent continued to block Westley from using the camp, she would have to revoke his licence. The appellant waited for almost one year but the respondent's conduct persisted. The appellant then issued a trespass notice to the respondent and Westley changed the locks to the camp. She urged the respondent to contact his son and work out a reasonable arrangement for their shared use. The respondent then sought and obtained an interlocutory injunction to restore the original locks and his occupancy of the camp.

The Trial

17 The parties' dispute proceeded to trial. The appellant; the respondent, Victoria; Misty; the appellant's son, Kenneth; William's brother, Allan Johnson (and with his wife, another one-third owner); and the appellant's great-niece, Hellen Frost (the other one-third owner) all testified. Westley did not.

18 The appellant, Victoria and Westley were aligned in interest. Aligned on the opposite side were the respondent, and though not parties to the litigation, Misty and the other surviving two-third owners of the island.

19 Before the trial judge, the respondent asserted that he was the owner of the camp. Alternatively, he argued that he had an equitable right to continue to occupy the camp based on unjust enrichment and proprietary estoppel. The appellant argued that the camp was a fixture and therefore belonged to her and the equitable remedies of unjust enrichment and proprietary estoppel were inapplicable.

20 The trial judge concluded that the parties intended that the camp be a permanent structure that was part of the realty and that ownership of the camp rested with the appellant. He determined that the respondent's occupation of the property was at the instance of the appellant and could be terminated by her unless an equitable remedy was available to the respondent.

21 The trial judge found that the respondent had established a claim for unjust enrichment and proprietary estoppel.

22 Dealing firstly with unjust enrichment, he noted that a successful claim required proof of three elements: an enrichment, a corresponding deprivation, and an absence of juristic reason for the deprivation. He made various findings of fact. At para. 29, he found that the appellant had been enriched because she would gain control of the camp "notwithstanding that she has never made any contribution towards the camp's construction, improvement or maintenance."

23 At para. 30, he found a corresponding deprivation on the part of the respondent:

> Mr. Clarke was instrumental in the actual construction of the camp. I am satisfied, based upon his

> evidence, that he contributed funds to its original construction. In addition, he has paid the expenses related to it for over 20 years. He has physically maintained the camp and contributed not insignificantly to its improvement. There can be no question that there would exist a corresponding deprivation. That he has had use of the camp since its construction is not sufficient to displace this deprivation, particularly in view of the reasonable expectation that his use would continue until his death.

24 The trial judge addressed the loan of $17,000, stating that having forgiven the debt or chosen not to pursue collection, it would be unfair for the appellant to rely on the loan to defeat the respondent's claim. In any event, the trial judge had little doubt that the appellant's enrichment and the respondent's deprivation "far exceed the amount loaned so as to exist notwithstanding the loan issue."

25 Given that there was no suggestion of any other juristic reason for the appellant's enrichment, the trial judge concluded that the three elements for a claim of unjust enrichment had been established.

26 The trial judge then addressed the claim for proprietary estoppel. Relying on *Schwark Estate v. Cutting*, 2010 ONCA 61 (Ont. C.A.) at para. 34, he noted that a successful claim for proprietary estoppel required proof of three elements:

> (1) the owner of the land induces, encourages or allows the claimant to believe that he has or will enjoy some right or benefit over the property;
>
> (2) in reliance upon his belief, the claimant acts to his detriment to the knowledge of the owner; and
>
> (3) the owner then seeks to take unconscionable advantage of the claimant by denying him the right or benefit which he expected to receive.

27 The trial judge determined that the appellant and William had induced, encouraged or allowed the respondent to believe that he would own the camp and ultimately it would be inherited by his children. The appellant and William gave the respondent and Victoria permission to build and lent funds to be used in the purchase and construction of the camp. The respondent was also given occupation first with his wife and then without and that occupation was never questioned. Moreover, the appellant and William acquiesced in the respondent's occupation and long-term maintenance and improvement of the camp. In reliance upon the belief that he would be entitled to occupy the camp during his lifetime, the respondent contributed significantly to its construction, maintenance and improvement, all with the knowledge and consent of the appellant and William. The trial judge concluded that denial of the respondent's use of the camp was unconscionable. At para. 38, he wrote:

> The attachment between a person and his or her camp is unique and not easily described. Over time there comes to be an emotional attachment borne of the surrounding beauty, the investment of sweat equity, and the memories of times spent with family and friends. When one has been allowed to develop that attachment over the course of decades, and has directed personal and financial resources to the property in the reasonable belief that it would continue, it is unconscionable to deny that benefit.

28 As such, the trial judge was satisfied that the respondent had established his claim of proprietary estoppel.

29 The trial judge then addressed the remedy at para. 40 of his reasons. He was satisfied that monetary damages were inadequate "given the very real and significant emotional attachment that exists between Mr. Clarke and the camp", and imposed a constructive trust that, among other things, reflected the respondent's interest in the property:

> I am also satisfied of the required link between the contributions made by Mr. Clarke and the camp. In my view, an appropriate remedy is the imposition of a constructive trust to reflect Mr. Clarke's interest in the camp property. That remedy coincides with the remedy appropriate to the finding of proprietary estoppel and reflects the legitimate expectations of the parties.

30 The trial judge had no doubt, at para. 41, that the respondent and the appellant "expected and intended that both Westley and Misty would always be welcome to share in the use of the camp." He determined, however, that the children's use of the camp should be regulated by the respondent. Neither child would be prohibited from using the camp but their use would be regulated by the respondent. The trial judge confirmed the respondent's licence to occupy the camp but made it subject to terms. The licence to occupy would continue until the respondent died or was no longer physically able to attend there; was personal to the respondent and his invitees; and could not be assigned or conveyed. The respondent was to maintain the camp in a good state of repair, and pay the taxes and utility costs associated with it. Lastly, he was to take no steps to materially alter the nature or quality of the camp during the term of the licence. Approximately one year later, on August 30, 2013, the order under appeal was amended to state that the licence was exclusive.

The Other Owners of the Island

31 At trial, evidence was received from the other two-third owners of the island. Both Hellen Frost and Allan Johnson testified at trial and affidavits sworn by them and by Allan's wife, Evelyn, were also made exhibits at trial.

32 Hellen received a one-third undivided interest in the island in 1994 from her parents, Laila and Omni Rintamaki. Laila was William's sister. Allan Johnson was William's brother. Hellen swore an affidavit as did Allan and Evelyn. In her affidavit, Hellen stated that: "I am familiar with the background of this dispute and wish to say categorically, that I support Donald Clarke throughout. I do not want him evicted from the island or from his camp." At trial, she confirmed that the contents of her affidavit remained true. Allan and Evelyn's affidavit was similar and like Hellen, Allan stated at trial that the contents of that affidavit continued to be true.

33 Moreover, the other two-third owners gave Donald written consent to cross their lands. The May 19, 2011 consent was made an exhibit at trial. Both Hellen and Allan confirmed that the respondent continued to have such permission. Indeed, Allan went further and testified that there was never any suggestion that the respondent did not own the camp.

34 None of the two-third owners, as non-parties potentially affected by the judgment, sought to vary the relief granted by the trial judge. Nor did they seek to intervene on this appeal.

Grounds of Appeal

35 The appellant appealed the judgment. Neither party challenged the trial judge's conclusion that the appellant owns the camp and the respondent does not. Furthermore, at trial, the appellant conceded that the respondent was a licensee. On appeal, the appellant's counsel (who was not trial counsel) stated that it was acknowledged and not disputed that the respondent was a licensee.

36 The appellant advanced three grounds of appeal. Firstly, the trial judge erred in failing to find that the respondent's licence had been revoked. Secondly, even if it were not revoked, the trial judge erred in finding that the respondent had established an equitable right to continue using the camp based on proprietary estoppel and unjust enrichment. Thirdly, the appellant submits that the trial judge erred in granting a remedy that exceeded the parties' reasonable expectations.

Analysis

(a) Revocation of Licence

37 The parties accepted that the relationship between them was that of a licensor (the appellant) and licensee (the respondent). A licence is a personal right between the owner of land and the licensee that allows the licensee to do some act upon the land that would otherwise constitute a trespass: Anne Warner La Forest, *Anger & Honsberger Law of Real Property*, 3rd ed., vol. 2 (loose-leaf, updated October 2012) (Toronto: Thomson Reuters Canada, 2013), § 16:40.10; *Pilcher v. Shoemaker* [1997 CarswellBC 1913 (B.C. S.C. [In Chambers])], 1997 CanLII 982, at para. 23. A licence is generally a personal right and is revocable. However, as explained in Anger & Honsberger, at § 16:40.10 where "the licensee has incurred expense on the strength of the licence, with the reasonable expectation of being allowed to remain ..., equity may hold that the licensor is estopped from revoking the licence."

38 The appellant complains that the trial judge never addressed the appellant's revocation of the respondent's licence. As the appellant revoked the respondent's licence on reasonable notice, the trial judge ought to have concluded that the revocation by the appellant was valid.

39 There are two bases on which this submission should be rejected. Firstly, this ground of appeal was not raised in the appellant's notice of appeal and in any event, the appellant did not press this ground in oral argument. Secondly, as the appellant accepted in her written argument, the respondent "could only block a revocation by establishing some entitlement to equitable relief." The trial judge properly concluded at para. 27 of his reasons that the respondent's use was at the instance of the appellant and could be terminated by her unless there was an equitable remedy available to him. Accordingly, correctly in my view, the trial judge focused his attention on the merits of the respondent's equitable claims and whether these claims estopped the appellant from revoking the licence. I would not give effect to this first ground of appeal.

(b) Proprietary Estoppel

40 The appellant submits that the trial judge erred in his application of the three elements necessary to sustain a claim for proprietary estoppel. Most notably, the appellant argues that the trial judge misunderstood and misapplied the requirement of unconscionability. The appellant accepts that the relevant question in addressing the respondent's proprietary estoppel claim is whether the appellant unconscionably took advantage of the respondent by revoking his licence to use the camp after he had denied Westley access to it.

(i) Evolution of the Doctrine

41 Proprietary estoppel is an equitable doctrine. In *Anger & Honsberger Law of Real Property*, loose-leaf, 3d ed. (Toronto: Thomson Reuters, 2013), Anne Warner LaForest describes proprietary estoppel at p. 28-3:

> The doctrine of estoppel by encouragement or acquiescence, or proprietary estoppel, is a means by which property rights may be affected or created, and it is invoked in situations where there is want of consideration or of writing.

42 The doctrine was recognized as long ago as 1866 in *Ramsden v. Dyson* (1866), L.R. 1 H.L. 129 (U.K. H.L.), and has repeatedly been accepted in Canada.

43 In 1880, Fry J. in *Willmott v. Barber* (1880), 15 Ch. D. 96 (Eng. Ch. Div.) established a five-part test for proprietary estoppel, the five elements sometimes being described as "five probanda". At pp. 105-6 of *Willmott v. Barber*, Fry J. stated:

> It has been said that the acquiescence which will deprive a man of his legal rights must amount to fraud, and in my view that is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud of that description? In the first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly... the defendant, the possessor of the legal rights, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right.

44 Subsequently, rather than treating the five probanda as elements of a test, Scarman L.J. described them as "a valuable guide" in *Crabb v. Arun District Council*, [1975] 3 All E.R. 865 (Eng. C.A.), at p. 876.

He also observed, at p. 877, that the word "fraud" as used in 1880 did not attract its more modern meaning:

> "Fraud" was a word often in the mouths of those robust judges who adorned the bench in the 19th century. It is less often in the mouths of the more wary judicial spirits who sit today on the Bench. But it is clear that whether one uses the word "fraud" or not, the plaintiff has to establish as a fact that the defendant, by setting up his right, is taking advantage of him in a way which is unconscionable, inequitable or unjust. It is to be observed from the passage that I have quoted from the judgment of Fry J., that the fraud or injustice alleged does not take place during the course of negotiation, but only when the defendant decides to refuse to allow the plaintiff to set up his claim against the defendant's undoubted right. The fraud, if it be such, arises after the event, when the defendant seeks by relying on his right to defeat the expectation which he by his conduct encouraged the plaintiff to have.

45 In the U.K., there has been a retreat from the five probanda — "a Procrustean bed constructed from some unalterable criteria", to use Oliver J.'s terminology in *Taylors Fashions Ltd. v. Liverpool Victoria Trustees Co.* (1979), [1981] 1 All E.R. 897 (Eng. Ch. Div.), at p. 918, and a move towards a more flexible approach to the doctrine. *Taylor Fashions* represented a "watershed in the development of proprietary estoppel" in the U.K.: see *Gillett v. Holt*, [2000] 3 W.L.R. 815 (Eng. C.A.), at p. 829, quoting Gray, *Elements of Land Law*, 2nd ed. (London: Butterworths, 1993), at p. 324. In *Taylor Fashions*, the court held that, in all the circumstances, it would be unconscionable for a representor to go back on the assumption which he had allowed the representee plaintiff to make. Justice Oliver stated, at p. 915-916:

> Furthermore, the more recent cases indicate, in my judgment, that the application of the *Ramsden v. Dyson* principle (whether you call it proprietary estoppel, estoppel by acquiescence or estoppel by encouragement is really immaterial) requires a very much broader approach which is directed to ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment rather than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour.

46 Lord Walker subsequently approved of *Taylor Fashions* in Cobbe v. Yeoman's Row Management Ltd., [2008] UKHL 55 (U.K. H.L.). He noted, at para. 56, that until clarified in *Taylor Fashions*, the five probanda had "over the years proved something of a stumbling-block in the development of equitable estoppel." Lord Walker also observed, at para. 56, that courts had often tried to "force factual situations into the *probanda* even where they were "ludicrously irrelevant or inapplicable" to the case." To establish proprietary estoppel in the U.K., three elements must be proven: encouragement or acquiescence; detrimental reliance; and unconscionability.

47 The application of the doctrine of proprietary estoppel has received somewhat uneven treatment in Canada.

48 This court considered proprietary estoppel in *Schwark Estate v. Cutting*, 2010 ONCA 61 (Ont. C.A.) and, more recently, in *Tiny (Township) v. Battaglia*, 2013 ONCA 274 (Ont. C.A.). The court in *Schwark* identified the three elements necessary to establish a claim for proprietary estoppel but described the three-part test in different language in separate parts of its judgment (at paras. 16 and 34). That said, it is clear that the second articulation of the test was the articulation actually applied to the facts in *Schwark*. This was the test cited by the trial judge at para. 34 of this case, namely: (1) inducement, encouragement or acquiescence; (2) detrimental reliance; and (3) unconscionability. Without discussion, the court in *Tiny Township* cited the first articulation of the three-part test from *Schwark*.

49 In *Schwark* and *Tiny Township*, the court appears to consider the five probanda described by Fry J. in *Willmott v. Barber* as constituting the test for determining the unconscionability element, as opposed to the test for proprietary estoppel itself: see *Schwark*, at para. 29; *Tiny Township*, at para. 138. *Schwark* does not, however, explicitly apply the five probanda in arriving at its conclusion on unconscionability. *Tiny Township* does apply the five probanda to determine unconscionability, but the evidentiary record could not support such a finding (at para. 139).

50 In contrast, jurisprudence from British Columbia, like that of the United Kingdom, has retreated from the five probanda due to their attendant inflexibility. In *Trethewey-Edge Dyking (District) v. Coniagas Ranches Ltd.*, 2003 BCCA 197 (B.C. C.A.), Newbury J.A., in a concurring judgment, stated that the five probanda, including the requirement of a mistake as to legal rights, had now been overtaken by a "broader and less literal approach" to proprietary estoppel (at para. 64). She relied on the "broader and less literal approach" to proprietary estoppel (at para. 64). She relied on the "broader and less literal approach" to proprietary estoppel (at para. 64). She relied on the *Taylor Fashions* decision, amongst others.

51 Subsequently, in *Erickson v. Jones*, 2008 BCCA 379 (B.C. C.A.), the British Columbia Court of Appeal followed Newbury J.A.'s analysis in *Trethewey* and endorsed a more "modern approach" to the ambit of proprietary estoppel than that espoused by Fry J. in 1880. This approach mirrored that described in *Taylor Fashions* and *Yeoman's Row*.

52 A summary of the principles governing proprietary estoppel based on the modern approach include the following:

- proprietary estoppel may form the basis of a cause of action;
- it is not essential that the five probanda be satisfied;
- rather, three elements must be established:

(i) the owner of the land induces, encourages or allows the claimant to believe that he has or will enjoy some right or benefit over the property;

(ii) in reliance upon his belief, the claimant acts to his detriment to the knowledge of the owner; and

(iii) the owner then seeks to take unconscionable advantage of the claimant by denying him the right or benefit which he expected to receive;

- detriment includes expenditures but countervailing benefits may also be considered;
- reliance may be express or inferred;
- if an equity arises, the court has a broad discretion to fashion an appropriate remedy.

53 That said, one must be reminded of Oliver J.'s observation in *Taylor Fashions* at p. 913:

> I am not at all convinced that it is desirable or possible to lay down hard and fast rules which seek to dictate, in every combination of circumstances, the considerations which will persuade the court that a departure by the acquiescing party from the previously supposed state of law or fact is so unconscionable that a court of equity will interfere. Nor, in my judgment, do the authorities support so inflexible an approach.

(ii) Application

54 In addressing this appeal, I will consider both the historical approach to proprietary estoppel described in *Willmott v. Barber* and the more flexible approach adopted in Taylor Fashions and applied by the British Columbia Court of Appeal in Erickson.

55 Although the courts in *Crabb*, at p. 876, and *Schwark*, at para. 27, suggested that the five probanda continued to serve as a "valuable guide", in the case under appeal, the five probanda were not expressly enumerated by the trial judge. That said, a conclusion based on the five probanda was available to him on the record. First, the trial judge concluded that the respondent was mistaken in his belief that he had an ownership interest in the camp. Second, the respondent expended considerable resources on the faith of this mistake. Third, the appellant would have known that the rights she claimed to the camp were inconsistent with the rights asserted by the respondent. Fourth, the record supports the conclusion that the appellant either knew of or was wilfully blind to the respondent's mistaken belief that he had an ownership interest in the camp. The respondent openly and exclusively occupied the camp after he separated from his wife, worked and spent money on it, and used it with and without his children. Indeed Allan Johnson, the appellant's brother-in-law, testified that there was never any suggestion that the respondent did not own the camp. Fifth, the trial judge explicitly found that the appellant and her husband encouraged the respondent to expend resources in constructing, maintaining and improving the camp and acquiesced in his continued use and maintenance.

56 Although the trial judge did not expressly address the five probanda, he did expressly identify and apply the modern approach to proprietary estoppel and, in that regard, relied on the second articulation of the test as discussed by this court in *Schwark*.

57 The trial judge properly identified the three elements required to establish a claim for proprietary estoppel. First, he found that the appellant and William both induced and encouraged the respondent to believe that he would own the camp. There is also no dispute that the appellant acquiesced in the respondent's use.

58 Second, the trial judge found that the respondent, in reliance, contributed significantly to the construction, maintenance and improvement of the camp with the knowledge and consent of the appellant and William.

59 Third, the trial judge then concluded that denying the respondent use of the camp was unconscionable. He found that the respondent had directed significant personal and financial resources to the property in the reasonable belief that his usage would continue, and that denial of such a benefit under the circumstances amounted to unconscionability.

60 In her factum, the appellant claims that her conduct can be considered unconscionable only if the respondent had reasonably expected to be able to deny his children access to the camp, and this could not have been the case because the trial judge found that both parties had expected that the children would always be welcome to share in the use of the camp. This submission should be rejected. This expectation does not mean that the respondent's use of the property was conditional on not being able to regulate access. Moreover, the reasonable expectation that is protected here is the expectation that the respondent can continue to use and regulate use of the camp as he has for decades. The children would always be welcome to share in the use of the camp but that usage would be regulated by him.

61 In my view, the trial judge correctly concluded that the respondent had established a claim for proprietary estoppel. While it is now preferable to adopt the modern approach to proprietary estoppel, the record in this case could also support an application of the historical approach.

(c) Unjust Enrichment

62 Before discussing the remedial implications of proprietary estoppel, I next explain why the trial judge also correctly concluded that the respondent's unjust enrichment claim precluded the appellant from revoking the respondent's licence to use the camp.

63 The appellant submits that the trial judge erred in concluding that the appellant was unjustly enriched by the revocation of the licence. She argues that the trial judge failed to consider the $17,000 loan and erred in concluding that there was no juristic reason for the enrichment. The appellant submits that the juristic reason was the respondent's breach of the parties' expectations relating to his use of the camp.

64 To establish unjust enrichment, a plaintiff must prove an enrichment; a corresponding deprivation; and the absence of a juristic reason for the enrichment: *Peter v. Beblow*, [1993] 1 S.C.R. 980 (S.C.C.), at p. 987. In *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269 (S.C.C.), Cromwell J. framed the absence of juristic reason at para. 40 as "no reason in law or justice for the defendant's retention of the benefit conferred by the plaintiff, making its retention "unjust" in the circumstances of

the case."

65 The trial judge found that there was an enrichment and a corresponding deprivation, noting at para. 29 that the appellant had never made any contribution towards the camp's construction, improvement or maintenance.

66 At para. 31, he considered the $17,000 loan. Although the loan was relevant to the enrichment inquiry, the trial judge found that the appellant's enrichment and the respondent's deprivation "far exceed the amount loaned so as to exist notwithstanding the loan issue." There was evidence to support this finding.

67 The parties' expectations do not inform the findings of facts relating to enrichment and deprivation, as these elements require a "straightforward economic approach": *Kerr*, at para. 37. Here the trial judge expressly found that the respondent had made significant contributions to the camp. While this might be offset to a degree by occupation rent, the trial judge again made an express finding that it was not. In the face of those findings, the first two elements of unjust enrichment are satisfied.

68 Turning to the issue of absence of juristic reason, it is at this juncture that the parties' reasonable or legitimate expectations are to be considered: *Kerr*, at para. 9. In that decision, at para. 34, Cromwell J. observed that the legal principles embedded in the law of unjust enrichment must be applied in the particular factual and social context out of which the claim arises. If there is no established basis such as a contract or a gift on which to deny relief to the party who has suffered a detriment, a trial judge should then consider whether there is another reason to deny relief. At this second stage of the analysis, a trial judge may take into account the parties' legitimate expectations and moral and policy-based arguments as to whether particular enrichments are unjust. Overall, the test for juristic reason is flexible, and the relevant factors will depend on the situation before the court: *Kerr*, at paras. 43-44. A trial judge is best positioned to perform the juristic reason analysis; however, the analysis should not be "purely subjective" with unacceptable "immeasurable judicial discretion": *Kerr*, at para. 43.

69 Applying these principles to this case, the trial judge observed at para. 32 that, other than the appellant's argument based on the loan, there was "no suggestion of any other juristic reason for the enrichment" of the appellant. In the absence of an established category to anchor the juristic reason analysis, the trial judge found that there was a reasonable expectation that the respondent's use would continue until his death. He therefore concluded that the respondent had established his claim for unjust enrichment.

70 On appeal, the appellant now asserts that the juristic reason was the respondent's breach of the parties' expectations and his refusal to grant Westley access to the camp.

71 At para. 41, the trial judge stated that no doubt the appellant regarded the respondent's ongoing maintenance and improvement of the camp as something that would eventually benefit the children. The trial judge did not doubt that the parties "expected and intended that both Westley and Misty would always be welcome to share in the use of the camp." That said, at trial, the appellant did not establish

that it was a condition of the respondent's licence that he would share the camp with his children, and that denial of unregulated or unfettered access to Westley constituted a breach of the licence. As the respondent points out, no one expected that he and Westley would be unable to reside together in harmony. As noted in *Kerr*, at para. 124, the question is whether the parties' expectations show that retention of the benefits is just. Even if the aforesaid juristic reason argument was not being made for the first time on appeal, it would hardly be just for the appellant to retain the benefit of the respondent's labour and financial contributions to the camp merely because she expected Westley would always be welcome, and has been disappointed in that regard. This is not akin to the example that Cromwell J. provided in *Kerr*, at para. 123, of a situation where a claim might be defeated on the basis of the parties' reasonable expectations, because those expectations are evidence of a bargain between the parties.

72 In my view, the trial judge was correct in concluding that the respondent had established his claim for unjust enrichment.

(d) Remedy

73 This brings me to the issue of remedy. The choice of an appropriate remedy involves the exercise of discretion on a principled and reasoned basis.

74 The trial judge was satisfied of the required link between the contributions made by the respondent and the camp. He also determined that monetary damages were inadequate given the emotional attachment that existed between the respondent and the camp. He therefore considered, and rejected, a remedy based on the cost to the respondent.

75 The trial judge determined that the appropriate remedy was the imposition of a constructive trust. In his view, this relief also reflected the legitimate expectations of the parties. As such, he considered that this was the only way to effect justice in the case. The trial judge therefore confirmed the respondent's licence and permitted him to occupy the camp until he died or was no longer physically able to attend there. Approximately one year later, on motion, the order was amended to state that the licence was exclusive.

76 The appellant submits that the trial judge granted a remedy that undermined everyone's reasonable expectations and gave the respondent more than he ever reasonably expected. She asserts that the parties had no reasonable expectation of lifetime use by the respondent coupled with the power to exclude others. The remedy granted derogated from the appellant's rights as owner and diminished the rights of the other two-third owners of the island.

77 The respondent counters that his reasonable expectation was that he would occupy the cottage during his lifetime and his family would use it until he died. If it was a condition of his occupation that he share usage with Westley, it was never articulated and was not understood as such. This is because there was no expectation that he would ever be unable to share the camp with Westley. To compel the respondent to share use of the camp with his son would be to deprive him of his use of the camp, given the interpersonal difficulties between them. He maintains that the other two-third owners of the island

support his position.

78 A successful claim for unjust enrichment may attract a monetary or a proprietary remedy. The first remedy to consider is always a monetary award and in most cases, it will be sufficient to remedy the unjust enrichment: *Kerr*, at para. 47. A proprietary award may be required when a monetary award is inappropriate or insufficient: *Kerr*, at para. 50. "Where the plaintiff can demonstrate a link or causal connection between his or her contributions and the acquisition, preservation, maintenance or improvement of the disputed property, a share of the property proportionate to the unjust enrichment can be impressed with a constructive trust in his or her favour": *Kerr*, at para. 50.

79 In the case under appeal, the trial judge considered a monetary remedy and rejected it as inappropriate in the context of the facts before him. He also addressed the link between the respondent's contributions and the camp, and determined that a constructive trust was the appropriate remedy. While the imposition of a constructive trust generally makes the claimant the beneficial owner of the property or a portion thereof, the trial judge crafted a narrower remedy in this case which accords with the appellant's intention that the property would not leave her family. In *Principles of Property Law*, 5th ed. (Toronto: Carswell, 2010), at p. 237, Professor Bruce Ziff states that a proprietary remedy for unjust enrichment may take a number of forms:

> A finding of unjust enrichment does not invariably lead to the imposition of a constructive trust. Another option open to a court is to award monetary compensation. And the granting of an interest in land need not amount to the fee simple estate; in some circumstances a more limited interest (*e.g.*, a life estate) may be the most appropriate response. [Footnote omitted.]

Professor Ziff does go on to state, at p. 316, that "[r]ecognizing the existence of an irrevocable licence is one way that a court can respond to unjust enrichment".

80 That said, the remedy for unjust enrichment typically consists of a monetary award or a constructive trust. Given the companion claim of proprietary estoppel, it is unnecessary in this case to rely on remedies available for unjust enrichment as clearly an irrevocable licence is an appropriate remedy for proprietary estoppel: see *Jarvis v. Toronto (City)* (1895), 25 S.C.R. 237 (S.C.C.); *Collier v. Salisbury (Village)* (1999), 208 N.B.R. (2d) 60 (N.B. C.A.); and J.E. Martin, *Modern Equity*, 19th ed. (London: Sweet & Maxwell, 2012) at p. 947; MacDougall, *Estoppel* (Markham, Ont.: LexisNexis 2012), at p. 505; see also *Scholz v. Scholz*, 2013 BCCA 309, 46 B.C.L.R. (5th) 98 (B.C. C.A.), at paras. 30-31, citing *Trethewey*, at paras. 63-84. As stated in E.H. Burn & J. Cartwright, *Cheshire and Burn's Modern Law of Real Property*, 18 ed., (New York: Oxford University Press, 2011), at pp. 936 - 937:

> The doctrine of proprietary estoppel has undergone a remarkable development over the last 50 years; and this has occurred largely in the context of licences.
>
> . . . . .
>
> The advantage of proprietary estoppel is its great flexibility. Once it is established that an estoppel is working in favour of a licensee — that is an equity has arisen — the court will decide which of the

available remedies is most appropriate. As has been said many times in the cases:

> The court must look at the circumstances in each case to decide in what way the equity can be satisfied.

Moreover, the remedy may be negative or positive; personal to the licensee or an interest in the property that will protect him against third parties; the enforcement of the licence by means of a right of occupation, or only the right to reimbursement of expenditure incurred by the licensor [sic licensee].

81 In my view, the trial judge made no error in the exercise of his discretion in confirming the personal licence granted to the respondent and making it exclusive. He was mindful of the context of the case that unfolded before him over the course of a three-day trial and strove to accommodate the parties' expectations. His choice of remedy represented the minimum equity to do justice in the circumstances. The respondent would not be entitled to the rights of an owner including the right to devolve the camp as part of his estate. Rather, consistent with expectations, he could regulate use during his lifetime or until he could no longer attend at the camp.

82 The trial judge's approach is also consistent with the Supreme Court's comments in *Kerr*, at paras. 71 and 73, that it has "often emphasized the flexibility of equitable remedies" and that the remedy "should mirror the flexibility inherent in the unjust enrichment principle itself, so as to allow the court to respond appropriately to the substance of the problem put before it." The same flexibility should be applicable to proprietary estoppel.

83 In *Kerr*, at para. 158, Cromwell J. stated that a trial judge's reasoned and careful exercise of judgment as to the appropriate monetary award to remedy an unjust enrichment should be treated with deference. Absent an error in principle, I see no reason not to accord such deference to a trial judge's exercise of discretion in structuring an equitable remedy. A reading of the trial transcripts also supports such deference. The remedy responded to the reasonable expectation found by the trial judge that the respondent's use would continue until his death. Furthermore, he was given the right to regulate usage. Neither child would be prohibited from using the camp but their use would be regulated by the respondent. Moreover, the other two-third owners of the island "categorically" supported the respondent. In my view, the trial judge carefully crafted an appropriate and minimally intrusive equitable remedy so as to do justice in difficult familial circumstances. I see no basis on which to interfere.

84 Lastly, the trial judge's remedy was based on existing circumstances. As indicated, these consisted of an unwritten agreement that the island remain the property of blood relatives of the Johnson family. The appellant submitted that the trial judge's remedy failed to take into account the eventuality that the island could be sold by all co-owners to a third party who is not a family member or by an order of partition and sale. The appellant submitted that this was an additional reason why the trial judge's remedy should be set aside.

85 In such an event, it does not necessarily follow that the respondent's licence to use the camp for life, being a personal right that is incapable of being transferred, would continue. The authors of *Megarry & Wade* (Charles Harpum, Stuart Bridge & Martin Dixon, *Megarry & Wade: The Law of Real Property*, 8th ed. (London: Sweet & Maxwell, 2012)) voice the opinion at § 16-006 that "it is not obvious that a licence declared to be irrevocable by reason of estoppel should create an equitable interest in land when a contractual licence does not." By this, I believe that the authors mean that an irrevocable licence created by estoppel does not create a proprietary interest in land that is capable of being registered on title so as to bind third parties. However, this is not free from doubt since the authors' discussion is in the context of England's *Land Registration Act* 2002 (U.K.) c. 9. Inasmuch as the question is a hypothetical one that was not fully argued, I do not purport to decide it.

Disposition

86 For all of these reasons, I would dismiss this appeal. I would order the appellant to pay the respondent's costs fixed in the amount of $21,800 inclusive of disbursements and applicable taxes.

***K.M. Weiler J.A.*:**

I agree

Appeal dismissed.

Footnotes*Epstein J.A. took no part in the reasons for judgment.

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF 31133736 CANADA LTD., 4362063 CANADA LTD., and A-Z SPONGE & FOAM PRODUCTS LTD.
Applicants

Court File No. CV-12-9545-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

BOOK OF AUTHORITIES OF THE APPLICANT, 4362063 CANADA LTD.
(MOTION RE: CLASS ACTION PROCEEDS)

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