IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ferguson v. Mapleguard Apartments Ltd.,* 2024 BCSC 123

Date: 20240129
Docket: S185004
Registry: Victoria

Between:

Mark Ferguson and Cheryl Kermeen

Petitioners

And

Mapleguard Apartments Ltd., Neal Davidge, Isobel Davidge, Lawrence Engelsman in his capacity as the Executor of the Estate of Jan Engelsman, Barbara Dunsmore, Robert Christie, Belva Christie, Patrick Wadden, Aiko Wadden, Leonard Hindle and Juanita Brillion

Respondents

- and -

Docket: S170310
Registry: Victoria

Between:

Mark Ferguson and Cheryl Kermeen

Plaintiffs

And

Mapleguard Apartments Ltd., Neal Davidge, Neal Davidge, as Executor and Trustee of the last will and testament of Isobel Davidge, Lawrence Engelsman in his capacity as the Executor of the Estate of Jan Engelsman, Barbara Dunsmore, Robert Christie, Belva Christie, Patrick Wadden, Aiko Wadden, Leonard Hindle and Juanita Brillion

Defendants

Before: The Honourable Justice Donegan

Reasons for Judgment

Counsel for the Petitioners:	J.M. Aiyadurai
Counsel for the Respondents, Mapleguard Apartments Ltd.	C.N. Christie
Counsel for the Respondent, Neal Davidge:	D.A. Hunter
Place and Date of Hearing:	Victoria, B.C. April 11, 12 & 14 and May 23, 2023
Place and Date of Judgment:	Victoria, B.C. January 29, 2024

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Overview

[1] This is a summary trial application and petition hearing arising from the same dispute.

[2] The plaintiffs/petitioners, Mark Ferguson and Cheryl Kermeen (the "Plaintiffs"), are shareholders in Mapleguard Apartments Ltd. ("Mapleguard"). Mapleguard, one of the defendants/respondents, owns two apartment buildings on a parcel of land in central Vancouver Island. Beneficial ownership of living units in the buildings is based on shareholdings by shareholders of Mapleguard. The process for sale and transfer of shares in Mapleguard is governed by certain provisions in Mapleguard's 1992 articles of incorporation (the "Articles"), specifically Articles 25.1 and 25.2.

[3] Both this action (the "Action") and this petition proceeding (the "Petition") relate to the sale of certain shares (the "Disputed Shares") in Mapleguard by one shareholder and another of the defendants/respondents, Lawrence Engelsman in his capacity as the executor of the estate of Jan Engelsman (the "Engelsman Estate"), to other shareholders and another of the defendants/respondents, Neal and Isobel Davidge (the "Davidges").

[4] In late 2016, the Davidges purchased the Disputed Shares from the Engelsman Estate for $52,500. In doing so, the Engelsman Estate, the Davidges and Mapleguard utilized a provision in the Articles which allows an existing shareholder to directly transfer shares to another person if two-thirds of Mapleguard's shareholders consent to the transfer. The Davidges say they acted in reliance on this provision and obtained the required consents.

[5] Around the same timeframe, the Plaintiffs, through another provision in the Articles, exercised their right of first refusal to purchase the Disputed Shares. They contend that their doing so created a binding contract between them and the Engelsman Estate for the purchase and sale of the Disputed Shares. By selling the Disputed Shares to the Davidges instead of them, the Plaintiffs say that the Engelsman Estate (and perhaps Mapleguard as its agent) breached this contract. They also advance a claim against Mr. Davidge for inducement of breach of contract.

[6] The Plaintiffs also contend that by proceeding as they did, the Engelsman Estate, the Davidges and Mapleguard breached another contract—the Articles. In this regard, they point to Mapleguard's shareholders agreement which requires all shareholders to comply with the Articles. They say that the failure of these defendants to comply with the Articles constitutes a breach of contract.

[7] In terms of relief in the Action, the Plaintiffs primarily seek a declaration that there is a binding agreement for them to purchase the Disputed Shares, specific performance effecting a transfer of the Disputed Shares to them, and related relief.

[8] The Plaintiffs seek effectively the same relief in the Petition. There, the Plaintiffs contend that Mapleguard engaged in oppressive and unfairly prejudicial behaviour pursuant to s. 227 of the *Business Corporations Act*, S.B.C. 2002, c. 57 [*BCA*] by not correctly following the process for the sale and transfer of the Disputed Shares set out in the Articles. The Plaintiffs say that as shareholders in Mapleguard, they held a reasonable expectation that the Articles would be followed. The sale of the Disputed Shares to the Davidges, which they contend was contrary to the process set out in the Articles, defied this reasonable expectation. Had Mapleguard followed the process required by the Articles, the Disputed Shares would have been sold to them.

[9] Mapleguard and the Davidges agree the Action is suitable for summary trial. They also agree that the two proceedings should be heard at the same time. Overall, these defendants/respondents contend that their interpretation of the Articles in

relation to the purchase and transfer of the Disputed Shares was the correct one. As such, they say there was no contract between the Engelsman Estate and the Plaintiffs and no breach of any contract, inducement of breach of contract and/or shareholder oppression. They ask that the Action and Petition both be dismissed.

Preliminary Matters

[10] Before turning to my factual findings and analysis of the issues, I will address some preliminary matters: (a) the status of the named defendants/respondents; (b) orders I granted at the outset of the hearing; and (c) the Plaintiffs' mid-hearing application to amend their pleadings.

(a) Status of the Named Defendants/Respondents

[11] The Plaintiffs claim against the same defendants/respondents in both the Action and the Petition. Specifically, they claim against Mapleguard, the Davidges, the Engelsman Estate, and the other shareholders in Mapleguard at the relevant time (the "Other Shareholders"). The Other Shareholders are Barbara Dunsmore, Robert and Belva Christie (the "Christies"), Patrick and Aiko Wadden (the "Waddens"), Leonard Hindle, and Juanita Brillion.

[12] Although the Other Shareholders are named, the Plaintiffs only seek relief against Mapleguard and the Davidges. The Plaintiffs named the Other Shareholders as defendants/respondents to provide notice to them in their capacity as shareholders in Mapleguard. Other than Ms. Dunsmore and Ms. Christie, who both provided affidavit evidence in this hearing, the Other Shareholders did not participate in the litigation.

[13] The Engelsman Estate did not participate in the hearing. Although the Plaintiffs' claim in the Action is primarily grounded in their assertion that the Engelsman Estate breached a contract it had with the Plaintiffs by selling the Disputed Shares to the Davidges rather than to them, the Plaintiffs do not seek any relief from the Engelsman Estate. At the outset of the hearing, counsel for the Engelsman Estate advised (through counsel for the Plaintiffs) that it would not be

taking a position or appearing at the hearing on the understanding that if the Plaintiffs were successful, they would seek to have any relief granted structured to avoid affecting the interests of the Engelsman Estate.

(b) Orders Granted at the Outset of the Hearing

[14] The Plaintiffs sought, and I granted, three orders at the outset of the hearing:

1. An order granting leave for the Plaintiffs to rely upon their Notice of Application, even though it exceeds ten pages;

2. An order to have the Plaintiffs' summary trial application in the Action heard at the same time as the hearing of the Petition; and

3. An order that examination for discovery transcripts and affidavits filed in the Action may be used in the Petition hearing.

[15] Mapleguard and the Davidges did not oppose any of the orders sought, provided that, in relation to order #3, they be permitted the same use of these materials. Given our time constraints, I did not provide reasons at the time, but will provide them now.

Notice of Application Exceeds Ten Pages

[16] Rule 8-1(4) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*] provides that "the notice of application, other than any draft order attached to it … must not exceed 10 pages in length." Rule 8-1(10) imposes a similar ten-page limit on application responses.

[17] Madam Justice Gray discussed the purpose behind this rule in *McMahon v. Harper*, 2017 BCSC 2328 [*McMahon*], where she held:

> [99] There is a good reason for a page length limit for a notice of application. It encourages brevity, and enables the court and the opposition to understand the application and the basis for it without undue investment of time.

[18] There is no dispute that the Plaintiffs' Notice of Application does not comply with Rule 8-1(4). Leaving aside the excerpts from the Articles attached to it, the Notice of Application is 22 pages in length.

[19] Rule 22-7 deals with the effect of non-compliance with the *Rules*.

[20] Rule 22-7(1) provides that, unless the court orders otherwise, a failure to comply with the *Rules* is to be treated as an irregularity and does not nullify, among other things, any step taken or any document made in a proceeding. Rule 22-7(2) sets out what a court may do if there has been a failure to comply with the *Rules*. This includes making any "order it considers will further the object" of the *Rules*: *Rules,* R. 22-7(2)(e).

[21] The object of the *Rules*, set out in Rule 1-3, is to secure the just, speedy and inexpensive determination of every proceeding on its merits. Securing this object includes considerations of proportionality, as set out in Rule 1-3(2):

> **Proportionality**
>
> (2) Securing the just, speedy and inexpensive determination of a proceeding on its merits includes, so far as is practicable, conducting the proceeding in ways that are proportionate to
>
> (a) the amount involved in the proceeding,
>
> (b) the importance of the issues in dispute, and
>
> (c) the complexity of the proceeding.

[22] I am satisfied, under Rule 22-7(2), that granting an order permitting the Plaintiffs to rely upon their Notice of Application even though it exceeds ten pages would further the object of the *Rules*. If I had considered it necessary, I would have granted the same order in respect of the defendants' application responses, which I note also exceed the ten-page limit. As stated by Gray J., "[i]t is difficult to conceive of a case in which the court would consider a notice of application to be a nullity only because of its length": *McMahon* at para. 104.

[23] This is a summary trial application in a case that is factually and legally complex. The hearing occupied four court days. Counsel tendered more than two

dozen affidavits, relied upon dozens of case authorities and, in addition to their oral arguments, provided extensive written briefs. This is not a case where the lengthy Notice of Application causes any prejudice to the defendants, nor is this a case where the court should insist on strict compliance with page limits.

[24] To the contrary, I am satisfied that the complexity of this proceeding and the importance of the issues in dispute requires such a comprehensive Notice of Application and such comprehensive responses. I am also satisfied that granting the order, as I have, promotes the just, speedy and inexpensive determination of the Action on its merits.

Application and Petition Heard at the Same Time

[25] The Plaintiffs' application to have their summary trial application in the Action and the Petition heard at the same time necessarily involves, as a first step, a determination that the Action is suitable for determination in a summary manner.

Suitability for Summary Trial

[26] The Plaintiffs' summary trial application is brought pursuant to Rule 9-7(15) of the *Rules*. This rule permits the court to grant judgment in favour of any party, either on an issue or generally, unless the court determines that it is not appropriate to do so. The relevant factors, when considering suitability for summary trial, are set out in *Girchuru v. Pallai*, 2013 BCCA 60 at paras. 28–31.

[27] There are two aspects to the test under Rule 9-7(15). First, I must be able to find the facts necessary to decide the issues of fact or law. Second, I must be of the opinion that it would not be unjust to decide the issues in this manner: *Brissette v. Cactus Club Cabaret Ltd.*, 2017 BCCA 200 at para. 26; *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202, 1989 CanLII 229 (C.A.) [*Inspiration Management*].

[28] The decision to proceed by way of summary trial is a discretionary one. It involves consideration of many factors, such as: the amount involved; the complexity of the matter; urgency and prejudice likely to arise by reason of delay; the cost of

taking the case forward to a conventional trial in relation to the amount involved; the course of the proceedings; whether credibility is a critical factor in determination of the dispute; and whether the application will result in "litigating in slices": *Inspiration Management* at para. 49; *Dahl et al v. Royal Bank of Canada et al*, 2005 BCSC 1263 at para. 12, aff'd 2006 BCCA 369.

[29] The parties agree, and I find, that the Action is suitable for determination by summary trial.

[30] Although the factual and legal issues are complex, most of the facts are undisputed. While I do have to consider credibility, I find it is not a critical factor in determining the dispute. In the discrete and limited areas of factual dispute, I am satisfied I can resolve the dispute and find the facts necessary to decide the issues of fact or law.

[31] I am also of the opinion that it would be just to decide the issues in the Action in this summary manner. The amount involved is not substantial. None of the parties will be prejudiced by this summary proceeding. A determination will conclude the litigation and save the parties the expense of a conventional trial. I am satisfied the object of the *Rules* will be promoted by proceeding in this manner.

[32] With this determination, I turn to outline my reasons for granting the orders to have the evidence from one proceeding used in the other and to have the Action and Petition heard at the same time

Tried at the Same Time

[33] Rule 22-5(8) of the *Rules* gives the court discretion to order the consolidation of proceedings or to order proceedings be tried at the same time. A "proceeding" includes, among other things, an action and a petition proceeding: *Rules,* R. 1-1(1).

[34] As set out by Master Kirkpatrick (as she then was) in *Merritt v. Imasco Enterprises Inc*., [1992] B.C.J. No. 160, 2 C.P.C. (3d) 275 (S.C.) [*Merritt*], there are two questions to be considered when determining whether two proceedings should

be tried together. The first is whether the two proceedings involve common claims, disputes and relationships. The second is whether the two proceedings are so interwoven as to make separate trials or hearings at different times before different judges undesirable and fraught with problems and expense.

[35] This second question involves consideration of a number of factors, including: whether it will create a savings in pre-trial procedures; whether there will be a real savings in experts' time and witness fees; the potential for a party to be seriously inconvenienced by being required to attend a trial in which they may only have a marginal interest; whether the number of trial days will be reduced if the matters are heard together; whether one of the actions is at a more advanced stage than the other; whether an order will result in a delay of the trial of one of the proceedings and, if so, where the prejudice to a party from delay will outweigh the potential benefits of a combined trial; and whether there is a risk of inconsistent findings: *Cao v. Chen,* 2020 BCSC 2050 at para. 24; *Merritt* at para. 19.

[36] I am aware that proceedings commenced by way of Notice of Civil Claim and proceedings commenced by petition are generally not consolidated or heard at the same time, as they follow different processes and involve different rules and procedures. However, this is a unique situation where those differences are immaterial and it makes very good sense to have this Action and this Petition heard at the same time.

[37] Pre-trial procedures in the Action have completed. The Action is not proceeding to a conventional trial. It is to be determined in a summary manner on the basis of affidavits and portions of examination for discovery evidence. The Petition is to be determined in the same summary manner, with a consent order that the affidavits tendered by the parties in the Petition and the affidavits and examination for discovery evidence tendered by the parties in the Action are to be used in both proceedings, in this one hearing.

[38] These two proceedings involve the same facts. They involve the same disputes, the same relationships, the same central issues of contractual

interpretation and, effectively, seek the same relief. To have separate hearings at different times before different judges would create the real potential for inconsistent findings, increase costs and inconvenience to the parties, and require the expenditure of more valuable court time. To have the evidence tendered in each proceeding used in the other, and then having the two proceedings heard together not only benefits the parties, but also promotes judicial economy.

[39] In all of these circumstances, I agree with the parties and conclude the two proceedings should be heard together pursuant to Rule 22-5(8) and the evidence tendered in each proceeding should be used in the other.

(c) Mid-Hearing Application to Amend Pleadings in the Action

[40] The Plaintiffs applied to amend their Fourth Amended Notice of Civil Claim on day three of the hearing pursuant to Rule 6-1 of the *Rules*. Specifically, they sought two amendments.

[41] First, under Part 1: Statement of Facts, they seek to add the following:

> 27J. The Davidges committed the unlawful act of breaching the shareholders agreement and the Company's Articles by purchasing the Shares in contravention of the process set out in Article 25.1 of the Company's Articles. That process, if not contravened, would have resulted in the sale of the Shares to the plaintiffs in these circumstances.

[42] Second, under Part 3: Legal Basis, they seek to add the following underlined sentences:

> 1. Breach of contract.
>
> […]
>
> (c) The Company's Articles also constitute a contract between the Company and its shareholders and a breach of the Company's Articles by either the Company or the shareholders is a breach of contract. <u>The Davidges breached the shareholders agreement and the Company's Articles by purchasing the Shares in contravention of the process set out in Article 25.1 of the Company's Articles. That process, if not contravened, would have resulted in the sale of the Shares to the plaintiffs in these circumstances</u>.

[43] The Davidges opposed the application and Mapleguard took no position. By agreement, and so as not to interfere with the time allotted for the hearing, I

reserved judgment on this application and we proceeded with the hearing as if the amendments had been allowed. I advised counsel I would include my decision, and the reasons for it, in my final decision. I have determined to grant the Plaintiffs' application.

[44] In order to understand the amendments sought, a review of the history of the pleadings in the Action is required.

[45] On January 25, 2017, the Plaintiffs filed the original Notice of Civil Claim. The claim sought the following relief: i) a declaration setting aside the transfer of the Disputed Shares to the Davidges; ii) a declaration that there was a binding contract of purchase and sale of the Disputed Shares with the Plaintiffs; iii) an order restraining the transfer of the Disputed Shares until the final disposition of the Action; iv) general damages; v) interest pursuant to the *Court Order Interest Act,* R.S.B.C. 1996, c. 79 [*COIA*]; and vi) costs. Grounded in their interpretation of the Articles, the basis of the claim was in breach of contract and the torts of unlawful interference with economic interests and inducement of breach of contract.

[46] On May 7, 2018, the Davidges filed their original Response to Civil Claim. They denied the substance of the claims against them and claimed instead that there was valid agreement for them to receive the Disputed Shares. They offered a differing interpretation of the Articles. On this same day, the Davidges also applied to strike the Plaintiffs' claim on the basis that it did not disclose a reasonable claim and, in particular, disclosed no material facts to support the claimed causes of action.

[47] On October 18, 2018, the Plaintiffs filed their Amended Notice of Civil Claim. They clarified and corrected certain terms and facts and, more significantly, they particularized their claim to assert that the Davidges had misrepresented that the approval the Davidges received was for the Disputed Shares to be transferred to the Davidges, rather than *pro rata* to the Davidges and the Plaintiffs. The claim refers specifically to Ms. Dunsmore, who approved the transfer but was alleged to have misunderstood the nature of what she was approving. The Amended Notice of Civil Claim also sought the following additional relief: i) shareholder oppression under the

BCA, s. 227; ii) an order that the Disputed Shares be transferred to the Plaintiffs upon their payment of the purchase price; iii) an accounting of the income earned by the Davidges on the property since the transfer; and iv) punitive damages.

[48] On February 28, 2019, Mapleguard filed its original Response to Civil Claim. Mapleguard denied the claim in its entirety.

[49] On July 14, 2022, Justice Taylor heard the Davidges' application to strike the claim as against them. Justice Taylor ordered the following relief sought to be struck from the Amended Notice of Civil Claim: the relief seeking a declaration setting aside the transfer of Disputed Shares to the Davidges, the oppression claim, and the relief seeking an order that the Disputed Shares be transferred to the Plaintiffs upon payment of the purchase price. Justice Taylor ordered the Plaintiffs to further particularize various elements of their claim, but did not dismiss the claim outright as against the Davidges.

[50] On August 5, 2022, the Plaintiffs filed their Second Amended Notice of Civil Claim. The amendment acknowledged the death of Mrs. Davidge and Mr. Davidge's new, additional role as her estate's administrator. It added further details about the alleged misrepresentation by the Davidges and removed some of the relief sought so that only the following remedies remained: a declaration of a binding purchase and sale agreement, an order for an accounting, general damages, punitive damages, *COIA* interest, and costs. The oppression remedy claim was removed. This amendment was made according to Taylor J.'s order of July 14.

[51] On August 23, 2022, the Davidges filed their Response to Amended Notice of Civil Claim. They responded to the Plaintiffs' allegations regarding Ms. Dunsmore, pleading facts relating to their having clarified to her that the consent they sought was for a transfer of the Disputed Shares only to them, rather than a *pro rata* apportionment between them and the Plaintiffs as alleged. The Davidges also amended their legal basis to include that they had no contractual relationship with the Plaintiffs.

[52] On August 25, 2022, Mapleguard filed its Response to Second Amended Notice of Civil Claim. It added pleadings related to: i) that the Articles gave the directors of Mapleguard total discretion to refuse to register share transfers, ii) that there was never a contract for the Plaintiffs to buy the Disputed Shares because Mapleguard never approved the transfer to them, and iii) that it acted in good faith, or alternatively, acted only in an agency relationship.

[53] On March 10, 2023, the Plaintiffs filed their Third Amended Notice of Civil Claim. This amendment added a claim based on unjust enrichment, and pleadings related to the Davidges having received and continuing to receive income as a result of the transfer of the Disputed Shares. This amendment was filed by consent of the parties.

[54] On April 11, 2023, the first day of this hearing but before the hearing began, the Plaintiffs applied to amend their pleadings again. The central change sought was to restore the requested order that the Disputed Shares be transferred to the relief sought, which had been removed due to inadvertence of counsel. There were also some additional changes to facts pled. The defendants consented to all of the amendments sought and I granted the order. The Plaintiffs later filed their Fourth Amended Notice of Civil Claim.

[55] It is against this backdrop that I now turn to consider the issues raised by the Plaintiffs' mid-trial application to amend their pleadings.

[56] The Court of Appeal recently discussed the law around mid-trial amendment of pleadings in *Sperring v. Shutiak*, 2023 BCCA 54 [*Sperring*]. The Court in *Sperring* again affirmed the criteria identified by Justice Harvey in *Macdonald v. Macdonald Estate* (1996), 21 B.C.L.R. (3d) 379, 1996 CanLII 1360 (S.C.) [*Macdonald*] to be applied when considering whether to permit such amendments. The Court identified the criteria, articulated as questions, at para. 95 as follows:

> (a) is it inconsistent with the pleadings already filed on behalf of the party seeking the amendment;

> (b) is it inconsistent with evidence already tendered by that party and his witnesses at trial and on discovery;
>
> (c) if it had been asked for at the outset of the trial, would it have changed the whole course of the trial;
>
> (d) would it be unfair to the opposite party;
>
> (e) is it necessary for the purpose of determining the real issues raised or depending upon the pleadings?

[57] Referring to two of the Court's previous decisions, also affirming the five-part test from *Macdonald*, the Court in *Sperring* went on:

> [97] In *Khera,* Justice Newbury, writing for the Court, observed the following when discussing the appropriate consideration of late amendments:
>
> > [16] The test normally applied is the five-part one which the trial judge here took from *Macdonald v. Macdonald Estate* (1996), 1996 CanLII 1360 (BC SC) 21 B.C.L.R. (3d) 379 (B.C.S.C.), quoted at para. 8 of her reasons. She dealt with each of these factors with some care, concluding that the defendants had not established "any real prejudice", that there was no obvious inconsistency between the evidence tendered by the plaintiffs at trial and the amendment, and that the amendment would not likely have changed the course of the trial had it been sought from the outset.
>
> [98] In *Olson,* Justice Frankel wrote:
>
> > [71] In *Gatien v. Avini*, 2015 BCCA 383 at paras. 30 −31, 389 D.L.R. (4th) 463, and *Century 21 Coastal Realty Ltd. v. Khera*, 2018 BCCA 298 at para. 16, 14 B.C.L.R. (6th) 311, this Court endorsed the test for determining whether to grant an amendment set out in *MacDonald v. MacDonald Estate* (1996), 1996 CanLII 1360 (BC SC), 21 B.C.L.R. (3d) 379 at para. 40, (S.C.). …
> >
> > > As Justice Rowles stated in *Langret Investments S.A. v. McDonnell* (1996), 1996 CanLII 1433 (BC CA), 21 B.C.L.R. (3d) 145 at para. 34 (C.A.):
> > >
> > > > Amendments are allowed unless prejudice can be demonstrated by the opposing party or the amendment will be useless. The rationale for allowing amendments is to enable the real issues to be determined. The practice followed in civil matters when amendments are sought fulfils the fundamental objective of the civil rules which is to ensure the just, speedy and inexpensive determination of every proceeding on the merits.
> >
> > [Emphasis original.]

[58] Applying these principles and criteria, I am satisfied the amendments sought should be permitted.

[59] The amendments are not inconsistent with the pleadings already filed by the Plaintiffs, nor are they inconsistent with evidence already tendered by the parties at this trial. I am also satisfied that had these amendments been asked for at the outset of the trial, they would not have changed the course of the Action, or the Petition for that matter. The Davidges concede as much.

[60] I included a summary of the previous amendments to the Plaintiffs' claims in order to provide important context. The Plaintiffs' claims have evolved over time and their articulations of their breach of contract(s) claim seemed to have solidified at the hearing. The Plaintiffs intend to establish the existence of two distinct contracts, both of which they say were breached when the defendants failed to follow the process (as they interpret it) for share transfers set out in the Articles. The two contracts they allege existed and they allege were breached are: (a) a contract between them and the Engelsman Estate for the purchase of the Disputed Shares that arose when the Plaintiffs exercised their right of first refusal; and (b) a contract between all shareholders pursuant to the shareholders' agreement and the Articles to follow the Articles. The Plaintiffs' pleadings had a tendency, in my respectful view, to blur these alleged contracts and their alleged breaches. Through the amendments they now seek, they hope to bring clarity.

[61] To the extent the amendments seek to further support a potentially novel contention that a shareholder has an independent cause of action against another shareholder for breach of the Articles, I do not find this to be determinative of the application. The Davidges concede that they are not caught by surprise. They do not point to any prejudice they will suffer as a result of the amendments. Their opposition is really about the merits of the claim and their position that the Plaintiffs' pleadings, even with the amendments, are still deficient.

[62] I think these amendments are necessary to fairly adjudicate the issues between the parties. The defendants' arguments on the merits will, of course, be addressed. There is no prejudice or injustice done to any of the non-amending parties. I exercise my discretion to permit the amendments.

[63] I turn now to my general findings of fact. I will make additional findings of fact in the course of my analysis of the issues.

Findings of Fact

[64] Mapleguard was incorporated as a British Columbia company on September 17, 1992, with a board of three directors.

[65] Scott Rodway was Mapleguard's corporate solicitor at incorporation. He remained Mapleguard's corporate solicitor over the years, including during the times relevant to this dispute. Mr. Rodway wrote the Articles, which included provisions for the sale and transfer of shares in Mapleguard.

[66] Shortly after incorporation, on October 26, 1992, Mapleguard and its shareholders entered into an agreement outlining their respective rights and obligations (the "Shareholders' Agreement"). Among other things, the Shareholders' Agreement requires the parties to conduct the business of Mapleguard in accordance with its Articles at s. 2.02. The Shareholders' Agreement is binding upon any successors.

[67] Many of the litigants in this dispute have been shareholders of Mapleguard since incorporation, including the Davidges and Ms. Dunsmore. Mr. Davidge was also a director during the times relevant to this dispute, as was Ms. Kermeen. Ms. Dunsmore was a director at the relevant times as well, as she has been since incorporation. Some of the original shareholders have died since the Action and Petition were commenced, including Mrs. Davidge and Mr. Christie.

[68] Mapleguard owns a property on Vancouver Island in Bowser, British Columbia legally known and described as:

> PID: 000-831-387; LOT 97, DISTRICT LOT 1, NEWCASTLE DISTRICT, PLAN 20442.
>
> (the "Property")

[69] The Property contains two residential apartment buildings that house a total of ten apartments (the "Buildings"). The apartments in the Buildings are occupied full

time, used as vacation homes, or rented out on a short or long-term basis. Mapleguard's sole business is owning the Property and the Buildings.

[70] The ownership of shares in Mapleguard corresponds to the control of specific apartment units through long-term leases. When Mapleguard was incorporated, each of the shareholders had a long-term lease for their unit(s). Since then, when a shareholder has sold shares, the corresponding lease has been assigned to the new owner of the shares in order to transfer control of the unit(s). The value of shares in Mapleguard arises from the right to control the corresponding unit(s), in exchange for payment of monthly fees that are put towards the expenses of owning and maintaining the Property and Buildings.

[71] As I described earlier, all individually named parties in the Action and Petition were shareholders of Mapleguard at the relevant times. Each shareholder held Class A voting shares ("Class A Shares") and also held Class B shares ("Class B Shares") relative to the size and amount of the units owned. While Class A Shares and Class B Shares hold different entitlements under the Articles, the nature of those entitlements are not at issue and I am satisfied this has no bearing on the outcome of the Action and Petition.

[72] Prior to November 2016, the following individuals owned shares in Mapleguard as follows:

Shareholders	**Class A Shares**	**Class A Share % Ownership**	**Class B Shares**	**Class B Share % Ownership**	**Units Owned**
The Plaintiffs	10	10%	34,900	5.49%	1
Ms. Brillion	10	10%	33,900	5.33%	1
Mr. Hindle	10	10%	77,900	12.25%	1
The Waddens	10	10%	85,900	13.51%	1
The Christies	10	10%	34,900	5.49%	1
Ms. Dunsmore	10	10%	82,900	13.03%	1
The Engelsman Estate	30	30%	205,700	32.34%	3

The Davidges	10	10%	79,900	12.56%	1

[73] The Articles, in Part 25, contemplate how potential share transfers may occur. As my interpretation of these Articles is central to the resolution of this dispute and my findings of fact will involve reference to them, I will reproduce the relevant portions of Articles 25.1 and 25.2 here.

[74] In this reproduction, I have added bolded headings that do not appear in the Articles. I use these headings for ease of reference, as the parties have in their submissions, and for no interpretative or other purpose.

[75] Headed “Restriction on Share Transfers”, Articles 25.1 and 25.2 provide:

> 25.1 As long as the Company is a company which is not a reporting Company, no shares in the capital of the Company shall be transferred by any member, or the personal representative of any deceased member or the trustee in bankruptcy of any bankrupt member, or the liquidator of a member which is a corporation, except under the following conditions:
>
> **Right of First Refusal (ROFR)**
>
> (a) A person (herein called the "proposing transferor") desiring to transfer any share or shares in the Company shall give notice in writing (herein called the "transfer notice") to the Company that he desires to transfer the same. The transfer notice shall specify the price, which shall be expressed in lawful money of Canada, and the terms of payment upon which the proposing transferor is prepared to transfer the share or shares and shall constitute the Company his agent for the sale thereof to any member or members of the Company at the price and upon the terms of payment so specified. The transfer notice shall also state whether or not the proposing transferor has had an offer to purchase the shares or any of them from, or proposes to sell the shares or any of them to, any particular person or persons who are not members and if so the names and addresses of such persons shall be specified in the transfer notice. The transfer notice shall constitute an offer by the proposing transferor to the other members of the Company holding shares of the class or classes included in the transfer notice and shall not be revocable except with the sanction of the directors. If the transfer notice pertains to shares of more than one class then the consideration and terms of payment for each class of shares shall be stated separately in the transfer notice.
>
> (b) The directors shall forthwith upon receipt thereof transmit the transfer notice to each of the members, other than the proposing transferor, holding shares of the class or classes set forth in the transfer notice and request the member to whom the transfer notice is sent to state in writing within 14 days from the date of the transfer notice whether he is willing to accept any, and if so, the maximum

number of shares he is willing to accept at the price and upon the terms specified in the transfer notice. A member shall only be entitled to purchase shares of the class or classes held by him.

(c) Upon expiration of the 14 day notice period referred to in Article 25.1(b), if the directors shall have received from the members entitled to receive the transfer notice sufficient acceptances to take up the full number of shares offered by the transfer notice and, if the transfer notice includes shares of more than one class, sufficient acceptances from the members of each class to take up the full number of shares of each class offered by the transfer notice, the directors shall thereupon apportion shares so offered among the members so accepting and so far as may be, pro rata according to the number of shares held by each of them respectively, and in the case of more than one class of share, then pro rata in respect of each class. If the directors shall not have received sufficient acceptances as aforesaid, they may, but only with the consent of the proposing transferor who shall not be obliged to sell to members in the aggregate less than the total number of shares of one or more classes of shares offered by the transfer notice, apportion the shares so offered among the members so accepting so far as may be according to the number of shares held by each respectively but only up to the amount accepted by such members respectively. Upon any such apportionment being made the proposing transferor shall be bound upon payment of the price to transfer the share to the respective members to whom the directors have apportioned same. If, in any case the proposing transferor, having become so bound fails in transferring any share, the Company may receive the purchase money for that share and shall upon receipt cause the name of the purchasing member to be entered in the register as the holder of the share and cancel the certificate of the share held by the proposing transferor, whether the same shall be produced to the Company or not, and shall hold such purchase money in trust for the proposing transferor. The receipt of the Company for the purchase money shall be a good discharge to the purchasing member and after his name has been entered in the register the validity of the proceedings shall not be questioned by any person.

(d) In the event that some or all of the shares offered shall not be sold under the preceding Articles within the 14 day period referred to in Articles 25.1 (b), the proposing transferor shall be at liberty for a period of 90 days after the expiration of that period to transfer such of the shares so offered as are not sold to any person provided that he shall not sell them at a price less than that specified in the transfer notice or on terms more favourable to a purchaser than those specified in the transfer notice.

(the “ROFR Provision”)

Consent Transfer

(e) the provisions as to transfer contained in this Article shall not apply:

> (i) if before the proposed transfer of share is made, the transferor shall obtain consents to the proposed transfer from members of the Company, who at the time of the transfer are the registered holders of two-thirds or more of the issued shares of the class to be transferred of the Company or if the shares comprise more than one class, then from the registered holders of two-thirds or more of the shares of each class to be transferred and such consent shall be taken to be a waiver of the application of the preceding Articles as regards such transfer; or
>
> …
>
> (the "Consent Transfer Provision")
>
> **Directors' Absolute Discretion**
>
> 25.2 Notwithstanding anything contained in these Articles the Directors may in their absolute discretion decline to register any transfer or shares and shall not be required to disclose their reasons therefor.
>
> (the "Directors' Absolute Discretion Provision")

[76] The ROFR Provision includes reference to giving "notice". The Articles expressly contemplate when a "notice" is effective in Article 21.1 as follows:

> **Notices**
>
> 21.1 A notice… may be given or delivered by the Company to any member either by delivery to him personally or by sending it by mail to him to his address as recorded in the register of members. Where a notice… is sent by mail, service or delivery of the notice… shall be deemed to be effected by properly addressing, prepaying and mailing the notice […] and to have been given on the day, Saturdays, Sundays, and holidays excepted, following the date of mailing…
>
> (the "Notice Provision")

[77] Between 1992 and 2016, there were a few informal, uncontentious transfers of shares in Mapleguard. When these transfers occurred, Mr. Rodway, as Mapleguard's solicitor, would send a letter informing shareholders of a transfer and the option of exercising a ROFR. No one ever exercised the right.

[78] In about 2012, the shareholders began to discuss selling Mapleguard. In 2014, the Property was appraised at $725,000. The appraisal was circulated among the shareholders, but the Property was not listed for sale.

[79] On June 26, 2015, shareholder Mr. J. Engelsman passed away. Mr. J. Engelsman owned the Disputed Shares, constituting 30 out of the 100 Class A Shares, and 205,700 out of the 636,000 Class B Shares. This corresponded to Mr. J. Engelsman having leases for three apartments in the Buildings; specifically, units 7, 8, and 10.

[80] After Mr. J. Engelsman's death, his son and executor of his estate, Mr. L. Engelsman, tried to sell the Disputed Shares. He placed a "for-sale" sign for the Disputed Shares on the Property, but by the fall of 2016 he had the sign removed.

[81] In the middle of September 2016, Mr. Engelsman reached out to the Davidges and asked them if they were interested in purchasing the Disputed Shares. They began discussions.

[82] On September 24, 2016, the annual general meeting of Mapleguard's shareholders took place (the "AGM"). There was a vacancy on the board of directors and one of the Plaintiffs, Ms. Kermeen, was elected as Vice President. After the AGM, Mapleguard's board of directors consisted of: Mr. Davidge as President; Ms. Kermeen as Vice President; and Ms. Dunsmore as Secretary/Treasurer (the "Board of Directors").

[83] There is a factual dispute about whether the Plaintiffs inquired about the Disputed Shares at the AGM and whether the Davidges replied to their inquiry in a misleading way, or at all.

[84] The Plaintiffs ask me to find that they inquired at the AGM whether the Disputed Shares would be offered for sale and that the Davidges answered their inquiry "in the negative". The Plaintiffs believe the Davidges responded in this way in a deliberate effort to keep the offer for sale to themselves. Mr. Davidge has no recollection of them being asked any such question or them giving any such response. He denies doing this.

[85] To the extent it is necessary to resolve this factual dispute, I do so in favour of the Davidges. I find that Ms. Kermeen's evidence on this point is unreliable. The

minutes of the AGM do not reflect any discussion of the Disputed Shares and Ms. Kermeen's evidence on this point has been inconsistent.

[86] In her first affidavit filed in the Action (sworn January 25, 2017), Ms. Kermeen deposed that she and her husband first learned that the Engelsman Estate was going to offer the Disputed Shares for sale in September 2016. This evidence changed when, in her first affidavit in the Petition (sworn November 19, 2018), Ms. Kermeen deposed that her previous evidence was in error and that she and her husband did not learn the Engelsman Estate was going to offer the Disputed Shares for sale until October 2016. She also deposed that she and her husband had asked about the sale of the Disputed Shares at the AGM, but received no response at that time.

[87] Ms. Kermeen's evidence on this point changed again in her third affidavit in the Action (sworn March 20, 2023). Here, she deposed that she and her husband actually received a response from the Davidges to their inquiry about the Disputed Shares at the AGM. According to Ms. Kermeen, the Davidges answered their inquiry "in the negative."

[88] I accept Mr. Davidge's evidence on this point. His evidence has not changed and is consistent with the minutes of the AGM. I find the Plaintiffs did not inquire about the Disputed Shares at the AGM, nor did the Davidges do or say anything in an attempt to conceal information about the Disputed Shares as alleged, or at all.

[89] In making this finding, I am not impugning Ms. Kermeen's credibility. The unreliability of her memory is a reflection of the time that has passed. These events happened several years ago now and memories will understandably be imperfect.

[90] Discussions regarding the purchase of the Disputed Shares continued between the Engelsman Estate and the Davidges. On or about October 12, the Davidges agreed to purchase the Disputed Shares for the sum of $52,500. On October 20, 2016, the Davidges delivered a $5,000 deposit to Mr. Rodway, who in

turn delivered the deposit to the solicitors acting for the Engelsman Estate in the transaction, Waterstone Law Group.

[91] Also in October 2016, the Plaintiffs learned the Disputed Shares were to be offered for sale. They were interested, but unsure of the process for shares in Mapleguard to be transferred, so they contacted Mr. Rodway. In response to their inquiry, Mr. Rodway wrote to the Plaintiffs on October 21, 2016, outlining the general process for a transfer, as he understood it.

[92] Mr. Rodway told the Plaintiffs that under Part 25 of the Articles there was a ROFR on the transfer of shares in Mapleguard. He explained that any offer to purchase shares must be sent to the existing Mapleguard shareholders (through him), who would then be given 14 days to respond as to whether or not they wished to purchase the shares. Assuming no one exercised their ROFR, he explained that his law firm would then prepare all necessary documents to effect the transfer of the shares and the assignment of the associated unit lease. Once these documents were signed by the purchaser and vendor, Mr. Rodway wrote that they would then be “presented to the directors and shareholders of Mapleguard for signature”. He added that, as a condition of any transfer of shares, the new shareholder, remaining shareholders and Mapleguard must all enter into a shareholders’ agreement, before the directors approved the transfer.

[93] This seems a convenient point to discuss the use of legal opinions in this case.

[94] As seen above, and as will been seen as this chronology unfolds, various lawyers provided opinions to the parties about how the transfer provisions in the Articles were to be construed at the time of these events. The drafter of the Articles, Mr. Rodway, also offered an opinion on this topic years later, at his examination for discovery. As there was some disagreement between counsel at the hearing about the use to be made of these opinions, it is important for me to clearly outline their permissible uses from the outset.

[95] None of the lawyers who offered opinions to the shareholders or to their respective clients about the interpretation of the Articles at the time of the events (or years later in the case of Mr. Rodway) were called as witnesses in this case, nor were any of their opinions tendered as expert evidence. None of their opinions are admissible for the purpose of assisting the court with its interpretation of the Articles.

[96] Where matters call for special knowledge, an expert may draw inferences and offer an opinion. The expert's function is to provide the trier of fact with ready-made inferences that the trier of fact was unable to formulate due to the technical nature of the facts involved: *R. v. Abbey*, [1982] 2 S.C.R. 24 at 42, 1982 CanLII 25. The interpretation of contractual documents, in this case the Articles, is within the specialized expertise of the court itself. The court can form its own opinion on the correct interpretation of the Articles without the assistance of a legal expert.

[97] The various legal opinions offered to the parties at the time the events occurred are admissible for two limited purposes: i) as context, to explain why the parties took the steps they did at the time; and, ii) in the case of the Plaintiffs, to inform the reasonable expectations they may have held at the time of these events.

[98] Mr. Rodway's later opinion, the one he offered at his examination for discovery, is not admissible for any purpose. I will discuss this in greater detail later in these reasons. I return now to my findings of fact.

[99] On October 25 and 26, 2016, Mr. Rodway wrote to all of the shareholders of Mapleguard (except the Engelsman Estate and the Davidges), notifying them of the proposed transfer of the Disputed Shares to the Davidges (the "Transfer Notice").

[100] The Transfer Notice, a letter dated October 25, 2016, states:

> Dear Sir/Madame:
>
> **Re: Mapleguard Apartments Ltd. (the "Company");**
>
> **Transfer of Shares – Estate of Jan Engelsman to Davidge**
>
> We enclose the following documentation with respect to the above noted transfers:
>
> 1. Notice of Sale; and

> 2. Waiver form consenting to the transfer from the Estate of Engelsman to the Davidges pursuant to the Notice of Sale. If you do not wish to invoke your right of first refusal, could you please return the executed waiver to the writer;
>
> Should you have any questions, please do not hesitate to contact us. Your early return of the documents would be greatly appreciated.

[101] Mr. Rodway's office emailed the Transfer Notice, along with the attachments, to the Plaintiffs on October 26, 2016. The Plaintiffs also received it by mail, with an envelope post-marked October 28, 2016.

[102] The first attachment, the Notice of Sale, is dated October 25, 2016. It states:

> **LAWRENCE JOHN ENGELSMAN, executor of the Estate of Jan Englesman** hereby gives notice that he intends to sell:
>
> (1) 30 Class "A" shares;
>
> (2) 205,700 Class "B" shares;
>
> (3) all of the Estate's interests in the lease of Units 7,8 and 10, 151 Burne Road, Bowser, B.C.;
>
> for the sum of $52,500.00 to **NEIL** [sic] **DAVIDGE AND ISOBEL DAVIDGE** of 3915 – 156th Street, Surrey, British Columbia to be completed on or before December 1, 2016

[103] The second attachment, the waiver form, was for each shareholder to date, sign and return. Among other things, it stated that the shareholder:

> …HEREBY WAIVES their rights to under the Articles of the Company and otherwise to acquire any of the [Disputed Shares] proposed to be transferred by the Estate of Jan Englesman [sic] to Neil [sic] Davidge and Isobel Davidge pursuant to a Notice of Sale dated the 25th day of October, 2016.

[104] Ms. Dunsmore emailed Mr. Rodway a signed waiver. She also sent him signed waivers on behalf of Mr. Hindle and Ms. Brillion.

[105] The Plaintiffs retained counsel, Michael Genge, to act on their behalf. On November 4, 2016, Mr. Genge wrote to Mr. Rodway and advised that his clients had received the Notice of Sale and wished to invoke their ROFR. Although Mr. Genge wrote that his clients were doing so pursuant to "section 25 of the Shareholders Agreement", I am satisfied he intended to convey that they were doing so pursuant to the ROFR Provisions in the Articles. Mr. Genge further wrote that his clients

"accordingly accept the offer to buy the shares of Jan Engelsman pursuant to the terms and conditions set out in the attached Notice of Sale."

[106] Mr. Rodway informed Ms. Dunsmore, as a director of Mapleguard, of the contents of Mr. Genge's correspondence. Ms. Dunsmore left it to Mr. Rodway to determine its implications.

[107] On November 9, 2016, Mr. Rodway asked the Engelsman Estate for its position on the Plaintiffs' exercise of their ROFR. Mr. Engelsman replied the next day and advised Mr. Rodway that the Engelsman Estate wished to pursue the sale to the Davidges alone, with the intention of closing on November 30. He wrote:

> Scott,
>
> Do you have an interpretation to article 25 as per our conversation yesterday? What I would like to do is push ahead with the deal with Neil [sic] with the intention of closing on November 30th. Let them deal with fall out, if any.

[108] It was around this time that the Davidges retained counsel, Carl Holm, to act on their behalf.

[109] On November 12, 2016, Mr. Rodway emailed Mr. Holm, to inform him that the Plaintiffs were seeking to invoke their ROFR. Mr. Rodway also advised Mr. Holm that he could see no way to avoid the ROFR Provisions unless the Engelsman Estate acted under the Consent Transfer Provision and obtained the consent of two-thirds of the shareholders to a transfer directly to the Davidges prior to completion of the transfer. Mr. Rodway expressed his view that acting under the Consent Transfer Provision required "a consent to the transfer from the members and not a waiver or a a failure to respond to the right of first refusal".

[110] Mr. Rodway also advised Mr. Holm in this correspondence that Mapleguard had not provided the Transfer Notice to the Davidges, who he concluded were also entitled to exercise the ROFR. He attached the Transfer Notice. The Transfer Notice and its attachments were mailed to the Davidges on November 14, 2016. Pursuant to the Notice Provision, it was deemed delivered to them on November 15, 2016.

[111] On November 21, 2016, Mr. Holm sent an email to Mr. Rodway asking for particulars of the number of Disputed Shares available for purchase by the Davidges.

[112] On November 23, 2016 at 8:55 a.m., Mr. Rodway sent an email to Mr. Holm outlining where he thought things stood. He included Mr. Engelsman and Ms. Dunsmore in this email. Among other things, Mr. Rodway told Mr. Holm that the Plaintiffs were the only shareholders who had, by that time, exercised their ROFR and that the Plaintiffs would therefore be considered the only purchasers under the Articles. He further advised that if the Davidges were also exercising their ROFR, there would be a *pro rata* split of the Disputed Shares between the Plaintiffs and the Davidges. He also provided his opinion as to the precise apportionment that would occur in that event.

[113] Mr. Holm wrote back to Mr. Rodway, by letter, that same day. Mr. Holm said he was puzzled by Mr. Rodway's position that the Plaintiffs were the only purchasers of the Disputed Shares to date. Mr. Holm detailed the Davidges' conduct in relation to the Disputed Shares to that point, including that they had signed a contract with the Engelsman Estate on October 12 for their purchase, and had forwarded the purchase funds to Mr. Rodway. Based on this conduct, Mr. Holm expressed his belief that Mr. Rodway had "[n]otice of Mr. and Mrs. Davidge's intention to purchase the shares pro-rata" and that the Davidges "have not waived their right to purchase". He expressed certainty that Mr. Rodway, as Mapleguard's corporate solicitor, was "well aware" of the Davidges' intentions in this regard.

[114] In this same letter, Mr. Holm also wrote about next steps, including the movement of the trust funds. He indicated that he would rely on Mr. Rodway's apportionment calculations, and that it would ultimately be necessary for Mr. Engelsman's counsel to secure Mr. Engelsman's signature "on the Transfer and Assignments (pro rata) of the leases". Mr. Holm noted that time was of the essence and that Mr. Engelsman, who was soon to be out of town for a period of time, had to execute these documents on or before November 25, 2016.

[115] The Davidges and Mapleguard take the position that Mr. Holm's November 23 correspondence to Mr. Rodway as I have just described constitutes an exercise of the Davidges' ROFR under the ROFR Provisions. The Plaintiffs submit that it does not.

[116] When I consider the language used by Mr. Holm throughout his letter in context of all that was occurring at the time, I find there can be no doubt that the Davidges exercised their ROFR through their counsel's correspondence to Mapleguard's counsel on November 23, 2016, within 14 days of their receiving notice of the proposed sale. Mr. Holm expressly stated the Davidges were not waiving any of their rights and said more than once that his clients would purchase the Disputed Shares *pro rata*. That this letter came to light through Mr. Rodway's discovery responses later in this litigation and that the Davidges ultimately pursued an undivided purchase of the Disputed Shares under the Consent Transfer Provision, is immaterial to this finding.

[117] By November 24, 2016, the following shareholders had returned signed waiver forms, waiving their ROFR: Ms. Brillion, Ms. Dunsmore, the Waddens, the Christies, and Mr. Hindle.

[118] It was around this time that the Engelsman Estate retained counsel, Edward Kaye, to act on its behalf.

[119] At 2:36 p.m. on November 24, 2016, Mr. Kaye responded to Mr. Rodway's November 23 email. The Engelsman Estate wished to pursue sale of the Disputed Shares to the Davidges only, using the Consent Transfer Provision. Mr. Kaye took the position that the ROFR Provision would not apply if two-thirds of the shareholders consented to a direct transfer to the Davidges under the Consent Transfer Provision, pointing out that nine out of ten units had already consented and waived their ROFR.

[120] Mr. Rodway replied to Mr. Kaye about two hours later. He included Mr. Holm and Ms. Dunsmore in the email chain. He expressed his position that the waivers

already returned by the shareholders were not sufficient to trigger the Consent Transfer Provision. He expressed the view that the shareholder consent required under the Consent Transfer Provision was different than a shareholder's waiver of the ROFR. He wrote:

> I am of the opinion that the consent process under Article 25.1(e)(i) requires a consent to the transfer from the shareholder not a waiver of the shareholders [sic] right to participate in the Right of First Refusal. This is substantiated by the last part of Article 25.1(e)(i) which indicates that the consent to the transfer is a waiver of the Article 25.1(a) procedure not a part of it. I believe a consent is different than the waiver.

[121] Like the Engelsman Estate, the Davidges also wanted to pursue the purchase and transfer of the Disputed Shares to themselves under the Consent Transfer Provision.

[122] As a result of Mr. Rodway's position that the waiver that had been previously sent out to the shareholders was different than the consent that was required under the Consent Transfer Provision, Mr. Davidge sent an email (copied to his counsel Mr. Holm) to the Other Shareholders (other than Ms. Brillion who did not have email) at 5:37 p.m. on November 24, 2016 to ask for their consent to the transfer.

[123] The subject line of the email reads: "Transfer/Sale of shares Unit 10, 8, & 7". The parties referred to this email as the "At This Late Hour Email" throughout their submissions, a reference to the introductory words used by Mr. Davidge in the body of the email. I will refer to this email in the same manner.

[124] In the At This Late Hour Email, Mr. Davidge asked the Other Shareholders for a return email indicating each shareholder's consent to the transfer of the Disputed Shares. He asked Ms. Dunsmore to ask Ms. Brillion for consent as Ms. Brillion did not have email. Mr. Davidge expressed some urgency with his request. As a result of his understanding that Mr. Engelsman was leaving town and needed to execute the documents no later than November 25, 2016, Mr. Davidge wrote that he needed the information from them by the next day and referred to "contractual arrangements being processed tomorrow".

[125] Ms. Dunsmore replied to the At This Late Hour Email promptly, at 6:05 p.m.. She wrote:

> This is to advise that I consent to the transfer of shares for Units 7, 8 and 10 of Mapleguard Apartments Ltd.

[126] Mr. Hindle also replied promptly to the At This Late Hour Email. At 6:45 p.m., he emailed to indicate that while he had waived his ROFR, he would not provide his consent to the transfer.

[127] The next day, November 25, 2016, was a very busy day. The shareholders were corresponding, as were the various lawyers.

[128] On the morning of November 25, 2016, Ms. Dunsmore sent Mr. Davidge two emails—the first at 6:38 a.m. and the second at 11:15 a.m. Collectively, I will refer to these two emails as the "Dunsmore Clarification Emails".

[129] By the time of her first email that morning, Ms. Dunsmore had read Mr. Hindle's email reply from the previous evening (which she described as a "rant"). As a result, she first wrote to Mr. Davidge to ask him to clarify the consent he had asked for in the At This Late Hour Email. At the time Ms. Dunsmore sent this email, she mistakenly thought Mr. Davidge had asked for the Other Shareholders to consent to a *pro rata* division of the Disputed Shares. Ms. Dunsmore's 6:38 a.m. email reads:

> Neal – I think you need to clarify to everyone who the shares are being transferred to and how many. Your e-mail makes it look like they're all going to you and may be one of the reasons for Len's "rant".

[130] When Mr. Davidge had not responded to her first email by 11:15 a.m., Ms. Dunsmore emailed him again. In this second email, Ms. Dunsmore clarified that the consent she provided the previous evening had been to the transfer of the Disputed Shares "as per Scott Rodway's e-mail of November 23, 2016", with the Disputed Shares to be apportioned between the Davidges and the Plaintiffs. Ms. Dunsmore wrote:

> Neal
>
> To clarify my consent to the transfer of shares for Mapleguard Apartments Ltd.: I am consenting to the transfer as per Scott Rodway's e-mail of November 23, 2016 with the Class B shares being split between you and Isabel (69.60%) and Cheryl Kermeen and Mark Ferguson (39.40%).
>
> Barb

[131] At the time she wrote the Dunsmore Clarification Emails, Ms. Dunsmore believed that an apportionment of the Disputed Shares could work for Mapleguard. As will be seen, her position in this regard changed.

[132] The Waddens and the Christies did not misunderstand the At This Late Hour Email as Ms. Dunsmore had.

[133] The Waddens replied, by email, to the At This Late Hour Email, on November 25, 2016 at 8:08 a.m., consenting to the transfer of the Disputed Shares to the Davidges. Mr. Wadden wrote:

> I consent to transfer of shares of Mapleguard Apartments Ltd 7 8 and 10 to Neal Davidge.

[134] The Christies also replied, by email, to the At This Late Hour Email on November 25, 2016. They consented to the transfer of the Disputed Shares to the Davidges. They wrote:

> Hello Neal:
>
> We, Robert and Belva Christie "we consent to transfer" shares in units 10, 7, & 8 at Mapleguard Apt Ltd. Hope this is enough information for you. Thanks
>
> Robert and Belva Christie

[135] Mrs. Christie has sworn an affidavit confirming that she understood at the time of this email that the Christies were consenting to have the Disputed Shares all transferred to the Davidges, and not to the Plaintiffs.

[136] Mr. Davidge forwarded all of the email consents he received to Mr. Holm.

[137] The Plaintiffs ask me to find that Mr. Davidge intentionally withheld disclosure of the Dunsmore Clarification Emails. I decline to make this finding.

[138] Mr. Davidge denies this accusation. He does not recall when he first saw the Dunsmore Clarification Emails, but, as will be seen, his counsel, Mr. Holm, knew the same day the Dunsmore Clarification Emails were sent that Ms. Dunsmore's consent may have been for a *pro rata* division and not a direct transfer to the Davidges. Things were happening quickly that day, with many emails flying. Whether Mr. Davidge forwarded the Dunsmore Clarification Emails or not, the information they contained was not withheld. Mr. Holm had the key information from the Dunsmore Clarification Emails—that Ms. Dunsmore's email consent had been for a *pro rata* division of the Disputed Shares—the very day the information came to light. As will also be seen, Mr. Holm passed on this key information to others. Nothing was withheld.

[139] While the shareholders were communicating that day, so were the lawyers. On November 25, 2016, Mr. Kaye responded to Mr. Rodway's November 24 position on the necessary "consent" required. He disagreed with his position, writing:

> I'm not sure what you are saying. Regardless of whether you call it a consent or a waiver, 9 of the 10 say that are OK with the transfer. You seem to be saying that there is a RFR, and it applies. On a plain reading of the provision, this is not the case. Section 25.1(e) says that the other provisions don't apply at all if before the transfer is made the transferor obtains consents from members who hold 2/3 or more of the shares. […] I also note that the provision does not say that you need a written consent, just a consent.

[140] Later in the day on November 25, 2016, Mr. Kaye sent an email to Mr. Holm asking that the Davidges sign a consent form enclosed with the email. He advised Mr. Holm that the Engelsman Estate would be signing the same consent form (consenting to a direct transfer of the Disputed Shares to the Davidges only) and that he would be endeavouring to get the other owners to "either verbally consent, email Scott Rodway with their consent, or sign a Consent."

[141] On November 25, 2016, Mr. Engelsman, on behalf of the Engelsman Estate, signed the consent form, consenting to transfer the Disputed Shares directly to the Davidges.

[142] Next, Mr. Holm's assistant, Nicole Gregerson, sent an email to Mr. Kaye, enclosing the email consents from Ms. Dunsmore, the Christies and the Waddens. Ms. Gregerson expressly noted in her correspondence that Ms. Dunsmore's email consent did not specify that her consent was to have the Disputed Shares transferred directly to the Davidges.

[143] Ms. Gregerson emailed Mr. Kaye again about 15 minutes later. She advised Mr. Kaye that Ms. Dunsmore may only be consenting to a "divided transfer," not 100% to the Davidges. She wrote:

> Just trying to reach our client [Mr. Davidge] – Carl [Mr. Holm] thinks that Barbara Dunsmore consents to the divided transfer, not 100% to the Davidges, which would explain why her email did not specify.

[144] This correspondence makes clear, as I found earlier, that Mr. Holm was in possession of the information contained in the Dunsmore Clarification Emails on the same day Ms. Dunsmore shared the information with Mr. Davidge.

[145] On November 27, 2016, Mr. Kaye forwarded all of the consents obtained to that point, including the email consents and his client's executed consent form, to Mr. Rodway. Indicating that these consents, along with the Davidges' anticipated consent, reflected more than the two-thirds required by the Consent Transfer Provision, Mr. Kaye asked for Mr. Rodway's confirmation that the Engelsman Estate's proposed transfer of the Disputed Shares to the Davidges would be accepted.

[146] On November 27, 2016, the Davidges executed a consent form consenting to the transfer of the Disputed Shares to them.

[147] On November 28, 2016, Mr. Rodway sent an email to all other counsel (Mr. Kaye, Mr. Holm, and Mr. Genge) and Ms. Dunsmore. Mr. Rodway stated that he could not advise Mr. Kaye as to whether or not the consents received were sufficient to effect a sale of the Disputed Shares to the Davidges, indicating that this would be a decision for the Board of Directors. He wrote that he could express an opinion to the Board of Directors, but that it would be for them to determine what they "can and

will do." Mr. Rodway also advised that Ms. Dunsmore had sent him an email clarifying the terms of her consent.

[148] On November 29, 2016, Mr. Kaye sent consent forms, specifically requesting consent for a transfer of the Disputed Shares to the Davidges alone, to Ms. Dunsmore for herself, Mr. Hindle, and Ms. Brillion to sign.

[149] At 7:35 p.m. on November 29, 2016, one of the Plaintiffs, Mr. Ferguson, wrote an email addressed to Ms. Dunsmore, Mr. Hindle and Ms. Brillion, forcefully advocating for them to refuse to consent to the transfer to the Davidges alone. Mr. Ferguson's animus toward Mr. Davidge was clear in this correspondence. He alleged that Mr. Davidge would use a controlling shareholding in Mapleguard for his own personal benefit. He wrote, in part:

> …The big picture is Neil having complete voting power. He will invite us all up to his new Penthouse Suite and we can all listen as he makes all the decisions on the fate and future of Mapleguard Apartments. We all know that the end is near, but at what price and how near? Its all up to Neal if he gets 100% of Englesmans shares. He will be looking down on everybody from the penthouse as we all move out ,,,, one by one …when they condemn the apartments below or when there is an assessment for repairs that is just too high to pay. No matter how many spins you put on it, we as shareholders, are going to lose when [Neal] votes not to repair something or wants another 'QUALIFIED ENGINEER' to come for another inspection. He will still be standing tall as HE sells the company for nothing !! . At least as shareholders, with a vote that counts, if we sell the place we can vote for the best market value. Not some ridiculous low price or hope for a ridiculous high price. Don't forget Englesman sold his shares for next to nothing. Stay tuned to see what happens with my offer of $10,000 to buy the Christies place. More than likely, he'll be in there getting 100% of that too? We need you as shareholders to vote AGAINST THE TRANSFER OF 100% OF ALL SHARES from Englesman to Davidge. The division, if you vote our way, of Englesman shares will be approx. 70% Davidge 30% Ferguson / Kermeen. But most importantly, NEIL WILL NOT HAVE COMPLETE VOTING CONTROL!

[150] Mr. Hindle replied a short time later, agreeing with Mr. Ferguson. He expressed his view that Ms. Dunsmore will net less for her unit unless she "stands up to Neal and declines to sign the consent" to the transfer to the Davidges alone.

[151] Mr. Ferguson's email changed Ms. Dunsmore's mind. She previously believed that an apportionment of the Disputed Shares between the Plaintiffs and the Davidges could work for Mapleguard, but after reading Mr. Ferguson's email, it

became clear to Ms. Dunsmore that it would not be workable for the Disputed Shares to be apportioned between the Plaintiffs and the Davidges. Ms. Dunsmore disagreed with Mr. Ferguson's accusation that Mr. Davidge was planning on gaining control over Mapleguard to personally benefit himself at the disadvantage of the Other Shareholders.

[152] Ms. Dunsmore was concerned that if the Disputed Shares were apportioned it would create difficulties for Mapleguard, as the Davidges and the Plaintiffs would inevitably disagree over management of the corresponding units. After reading Mr. Ferguson's email, Ms. Dunsmore decided firmly, on November 29, 2016, that she consented to the transfer of the Disputed Shares directly to the Davidges. She concluded that the apportionment of Disputed Shares between the Plaintiffs and the Davidges would not be in the best interests of Mapleguard.

[153] I agree with the positions of Mapleguard and the Davidges that Mapleguard was faced with two potential outcomes from all of this. Neither potential outcome would see the Plaintiffs receive all of the Disputed Shares. Either the Davidges would receive the Disputed Shares under the Consent Transfer Provision if the necessary consent threshold was achieved, or the Disputed Shares would be apportioned *pro rata* between the Davidges and the Plaintiffs under the ROFR Provision.

[154] Ms. Dunsmore was clearly aware of these two alternatives and the Davidges' exercise of their ROFR. She initially consented to the *pro rata* apportionment, but changed her mind on November 29, 2016 and decided to consent to the Engelsman Estate transferring the Disputed Shares only the Davidges, without apportionment to the Plaintiffs.

[155] Although she made this decision firmly on the evening of November 29, Ms. Dunsmore did not sign her written consent to the transfer of the Disputed Shares to the Davidges under the Consent Transfer Provision until the following day, November 30, 2016. Her executed written consent provides as follows:

> WHEREAS:

A. Jan Adrian Den Engelsman is the registered holder of 30 Class “A” Common and 205,700 Class “B” Common shares (the “Shares”) in the capital of Mapleguard Apartments Ltd, which represent Jan Adrian Den Engelsman’s rights to three of the 10 residential units (the “Units”) in Mapleguard Apartments;

B. Jan Adrian Den Engelsman died on June 26, 2015;

C. On October 7, 2016 Lawrence John Elgelsman obtained a Grant of Probate of the Will of Jan Adrian Den Engelsman;

D. Lawrence John Engelsman wishes to transfer to Neal Davidge and Isobel Davidge all of the Shares and all interest of Jan Adrian Den Engelsman in the Units;

E. The Articles of Mapleguard Apartments Ltd. provide in Sections 25.1(a) to (d) that the other owners of Shares in Mapleguard Apartments Ltd. have a right of first refusal, and Section 25.1(e)(i) provides that “the provisions as to transfer contained in this Article shall not apply if before the proposed transfer of share is made, the transferor shall obtain consents to the proposed transfer from members of the Company, who at the time of the transfer are the registered holders of two-thirds or more of the issued shares of the class to be transferred of the Company or if the shares comprise more than one class, then from the registered holders of two-thirds or more of the shares of each class to be transferred and such consent shall be taken to be a waiver of the application of the preceding Articles as regards such transfer.”

F. The undersigned is the registered and beneficial owner of 10 Class “A” Shares and 82,900 Class “B” Shares in the capital of Mapleguard Apartments Ltd. and consents to the transfer referred to in recital D above;

NOW THEREFORE, I, Barbara Dunsmore do hereby consent to the transfer of all the Shares from Jan Adrian Den Engelsman and/or Lawrence John Engelsman, Executor of the Estate of Jan Adrian Engelsman, to Neal Davidge and Isobel Davidge for the purposes of Section 25.1(e)(i) of the Articles of Mapleguard Apartments Ltd.

[156] Ms. Dunsmore was not aware of any alleged deadline for securing the necessary number of consents to the transfer of the Disputed Shares to the Davidges. Her understanding at the time was that if the required two-thirds consent threshold was achieved, the Engelsman Estate and the Davidges would be permitted to continue the process of the Davidges’ purchase of the Disputed Shares from the Engelsman Estate.

[157] In the end result, the position taken by the shareholders of Mapleguard in regard to the transfer of Disputed Shares from the Engelsman Estate to the Davidges under the Consent Transfer Provision was as follows:

Shareholder	**Number of Shares**	**Percentage of Shares**	**Position for or against**
Mark Ferguson and Cheryl Kermeen	10 Class A 34,900 Class B	10% Class A 5.487% Class B	Against
Juanita Brillion	10 Class A 33,900 Class B	10% Class A 5.330%	Against
Leonard Hindle	10 Class A 77,900 Class B	10% Class A 12.248%	Against
Patrick and Aiko Wadden	10 Class A 85,900 Class B	10% Class A 13.506%	For
Robert and Belva Christie	10 Class A 34,900 Class B	10% Class A 5.487% Class B	For
Barbara Dunsmore	10 Class A 82,900 Class B	10% Class A 13.034% Class B	For
Jan Engelsman (the Engelsman Estate)	30 Class A 205,700 Class B	30% Class A 32.342% Class B	For
Neal and Isobel Davidge	10 Class A 79,900 Class B	10% Class A 12.562% Class B	For
Total Against	30 Class A 146,700 Class B	30% Class A 23.07% Class B	
Total For	70 Class A 489,300 Class B	70% Class A 76.93% Class B	

[158] This result clearly meets the two-thirds threshold required by the Consent Transfer Provision. On November 30, 2016, the Davidges entered into a written contract with the Engelsman Estate for the purchase of the Disputed Shares (the "Share Purchase Contract").

[159] The Share Purchase Contract closed on the same date. On that date, the Davidges delivered the remaining balance of the purchase price in the amount of $47,500 to Waterstone Law Group.

[160] On November 30, 2016, the Engelsman Estate signed an application for transfer, requesting that Mapleguard complete the transfer of the Disputed Shares to the Davidges.

[161] On December 13, 2016, Mr. Rodway provided the Board of Directors with an opinion (the "Rodway Opinion") on the request that had been made to have Mapleguard effect the transfer of Disputed Shares as per the Share Purchase Contract. He enclosed correspondence from Mr. Holm and copies of the consents. He explained the Consent Transfer Provision and noted that, in his opinion, it does not indicate that the consent has to be in any particular form or that it has to be in writing. He wrote that "it would appear from the correspondence received that [the required] consents have been obtained." He explained that if the Board of Directors found the consents were acceptable, it was his opinion that the procedure in the Consent Transfer Provision "has been met and the right of first refusal procedure does not apply". He further wrote:

> As such, even though the Company undertook the right of first refusal procedure and there was an exercise of that right of first refusal procedure by Mr. Ferguson and Ms. Kermeen, it would appear that Article 25.1(e)(i) renders that procedure inoperable.

[162] Mr. Rodway recommended the Board of Directors proceed with the resolution transferring the Disputed Shares to the Davidges.

[163] Ms. Dunsmore signed the directors' resolution effecting the transfer from the Engelsman Estate to the Davidges, but Ms. Kermeen refused to sign. This prompted Mr. Kaye, counsel for the Engelsman Estate, to write to the Plaintiffs' counsel, Mr. Genge, on December 22, 2016, asking for an explanation and demanding that Ms. Kermeen sign the resolution in order to complete the transfer.

[164] The situation remained unresolved by 2017 as Ms. Kermeen had not signed the resolution, so a Board of Directors meeting was scheduled for January 13, 2017 at Mr. Rodway's office for the purpose of putting the matter to a vote.

[165] On the morning of January 13, 2017, prior to the meeting, Ms. Kermeen sent an email to Mr. Rodway advising him that she would be unable to "ratify the proposed transfer" in light of a legal opinion provided by her counsel, Andrei Whitaker, which she attached for Mr. Rodway's consideration. In short, the Plaintiffs'

counsel interpreted the transfer provisions in the Articles differently than Mr. Rodway —effectively the same interpretation advanced by the Plaintiffs in this litigation.

[166] The Board of Directors' meeting went ahead that day. Mr. Davidge and Ms. Dunsmore voted in favour of the resolution transferring the Disputed Shares to the Davidges and Ms. Kermeen voted against it. As the only director who did not have a personal interest in the transaction, all parties now agree that Ms. Dunsmore's vote was the one that counts. She voted to approve the sale of the Disputed Shares, as proposed by the Engelsman Estate, to the Davidges. Ms. Dunsmore explained in her affidavit that she voted this way because she believed it was in the best interests of Mapleguard.

[167] On January 17, 2017, Ms. Dunsmore reported to the shareholders of Mapleguard by email and sent them a copy of the minutes of the meeting.

[168] The Plaintiffs commenced the Action on January 25, 2017. They immediately applied for interlocutory injunctive relief restraining Mapleguard, the Engelsman Estate and the Davidges from transferring or otherwise dealing with the Disputed Shares. Their application was heard on February 22, 2017, and dismissed on March 29, 2017. The proposed transfer was then registered and completed.

[169] The Plaintiffs commenced the Petition proceeding on November 20, 2018.

[170] As I discussed at the outset, this case involves two central and overriding disputes. The first dispute, arising in the Action, involves the Plaintiffs' claim that by virtue of the ROFR Provision, they had a binding contract with the Engelsman Estate to purchase the Disputed Shares. They say that contract was breached, and that Mr. Davidge induced that breach, when the Disputed Shares were sold and transferred to the Davidges. Related to this claim, the Plaintiffs assert that the defendants breached the Shareholders Agreement and the Articles by acting as they did and that this constitutes a breach of another contract.

[171] The second dispute, arising in the Petition, involves the Plaintiffs' claim that Mapleguard's approval of the sale of the Disputed Shares to the Davidges was oppressive and/or unfairly prejudicial to them as shareholders.

[172] At the core of these disputes is the Plaintiffs' assertion that they had a binding contract to purchase the Disputed Shares by virtue of the ROFR Provision. Fundamental to this assertion is the interpretation of Articles 25.1 and 25.2 and what effect, if any, the ROFR Provision has on the use of the Consent Transfer Provision.

[173] These disputes naturally require, as a first step, an interpretation of the share transfer provisions in the Articles.

Interpretation of the Articles

[174] I will begin with a review of the general principles applicable to the interpretation of company articles.

General Principles of Contractual Interpretation

[175] A company and its shareholders are bound by the company's articles: *BCA*, s. 19. Accordingly, a company's articles represent a contract in law between the company and its shareholders, and the principles of contractual interpretation apply to the interpretation of those articles: *Rogers v. Rogers Communications Inc.*, 2021 BCSC 2184 at para. 81.

[176] The principles to be applied when interpreting contracts were discussed by the Supreme Court of Canada in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53. Justice Armstrong recently summarized those principles in *Abstract Projects Inc. v. The Owners, Strata Plan EPS6069*, 2023 BCSC 42 as follows:

> [144] … In *Sattva,* the Supreme Court clarified and affirmed principles to be used in interpreting contracts, emphasizing that the interpretation of contracts engages common sense principles and is "not dominated by technical rules of construction"(at para. 47). The goal of contractual interpretation is "to ascertain the objective intention of the parties": *Sattva* at para. 49.
>
> [145] Contracts must be interpreted as a whole rather than interpreting individual parts: *Sattva* at para. 47. The factual matrix extant at the time of contract formation can be considered without any precondition that the terms

> of the agreement are ambiguous; rather, considering the factual matrix surrounding the making of a contract is one part of the interpretive exercise: *Sattva* at paras. 46-50.
>
> [146] It is not appropriate to consider the parties' subjective intentions: *Sattva* at paras. 58-60. Rather, contractual interpretation relies on an objective assessment of the facts known (or that reasonably ought to have been known) to the parties when they made their agreement: *Sattva* at para. 58. A court may consider anything that could affect the way a reasonable person would have understood the language of a document: *Sattva* at para. 58.
>
> [147] Surrounding circumstances or consideration of the factual matrix cannot overwhelm the words of the agreement itself: *Sandhu v. Sidhu*, 2019 BCCA 465 at para. 24, citing *Sattva* at para. 57. Contract interpretation should be centered on the core meaning of the entire contract, and consideration of background facts should only come from objective evidence extant at the time of the execution of the contract: *Sattva* at para. 58.
>
> [148] The Supreme Court has also confirmed that surrounding circumstances cannot be used to "deviate from the text such that the court effectively creates a new agreement": *Sattva* at para. 57, citing *Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62 at para. 20, 1997 CanLII 4085 (C.A.).

[177] Justice Armstrong summarized the overarching principles to be considered in the interpretation of agreements at para. 152:

> a) the court must ask what objective intentions of the parties existed at the time the agreement was made;
>
> b) words in the contract should be given their plain and ordinary meaning, while being construed in the context of the agreement as a whole;
>
> c) the words of the agreement must be considered in the context of the factual matrix of events preceding the making of the agreement;
>
> d) the parties' subjective intentions are not to be considered – the interpretation is based on the perspective of a reasonable person informed by an objective assessment of the surrounding circumstances known at the time;
>
> e) the court should not interpret words according to their literal meanings if the result would be a commercial absurdity;
>
> f) the court looks to determine whether there is only one reasonable meaning of the words in question or whether the meaning of the words is ambiguous in the sense of being reasonably capable of two different interpretations; and

> g) it is only if the meaning of the words is ambiguous or if interpreting the words according to their literal construction would result in a commercial absurdity that the court may rely on extrinsic evidence, including facts arising after the agreement was made.

[178] Justice Stephens also provided a helpful summary of the applicable legal principles in *Han-Earl Consulting Ltd. v. 1048661 BC Ltd.,* 2022 BCSC 1073:

> [28] Contractual interpretation requires a practical, common sense approach not dominated by technical rules of construction. The overriding concern is to determine the objective intent of the parties and the scope of their understanding. To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of the formation of the contract, otherwise known as a "factual matrix": *Penguin Enterprises* at para. 31 (relying on *Sattva Capital Corp. v. Creston Moly Corp,* 2014 3CC 53 at para. 47; *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12 at 23-24); *Group Eight Investments v. Taddei*, 2005 489 at para. 20, and *Sandhu* BCCA at para. 39. The factual matrix is the background facts both parties must clearly have been taken to have known and to have in mind when they composed the written text of their agreement and at the time the contract was executed: *Tang* BCCA at para. 16; *Sandhu* BCSC at para. 41. However, surrounding circumstances cannot overwhelm or contradict the words employed in the contract. In addition, where the words of an agreement are unambiguous, extrinsic evidence is not permissible to alter, vary, interpret, or contradict the words in the contract: *Sandhu* BCSC at para. 40, following *One West Holdings Ltd. v. Greata Ranch Holdings Corp*., 2014 BCCA 67 at para. 27.
>
> [29] In addition, commercial reasonableness is a central consideration when interpreting commercial contracts. Courts prefer commercially reasonable interpretations because they are more likely to reflect the parties' objective intentions. While a party cannot avoid its contractual obligations simply because the bargain they entered into was undesirable or unusual, commercially absurd interpretations should be avoided: *Blackmore Management v. Carmanah Management Corporation*, 2022 BCCA 117, paras. 41-42 [*Blackmore Management*], following *Resolute Forest Products v. Ontario (Attorney General)*, 2019 SCC 60 at paras. 142-144.

Questions

[179] Informed by these principles, I turn now to my analysis. Always bearing in mind that I am to interpret the Articles as a whole, I find it helpful to structure my analysis by addressing four central questions:

1. Can the Consent Transfer Provision be used once the ROFR Provision has been engaged?

2. Can the Consent Transfer Provision be invoked and/or consents obtained after the 14-day period of the ROFR Provision has ended?

3. What is the effect of the Directors' Absolute Discretion Provision?

4. Were the consents obtained valid?

Analysis

1. Can the Consent Transfer Provision be used once the ROFR Provision has been engaged?

[180] The answer to this question is yes.

[181] The Plaintiffs ask me to interpret the Articles to mean that shares in Mapleguard can be transferred in two separate and different ways: by operation of ROFR Provision (Articles 25.1(a) – (d)) and also by operation of the Consent Transfer Provision (Article 25.1(e)). In their view, the Articles require that these two processes do not operate in tandem; rather, they operate as an "either or" situation. In other words, they contend that the Articles allow for two separate and distinct ways to transfer shares, but that both cannot be in operation at the same time. In this way, the Plaintiffs argue that once the ROFR process is engaged by sending out a transfer notice, the Consent Transfer Provision cannot be used.

[182] I find it helpful to reproduce the Consent Transfer Provision here again:

> (e) the provisions as to transfer contained in this Article shall not apply:
>
> (i) if before the proposed transfer of share is made, the transferor shall obtain consents to the proposed transfer from members of the Company, who at the time of the transfer are the registered holders of two-thirds or more of the issued shares of the class to be transferred of the Company or if the shares comprise more than one class, then from the registered holders of two-thirds or more of the shares of each class to be transferred and such consent shall be taken to be a waiver of the application of the preceding Articles as regards such transfer;

[183] To support their position, the Plaintiffs submit that the phrase “before the proposed transfer of share is made” used in the Consent Transfer Provision should be interpreted to mean “before the transfer notice is provided to and subsequently sent out by Mapleguard under the ROFR Provision”. In other words, the Plaintiffs say the Consent Transfer Provision can only be invoked before Mapleguard sends a transfer notice to the shareholders under the ROFR process.

[184] The Plaintiffs say this interpretation finds support in the introductory words of the Consent Transfer Provision, which reads: “the provisions as to transfer contained in this Article shall not apply” [emphasis added]. Noting that these words do not use language such as “shall no longer apply” or any other wording that might suggest a nullification of a process already in effect, they submit this supports an interpretation that the Consent Transfer Provision would need to be invoked prior to any invocation of the ROFR process.

[185] Further, the Plaintiffs point to the fact that Article 25.1(a) notes that the transfer notice “constitutes an offer” that shareholders have 14 days to accept. They say that once this offer has been accepted by a shareholder, a contract is formed between the proposing transferor and the shareholder as evidenced by Article 25.1(c) wherein the transferor is bound to transfer the shares upon payment of the price contemplated. The Plaintiffs submit that to interpret the Articles in such a manner that could allow interference with this contract through invocation of the Consent Transfer Provision is commercially unreasonable and untenable.

[186] The Plaintiffs rely on this interpretation to support their claims in both the Action and the Petition. They say that once Mapleguard sent out the Transfer Notice on October 25, 2016, the Consent Transfer Provision could not be utilized. The Transfer Notice became a legally binding offer to all the shareholders on that date. The Plaintiffs say that when they accepted this offer on November 4, 2016, they entered into a binding contract with the Engelsman Estate to purchase the Disputed Shares, well prior to the time when the consents for the direct transfer to the Davidges were obtained.

[187] The positions of Mapleguard and the Davidges are aligned. They both disagree with the Plaintiffs' interpretation of the Articles. They submit that the share transfer procedure set up in the Articles, properly interpreted, is straightforward and operates in the manner I will now describe.

[188] Any shareholder who wishes to sell their shares will notify the other shareholders, all of whom will be at liberty to make a potential offer for those shares. This system can lead to members purchasing the shares on a *pro rata* basis, purchasing such shares by themselves (if no other members are willing to do so), or simply not buying them at all.

[189] Then, if an offer is made to purchase the entirety of shares on offer, and if that offer is compliant with the ROFR Provision, then the directors are bound by Article 25.1(c) to accept that offer in the normal course (subject to the Directors' Absolute Discretion Provision).

[190] However, in the event a proposed transferor secures consents to a direct transfer from a two-thirds majority of shareholders, the ROFR Provision does not operate. The defendants say the Consent Transfer Provision is unambiguous in this regard: securing such consents "shall be taken to be a waiver of the application of the preceding Articles" (i.e. a waiver of the ROFR Provision), and the consents must be obtained "before the proposed transfer of shares is made," not before any offer is made or accepted, as the Plaintiffs assert.

[191] Read holistically, Mapleguard and the Davidges submit that the objective intent of the parties in this small company was to have a share transfer system that facilitates other shareholders buying shares in the normal course, but also permits someone with the consent of two-thirds of the shareholders, a supermajority, to bypass the formal process and sell their shares directly on the terms set out in the transfer notice, all while leaving the directors with the discretion to veto any and all transfers. They say this interpretation, unlike the Plaintiffs', avoids implying additional words into the language of the Articles, gives the words used their ordinary and grammatical meaning consistent with the surrounding circumstances, and is a commercially reasonable interpretation.

[192] Overall, Mapleguard and the Davidges urge me to conclude that the share transfer provisions in the Articles work together and integrate in the following manner:

a) A proposing transferor notifies Mapleguard of their intention to make a share transfer and Mapleguard sends the transfer notice to other shareholders;

b) Shareholders may exercise their ROFR under the ROFR Provision within 14 days from the date of the transfer notice;

c) A proposing transferor can solicit consents under the Consent Transfer Provision during and after the 14-day ROFR period described in (b);

d) If no shareholder exercises a ROFR, then the proposing transferor may market the shares under Article 25.1(d);

e) If a ROFR is exercised, then the shareholder(s) who exercised it may be able to purchase the shares, subject to the Consent Transfer Provision not being invoked before the transfer is registered, and subject to the transfer being refused under the Directors' Absolute Discretion Provision;

f) If a ROFR is exercised but the proposing transferor obtains the required two-thirds shareholder consent and invokes the Consent Transfer Provision before the transfer is registered, then the proposing transferor may proceed under the Consent Transfer Provision and the ROFR process is waived; and

g) Any registration is subject to the Directors' Absolute Discretion Provision.

[193] I agree with the position taken by Mapleguard and the Davidges, on all points.

[194] With respect, the Plaintiffs' proposed interpretation would require me to ignore the plain, literal meaning of the words of the Articles.

[195] The Consent Transfer Provision expressly states that if the transferor obtains consents "before the proposed transfer of shares is made", the ROFR Provision shall be taken as waived. These words are not ambiguous. This wording requires that the consents under the Consent Transfer Provision be obtained before a proposed transfer of shares is actually made, i.e., before completion of a transfer of those shares.

[196] Under Article 5.1, a transferor of shares is deemed to remain the holder of the shares until the name of the transferee is entered in the register of members of Mapleguard. This means that a proposed transfer of shares is not "made" until it is completed by registration of the shares in the name of the transferee.

[197] As the literal meaning of the language is unambiguous, the Plaintiffs have to show that this literal interpretation leads to a commercial absurdity. In *Jardine v. General Hydrogen Corporation*, 2007 BCSC 119, Justice Tysoe expressed the meaning of "commercial absurdity" in the following terms:

> [34] I have been unable to locate an authority which describes what is meant by the term "commercial absurdity". In my opinion, the term means a result brought about by the literal interpretation of the words which is so ludicrous that no sensible business person in negotiating the agreement, if he or she had directed their mind to the point, would have agreed to it.

[198] In light of the Articles as a whole, I see nothing inherently ludicrous about the literal meaning of the words of the Consent Transfer Provision. Mapleguard is a small company, incorporated for the sole purpose of owning the Property and the Buildings. The shareholders in Mapleguard are few, and they are neighbours. Objectively, the intent or purpose of the Consent Transfer Provision is clear. It allows a direct transfer of shares if a "supermajority" of the shareholders agree. It cannot be said that no sensible businessperson would agree to waiting until the ROFR process is engaged or completed before deciding whether or not to consent to an alternative direct transfer proposal. Nor can it be said that no sensible businessperson would agree to allow a supermajority of shareholders to override or interrupt a ROFR process that has the potential of harming the company before it has been

completed. To the contrary, I think a sensible businessperson would agree to these things.

[199] The Plaintiffs submit that this interpretation would lead to "chaos" and is thus a commercially unreasonable interpretation. As an example, they describe a situation where a shareholder invoking their ROFR might take certain steps, such as obtaining a bank loan, only to have the rug pulled out from under them by a last-minute direct transfer under the Consent Transfer Provision. While I accept that the shareholder who invoked their ROFR might find this to be an undesirable turn of events, this does not make it commercially unreasonable.

[200] To accept the Plaintiffs' interpretation would require words to be implied into the Articles that are not there, or at the least would require the existing words to be twisted beyond any tenable interpretation.

[201] The wording of the Consent Transfer Provision requires only that the necessary consents be obtained before a proposed transfer is made. As I have found, the word "made" means completion of a transfer. It cannot, and does not, mean when the ROFR process begins with the sending of a transfer notice, as the Plaintiffs submit. A transfer notice is an offer under Article 25.1(a). The sending of an offer under the ROFR process cannot reasonably be construed as the time that "the proposed transfer is made".

[202] Had the parties intended that the Consent Transfer Provision be rendered inoperable once a transfer notice is sent out by Mapleguard, the Articles could have been drafted that way. For example, had the parties intended the interpretation the Plaintiffs seek, the introductory words in Article 25.1(e) might have been drafted to read: "if before the transfer of shares is proposed…", or "if before commencement of the process set out at Articles 25.1(a)–(d) …". But, as the Davidges submit, this is not what the words say. The language of the Consent Transfer Provision is clear. Implying words is unnecessary and would change the meaning of what was intended.

[203] The Plaintiffs' interpretation of the Articles would also lead to a commercially unreasonable result. Under their interpretation, for a transferor to pursue a direct transfer under the Consent Transfer Provision, they would need to secure consent from two-thirds of the shareholders before Mapleguard sent out a transfer notice under Article 25.1(a).

[204] The unreasonableness arises because there is no discretion in Article 25.1(a) for a shareholder to delay notifying Mapleguard of their desire to transfer their shares. Under Article 25.1(a), a shareholder is required to notify Mapleguard of their desire to transfer their shares. This triggers Mapleguard's obligation to send the transfer notice to the shareholders, thereby (under the Plaintiffs' interpretation) immediately preventing the proposing transferor from soliciting consent of the shareholders under the Consent Transfer Provision. This interpretation could not objectively be what was intended. This interpretation would mean that the Consent Transfer Provision would only be available in the very short period of time between the shareholder's notice of their desire to transfer and Mapleguard's issuance of the transfer notice to the shareholders. As Mapleguard submits, this would lead to a commercially unreasonable result where the Consent Transfer Provision becomes a race to solicit consent to a direct transfer in the very brief window before Mapleguard sends out the transfer notice.

[205] The Plaintiffs' interpretation also seeks to interpret the ROFR process as a binding process from which one cannot withdraw. I find this characterization is not sustainable as it ignores the fact that the Articles expressly permit the directors to sanction the withdrawal of a proposed transfer under the ROFR Provision. Article 25.1(a) expressly states that a transfer notice shall constitute an offer by the proposing transferor that "shall not be revocable except with the sanction of the directors." [Emphasis added.] This sanctioned withdrawal from the ROFR process is consistent with the Consent Transfer Provision, the direct transfer process, being available at any time.

[206] I interpret the Articles, read as a whole, to mean the Consent Transfer Provision can be invoked even if the ROFR process has begun with the sending of a

transfer notice. The two processes can unfold simultaneously. It is not an "either or" situation.

2. Can the Consent Transfer Provision be invoked and/or consents obtained after the 14-day period of the ROFR Provision has ended?

[207] Again, the answer is yes.

[208] If I interpret the Articles to mean that both the ROFR and direct transfer processes can unfold simultaneously (as I have), the Plaintiffs submit that the Articles must be interpreted to mean that the Consent Transfer Provision can only be invoked, and all consents must be obtained, before the 14-day period in the ROFR Provision has ended.

[209] In terms of the facts of this case, the Plaintiffs say this means that the ROFR process completed and "crystalized" in this case on November 29, 2016, 14 days after the Davidges received notice, with the Plaintiffs as the only shareholder to invoke their ROFR. They say that this "crystallization" prevents the use (or any further use) of the Consent Transfer Provision. Because Ms. Dunsmore did not provide her written consent to the transfer until November 30, 2016, the Plaintiffs say the two-thirds threshold was not achieved.

[210] I do not agree with any of these assertions.

[211] First, as I have earlier explained, I find the Davidges also exercised their ROFR on November 23, 2016.

[212] Second, the Plaintiffs' submission effectively asks me to imply a time limit of 14 days on invocation of the Consent Transfer Provision and the obtaining of the required consents. This would be contrary to the plain wording of the Consent Transfer Provision. As I have found, the Articles set out only one timing requirement for a direct transfer—the required consents must be obtained before the proposed transfer is made. I can see no principled reason to imply a time limit that does not exist and is inconsistent with the plain wording of the provision. The Consent Transfer Provision makes it clear that there is nothing to "crystalize" upon expiry of

the 14-day ROFR period because the ROFR process remains subject to the Consent Transfer Provision.

[213] This interpretation gives the words used their ordinary and grammatical meaning. It is also commercially reasonable in that it provides certainty for the proposing transferor. Under the Plaintiffs' interpretation, a proposing transferor would not necessarily know when the 14-day time period would end because the ROFR Provision requires Mapleguard, and not the proposing transferor, to send out the transfer notice. There is no requirement for Mapleguard to send out a transfer notice to all shareholders at the same time. Indeed, this is what happened in this case. Mapleguard sent out the Transfer Notice to some shareholders in October and others in November. If the proposing transferor had a specific purchaser in mind, (again as what happened in this case), and wished to invoke the Consent Transfer Provision, they would be faced with a very uncertain timeframe under the Plaintiffs' interpretation.

[214] The defendants' interpretation, with which I agree, is a commercially reasonable one that is much more likely to reflect the parties' objective intentions. This interpretation creates certainty. On the plain language of the provision, the deadline for obtaining the required consents under the Consent Transfer Provision is before the transfer of shares is made. This gives the proposing transferor certainty. The proposing transferor will be involved in the proposed ROFR transfer, so will know when that deadline is, creating a clear cut-off for using the Consent Transfer Provision and obtaining the required consents.

[215] This interpretation also objectively benefits all shareholders. While there is no requirement for shareholders to be notified of anyone exercising their ROFR, some of them might deem it important and make inquiries, particularly in a smaller company like Mapleguard, where the shareholders are neighbours, in order to compare the outcome of the ROFR process with what they are being asked to consent to under the Consent Transfer Provision, and might want to know who had exercised their ROFR. In that scenario, the ROFR outcome is not certain until the 14

days has passed for all shareholders and they have either exercised or not exercised their right.

[216] The defendants' interpretation, with which I agree, is consistent with this because a shareholder who wished to wait until the 14 days had passed, and inquire as to the outcome of the ROFR process, before giving consent would be able to do so. The plain wording of the Consent Transfer Provision keeps this option open so that shareholders can, if they wish to make inquiries, ascertain the two potential outcomes before giving consent or not.

[217] To support their position, the Plaintiffs seek to rely on Mr. Rodway's examination for discovery evidence where he opined that the Consent Transfer Provision has to be exercised within the 14-day ROFR period. As I referred to earlier in these reasons, I find this evidence is not admissible for this, or any, purpose. It is irrelevant.

[218] First, for reasons I explained earlier, Mr. Rodway's evidence is not tendered as expert opinion evidence, nor would I consider it admissible as such. It is for the court to interpret the Articles and apply them in this case.

[219] Second, Mr. Rodway did not act contemporaneously as if the opinion he now expresses was true. It is clear from the whole of the evidence that the parties, at the time of these events, did not believe there was any 14-day time limit on invocation of the Consent Transfer Provision. None of the correspondence contains any such reference or gives any indication of urgency or an approaching deadline. Ms. Dunsmore did not think there was any time limit, nor is there any evidence to suggest that anyone else did either.

[220] Third, the words in the Articles are unambiguous, so extrinsic evidence such as this, even from the drafter of the Articles, is unnecessary and impermissible.

[221] Finally, Mr. Rodway was not a shareholder, so the understanding or reasonable expectations he now expresses about the operation of the Articles has no probative value. As the Davidges argue, it is the Plaintiffs' reasonable

expectations, in 2016, that informs the analysis I will later undertake when considering the oppression claim, not Mr. Rodway's view some six years later. This is particularly so where Mr. Rodway's current opinions would have, in 2016, been unknown to the Plaintiffs.

[222] I interpret the Articles, read as whole, to mean that the Consent Transfer Provision can be invoked at any time before a proposed transfer is registered. There is no requirement that the Consent Transfer Provision be invoked and/or that the required threshold for the consents under the Consent Transfer Provision be achieved, before the expiration of the 14-day period under the ROFR Provision during which shareholders may exercise their ROFR.

3. What is the effect of the Directors' Absolute Discretion Provision?

[223] The Plaintiffs' overall position in both the Action and the Petition is grounded in the assertion that the ROFR process creates a binding and enforceable contract once the shareholder exercises their ROFR by accepting a proposed transfer. They say that by invoking their ROFR, they accepted the Engelsman Estates' offer to purchase the Disputed Shares, thereby creating a binding contract that they are entitled to enforce. This interpretation is not borne out by the Articles.

[224] The Plaintiffs' position does not consider that the ROFR Provision is subject to the Consent Transfer Provision as I have described earlier. Nor does it consider the effect of the Directors' Absolute Discretion Provision. This provision gives the directors exactly that—the absolute discretion to refuse to approve a share transfer, any transfer, without providing reasons.

[225] This provision allows the directors of Mapleguard to have ultimate control over who becomes a shareholder. They can refuse to approve any share transfer. In this way, the Directors' Absolute Discretion Provision is a "true" condition precedent, being an external condition dependent upon a future uncertain event (the Board of Directors' approval), the happening of which depends entirely on the will of a third party (the Board of Directors): *Peier v. Cressey Whistler Townhomes Limited*

Partnership, 2012 BCCA 28 at para. 19. A true condition precedent is precedent to the existence of any contractual obligations: *Peier* at para. 19.

[226] Accordingly, as the defendants submit, no offer can be truly binding until the directors approve it.

[227] Consistent with their overall role in supervising share transfers, the directors also have discretion under Article 25.1(a) to permit a proposing transferor to withdraw from the ROFR process. This further undermines the “crystallization” theory propounded by the Plaintiffs, as I discussed in the section above.

[228] The Articles place total discretion in the hands of the directors through the Directors’ Absolute Discretion Clause, which creates a condition precedent to performance under the ROFR. A party exercising their ROFR cannot compel performance of the proposing transferor because the discretion to permit the share transfer lies in the hands of the directors.

[229] In this case, not only does any share transfer depend upon approval of the directors, but the Articles also permit a proposing transferor to withdraw from the ROFR process. While the Articles do not specify what is to occur if a proposing transferor wishes to withdraw after a ROFR has been exercised, the combined discretion placed on the directors to both permit withdrawal and decline to register a transfer under the Directors’ Absolute Discretion Provision make it clear that a binding contract is not created by a shareholder exercising their ROFR.

[230] This is a convenient point to address the good faith of Ms. Dunsmore.

[231] When dealing with such director discretion provisions, the court will presume that the directors have acted *bona fide*, absent evidence to the contrary, even when reasons are not given: *Goddard v. Shoal Harbour Marine Service,* [1956] B.C.J. No. 70 at para. 4, 20 W.W.R. 312 (S.C.). The refusal of the directors to approve a transfer of shares will be set aside only on proof of bad faith.

[232] Directors may consider matters of taste, sensibility, personal standards of behaviour and judgment in reaching a subjective opinion and exercising their discretion regarding whether to approve a person as a shareholder: *Aujla v. Yellow Cab Company Ltd.,* 2006 BCCA 116, at para 19.

[233] Ms. Kermeen and Mr. Davidge were both interested in the decision of whether to approve the transfer of the Disputed Shares to the Davidges. Ms. Kermeen wished to obtain the Disputed Shares. She obtained a legal opinion prior to the January 13, 2017 Board of Directors meeting to assist in her position that it should be the Plaintiffs who were entitled to the Disputed Shares.

[234] Mr. Davidge voted in favour of the transfer, Ms. Kermeen against. As all parties conceded at the hearing, Mr. Davidge and Ms. Kermeen cancel one another out and Ms. Dunsmore, as the director not interested in the transaction, determined to approve the transfer of the Disputed Shares to the Davidges.

[235] While she was not required to do so, Ms. Dunsmore has provided her reasons for approving the transfer to the Davidges. In reaching her decision, she considered and rejected the apportionment of the Disputed Shares between the Davidges and the Plaintiffs, which she concluded was unworkable and not in the interests of Mapleguard due to the conflict between the Plaintiffs and Mr. Davidge. I find she acted in good faith.

[236] That Ms. Dunsmore acted in good faith is further supported by the fact that she followed the Rodway Opinion recommending the Board of Directors approve the transfer.

[237] The Plaintiffs have not established, and cannot establish on the evidence adduced, any bad faith on the part of the Board of Directors, or more pointedly, on the part of Ms. Dunsmore, in approving the transfer to the Davidges only and declining to transfer Disputed shares to the Plaintiffs. Absent proof of bad faith, the Directors' Absolute Discretion Clause is final.

4. Were the consents obtained valid?

[238] The answer to this question is yes.

[239] The Plaintiffs take the position that even if the Consent Transfer Provision was invoked properly and not rendered ineffective through the operation of the ROFR Provisions, the consents obtained were invalid as they were not in accordance with the requirements of the Consent Transfer Provision. As I understand it, the Plaintiffs make three arguments here. They contend the Consent Transfer Provision should be interpreted to:

a) require the proposing transferor to personally solicit the necessary consents;

b) preclude the proposing transferor from being counted as part of the two-thirds majority threshold; and

c) require the consenting shareholder to know whether any other shareholder had exercised their ROFR in order for their consent to be valid.

[240] I will address each of these arguments in turn.

(a) Is the proposing transferor required to personally solicit consents?

[241] The answer to this question is no.

[242] The Plaintiffs contend that the Consent Transfer Provision, properly interpreted, requires that the proposing transferor (here, the Engelsman Estate) and not the proposed transferee (here, the Davidges), obtain the necessary consents for the transfer. In other words, they say the Consent Transfer Provision requires that only the Engelsman Estate may solicit shareholders to obtain the consents in order for those consents to be valid.

[243] I disagree. This interpretation is inconsistent with the language used in the Articles and is inconsistent with the objective intention of the parties with respect to

the Consent Transfer Provision. It would not be a commercially reasonable interpretation.

[244] As the defendants highlight, the Articles contain no language that would suggest actors must do things strictly by themselves, without assistance from others or without using an agent. The Consent Transfer Provision does not include any express (or even implied) language that could suggest some sort of a prohibition on a proposing transferor obtaining consents with the assistance of, or through, someone else (including the proposed transferee), nor do any of the Articles. Indeed, the Articles refer to a proposing transferor using Mapleguard as its agent. This is a clear, objective, signal that the parties intended agency relationships to be permissible.

[245] If the Plaintiffs' interpretation were followed, a proposing transferor could not use any agents, including family members or even counsel, to solicit shareholders to obtain consents. This would not be a commercially reasonable interpretation.

[246] I agree with the defendants that the obvious objective intention of the parties with respect to the Consent Transfer Provision was that two-thirds of the shareholders, a supermajority, consent to the direct transfer. There is no language in the Articles to suggest it would matter who solicits those consents. Again, Mapleguard is a small company whose purpose is to own the Property and Buildings. The share transfer restrictions in the Articles are, at least in part, intended to provide existing shareholders with some degree of control over who their fellow shareholders, and neighbours, will be. That the Davidges were involved in some of the administrative work of obtaining the consents the Engelsman Estate required is not surprising, nor is it unreasonable. The consents pertain to them. They are the ones the existing shareholders are, in effect, consenting to.

[247] The Plaintiffs' interpretation is inconsistent with this intention and would unnecessarily interfere with its commercial purpose. It would, again, require me to read in language, to apply terms, that do not exist.

[248] It is clear from the whole of the evidence that the Engelsman Estate was the driving force behind the direct transfer to the Davidges. Mr. L. Engelsman reached out to the Davidges initially. When he learned the Plaintiffs had invoked their ROFR, he told Mr. Rodway that he wished to pursue the direct transfer to the Davidges alone. When Mr. L. Engelsman retained counsel, Mr. Kaye made his client's position, that the Engelsman Estate wished to pursue a direct transfer under the Consent Transfer Provision to the Davidges, clear. Mr. Kaye sent out formal written consents to some of the shareholders for their consideration.

[249] That Mr. Davidge was involved in doing some of the leg work to obtain the consents the Engelsman Estate required, such as sending the At This Late Hour Email, is immaterial and does not undermine the validity of the consents obtained.

(b) Does the consent of the Engelsman Estate count?

[250] The answer to this question is yes.

[251] The Plaintiffs submit that the Consent Transfer Provision should be interpreted to preclude the proposing transferor (here, the Engelsman Estate) from being counted as part of the two-thirds shareholder consent threshold. In other words, the Plaintiffs say that the Engelsman Estate's consent does not count, the required threshold was not met, and the transfer to the Davidges was therefore contrary to the Articles.

[252] I respectfully disagree with this interpretation as well.

[253] The Engelsman Estate was the single largest shareholder at the time. As the holder of the Disputed Shares at the relevant time, I find that it had the right to take a position on the proposed transfer. The plain language of the Consent Transfer Provision makes this clear. It expressly states that the Engelsman Estate was required to "obtain consents to the proposed transfer from members of the Company who at the time of the transfer are the registered holders of two-thirds or more of the issued shares of the class to be transferred". There can be no dispute that the

Engelsman Estate falls within that class of members, was entitled to cast its vote, and that its vote (i.e., its consent) would be counted.

[254] Again, the Plaintiffs' interpretation would require me to imply terms into the Consent Transfer Provision, effectively removing the voting rights of the Engelsman Estate in circumstances where the wording of the provision is clear that the Engelsman Estate is included when calculating required consents. As the defendants point out, the Consent Transfer Provision refers to "issued shares", not "issued shares minus those issued shares held by the transferor".

[255] The Plaintiffs submit this interpretation is commercially unreasonable. They argue that, in the event one shareholder held two-thirds of the shares of Mapleguard, it would be absurd for that shareholder to be permitted to be the required two-thirds consent to their own transfer. I disagree.

[256] As Mapleguard argues, I find this scenario is not an absurdity. Rather, it is part of the natural state of affairs in a private company, where a majority shareholder can exercise control, provided they are not oppressive. There is nothing commercially unreasonable about this.

[257] Rather, I find it is the scenario the Plaintiffs' interpretation generates that would be the commercially unreasonable one—a scenario where, in the absence of clear wording in the Articles, a majority shareholder would be disentitled from participating in the very transaction it is trying to effect for its own benefit. Or, viewed from another perspective, the Plaintiffs' interpretation would generate the commercially unreasonable scenario where, in the absence of clear wording in the Articles, a transaction in the interests of a company and endorsed by a majority shareholder could be blocked by a potentially self-interested minority shareholder.

(c) Do the consents have to be "informed"?

[258] As I understand it, the Plaintiffs ask me to interpret the Consent Transfer Provision to require that only "informed consents" are valid. They assert that "informed consent" in this circumstance requires the person soliciting the consent to

the transfer to provide shareholders with information about whether any other shareholder has exercised their ROFR.

[259] The Plaintiffs submit that some of the consents were not "informed", and thus not valid, because Mr. Davidge misled some of the Other Shareholders into believing the Davidges were the only potential purchasers of the Disputed Shares by withholding his knowledge that the Plaintiffs had invoked their ROFR.

[260] Once again, I respectfully disagree, not only with the Plaintiffs' proposed interpretation of the Consent Transfer Provision, but also with their assertion that the shareholders were misled by Mr. Davidge, or anyone.

[261] The word "informed" or the phrase "informed consent" do not appear in the Consent Transfer Provision. Adding such a word or phrase, and interpreting that word or phrase in the manner suggested by the Plaintiffs, would impose a significant additional burden on a proposing transferor seeking to use the Consent Transfer Provision. There is no basis upon which I could read such an additional requirement into the provision.

[262] In any event, the Other Shareholders were not misled. On the contrary. By the time of the At This Late Hour Email, they had all received Mr. Rodway's October 25, 2016 letter, which included information and documentation clearly and expressly setting out that the Engelsman Estate was proposing to transfer the Disputed Shares to the Davidges. The At This Late Hour Email also referred to one of the waivers the shareholders had already signed, which was originally referenced in, and attached to, Mr. Rodway's October 25 letter.

[263] Leaving aside Ms. Dunsmore for the moment, I am satisfied the shareholders receiving the At This Late Hour Email knew Mr. Davidge was asking them to consent to a transfer of all of the Disputed Shares to himself and his wife. Mr. Hindle certainly knew, as his email demonstrates. The Waddens specifically stated that they consented to the Disputed Shares going to Mr. Davidge. Ms. Christie has affirmed that her consent was for the Davidges receiving the Disputed Shares. Of course

there is no issue that the Engelsman Estate and the Davidges knew they were consenting to the Disputed Shares being transferred to the Davidges.

[264] Ms. Dunsmore eventually decided to consent to the transfer of all of the Disputed Shares to the Davidges alone on November 29, 2016. Although nothing in the Articles requires consents to be in writing, she provided her clear and unequivocal written consent to this transfer on November 30, 2016. She has affirmed that she understood the nature of her consent. I find that Ms. Dunsmore's initial confusion following the At This Late Hour Email occurred only because she had been previously included, as a director of Mapleguard, in the various emails between legal counsel, including Mr. Rodway's email of November 23, 2016 where he set out the potential apportionment that would occur if both the Plaintiffs and the Davidges used the ROFR Provision and no one used the Consent Transfer Provision. Ms. Dunsmore's confusion was clarified. Her consent to the transfer to the Davidges alone, like the others, was clear and unequivocal.

[265] The Articles do not impose any obligation on proposing transferors, or on proposed transferees, to inform the other shareholders about details of other negotiations, or of any knowledge they may possess about other shareholders' exercise of their ROFR.

[266] Moreover, it must be remembered that in this transaction, Mr. Davidge was a prospective purchaser. Given that both he and Ms. Kermeen were in a conflict of interest, he had no role as a director. The Plaintiffs have alleged that Mr. Davidge misled shareholders into assuming that the Davidges were the only potential purchasers of the Disputed Shares and that he concealed certain information. I have found this not to be the case, but would conclude, if necessary, that it is irrelevant in any event. As a prospective purchaser, Mr. Davidge had no duty to the Other Shareholders to inform them of the details of the negotiations of which he was aware.

Conclusion

[267] Overall, I agree with the defendants' interpretation of the Articles and conclude that the ROFR and the Consent Transfer Provision work together and integrate as follows:

a) A proposing transferor notifies Mapleguard of their intention to make a share transfer and Mapleguard sends the transfer notice to the other shareholders;

b) Shareholders may exercise their ROFR under the ROFR Provision within 14 days from the date of the transfer notice;

c) A proposing transferor can solicit consents under the Consent Transfer Provision during and after the 14-day ROFR period described in (b);

d) If no shareholder exercises a ROFR, then the proposing transferor may market the shares under Article 25.1(d);

e) If a ROFR is exercised, then the shareholder(s) who exercised it may be able to purchase the shares, subject to the Consent Transfer Provision not being invoked before the transfer is registered, and subject to the transfer being refused under the Directors' Absolute Discretion Provision;

f) If a ROFR is exercised but the proposing transferor obtains the required two-thirds shareholder consent and invokes the Consent Transfer Provision before the transfer is registered, then the proposing transferor may proceed under the Consent Transfer Provision and the ROFR process is waived; and

g) Any registration is subject to the Directors' Absolute Discretion Provision.

[268] Further, there are no requirements: (i) that the proposing transferor personally solicit the necessary consents under the Consent Transfer Provision; or (ii) that a consenting shareholder be informed about whether any shareholders have

exercised a ROFR in order for their consent under the Consent Transfer Provision to be valid. Finally, the proposing transferor's consent under the Consent Transfer Provision is to be counted in determining whether the two-thirds threshold has been achieved.

[269] I am satisfied this interpretation aligns with the objective intent of the parties. It gives the words used their ordinary and grammatical meaning, consistent with surrounding circumstances known to the parties at the formation of the Articles, and is, overall, a commercially reasonable interpretation.

[270] I turn now to consider the Plaintiffs' various claims.

Have the Plaintiffs established any breach of any contract?

[271] I have, in the course of my interpretation of the Articles, answered this question already. The answer is no, the Plaintiffs have not established any breach of any contract.

[272] Again, the Plaintiffs claim they have established the existence of two contracts, both of which they say were breached. While their arguments tended, at times, to blur the two, it is important to keep them distinct. They claim they have established a breach of: first, the contract that was created with the Engelsman Estate when they exercised their ROFR; and, second, the contract between all shareholders pursuant to the Shareholders' Agreement and the Articles, to follow the Articles.

[273] Both claims must fail. For the reasons expressed above, I have concluded that the Plaintiffs' interpretation of the share transfer provisions of the Articles is incorrect. As both claims here are grounded in that erroneous interpretation, they cannot succeed.

[274] Regarding the first claim, as I have interpreted the Articles, it is clear that there was never any binding contract between the Plaintiffs and the Engelsman Estate for the purchase and sale of the Disputed Shares. The Plaintiffs' exercise of

their ROFR for the Disputed Shares did not create a binding and enforceable contract.

[275] However, even if I am wrong in this interpretation and it could be found that the Plaintiffs somehow had an enforceable contract with the Engelsman Estate for the Disputed Shares when they exercised their ROFR, the evidence establishes that it was not Mapleguard (or the Davidges) that breached the contract. It was the Engelsman Estate. The obvious defendant for such a claim, it is curious that the Plaintiffs have chosen not to seek any relief against the Engelsman Estate. The Davidges were not a party to the first contract, if such a contract could be found to exist. Mapleguard was not a party to it either. Mapleguard acted only as agent for the proposing transferor, the Engelsman Estate, as set out in Article 25.1(a). If there was a contract, it was the Engelsman Estate who breached it, not Mapleguard.

[276] The second alleged breach of contract claim is a novel one in which the Plaintiffs pursue the defendants for breach of the Articles. This claim can be disposed of succinctly. The Plaintiffs have failed to establish any breach of the Articles, by anyone. For all of the reasons I articulated earlier in interpreting the Articles, I find the defendants followed the Articles in proceeding under the Consent Transfer Provision as they did to ultimately effect the transfer of the Disputed Shares from the Engelsman Estate to the Davidges. Given this conclusion, it is unnecessary for me to determine whether a shareholder has an independent cause of action in contract as against another shareholder and/or the company for a breach of the Articles. There was no breach.

[277] The Plaintiffs' claims in breach of contract are dismissed.

Have the Plaintiffs established that Mr. Davidge induced any breach of contract?

[278] The Plaintiffs allege that Mr. Davidge is liable for the common law tort of inducement of breach of contract. To succeed, the Plaintiffs must establish the following elements: (a) the existence of a contract; (b) that Mr. Davidge was, or can be assumed to have been, aware of the existence of this contract; (c) that he

intended to cause the breach of this contract; (d) that he caused or induced the breach; (e) the absence of a justification; and (f) that they suffered damage as a result: *Super-Save Enterprises Ltd. v. Del's Propane Ltd.*, 2004 BCCA 183 at para. 2; *Himark Homes Ltd. v. Janas*, 2017 BCSC 1719 at para. 21.

[279] The Plaintiffs' claim here fails on the first element. For all of the reasons I have explained in my interpretation of the Articles, the Plaintiffs have failed to establish the existence of the contract they claim Mr. Davidge induced the Engelsman Estate to breach. On my interpretation of the Articles, there was never a binding contract between the Plaintiffs and the Engelsman Estate. Nor was there any breach of the Articles.

[280] I will add, for the sake of completeness, that even if my interpretation of the Articles is wrong and it could be found that the Plaintiffs' acceptance of the ROFR offer constituted a binding contract with the Engelsman Estate, I would nevertheless find this claim would still fail on the evidence that has been adduced, for all of the reasons expressed by the Davidges in their written submissions at paragraphs 84–103.

[281] The Plaintiffs' claim against Mr. Davidge based upon inducement of breach of contract is dismissed.

Have the Plaintiffs established that Mr. Davidge is liable under the tort of unlawful interference with economic relations?

[282] I will also add, again for the sake of completeness, that to the extent the Plaintiffs' pleadings and submissions may also allege that Mr. Davidge is liable under the tort of unlawful interference with economic relations, this claim must also fail.

[283] To be successful here, the Plaintiffs would have to establish the following elements: (a) that Mr. Davidge committed an unlawful act committed against a third party; (b) that he intended to cause economic harm to the Plaintiffs; and (c) this resulted in economic harm to the Plaintiffs: *Low v. Pfizer Canada Inc*., 2015 BCCA

506 at para. 77, leave to appeal to SCC ref'd [2016] S.C.C.A. No. 55 [*Pfizer Canada Inc*.].

[284] The Plaintiffs have failed to establish any of these elements.

[285] Regarding the first element, conduct is unlawful if it would be actionable by the third party or would have been actionable if the third party had suffered loss as a result: *Pfizer Canada Inc.* at para. 79. As I understand it, the Plaintiffs allege that Mr. Davidge acted unlawfully by breaching the Articles by purchasing the Disputed Shares. They also allege he acted unlawfully by withholding disclosure of the Dunsmore Clarification Emails and/or by voting in favour of the transfer to himself at the January 2017 Board of Directors meeting.

[286] Mr. Davidge did not breach the Articles. I am not satisfied that either of the Plaintiffs' other allegations, even if they could be established, could be characterized as an unlawful act.

[287] I have found that Mr. Davidge did not intentionally withhold anything, nor did he mislead anyone. His lawyer knew on the same day as the Dunsmore Clarification Emails that Ms. Dunsmore may not have been consenting to a direct transfer. Even if Mr. Davidge did not forward the emails themselves, this is not conduct that would be actionable by any third party. The Dunsmore Clarification Emails were not relied upon by anyone in entering into the relevant transactions. The sale between the Davidges and the Engelsman Estate did not close until November 30, 2016. By that time, Ms. Dunsmore had signed a formal, written consent form consenting to the direct transfer.

[288] Similarly, I find that Mr. Davidge's act of voting in favour of the transfer was not unlawful. He was (as was Ms. Kermeen I might add) in a conflict of interest, but the Plaintiffs have failed to establish how his voting so would constitute an actionable civil wrong. Section 149 of the *BCA* authorized the directors to approve the Share Purchase Contract. Since Ms. Dunsmore was the only director without a

conflict of interest, her vote in favour of the transfer relieved Mr. Davidge from any further duties or obligations to Mapleguard.

[289] Regarding the second element, the intention required for this tort is an intention to cause economic harm to the Plaintiffs as an end in itself, or an intention to cause economic harm to them because it is a necessary means of achieving an end that serves some ulterior motive: *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12 at para. 95 [*Bram Enterprises*]. The Court in *Bram Enterprises* made it clear that the approach to intention in this context is narrow when they explained that it is the intentional targeting of a plaintiff by a defendant that justifies stretching the defendant's liability so as to afford the plaintiff a cause of action. It is not enough that the harm to the plaintiff is an incidental consequence of the defendant's conduct, even when the defendant realizes that harm to the plaintiff is extremely likely to result: *Bram Enterprises* at paras. 95–97.

[290] As the Davidges argue, the Plaintiffs' claim fails on this element as well. Even if they could establish that Mr. Davidge committed an unlawful act, the Plaintiffs have tendered no evidence that Mr. Davidge intentionally targeted the Plaintiffs as described above. No such intention could be inferred on the facts of this case. There is no need to go further.

[291] The Plaintiffs' claim, based on the tort of unlawful interference with economic relations, is dismissed.

Have the Davidges been unjustly enriched?

[292] The Plaintiffs' alternative position, one not strongly supported on the pleadings or strongly advanced at the hearing, is that the Davidges have been unjustly enriched without juristic reason by wrongfully receiving the Disputed Shares. The Plaintiffs ask me to find that the Davidges hold the Disputed Shares on constructive trust for their benefit, based on the principles of unjust enrichment.

[293] The law surrounding unjust enrichment is well settled. The Supreme Court of Canada summarized the principles of unjust enrichment in *Moore v. Sweet*, 2018

SCC 52 at para. 37 [*Moore*], where it held that a plaintiff will succeed on the cause of action if they can show:

a) that the defendant was enriched;

b) that the plaintiff suffered a corresponding deprivation; and

c) that the defendant's enrichment and the plaintiff's corresponding deprivation occurred in the absence of a juristic reason.

[294] The first two elements of the cause of action are closely related. To establish that the defendant was enriched and the plaintiff correspondingly deprived, it must be shown that something of value—a "tangible benefit"—passed from the latter to the former: *Moore* at para. 41. The Supreme Court of Canada has adopted a straightforward economic approach to the first two elements. Accordingly, other considerations such as moral and policy questions, are appropriately dealt with at the juristic reason stage of the analysis: *Kerr v. Baranow*, 2011 SCC 10 at para. 37 [*Kerr*].

[295] As the purpose of the doctrine is to reverse unjust transfers, it must first be determined whether wealth has moved from the plaintiff to the defendant: *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, 2012 SCC 71 at para. 152.

[296] The third element, the absence of a juristic reason, "means that there is 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": *Kerr* at para. 56. In *Garland v. Consumers' Gas Co.*, 2004 SCC 25, the Supreme Court of Canada adopted a two-step analysis for the absence of a juristic reason as follows:

> [44] … First, the plaintiff must show that no juristic reason from an established category exists to deny recovery. … The established categories that can constitute juristic reasons include a contract (*Pettkus*, *supra*), a disposition of law (*Pettkus*, *supra*), a donative intent (*Peter*, *supra*), and other valid common law, equitable or statutory obligations (*Peter*, *supra*). If there is no juristic reason from an established category, then the plaintiff has made out a prima facie case under the juristic reason component of the analysis.

> [45] The *prima facie* case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. As a result, there is a *de facto* burden of proof placed on the defendant to show the reason why the enrichment should be retained. This stage of the analysis thus provides for a category of residual defence in which courts can look to all of the circumstances of the transaction in order to determine whether there is another reason to deny recovery.
>
> [46] As part of the defendant's attempt to rebut, courts should have regard to two factors: the reasonable expectations of the parties, and public policy considerations. …

[297] I agree with the position taken by the Davidges. The Plaintiffs have not satisfied any of the elements of unjust enrichment. In particular, no wealth has transferred from the Plaintiffs to the Davidges. The Davidges purchased the Disputed Shares from the Engelsman Estate, and not the Plaintiffs, so the benefit they received does not correspond to any deprivation of the Plaintiffs. There is clearly a juristic reason in this case as the Davidges received the Disputed Shares. The Share Purchase Contract was, I find, a valid and enforceable contract, subject to the Directors' Absolute Discretion Clause of course. This is an established category of juristic reason sufficient to deny recovery even if the other elements had been met, which I conclude they have not.

[298] The Plaintiffs' claim based in unjust enrichment is dismissed.

Have the Plaintiffs established oppression under the *BCA*?

[299] The Plaintiffs in their Petition advance a claim of oppression pursuant to s. 227 of the *BCA.* The Plaintiffs allege that Mapleguard acted in an oppressive and unfairly prejudicial manner towards the Plaintiffs by not correctly following the process for disposition of the Disputed Shares. They also allege that Mr. Davidge and Ms. Dunsmore, in their capacities as directors of Mapleguard, acted in an oppressive and unfairly prejudicial manner when voting to transfer the Disputed Shares to the Davidges. Further, the Plaintiffs submit that Mr. Davidge is personally liable for damages arising from those oppressive actions as he personally benefited by becoming the owner of the Disputed Shares.

[300] Section 227 of the *BCA* provides that a shareholder may apply to the court for relief from "oppressive" or "unfairly prejudicial" conduct by the company or its directors.

[301] The leading case on oppression is *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 [*BCE*]. The "oppression remedy" is an equitable remedy to protect the reasonable expectations of corporate shareholders, which seeks to ensure fairness and what is just and equitable: *BCE* at para. 58.

[302] To make out a claim of oppression, the affected shareholder must establish: i) "a reasonable expectation that he or she would be treated in a certain way in the conduct of the company's affairs"; and ii) "that the failure to meet the reasonable expectation is conduct that falls within the concepts of oppression or unfair prejudice of the claimant's interest within the meaning of the *BCA*": *1043325 Ontario Ltd. v. Jeck*, 2014 BCSC 1197 at para. 61, rev'd on other grounds 2016 BCCA 258, leave to appeal to SCC ref'd [2016] S.C.C.A. No. 383 [*Jeck*]; *BCE* at para. 68.

[303] In *BCE*, the Court discussed reasonable expectations and factors that may assist in determining whether a reasonable expectation exists:

> [62] As denoted by "reasonable", the concept of reasonable expectations is objective and contextual. The actual expectation of a particular stakeholder is not conclusive. In the context of whether it would be "just and equitable" to grant a remedy, the question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations.
>
> […]
>
> [72] Factors that emerge from the case law that are useful in determining whether a reasonable expectation exists include: general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders.

[304] As explained in *BCE,* not every unmet expectation necessarily means there has been oppressive or unfairly prejudicial conduct:

> [67] Having discussed the concept of reasonable expectations that underlies the oppression remedy, we arrive at the second prong of the s. 241

> oppression remedy. Even if reasonable, not every unmet expectation gives rise to claim under s. 241. The section requires that the conduct complained of amount to "oppression", "unfair prejudice" or "unfair disregard" of relevant interests. "Oppression" carries the sense of conduct that is coercive and abusive, and suggests bad faith. "Unfair prejudice" may admit of a less culpable state of mind, that nevertheless has unfair consequences. …

[305] Finally, a claim pursuant to s. 227 protects a shareholder's rights as a shareholder, and not any rights that shareholder may also have in other capacities such as an employee: *Azam v. Andrews Custom Furniture Designs Inc.*, 2022 BCSC 1166 at para. 13 [*Azam*]. Accordingly, Mapleguard submits that Ms. Kermeen's interests as a director of Mapleguard are not relevant to any inquiry under s. 227.

Reasonable Expectations

[306] The Plaintiffs take the position that any breach of a shareholder agreement, company articles or the requirements of the *BCA* would constitute a violation of the reasonable expectations of a shareholder. In this regard, the Plaintiffs rely on Justice Norell's comments in *Azam*, which outline the importance of a company's articles and applicable statutory requirements in determining a shareholder's reasonable expectations:

> [45] The starting point in determining the reasonable expectations of Azam is the legal rights described in the Article. There may be equitable rights beyond the strict legal rights which the doctrine of reasonable expectations may also protect: *Jeck* at paras. 123-124; *BCE* at para. 71; *Runnalls v. Regent Holdings Ltd.*, 2010 BCSC 1106 [*Runnalls*] at para. 42.
>
> […]
>
> [47] For the following reasons, I find that Azam had and continues to have reasonable expectations that Singh and Andrews would comply with the Articles and statutory requirements of the BCA, and more specifically, that AGMs would be held and Azam would receive accurate and audited financial statements.
>
> [48] The right to attend an AGM and the right to audited financial statements are clear legal rights vested in Azam. There is no suggestion in the evidence that Azam purchased shares and did not care what was taking place within Andrews. The evidence is to the contrary. On Azam's evidence he demanded the "real" financial statements. On Singh's and Krishna's evidence, Azam was clearly interested in how the business was doing financially, as they said they gave him full access to Andrews' financial information and Azam attended regularly at Krishna's office for that purpose. I adopt the comments of Justice Sigurdson in *Jeck* at para. 104:

> [104] I think it is objectively a reasonable expectation among shareholders, absent other evidence, that statutory corporate requirements, particularly those dealing with the financial affairs of the company, would be complied with.

[307] The Plaintiffs' evidence regarding their expectations was, simply, that they expected Mapleguard and its directors to follow the Articles and had they done so, the Disputed Shares would have been sold to them.

[308] I agree with the position taken by Mapleguard and find the Plaintiffs' asserted expectations are not reasonable.

[309] First, the Plaintiffs pre-suppose that there has been a breach of the Articles by the Board of Directors' not following their interpretation of the Articles. Second, the Plaintiffs' position overlooks the discretion afforded to the directors of Mapleguard regarding share transfers, and assumes that they would have acquired all of the Disputed Shares, when the evidence contradicts this position.

[310] The Plaintiffs say the transfer of the Disputed Shares to the Davidges was a violation of the Articles, but I have concluded it was not. The Consent Transfer Provision could be invoked at any time prior to the transfer of the Disputed Shares. The Engelsman Estate obtained the requisite consents under the Consent Transfer Provision and was entitled to transfer the Disputed Shares to the Davidges as it did.

[311] Further, the Directors' Absolute Discretion Clause permits the directors to refuse to register any transfer, with no reasons given. The ROFR Provision also permits a proposing transferor to withdraw from the ROFR with director's approval. In these circumstances, I conclude the Plaintiffs could not have objectively had a reasonable expectation that they would be entitled to receive the Disputed Shares, or a *pro rata* portion, simply upon their exercising their ROFR.

[312] The Plaintiffs' reasonable expectations must be further tempered by the fact that the events in question were the first time that the ROFR had ever been invoked. The Plaintiffs themselves had to ask for an explanation from Mr. Rodway. While they assert that this explanation of the share transfer process informed their reasonable

expectations, this overlooks the fact that Mr. Rodway's description of the process assumed no one exercised their ROFR. The explanation they received did not speak to what would happen if the ROFR was exercised.

[313] The Plaintiffs' expectations are not based on the Articles, but in fact arise from the legal opinion that they obtained. This illustrates the complexity of the situation. The Plaintiffs' goal was to purchase the Disputed Shares. Their lawyer provided an opinion on the interpretation of the Articles with that goal in mind.

[314] Ultimately, I find the Plaintiffs' asserted expectation that they would be entitled to the Disputed Shares by exercising their ROFR was not reasonable upon consideration of the entire context, which included that the ROFR had never before been used, the Consent Transfer Provision existed in the Articles, and any transfer of shares was subject to the Directors' Absolute Discretion Clause.

[315] The Plaintiffs have failed to establish the violation of their reasonable expectations concerning how the transfer of the Disputed Shares would proceed in this case. They are understandably disappointed that they did not receive the Disputed Shares, but this does not mean their expectations were reasonable in the circumstances.

Oppression, Unfair Prejudice or Disregard

[316] As noted, not every unmet expectation is the result of conduct that is oppressive or unfairly prejudicial.

[317] The term "oppression" implies the absence of good faith; oppression focuses, therefore, on the character of the conduct complained of: *Discovery Enterprises Inc. v. Ebco Industries et al.*, 2002 BCSC 1236 at para 207 [*Discovery Enterprises*]. Conduct does not have to be malicious, intentionally harmful or based on improper motive in order to be oppressive; nor does a single act need to constitute oppressive or unfairly prejudicial conduct, it is the combination of acts that must be examined in their totality: *Gierc Jr. v. Wescon Cedar Products Ltd.,* 2021 BCSC 23 at para. 87.

[318] In the context of s. 227, “unfair prejudice” has a broader meaning than “oppression”. Accordingly, conduct that is oppressive is also unfairly prejudicial, but conduct that is unfairly prejudicial is not necessarily oppressive: *Discovery Enterprises* at para. 208.

[319] In *Discovery Enterprises,* this Court discussed the meaning of “unfair prejudice”:

> [209] The phrase “unfair prejudice” is designed to ensure that actions taken by a corporation in good faith are, at the same time, “just and equitable” from the perspective of all shareholders… In considering whether conduct is unfairly prejudicial, the emphasis is on the effect of the conduct on the complaining shareholder. In that regard, one should have regard for the provisions of the articles of the company, the provisions of any agreement between the shareholders, factors that may define the reasonable expectations of the shareholders, and the base question of whether that which was done was fair to the shareholders as a whole...
>
> [Citations omitted.]

[320] Even if the Plaintiffs had established a reasonable expectation of receiving the Disputed Shares, they have failed to establish oppressive conduct or unfair prejudice.

[321] The Plaintiffs have provided no evidence of bad faith and cannot therefore establish “oppressive” conduct. In fact, I am satisfied from the whole of the evidence that Mapleguard and its directors acted in good faith at all times.

[322] The Plaintiffs have not established that Mapleguard’s actions, or those of its directors, unfairly prejudiced or unfairly disregarded their expectations as shareholders either.

[323] As Mapleguard argues, this case involved making a decision that was bound to disappoint someone. The situation facing Mapleguard, and Ms. Dunsmore as the disinterested director, at the time was as follows:

a) The Engelsman Estate had negotiated a deal for the sale of the Disputed Shares to the Davidges;

b) The Plaintiffs then sought to exercise their ROFR under the ROFR Provision;

c) The Davidges then, in an effort to reserve all of their rights, also sought to exercise their ROFR;

d) The Engelsman Estate then secured consent from more than two-thirds of the shareholders for a direct transfer of the Disputed Shares to the Davidges under the Consent Transfer Provision;

e) The Engelsman Estate then requested that Mapleguard transfer all of the Disputed Shares to the Davidges;

f) Mr. Ferguson believed Mr. Davidge was pursuing a scheme to obtain control of Mapleguard and liquidate it for his personal benefit, and Ms. Dunsmore believed that apportionment of the shares between the Davidges and the Plaintiffs would be detrimental to Mapleguard; and

g) Mr. Rodway provided the Rodway Opinion, as Mapleguard's corporate solicitor, to the Board of Directors opining that the consent process rendered the ROFR inapplicable and recommending approval of the transfer proposed by the Engelsman Estate.

[324] Ms. Dunsmore had to make a decision on the proposed transfer of the Disputed Shares to the Davidges. This decision necessarily involved considering the other potential alternative, which was a *pro rata* division of the Disputed Shares between the Plaintiffs and the Davidges. Pursuant to the Directors' Absolute Discretion Provision, Ms. Dunsmore had discretion to reject any proposed transfer.

[325] Directors are required to make decisions that are in the best interests of the company. They are best-positioned to make those determinations and their decisions are entitled to some deference. Ms. Dunsmore was aware of the alternatives and made a determination of what was in the best interests of

Mapleguard. Although entitled to some deference, I find her decision was, objectively, the right one.

[326] If Ms. Dunsmore had exercised her discretion differently and the Disputed Shares had been apportioned, it is not hard to predict the problems that would have arisen. The Davidges likely would have commenced litigation, particularly because Mapleguard's counsel had given the Board of Directors his opinion favouring the proposed transfer to the Davidges. As well, Mapleguard would have been faced with trying to manage the difficulties that would inevitably arise out of co-ownership and management of the three units corresponding to the Disputed Shares by the Plaintiffs and the Davidges. Mr. Ferguson's email made this abundantly clear. None of this would have been in Mapleguard's best interests.

[327] The Plaintiffs suggest that Ms. Dunsmore communicating directly with Mr. Rodway and Mapleguard's related claim of privilege forms part of the unfair disregard. I do not agree.

[328] While there was some communication between Ms. Dunsmore and Mr. Rodway during these events which did not involve Ms. Kermeen (or Mr. Davidge for that matter), I am satisfied this was appropriate in the circumstances. It is also irrelevant.

[329] Ms. Kermeen's complaints here are as a shareholder, and not as a director. Were she not a director, she would have had no involvement in the Board of Directors seeking advice on the situation and, therefore, the fact that she was not included in all communication with Mr. Rodway is not relevant to the issue of shareholder oppression.

[330] Finally, Mr. Rodway's opinion and recommendations as set out in the Rodway Opinion, was sent to all the directors, including Ms. Kermeen. Mr. Rodway's final opinion was that the Consent Transfer Provision had been validly used to negate the ROFR.

[331] In all of the circumstances, Ms. Dunsmore's considered decision to approve the transfer of the Disputed Shares to the Davidges cannot be considered to unfairly disregard or prejudice the Plaintiffs. Mapleguard carefully considered the options, and the interests of the shareholders as a whole, and reached a decision. Clearly the Plaintiffs are disappointed, but Ms. Dunsmore had to make a decision she determined was in the best interests of Mapleguard. Her decision did not unfairly disregard or prejudice the Plaintiffs. Objectively, she made the correct decision.

[332] The Plaintiffs' oppression claim is dismissed.

Conclusion

[333] For all of these reasons, all claims in the Action and the Petition are dismissed. Unless there are matters counsel wish to bring to my attention, the Davidges and Mapleguard are entitled to their costs of both the Action and the Petition to be assessed on the ordinary scale. My thanks to all counsel for their thorough submissions in this most interesting case.

"S.A. Donegan J."

DONEGAN J.