IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *1155204 B.C. Ltd. v. NV Highway Properties Ltd.,* 2024 BCSC 248

Date: 20240213
Docket: S1813796
Registry: Vancouver

Between:

1155204 B.C. Ltd. and 1172111 B.C. Ltd.

Plaintiffs

And

NV Highway Properties Ltd. and Catalina Facilities Rental Properties Ltd.

Defendants

Before: The Honourable Madam Justice Forth

Reasons for Judgment

Counsel for the Plaintiffs:	W.J. McMillan N. Kamoosi M. Stewart, Articled Student
Counsel for the Defendants:	S.T. Robertson E. Snow Y. Nijm, Articled Student J. Robertson-Taylor, Articled Student
Place and Date of Trial:	Vancouver, B.C. June 12-16, 19-20, 22-23, 2023
Place and Date of Judgment:	Vancouver, B.C. February 13, 2024

Introduction

[1] This action involves a failed transaction for the purchase and sale of properties in North Vancouver, British Columbia. The main issue in this trial was whether a deposit of $1,250,000, paid by the plaintiffs to the defendants, should be returned to the plaintiffs or whether the defendants are entitled to keep the deposit.

[2] The plaintiffs' claim is that the contract of purchase and sale for the properties (the "Contract") was unenforceable on the basis that the defendants did not own or have the authority to sell the shares and/or that there was no *consensus ad idem* regarding the essential terms of the Contract. They further claim, in the alternative, that the defendants breached the Contract by failing to be ready, willing, and able to complete the transaction by the closing date of the Contract and/or the defendants breached the essential terms of the Contract.

[3] The defendants submit that the Contract is enforceable, it recorded the parties' intention to be bound and the essential terms, and it was the plaintiffs who chose not to complete the Contract. As such, the deposit, which was non-refundable, should not be returned.

The Parties and the Property

[4] Farzad Mazarei is the authorized representative of the plaintiffs, 1155204 B.C. Ltd., ("1155") and 1172111 B.C. Ltd. ("1172").

[5] In 2018, Davoud Mirtaheri and Mr. Mazarei were the only directors of 1172.

[6] In 2018, the only directors of the defendants, NV Highway Properties Ltd., ("NV Highway") and Catalina Facilities Rental Properties Ltd. ("Catalina Rental"), were: Ian Bond, James B. Bond, Moray B. Keith, and Greg Keith. Both NV Highway and Catalina Rental were 100% owned by Catalina Facilities Holdings Ltd. ("Catalina Holdings").

[7] In 2018, Mr. M. Keith and Mr. J. Bond were the only directors of Catalina Holdings.

[8] The dispute involves three contiguous commercial real estate properties with an existing residential rental complex of 46 units at 2855, 2875, and 2931 Mountain Highway, North Vancouver, British Columba (the “Properties”). The Properties were managed by Vista Realty Ltd.

[9] The defendants, through another corporate entity, purchased the Properties in 2013. At the time, Robert Greer of Avison Young, a real estate services firm, was engaged as their representative.

[10] The defendants held the Properties under a bare trust arrangement whereby the legal and beneficial ownership was divided between the defendant companies. Legal title was held by NV Highway and beneficial title was held by Catalina Rental.

Relevant Background

[11] On or around May 2, 2016, NV Highway and Avison Young entered into an exclusive listing agreement under which Avison Young agreed to list, market, and enter into negotiations regarding the sale of the Properties. Mr. Greer represented the defendants in all negotiations, discussions, and exchanges of offers between the defendants and 1155.

[12] The Properties were marketed for sale as a development property. The marketing brochure prepared by Avison Young noted that the Properties were held in a bare trust with the potential to save property transfer tax (“PTT”).

[13] Jon Pezzente of Sutton Group West Coast Reality represented the plaintiffs in the negotiations. Neither Mr. Pezzente nor Mr. Greer had authority to contractually bind their respective clients regarding the Contract or any amendments to it.

[14] In late 2017, Mr. Pezzente became aware of the Properties and informed Mr. Mazarei about them.

[15] On March 2, 2018, on Mr. Mazarei’s instructions, Mr. Pezzente prepared a draft offer to purchase the Properties and sent it to Mr. Mazarei for his review. The

offer described the seller as NV Highway and listed a purchase price of $24,000,000 plus GST.

[16] On March 5, 2018, Mr. Pezzente asked Mr. Greer to confirm the “sellers name and address”. After receiving the information, Mr. Pezzente prepared a new draft of an offer to purchase which contained the name of the buyer as 1155 and added Catalina Rental as a beneficial owner. The offer was sent to Mr. Greer. This offer contained a clause titled, “Election to Proceed by Way of Share Acquisition” which Mr. Pezzente agreed was something he had “cut and pasted” from other forms.

[17] On March 22, 2018, Mr. Greer sent Mr. Pezzente a new draft of an offer form, which was sent to Mr. Mazarei for review. This form contained the following relevant terms:

i. Purchase price of $26,250,000;

ii. NV Highway is named as the “Nominee”;

iii. Catalina Rental is named as the “Beneficial Owner”;

iv. Catalina Rental and NV Highway are jointly named as the “Vendor”;

v. A provision granting the Purchaser an option to purchase solely NV Highway’s shares.

[18] Between April 11, 2018 and May 1, 2018, various offers were exchanged ultimately leading to the Contract that was signed on May 1, 2018. The focus of the negotiations was on the purchase price, the deposit amounts, the subject removal dates, and the closing date.

[19] Throughout the negotiations, Mr. Pezzente and Mr. Greer never discussed the purchase of Catalina Rental. The evidence of the sellers was that from the time they listed the Properties for sale through the fall of 2018 they never intended to sell Catalina Rental.

[20] The relevant terms of the Contract provided:

a) The “Seller” is defined as “NV Highway as legal owner” and “Catalina as beneficial owner”;

b) The “Buyer” is defined as 1155;

c) The Buyer offers to purchase the Properties;

d) The purchase price of $25,900,000 plus GST (Clause 1(a));

e) A Closing Date of November 15, 2018 (Clause 2) with the following wording: “The Buyer shall cause its solicitor to prepare all closing documents, required to facilitate the transfer of the property to the Buyer and the completion of this transaction and to forward same to the Seller’s solicitor not less than seven (7) business days prior to the Closing Date” (“Closing Documents Clause”);

f) A Time is of the Essence clause that provided (Clause 4): “Time shall be of the essence in this Agreement, and, unless the balance of the Purchase Price is paid by the Buyer to the Seller on or before the Closing Date, the Seller may, at this option, cancel the Agreement, and in such event, any deposits paid by the Buyer to the Seller under this Agreement and interest accrued thereof shall be absolutely forfeited to the Seller as liquidated damages as a genuine pre-estimated of the damages with no further recourse by either party against the other”.

g) Clause 9 provided that certain documents had to be produced within ten (5) business days of the offer being accepted including:

> …
>
> (ii) All tax returns for the Seller for the prior two years;
>
> …
>
> (vii) True copies of all commercial leases, all services, maintenance, leasing, management and other contracts, or other agreements pertaining to the Lands;

(viii) A certified rent roll setting out the following items:

a. Name of tenant;

b. Address;

c. End of leasing terms;

d. annual rent;

e. Annual triple net costs for the two years immediately prior;

…

(xv) A general authorization and release allowing the Buyer to make such inquiries and to obtain such records as may be necessary or desirable in conducting its due diligence of the Seller or the Property along with its execution of such specific forms and authorization as may be required to be completed by third parties.

[21] Of particular significance was a share election clause (Clause 13) that stated:

13. ELECTION TO PROCEED BY WAY OF SHARE ACQUISITION

The Buyer may, up to 30 days prior to the Closing Date, unilaterally choose to convert this Agreement to purchase the Property to an agreement to purchase all of the outstanding and issued capital and shares in the Seller for the Purchase Price under the same payment terms set out above in paragraph 1, by providing the Seller with a written notice of its election to do so (The "Share Election Notice")

Prior to the Buyer issuing a Share Election Notice it may request in writing from the Seller copies of the following disclosure documents which the Seller shall promptly provide:

i. The corporate minute book of the Company;

ii. All material contracts the Seller is currently bound by including any debt instruments;

iii. Current general ledger, balance sheet and income statement for the Seller;

iv. All tax filings including corporate, source deductions, PST and GST for the 5 years immediately proceeding;

v. Such further and other documents as the Buyer may reasonable [*sic*] require to complete its due diligence of the Seller.

(the "Share Purchase Option")

[22] There were also clauses dealing with tenancy agreements and other leases, services and maintenance contracts which provided:

> **22. SELLER'S EXISTING CONTRACTUAL OBLIGATIONS**
>
> …
>
> (b) The Seller will not from the date hereof, to and including the Closing Date, materially vary the terms and conditions of any tenancy agreement, or further encumber the Lands in any way not to be unreasonably withheld. The Seller or his agent will operate and manage the Lands until completion in the same manner as would a prudent owner of a comparable property.
>
> (c) The Seller shall not enter into or amend any contract with respect to the Property, including any leases, services and maintenance contracts before Closing Date without prior written approval by the Buyer.

[23] On May 7, 2018, Mr. Greer sent Mr. Pezzente and the defendants a Transaction Summary Sheet which defined the vendor as Catalina Rental.

[24] On May 7 and 8, 2018, the defendants, through Avison Young, sent Mr. Pezzente the documents referenced in Clause 9 of the Contract.

[25] On June 25, 2018, the parties executed an addendum to the Contract, which increased the deposit payable, waived three of the four conditions precedent, and extended the deadline for removing the final condition precedent (the "First Addendum").

[26] On July 5, 2018, the parties executed a second addendum to the Contract, which decreased the purchase price and deposit, waived the final condition precedent, and changed the Share Purchase Option ("the Second Addendum"). The variation to the Share Purchase Option was the addition of the words "*mutatis mutandis* as this agreement" being added at the request of the purchaser's lawyer, Timothy Murphy.

[27] On July 9, 2018, 1155 paid the defendants $1,200,000, pursuant to the Contract. The $1,200,000, along with $50,000 previously paid on May 2, 2018, formed the deposit under the Contract (the "Deposit").

[28] In an email dated September 5, 2018, Mr. Murphy reached out to counsel acting for the sellers, Brian MacKay, advising that his clients had assigned the purchase agreement from the current purchaser, 1155, to 1172. He further stated:

> Also as mentioned, our client is contemplating conversion to a share purchase pursuant to Clause 13 of the purchase agreement. Accordingly, we would be grateful if your office could provide us with initial disclosure documents, as follows:
>
> - The corporate minute book of NV Highway Properties Ltd. (the "Company");
> - All material contracts the Company is currently bound by, including any debt instruments;
> - Current general ledger, balance sheet and income statement for the Company; and
> - All tax filings, including corporate, source deductions, PST and GST, for the last five years.
>
> We will send over a more fulsome due diligence list and search authorization forms for the principals of the Company in due course….

[29] By email on September 5 and 6, 2018, Mr. MacKay provided Mr. Murphy with the following documents requested for NV Highway, including contracts and debts of NV Highway, services contracts and leases, mortgage, declaration of trust agreement, and financial statements from 2014-2016.

[30] In addition, on September 5, 2018, Mr. MacKay sent over the minute book for NV Highway.

[31] On September 12 and 13, 2018, Mr. Murphy's office requested a due diligence authorization form for NV Highway. Mr. M. Keith signed and returned the document.

[32] On September 24, 2018, Mr. Murphy's office wrote to Mr. MacKay, copying Mr. Murphy and Mr. Mazarei, enclosing the due diligence request list that only requested documents for NV Highway. The subject line states: "Share Purchase of NV Highway Properties Ltd. (the "Company")".

[33] On October 15, 2018, Mr. Murphy sent a letter on behalf of the 1172, issuing the Share Election Notice under the Share Purchase Option. The letter reads:

> **RE: NV Highways Properties Ltd. – Election to Proceed as Share Purchase**
>
> As discussed during our telephone call today, our client has elected, pursuant to Section 13 of the Offer to Purchase dated April 22, 2018 between our clients, to proceed by way of a share purchase.
>
> Please accept this letter as notice of same.

[34] The copy of the letter indicates it was copied to "Client, Realtors".

[35] On October 26, 2018, after the Share Election Notice had been issued by 1172, 1172's accountant, John Yeum, requested copies of financial statements for Catalina Rental from Mr. MacKay for the first-time.

[36] On November 15, 2018, 1172 exercised its right to extend the Closing Date to December 17, 2018 by paying a further $100,000 to the defendants (the "Extension Fee").

[37] On November 15, 2018, Mr. MacKay responded to Mr. Yeum stating:

> …Catalina is not being purchased, it is selling real property. It is a separate legal entity and its financials are private. Due diligence to ensure that there are no liens on the property is fine and I thought was already completed by [Mr. Murphy].

[38] Mr. Yeum responded the same day with the following:

> …These questions were prepared and sent to [Mr. Murphy] a few weeks ago on the basis that Catalina is being purchased. I agree that the questions below are not relevant given that Catalina is now selling the real property.

[39] On November 22, 2018, the following email exchange took place between Mr. Murphy and Mr. MacKay:

- Mr. Murphy:

  > I spoke to my clients and they have indicated that, at least in their minds, the intent was to purchase the shares of both companies through exercise of the option for the current purchase price. It appears though that may have not been the intention of your clients.

- Mr. MacKay:

  > Why in the world would they want to buy the beneficial owner and lose $10 million in costs. Again we can do that but I can't understand any reason why the Buyer would want that.

- Mr. Murphy:

  > Please arrange for the minute books and financials to be sent over so we can have a look.

[40] On November 26, 2018, Mr. MacKay provided the 2016 financial statements for Catalina Rental and 2017 "year-end internals" to Mr. Murphy. The financial statements were forwarded on to Mr. Yeum.

[41] The financial records showed that Catalina Rental was in a deficit position, with approximately $14 million in liabilities, and a cost basis for the Properties of approximately $13 million.

[42] After the financial statements were provided to Mr. Yeum, no further requests were made for the minute book of Catalina Rental.

[43] On December 12, 2018, counsel for the plaintiffs advised that the Contract was not enforceable and that there was a failure to provide documents as required in Clause 13, which is in breach of the Contract (the "Termination Letter").

[44] On December 13, 2018, counsel for the defendants responded to the Termination Letter, advising that the defendants were prepared to give effect to the sale of the shares of Catalina Rental.

[45] There were no closing documents tendered under the Contract and the transaction did not close on December 17, 2018.

[46] On December 19, 2018, counsel for the defendants stated that the defendants were ready, willing and able to proceed by way of a share purchase of both NV Highway and Catalina Rental and that as a consequence of the buyer failing to pay the balance of the purchase price, the seller was exercising its option

under Clause 4 of the Contract, accepting forfeiture of all deposits paid and all accrued interest as liquidated damages.

[47] After December 19, 2018, the plaintiffs placed a certificate of pending litigation ("CPL") on the Properties.

[48] On July 21, 2020, the Bank of Montreal, at the request of Catalina Rental, issued 1172 a letter of credit for $1,200,000 in relation to the removal of the CPL. The $1,200,000 is being held in trust by counsel for the defendants, on the condition that it will not be released other than by agreement of the parties or by a court order.

[49] In July 2020, the defendants sold the Properties for $17,000,000.

Assessment of Credibility

[50] A key area of conflict in this dispute is whether the parties focused on the sale of both defendant companies in entering into the contract. The parties tendered conflicting evidence on this issue, which requires me to make credibility assessments in order to make findings of fact.

[51] Justice Mayer provides a helpful summary of the principles and methodology used in assessing a witness' credibility in *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2019 BCSC 739 at paras. 91–92, aff'd 2020 BCCA 130, leave appeal to SCC ref'd [2020] S.C.C.A. No. 218:

> [91] An acceptable methodology for assessing credibility is to first consider the testimony of a witness on its own followed by an analysis of whether the witness' story is inherently believable in the context of the facts of the entire case. Then, the testimony should be evaluated based upon the consistency of the evidence with that of other witnesses and with documentary evidence, with testimony of non-party, disinterested witnesses being particularly instructive. At the end, the court should determine which version of events is the most consistent with the preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.
>
> [92] Some additional factors which may impact credibility include the following:
>
> > a) A series of inconsistencies, considered in their totality, may become quite significant and cause the trier of fact to have a reasonable doubt about the reliability of the witness' testimony:

> see paras. 57-59, 86 of *F.H. v. McDougall*, 2008 SCC 53, adopting the comments of Rowles J.A. at paras. 28-29 in *R. v. R.W.B.* (1993), 24 B.C.A.C. 1.
>
> b) Where a witness is found to have lied under oath, their credibility may be wholly undermined: *Le v. Milburn,* 1987 CarswellBC 2936 (W.L.) at para. 1; *Jones v. Jones,* 2008 BCSC 1401 at paras. 31, 32 and 60; *Hardychuk v. Johnstone,* 2012 BCSC 1359 at para. 9.
>
> c) Collusion and deception between two or more witnesses in the course of a litigation may taint the entirety of a witness's evidence: *Bradshaw* at para. 190;
>
> d) Credibility will be undermined when a witness seeks to rely on false documents regarding the issues at trial: *Osayande v. Canada (Minister of Citizenship And Immigration),* 2002 FCT 368 at paras. 19 and 21;
>
> e) Credibility will be undermined when a witness (or party) has failed to produce documents: *Bradshaw* at para. 188; *Pacific West Systems Supply Ltd. v. Vossenaar*, 2012 BCSC 1610 at paras. 84 to 86;
>
> f) Credibility will be in doubt when a witness's explanation defies business logic or common sense: *R. v. Storey,* 2010 NBQB 86 at para. 78; *Wang v. Wang*, 2017 BCSC 2395 at paras. 45-46 and 89-90; and
>
> g) Credibility may be impacted when a witness is evasive, longwinded and argumentative in their responses to questions: *Bradshaw* at paras. 191 to 192.
>
> [Emphasis in original.]

[52] Frequently, the most reliable evidence is to be found in contemporaneous written documentation:

> [28] In any commercial dispute which does not proceed to trial for many years after the events in issue, it is not surprising to find serious conflicts in the evidence as memories fade and positions harden. The result will often be the reconstruction of events to accord with the position advanced by the litigants. That is not to say that the litigants are intentionally dishonest when testifying. Although that may be true in some cases, more often witnesses who have a stake in the outcome of the litigation will have adopted as their evidence a version of events which has emerged and evolved over time through the litigation process and which favours their legal position.
>
> [29] In such circumstances the most reliable evidence as to what transpired will likely be found in contemporaneous documentation. In addition, the evidence of independent witnesses and the actions of all witnesses at the time events unfolded will more often reflect reality than a view of the past presented through reconstructive lenses. Further, the consistency or lack of consistency of the evidence of an interested witness

> with the contemporaneous documentation and with the evidence of independent witnesses will often be a valuable indicator of reliability.

Wu v. Sun-Gifford, 2001 BCSC 191.

Mr. Mazarei's Evidence

[53] The defendants challenge the credibility of Mr. Mazarei's evidence that he was focused on purchasing the shares of both seller companies. They do so on the basis of the objective documentary evidence, which the defendants argue is inconsistent with Mr. Mazarei's evidence. They point to the following documents as being inconsistent with his evidence:

- The subscription agreement for the partnership agreement and the partnership agreement make no mention of the purchase of shares of Catalina Rental;
- The First and Second Addendums, both reviewed and signed by Mr. Mazarei, which refer to: "THE SELLER: NV HIGHWAY PROPERTIES LTD.";
- An email, sent on July 20, 2018, by Mr. Mazarei to Mr. Pezzente, in which he stated:

  > This is unfortunately not what we are looking for. We need Financial Statements for the last two years. Please make sure that send it to us as soon as possible. It's becoming a problem and can eventually become a $500K issue. We are trying to take over the co and without it, it would [sic] impossible unless we pay $500k [property transfer tax].

- An email, sent on September 5, 2018, by Mr. Murphy to Mr. MacKay requesting documents pursuant to the Share Purchase Option for only NV Highway. Mr. Mazarei was blind copied on the email;
- The assignment agreement between the plaintiffs dated August 10, 2018 signed by Mr. Mazarei, which described the seller as NV Highway;
- A letter, dated September 5, 2018, sent from Mr. MacKay to Mr. Murphy, to which Mr. MacKay enclosed the minute book for NV Highway and sought an

undertaking not to change or make any alterations without their consent or "until your client has completed the purchase of the shares of [NV Highway];

- The September 12, 2018 due diligence authorization form requested from Mr. Murphy's office, which pertained only to NV Highway;
- The September 24, 2018 email enclosing the due diligence request, which listed only requested documents from NV Highway; and
- The October 15, 2018 letter from Mr. Murphy to Mr. MacKay notifying the defendants of 1172's election under the Share Purchase Option, which referred only to NV Highway in its "Re:" line and in the subject line of the covering email.

[54] The defendants further argue that if Mr. Mazarei had intended from the beginning of the negotiations to purchase the shares of both NV Highway and Catalina Rental, he would have requested documents for both companies under the Share Purchase Option in order to complete the necessary due diligence, before issuing the Share Election Notice, not simply the documents pertaining to NV Highway.

[55] I accept that the objective documentary evidence supports that the initial intention was that only the shares in NV Highway were planned to be purchased. It appears that in approximately mid-October 2018, the plaintiffs decided to also demand the purchase of the shares in Catalina Rental.

[56] The defendants also argue that Mr. Mazarei's evidence defies business logic. In their submissions, they argue:

> …the plaintiffs' evidence is fundamentally inconsistent with the "preponderance of possibilities which a practical and informed person would readily recognize as reasonable" and defies common sense. The plaintiffs' version of events would lead to a commercially absurd result.

[57] In support, the defendants rely on the Court of Appeal's comments in *Blackmore Management Inc. v. Carmanah Management Corporation*, 2022 BCCA 117:

> [42] 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: *Resolute FP Canada Inc. v. Ontario (Attorney General)*, 2019 SCC 60 at paras. 142–144 at para. 142 (Côté and Brown JJ., dissenting but not on this point) [*Resolute*]. As Justices Côté and Brown explained in *Resolute*:
>
> > [144] Given, then, the choice between an interpretation that allows the contract to function in furtherance of its commercial purpose and one that does not, it is generally the former interpretation that should prevail. While a party cannot avoid its contractual obligations simply because the bargain that they entered into was undesirable or unusual, commercially absurd interpretations should be avoided. As this Court said in *Guarantee Co. of North America v. Gordon Capital Corp*., "[i]f a given construction of the contract would lead to an absurd result, the assumption is that this result could not have been intended by rational commercial actors in making their bargain, absent some explanation to the contrary".
>
> [Citations omitted.]
>
> See also the reasons the majority: *Resolute* at paras. 79–80.

[58] The defendants rely on the evidence of Hugh Woolley, chartered professional accountant, with experience as a tax consultant in the real estate industry in support of this position.

Expert Evidence of Hugh Woolley

[59] Mr. Woolley prepared a report dated March 16, 2023 and testified at the trial on behalf of the defendants. The plaintiffs argue that Mr. Woolley's opinion should be given little weight on the basis that the type of dealings Mr. Woolley has been involved in are materially different from the case at bar.

[60] I reject this submission of the plaintiffs. I was and am persuaded that Mr. Woolley has the necessary qualifications and expertise to opine on the tax implications of real estate transactions involving bare trust corporations and the industry practice related to the purchase and sale of real estate held in bare trusts in British Columbia.

[61] I am persuaded that Mr. Woolley's opinion is relevant to the issue of the associated tax implications of the sale of the shares and the assigned cost basis in commercial real estate deals. I agree that this opinion is of some assistance in

assessing the commercial reasonableness of the actions of the plaintiffs. I accept that issues relating to tax implications and the associated "assigned cost basis" are issues that are outside the ordinary experience or knowledge of the trier of fact: *CMC Engineering and Management Limited v. Pinnacle Renewable Energy Inc.*, 2018 BCSC 2457 at para. 15.

[62] I accept the following opinion evidence from Mr. Woolley:

- The fair market value purchase price of the Properties was $25,500,000 and the book costs of the property to Catalina Rental was only $13,371,203 so the potential loss in tax basis would have been $12,128,797;

- Based on his experience, no purchaser would take this tax risk when they had the option of purchasing the beneficial ownership in the Properties directly whereby their tax basis would be guaranteed to be the $25,500,000 purchase price;

- If the Properties were redeveloped by the plaintiffs, their potential additional tax expenses would have been over $3 million; and

- He has never been involved in a situation where a purchaser would voluntarily opt to acquire the beneficial shares of the corporation that was the beneficial owner of the real property.

[63] On the totality of the evidence, I do not accept Mr. Mazarei's evidence that his intention from the beginning was to purchase the shares of both companies. It is clear that, up until Mr. Yeum became involved on behalf of purchasers, both parties operated under the understanding that only the shares in NV Highway were to be purchased. When Mr. Yeum became involved, it appears that he recognized that it was possible to demand information regarding both companies due to the wording of Clause 13.

Mr. Greer's Evidence

[64] Mr. Greer testified on behalf of the defendants. The plaintiffs challenge the reliability of Mr. Greer's evidence based on the fact that he was not an independent witness and that there were a number of inconsistencies in his evidence. I am not persuaded that Mr. Greer gave unreliable evidence. I find that any inconsistencies in his evidence can more likely be explained by the fact that he was giving evidence in 2023 about events that occurred mainly in 2018.

Issues

[65] The evidence and submissions raise the following issues:

1. Did the parties enter into a binding contract for the purchase and sale of the Properties?

2. Is the Contract unenforceable due to the principle of *nemo dat quod non habet*?

3. If the Contract is enforceable, has there been any repudiatory, fundamental and anticipatory breaches?

4. What damages, if any, should be awarded to the plaintiffs?

Position of the Parties

[66] I will deal with the position of the parties respecting issues 1 and 2.

Position of the Plaintiffs

[67] The plaintiffs challenge the enforceability of the Contract on two bases: that there was no *consensus ad idem*, a meeting of the minds, with respect to an essential term of the Contract, being the Share Purchase Option, and that it is enforceable by application of the principle *nemo dat quod non habet*.

[68] The plaintiffs say that there was no meeting of the minds with respect to whether the Share Purchase Option pertained to the shares of NV Highway and Catalina Rental, or just NV Highway. The plaintiffs say that it is clear that it referred

to both companies. However, if the Court finds the Contract is not clear then the issue of *consensus ad idem* needs to be considered. They argue that the Share Purchase Option is, on its face, clear that it pertains to the shares of both defendants. They further argue that the inclusion of the term "*mutatis mutandis*" cannot be properly interpreted to remove the requirement that the defendants transfer the shares of Catalina Rental, given that the term only pertains to details in the Contract; it cannot function to fundamentally shift the clear interpretation of the Contract prior to the addition of the term or to meaningfully alter the main terms.

[69] The plaintiffs also argue that the Contract is unenforceable because the principle of *nemo dat quod non habet*, that one cannot give that which one does not have, applies. They argue that since Catalina Holdings was not a party to the Contract, there was no means to compel Catalina Holdings to transfer any shares. There was also no means to compel NV Highways and/or Catalina Rental to transfer any shares since they never owned the shares to be transferred. For the Contract to be enforceable, Catalina Holdings was a necessary party.

[70] The plaintiffs rely on the Court of Appeal's decision in *Badesha v. Aujla*, 2016 BCCA 294 [*Badesha CA*], in which the Court found that the contracts at issue were incapable of performance as drafted since the seller in each case did not own the shares proposed to be sold.

[71] The plaintiffs further argue that the enforceability by virtue of *nemo dat* cannot be remedied through piercing the corporate veil. Relying on a decision from the Ontario Court of Appeal, they argue that it makes no difference that the defendants were subsidiaries of Catalina Holdings. In *Meditrust Healthcare Inc. v. Shoppers Drug Mart* (2002), 61 O.R. (3d) 786, 2002 CanLII 41710 (C.A.) [*Meditrust Healthcare*], the Ontario Court of Appeal held that parent companies and subsidiaries are separate corporate entities and that the plaintiff could not pierce its own corporate veil, despite arguments that the parent company completely controlled its subsidiaries and that it operated as a single corporate entity: at paras 29–30. The plaintiffs assert that this reasoning applies to the present case.

[72] The plaintiffs submit that rectification is not an appropriate remedy and the claim for it must fail.

Position of the Defendants

[73] The defendants submit that the parties entered into a clear, binding contract for the sale of the Properties and that the Share Purchase Option was just a mechanism for the transfer of the Properties. They argue that there was no mutual mistake rendering the Contract unenforceable.

[74] The defendants dispute that there was no *consensus ad idem* and argue that it was clear, on an objective standard, that the parties intended to be bound by the Contract since the purchasers paid the Deposit. They take the position that the essential terms of the Contract were the price (including the deposit amounts), the subject matter of the transaction (the sale of the Properties), the parties to the transaction, and the effective date. They dispute that the Share Purchase Option was an essential term. To support this position, they argue that the negotiations did not focus on the Share Purchase Option and that if the term were removed from the Contract, the transaction would still be able to proceed on the basis of the essential terms listed above.

[75] The defendants further submit that even if the Share Purchase Option was an essential term, it was not so uncertain that it cannot be given meaning in the context of the Contract as a whole. They rely upon the British Columbia Court of Appeal's comments in *Langley Lo-Cost Builders Ltd. v. 474835 B.C. Ltd.*, 2000 BCCA 365, where the Court refused to find that any of the essential term was so uncertain that it could not be given a realistic commercial meaning and held that "[any] future difficulties in carrying out the bargain, which may or may not arise, do not change the basic nature of the deal": at para. 75. In this case, they argue that the commercial meaning of the Share Purchase Option is that the buyer could elect to purchase the shares in NV Highway as the mechanism to effect the purpose of the Contract, being for the plaintiffs to acquire the Properties. They argue that the

plaintiffs objective conduct throughout the negotiations support that the parties reached *consensus ad idem* and that no mutual mistake occurred.

[76] As mentioned above in these reasons, the defendants emphasize the commercial absurdity of the plaintiffs' position that it intended to purchase Catalina Rental, given its various liabilities.

[77] In the alternative, if the Court finds there was a mutual mistake with respect to the Share Purchase Option, the defendants claim rectification and ask the Court to correct the Contract to reflect that the Share Purchase Option applied only to NV Highway in accordance with the parties' original intention.

[78] The defendants also argue that the principle of *nemo dat quod non habet* is not applicable since it is a general principle of property law that serves to protect the interests of the true owner and to determine the priority of property interests when there are numerous competing claims to property. This case does not involve competing claims to the Properties. They submit that in this case the overall structure of the Contract was to sell the Properties which could have been accomplished by way of a straight land conveyance. They argue that the plaintiffs' sole reason for raising the *nemo dat* rule is to attempt to render the Contract unenforceable.

[79] The defendants argue that *Badesha CA* is distinguishable since the subject matter of the contract concerned itself with the sale of shares and not the sale of land or the sale of assets. They argue that in this case, the subject matter of the Contract, being the Properties, was owned by the defendants whereas *in Badesha CA*, the shares were not owned by the seller. Additionally, they distinguish *Badesha CA* on the basis that the contract in that case did not provide a mechanism for the transfer of the shares. Here, the Contract was capable of performance either, at the option of the buyer, through acquisition of the legal and beneficial title directly from the defendants or through the Share Purchase Option. Should the second option be chosen, they note that the Share Purchase Option expressly contemplates that it may be necessary for the defendants to enter into further agreements to give effect

to the transfer of the shares. They also note Clause 30, which requires the parties to take further steps as necessary to carry out the Contract.

Issue 1: Did the parties enter into a binding Contract for the purchase and sale of the Properties?

Legal Principles

Consensus ad idem and mutual mistake

[80] It is settled law that a binding contractual relationship requires that the parties reached *consensus ad idem* on essential terms, meaning that there was a "meeting of the minds" on all essential matters relating to it: *Berthin v. Berthin*, 2016 BCCA 104 at para. 48, citing *Frolick v. Frolick*, 2007 BCSC 84.

[81] In *Berthin*, the British Columbia Court of Appeal addressed the principles regarding consensus and certainty on essential terms:

> [47] Of course, the terms in question must be enforceable — i.e., must have a definite as opposed to uncertain meaning such that a court can order either for damages or for specific performance in the event of breach. There is no doubt that courts will "lean heavily against finding contracts void for uncertainty" (*Copperart Pty. Ltd. v. Bayside Developments Pty. Ltd*. (1996) 16 W.A.R. 396 (S.C., Full Court) at 399, quoted in S.M. Waddams, *The Law of Contracts* (5th ed., 2005), 42 at fn.128). Thus Madam Justice D. Smith stated in *Frolick v. Frolick*, *supra*:
>
> > An effective agreement requires a meeting of the minds of the parties. An enforceable contract requires a consensus between the parties on all of the essential terms of their agreement. It is the responsibility of the parties, not the court, to clearly express those essential terms so "that their meaning can be determined with a reasonable degree of certainty": *Scammell and Nephew Ltd. v. Outston*, [1941] A.C. 251.
> >
> > If the parties fail to reach a meeting of the minds on the essential terms of their agreement, or fail to express themselves in such a fashion that the meaning of the terms they agreed upon cannot be reasonably divined by the court, then the agreement will fail for lack of certainty. However, the requirement of certainty of the terms is always balanced with the reality of transactional negotiations. Parties may intentionally leave gaps in the terms of an agreement to provide for future or mutually satisfactory accommodations. In those circumstances, the court should not apply the doctrine of certainty so rigidly so that the intentions of the parties to create a binding agreement are thwarted.

> Lambert J.A. observed in *Griffin v. Martens* (1988), 27 B.C.L.R. (2d) 152 (C.A.) at ¶4: "As long as the agreement is not to be constructed by the court, to the surprise of the parties, or at least one of them, the courts should try to retain and give effect to the agreement that the parties have created for themselves."
>
> [At paras. 30-32; emphasis added.]

[82] The inquiry into whether there was a meeting of the minds requires an objective approach. This Court explained the rationale for the objective approach in *Timberwolf Log Trading Co. Ltd. v. Columbia National Investments Ltd*., 2011 BCSC 864:

> [66] In Swan, Reiter and Bala, *Contracts: Cases, Notes & Materials*, 6th ed. (Markham: Butterworths, 2002) at pp. 392 and 393, the authors state:
>
> > ... No legal system can require that there be an actual "meeting of the minds", for that would provide too much of an incentive to those who would like to contract with their "fingers crossed". The requirement that a subjective agreement exist would permit one party to stay with a contract only so long as it suited its convenience; when it did not, the party could claim that it had never really agreed to the other's terms.

[83] The doctrine of *consensus ad idem* is fundamentally related to the doctrine of mutual mistake. The relationship between the two was articulated by the Saskatchewan Court of Queen's Bench in *Cozart v. Cozart*, 2007 SKQB 160:

> [48] In mutual mistake, both parties are mistaken, but do not share their mistake. In that sense, it is quite different from common mistake. It arises in situations where the parties are operating at cross purposes and the question is whether they have, in fact, reached an agreement. In other words, has there been a *consensus ad idem*? Fridman, *The Law of Contract in Canada*, *supra*, comments at page 250-251:
>
> > In mutual mistake the issue would seem to be: what would a reasonable person infer from the words and conduct of the parties? If, despite their different mistakes, it would appear to the outside world that the parties were in agreement as to a contract and its terms, then a contract would exist at common law. As it was put in one Canadian case, "mutual assent is not required for the formation of a valid contract, only a manifestation of mutual assent. ... Whether or not there is a manifestation of mutual assent is to be determined from the overt acts of the parties." [*Walton v. Landstock Invts. Ltd.* (1976), 72 D.L.R. (3d) 195 at 198] …
>
> Such instances of mistake may be regarded in two ways. In the first place, it could be said that as long as there was an apparent correspondence of offer and acceptance, the inward, secret beliefs of one or both parties were

> irrelevant. Objectively speaking, the parties have arrived at a *consensus ad idem*, which is the foundation of contract at common law. Hence, even if parties have been mistaken, a court may be able to find that they have in effect validly contracted, either by the appearance of agreement, or by some kind of estoppel, arising from the belief that was induced in one party by the language or acts of the other party. However, if no such *consensus* can be discovered, for example, where there is an obvious ambiguity about the terms of the purported contract, no objectively ascertained agreement can be inferred or concluded…

[84] Where mutual mistake is alleged, the Court must decide what reasonable third parties would infer to be the contact from the words and conduct of the parties who entered into it. It is only in a case where the circumstances are so ambiguous that a reasonable bystander could not infer a common intention that the Court will hold that no contact was created: *Staiman Steel Ltd. v. Commercial & Home Builders Ltd. et al.* (1976), 13 O.R. (2d) 315 at para. 24; 1976 CanLII 826 (SC).

Principles of Contractual Interpretation

[85] When interpreting a contract, the Court must first look at the plain and ordinary language of the contract, reading the contract as a whole. Courts should only use extrinsic evidence to aid in the interpretation of an agreement where there is ambiguity: *Tham v. Bronco Industries Inc.,* 2018 BCCA 207 at para. 16, citing *Water Street Pictures Ltd. v. Forefront Releasing Inc*., 2006 BCCA 459 at para. 23 [*Water Street Pictures*]. In *Tham*, the Court stated:

> [16] … Recourse to extrinsic evidence to aid in the interpretation of an agreement is the court's last resort. It is only when the intentions of the parties cannot be determined from the words they have chosen to employ, such that there is an ambiguity in the agreement, that the law permits consideration to be given to evidence of their conduct in making the agreement and in fulfilling their obligations: *Water Street Pictures* at para. 23.
>
> [17] With respect to ambiguity, the Court in *Water Street Pictures* said this:
>
> > [26] An ambiguity can be said to exist only where, on a fair reading of the agreement as a whole, two reasonable interpretations emerge such that it cannot be objectively said what agreement the parties made: *Gilchrist v. Western Star Trucks Inc*. (2000), 73 B.C.L.R. (3d) 102, 2000 BCCA 70 at paras. 17-18; *and Re Canadian National Railways and Canadian Pacific Ltd.* (1978), 95 D.L.R. (3d) 242 at 262, [1979] 1 W.W.R. 358 (B.C.C.A.), aff'd [1979] 2 S.C.R. 668. Where extrinsic evidence has been admitted, it has been to resolve an ambiguity in what the parties in fact agreed as opposed to overcoming

> an uncertainty about the legal consequences of the agreement they made.

[86] In *Water Street Pictures*, the Court of Appeal described the types of extrinsic evidence that may be considered to resolve ambiguity in a contract:

> [27] Where an ambiguity exists, a court in this province (unlike an English court) may consider not only evidence of the parties' conduct in making their agreement, such as the course of their negotiations, but also the conduct of the parties in performing their agreement.

[87] The Supreme Court of Canada provided helpful guidance on the relevance of "surrounding circumstances" in exercises of contractual interpretation in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at paras. 56–58:

> [56] I now turn to the role of the surrounding circumstances in contractual interpretation and the nature of the evidence that can be considered. The discussion here is limited to the common law approach to contractual interpretation; it does not seek to apply to or alter the law of contractual interpretation governed by the Civil Code of Québec.
>
> [57] While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (*Hayes Forest Services,* at para. 14; and *Hall*, at p. 30). The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (*Hall*, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v. BC Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62 (B.C. C.A.)).
>
> [58] The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (*King*, at paras. 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting…

[88] Contracts should be interpreted to align with sound commercial principles and absurd interpretations should generally be avoided. However, parties cannot be permitted to avoid their contractual obligations simply because the bargain was undesirable or usual: *Felger v. Banov*, 2022 BCCA 124 at paras. 29–32, 34, 39-40,

citing *Resolute FP Canada Inc. v. Ontario (Attorney General),* 2019 SCC 60 at paras. 142–144 [*Resolute FP*]. On commercial reasonableness, I note the comments in *Resolute FP* from the separate opinion of Justices Côté and Brown, dissenting in part, with whom Justice Rowe concurred:

> [142] As we have already observed, commercial reasonableness is a crucial consideration in interpreting a contract (see *Canadian Contractual Interpretation Law*, at p. 55). This is simply a corollary of the object of discerning the parties' intentions: when interpreting commercial contracts, courts seek to reach a commercially sensible interpretation, since doing so is more likely than not to give effect to the intention of the parties (see *ibid.*, at p. 57; *Nickel Developments Ltd. v. Canada Safeway Ltd.*, 2001 MBCA 79, 156 Man. R. (2d) 170 (Man. C.A.), at para. 34). Simply put, courts safely assume that those who enter into commercial contracts intend for their contracts to "work" (*Humphries v. Lufkin Industries Canada Ltd.*, 2011 ABCA 366, 68 Alta. L.R. 175 (Alta. C.A.), at para. 15).
>
> [143] Discerning commercial reasonableness entails, like all contractual interpretation, an objective analysis (see *Canadian Contractual Interpretation Law*, at p. 57). Courts should therefore read commercial contracts in a "positive and purposive manner", seeking to understand the structure of the agreement reached by the parties, the purpose of the transaction and the business context in which the contract was intended to operate (*Humphries* , at para. 15). As Lord Wilberforce said in *Reardon Smith Line v. Hansen-Tangen*, [1976] 3 All E.R. 570 (U.K. H.L.) , and as quoted with approval by this Court in *Sattva* , at para. 47:
>
> > No contracts are made in a vacuum: there is always a setting in which they have to be placed. ... In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.
>
> [144] Given, then, the choice between an interpretation that allows the contract to function in furtherance of its commercial purpose and one that does not, it is generally the former interpretation that should prevail (see *Humphries* , at para. 15). While a party cannot avoid its contractual obligations simply because the bargain that they entered into was undesirable or unusual, commercially absurd interpretations should be avoided (see *Canadian Contractual Interpretation Law*, at pp. 61-63). As this Court said in *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 (S.C.C.) , at para. 61, "[i]f a given construction of the contract would lead to an absurd result, the assumption is that this result could not have been intended by rational commercial actors in making their bargain, absent some explanation to the contrary". See also *Toronto (City) v. W.H. Hotel Ltd.*, [1966] S.C.R. 434 (S.C.C.) , at p. 440.

Analysis

[89] It is clear that the parties intended to enter into a binding contract to purchase the Properties. However, the parties disagree as to whether the Share Purchase Option is an essential term of the Contract and if it is, whether they reached *consensus ad idem* about whether the Share Purchase Option pertained only to the shares of NV Highway or to the shares of both of the defendants.

[90] I am prepared to find that the Share Purchase Option is an essential term of the Contract. It was the mechanism by which the purchaser could avoid paying a significant sum of PPT.

[91] The question I must address is what reasonable third parties would infer from the words of the Contract, and in the face of ambiguity, the surrounding circumstances. Ultimately, I do not find, on an objective standard, that the Share Purchase Option is so ambiguous that a common intention cannot be inferred.

[92] I must first look at the words of the Contract itself. The plaintiffs rely on the definition of “Seller” in the preamble as referencing both companies. Since the Share Purchase Option references “Seller” in subsections ii, iii, and v, the “Seller” is referenced, the argument is that both companies are referenced. However, within the same provision, at subsection i, the provision references the minute book of “the Company”. The use of both “the Seller” and “the Company” within the term creates some confusion.

[93] The plaintiffs argue that subsection i should be considered a “meaningless term” and to the extent that it gives rise to any uncertainty or ambiguity in the interpretation of the Share Purchase Option, the term “Company” should be severed. I disagree.

[94] In my view, there is an ambiguity in the Share Purchase Option which cannot be resolved by looking within the four corners of the agreement to give effect to the parties’ intention. Therefore, to ascertain whether the parties were *ad idem*, I may consider the surrounding circumstances and extrinsic evidence. It is not the

subjective intention of the parties that I must determine, but the objective understanding of a reasonable bystander in the circumstances.

[95] It is clear on the evidence that the defendants' intention was not to offer up the shares in Catalina Rental, but only in NV Highway, despite that they ultimately were prepared to transfer the shares of both companies.

[96] There is, however, conflicting evidence on the intentions and understanding of the plaintiffs. Mr. Mazarei testified that he intended from the outset to purchase the shares of both companies. I have found this to be unreliable as it is contradicted by the objective documentary evidence, as canvassed earlier in these reasons. Based on the evidence of the plaintiffs' conduct and the documentary evidence, it is clear that, at the time the Contract was formed, the plaintiffs understood that they were contracting only for the shares of NV Highway with respect to the Share Purchase Option; there was no mutual mistake in this regard.

[97] Most significantly, the Share Purchase Option required that up to 30 days prior to the Closing Date, the Buyer could convert the agreement to purchase the shares by providing the Seller with written notice of its election to do so in the form of the Share Election Notice. There was one Share Election Notice made on October 15, 2018, delivered 30 days before the scheduled closing date of November 15, 2018. If the plaintiffs wanted to purchase the shares in both companies they failed to comply with the need to deliver a Share Election Notice that supported that intent. The Share Election Notice only refers to the purchase of the shares in NV Highway and not to the purchase of the shares in Catalina Rental. At no time was a further Share Election Notice served by the plaintiffs seeking to purchase the shares of Catalina Rental. Further, the steps taken by the plaintiffs leading up to the issuance of the Share Purchase Option, in which only the documents relating to NV Highway were requested in accordance with the terms of the Share Purchase Option.

[98] This interpretation is further supported by the expert evidence of Mr. Woolley which supports that no purchaser would reasonably seek to purchase the shares of the beneficial owner and the significant tax liability that would result. I accept that

when the Share Purchase Option is interpreted from the perspective of commercial reasonableness, its purpose must have been to provide the plaintiffs with the option of avoiding the property transfer tax that would otherwise be paid by a land conveyances. Interpreting the Share Purchase Option as offering up the transfer of the shares of both the bare trustee company and the beneficial owner operating company is not aligned with commercial reasonableness. In the circumstances, such an interpretation would lead to the result of the buyer inheriting the historical cost basis for the Properties, which would result in a significant tax liability, thereby negating the tax benefit purpose of the clause.

[99] Finally, I am not persuaded that the Second Addendum that added the words "*mutatis mutandis*" changed the Share Purchase Option in any meaningful way.

[100] Applying an objective standard, I am satisfied that the parties reached consensus with respect to the subject matter of the Share Purchase Option. Looking at the surrounding circumstances and with a mind to commercial reasonableness, I find that reasonable third parties in the position of the parties would have understood the term to be referencing only shares of NV Highway.

[101] I note that even if the Share Purchase Clause did apply to both companies, the plaintiffs were foreclosed from seeking to purchase the shares of Catalina Rental since they failed to comply with the provisions of the Share Purchase Option. However, in my view, it is telling that once it became clear that the defendants were willing to transfer the shares of Catalina Rental, despite this not being their original intention, the plaintiffs did not take further steps to close the transaction. They could have sought to use one of the contract extensions under the Contract, and could have issued a new Share Purchase Notice for both companies, but they did not do so.

Issue 2: Is the Contract unenforceable due to the principle of *nemo dat quod non habet*?

Legal Principles

[102] The Latin maxim, *nemo dat quod non habet*, stands for the principle that one cannot give that which one does not have.

[103] The principle has been applied by courts in the context of corporate transactions involving the sale of shares. In particular, the plaintiffs directed me to consider the decision in *Badesha CA*, rev'g *Badesha v. Snowland Sporting Goods Ltd*., 2015 BCSC 1229 [*Badesha SC*].

[104] The plaintiffs submit that the Court's analysis in *Badesha CA* is determinative of the issue in the case before me. The defendants submit that it is distinguishable on the facts and does not apply to make the Contract unenforceable. On the arguments of the parties, much turns on whether and how the Court of Appeal's analysis is applicable in this case. As such, I provide an overview of the decision before considering whether the *nemo dat* rule operates to render the Contract unenforceable.

Badesha v. Aujla

[105] In *Badesha SC* and *Badesha CA*, the matter before the Court involved a dispute over two failed transactions for the swap of commercial properties by way of share sale. I will refer to the two commercial properties as the "Hotel property" and the "Chilliwack property" and I will refer to the corresponding contracts as the "Hotel Contract" and the "Chilliwack Contract".

[106] The Court provided a concise summary of the facts which led to the litigation, including the ownership structures of the properties and the terms and parties of the two contracts: see *Badesha CA* at paras. 4-5. Given the importance of the relationships and the corporate ownership structures to the dispute, the facts are reproduced below:

> [4] The hotel in Williams Lake is owned by Snowland Sporting Goods Ltd. Snowland, in turn, is owned by 0912494 B.C. Ltd., which I will refer to as 494

> BC. 494 BC is owned 25% by Mr. Aujla, 25% by Mr. Aujla's son, and 50% by Parminder Kaler in trust for her husband. What I will call the "hotel contract" … named Snowland and Mr. Aujla as the seller and Mr. Badesha as the buyer. While on its face the contract described the property that is the subject of the contract as the hotel, the contract did not concern itself with the sale of land or the sale of assets. Rather it anticipated that Mr. Badesha would purchase shares of Snowland. The key clause was in an addendum that provides:
>
> > The seller [i.e., Snowland and Mr. Aujla] agree to sell and the buyer agree to buy 100% shares of the company "Snowland Sporting Goods LTD."
>
> [5] The Chilliwack property is owned by the respondent 0909043 B.C. Ltd., which I will refer to as 043 BC. The shares of 043 BC are held equally by the respondent Mr. Badesha, Mr. Rai and Mr. Pannu. The "Chilliwack contract" described the property being sold by its street address and legal description. It named 043 BC as the seller and Mr. Aujla as the buyer. However, it too, described a share purchase to effect the change of control over the Chilliwack property. The key clause was in an addendum that provides:
>
> > This is the fundamental condition of this contract that the seller [i.e., 043 BC] agree to sell and the buyer agree to buy 100% shares of the company 0909043 B.C. LTD.

[107] Essentially, the parties were misnamed in the contracts. The transactions provided for the sale of shares in the companies that owned the properties; however, those companies were not the sellers in the written contract.

Background and the BCSC Decision

[108] When the transactions failed to complete, the plaintiffs, being Mr. Badesha and 043 BC, commenced legal proceedings against the defendants. I will summarize only the arguments and analysis relevant to the issues of *nemo dat* and rectification.

[109] At trial, the defendants, being Mr. Aujla and Snowland, alleged that the contracts were unenforceable because the sellers in both contracts did not own the assets they were purporting to sell, that is, *nemo dat quod non habet*. They argued that since the shares of the named sellers in the written contracts were owned by other individuals or entities, the sellers could not sell their own shares.

[110] Concerning the Hotel property, the plaintiffs submitted that it was intended that the seller would be the actual owner of the shares of Snowland, being 494 BC Ltd. Concerning the Chilliwack property, the plaintiffs alleged that the sellers would

be him and his two business partners, despite their company 043 BC Ltd. being the named seller. They sought rectification of the contracts to correctly name the owners of the shares being sold in each case: see *Badesha CA* at paras. 6-9.

[111] The trial judge dismissed the plaintiffs' action for breach of contract and held the contracts to be enforceable. The trial judge recognized the contracts did not name the correct parties; however, she found that the sellers "both had the consents of the necessary parties to transfer their respective shares" and the "authority to act for their respective business partners": *Badesha SC* at paras. 129 and 130. While the trial judge did not specifically discuss rectification, the Court of Appeal found that she must have reached her conclusions on a rectification basis: *Badesha CA* at para. 15.

The BCCA Decision

[112] The Court of Appeal reversed the trial judge's findings on the issue of enforceability, stating:

> [12] It is axiomatic that the vendor in a contract for sale must be able to convey the asset sold. If not, the contract collapses for failure of consideration or, to look at it another way, collapses because the true owner of the asset has not agreed to sell. The hotel contract has suffered this collapse. It is fatally undermined by the requirement that Snowland, the owner of the hotel, and Mr. Aujla (together defined as the seller), sell 100% of the shares of Snowland to Mr. Badesha. Snowland does not and cannot own 100% of the shares of itself. If it is Snowland that is required to sell shares, the clause confuses the corporate entity with its owners. If it is Mr. Aujla who must sell 100% of the shares of Snowland, or indeed any shares of Snowland, he cannot because 494 BC owns the shares. The principle that a corporation and its owners are distinct is strong. This contract is incapable of performance as drafted.
>
> [13] The Chilliwack contract, as is, is likewise fatally undermined by the commitment of 043 BC to sell 100% of its shares. 043 BC, like Snowland, cannot sell its shares; the shares are owned by Mr. Badesha, Mr. Pannu and Mr. Rai, and the latter two men are not party to the contract at all.
>
> [14] I conclude that both contracts, as written, are not enforceable because the seller in each case does not own the shares proposed to be sold. Accordingly, any damages claim against Mr. Aujla for non-performance based on the contracts cannot succeed on the current language.
>
> [Emphasis added.]

[113] With respect to rectification, the Court of Appeal found that the Chilliwack Contract could be rectified to change the seller from 043 BC to the three shareholders of 043 BC. However, rectification of the contract for the Hotel property was not possible because the evidence of general statements that Mr. Aujla had the authority to transfer the shares to the plaintiffs did "not provide sufficient clarity on the structure of the intended transaction to allow the court to say that the parties shared a continuing common intention of what would be sold…": at para. 21.

[114] Given the multiple layers of ownership (Mr. Aujla, Mr. Aujla's son and Mrs. Kaler being the shareholders of 494 BC, which in turn owned all of the shares of Snowland), the Court of Appeal held that there were at least three alternate agreements whereby the plaintiffs could obtain control of the Hotel property. On these alternatives, the Court said:

> [23] The presence of these widely divergent alternatives demonstrates that the hotel contract is not suitable for rectification. While one can see that some transaction was intended, one cannot discern with any degree of clarity how the parties intended to effect the change in control of the hotel. It fails the test in *Fraser v. Houston et al*. The transaction disintegrates into fault gouge of incohesive legal intentions.

[115] The Court concluded that it was an error to rectify this contract without knowing how the identity of the seller will be modified and the error was fatal to the enforceability of the Hotel Contract. This error was "conversely fatal to the Chilliwack property contract because it is agreed the two contracts are a matched pair – if one falls, the other does as well.": at para. 24.

[116] Further, the Court held that even if it were possible to determine which company's shares were to be transferred in the Hotel Contract, the named seller (Mr. Aujla) could not be liable for either corporations' non-performance of the contract. To find Mr. Aujla liable would be to pierce the corporate veil, which courts are reluctant to do. The Court emphasized the distinction between each corporate entity and its individual shareholders, stating:

> [27] The distinction in law between each company and Mr. Aujla is significant. In *Edgington v. Mulek Estate*, 2008 BCCA 505, Mr. Justice Lowry

commented on the importance of legal vehicles and the reluctance of courts to pierce the corporate veil:

> [20] I consider the position taken by the purchasers largely ignores the longstanding principle that a corporation is in law an entity distinct and separate from its shareholders: *Salomon v. Salomon & Co.*, [1897] A.C. 22 (H.L.). Parties to transactions employ the use of corporate vehicles for a reason, as they are entitled to do. Shareholders, despite being in a position of control, do not, as a rule, incur liability for the breach of their corporation's contractual obligations. It is not a matter of control; the shareholders of a closely held company like Westpark invariably have control of the company.
>
> [21] The separate legal personality of the corporation will not be lightly disregarded. As recognized in *Big Bend Hotel Ltd. v. Security Mutual Casualty Co.* (1980), 1980 CanLII 505 (BC SC), 19 B.C.L.R. 102 at 108 (B.C.S.C.), respect for the corporate form is strict:
>
> > On the whole, Canadian and English courts rigidly adhere to the concept set out in *Salomon*, supra, that a corporation is an independent legal entity not to be identified with its shareholders.
>
> [22] There are certain circumstances in which what the authorities state to be the "corporate veil" will be "pierced" or "lifted", or where the separate legal personality of the corporation will be disregarded. Such circumstances generally arise where the corporate form has been abused – that is, it has been used for fraudulent or illegitimate purposes (see *Big Bend Hotel*).
>
> [23] In *Kosmopoulos v. Constitution Insurance Co.*, 1987 CanLII 75 (SCC), [1987] 1 S.C.R. 2 at 10, 34 D.L.R. (4th) 208, Wilson J. recognized that in certain circumstances a court will pierce the veil where failing to do so would result in unfairness, which would appear to be the suggestion that underlies the purchasers' contention on this appeal:
>
> > As a general rule a corporation is a legal entity distinct from its shareholders: *Salomon v. Salomon & Co.*, [1897] A.C. 22 (H.L.). The law on when a court may disregard this principle by "lifting the corporate veil" and regarding the company as a mere "agent" or "puppet" of its controlling shareholder or parent corporation follows no consistent principle. The best that can be said is that the "separate entities" principle is not enforced when it would yield a result "too flagrantly opposed to justice, convenience, or the interests of the Revenue": L.C.B. Gower, *Modern Company Law* (4th ed. 1979), at p. 112.
>
> [24] This Court has, however, been clear that lifting the corporate veil does not extend to circumstances where declining to do so would simply be unfair.

[28] Mr. Justice Lowry went to this passage from *B.G. Preeco I (Pacific Coast) Ltd. v. Bon Street Holdings Ltd.* (1989), 1989 CanLII 230 (BC CA), 60 D.L.R. (4th) 30, 37 B.C.L.R. (2d) 258 (C.A.):

> The concluding words in the chapter in L.C.B. Gower, Modern Company Law, 4th ed. (London: Stevens & Sons, 1979), from which Wilson J. quoted are these (at p. 138):
>
> > The most that can be said is that the courts' policy is to lift the veil if they think that justice demands it and they are not constrained by contrary binding authority. The results in individual cases may be commendable, but it smacks of palm-tree justice rather than the application of legal rules.
>
> He concluded:
>
> > [26] It follows that any argument to the effect this Court must disregard the separate legal personality of Westpark because a failure to do so will result in "unfairness" cannot stand. The strict recognition of Westpark as an entity distinct from its owners does not yield a result that comes anywhere near being flagrantly opposed to justice. A corporation and its shareholders are separate legal entities. While a narrowly held corporation or a corporation with a sole shareholder may appear to be the "alter ego" of its shareholders, the two entities remain legally distinct and must be treated as such.

Analysis

Is the Contract enforceable?

[117] The defendants rely on comments made by Justice Warren in the case of *Bentley Aviation Ltd. v. Homelife Benchmark Realty Corp.*, 2017 BCSC 1332 [*Bentley Aviation*] to support their position that the Contract is not unenforceable by application of *nemo dat*. Upon review of the case and the context in which the analysis took place, I do not find this case lends support to the defendants' position that there is no rational basis on which the *nemo dat* principle may render the contract enforceable.

[118] *Bentley Aviation* involved an application to strike the plaintiff's claim on the basis that its pleadings disclosed no reasonable cause of action. Importantly, in an application to strike, the trial judge is concerned only with the sufficiency of pleadings; the analysis proceeds on the basis that the facts as pleaded are true: *Bentley Aviation* at para. 25. The defendants argued that since the defendant realtor who signed the contract on the plaintiff's behalf did not have authority to do so, the *nemo dat* principle rendered the contract unenforceable against the plaintiff. They argued that since the contract was unenforceable, the negligence claim had no

reasonable prospect of success. Justice Warren declined to strike the claim on this basis, holding that whether a contract is enforceable is a heavily fact-dependent exercise. While she found that the fact that the contract was not signed by nor did it properly identify the actual seller was "not necessarily determinative" of the issue of enforceability (*Bentley Aviation* at para. 33), she did not actually consider the enforceability of the contract, only that the pleadings were not so deficient as to warrant being struck. Justice Warren's comments simply did not foreclose the possibility of a trial judge finding the contract to be enforceable on the whole of the evidence.

[119] Notwithstanding that *Bentley Aviation* involved different factual matrix, being an agent signing a contract without the consent of its principal and the contract listing the seller as an entity that did not actually exist, I agree with Warren J. that the issue whether a contract of enforceability is a fact dependent exercise.

[120] On the facts of the case before me, I am satisfied that the Contract for the sale of the shares to be enforceable by the owner of the shares, Catalina Holdings, had to be named in the Contract. It was not. While *Badesha CA* can be distinguished from the present case in some important respects as I will discuss below, the Court of Appeal was clear that a company cannot sell shares it does not own. In this respect, *nemo dat* operates to render the Share Purchase Option unenforceable as the Contract was drafted.

[121] All of the shares of NV Highway and Catalina Rental were owned by Catalina Holdings. For the shares of NV Highway to be transferred pursuant to the Share Purchase Option, Catalina Holdings would have been required take steps to facilitate the transfer. However, Catalina Holdings is a distinct corporate entity and it was not a party to the Contract.

[122] The only shareholders of Catalina Holdings in 2018, being Mr. M. Keith and Mr. J. Bond, both testified that they were prepared to transfer the shares of NV Highway and Catalina Rental as required. Mr. Keith described the share transfer as "an easy thing to transfer". Despite their evidence that they were willing to complete

the transaction and that Catalina Holdings asserts it was ready, willing, and able to complete the Contract, the obligation was on NV Highway to complete the Contract.

[123] The defendants rely on two additional provisions of the Contract to support their claim that the Share Purchase Option was capable of performance. The first contemplated that it may be necessary for the Seller to enter into further agreements to give effect to the transfer of shares. The second contemplated that the parties would be required to take such further steps as may be necessary to implement and carry out the intent of the Contract. However, neither of these provisions are enforceable as against Catalina Holdings or its shareholders, without piercing the corporate veil. This is not one of those "rare cases" in which the veil should be lifted: *Meditrust Healthcare*. The fact that Catalina Rental and NV Highway were subsidiary companies does not change the legal reality: *Meditrust Healthcare* at paras. 29–30.

[124] In the present case, the defendants argue that unlike the Hotel Contract in *Badesha CA*, the Contract in this case was capable of performance. The subject matter of the Hotel Contract in *Badesha CA* was, on its face, the Hotel Property; however, the contract did not concern itself with the sale of land or the sale of assets. Rather, it only contemplated that the defendant would purchase shares of the plaintiff company: *Badesha CA* at para. 4. Thus, by reason of the *nemo dat* principle, it was incapable of being performed.

[125] The defendants argue that since the Contract for the Properties provided for two possible mechanisms for the transfer of ownership, the Contract for the purchase of the Properties could have been performed by the transfer of the legal title from NV Highway and the beneficial interest by Catalina Rental, despite the unenforceability of the Share Purchase Option. I accept that it was capable of performance through a direct title transfer of the Properties; however, the plaintiffs formally elected to proceed by way of share purchase on October 15, 2018 and I found that the Share Purchase Option was an essential term of the Contract. The evidence supports a finding that it was the parties' intention that the transaction

would proceed by way of the Share Purchase Option. Given the unenforceability of the essential term, the Contract itself cannot stand as drafted.

Can the Contract be rectified to add Catalina Holdings as a party?

[126] Since I have found that the Contract is not enforceable, I must next consider whether the Contract can be rectified so that it is capable of enforcement.

[127] I note at the outset that while the defendants did seek rectification, they did so only with regard to Clause 13 of the Contract. They did not plead, nor argue at trial, for the Contract to be rectified such that Catalina Holdings would be added as a party. The plaintiffs submit that since rectification on this issue was not plead, it is insufficient to overcome the *nemo dat* concerns, and in any event, is not an appropriate remedy on the evidence.

[128] Despite that rectification was not properly plead, I agree with the plaintiffs that rectification is not an appropriate remedy in the circumstances. I note that in the subsequent sale of the Properties in July 2020 Catalina Holdings was one of the named parties.

[129] Where a written agreement inaccurately records the parties' intentions, rectification permits the court to correct the document so that it conforms to those intentions. It is "not concerned with mistakes in the underlying agreement": *McDonald Bankruptcy (Re)*, 2017 BCSC 1957 at paras. 107. I am mindful of the Supreme Court of Canada's caution that "… a relaxed approach to rectification as a substitute for due diligence at the time a document is signed would undermine the confidence of the commercial world in written contracts": *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.* 2002 SCC 19 at para. 31.

[130] I am not satisfied that the exclusion of Catalina Holdings as a party was an unintentional omission contrary to the intent of the parties. The evidence before me is that the shareholders of Catalina Holdings, Mr. M. Keith and Mr. J. Bond, did not think it was necessary to add Catalina Holdings as a party because the other provisions of the Contract providing for further steps to be taken by the parties to

realize the share transfer, would be sufficient. In my view, the failure to name Catalina Holdings as a party was an oversight resulting from a lack of due diligence. On this basis, I exercise my discretion to refuse to grant the remedy of rectification. I cannot rectify the Contract to correct an oversight by the defendants.

[131] Since I have found that the Contract was not enforceable and that rectification is not an appropriate remedy in the circumstances, I need not consider the issue of whether there was a breach of the essential terms of the Contract. I turn to an assessment of what damages, if any, the plaintiffs are entitled to.

Issue 3: What Damages, if any, should be awarded to the Plaintiffs?

Relevant Facts

[132] The Contract was signed in May 2018. Between July 2018 and January 2019, the plaintiffs expended considerable funds to prepare for the future development of the Properties. According to the plaintiffs, the expenditures total $193,581.71, comprised as follows:

1.	Development Consulting Services	$67,068.75
2.	Appraisal Fees	$6,720.00
3.	Property Condition Assessment Report	$4,725.00
4.	Environmental Site Assessment	$4,200.00
5.	Deposit to Prospective Lender	$100,000.00
6.	Feasibility Study	$10,867.96
		$193,581.71

[133] The $100,000 expense listed at #5 above, is a deposit that was paid by 1172 to a prospective lender, being KingSett Capital (“KingSett”), to secure financing for the purchase of the Properties. Mr. Mazarei testified that Mr. Greer informed KingSett that the transaction was not going to be completed and KingSett has subsequently refused to return the deposit. In cross-examination, he testified that a demand letter was sent through counsel.

Position of the Parties

Position of the Plaintiffs

[134] If the Contract is found to be unenforceable, the plaintiffs' position is that the Deposit should be returned as it was paid on the strength of the Contract's enforceability. They argue they should not be punished because the defendants purported to sell something they did not own.

[135] In addition, they claim $193,581.71 in damages incurred in reliance on, and in anticipation of, completing the Contract. They also submit that they are also entitled to damages to compensate for the $100,000 Extension Fee paid to extend the closing date of the Contract.

Position of the Defendants

[136] The defendants did not make fulsome submissions on the issue of damages. They rely on their ultimate position that the contract was enforceable and that Catalina Holdings and the defendants were ready, willing, and able to sell the shares.

Analysis

[137] I agree that the Deposit should be returned to the plaintiffs. The Contract is not enforceable and as such, the defendants cannot rely on its terms to assert the Deposit is non-refundable. Similarly, the plaintiffs paid the Extension Fee pursuant to the Contract terms, under the mistaken belief that the defendants were able to fulfil its obligations pursuant to the Share Purchase Option. In my view, allowing the defendants to retain the Deposit and the Extension Fee, which they obtained pursuant to an agreement in which they purported to sell shares which they did not own, albeit without ill intent, would be unjust.

[138] I turn now to the issue of damages.

[139] Where there has been a breach of contract, the innocent party may recover damages from the other. Courts usually employ expectation damages, which focus

on placing the innocent party in the same position they would have been in had the contract been performed. Alternatively, courts may employ restitution damages, which focus on the advantage gained by the breaching party as a result of the breach: *Six Factor Professional Services Ltd. v. Aquilini Investment Group Limited Partnership*, 2020 BCSC 127 at paras. 11–12. However, since the Contract in this case was not enforceable, it cannot be said that there has been a breach. As such, the regular principles of damages in contract cases do not neatly apply.

[140] Neither party made comprehensive submissions or arguments on the issue of damages; however, the plaintiffs provided a limited number of cases on the matter. I do not find these cases particularly instructive as both involve valid contracts that were breached, not Contracts that were unenforceable: see *Lalani v. Wenn Estate*, 2011 BCCA 499 and *Jenkins Road Developments Ltd. v. Wille*, 2002 BCCA 399.

[141] The plaintiffs' claim for damages is rooted in reliance. The plaintiffs cite the following comment by the British Columbia Court of Appeal as a basis for their claim that the Court should protect their reliance interest by awarding damages:

> Tort is usually concerned with reliance damages, that is putting the plaintiff in their original position, and contract is usually concerned with expectation damages, that is giving the plaintiff the fruits of their bargain. However, this case does not fit neatly within either category. While those categories are helpful, the guiding principle is that damages are compensatory.

Smith v. Landstar Properties Inc., 2011 BCCA 44 at para. 36.

[142] The case before me does not involve a tort claim and there was no valid contract. While I accept that the guiding principle for damages is compensatory and that some cases, including this case, do not fall neatly in either category, I am not prepared to award further damages in the circumstances.

[143] The plaintiffs expended $193,581.71 on various consulting, financing, feasibility, and appraisal fees in preparation for future development. They chose to do this after the Contract was signed, but before the transaction was completed. In doing so, they exposed themselves to additional risk. The plaintiffs could have

sought legal advice to ensure the Contract was enforceable before expending such substantial amounts of money, but they opted not to. Further, while I found the defendants' error in misnaming the parties to the Contract resulted in it ultimately being unenforceable, I note that it was the plaintiffs that decided not to follow through with the transaction on account of their purported intention to purchase the shares of both NV Highway and Catalina Rental, which I found not to be credible.

Conclusion

[144] The plaintiffs are entitled to the return of the Deposit of $1,250,00 and the Extension Fee of $100,000. I decline to award any further damages in favour of the plaintiffs.

[145] The plaintiffs are entitled to their costs on scale B unless the parties need to return to provide some further submissions. If they do, the parties must advise the registry in writing within 30 days of the pronouncement of these reasons. If they do not do so then the order granting costs to the plaintiffs will apply.

[146] Finally, I would like to commend both sets of counsel for the assistance provided, in particular, for the detailed and helpful joint agreed statement of facts, and their comprehensive written submissions.

"The Honourable Justice C. Forth"