IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *MNP Corporate Finance Inc. v. Taplow Ventures Ltd.,* 2024 BCSC 547

Date: 20240405
Docket: S229821
Registry: Vancouver

Between:

MNP Corporate Finance Inc.

Plaintiff

And

Taplow Ventures Ltd., and Michael Zdenek Florian

Defendants

Before: The Honourable Madam Justice Murray

Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	L.M.A. Kotler M. Hashmi
Counsel for the Defendants:	J.C. MacInnis, K.C. A.E. McMahon
Place and Dates of Hearing:	Vancouver, B.C. September 28 and 29, October 31, 2023
Place and Date of Judgment:	Vancouver, B.C. April 5, 2024

INTRODUCTION

[1] The defendants seek summary dismissal of claims brought by the plaintiff in its Notice of Civil Claim (NOCC) filed on January 19, 2023.

[2] MNP Corporate Finance Inc. (the plaintiff or MNP) is a professional services firm. Defendant, Taplow Venture Ltd. is a pet food manufacturer. Defendant, Mr. Florian is its principal and majority shareholder. I will refer to the two defendants together as the defendants or "the Company".

[3] In 2019, the defendants retained the plaintiff to act as the defendants' exclusive financial advisor in relation to the marketing and sale of the Company. The parties entered into an Engagement Letter on April 8, 2019. The contract was for a period of a year following which it automatically renewed. At the relevant times, it was in a period of renewal.

[4] In its Notice of Civil Claim (NOCC), MNP makes the following claims:

1. The defendants owe them "professional fees" because it (MNP) terminated the contract for Cause;

2. The defendants owe MNP "a completion fee" because the defendants failed to accept a Bona Fide Offer;

3. The defendants are required to reimburse MNP for out-of-pocket fees;

4. The defendants are liable for damages for breach of contract;

5. The defendants are liable for damages for breach of the duties of good faith and honest contractual performance; and

6. The defendants are liable for damages for unjust enrichment.

[5] The defendants concede that there is a triable issue with respect to the breach of contract claim, however, they argue that the other claims are bound to fail. With respect to claims 1 and 2, the defendants say that there is no evidence that the

plaintiff terminated the contract, which is a precondition to the recovery of the fees sought. With respect to claim 3, the defendants say that MNP never sought the defendants' consent before incurring the expenses, a precondition under the Engagement Letter. Regarding claim 5, the defendants say that there is no such claim in law as the duty of good faith and no facts to support a breach of the duty of honest performance have been plead. Finally, the defendants argue that there is no unjust enrichment as the contract is the juristic reason for the enrichment.

[6] The plaintiff responds that it terminated the Engagement Letter and that the evidence shows that both parties were aware of it. The plaintiff further argues that it would be dangerous for this Court to dismiss some claims as the breach of contract claim will proceed regardless.

ISSUES

[7] This application raises the following issues:

1. Whether MNP's claim that it is entitled to professional fees and out-of-pocket expenses because it terminated the Engagement Letter for Cause is bound to fail;

2. Whether MNP's claim that it is entitled to the completion fee because the Company failed to accept a Bona Fide Offer is bound to fail;

3. Whether MNP's claim that the Company breached the duties of good faith and honest contractual performance is bound to fail; and

4. Whether MNP's claim that the Company was unjustly enriched is bound to fail.

[8] I will consider the issues in turn after reviewing the applicable law and the relevant terms of the Engagement Letter.

THE LAW

[9] Rule 9-6, the summary judgment rule, is employed to prevent claims or defences that have no chance of success from proceeding to trial. It reads in relevant part as follows:

> (4) In an action, an answering party may, after serving a responding pleading on a claiming party, apply under this rule for judgment dismissing all or part of a claim in the claiming party's originating pleading.
>
> (5) On hearing an application under subrule (2) or (4), the court,
>
> (a) if satisfied that there is no genuine issue for trial with respect to a claim or defence, must pronounce judgment or dismiss the claim accordingly,
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> ….
>
> and
>
> (d) may make any other order it considers will further the object of these Supreme Court Civil Rules.

[10] The onus is on the party seeking the summary dismissal to prove that there is no genuine issue for trial. If the defendant is able to meet this high bar, the burden shifts to the plaintiff to refute or counter the defendant's evidence: *Canada v. Lameman*, 2008 SCC 14 at paras. 10 and 11.

[11] In *Skybridge Investments Ltd. v. Metro Motors Ltd*., 2006 BCCA 500 our Court of Appeal set out the approach the court is to take on a summary dismissal application:

> [10] A judge hearing an application pursuant to Rule 18(6) must: examine the pleaded facts to determine which causes of action they may support; identify the essential elements required to be proved at trial in order to succeed on each cause of action; and determine if sufficient material facts have been pleaded to support each element of a given cause of action.
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> [11] If insufficient material facts have been pleaded to support every element of a cause of action, then beyond a doubt that cause of action is bound to fail and a defendant bringing an application pursuant to Rule 18(6) will have met the onus to negative the existence of a *bona fide* triable issue.
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> [12] If sufficient material facts have been pleaded to support every element of a cause of action, but one or more of those pleaded material facts are contested, then the judge ruling on a Rule 18(6) application is not to weigh the evidence to determine the issue of fact for the purpose of the application. The judge's function is limited to a determination as to whether a *bona*

> *fide* triable issue arises on the material before the court in the context of the applicable law. If a judge ruling on a Rule 18(6) application must assess and weigh the evidence to arrive at a summary judgment, the "plain and obvious" or "beyond a doubt" test has not been met.
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> [Emphasis in the original.]

[12] While the court is not to weigh the evidence, uncorroborated assertions are unlikely to defeat summary judgment: *Balfour v. StormCloud Network (Canada) Incorporated*, 2015 BCSC 1232, aff'd 2016 BCCA 438.

[13] Where, as here, the summary judgment involves a contract, the court must interpret the terms of the contract in order to determine whether the claim raises a triable issue: *Trowbridge v. Connelly*, 2017 BCSC 2336 at para. 6.

THE ENGAGEMENT LETTER

[14] The pertinent sections of the Engagement Letter stipulate the following with respect to termination and resultant compensation. Capitalized terms are defined in the Engagement Letter. The emphasis is mine:

1. The Engagement Letter may be terminated "at any time with or without Cause" by either party on 15 days written notice;

2. If MNP terminates the Engagement Letter for Cause, the Company must compensate MNP for its Professional Fees (time expended at standard professional fee rates) and any unpaid out-of-pocket expenses and administrative fees;

3. If MNP terminates the Engagement Letter without Cause, MNP is entitled to just the Work Fee ($50,000) paid or payable;

4. If the Company fails to accept a Bona Fide Offer, MNP may at its sole discretion and without notice deem the Engagement Letter to be immediately terminated and MNP will be entitled to its Completion Fee.

[15] MNP has "Cause" to terminate the Engagement Letter if the Company, *inter alia*, engages in the following conduct:

1. Fails to operate business in a prudent manner;
2. Engages in activities or conduct that impedes MNP's ability to perform the Services;
3. Gives false or misleading information to MNP;
4. Fails to cooperate with and/or support MNP;
5. Misleads MNP in any way; or
6. Materially breaches the terms of the Engagement Letter.

[16] Bona Fide Offer is defined as "any offer, proposal or letter of intent received from a prospective purchaser in respect of a Transaction which has the following attributes: (i) MNP reasonably believes the prospective purchaser has the financial capability necessary to effect the Transaction as proposed in the Offer; (ii) the Offer is not patently unreasonable; and (iii) the Offer is subject only to conditions which are not unusual in transactions of this nature and which can be satisfied in a timely basis or which are not unduly onerous.

ISSUE 1: WHETHER MNP'S CLAIM THAT IT IS ENTITLED TO PROFESSIONAL FEES AND OUT-OF-POCKET EXPENSES BECAUSE IT TERMINATED THE ENGAGEMENT LETTER FOR CAUSE IS BOUND TO FAIL

[17] MNP submits that it became entitled to Professional Fees and out-of-pocket expenses when it terminated the Engagement Letter for Cause because the Company:

i. impeded MNP's ability to perform the Services;

ii. gave MNP false and misleading information; or

iii. failed to cooperate with and support MNP in the performance of its services.

[18] Regarding ii. above, MNP focuses on the actions of the Company in involving another financial advisor who interfered with prospective purchasers.

[19] MNP takes the position that through the invoice plus its representative Mr. Bandali's contemporaneous communications to Mr. Florian (principal of the Company), it made clear that MNP had terminated the Engagement Letter.

[20] The Company argues that there is just one circumstance under which MNP is entitled to its Professional Fees: if MNP provides the company with 15-day written notice of Termination for Cause which they did not.

[21] MNP responds that the Company's argument is premised on the fact that MNP did not use the word "termination" in its communications. MNP points out that the Engagement Letter does not require that that word be used.

[22] In its pleadings, MNP relies on Mr. Bandali's June 21, 2021 email as the notice of termination. Mr. Bandali on behalf of MNP deposes that at the June 17, 2021 meeting he made clear to Mr. Florian and others from the Company that MNP would not do further work under the Engagement Letter and that he would be issuing an invoice, as follows:

> [70] At the meeting, and after exchanging pleasantries, Mr. Florian and Mr. Hicks began to discuss their plans for Taplow, its growth prospects and their expectations for a future sale price. In the context of this discussion, I raised the following points (among others):
>
> a) MNPCF had taken Taplow to market twice, without closing a transaction;
>
> b) Mr. Florian was overestimating Taplow's value;
>
> c) MNPCF would be issuing an invoice for its work;
>
> d) The invoice was required to be paid by the terms of the Engagement Letter;
>
> e) MNPCF would not continue under the existing terms of the Engagement Letter. (in particular, the previously agreed-upon threshold price of $60 million would need to be renegotiated); and,

> f) MNPCF would not do further work if Taplow failed to pay MNPCF for its work thus far.
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> [71] At the end of the meeting, I advised Mr. Florian and Mr. Hicks that they should expect an invoice soon. Mr. Florian told me that he would consider our position and revert with a plan forward, including on new engagement terms.
>
> [72] On June 21, 2021, I sent Mr. Florian a draft final invoice. In sending this invoice, consistent with the discussion at the June 17, 2021 meeting, I was terminating the Engagement Letter on behalf of MNP…
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> [Emphasis added.]

[23] The June 21, 2021 draft final invoice (the "Draft Final Invoice") that Mr. Bandali sent the Company was for time expended (Professional Fees) and out-of-pocket expenses. The email attaching the invoice reads in part:

> Hello Mike,
>
> As we discussed last week, please find our invoice attached. The invoice is in draft form as we should discuss an appropriate discount. Also, please note that in the event that we close a transaction within the next two years, we will credit back up to 90% of the payment to the success fee….
>
> [Emphasis added.]

[24] Of note, there is no mention of Cause. Nor is there mention of a termination or any words to indicate that the Engagement Letter was at an end. To the contrary, the email speaks of the parties will continue working together.

[25] On the same day, June 21, 2021, Mr. Florian responded to Mr. Bandali asking that he send a copy of the Engagement Letter and requesting that he "point out the clause that is pertinent to your attached invoice". Mr. Bandali replied by email saying that he would send a copy of the Engagement Letter. He also expressed MNP's desire to continue working with the Company:

> One thing to consider is when you go to market the company again. The sooner you would like to go back to market the more significant the discount we can provide. We really want to be with you when you eventually complete a transaction so let's keep that in mind as we have this discussion.
>
> [Emphasis added.]

[26] The following day, June 22, 2021, Mr. Bandali sent a copy of the Engagement Letter without indicating the clause that MNP relied on in issuing the invoice. His

explanation for not doing so is that "it is not [his] practice to debate legal terms with clients". I fail to see how clarifying the authority to issue an invoice equates to a debate regarding legal terms.

[27] The understanding of the parties as to whether there was a termination is irrelevant. The test is an objective one: whether a reasonable recipient of the June 21, 2021 email and Draft Final Invoice, bearing in mind the terms of the Engagement Letter, would conclude that MNP was terminating the Engagement Letter? In my view the answer is no.

[28] Nowhere in Mr. Bandali's recitation of the June 17, 2021 conversation is there mention of termination. Mr. Bandali's statement that the threshold price had to be renegotiated is not a termination. Similarly, nowhere in the June 21, 2021 email or Draft Final Invoice is there mention of termination.

[29] Plus, in a June 27, 2021 email Mr. Bandali advised Mr. Florian that if he reached out to a prospective purchaser himself, it "reflects a company led termination of our engagement". If Mr. Bandali had terminated the Engagement Letter on June 21, 2021 why would he be concerned about the Company reaching out to prospective buyers? And how could there be a "company led termination" of an already terminated Engagement Letter?

[30] Further, according to undisputed evidence, during an October 2021 meeting, Mr. Bandali advised Mr. Florian that his superiors wanted the Company to terminate the Engagement Letter so that MNP would be able to collect the Completion Fee if the Company was sold to a purchaser identified by MNP. Again, how could the Company terminate an already terminated Engagement Letter?

[31] There is a further difficulty respecting MNP's claim for out-of-pocket expenses. As per the Engagement Letter, MNP was required to obtain the Company's written consent before incurring over $3000 in any billing period and to invoice the Company on a regular basis. The Draft Final Invoice of $31,097.18 in expenses is the only invoice MNP issued for the expenses. Having failed to obtain

prior written consent, the Company says that MNP cannot now seek reimbursement for them. I agree. MNP can not claim for out-of-pocket expenses

[32] Having considered all of the evidence, I find that the June 21, 2021 email and Draft Final Invoice did not constitute the 15-day written notice of Termination as required under the terms of the Engagement Letter. While I agree with MNP that there is no requirement that the word termination be used, the notice, when read as a whole, must clearly demonstrate MNP's intention to terminate because of the Company's failure to comply with a fundamental term of the Engagement Letter: see *2174372 Ontario Ltd. v. Dharamshi,* 2021 ONSC 6139 at para. 105.

[33] I find that there is nothing in the email or invoice that suggests that MNP was ending the engagement. Accordingly, I find that MNP's claim for Professional Fees and out-of-pocket expenses does not raise a triable issue.

[34] In reaching this conclusion, I reject MNP's argument that this application is premature as discoveries have not been conducted. The fact that discoveries have not been conducted is not in and of itself enough to prove that a summary judgment application is premature. As stated by Crerar, J. in *Xiao v. Fan*, 2020 BCSC 69:

> [48] A respondent to a summary judgement application may also argue that the application is premature as there may exist material evidence that has not yet come to light, but stands a reasonable prospect of emerging in the course of discovery and disclosure. This possibility forms an exception to the general rule that summary judgment applications should be determined on the evidence actually before the court. The purpose of the summary judgment rule "is to prevent claims or defences that have no chance of success from proceeding to trial and not to prevent actions that have some potential of succeeding from developing through the discovery process": *Nextgear* at para. 39. In other words, "there may be circumstances in which an application for summary judgment may be premature, such as where a party has not had an opportunity to develop evidence through the discovery process on issues raised in the pleadings": *Veritas Geophysical (Nigeria) Limited v. Energulf Resources Inc*., 2010 BCSC 1253 at para. 34.
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> [49] The mere fact that the discovery process is not yet complete is not enough in itself to resist summary judgment. Rather, the respondent must articulate "some specificity" for the claim that the discovery process may uncover relevant evidence: *Nextgear* at para. 39. As explained in *Bank of Montreal v. Scotia Capital Inc.*, 2002 NSSC 252 (cited in *Coady v. Burton Canada*, 2012 NSSC 257, which is cited in *Nextgear* at para. 39), there must be "an indication, at least in a very limited way supported by the

> circumstances, that the discovery, either oral or often more likely of documents, stands a possible opportunity to confirm an allegation" (at para. 23). In other words, the respondent must demonstrate there is a reasonable prospect further discovery will reveal the existence of a triable issue. In these circumstances, a final order of summary judgment is not warranted; there is still a reasonable doubt about whether a triable issue may yet emerge.
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> [Emphasis added.]

[35] MNP delineated the following issues as requiring discovery:

(a) Whether Taplow provided MNP with false information concerning its financial performance.

(b) Mr. Florian's phone calls and meetings with Mr. Lanthier.

(c) Communications between the defendants and financial advisors other than MNP.

(d) Mr. Florian's subjective understanding that the Engagement Letter remained in effect.

[36] None of these matters relate to the issues relevant to this application. The first three items relate to Cause which is not in issue on this application and the fourth to Mr. Florian's subjective state of mind, which again is not a relevant consideration on this application.

[37] I further reject the Company's argument that granting the Company's application would result in litigation in slices. MNP's claims for Professional Fees and out-of-pocket expenses are based on MNP giving the Company the notice required under the terms of the Engagement Letter. It does not involve a consideration of whether MNP had Cause or whether the Company failed to accept a Bona Fide Offer. It is a consideration distinct from the other claims of MNP. The fact that a party has pled other causes of actions is not an automatic bar to having some claims summarily dismissed. The summary dismissal rule is the method by which claims that have no prospect of success can be struck so the trial can focus on meritorious claims.

ISSUE 2: WHETHER MNP'S CLAIM THAT IT IS ENTITLED TO COMPLETION FEE BECAUSE THE COMPANY REJECTED A BONA FIDE OFFER IS BOUND TO FAIL

[38] In its NOCC, MNP submits that it became entitled to the Completion Fee when the Company rejected a Bona Fide Offer which allowed MNP to immediately terminate the Engagement Letter without notice. The pleadings read as follows:

> 23. The Company rejected the Bona Fide Offer, by inter alia, taking steps to renegotiate key terms of the LOI with the Purchaser, which steps were taken against the advice and objections of [MNP].
>
> 24. Pursuant to the terms of the Engagement Letter, having rejected the Bona Fide Offer, the Company owes [MNP] the Completion Fee…

[39] The Company argues that on the pleadings, there is only one scenario under the terms of the Engagement Letter which entitles MNP to the Completion Fee: if the Company rejects a Bona Fide Offer for an amount equal to or exceeding the threshold price and MNP elects to terminate the Engagement Letter. In such case, MNP may "without notice" deem the Engagement Letter to be "immediately terminated" and may claim the Completion fee only. Under this scenario, MNP is not entitled to claim Professional Fees, which is what it invoiced.

[40] The Company concedes that there is a dispute about whether the Company failed to accept a Bona Fide Offer. That will be the subject of the breach of contract issue. The issue on this application is simply whether MNP terminated the Engagement Letter.

[41] MNP submits that "without notice" means that there was no requirement for MNP to provide any notice to the Company. The Company responds that "without notice" does not mean that MNP does not have to advise the Company that they are terminating the Engagement Letter. Rather it means that no advance notice is required. The Company argues that it would make no sense that MNP could deem a termination thereby crystallizing the rights and obligations of the parties while the client remained unaware. I agree. Regardless, there is no evidence that MNP ever deemed the Engagement Letter to be terminated, even internally.

[42] I return to the June 21, 2021 email and Draft Final Invoice. The invoice is for Professional Fees and out-of-pocket expenses. Not the Completion Fee.

[43] There is no evidence that MNP terminated the Engagement Letter on the grounds that the Company failed to accept a Bona Fide Offer. Accordingly, MNP's claim for the Completion Fee does not raise a triable issue and is bound to fail.

ISSUE 3: WHETHER MNP'S CLAIM THAT THE COMPANY BREACHED THE DUTIES OF GOOD FAITH AND HONEST PERFORMANCE IS BOUND TO FAIL

[44] As touched on above, the duty of good faith is an organizing principle, not a rule of law. A further manifestation of the doctrine is the duty of honest performance which means that a party "must not lie or knowingly mislead each other about matters directly linked to the performance of the contract": *Bhasin v. Hrynew*, 2014 SCC 71 at paras. 63—66 and 73.

[45] The Company submits that MNP has not pleaded any material facts that establish that the Company lied or knowingly misled them. The only allegation of dishonesty in MNP's NOCC is at para. 25 where MNP states that it terminated the Engagement Letter for Cause for, *inter alia*:

> (c) The Company gave false or misleading information to [MNP];
>
> ….
>
> (f) The Company mislead (sic) [MNP] in a material way (including misleading [MNP] into believing that the Company was serious about entering into a Transaction); …

[46] Alternatively, the Company submits that even if it was properly pleaded it would not allow MNP to recover the Professional Fees, Completion Fee or Out-of-Pocket Expenses. MNP would only be entitled to be placed in the position it would have been had the duty been performed: *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45 (Callow) at para. 107. As the Company stated in written argument, MNP cannot use

the duty of honest performance to circumvent the express requirements of its contract:

> [124] In this case, the Company's purported dishonesty did not deprive MNP of any contractual benefits. Rather, any loss of its entitlement to additional fees resulted from its decision not to terminate the Engagement Letter. It cannot rely on good faith to avoid the consequences of that decision.
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> [125] If the Company engaged in dishonest conduct that caused the sale with Purchaser B to collapse (which is not pleaded), then MNP was entitled to terminate the Engagement Letter and claim the Completion Fee. If the Company engaged in dishonest conduct that did not cause the sale to collapse, but was nevertheless "material" in some way (also not pleaded), then MNP was entitled to terminate the Engagement Letter for Cause and collect the Professional Fees. That MNP was entitled to pursue these options is apparent from paragraph 25 of MNP's notice of civil claim, where it cites the Company's misleading conduct as Cause for its purported termination of the Engagement Letter.
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> [126] MNP chose not to exercise these options, preferring to negotiate for an extracontractual payment while preserving its ability to claim the Completion Fee if the Company sold at a later date. Having made this choice, it cannot rely on the duty of honest performance to circumvent the express requirements of its own contractual agreement. As expressed by the concurring judges in *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 202 SCC 7:
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> > [130] . . . [T]he purpose of good faith is to "secur[e] the performance and enforcement of the contract made by the parties" (*Transamerica Life Canada Inc. v. ING Canada Inc.* (2003), 68 O.R. (3d) 457 (C.A.), at para. 53). It cannot be used as a device to "create new, unbargained-for rights and obligations", or "to alter the express terms of the contract reached by the parties" (*Transamerica*, at para. 53). Contracting parties cannot be held to a standard that is "contrary to the plain wording of the contract, or that involves the imposition of subjective expectations" (*Styles v. Alberta Investment Management Corp.*, 20 1 7 ABCA 1, 44 Alta. L.R. (6th) 2 1 4, at
> >
> > para. 45).
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> [Emphasis in original.]

[47] In its Application Response, MNP explains its claim for breach of the duty of honest performance as that the Company had an obligation to exercise its discretion to reject the Bona Fide Offer in good faith. It argues that MNP has the right to claim damages even if it never terminated the Engagement Letter. In making this submission MNP relies on the following passages from *Callow*:

[113] It bears emphasizing that, despite Cromwell J.'s comments related to *Hamilton*, he nonetheless awarded damages to the appellant flowing from the breach of the respondents' obligation to perform the contract honestly. Damages were awarded using the ordinary measure of contractual expectation damages, namely to put Mr. Bhasin in the position he would have been in had Can-Am not breached its obligation to behave honestly in the exercise of the non-renewal clause (*Bhasin*, at paras. 88 and 108). This resulted in Mr. Bhasin being compensated for the value of his business that eroded (paras. 108-10). As Professors O'Byrne and Cohen helpfully explain, "if Can-Am had dealt with Bhasin honestly on all fronts (though without requiring it to disclose its intention not to renew), Bhasin would have realized much sooner that his relationship with Can-Am was in tremendous jeopardy and reaching a breaking point. He could have taken proactive steps to protect his business, instead of seeing it 'in effect, expropriated and turned over to Mr. Hrynew'" ("The Contractual Principle of Good Faith and the Duty of Honesty in *Bhasin v. Hrynew*" (2015), 53 Alta. L.R. 1, at p. 8 (footnotes omitted)).

[114] How is it that damages were awarded for a breach of the duty of honest performance despite the principle outlined in *Hamilton*? While damages are to be measured against a defendant's least onerous means of performance, the least onerous means of performance in this case would have been to correct the misrepresentation once Baycrest knew Callow had drawn a false inference. Had it done so, Callow would have had the opportunity to secure another contract for the upcoming winter. As Callow explained at the hearing, "since this dishonesty caused Callow a loss by inducing it not to bid on other contracts during the summer of 2013 for the winter of 2013 to 2014, the condos are liable to it for damages" (transcript, at p. 5), which reflect its lost opportunity arising out of its abuse of clause 9.

[115] It may be true that the trial judge could have explained her rationale for awarding damages more plainly. But even if the trial judge fell into the same error that the trial judge in *Bhasin* committed, so as to award damages as though the contract had carried on, it was one of no consequence.

[116] As the trial judge found, Baycrest "failed to provide a fair opportunity for [Callow] to protect its interests" (para. 67). Had Baycrest acted honestly in exercising its right of termination, and thus corrected Mr. Callow's false impression, Callow would have taken proactive steps to bid on other contracts for the upcoming winter (*A.F.*, at paras. 91-95). Indeed, there was ample evidence before the trial judge that Callow had opportunities to bid on other winter maintenance contracts in the summer of 2013, but chose to forego those opportunities due to Mr. Callow's misapprehension as to the status of the contract with Baycrest. In any event, even if I were to conclude that the trial judge did not make an explicit finding as to whether Callow lost an opportunity, it may be presumed as a matter of law that it did, since it was Baycrest's own dishonesty that now precludes Callow from conclusively proving what would have happened if Baycrest had been honest (see *Lamb v. Kincaid* (1907), 38 S.C.R. 516, at pp. 539-40).

[48] From the above passages, I conclude that it is open for the trial judge to award an aggrieved party damages for breach of the duty of honest performance of matters directly linked to the performance of the contract. In *Callow*, the case turned on the dishonest manner in which the respondents exercised the termination clause, though they exercised the clause according to the terms of the contract. As stated at para. 37, the "relevant question is generally whether a right under the contract was exercised, or an obligation under that contract was performed, dishonestly…"

[49] The award for breach of honest performance may be the same as set out in the contract but it may be different—designed to put the injured party back in the position it would have been before the breach.

[50] Even if I am wrong, I am unable to conclude that MNP is confined to seeking damages as per the Termination clauses or that by seeking damages for breach of honest performance MNP is seeking to try to circumvent the Engagement Letter through the contract.

[51] On the submissions before me, I am unable to find that this claim does not raise a triable issue.

ISSUE 4: WHETHER MNP'S CLAIM THAT THE COMPANY WAS UNJUSTLY ENRICHED IS BOUND TO FAIL

[52] MNP claims that the Company was enriched by MNP's performance of its obligations under the Engagement Letter.

[53] To succeed in an unjust enrichment claim, MNP must establish three elements:

1. an enrichment to the respondent;
2. a corresponding deprivation to the petitioner; and
3. the absence of any juristic reason for the enrichment.

See *Kerr v. Baranow*, 2011 SCC 10 at para. 32.

[54] Regarding the first element, an enrichment, the Court has taken an economic approach. There must be a tangible benefit which has enriched the Company and which can be restored to MNP in kind or with money: *Kerr* at paras. 37 and 38.

[55] The second element, a corresponding deprivation, bears relation to the Company's gain. Put another way, the Company's gain has led to or caused MNP's loss: *Kerr* at para. 39.

[56] The third element, the absence of juristic reason, means that there is no reason in law or justice for the Company's gain: *Kerr* at paras. 40-41. It contemplates the autonomy of the parties, including their legitimate expectations and their right to order their affairs by contract.

[57] In this case, there is a juristic reason- the Engagement Letter. The existence of a contract is an established reason for enrichment. In this case, MNP's claim rests upon the "Services" MNP provided. "Services" is defined in the Engagement Letter as the services agreed to as part of the engagement. There is no claim for any services or enrichment provided outside the Engagement Letter.

[58] MNP makes no submissions regarding the claim of unjust enrichment.

[59] Given the juristic reason, I find that MNP's claim of unjust enrichment does not raise a triable issue.

CONCLUSION

[60] I declare that MNP did not terminate the Engagement Letter prior to October 25, 2021.

[61] I make the following orders:

1. MNP's claims at Part 1 paragraphs 24, 25, 28, 29 and 30, Part 2 paragraph 1(a), (b) and (c) and Part 3 paras. 3, 4, and 5 of the NOCC filed December 9, 2022 are hereby struck;

2. Notwithstanding order 1 above and subject to order 3 below, MNP has leave to amend the NOCC within 30 days to advance a claim of breach of the Engagement Letter ("the Amended Claim");

3. The Amended Claim must not allege that MNP terminated the Engagement Letter and MNP's claims in the Amended Claim must not be dependent on Termination of the Engagement Letter by MNP as a material fact or as a basis for relief as against the Defendants;

4. The defendants' application to have MNP's claim for breach of the duty of honest performance is dismissed;

5. Costs to the defendants in the cause.

"The Honourable Madam Justice Murray"