IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Phoenix Homes Limited v. Takhar,
2023 BCSC 184

Date: 20230208
Docket: S140077
Registry: Vancouver

Between:

Phoenix Homes Limited

Plaintiff

And

Nirmal Takhar, Phoenix Construction Systems Ltd.,
Phoenix Star Enterprises Limited,
View Side Developments Ltd, and Phoenix Homes (2011) Limited

Defendants

And

Kundan Singh Khela, Kamaljit Kaur Khela
and Phoenix Homes Limited

Defendants by Counterclaim

Before: The Honourable Mr. Justice Kent

Reasons for Judgment

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Place and Dates of Trial:	Vancouver, B.C. April 3–5, 9–13, 16, 18, 23–26, 30, 2018 May 1–4, 7–10, 14, 18, 28, 2018 June 25, 2018 October 18, 2021 November 1–5, 8–10, 12, 15–19, 22–26, 2021 December 6–10, 13–17, 20–22, 2021 January 17–21, 2022 February 1–4, 2022 April 19–22, 2022 July 18–22, 25–29, 2022 August 2–3, 2022 October 11–14, 17–21, 24–28, 31, 2022 November 1–4, 2022
Place and Date of Judgment:	Vancouver, B.C. February 8, 2023

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I. INTRODUCTION AND OVERVIEW

"A verbal contract is not worth the paper it's written on."

[1] This witticism is commonly attributed to the film producer, Sam Goldwyn, although it is also widely reported to have been the joke of an Australian-Irish politician printed in an 1890 copy of "The Irish Law Times and Solicitors' Journal". In real life, of course, many people rely on unwritten promises and, as a matter of law, enforcement of such promises is possible in certain circumstances. The truth underlying the quip, however, is that an agreement which is written and signed by the parties is easier to prove and, if drafted properly, to understand and enforce.

[2] This case illustrates the folly of entering into business transactions based on unwritten promises and misplaced trust, where the failure to reduce understandings and obligations to writing leads to years of costly litigation in which reputations are publicly tarnished and liquidation of a joint venture appears inevitable.

[3] Both Mr. Kundan Khela ("Mr. Khela") and Mr. Nirmal Takhar ("Mr. Takhar") acknowledge that in early 2005 they made an oral agreement to purchase and develop a property located at 7298–199A Street (the "199A Property") in the City of Langley, on which residential housing would be built and sold to their mutual and equal profit. They both agreed that a company, now known as Phoenix Homes Limited ("Phoenix Homes"), would be incorporated and used for the project (the "199A Property Project").

[4] Even though many millions of dollars were potentially involved, they put nothing in writing. No partnership or joint venture agreement was drafted setting out the terms of their understanding. No shareholders' agreement was signed setting out their respective expectations for the management of Phoenix Homes' affairs, or how the project would be financed and built.

[5] It turned out the vendor of the 199A Property resiled from the sale at the 2005 closing and specific enforcement litigation ensued. A settlement was eventually reached four years later in 2009, whereupon the 199A Property was developed by a

different company owned by Mr. Takhar, Phoenix Construction Systems Ltd. ("Phoenix Construction"). Some 62 townhouses were subsequently built and sold. In this lawsuit, it is alleged that the project was a business opportunity belonging to Phoenix Homes improperly misappropriated by Mr. Takhar in breach of his fiduciary and statutory obligations to that company and for which both he and Phoenix Construction are liable.

[6] A second development opportunity involved three properties on 160th Street in the City of Surrey (the "160th Street Properties"), which were registered in 2006 in the name of Phoenix Star Enterprises Ltd. ("Phoenix Star"). Some 41 townhouses have since been built and sold (the "160th Street Project"). It is alleged that this too was another business opportunity belonging to Phoenix Homes that was misappropriated by Mr. Takhar in breach of his fiduciary and statutory obligations. Phoenix Homes also claims judicial relief against Phoenix Star, a company whose ownership and control Mr. Takhar initially denied under oath but eventually admitted at trial.

[7] A third real estate development project involving the parties concerns land at 8184 and 8170–208th Street, in the City of Langley (the "208th Street Properties"). These properties have been registered in the name of Phoenix Homes since November 2006, but their development has been stalled by the later fractured relationship between Mr. Khela and Mr. Takhar and the ensuing litigation. Part of the claim here is that, again in breach of his fiduciary and statutory obligations owed to Phoenix Homes, Mr. Takhar caused the latter to enter into an unauthorised "side deal" purporting to sell a portion of the land to View Side Developments Ltd. ("View Side"), yet another company that Mr. Takhar is alleged to own and/or control. Phoenix Homes claims this deal with View Side is a "sham transaction" that must be set aside and that both Mr. Takhar and View Side are jointly and severally liable for all resulting loss.

[8] Phoenix Homes also initially claimed intellectual property in the name "Phoenix Homes". It claimed that by using the name in electronic and print media

and incorporating yet another company using the name—Phoenix Homes (2011) Ltd. ("Phoenix Homes 2011")—the defendants committed the tort of "passing off". Judicial relief was sought in the form of damages and an injunction. However, this claim was ultimately abandoned in final argument at trial and I shall say no more about it.

[9] The defendants deny all wrongdoing. They bring various counterclaims for damages and other relief against Phoenix Homes, Mr. Khela and his spouse, Kamaljit Khela ("Mrs. Khela"). Mr. Khela is alleged to have breached his agreement with Mr. Takhar to fund the development(s). Abuse of process is also alleged and substantial damages are claimed for wrongful filing of certificates of pending litigation against the titles to the 160th Street and 199A Properties. View Side seeks a declaration that the oral promises made by Mr. Takhar and written contract of purchase and sale documents respecting the eastern portion of the 208th Street Properties (together, the "View Side Contract") constitute a valid and enforceable contract, as well as other related relief.

[10] Lest there be insufficient "fire burn, and cauldron bubble" in this Shakespearean witches' brew, the parties also add to the pot combustible ingredients of perjury, forgery, deceit and other dishonesty. Regrettably, these allegations have real substance.

[11] Almost every fact in this case is in dispute. The fact finding necessary to resolve the legal issues between the parties is made extremely difficult by the complete absence of written agreements or correspondence between the principals in this drama. While cross-examination is often said to be the crucible in which truth is distilled, credibility is a major obstacle for all the major witnesses in this case and what may loom larger in the outcome here is the principle that the burden of proof generally lies upon he who affirms, and not upon who he denies.

II. PREVIOUS PROCEEDINGS AND ORDERS

[12] In November 2011, Mr. and Mrs. Khela ("the Khelas") issued petition proceedings in this court against Phoenix Homes and Mr. Takhar. They claimed

Mr. Takhar was operating Phoenix Homes in a manner that was oppressive and unfairly prejudicial to their interests as shareholders and sought remedies pursuant to s. 227 of the *Business Corporations Act*, S.B.C. 2002, c. 57 [*BCA*]. They also sought leave under s. 233 of the *BCA* to start a derivative action in the name of Phoenix Homes against Mr. Takhar and his related companies on the basis that they had misappropriated business opportunities belonging to Phoenix Homes.

[13] Mr. Takhar opposed these applications and brought his own application under s. 233 for leave to prosecute a derivative action in the name of Phoenix Homes against Mr. Khela, whom he alleged had breached both his duties as a director of the company and the terms of the development/funding agreement made with Mr. Takhar and Phoenix Homes.

[14] The petition proceedings were heard by Mr. Justice Skolrood in late summer 2013, and judgment was issued on November 18, 2013, indexed at 2013 BCSC 2079. Among other things, Mr. Justice Skolrood dismissed the Khelas' oppression claim but granted leave to Mr. Khela to commence and prosecute a derivative action against Mr. Takhar and any other entity against which Phoenix Homes had a valid claim for misappropriation of the latter's opportunities and projects. He dismissed Mr. Takhar's cross-application for leave to commence a derivative action in the name of Phoenix Homes against Mr. Khela. He made it clear at para. 142, however, that he was "not passing judgment on the merits of the respective claims of the parties" and ordered that costs of both the Khelas' petition and Mr. Takhar's cross-application would be costs in the cause of the proposed derivative action.

[15] Pending the outcome of the derivative action, Mr. Justice Skolrood issued an order restraining both Mr. Takhar and Mr. Khela from contracting on behalf of Phoenix Homes without the other's consent or a court order first being obtained. The corporate affairs of Phoenix Homes have remained deadlocked ever since, although both the 208th Street Properties' mortgage and property tax payments have been made in the meantime. Perhaps fortunately for all concerned, the value of the 208th

Street Properties has increased substantially in the intervening years, seemingly exceeding $40 million by the end of trial.

[16] An appeal was taken by both parties but was dismissed by the Court of Appeal in May 2015 (2015 BCCA 202). The Court of Appeal stated at para. 80 that it was "satisfied that the discretionary orders of [Skolrood J.] created an effective and equitable procedural framework for the resolution of this corporate dispute".

[17] With respect to Mr. Takhar's proposed breach of contract claim, the Court of Appeal expressed doubt that any such contract extended beyond Mr. Khela to include Phoenix Homes as a contracting party. It observed at para. 75 that Phoenix Homes was "simply the vehicle that Mr. Takhar and Mr. Khela intended to use in carrying out their plans for [the 208th Street Properties]". Instead, the content of the agreement between Mr. Takhar and Mr. Khela was the "critical question" in the litigation.

[18] I agree that this is a critical question, and it must also be borne in mind that whatever initial agreement may have been made by the parties before Phoenix Homes was incorporated was almost certainly amended or superseded by subsequent dealings between the principals.

III. PLEADINGS AND PRE-TRIAL EVENTS

[19] The pleadings define the issues in dispute and may determine the relevancy or admissibility of contested evidence. I therefore review them in detail here, but before I do so I should perhaps first address a misnomer.

[20] One of the named defendants is View Side Developments Ltd. That name is used in most of the pleadings starting, of course, with the plaintiff's Notice of Civil Claim. Part of the evidence at trial, however, included a corporate summary for an entity called View Side Development Ltd. (i.e., no "s" attached to the word "Development"). One exception is the style of cause on the pleadings filed by that defendant where the "s" does not appear at the end of the word "Development"

although, just to confuse matters further, those same pleadings indicated that they were “filed by: View Side Developments Ltd.” [emphasis added].

[21] This Court assumes that the proper name of the entity involved in this lawsuit is indeed View Side Development Ltd. and that there is a misnomer in the pleadings that has been perpetuated throughout the litigation, including through trial. It goes without saying that, although the words “Development” and “Developments” may appear from time to time throughout the evidence and these reasons, it is intended by the Court that these are references to the same and proper entity.

a. Phoenix Homes pleadings

[22] The derivative action in the name of Phoenix Homes Limited was first filed in this Court on January 7, 2014. Three days later, an Amended Notice of Civil Claim was filed pursuant to *Supreme Court Civil Rule* 6-1(1)(a) (i.e., the “one free amendment” rule) to correct the PID numbers for the subdivided portions of the 160th Street Properties that were still registered in the name of Phoenix Star and in respect of which a beneficial ownership interest was claimed by Phoenix Homes.

[23] The first Amended Notice of Civil Claim alleged breach of fiduciary duty on the part of Mr. Takhar and misappropriation of Phoenix Homes’ corporate opportunities in respect of the 199A Property, the 160th Street Properties and the 208th Street Properties. With respect to the first two properties, the pleading identified subdivided lots that remained in the name of Phoenix Construction or Phoenix Homes, claimed a beneficial interest in each lot and “claimed” certificates of pending litigation on each such lot.

[24] With respect to the 208th Street Properties, Mr. Takhar’s breach of fiduciary duty was alleged to arise by virtue of the View Side Contract, whereby a portion of the land was contracted for sale to View Side, an entity owned and/or controlled by Mr. Takhar, at a price less than market value. View Side was also alleged to have “improperly registered” a “Right to Purchase” on the title of the 208th Street Properties.

[25] The first Amended Notice of Civil Claim also alleged additional breaches of fiduciary duty on the part of Mr. Takhar, including:

- nine “Unauthorized Payments” made by Mr. Takhar to his company Phoenix Construction from the Phoenix Homes bank accounts during the period April 15, 2008 to May 2, 2011 in the aggregate sum of $1,204,700;
- “mixing” of the debts and expenses of other companies owned and/or controlled by Mr. Takhar with those of Phoenix Homes and “wrongfully attributing” such unrelated items to, and causing them to be paid by, Phoenix Homes;
- deliberately misplacing Phoenix Homes’ corporate records; and
- improperly “passing off” the “Phoenix Homes” trademark and goodwill through electronic and print media relating to other projects and the naming of another corporate entity owned and controlled by Mr. Takhar, Phoenix Homes 2011.

[26] Shortly before the commencement of this trial, on February 21, 2018, Phoenix Homes filed a Second Further Amended Notice of Civil Claim. The basic claims remain the same, although some further particulars are provided and the nature/extent of Mr. Takhar’s fiduciary and statutory obligations are somewhat expanded. View Side is now alleged to have provided “knowing assistance” to Mr. Takhar’s breaches of fiduciary and/or statutory duty and the doctrine of agency is raised as a basis for claiming joint and several liability in that regard. Technical legislative challenges are also made to the enforceability of the View Side Contract based on the *Law and Equity Act*, R.S.B.C. 1996, c. 253 [*Law and Equity Act*], the *Land Title Act*, R.S.B.C. 1996, c. 250 [*Land Title Act*] and the *BCA*. Lastly, the claim for misappropriation of corporate funds is reframed as the tort of conversion.

[27] The defendants also filed Amended or Further Amended Responses to Civil Claim shortly before or during trial.

b. Mr. Takhar, Phoenix Construction and Phoenix Homes 2011 pleadings

[28] Mr. Takhar, Phoenix Construction and Phoenix Homes 2011 are all represented by the same counsel and have filed joint defence pleadings. Phoenix Homes 2011 is essentially a bit player in this litigation, but on behalf of Mr. Takhar/Phoenix Construction the Second Further Amended Response to Civil Claim stakes out the following positions:

- the oral agreement between the parties was made in April 2005 and did not contemplate the development of multiple properties but rather related only to the 199A Property which was to be developed through a corporate vehicle (Phoenix Homes) in which the two principals (Mr. Khela and Mr. Takhar) would equally share the purchase/development costs as well as the profit;

- Phoenix Homes was otherwise to be "merely a shell company with no funds or business of its own";

- the principals had to be ready, willing and able at all material times to fully perform their obligations to fund as necessary and also guarantee any construction loans required to develop the property;

- it was also an "express or implied term" of the agreement that the principals were "free to invest in and/or develop other properties on their own or with other investors and companies as they each saw fit";

- any fiduciary relationship between Mr. Takhar and Phoenix Homes was therefore "limited in scope and effect";

- the 199A litigation (the specific enforcement lawsuit against the resiling vendor) rendered the original undertaking "uncertain" and the principals agreed to "look for other property investment opportunities"; and

- after the 208th Street Properties opportunity was identified, the principals agreed to "terminate" the 199A Property venture and to "replace it" with an agreement relevant to the development of the 208th Street Properties (the "208th Street Properties Project"), following which date Phoenix Homes "had no further interest in the 199A Property".

[29] In alternative allegations, one of which arguably constitutes a recognition of the plaintiff/Khelas' ongoing interest in the 199A Property, Mr. Takhar/Phoenix Construction plead that upon settlement of the 199A Property litigation, neither Phoenix Homes nor the Khelas were ready, willing or able, and never tendered the funds, to complete the purchase of the 199A Property, but rather "the Khelas wanted to 'flip' the 199A Property". As such, they say any recoverable loss "cannot exceed any net profit that may have been earned by the Plaintiff if the 199A Property been 'flipped' in 2009".

[30] With respect to the 160th Street Properties, Mr. Takhar/Phoenix Construction allege in their defence that:

- it was Mr. Takhar's wife, not the Khelas, who brought to his attention in early 2006 this potential development opportunity, following which Mr. Takhar arranged for two of the properties to be purchased in the name of Phoenix Construction and the third in the name of one of his other companies, Standard Plumbing and Heating Ltd., transactions that were ultimately transferred to Phoenix Star;
- "[Mr. Takhar] is not a director, officer or shareholder of Phoenix Star" but he "provides management services to Phoenix Star" (a misleading plea given Mr. Takhar's admission at trial that he was in effect the sole owner and controller of Phoenix Star); and
- neither the Khelas nor Phoenix Homes have ever made or offered any contribution, financial or otherwise, towards the purchase or development of the 160th Street Properties and they are estopped or

precluded by acquiescence or delay from making any beneficial interest claims in that regard.

[31] Insofar as the 208th Street Properties Project is concerned, Mr. Takhar/Phoenix Construction allege in defence that:

- following completion of the purchase on November 30, 2006, the Khelas' contribution towards the project has always been less than Mr. Takhar's and, in breach of the underlying agreement between the principals, they have continuously failed to equalize their contribution even as the development costs grew;
- all "equity, management services, labour, interest, construction costs, professional fees, financing and carrying costs (including Phoenix Homes' interest obligations to its lender), risks, time and expertise" necessary for the ongoing development of the 208th Street Properties Project have been carried out or paid for by or "on behalf of" Mr. Takhar or Phoenix Construction, and both the Khelas and Phoenix Homes are liable to reimburse same; and
- Mr. Khela expressly agreed with Mr. Takhar in 2010 that Phoenix Homes would sell a portion of the 208th Street Properties to View Side "to raise money in order to fund ongoing development expenses for the [208th Street Project]"—an arm's-length transaction at or above fair market value which was fair and reasonable to, and in the best interests of, Phoenix Homes.

[32] Mr. Takhar/Phoenix Construction also deny that any corporate funds of Phoenix Homes have been misappropriated or that any deliberate/wrongful "mixing of funds" has occurred. They do admit that Mr. Takhar "caused the payments" (the $1.2 million referred to in the Phoenix Homes pleading) to have been made, however, this was done "in good faith to pay the ongoing 208 Development Costs or to reimburse Phoenix Construction and others who incurred or would incur the 208

Development Costs", something that was "necessitated as a result of the Khelas' continuing breach" of their development funding contribution obligation.

[33] Lastly, Mr. Takhar/Phoenix Construction plead that Mr. Khela breached his agreement with Mr. Takhar and improperly caused Phoenix Homes to breach the construction loan agreement made in March/April 2011 with CareVest Capital Inc. ("CareVest Capital" or "CareVest") to finance the development of the 208th Street Properties. The breach was Mr. Khela's deliberate refusal to deliver the executed loan and guarantee documents with the express intention of halting the 208th Street Properties Project, an outcome that has caused significant financial loss to Mr. Takhar.

[34] As noted earlier, Mr. Takhar and Phoenix Construction have jointly issued a counterclaim against both the Khelas and Phoenix Homes. That Counterclaim repeats the same alleged breaches by the Khelas with respect to their funding/development obligations and seeks judgment against them whether as damages, unjust enrichment, *quantum meruit* or debt.

[35] In the alternative, they claim that if this Court determines that the Plaintiff or the Khelas have any interest in the 199A Property or the 160th Street Properties, they must pay compensation for the financial and development costs incurred with respect to those projects. If the Court finds that Phoenix Homes had no interest in these properties and that the Khelas therefore caused Phoenix Homes to wrongfully register certificates of pending litigation against title, damages are claimed accordingly.

c. Phoenix Star pleadings

[36] With leave of the court, Phoenix Star filed a Second Further Amended Response to Civil Claim on November 3, 2021. The amendments made at that time were that:

- "Phoenix Homes and the Khelas have misconducted themselves in this action in the form of fabrication of documents and the giving of untruthful evidence in respect of those documents"; and that
- both Phoenix Homes and "its representatives, the Khelas" do not come before the Court with "clean hands" and accordingly should be disentitled to all equitable relief sought in the action.

[37] Otherwise, the Phoenix Star pleading makes many of the same factual allegations as the Takhar/Phoenix Construction pleading, albeit with some additional facts specific to the 160th Street Properties:

- "Nirmal Takhar is not a director or officer of or shareholder in Phoenix Star. Takhar's only relationship with Phoenix Star is that he provides it with management services pursuant to an oral agreement to do so" (as noted above, an artfully misleading plea which does not disclose Mr. Takhar's status as the sole owner and controller of Phoenix Star);
- Phoenix Star purchased and developed the 160th Street Properties without any involvement of or contribution from Phoenix Homes or the Khelas;
- the lender for the development was Westminster Savings Credit Union ("WSCU"), whose mortgage against the strata lots comprising the development has been discharged by payment of net proceeds of sales;
- Phoenix Star did not knowingly assist Mr. Takhar in committing any breaches of fiduciary or statutory duty owed to Phoenix Homes; and
- Phoenix Homes is estopped from advancing its claim against Phoenix Star as a result of acquiescence, laches or delay, since it made no objection to the purchase, subdivision or development of the 160th Street Properties until development was at a very advanced stage and has made no contribution of any kind to the project.

[38] Phoenix Star has also issued a counterclaim against Phoenix Homes and Mr. and Mrs. Khela personally. The counterclaim seeks general and punitive damages for the wrongful filing of certificates of pending litigation against the 160th Street Properties (now stratified) but also includes the following allegations of fact not found in other pleadings:

- "the purchase and development of the [160th Street] Properties was financed by Phoenix Star in part from an aggregate of approximately $1,650,000 advanced by 11 private lenders, with whom Phoenix Star agreed to repay principal and 15% per annum interest following sales of its strata properties", and
- "as a result of the [certificates of pending litigation] and the necessary holding of funds in trust and replacement of them, Phoenix Star has been unable to repay the private lenders, and interest on those debts has continued to run at 15% per annum".

d. View Side pleadings

[39] View Side's Amended Response to Civil Claim filed on the eve of trial alleges as follows:

- View Side is owned and controlled by Mr. Manjit Gill who is the sole shareholder, director and officer of the company. Mr. Takhar has never been affiliated with View Side and does not have any direct or indirect ownership or control of View Side's affairs;
- the View Side Contract was an arm's length transaction entered into in good faith by View Side, at market value and in reliance upon the authority of Mr. Takhar to create contractual relations on behalf of Phoenix Homes;
- the View Side Contract was partly written and partly oral—the written part of the contract comprises the contract of purchase and sale documents (the "View Side CPS"), whereas the oral part of the contract

was Mr. Takhar's personal agreement to provide all necessary "guidance and assistance" in the development of the 40-unit portion of the 208th Street Properties being sold to View Side;

- in reliance upon the validity of the contract and the View Side Contract, and without any knowledge of any breach of duty owed by Mr. Takhar to Phoenix Homes, View Side made seven instalment deposit payments to Phoenix Homes over the period May 31, 2010 to May 2, 2011 in the aggregate amount of $1,200,000; and
- having accepted these deposit payments, Phoenix Homes is estopped from disavowing the View Side Contract on grounds of late payment and, in any event, View Side has not accepted any purported repudiation of the contract by Phoenix Homes and "demands performance of the View Side Contract by the plaintiff".

[40] View Side also filed an Amended Counterclaim in this action, albeit against only Phoenix Homes. The counterclaim seeks:

- a declaration that the View Side Contract is a valid and binding contract and that the View Side Contract remains extant;
- a declaration that View Side has an enforceable interest in the 40-unit portion of the 208th Street Properties and the right to purchase registered by View Side against title on January 6, 2011 is a valid and enforceable charge against title; and
- an order for specific performance and damages with respect to the View Side Contract.

e. Khela pleadings

[41] Mr. and Mrs. Khela were named as Defendants in the two counterclaims issued by Phoenix Construction/Takhar and Phoenix Star. Their pleadings essentially just deny the allegations made against them. However, in their Amended Response to the Counterclaim of Takhar/Phoenix Construction, they plead:

- Mr. Khela had cause to terminate the CareVest Capital construction loan for the 208th Street Properties "given the conduct of Mr. Takhar … that has been discovered in this action[,] particulars of which include the creation, or use, of false invoices, and swearing of false statutory declarations that occurred prior to the time of the alleged breach of the Construction Loan Agreement", and that
- "absent a contract, there is no legal basis to compel a shareholder to fund the liabilities of a corporation".

f. Pre-trial orders and events

[42] As noted above, when this derivative action was filed in January 2014, Phoenix Homes filed certificates of pending litigation against both the 199A Property and the 160th Street Properties. At that time, both projects were being marketed to the public, and to permit orderly completion of sales to third parties, an agreement was reached between the parties and/or by court order which enabled the certificates of pending litigation to be removed from individual titles and the net sale proceeds to be put into trust pending the outcome of this litigation.

[43] The parties also agreed that the sale proceeds could be used to repay the construction financing for the projects and, indeed, that financing has since been repaid in full and the related charges on title have been discharged. To date, there apparently remains approximately $5,000,000 of sale proceeds in trust related to the 199A Property and approximately $4,000,000 in trust for the 160th Street Properties.

[44] Counsel for Mr. Takhar/Phoenix Construction has submitted a schedule of the respective Khela/Takhar financial "contributions" to the Phoenix Homes enterprise (as they define it) with a view to illustrating the extent to which Mr. Takhar has "over contributed". The schedule indicates that the Khelas made initial contributions towards the 199A Property ($150,000 in 2005) which were then "credited" towards the 208th Street Properties Project following what Mr. Takhar/Phoenix Construction say was an agreement with Mr. Khela to "substitute" the former for the latter project in 2006. Mr. Takhar's "contributions" include approximately $700,000 of "consultant

and application fees" paid by him or his companies (Phoenix Construction, in particular).

[45] The 208th Street Properties Project had ground to a halt by the time the petition proceedings were issued by Mr. Khela in November 2011. Since then, the only ongoing payments made by the parties related to the 208th Street Properties have been property taxes (mostly by Mr. Khela) and mortgage instalments (mostly by Mr. Takhar). The latter have substantially exceeded the former over the years, such that Mr. Takhar's "over contribution" to date is said to be close to $2 million.

[46] The schedule is not part of the evidence in this trial but it is a useful chart setting out the chronology of many key events. By agreement of the parties, the trial before me was, and hence this judgment is, limited to the liability issues. Consequential judicial relief in terms of damages, including any formal taking of accounts, is left for another day.

[47] On February 7, 2018, Madam Justice DeWitt-Van Oosten, then of this Court, issued a Consent Order which, among other things, severed certain liability issues and required them to be tried separately before any related remedy issues. Perhaps through oversight, the Order did not formally address the defendants' various counterclaims which, of course, included claims for damages as well as other judicial relief. These issues came to the fore once the trial got underway and thereafter resulted in two further Consent Severance Orders filed April 3, 2018 and July 6, 2022.

IV. ISSUES TO BE DECIDED

[48] The trial lasted 105 days (21 weeks). It was interrupted at the end of May 2018 by a combination of Mr. Khela's health crisis, another long trial that had to proceed before me and, of course, the subsequent COVID-19 pandemic. It resumed in late 2021 and, given scheduling challenges, proceeded in fits and starts through to November 2022.

[49] Thirty-two witnesses were called to testify, twenty on behalf of Phoenix Homes/the Khelas, seven on behalf of Mr. Takhar/Phoenix construction, one on behalf of View Side (Mr. Gill, its principal), and four on behalf of Phoenix Star. There were 196 exhibits, many marked as a single exhibit but comprising several volumes of documents.

[50] Final submissions spanned four weeks. There were nine cerlox-bound volumes of written submissions and 15 volumes of legal authorities tendered. Stacked on top of each other, the closing materials exceeded five feet in depth.

[51] Shortly before the close of evidence at trial, the Court issued a memo requesting counsel to agree on (1) a common list of issues to be decided and (2) a common "Table of Contents" for final written submissions reflecting the issues in logical order. The Court also requested, perhaps with excessive optimism, an expansive but neutral statement of agreed uncontroversial background facts, including a chronology of key events. The assistance such an organised/coordinated approach provides to the judge tasked with writing the judgment is self-evident.

[52] Regrettably but not surprisingly, given the credibility issues at play in this case, these requests proved impossible, although I have no doubt counsel made every reasonable effort in that regard.

[53] The Court was provided with a document entitled "Agreed Issues" which represented the defendants' version of the requested list. It set out 16 issues, all of which (except the claim for passing off) will have to be addressed one way or another in this judgment.

[54] For their part, the Phoenix Homes/Khela contingent adopted the defendants' list but added several additional questions to be decided. Again, all of these questions will also have to be addressed in the judgment one way or another.

[55] One of the issues raised by the defendants, perhaps aptly described as the nuclear option, is whether the plaintiff's claim should be wholly dismissed as an abuse of process. The argument is that Mr. and Mrs. Khela have perpetrated a fraud

on this Court in the course of pursuing this derivative action and otherwise misconducted themselves by: (1) fabricating documents; (2) repeatedly lying under oath; (3) concealing documents; and (4) seeking to obtain and proffer false testimony from others.

[56] As will be seen, I have regrettably concluded that Mr. and Mrs. Khela have done all of these things to one degree or another, however, I am not inclined to entirely dismiss their claims and defences on that account.

[57] As will also be seen, I have concluded that Mr. Takhar is himself guilty of serious misconduct, including swearing false affidavits and statutory declarations, forging documents and signatures, deceiving banks in order to secure financing, non-disclosure of important information to his "partner" Mr. Khela, and inappropriate self-dealing with funds properly belonging to Phoenix Homes.

[58] What we have here is the proverbial "pot calling the kettle black". Neither party comes to court with clean hands. Both principals have displayed disturbing dishonesty. Summary dismissal of respective claims and counterclaims based on "abuse of process" is not appropriate in such circumstances and instead the Court will do its best to separate the wheat from the chaff in deciding the merits of the case.

[59] As noted, the evidentiary record in this case is very extensive. Almost every material fact is in dispute. However, the Court cannot possibly address every leaf on every branch on every tree in the forest before it; instead, I will limit myself to making findings of fact necessary to decide each of the following broadly stated issues, recognizing that there are many sub-issues subsumed within them:

1. What were the express and implied terms of the initial agreement between Mr. Khela and Mr. Takhar?

2. What role did Mr. and Mrs. Khela play in the identification and acquisition of the 160th Street Properties?

3. Did Mr. Khela agree with Mr. Takhar that Phoenix Homes would substitute the 208th Street Properties Project for the 199A Property Project and/or otherwise relinquish any interest in 199A Property Project?

4. Was the View Side Contract a valid and enforceable contract with Phoenix Homes?

5. Was Mr. Khela entitled to terminate the CareVest Capital loan in 2011 and thereby effectively terminate the agreement to develop the 208th Street Properties?

6. Are Phoenix Homes and/or the Khelas liable for "wrongful" filing of certificates of pending litigation against the title to the 199A Property and the 160th Street Properties?

[60] I recognize, of course, that the derivative action brought in the name of Phoenix Homes deals primarily with alleged breaches by Mr. Takhar of his fiduciary and statutory obligations to Phoenix Homes. That analysis will be both informed by and woven into each of the above sections of this judgment. First, however, I turn to the credibility challenges in this case and their effect upon the fact-finding process.

V. PROCESS FOR RESOLVING CREDIBILITY DISPUTES AND MAKING FINDINGS OF FACT

[61] I recently provided a "plain English" description of this process without legal citations for the benefit of a self-represented litigant in *Eaglestone v. Intact Insurance*, 2022 BCSC 2007 at para. 17. It is perhaps worth repeating here:

> [14] The primary role of a trial judge is to make findings of fact, i.e. to determine what happened in any given case, and to apply the law to those facts in order to generate the appropriate legal result. Findings of fact are based on admissible evidence presented to the court. As in this case, that evidence can include testimony under oath from witnesses respecting their actions and observations, as well as documents or other material marked as exhibits. The role of the trial judge is to appropriately weigh all of this evidence and to determine which alleged facts have been proved in accordance with the applicable standard of proof – in civil cases, on a balance of probabilities.

> [15] The assessment of a witness's oral testimony necessarily entails an assessment of credibility. The role of the court is not usually reduced to simply choosing between two or more versions of events, and it is not an all-or-nothing process. In determining facts, i.e. making findings as to what actually occurred in any given case, the court is free to reject some aspects of a witness's evidence while accepting others and, indeed, to assign different weight to different parts of the witness's evidence.
>
> [13] A human being's perception and memory of events is fallible. Memories are fragmentary, suggestible, and malleable. They often contain amnesic gaps, information out of order, guesses, and incorrect details. They are subject to decay, interference, distortion, and constructive error. Witnesses in a trial usually do their best to provide accurate evidence about a sequence of events or the content of conversations, but there is a great deal of room for error and reconstruction, and conflicting testimony is commonplace.
>
> [16] Accepting all or part of the testimony of any witness involves an assessment of credibility (truthfulness/honesty) and reliability (accuracy) of both the witness and the evidence. That in turn involves consideration of many different factors including:
>
> - consistency of the witness's account of events;
> - consistency with other admissible evidence from witnesses, documents, or other physical objects;
> - whether the evidence is reliably corroborated or contradicted by other evidence;
> - the witness's ability to reliably recall and communicate details;
> - the demeanour of the witness and whether the questions are answered in a frank and forthright fashion without evasion, speculation, or exaggeration; and
> - the inherent plausibility of the evidence and its consistency with the probabilities affecting the case as a whole.
>
> [17] Sometimes, however, witnesses deliberately lie and intend to deceive. When that occurs, it may be impossible to accurately separate truth from falsehood and the court may simply find the witness's testimony wholly unreliable. The more frequently the witness lies, the more likely that will be the case. If as a consequence a truth is not accepted as a fact by the court, the witness has only himself or herself to blame.

[62] The above summary reflects in part the methodology articulated at paras. 186–187 of the often-cited case of *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, leave to appeal ref'd [2012] S.C.C.A. No. 392, 2013 CanLII 11302. The defendants strongly urge me to apply this methodology here:

- First, the court should consider the testimony of a witness on a "standalone" basis, followed by an analysis of whether the witness's story is inherently believable;
- Then, if the witness's testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison; and
- Finally, 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.

[63] I would note, however, that a determination of what is "reasonable" or "inherently believable" is, like concepts of "common sense" and "implausibility", often a subjective assessment reflecting personal experience and one that may be unintentionally informed by implicit bias and even inappropriate stereotyping or myths. This is particularly true in cases involving testimony of witnesses from different cultures and backgrounds not necessarily understood by the trier of fact. As noted in *Kim v. Choi*, 2019 BCSC 437:

> [17] Caution should be exercised in assessing the testimony of witnesses from other cultures or where English is a second language and the evidence is received through an interpreter. The reason for caution was explained in *Fu v. Zhu*, 2018 BCSC 9 at paras. 39-42:
>
> > [39] Some caution had to be exercised in assessing credibility because the witnesses were from another country and culture and did not speak English. Often cultural and linguistic differences can affect the demeanour of witnesses in ways not necessarily understood by the trier of fact. For this reason, I was hesitant to conclude that a witness was evasive, in case what appeared to be evasiveness could be due to language or cultural differences.
> >
> > [40] I have approached the evidence aware that nuances might be lost in translation, both in terms of the translation of the question to the witness and in the answer. Word choice and word order in a sentence might be an interpreter's preference and I have been careful not to form judgment

> based on the wording of a single answer. Rather, I have considered the whole tenor of the evidence in coming to conclusions as to the facts. In my view it would be a mistake to take a single passage from a witness's evidence as a conclusive admission against interest, given the nuances that might be lost in translation.
>
> [41] As well, I have kept in mind that motives and conduct that might seem improbable to a person raised in a Canadian culture might not be improbable in another cultural context. The very structure of the transactions at issue in this case was unusual in the Canadian context, as it involved large sums of money changing hands over several years, without any written agreements in place or any common accounting practices. I have been mindful that different cultural contexts can affect the court's perspective as to inherent probabilities or improbabilities.
>
> [42] On the other hand, certain characteristics probably cross all cultures, and that includes the instinct and ability to be self-serving in one's memory so as to advance one's own interests, especially when it comes to matters of money.

[18] The *Fu* caution is instructive, but it does not provide a license for a witness to lie. Simply because a witness comes from a different culture and speaks a different language does not result in a free ride in the witness box. A truthful witness is not diminished and an untruthful witness is not elevated. A truthful witness is to be believed and a liar is to be rejected.

[64] The last paragraph cited above is an observation similar to that of Southin J., as she then was, in *Le (Guardian ad litem of) v Milburn*, [1987] B.C.J. No. 2690, 1987 CarswellBC 1589 (S.C.) at para. 2:

> When a litigant practises to deceive, whether by deliberate falsehood or gross exaggeration, the court has much difficulty in disentangling the truth from the web of deceit and exaggeration. If, in the course of the disentangling of the web, the court casts aside as untrue something that was indeed true, the litigant has only himself or herself to blame.

[65] Insofar as the assessment of Mr. Takhar's credibility is concerned, the defendants argue that the incidents of his untruthfulness, forgery or deceitful conduct invoked by the plaintiff/Khelas to impugn his character is "similar fact" evidence presumptively inadmissible pursuant to *R. v. Handy*, 2002 SCC 56. They submit such evidence lacks significant probative value, is prejudicial and should be given no weight in any *Bradshaw* analysis.

[66] The plaintiff/Khelas resist such an outcome on the grounds that this is admissible similar fact evidence probative of Mr. Takhar's propensity to engage in dishonest conduct in his business dealings, the very basis on which Mr. Khela decided to terminate further development of the 208th Street Properties. They say it is in any event admissible as matters affecting Mr. Takhar's credibility: see *Randhawa v. 420413 B.C. Ltd.*, 2009 BCCA 602 at paras. 48–60 and 97–100. Counsel for Phoenix Star conceded this last point, at least in relation to evidence regarding the 160th Street Properties.

[67] As noted above, a finding of fact by the court is not usually a matter of simply choosing between two or more conflicting versions of events. The court may reject some aspects of a witness's evidence while accepting others and it may assign different weight to different parts of the witness's evidence. Where, however, the state of the evidence is so unsatisfactory that a finding of fact cannot be fairly made one way or the other, the matter may be determined based on the burden of proof.

[68] This is precisely what occurred in the recent case of *Pavlovich v. Danilovic*, 2019 BCSC 153, aff'd 2020 BCCA 239, where the Court was unable to find one party more credible than the other and was therefore unable to determine on a balance of probabilities the deceased's intention regarding the impugned transfer of property to his son. The Court simply ruled that the son had not met the burden of proof regarding displacement of the legal presumption of resulting trust and judgment was issued accordingly. In affirming the decision, the Court of Appeal referred to *Rhesa Shipping Co. S.A. v. Edmunds*, [1985] 2 All E.R. 712 (H.L.) where, at 718, Lord Brandon stated:

> [T]he judge is not bound always to make a finding one way or the other with regard to the facts averred by the parties. He has open to him the third alternative of saying that the party on whom the burden of proof lies in relation to any averment made by him has failed to discharge that burden. No judge likes to decide cases on burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course for him to take.

[69] In this case, I have at various places found the evidence of one principal witness to be unworthy of belief and have accepted the evidence to the contrary tendered by the other party. In other instances, I have disbelieved the evidence of both principals and yet have been able to determine certain facts with reference to other reliable evidence. In yet other instances, I have found the evidence on the point of contention to be wholly unsatisfactory and have simply determined that the point has not been proved to my satisfaction on the balance of probabilities. Throughout I have attempted to take into account how cultural and linguistic differences might affect assessments of plausibility and implausibility and, where possible, I have avoided giving significant weight to what might be characterized as similar fact evidence which might otherwise impugn a witness's character or credibility.

[70] Having said that, as explained later in these reasons, I find that both principals have been untruthful with the Court at various times and have also created, and presented to the Court and others, false documents to support their cause or to promote their self-interest. Consequently, I consider their evidence, particularly their testimony regarding oral conversations between themselves, to lack credibility unless corroborated by other reliable evidence or testimony of disinterested witnesses.

[71] I turn now to a determination of the disputed issues listed above.

VI. EXPRESS AND IMPLIED TERMS OF THE INITIAL JOINT VENTURE AGREEMENT BETWEEN MR. KHELA AND MR. TAKHAR

a. Mr. Takhar's background

[72] Mr. Takhar was born and educated in India where he attained bachelor degrees in arts and education. He arrived in Canada in 1987 at the age of 23. He started work as a helper at a plumbing company during the day and attended BCIT at night, eventually obtaining his plumbing and other journeyman qualifications.

[73] Mr. Takhar incorporated his own plumbing business in 1991 under the name Standard Plumbing and Heating Ltd. ("Standard Plumbing"). This business grew

over the years to involve as many as 40 employees engaged in plumbing, gas and sprinkler work for both residential and commercial projects.

[74] At one point, Mr. Takhar bought a lot in Vancouver, subdivided it into two lots and built two homes. Thereafter he undertook similar projects throughout the Lower Mainland, expanding into multi-unit residential housing, particularly townhouse developments. Phoenix Construction was incorporated in 1999 and various other corporations using the name “Phoenix” were used for different development projects from 2002 to 2006.

[75] Mr. Takhar raised capital for his development ventures by way of loans from private individuals within his community. He offered attractive terms, including 15% interest, compounded annually. The loans were repayable on demand, provided several months’ notice was given in order for Mr. Takhar to liquidate assets or otherwise obtain the money required for the repayment.

[76] These loan agreements were verbal in nature. No promissory notes or any other written documents were prepared evidencing the obligations. Mr. Takhar kept handwritten notebooks related to his various development projects and apparently did likewise with respect to these debt obligations, although no such notes regarding the loans were put into evidence.

[77] Mr. Takhar did not inform the banks financing the development projects of his “investors” or his related personal debt obligations. He never informed Mr. Khela about his source of capital for funding personal contributions to Phoenix Homes. The true extent of his financial affairs, including indebtedness to all his investors over the years was not in evidence before the Court.

b. Mr. Khela’s background

[78] Mr. Khela was born in India in 1957 and moved to Canada in 1978. He received formal education in India up to Grade 9. His first language is Punjabi. While he speaks some broken English, he cannot read or write English with much

competence. He has very limited comprehension of legal documents written in English unless they are explained or translated in Punjabi.

[79] Mrs. Khela was also born in India in 1963. She moved to England in 1965 and to Canada in 1983, marrying Mr. Khela that same year. She went to school until she was 16 years old and thereafter completed two years of college before attending secretarial school. She undertook some coursework when she arrived in Canada, including studying to become a real estate agent, although she did not obtain a license. She reads, writes and speaks English fluently.

[80] Mr. Khela originally worked at a sawmill in Canada and thereafter as a taxi driver before getting involved in the construction business. Before 1991, that entailed mostly remodelling houses but thereafter he built and sold several single-family residences in the years up to 2004.

[81] Mr. Khela and Mr. Takhar first met around 1994 when Mr. Khela hired Standard Plumbing to perform work on one of his construction sites. This repeated itself on two or three further occasions in the next few years. The relationship between the two men was friendly but was of a business, not social, nature.

[82] In the year 2000, Mr. and Mrs. Khela purchased a blueberry farm located at 1975-232nd Street in Langley (the “232nd Street Farm”). The purchase price was $1,445,000.

[83] Mr. and Mrs. Khela listed the 232nd Street Farm for sale on two occasions in the years 2001 and 2003. The farm did not sell on either occasion.

c. Discussions and the 199A Property agreement

[84] In 2004 Mr. Takhar and Mr. Khela had several discussions about the profitability of multi-unit property development. Mr. Khela was attracted by the notion but had no experience with that type of venture, one that also required substantially more capital than the “usual” single-family residence construction and sale venture with which he was familiar.

[85] Mr. Khela says that, in 2004, Mr. Takhar "convinced him to sell the farm and go into business with him", but I find this to be an overstatement. I am not persuaded that these initial conversations between Mr. Takhar and Mr. Khela involved any legally binding promises or commitments. Those came later when Mr. Takhar and Mr. Khela specifically agreed to purchase and develop the 199A Property.

[86] The Khelas again listed the 232nd Street Farm for sale, and in January 2005, they accepted an offer for its purchase. The completion date for the transaction was April 18, 2005. The sale price was $2,750,000 and the net sale proceeds were to be approximately $1.5 million.

[87] Both parties agree that they met in late March 2005 and agreed to jointly develop the 199A Property. Mr. Khela's 17-year-old son, Harpreet, was also in attendance at this meeting, which occurred at a Starbucks coffee shop in Langley. Mr. Takhar brought with him to the meeting a copy of the Contract of Purchase and Sale he had signed for the 199A Property.

[88] As with other contracts of purchase and sale in this case (hereinafter referred to generically as "CPSs"), no original document was tendered in evidence. Instead, there are various versions of the CPS document for the 199A Property, all of them photocopies, often of poor quality and some with multiple different fax dates. It is difficult to discern precisely what version of what document was produced on what date.

[89] What is clear from the material is that:

- the original CPS was prepared on March 19, 2005, the same date a Limited Dual Agency Agreement was signed with the realtor by both the vendor and purchaser;
- various offers and counter-offers had been made but the purchase price was ultimately agreed at 7 p.m. on March 28, 2005 in the amount of $2,125,000;
- the property had been viewed by the buyer on March 10, 2005;

- an initial deposit of $10,000 was to be paid within 48 hours of the agreement being finalized and was to be increased to a non-refundable $100,000 upon subject removal (a $10,000 deposit cheque was written by the purchaser on March 28, 2005);
- the vendor was 682163 B.C. Ltd., a company owned by a Mr. Jasbir Sandhu, and the purchaser was Phoenix Construction;
- the property was described as land “located near 72nd Avenue and 200th Street, Langley, B.C.” and was to be “rezoned” and “serviced” by the vendor to the property line of the “proposed 62-unit townhouse site”;
- the buyer would have the option of building out the 62-unit project in phases; and
- the completion date was stated as June 30, 2005, however addenda to the CPS also set out certain “requirements to finalise the sale” (certain specified development steps) and contemplated the possibility of “extending the completion to a maximum of 60 days” following September 30, 2005.

[90] Both parties agree that at this Starbucks meeting, an oral agreement was made between Mr. Khela and Mr. Takhar to proceed with the purchase and development of the 199A Property. They both agreed that Mr. Khela would initially contribute $1.5 million (the net proceeds of the 232nd Street Farm sale) and that a company would be created, owned equally, to purchase and build the 62-townhouse project contemplated for the 199A Property.

[91] The parties disagree on all other terms of their oral agreement.

[92] Mr. Khela (and his son, Harpreet) say they were told by Mr. Takhar that he did not have the money available at that time to complete the purchase but that, if the Khelas contributed what was required for the 199A Property Project, then Mr. Takhar would fund the purchase and development of the next project that the parties developed together. According to plaintiff’s counsel, this term is the “basis for

Mr. Khela's understanding" of the later 160th Street Properties opportunity in general and its "financing" in particular.

[93] Mr. Takhar denies that any such agreement was made. He acknowledges that the parties agreed to equally share all the expenses and profits regarding the 199A Property development, however he did not have the cash immediately available to do so at the time and that Mr. Khela was to initially contribute $1.5 million toward the purchase with Mr. Takhar's equalizing contributions coming later. Mr. Takhar estimated the cost of construction for the project would be in the vicinity of $10–$12 million and that $3 million in equity would be required, perhaps more. Hence, each of Mr. Khela and himself would need to contribute at least $1.5 million. He expressly denied there was any discussion, let alone agreement, about any other projects at this meeting.

[94] This, of course, is another stark disagreement between the parties as to what occurred and what was said at the meeting, a matter not reduced to writing and about which there is no corroboration from a reliable, disinterested witness. However, I find the evidence of both Mr. Khela and his son, Harpreet, to be unpersuasive. In many respects, it lacks logic and commercial sense.

[95] The 199A Property Project was the first project which the parties were proposing to jointly develop. It was a substantial project requiring significant capital, only a portion of which was capable of being financed. It is logical that new partners would use their first significant venture together to "test the waters" of their relationship and the performance of their respective commitments to each other. It is highly improbable that any reasonably competent businessperson (and while Mr. Khela is not well-educated, he is by no means a naïve businessman) who is only a 50 percent partner in the venture would agree to provide 100 percent of the very substantial funds required in exchange for simply an unsecured promise by the other partner to fund 100 pecent of an as yet unidentified and unknown future project.

[96] The words Mr. Khela used in his testimony are also telling. He acknowledged in cross-examination that Mr. Takhar told him his other properties were "about to be

sold" and that "much time will not be taken" for him to contribute. This supports Mr. Takhar's evidence that he did indeed intend to contribute equally to the 199A Property, albeit after Mr. Khela's initial contribution.

[97] In the result, the evidence does not satisfy me on the balance of probabilities that the oral agreement between the parties in late March 2005 contemplated Mr. Khela contributing 100 percent of the necessary equity/funding to purchase and develop the entire 199A Property in exchange for a commitment by Mr. Takhar to similarly fund some subsequent project in the future. To the contrary, I am satisfied on the balance of probabilities, and I find as a fact, that the oral agreement between the parties to equally fund their venture related only to the 199A Property at the time and there was no discussion between them about other projects when that oral agreement was concluded.

d. Incorporation of Phoenix Homes

[98] Phoenix Homes was incorporated on April 6, 2005 by the offices of Mr. Takhar's accountant, Mr. Sarb Sandhu.

[99] Mr. Khela wished for his wife to be the shareholder/director in the company, no doubt because of her fluency in English and her competency to understand the corporate documents that might have to be executed from time to time. Both he and Mrs. Khela have made it clear in their testimony that they were equal partners in all of their various investments or business undertakings and I accept that this was the case.

[100] One of the exhibits marked at trial was a "Corporate Resolution Book" for Phoenix Homes. Some of the documents in that book are materials provided to the company's first bank, WSCU, on April 22, 2005, which are also found in a "Bank Records Book" marked as another exhibit. This latter package includes a corporate resolution by Phoenix Homes (on WSCU letterhead) signed on that date by each of Mr. Takhar and Mrs. Khela as directors of Phoenix Homes, requiring both of them to jointly instruct and make arrangements with the credit union and/or draw and sign all cheques to be charged to Phoenix Homes. The package also includes Phoenix

Homes' Articles of Incorporation, a Memorandum of Incorporation signed by both Mr. Takhar and Mrs. Khela dated April 6, 2005, and a Consent to Act as a Director form dated April 15, 2005 signed by each of Mr. Takhar and Mrs. Khela.

[101] The Corporate Resolution Book includes the Memorandum referred to above, a share subscription dated April 15, 2005 signed by Mrs. Khela, and the two Consents to Act as a Director.

[102] In March 2006, Phoenix Homes entered into a "Registered and Records Offices Agreement" with the McQuarrie Hunter law firm, formally appointing the latter as the company's Records Office. The agreement was signed only by Mr. Takhar on behalf of Phoenix Homes. McQuarrie Hunter had been the lawyer for Mr. Takhar and his various companies for many years.

[103] In May 2011, the Khelas went to the offices of McQuarrie Hunter to review the corporate records for Phoenix Homes. At that time, they discovered, much to their dismay, the existence of numerous shareholder resolutions on which the signature of Mrs. Khela had been forged. These single page resolutions had also been signed by Mr. Takhar. Among other things, these forged resolutions purported to appoint Mr. Takhar as the sole director of the company, waived the preparation of annual financial statements, and "approved, ratified and confirmed" contracts, acts and payments made by the "directors" (presumably, Mr. Takhar).

[104] I accept Mrs. Khela's evidence that these documents were not signed by her and that her purported signatures are forgeries. Mr. Takhar denies having anything to do with it, but I do not accept his testimony on this point. Mr. Takhar admitted forging Mrs. Khela's signature on a January 5, 2009 cheque (which he also signed in his own name) drawn on Phoenix Homes' WSCU bank account paying $8,000 to Phoenix Construction—that forged signature looks very similar to the forged signature appearing in the McQuarrie Hunter corporate records.

[105] These corporate documents are confused and confusing and have certainly reinforced the Khelas' subsequent distrust of Mr. Takhar. However, several

witnesses (accountant and lawyers) confirmed that Mr. Takhar mostly just goes through the motions with these sorts of formal corporate documents. Mr. Takhar himself referred to them as “paperwork” or “forms filled out by lawyers” which he signs upon request.

[106] Mr. Takhar also admitted that until this litigation ensued, he did not know (and evidently did not care about) the responsibilities or role of a corporate director. He had no understanding of corporate governance documents such as a shareholders’ agreement. He did state, however, that in a “partnership” such as the one he had with Mr. Khela, there is an obligation for the “partners” to make full disclosure and to “discuss and agree everything”.

[107] Notwithstanding the formal corporate documents, I am satisfied that both Mr. Takhar and Mr. Khela intended that Phoenix Homes would be the corporate vehicle used for their joint venture development of the 199A Property, that they would each have equal and joint ownership and control over Phoenix Homes’ business, that all significant decisions affecting that business and joint venture undertaking would be made through discussion and consent, and that unilateral control of the enterprise was not vested in Mr. Takhar alone.

[108] It is also worth noting that, although Mr. Takhar was unaware of it, as a director of the company he was at all times subject to a statutory duty under ss. 142 and 147 of the *BCA* to:

- act honestly and in good faith in the best interests of the corporation;
- exercise reasonably prudent care, diligence and skill in directing the business affairs of the corporation;
- abide by the *BCA* and in accordance with the articles of the company; and
- disclose and secure approval for any contract or transaction made on behalf of the corporation and in which he had a direct or indirect material interest.

e. Banking arrangements and adding Phoenix Homes to the 199A Property CPS

[109] As noted above, Phoenix Homes opened a bank account at WSCU for which both Mr. Takhar and Mrs. Khela were joint signatories. At Mrs. Khela's request, the address for the account and to which the bank statements would be mailed was the Khelas' home at 3676 Mount Lehman Road. The Khelas deposited $100,000 into the WSCU account on the day that it was opened.

[110] On April 29, 2005, the following events occurred with respect to the CPS for the 199A Property:

- an addendum was signed by both the vendor and Mr. Takhar purporting to "correct" the CPS to reflect that "the buyer [is] to be Phoenix Homes Limited";
- a Phoenix Homes cheque in the amount of $90,000 was presented to the realtor (Valley Pacific Realty Ltd.);
- both the vendor and the purchaser (under Mr. Takhar's signature) signed a document authorizing and instructing the realtor to immediately release the $100,000 deposit to the vendor; and
- Valley Pacific Realty Ltd. issued to the vendor a cheque in the amount of $100,000 with a notation "release deposit to seller".

[111] Accordingly, as of April 29, 2005, the purchaser of the 199A Property became Phoenix Homes Limited and the deposit that Phoenix Homes paid on that transaction was issued to the vendor on a non-refundable basis.

[112] Mr. Khela was not present at the April 29, 2005 meeting where the deposit cheque was provided to the realtor and the addendum substituting Phoenix Homes as the purchaser was signed. Neither he nor Mrs. Khela were given a copy of that addendum by Mr. Takhar. Indeed, the first time that the Khelas (and their counsel) even learned of the existence of this addendum was during the course of this litigation when McQuarrie Hunter's 199A Property litigation file was produced.

[113] That litigation was triggered at the end of June 2005 when the vendor resiled from the sale and it was not settled until four years later in 2009, at which time title to the property was transferred to Phoenix Construction and not Phoenix Homes. On June 27, 2005, Mr. Takhar faxed Mr. Khela a copy of the CPS related to the 199A Property sale but did not include the addendum referred to above. Instead, he simply scribbled out the name Phoenix Construction as the buyer for the land and wrote in the words “Phoenix Homes”, presumably intending to confirm to Mr. Khela that Phoenix Homes was indeed intended to be the owner of the property.

[114] Mr. Takhar’s preferred architect for his townhouse development projects was Yamamoto Architecture Inc. (“Yamamoto Architecture”). Yamamoto Architecture had been retained by Mr. Takhar to provide architectural services in support of the proposed development at the 199A Property. By the beginning of July 2005, the property had been assigned a new street address by the city of Langley (7285–199A Street) and professional fees related to the project were starting to accumulate.

[115] Both Mr. Takhar and Mrs. Khela signed a cheque on July 7, 2005, drawn on the Phoenix Homes WSCU bank account, in the amount of $40,787.67 payable to Yamamoto Architecture. The following day, the Khelas deposited $50,000 into the WSCU account to ensure that cheque would be honoured. As of that date, the Khelas had deposited the aggregate sum of $150,000 into the WSCU account for Phoenix Homes as part of their agreement with Mr. Takhar to make the initial funding contributions to the company on account of the 199A Property Project.

[116] These contribution mechanics are noteworthy. The Khelas did not make their contribution by way of a direct payment to either the realty company or the architect but instead deposited the monies into the WSCU bank account in the name of Phoenix Homes, and Phoenix Homes cheques were issued in payment of the joint venture obligations. Two further Phoenix Homes cheques were signed and issued in September 2005 for engineering and landscape architect services related to the 199A Property.

[117] The monthly bank statements for the Phoenix Homes account with WSCU were sent to the Khelas' then-residence on Mount Lehman Road in Abbotsford. The statements included photocopies of the cheques that had been issued on the account, and thus kept the Khelas informed of the money that was deposited into and disbursed from that account.

f. Express/implied terms of the initial joint venture agreement

[118] In *Amneet Holdings Ltd. v. 79548 Manitoba Ltd*., 2004 MBCA 32, the Court recognized the different forms that joint venture relationships can take:

> [13] While the term "joint venture corporation" has no definitive meaning, the concept is not unknown. In Barry J. Reiter & Melanie A. Shishler, *Joint Ventures: Legal and Business Perspectives*, (Toronto: Irwin Law, 1999), the authors state (at pp. 19-20):
>
> > Joint venturers can pursue their business goals using a corporate, partnership or contractual vehicle. . . .
> >
> > For lawyers and judges, using the term "joint venture" . . . without any legal context is a very imprecise and dangerous exercise. The loose use of the term, and the assumption that it has some defined legal meaning, have caused many . . . interpretive problems . . . . Where a collaborative business arrangement is housed in a corporation . . . the joint venture is more properly called a "joint venture corporation" . . . it is the corporate . . . designation that is the defining element of the legal relationship.
>
> [14] If the investors in the Project had decided to make their investment in shares of the numbered company, thus funding that entity so that it would then acquire and beneficially own the Project, the numbered company might logically be referred to as a "joint venture corporation." In such case, from a legal perspective, it would be no different than any other privately held corporation functioning under and governed by the *Act*. But that is not at all what happened here. As the Agreement, and all related documents, make clear, the investors put their money directly into the Project and not into the numbered company. That is how they acquired their undivided interests in the Project. Legal title in the trustee numbered company does not alter the substance of the arrangement.
>
> [15] Reiter and Shishler (*op. cit*) identify the two methods other than by a "joint venture corporation," to structure a joint venture. One is to utilize a partnership, and the other is to establish a contract among the joint venturers, which the authors describe as a "contractual joint venture." It is clear, I think, that what was created here was such a contractual joint venture.

[119] In this particular case, we are dealing with two investors who entered into an oral agreement to purchase and develop the 199A Property using a company specifically incorporated for that purpose, a joint venture corporation in which they would have equal ownership and control and which would be funded equally by the two individuals. The parties intended that they or their nominees (in Mr. Khela's case, his wife, Kamaljit) would be equal shareholders and directors of the corporation, and that the corporation would open a bank account at a financial institution (here, WSCU) into which the funds for the venture would be deposited and thereafter disbursed through mutual discussion and consent (including joint signatures on cheques). While it was anticipated that Mr. Takhar would also contribute his multi-unit development experience, including trusted consultants in the areas of finance, design and municipal planning/approval, unilateral control of the enterprise was not intended to be vested in Mr. Takhar alone.

[120] The parties did not incorporate their understandings into any formal written agreements and did not discuss beforehand the precise mechanics by which costs and expenses for the project would be managed or the timing/procedures by which equal financial contributions to the project would be accounted and reconciled. Nevertheless, to the extent there exist "gaps" in their express agreement on such matters, the law provides assistance through the concept of implied terms and the doctrine of good faith contractual performance.

[121] The principles governing the implication of terms into a contract are well-established in Canadian common law. They arise from two decisions of the Supreme Court of Canada and have been applied countless times by that Court and other provincial appellate courts across the country, including, of course, in B.C.

[122] The two cases are *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 SCR 711, 1987 CanLII 55 and *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd*., [1999] 1 SCR 619, 1999 CanLII 677 [*M.J.B*.]. These cases establish the three ways in which terms can be implied into a contract, written or oral, namely:

1. based on custom or usage;

2. as the legal incidents of a particular class or kind of contract; and most commonly,

3. based on the presumed intention of the parties where the implied term is necessary "to give business efficacy to a contract or as otherwise meeting the 'officious bystander' test as a term which the parties would say, if questioned, that they had obviously assumed": *M.J.B*. at para. 27

[123] The law regarding implied terms is discussed in detail in Geoff Hall, *Canadian Contractual Interpretation Law*, 3rd ed. (Toronto: LexisNexis, 2016), ch. 4 [*Hall Text*] and will not be repeated here. It should be noted, however, that every case is determined on its own particular facts, and the concept of an implied term cannot be used to "rewrite a contract" or to contradict its express terms, oral or written. A term will not be implied simply because it appears reasonable in the circumstances; rather, the term must be necessary to give business efficacy to the contract such that the parties must have intended that it would apply: *Hall Text* at 180–81.

[124] In addition to the mechanism for implying terms into a contract, the Supreme Court of Canada has in recent years articulated a "general organizing principle of good faith" in contract law, namely "a duty of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligations": *Bhasin v. Hrynew*, 2014 SCC 71 at para. 3. In practice, the Court has said this is "a simple requirement not to lie or mislead the other party about one's contractual performance" or "about matters directly linked" thereto: *Bhasin* at para. 73, and more recently, *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45 at para. 130.

[125] These principles of good faith contractual performance do not necessarily impose fiduciary duties as between the contracting partners. If a joint venture is undertaken by way of a formal partnership, such fiduciary duties are automatically engaged. Where, as here, the joint venture is undertaken through a corporation, fiduciary duties as between the joint venturers may not necessarily arise in the

absence of the “usual” requirements of vulnerability, dependency and discretionary power: *Astanehe v. Omidi*, 2015 BCSC 438 at para. 45.

[126] As noted above, however, if the joint venturers become directors of the joint venture corporation, they owe statutory duties to act honestly and in good faith in the best interests of the corporation. That in turn prohibits such a director/joint venturer from securing for themselves opportunities belonging to the company or for which the company had been negotiating, unless permission to do so is given after full disclosure of all material facts: see *Jasmur Holdings Ltd. v. Taynton Developments Inc*., 2016 BCSC 1902 at paras. 144–49; *Sonic Holdings Ltd. v. Savage*, 2021 BCCA 441 at paras. 80–81; *First Majestic Silver Corp. v. Davila*, 2013 BCSC 717 at para. 111, and the case law discussed therein regarding the corporate opportunity doctrine. Indeed, this principle is the basis for the derivative action by Phoenix Homes against Mr. Takhar—i.e., that he “stole” the 199A and 160th Street Properties “opportunities” from Phoenix Homes and that he has also engaged in inappropriate self-dealing in relation to the View Side Contract for partial sale of the 208th Street Properties.

[127] There are two other matters which were not expressly discussed and agreed upon by Mr. Takhar and Mr. Khela, but which might possibly warrant implied terms in the oral joint venture/shareholders’ agreement:

1. terms regarding the making and accounting of financial contributions, and

2. terms dealing with termination of/withdrawal from the venture.

Both are squarely at issue in this case.

[128] I mentioned earlier how the Khelas made their initial financial contribution to the 199A Property Project by depositing funds in the Phoenix Homes bank account at WSCU, funds which were later disbursed to cover joint venture obligations such as deposits or consultant expenses. It is highly probable that the Khelas expected Mr. Takhar’s financial contributions to the company to be made in the same fashion. They would not have been familiar with Mr. Takhar’s rather casual practice of

moving money around between his projects as payments fell due regardless of legal formalities such as restrictions in loan agreements or the different corporate entities involved. To Mr. Takhar, it was all “his money” to be moved around as he wished, so long as accountings were eventually made and monies ultimately reallocated to balance matters in the end.

[129] Mr. Sandhu, the accountant for Mr. Takhar’s various enterprises, testified that the financial statements for Mr. Takhar’s companies, including Phoenix Construction, were for “income tax purposes only” and could not be relied upon as an accurate accounting of any particular project at any particular time.

[130] As noted earlier, over the years of litigation, counsel have prepared a schedule purporting to represent Mr. Khela’s and Mr. Takhar’s respective “contributions” to their joint venture. The Khela contributions comprise deposits into the Phoenix Homes bank account(s) or bank drafts payable directly to the person to whom Phoenix Homes was obligated. There were approximately 8 to 12 such transactions in that regard.

[131] Mr. Takhar’s contributions also included some substantial payments of Phoenix Homes’ obligations, particularly in respect of the purchase of the 208th Street Properties. The schedule of his “contributions”, however, otherwise comprises of payments by his various corporations of up to 200 invoices from a variety of consultants working in connection primarily with the 208th Street Properties Project from 2006 to 2011. Most of these invoices were paid directly by one of Mr. Takhar’s companies instead of him first putting the money into the Phoenix Homes bank account(s) and thereafter issuing a Phoenix Homes cheque to the creditor in question.

[132] The result is that, while the Khelas may have been generally aware of ongoing consulting work and had access to the Phoenix Homes bank statements, they were not informed of Mr. Takhar’s specific “contributions” as they were made and were not provided with any meaningful accounting in that regard until early 2011 (as discussed later in these reasons).

[133] In these circumstances, it cannot be said that both Mr. Takhar and Mr. Khela "presumably intended" or "obviously assumed" that their respective funding contributions to the joint venture would necessarily be made only through deposits to the Phoenix Homes bank account(s), and the "officious bystander" test for implying terms into a contract is not satisfied on this point. Still, both parties intended that there would be equal financial contribution to the joint venture and, as a matter of business efficacy or necessity, that would have required at least an informal accounting of joint venture-related expenses and payments from time to time.

[134] It is also clear that disintegration of trust between the principals is the main reason for the de facto dissolution of the "partnership" in 2011, which in turn begs the question whether the joint venture/shareholders' agreement included any implied terms respecting termination or dissolution of the enterprise.

[135] There is case law beyond the employment law context which stands for the proposition that "[i]n the absence of [a] provision for [termination], the rule requiring reasonable notice of termination should be applied as an implied term of the contract": *Hillis Oil & Sales v. Wynn's Canada*, [1986] 1 S.C.R. 57 at 68, 1986 CanLII 44 (discussion regarding long-term distribution agreement). Contracts lacking formal termination provisions are *prima facie* perpetual, but a court must "look at the relationship between the parties and the nature and terms of the contract to determine whether there is a basis upon which to conclude that the contract is terminable upon reasonable notice": *Rapatax (1987) Inc. v. Cantax Corporation Ltd.*, 1997 ABCA 86 at para. 19. In other words, courts have authority to imply a right to unilateral termination, including in the context of joint ventures where cooperation required for the project is frustrated by the poisoning of the contracting parties' relationship: *Rapatax (1987) Inc.* at para. 22 (software development joint venture); Angela Swan, Jakub Adamksi & Annie Y. Na, *Canadian Contract Law*, 4th ed. (LexisNexis, 2018), s. 8.256. The Manitoba Court of Appeal has previously held that an implied right to terminate could be presumed in "contracts of employment, personal service or partnership which depend upon mutual trust between the contracting parties": *Shaw Cablesystems (Manitoba) Ltd. v. Canadian Legion*

Memorial Housing Foundation (Manitoba), 143 D.L.R. (4th) 193, 1997 CanLII 11521 at 8 (M.B. C.A.).

[136] In this case, while both Mr. Khela and Mr. Takhar would very likely have agreed, if asked at the outset, that their joint venture would be subject to a "general organizing principle of good faith requiring honest performance", including a simple requirement not to lie or mislead each other about matters directly linked to their joint venture, it is a virtual certainty that neither party addressed their mind to the mechanics for dispute resolution in the event they were unable to reach a decision on a matter of significance.

[137] I find, however, that if asked at the outset whether it would be permissible for one of the principals to unilaterally terminate the joint venture if dishonesty occurred or if trust in the "partnership" disintegrated, both parties would have agreed wholeheartedly. Although not giving rise to formal partnership, the joint venture in this case depended very much on trust and confidence between the parties as the basis for funding and management of the joint venture projects. As a matter of business efficacy and common sense, and given the large sums of money involved, I find it highly unlikely that either party would have agreed at the outset to stay "married" to the other if their faith in the relationship dissolved.

[138] Further, by agreeing to pursue their joint venture through a corporation, Mr. Takhar and Mr. Khela implicitly endorsed the deadlock procedures and remedies provided in the *BCA*, including the forced liquidation and dissolution of the enterprise: see, as a recent example, *Petersen v. Hawley*, 2022 BCCA 169.

[139] So, applying all of the above to the factual matrix of this case, I find that the oral joint venture/shareholders' agreement between Mr. Takhar and Mr. Khela included the following terms:

- the parties would proceed with the purchase and development of the 199A Property as a multi-unit townhouse project in which all expenses and profits would be shared equally;

- a joint venture corporation—Phoenix Homes—would be specifically incorporated for the project and both parties (or their nominees) would be equal shareholders and directors;
- Mr. Takhar would bring to the project his multi-unit residential development experience, including trusted consultants in the areas of finance, design and municipal planning/approval, however unilateral control of the enterprise was not to be vested in Mr. Takhar alone;
- all significant decisions affecting the joint venture project would be made through discussion and consent;
- both parties would be honest with each other in their joint venture dealings, would fully disclose all significant information related to the venture and would not lie or mislead each other about such matters;
- each party would act honestly and in good faith in the best interests of the joint venture corporation and the joint venture itself and would disclose and secure approval for any contracts or transactions made on behalf of, or related to, the joint venture in which either of the principals had a direct or indirect material interest;
- the joint venture corporation would open a bank account into which the two principals could deposit their financial contributions and all significant disbursements from that bank account were to be jointly authorized by the principals (or their nominee directors if any);
- Mr. Khela would initially contribute his net sale proceeds of the 232nd Street Farm ($1.5 million) ahead of any contribution by Mr. Takhar, however the latter would make his financial contribution at a later date when anticipated proceeds from the sales of his other properties were received;
- to the extent any financial contribution to the venture by either Mr. Takhar or Mr. Khela was made by way of direct payments to third parties, the details of such payment would be disclosed to the other

person within a reasonable time and, in any event, upon request for a reconciliation;

- unliteral termination of the joint venture was permissible if trust between Mr. Takhar and Mr. Khela dissolved; and
- in the event of a disagreement between the two principals on a significant matter affecting the joint venture, including next steps if one principal expressed a desire to terminate the venture, and if the principals were unable to resolve the matter through negotiation, the parties would be at liberty to seek redress through the procedures provided in the *BCA*.

VII. IDENTIFICATION AND ACQUISITION OF THE 160TH STREET PROPERTIES

[140] I turn now to the dispute regarding the 160th Street Properties. It is unique among the three developments because, unlike the 199A and 208th Street Properties, the Khelas made no financial contribution of any sort to this venture.

[141] The claims here rest upon the Khelas' allegation that this was an opportunity they brought to Mr. Takhar's attention on the understanding it would form part of their joint venture and that Mr. Takhar, in breach of his fiduciary duties to both the Khelas and Phoenix Homes, "stole" this opportunity for his sole benefit.

[142] Again, the two principals recite diametrically opposed versions of events under oath. The credibility and factual findings have a potential "domino effect" on the other claims respecting the 199A and 208th Street Properties Projects, because the evidence respecting those claims includes references to the 160th Street Project.

a. Uncontroversial chronology of acquisition

[143] The 160th Street Properties consist of three contiguous lots located at 2667, 2639 and 2627–160th Street, Surrey, B.C (the "2667 Lot", "2639 Lot", and "2627 Lot"). They are located across from Southridge School on 2656–160th Street.

[144] The listing agent for each of the 2667 and 2639 Lots was Mr. Manjit Gill of RE/MAX Realty. The CPS agreements were signed on March 26 and 27, 2006, respectively. In each case, the purchaser was Phoenix Construction and the contracts were signed on its behalf by Mr. Takhar. Phoenix Construction and Mr. Takhar also signed a Limited Dual Agency Agreement with RE/MAX, such that Mr. Gill was acting for both parties to the transaction.

[145] The sale price for the 2667 Lot, ultimately agreed to by the parties on April 8, 2006, was $1.2 million. The deposit was $70,000 to be paid within 48 hours of acceptance. The closing date was December 28, 2006. The CPS indicated the property had been viewed by the purchaser on March 26, 2006.

[146] The CPS for the 2639 Lot was dated March 27, 2006, although the final offer and acceptance were made on April 9, 2006. Again, there was a Limited Dual Agency Agreement signed by both parties with RE/MAX. The CPS indicated the property had been viewed by the purchaser on March 6, 2006.

[147] The purchase price for the 2639 Lot was $1.2 million and a deposit of $70,000 was to be paid within 48 hours of acceptance. The closing date was September 29, 2006 and the CPS contained an addendum requiring Phoenix Construction to pay $2,500 per month or find a tenant for the property for the months of July, August and September. The addendum also granted the purchaser the right to assign the CPS to any third party.

[148] The CPS for the 2627 Lot was dated July 26, 2006, although the final offer/acceptance was made on July 28, 2006. The listing agent was MacDonald Commercial Realty with whom both parties signed a Limited Dual Agency Agreement. The purchase price was initially agreed at $1.35 million, later reduced by an addendum dated August 11, 2006 to $1.3 million. The purchaser was Standard Plumbing, and the contractual documents were signed on its behalf by Mr. Takhar. The closing date was December 20, 2006. The addendum also increased the original $5,000 deposit to a non-refundable $100,000 payable directly to the seller.

[149] Phoenix Star was incorporated on September 11, 2006.

[150] On October 31, 2006, the sale of the 2639 Lot was completed. Phoenix Star was the purchaser, although any formal assignment by Phoenix Construction to Phoenix Star was not put in evidence. Funding for the purchase was partly provided by a mortgage loan granted by WSCU. The stated principal amount of the mortgage registered on title was $8 million at an interest rate of 5% above prime, although the net mortgage proceeds advanced for the purchase were a little over $853,000.

[151] On November 15, 2006, a Land Development Application was submitted to the City of Surrey's Planning & Development Department and assigned the file number 7906-0476-000. The application related to all three 160th Street Properties, where a 45-unit, three-story townhouse development was proposed, a matter that required an OCP amendment, rezoning, subdivision and a development permit. The application was filed by Barnett Dembeck Architects Inc. as agent for the owners, who at that time were identified as the individual vendors of the 2627 and 2667 Lots, and Phoenix Star as the registered owner of the 2639 Lot.

[152] On December 20, 2006, the sale of the 2627 Lot was completed. Phoenix Star was the purchaser, although any formal assignment by Standard Plumbing to Phoenix Star was not put into evidence. Funding for the purchase was again partly provided by the mortgage loan granted by WSCU.

[153] On December 28, 2006, the sale of the 2667 Lot was completed. Phoenix Star was the purchaser, and in this particular instance, a formal assignment agreement between Phoenix Construction and Phoenix Star, dated December 15, 2006 and signed by Mr. Takhar on behalf of both entities, was put into evidence. Funding for this purchase was again partly provided by the mortgage granted by WSCU.

[154] Hence, by the end of December 2006, all three of the 160th Street Properties had come to be registered in the name of Phoenix Star and steps had been taken to initiate the process for re-development approval from the City of Surrey. As it turns

out, the project did not proceed smoothly and took some years longer to complete than originally anticipated by Mr. Takhar.

b. Ownership and control of Phoenix Star

[155] I referred earlier in these reasons to Mr. Takhar being "guilty of serious misconduct" for events involving dishonesty and falsehoods impugning his credibility as a witness. Some of these events relate to Phoenix Star.

[156] In his final submissions at trial, Mr. Takhar's counsel states that Mr. Takhar "was not truthful about the full extent of his relationship with Phoenix Star" and he acknowledges that Mr. Takhar "is the beneficial owner of Phoenix Star". This terminology does not fully capture the deceit Mr. Takhar attempted to perpetrate upon the Court.

[157] On February 3, 2012, Mr. Takhar swore an affidavit in the petition proceedings before this Court in which he plainly and falsely stated at para. 14:

> I am not a shareholder, officer or director of Phoenix Star, which was incorporated on September 11, 2006 and is owned by three other individuals.
>
> [Emphasis added.]

[158] Mr. Takhar was cross-examined on this affidavit in November of that year. When asked whether he had any interest in Phoenix Star, he stated under oath:

> No, because the Phoenix Star is … they use Phoenix, my brand, because I'm building for them.
>
> [Emphasis added.]

[159] This is again a false statement under oath.

[160] On March 7, 2014, Phoenix Star filed its Response to Civil Claim in this derivative action which stated (and continues to state in its more recent pleading) that:

> Nirmal Takhar is not a director or officer of or shareholder in Phoenix Star. Takhar's only relationship with Phoenix Star is that he provides it with management services pursuant to an oral agreement to do so.
>
> [Emphasis added.]

This is a false plea, although its falsehood was almost certainly known only to Mr. Takhar and not to his counsel.

[161] On July 24, 2014, Mr. Takhar swore another very detailed affidavit purporting to describe in detail the ownership, control and financing of Phoenix Star. In that affidavit, he describes a meeting with three other individuals at which an oral "understanding" was reached concerning the purchase and development of the 160th Street Properties. That understanding anticipated funding the project by way of loans from various parties over and above the WSCU financing, which loans would be later repaid with interest at 15% per annum. The affidavit identified 12 such contributors, including Phoenix Construction, Standard Plumbing and Mr. Takhar's wife, among others.

[162] In that affidavit, he reframes the history of his relationship with Phoenix Star:

> Initially, I was a shareholder in and director of Phoenix Star, at a time when I was planning to invest money into the company, but that plan changed, I did not invest any money into the company, I ceased being a director and my shares were transferred to the other shareholders, being Jaswinder Kajla, Satwinder Badh and Kirpal Basra … All of that occurred in approximately November, 2006. Since then I have not been a director or officer of or shareholder in Phoenix Star, but I have been a manager of its 160th Street project pursuant to the [oral understanding].

This whole theme of Mr. Takhar not being an owner of the company, not investing any money into the company, and only being a manager for the development project was again a deliberate attempt to deceive the Court as to the true state of affairs (something I am again sure was not known to counsel at the time).

[163] As part of his "management" of the 160th Street Project, one of Mr. Takhar's "responsibilities" was the securing of financing from WSCU and engaging quantity surveyors to secure progress draws on the construction loan. At trial, Mr. Takhar

admitted to signing some 26 statutory declarations (at McQuarrie Hunter, the corporate records office for Phoenix Star) which were provided to WSCU under cover of the quantity surveyor reports required to obtain advances on the construction loan. The statutory declaration is pretty much a standard form, but in it, Mr. Takhar declares "conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath and by virtue of the *Canada Evidence Act*". The declaration sets out that, among other things:

- he is a director of Phoenix Star and the developer for the construction project;
- all information and documentation provided to the quantity surveyor for WSCU in connection with the loan advance "are true and accurate in every respect"; and
- all proceeds of the progress claim advanced by WSCU as progress draws "will be utilized for the purpose of settlement of accounts payable relative to the said project".

[164] Mr. Takhar has little regard for the truth of his statutory declarations. Quite apart from his false statement about his status as a director, there are other examples in the evidence of him: (1) supplying fraudulent invoices to the quantity surveyor for substantial expenses that were not in fact paid to the invoicing contractor; and (2) using the progress draw proceeds to fund matters unrelated to the project. In one particularly egregious example of the latter, he advanced $200,000 to View Side in order that View Side might pay a $200,000 deposit to Phoenix Homes in January 2011 as part of the View Side Contract.

[165] Mr. Takhar's carefully constructed façade of third-party shareholdings and directorships in Phoenix Star was devised to deceive WSCU and to circumvent that institution's "lending limit" for any single WSCU member. Mr. Takhar's account manager at WSCU testified that he had many discussions with Mr. Takhar about this lending limit. That account manager recalls being introduced to the three principals

for Phoenix Star and being satisfied that it was “a company not owned or controlled by Nirmal Takhar”.

[166] The façade crumbled in 2015 when the estate of one of Mr. Takhar’s investors, Mr. Badh, issued a proceeding in this Court against Mr. Takhar, Phoenix Star and the other “shareholders” to recover Mr. Badh’s interest in the corporation. That proceeding sought a declaration that Mr. Badh was a 50 percent shareholder of Phoenix Star and also sought the appointment of an independent valuator to conduct a valuation of the corporation so that Badh’s interest could be sold at fair market value.

[167] The individual defendants in that petition proceeding filed their Response to Petition on March 19, 2015. Among other things, that pleading stated that Mr. Badh had agreed to advance money for the 160th Street Project only as “a loan with interest at 15% per annum” to be repaid when the project was completed. It also pleaded that neither Mr. Badh nor the other investors ever actually paid for any shares in Phoenix Star and “never attributed any significance, value, rights or obligations to the shares of Phoenix Star”.

[168] Mr. Takhar repeated that phrase more than once in his supporting affidavit sworn March 18, 2015—an affidavit in which he also stated that he instructed his accountant, Mr. Sandhu, to incorporate Phoenix Star and to name Mr. Badh and Mr. Basra as equal shareholders. The Central Securities Register for Phoenix Star was attached as an exhibit to Mr. Takhar’s affidavit, a document which corroborates that he had actually been issued 76 common shares in the company on November 16, 2006 which he subsequently transferred on December 5, 2006 to Messrs. Basra, Badh and Samra.

[169] During the course of the trial, under questioning from both counsel and the Court, Mr. Takhar finally admitted that even though his name does not appear “on the books” of the company, he was and is “the real owner” and that:

- other people were appointed as directors and shareholders “on paper” so that WSCU could still fund the project notwithstanding their “internal lending cap”;
- he fully controlled the company from day one; and
- after everything was developed and sold and the lenders received back their loan with accumulated interest, the remaining money in the company “belonged to” Mr. Takhar.

[170] Plaintiff’s counsel sums up this state of affairs as follows:

> In short, the evidence demonstrates that Mr. Takhar has been willing, for over 10 years, to mislead his business partner Mr. Khela, the Westminster Savings Credit Union and ultimately the Court, as to his true relationship to Phoenix Star.

[171] I agree, but while Mr. Takhar’s dishonesty and deception speaks to his lack of credibility, it does not necessarily lead to a conclusion that Mr. Khela’s version of events is true and that Phoenix Homes has a valid claim against either Mr. Takhar or Phoenix Star regarding an interest in the 160th Street Properties. As will be seen, Mr. Khela confronts insurmountable credibility problems of his own in that regard.

c. Mr. Khela’s version of events

[172] Mr. Takhar’s version of events about the discovery and acquisition of the 160th Street Properties is quite simple; he says he was first alerted to the properties by his wife, Navresh Takhar, who had noticed the “for sale” signs when she was dropping off their daughter at Southridge School across the road. He viewed the properties and then contacted the listing realtor, Mr. Gill, whom he knew from previous dealings. He spoke with the City of Surrey planning department about possible development of the land and learned that acquisition of a third property at the corner of 160th Street and 26th Avenue would be required for that to occur. He then worked with Mr. Gill to acquire the 2639 and 2667 Lots in late March 2006, and thereafter, in July 2006, secured a CPS for the third lot in the name of Standard Plumbing. He denies speaking with Mr. Khela about the 160th Street Properties at any time before, during or after the negotiations for their purchase.

[173] Mr. Takhar's evidence is, perhaps not surprisingly, corroborated by his wife, however also by the realtor, Mr. Gill, whose evidence I found refreshingly forthright and which I accept in its entirety.

[174] Mr. Gill described how he obtained the listing for two of the 160th Street Properties, how he discussed and reviewed the properties with Mr. Takhar, and ultimately how the CPS agreements were negotiated and finalized. He has no recollection of Mr. Takhar ever mentioning Mr. Khela during their discussions, whether as a partner or otherwise, although he believes he would have remembered any such partnership had it been mentioned. He also has no recollection of receiving any phone call or message from Mr. Khela, but had that occurred he is sure he would have called back.

[175] In addition to his evidence under oath at trial, Mr. Khela had earlier sworn three affidavits that described his discovery of the 160th Street Properties, how he passed the information on to Mr. Takhar, and that Mr. Takhar agreed to purchase and fund the development of the properties. There are several inconsistencies in those three affidavits which were put to Mr. Khela in cross-examination at trial, but for present purposes I focus primarily on the role played by another realtor, Mr. Jasbir Banwait.

[176] In his affidavit sworn on November 16, 2011, Mr. Khela deposed that: (i) he and his wife found the two 160th Street Properties, which were in the process of being rezoned for a 30 townhouse development; (ii) he visited Surrey City Hall to check on the development potential; and thereafter (iii) he contacted Mr. Takhar about the matter, all of which resulted in the latter agreeing that Phoenix Homes would purchase and develop the properties at Mr. Takhar's sole expense (because the Khelas had "funded the 199A Property"). No mention was made in this affidavit of the involvement of Mr. Banwait.

[177] Ten months later, in his second affidavit sworn September 25, 2012, Mr. Khela repeated his claim that "[he] was the one who discovered the 160th Street Properties and brought them to Mr. Takhar's attention in February or early March

2006". However, he explained that he had "first met with a realtor, named Jasbir Banwait with Lighthouse Realty, who gave [him] the addresses and he and [Mr. Khela] visited the 160th Street Properties together". Thereafter, Mr. Khela says he "returned to the 160th Street Properties the following day and telephoned the listing agent Manjit Gill and left him a voicemail".

[178] In his third affidavit sworn July 3, 2013, Mr. Khela attached as an exhibit and described

> a copy of a letter from Jasbir Banwait, realtor. In that letter he explains that he was the realtor who told me about 160th Street Properties and that we attended at the site together.

[179] The third affidavit continues,

> (17) I have asked Mr. Banwait to provide an Affidavit containing the facts in his letter but he explains that he is unwilling to do so as his son, who lives with him, is married to the daughter of a very close friend of Mr. Takhar, and swearing an Affidavit in this matter will make things awkward for his family.

[180] The Banwait letter attached as an exhibit is dated February 12, 2012 and reads as follows:

> To whom it may concern,
>
> I, Jasbir Banwait am an experienced Realtor with Lighthouse Realty Ltd in Abbotsford B.C. and I have worked in the industry for many years. Kundan Khela has been one of my regular clients to buy and sell real estate through me. Kundan often visited my office on Clearbrook Road in Abbotsford to find out about new potential deals and to stay informed of the real estate market. Around the beginning of 2006, Kundan was at my office when I mentioned a development opportunity to him which was located on 160th Street in South Surrey/White Rock area. I knew that Kundan had purchased a property on 200th Street and 72nd Avenue with a partner and may be interested in other construction opportunities as well. Kundan showed interest in the property, so we travelled to the mentioned addresses on MLSF2601633 and MLS2601883. After seeing the property, Kundan said this appeared to be a great opportunity and liked the fact that there was a school and all amenities nearby. The two properties totalled about two acres and allowed for 30 townhouses according to the information on MLXchange. I did not hear back from Kundan about this property, but later found out from the sign that this project was being constructed by Phoenix Homes. I was surprised by this since Kundan had not called me back regarding this opportunity and I assumed that he and his partner had purchased this property without my services.

[181] At trial, Mr. Khela again testified that Mr. Banwait had informed him about the 2667 and 2639 Lots, and that the two of them went to visit the properties together. He testified that he thereafter phoned the listing real estate agent, Mr. Gill, and left a message. He also testified (albeit somewhat inconsistently with his previous affidavit evidence) that he received information from City Hall about development possibilities, spoke with Mr. Takhar about the matter, and later had a meeting with Mr. Takhar where the latter took Mr. Khela's "file" on the matter. He testified that Mr. Takhar informed him in March 2006 that "we have received those properties, we have purchased those under the name of Phoenix Homes" and that he had provided the deposits for the purchases.

[182] Mr. Banwait was on the list of witnesses proposed to be called by the plaintiff at trial. He was not actually called by the plaintiff to testify, however his attendance at trial was subpoenaed by Phoenix Star.

[183] Mr. Banwait was taken through the February 12, 2012 letter. He acknowledged that all substantive portions of that letter were false. He stated that he had nothing to do with the 160th Street Properties, he did not tell Mr. Khela about them in 2006, and he did not visit these properties with Mr. Khela.

[184] Mr. Banwait testified that he met Mr. Khela and Mr. Satwinder Sharma at a Tim Hortons on Clearbrook Road in Abbotsford. Both Mr. Khela and Mr. Sharma were his close friends and also clients. When asked to explain the circumstances in which he signed the letter, Mr. Banwait testified:

> You know, as you see I've been in this business for 33 years, and I have seen so many cases that when the matter goes into the court, nobody wins except the lawyers, so I had very good relationship with Satwinder Sharma and Kundan Singh Khela, and they approached me to settle this dispute out of the court only give us this letter to settle it with Mr … what's his name … Nirmal Takhar to scratch little bit more money. We will settle out of the court. We won't give this document to nobody. So I was under the impression that this document will not be given to nobody and it will be settled. That's the whole reason that I signed this letter

[185] In cross-examination, Mr. Banwait repeatedly acknowledged that he did lie in the letter and that he knew when he signed the letter that he was lying. He said

Mr. Khela “wanted to use it to show Mr. Takhar to settle [the claim]. Maybe motive was to get a little bit more money”.

[186] Mr. Satwinder Sharma also testified at trial. He took no responsibility for the letter in any way. He said he had nothing to do with it and heard no conversation about it. He remembers Mr. Banwait signing something but purports not to remember anything else as it was a long time ago. I found Mr. Sharma to be an evasive witness on this point and his denial of any memory of the events rings false. I find as a fact that he was actively involved in procuring the Banwait letter.

[187] I acknowledge that Mr. Banwait is an untrustworthy individual who was evidently prepared to sign letters containing false information in order to help his friend extract some sort of settlement in litigation with others. Nevertheless, I accept his evidence that he was not prepared to commit perjury at trial, that he had nothing to do with the 160th Street Properties, that he did not tell Mr. Khela about them in 2006 and did not visit the Properties with him. I accept his evidence that the February 12, 2012 letter was prepared by and presented to him by Mr. Khela and that he signed the document knowing full well that its contents were false and would be used for a dishonest purpose.

[188] I find that Mr. Khela’s evidence regarding his introduction of the 160th Street Properties to Mr. Takhar is fabricated and entirely false. He has not only himself lied to this Court on the matter, he also created and secured Mr. Banwait’s signature on a statement provided to the Court the contents of which he knew to be untrue. Regrettably, it is not the only time this has occurred in this trial.

d. The Oceanview Star cheque

[189] On December 11, 2007, Oceanview Star Homes Ltd. (“Oceanview Star”) was incorporated at Mr. Takhar’s instruction for the purpose of building a single-family home on Beatrice Street in Vancouver, B.C. Mr. Jaswinder Kajla was recorded as the sole director and shareholder of the company.

[190] Mr. Kajla is Mr. Takhar's brother-in-law. While he worked for Standard Plumbing for a number of years in the early 1990s, for the past 22 years he has been a bus driver, and more recently, a transit supervisor with Coast Mountain Bus Company. He has also invested in some of Mr. Takhar's development projects over the years.

[191] Mr. Kajla testified that he loaned $240,000 to Mr. Takhar on behalf of Phoenix Star in 2007 for the 160th Street Project. The loan carried interest at 15% compounded annually. The loan was made by way of a bank draft issued to Phoenix Construction, again at Mr. Takhar's request.

[192] As with Phoenix Star, Mr. Takhar was the "real owner" of Oceanview Star, even though the paperwork was in Mr. Kajla's name. Mr. Kajla says his interest in the company is limited to his loan, although he was also a signatory at the bank and signed (mostly blank) company cheques at Mr. Takhar's request. He made a $230,000 loan to Oceanview Star and, unlike the loan to Phoenix Star, this loan has since been repaid with interest.

[193] Mr. Kajla testified that setting Oceanview Star up as Mr. Kajla's company was, like Phoenix Star before it, necessary to avoid internal bank lending limits. Oceanview Star banked with Coast Capital Savings. The bank statements were sent to Mr. Kajla's home in Surrey. He no longer has any of the bank records. While the parties have been able to obtain an electronic printout of the Coast Capital account statement for 2008, copies of the signed cheques are apparently not available and have not been produced.

[194] The corporate and banking "set up" for Oceanview Star is, of course, another example of Mr. Takhar using a façade, some might say "sham", to disguise the real ownership and control of the corporation's business affairs.

[195] With this background, I now turn to a certain cheque said to have been issued by Oceanview Star to Mrs. Khela, dated July 4, 2008, in the amount of $1.2 million for a "buyout" of her interest in the 199A and 160th Street Properties. The plaintiff

and the Khelas say that this cheque is definitive proof of Phoenix Homes' interest in both the 199A and 160th Street Properties. Mr. Takhar says it is a forgery.

[196] The existence of this cheque was first disclosed by the Khelas in August 2016, approximately one month before the first scheduled trial date in this derivative action. What was produced at the time was a poor photocopy. On the page comprising the photocopy, there is a mark beside, but not forming part of, the image of the cheque. This mark is known as a "trash mark", something that can be created by dirt or debris on the photocopier at the time the photocopy was made.

[197] Production of this document resulted in the adjournment of the trial. The Takhar defendants retained a forensic document expert who produced an expert report disputing the authenticity of the cheque based, in part, on the trash mark (the trash mark is found on only one other document produced in this litigation, another document photocopied and produced shortly before trial).

[198] The expert report disputed the Khelas' claim that the document was a first-generation photocopy and the only photocopy of the original cheque—a cheque which they say had been given to Mr. Khela by Mr. Takhar in July 2008, and returned to him by Mr. Khela a few months later (hence the unavailability of the original). The defendants' expert, Mr. Gaudreau, opined that the document was actually a poor quality, multi-generational photocopy and not a first-generation photocopy as claimed.

[199] In March 2018, two and a half months after Mr. Gaudreau's expert forensic report was served on the plaintiff/Khelas, and just under two weeks before the next scheduled trial date, the Khelas disclosed yet another photocopy of the July 4, 2008 Oceanview Star cheque which they then claimed was the actual first generation photocopy of the original cheque.

[200] This second version of the photocopied Oceanview Star cheque is a much higher quality image of the cheque and it does not have any trash mark on it. Nevertheless, both Mr. Gaudreau and Mr. Purdy, the forensic expert retained by

Phoenix Homes/the Khelas, agree that even this second version is not a first-generation copy of the original cheque. This uncontroverted expert evidence, which I accept on this point, completely undermines Mr. Khela's testimony that the second version of the cheque photocopy was the first-generation photocopy he claimed to have made in 2008.

[201] The Oceanview Star cheque as depicted in the two photocopied versions has the following features:

- it is a pre-printed Oceanview Star cheque, number 0052, drawn on the company's account at Coast Capital, the blank portions of which (payee, amount, signature and "RE:" line) have been filled in by handwriting;
- the payee is "Kamljit [*sic*] K. Khela" and the amount is "$1,200,000";
- the "RE:" line states "2667, 2639 160 ST share buyout" and "7248 199A share buyout";
- the signature is an indecipherable scrawl, however it bears no resemblance whatsoever to Mr. Takhar's signature as depicted on numerous documents put into evidence at trial;
- there is a square hologram to the left of the signature line; and
- three vertical lines are depicted on the cheque consistent with an original having been folded in half and then folded in half again at some point in time before being photocopied.

[202] There are some other notable features about the handwriting depicted in the photocopies. When Mr. Takhar writes cheques, he almost always puts: (1) a stylized squiggle on the amount line before writing in the figure; (2) a period between the written dollars and cents numbers with a small line or stylised loop under the cents number; and (3) the same zero/zero with a downward loop at the end of the handwritten amount line. These unique features, which appear on almost all the other cheques in evidence written by Mr. Takhar, are missing from the photocopied cheque image, as of course is also Mr. Takhar's actual signature.

[203] As well, the cheque does not reflect the correct address for the 199A Property. The street number on the cheque image appears to be “7248” (a number which actually relates to a single-family house further down the street). The 199A Property did not have a numerical civic address until early June 2009 when, as confirmed by a witness from the Township of Langley at trial, the civic address of “7298–199A Ave.” was created for the first time.

[204] Mr. Khela’s version of events surrounding the Oceanview Star cheque is essentially as follows:

- he and Mr. Takhar met at a Tim Hortons coffee shop and had an argument about the lack of progress on the Phoenix Home projects;
- Mr. Takhar took a folded cheque out of his pocket and gave it to Mr. Khela, something that surprised and upset him, however Mr. Khela took the cheque with him when he left the coffee shop;
- Mr. Khela discussed the incident with his wife and the later testified that she was “gutted”, “confused”, “dumbfounded” and “very annoyed”;
- two or three days later, he and Mr. Takhar spoke on the phone and agreed to continue working together, at which time Mr. Takhar requested the return of the cheque;
- he eventually returned the cheque to Mr. Takhar sometime in September or October 2008, but before doing so he made a copy of it. The cheque had been with him in his wallet while working on the farm and may have gotten wet when it rained;
- both Mr. Khela and his wife completely forgot about the cheque and the entire incident surrounding it, and did not remember the photocopy until shortly before trial in the summer of 2016 when he found the photocopy while searching for additional documents relating to the case in the furnace room in their new home;

- the Khelas brought the photocopy to the offices of their then counsel; and
- in March 2018, Mrs. Khela located an additional photocopy of the cheque in their dining room while again looking for documents to give to counsel.

[205] A lengthy section of the Takhar defendants' written final submissions is devoted to dissecting the Khelas' inconsistent evidence on different occasions about this series of events and asks the Court to conclude that the evidence "overwhelmingly demonstrates" that the different photocopied images were "somehow fabricated by the Khelas and falsely proffered by them" in conjunction with "false evidence about the purported circumstances" surrounding them. I will not repeat all of that material here, but suffice it to say that I am inclined to agree with much of it.

[206] On many occasions during this trial, Mr. Khela gave very detailed evidence about the location and content of various meetings and discussions he had with Mr. Takhar regarding the Phoenix Homes Projects. Mr. Takhar's counsel submits, and I agree, that it is simply inconceivable that, during five years of litigation over the ownership of three alleged joint venture claims, not one but both of Mr. and Mrs. Khela would completely forget about a $1.2 million offer by their opponent to buy out their interest in two of the three joint venture properties. It was a critical event and document that challenged Mr. Takhar's claim that neither the Khelas nor Phoenix Homes had any interest in those two properties. In their words, the offer was a "unique" and "very memorable" event, and it left them "surprised", "upset" and "dumbfounded". The likelihood of both Khelas completely forgetting such an event until the eve of trial is essentially zero. I find their evidence to the contrary completely unbelievable, and I reject it as untruthful.

[207] Having said that, I do acknowledge there are some unexplained oddities surrounding this Oceanview Star cheque. The facts are that:

- Oceanview Star did have a chequebook issued to them by Coast Capital that had numbered cheques and cheque stubs. The chequebook and cheque stubs were put into evidence;
- there is a cheque stub for Oceanview Star cheque number 0052, which bears Mr. Takhar's handwriting, including the July 4, 2008 date, and also bears an "X" mark which, according to Mr. Takhar's evidence, means that the cheque had not been issued but instead had been torn up;
- Mr. Takhar acknowledged that at least some of the handwriting on the photocopied document was his ("looks like these dates is my handwriting");
- he also said "looks like that signature is Jaswinder Kajla";
- the capital letter "H" in the words "sHare" and "Hundred" is very similar to the same letter on other cheques written by Mr. Takhar, and
- the written and misspelled first name of Mrs. Khela ("Kamljit") on the payee line of the cheque is very similar to the forged written and misspelled name on some of the resolutions in the Phoenix Homes corporate records and at least one other cheque written by Mr. Takhar in February 2006 on a Phoenix Construction account at Coast Capital.

[208] As well, the "forgery" version of events requires that Mr. Khela (or someone on his behalf) must have somehow come into possession of an original Oceanview Star cheque bearing Mr. Takhar's handwritten date and Mr. Kajla's signature but otherwise blank, which was retained and concealed for eight years, at which time the Khelas went to extraordinary efforts to create false evidence to help their case (forging the contents, making multi-generational photocopies to avoid detection, and concocting a story to justify both its origin and related discovery).

[209] Plaintiff's counsel relies on these oddities and improbabilities along with the admittedly qualified evidence of the defendants' forensic expert about Mr. Takhar's handwriting to say that "Mr. Khela's version of events should be accepted, or at the

very least, the Plaintiff submits [the Court] should conclude it is unable to find, on a balance of probabilities, that the Oceanview cheque was forged".

[210] In making this submission, counsel perhaps overlooks the fact that it was the plaintiff/Khelas who proffered the Oceanview Star cheque photocopies into evidence and have the onus of proof respecting their authenticity. I have already rejected the Khelas' evidence regarding the discovery of the 160th Street Properties and, indeed, found that they attempted to proffer false evidence and false documents in support of that claim. Given this false evidence and the implausibility of the alleged memory failure respecting the origin and existence of the Oceanview Star cheque, I am not persuaded on the balance of probabilities that the alleged Oceanview Star cheque is genuine.

[211] The cheque photocopies thus cannot and do not corroborate Mr. Khela's evidence regarding the July 2008 meeting and, absent any other reliable evidence on the matter, I am not persuaded on the balance of probabilities that any such meeting occurred.

e. Conclusions on the 160th Street Properties claim

[212] Phoenix Homes and the Khelas have failed to prove on the balance of probabilities that Mr. Khela first discovered the availability of the 160th Street Properties, that he brought this development opportunity to Mr. Takhar's attention in early 2006 for inclusion in the Phoenix Homes joint venture, and that Mr. Takhar agreed to fund the development of those properties for the benefit of Phoenix Homes.

[213] The derivative claim by Phoenix Homes that Mr. Takhar breached his fiduciary and statutory duties to Phoenix Homes in relation to the 160th Street Properties and that Phoenix Star is also liable on that account, whether as a joint tortfeasor or on other grounds such as unjust enrichment, must be and is dismissed.

[214] I will address Phoenix Star's counterclaim against Phoenix Homes and the Khelas later in these reasons.

VIII. DID THE PARTIES AGREE THAT PHOENIX HOMES WOULD RELINQUISH ITS INTEREST IN THE 199A PROPERTY?

a. 199A Property completion and resulting litigation

[215] As noted earlier, the completion date for the sale of the 199A Property was handwritten on the front page of the CPS as June 30, 2005, although the addenda to that document specified certain "requirements to finalize the sale" (including "completed services to the property line") and also contemplated "extending the completion date up to a maximum of 60 days" following September 30, 2005 "if the said servicing was not in place by that date".

[216] Mr. Takhar retained his preferred solicitors, McQuarrie Hunter, with respect to the completion of the sale and the subsequent related litigation.

[217] On June 15, 2005, the solicitor for the vendor (682163 B.C. Ltd.) wrote to McQuarrie Hunter, enclosing a plan for the proposed development of the property and identifying "a number of problems" with respect to the CPS including the confused closing conditions and insufficient identification of the property being sold. That letter continued,

> I understand that your client may not wish to complete. This contract may not be enforceable in its present state. If your client doesn't want to complete, please let me know so that we can cancel the transaction.

[218] Further correspondence between the solicitors then ensued and on June 30, 2005, the solicitor for the vendor faxed the closing documents to McQuarrie Hunter. Mr. Takhar met with litigation counsel at McQuarrie Hunter that same day and, on Mr. Takhar's instruction, the latter prepared and filed both a Writ of Summons in Court and a certificate of pending litigation against the property before the close of business. Copies of those documents were faxed to Mr. Takhar by McQuarrie Hunter at that time.

[219] Litigation counsel at McQuarrie Hunter, Mr. Brian Schreiber, was called as a witness at trial. He acknowledged that the materials provided to him before filing the Writ of Summons included the addendum substituting Phoenix Homes as the

purchaser, however the litigation was nevertheless issued in the name of Phoenix Construction. Mr. Schreiber said this was something he did not discuss with Mr. Takhar beforehand but was a decision he made himself. He says he viewed Phoenix Homes as "more of a party who might be a nominee to take title" but that he thought "the party that could compel performance of the obligation was Phoenix Construction". He acknowledged the decision caused him some anxiety but the Writ of Summons needed to be filed right away.

[220] I accept Mr. Schreiber's testimony on this point, although I must say that I have difficulty with his reasoning. I am satisfied that the naming of Phoenix Construction as a plaintiff in the 199A Property lawsuit was not part of some devious strategy hatched by Mr. Takhar to deprive Phoenix Homes of its interest in the property, although I acknowledge how the Khelas might later have formed a hindsight impression otherwise.

[221] On June 27, 2005, Mr. Takhar sent a fax to Mr. Khela enclosing a copy of the 199A Property CPS, albeit without the addendum naming Phoenix Homes as the purchaser. The Khelas had completed the sale of their farm on April 18, 2005, and in early May 2005, they had used the net proceeds to purchase three term deposits from CIBC totaling approximately $1.5 million. On June 30, 2005, CIBC sent Mrs. Khela a letter confirming that funding was in place to complete the purchase of the 199A Property. On July 8, 2005, even though the 199A Property litigation had been issued in the name of Phoenix Construction, the Khelas deposited a further $50,000 into the WSCU account for the 199A Property, some of which was immediately disbursed to pay certain architectural invoices related to the proposed development.

[222] On July 21, 2005, Phoenix Construction filed its statement of claim seeking specific performance of the 199A Property CPS. Litigation counsel, Mr. Schreiber, had already explained to Mr. Takhar before the pleading was filed that the CPS had been poorly drafted and that the claim to enforce the transaction was by no means certain. He informed Mr. Takhar that "even if he has an 80% case, a judge may not

see it his way and could say that he is in breach and has forfeited the deposit—a bitter pill [to be avoided] if he can negotiate something [before going to trial]".

[223] On August 5, 2005, Mr. Schreiber sent a "without prejudice" correspondence to the solicitor for the vendor addressing the possibility of settlement. In that correspondence, which was copied to Mr. Takhar, he stated that "Phoenix is interested in buying the land to be retained by your client in the subdivision according to the contract between the parties for a price which our clients can negotiate and agree upon". The correspondence suggested a possible "joint venture" for the construction of certain improvements.

[224] On August 11, 2005, the 199A Property vendor filed its statement of defence and counterclaim. The defence was that the closing documents had been tendered but the purchaser had failed to complete and to pay the purchase price on June 30, 2005 as required. In the alternative, a claim was made that the agreement between the parties was "void for uncertainty" in relation to the completion date and/or "unenforceable in any event" because it was "in essence an agreement to agree".

[225] Settlement negotiations thereafter continued both between the solicitors and directly between their respective clients, the latter with the assistance of the real estate agent for the transaction. At one point, settlement seemed imminent and an operating loan for Phoenix Homes was obtained from the Toronto Dominion Bank in the amount of $1,151,250. McQuarrie Hunter acted for Phoenix Homes in relation to that credit transaction, although the parties ultimately failed to complete the settlement and the loan was never actually formalized.

[226] All communications with/by McQuarrie Hunter involved only Mr. Takhar and did not include Mr. Khela, even though the lawyers at the firm were well aware that Mr. and Mrs. Khela were 50 percent shareholders in Phoenix Homes, the entity which was to be the ultimate purchaser of the 199A Property. No satisfactory explanation has been offered for the failure to directly involve, or even just copy, Mr. and Mrs. Khela in the communications, although it is entirely probable that

McQuarrie Hunter treated Mr. Takhar as their "real" and instructing client for all practical purposes.

[227] In November 2005, Carmichael Wilson Property Consultants Ltd. ("CWPC") issued to each of Mr. Takhar and TD Canada Trust an appraisal of the proposed 62-unit townhouse 199A Property Project. The appraised "land value" as of November 17, 2005 was $2,665,000—a $540,000 increase over the purchase price in the 199A Property CPS. The estimated market value of the property under the "Cost Approach", assuming construction of the proposed development was fully complete, was $14,560,000 excluding "developer's profit".

[228] On June 2, 2006, another appraisal firm, Grover Elliott & Co., issued a further appraisal of the 199A Property and the proposed 62-unit townhouse development. It reported that, as of May 18, 2006, the land value for the property was $4,400,000—$2,275,000 more than the CPS purchase price. This appraisal was undertaken as part of the settlement negotiations between Mr. Takhar and the principal of the 199A Property vendor company.

[229] There are numerous conflicts in the evidence, both in affidavits and at trial, about the timing and content of communications between Mr. Takhar and Mr. Khela regarding settlement negotiations and appraised values. However, I am satisfied that Mr. Takhar did not provide Mr. Khela copies of the pleadings in the 199A Property lawsuit, the letters he received from McQuarrie Hunter, or the appraisals referred to above. Nonetheless, he did convey to Mr. Khela by at least the end of March 2006 information to the effect that the 199A Property litigation would not settle quickly.

[230] I am also satisfied that Mr. Khela was becoming concerned about leaving his $1,500,000 in a bank account instead of having it actively invested in real estate and that he decided to look for other investment opportunities at the time. In making this finding, however, I am not making a finding that Mr. Khela (as a 50 percent "owner" of Phoenix Homes) had in any way decided to relinquish the interest in the 199A Property at this time. Whether he did so later is a matter I will address in due course.

b. Acquisition of the 208th Street Properties

[231] The chronology of this acquisition is basically as follows:

April 22, 2006	Date of assignment agreement between SMB Holdings Ltd. (“SMB Holdings”) and Phoenix Homes (Kundan Khela [name crossed out] and Phoenix Homes [name handwritten]) assigning CPSs and rights to purchase 8184–208th Street for $1,620,000 (the “8184 Lot”) and 8170–208th Street for $4,909,000 (the “8170 Lot”), in exchange for an assignment fee of $500,000 ($100,000 payable immediately, $400,000 payable on/before May 12, 2006). Mrs. Khela provides VanCity draft for $100,000.
May 8/9, 2006	Addendum added to the 8170 Lot CPS reducing purchase price to $800,000 per acre of land usable as building or road/pathway allowances and excluding non-buildable wetlands/ditch/watercourse to a maximum of 1.5 acres.
May 15, 2006	The Khelas make bank draft deposit payments to the vendors of the 8170 Lot ($300,000) and 8184 Lot ($250,000).
June 14, 2006	Mr. Takhar provides VanCity bank draft payable to SMB Holdings in the amount of $400,000 on account of assignment fee balance.
August 4, 2006	Mr. Takhar—on behalf of Phoenix Homes as authorized agent for vendors—submits a development application form with the Township of Langley to rezone and develop the 208th Street Properties as a proposed 107-unit three-storey townhouse project with attached plans from Yamamoto Architecture, dated June 19, 2006. Numerous

	communications between Langley and Mr. Takhar's development consultants thereafter ensue.
November 21, 2006	The Khelas and Mr. Takhar open a new bank account for Phoenix Homes at North Shore Credit Union ("NSCU"), on which Mrs. Khela and Mr. Takhar each had signing authority. The Khelas deposit $800,000 into the account by way of a CIBC bank draft and Mr. Takhar deposits $1,300,000 by way of Coast Capital drafts in the amounts of $850,000 and $450,000. This money was used to complete the purchase of the 208th Street Properties shortly thereafter.
November 30, 2006	Phoenix Homes completes the purchase of the 208th Street Properties. The closing documents are executed at McQuarrie Hunter. The Khelas and Mr. Takhar are in attendance. Mr. Takhar provides McQuarrie Hunter with a Coast Capital draft in the amount of $75,000. NSCU provides first mortgage financing in the amount of $3,400,000. The final purchase price after addendum deductions and transaction adjustments was $3,971,871.51 for the 8170 Lot and $1,653,829.75 for the 8184 Lot.

c. Unequal contributions and the alleged "substitution" agreement

[232] As of November 30, 2006, and taking into account both the 199A Property and 208th Street Properties transactions, the Khelas had contributed the aggregate sum of $1,600,000 to the Phoenix Homes venture. As of that same date, Mr. Takhar had contributed $1,775,000 by way of lump-sum payments, however he had also

incurred additional expenses for both the 199A Property Project and the 208th Street Properties Project on account of various lawyer and consultant fees.

[233] The informal reconciliation subsequently prepared by counsel (which I emphasize is not formally in evidence) indicates that, taking into account only the 208th Street Properties expenses (i.e., not including any 199A Property expenses), Mr. Takhar had "over contributed" a little over $200,000. As well, of course, it was primarily Mr. Takhar who was "managing" the two projects and instructing the various professionals he had engaged.

[234] On November 7, 2006, CWPC issued a report appraising the 208th Street Properties as of October 30, 2006 at $7,110,000 "as is" and $8,175,000 "as if rezoned". The estimated total construction costs for phase one of the project were $3,717,000.

[235] A little later in November 2006, CWPC issued an addendum to its October 30, 2006 appraisal wherein the net site area was reduced to 6.21 acres (as opposed to 7.11 acres) and the appraised values as of October 30, 2006 were reduced to $6,210,000 "as is" and $7,140,000 "as if rezoned".

[236] While the principal amount of the NSCU loan was $3,500,000, the net initial advance available to Phoenix Homes at the time of closing was a little over $2,900,000. The difference included a $250,000 holdback pending resolution of the "wetlands issue", a "commitment fee" of $35,000 and a "debt service reserve" of $280,000. The reserve was designed to cover interest payments on the loan for the duration of the loan term or as long as such funds remained available. It was an "interest-only" loan at prime plus 2% (the "Mortgage Interest Reserve").

[237] The terms of the loan contemplated "borrowers' cash equity" of a little over $4,000,000 (based on a total funding proposal of $7,577,000), although the required "borrowers' cash equity" at the time of purchase completion was to be $3,127,400.

[238] Both Mr. Takhar and Mrs. Khela signed their acceptance of the loan terms on November 21, 2006 in their capacities as both Phoenix Homes “signatories” and as “indemnitors” of the debt obligation.

[239] Mr. Takhar has not fully disclosed the source of the funds that he provided towards the closing of the 208th Street Properties purchase. He informed neither the Khelas nor NSCU of the investors from whom he borrowed funds at the time and to whom he presumably remains indebted. This “interest expense” presumably forms part of his damages counterclaim against the Khelas.

[240] Mr. Takhar claims that he reached an agreement with Mr. Khela that the 208th Street Properties Project would be substituted for the 199A Property Project, that Mr. Khela’s earlier contribution of $150,000 to Phoenix Homes on account of the 199A Property Project would be credited towards the 208th Street Properties Project, and that, following the closing of the 208th Street Properties purchase transaction, Phoenix Homes would no longer have any interest in the 199A Property. As with many other communications between these individuals, there were no third-party witnesses and there is no contemporaneous documentation corroborating the existence or content of any such “agreement” or understanding.

[241] Mr. Takhar’s evidence under oath regarding this alleged agreement is vague, inconsistent and unconvincing. His Response to Petition filed February 8, 2012 alleges that Mr. Khela “agreed to terminate [the “199A Agreement”] on or about April 22, 2006”. His supporting affidavit sworn February 3, 2012 says that on some “later” date after the April 22, 2006 transactions, he and Mr. Khela “met at a coffee shop in Abbotsford” where Mr. Khela “asked me to end our agreement concerning the 199A Property and credit his $150,000 contribution towards the development of the 208 Street Properties”.

[242] Mr. Takhar’s Second Further Amended Response to Civil Claim in the derivative action makes no reference to the coffee shop meeting but simply states the parties

> agreed that they would purchase and develop the 208 Street Properties together and that the 199A Agreement would be replaced with a new agreement whereby the Khelas and Nirmal would develop the 208 Street Properties using the plaintiff [Phoenix Homes] as a corporate vehicle instead of the 199A Property (the "208 Agreement")

[243] At trial, Mr. Takhar referred to a "$211,000 shortfall" in Mr. Khela's contributions. That number comes from a schedule prepared by his accountant, Mr. Sandhu, several years later, which was attached to his February 3, 2012 affidavit. That schedule is entitled "Shareholders' Contributions at the Start of Project: 208 Street" and includes, among other things, some $36,065 of "expenses paid by Nirmal before November 30, 2006". That date was, of course, the closing date for the 208th Street Properties purchase transaction.

[244] At trial, Mr. Takhar proved to be uncertain about whether and where he had one or two meetings with Mr. Khela around the time of closing, although both such references were in the context of meeting in the vicinity of the McQuarrie Hunter offices. With regards to content, he testified:

> So the reason to show to Kundan for this page and show him this the way it's look, because if that $200,000 short total contribution … total contribution to Phoenix Homes Ltd. and if I look at … told him for whatever agreement we have, $150,000 is on … put it on 199A, and the difference is now close to 350 … You can calculate maybe around 360,000 or something like that. I told him this is the problem, and also is … also tell him the problem is because 208 also ongoing, ongoing development, and kind of getting bills kind of every day from the consultant. It's ongoing, and myself told him, says, I told you day one this is bigger project. This need a lot of more money, and you have to come up with more money. When I told him it's 208 Street your shortfall 350 to $360,000 and <u>that's the time he told me for $150,000 leave it in the Phoenix Homes as we doing 208 Street Property</u>, Phoenix Homes. And I told him, I said, if this 150 go towards 208 Street Property, then you still shortfall $211,000. And <u>that's the time he … me and … he told him he wanted $150,000 towards 208 Street Property</u>, and I explained him again, you're still shortfall $211,000. Then he promised me he can come that money very shortly, and that's discussion was that way on that meeting.
>
> [Emphasis added.]

[245] Mr. Khela, of course, denies any such discussion or agreement took place.

[246] Counsel for Mr. Takhar urges me to accept Mr. Takhar's version of these events because, in the language of *Bradshaw* at para. 187, it 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”. The conditions to which he refers are that Mr. Khela had exhausted his financial resources by purchasing several other properties, during the period spanning August 2005 to December 2006, including their residence on Mount Lehman Road, three other farms (one of which was actually “flipped” during that period) and a mall in Alberta. In such circumstances, the ability of Mr. Khela to make the required contributions for the development of the 208th Street Properties Project was questionable and this was logically Mr. Khela’s motive for having Phoenix Homes relinquish any further interest in the 199A Property Project.

[247] I do not find this submission persuasive. There is no question that Mr. Khela did pursue these other investments (one of which actually netted him in excess of $2 million in the space of a year), but the submission about Mr. Khela’s motives at the end of November 2006 is simply speculation. The outcome of the 199A Property litigation was uncertain, but if it was resolved in Phoenix Homes’ favour, whether through judgment or settlement, it was entirely possible the property might have been sold (or “flipped”) at a tidy profit in a rising market, the proceeds of which could then be invested in the 208th Street Properties Project (or any other enterprise the joint venture might choose to undertake at the time). This, as it turns out, is precisely what Mr. Khela wanted to do in 2009.

[248] I explained earlier in these reasons why I consider the testimony of both Mr. Khela and Mr. Takhar respecting their oral conversations to lack credibility unless corroborated by other reliable evidence or testimony of disinterested witnesses. I find Mr. Takhar’s testimony regarding any alleged “substitution” agreement to be unconvincing and unreliable, and I find that no such agreement was reached by the parties, whether at the end of November 2006 or any earlier date.

[249] It follows that I also find that Phoenix Homes retained its interest as the rightful purchaser of the 199A Property, on whose behalf a $100,000 deposit had

been made and for whose benefit the specific performance litigation was being pursued.

[250] That is not the end of the matter, however. It remains to be seen whether the events surrounding the settlement of the 199A Property litigation somehow extinguished Phoenix Homes' interest in the property in 2009.

d. Settlement of the 199A Property litigation

[251] The trial of the 199A Property litigation was originally scheduled for November 17, 2008.

[252] The McQuarrie Hunter litigation file was put into evidence at this trial. It documents some of the trial preparations as well as the settlement correspondence exchanged between counsel on behalf of their respective clients. Several offers and counter-offers were made. One of the expert appraisal reports commissioned by Phoenix Construction estimated the market values for the 199A Property at a low of $2,200,000 as of June 2005 and a high of $4,300,000 as of December 2007. In other words, the value of the property had basically doubled from the original purchase price over the ensuing two years.

[253] The trial did not proceed on November 17, 2008 because no judge was available to hear it. It was therefore reset for March 23, 2009.

[254] Shortly before the new trial date, counsel for the defendant wrote to McQuarrie Hunter enclosing the addendum substituting Phoenix Homes as the purchaser on the 2005 CPS for the 199A Property. One of the defendant's arguments at the upcoming trial related to the uncertainties in the contract as a basis for resisting specific enforcement. Defence counsel wrote at the time:

> I don't intend to make any motion to strike the action on the basis of the wrong plaintiff but I will be using the document [the addendum] in respect to one more argument as to the issue of certainty going to who the proper parties to the contract were.

[255] The lawyers settled the case on March 21, 2009 and on the first day of the trial, March 23, 2009, obtained a consent order from Mr. Justice Verhoeven of this Court embodying the terms of settlement. The settlement/order required the defendant to sell/transfer the 199A Property (as subdivided) to Phoenix Construction for a total price of $2,175,000 with the closing to occur on September 20, 2009.The order also addressed the foreclosure proceedings which had been brought by WSCU with respect to the 199A Property.

[256] The sale transaction did not complete on September 20, 2009 for reasons not relevant here. Phoenix Construction immediately applied to this Court for an order directing the vendor to complete the transaction, and on November 5, 2009, Mr. Justice Verhoeven issued judgment directing that to occur. Part of the evidence before Mr. Justice Verhoeven was an affidavit sworn by Mr. Takhar explaining the background. It appears that the Court was at no time advised of Phoenix Homes' interest in the property.

e. Closing of the 199A Property transaction and attempts to sell

[257] Phoenix Construction became the registered owner of the 199A Property on November 12, 2009. The statement of adjustments for that transaction confirms that the funds required for the transaction to complete totalled $2,354,981.58 and came from the following sources:

- $100,000 deposit ($90,000 of which was paid by Phoenix Homes) already disbursed to the vendor in April 2005;
- $1,238,546.64 proceeds of a CareVest Capital mortgage;
- $598,967.92 proceeds of a Peoples Trust Company mortgage (an "inventory mortgage" respecting other property owned by Mr. Takhar); and
- $417,467.02 paid by a Phoenix Construction bank draft (the source of which funds Mr. Takhar said at trial he was unable to recall).

[258] In order to secure first mortgage financing for the purchase, Phoenix Construction had commissioned an appraisal of the proposed 62-unit townhouse project on the 199A Property. CWPC appraised the property as of July 16, 2009 as follows:

- a land valuation of $3,970,000 ($1,615,018.42 more than the amount paid on closing); and
- an estimated developer's profit of $3,496,032 (an estimate which was based on the stated land cost of $3,970,000 rather than the $2,354,981.58 it was actually purchased for, meaning the projected developer's profits were in actuality closer to the $5 million mark).

[259] Mr. Khela was aware of the 199A Property litigation and had some contact with McQuarrie Hunter related to the latter's preparation for trial. One of the issues in the case was whether the purchaser had the funds available to actually close the transaction in November 2005 and the Khelas were called upon to assist in producing evidence regarding the GIC funds they had set aside for that purpose. The law firm's litigation file contains memoranda confirming the Khelas' involvement with Phoenix Homes and the relationship with Phoenix Construction.

[260] The principal of the defendant vendor corporation became aware in November 2008 of the Khelas' involvement in the 199A Property transaction. That principal, Mr. Sandhu, called Mr. Khela and a meeting was organized at a Tim Hortons coffee shop in Surrey to discuss options for settlement. Mr. Sandhu's brother and Mr. Takhar were also in attendance for that meeting. No settlement resulted at that time, however I accept Mr. Sandhu's evidence that Mr. Takhar referred to Mr. Khela during this meeting as his "partner".

[261] Mr. Khela argues this reference is Mr. Takhar's acknowledgement that both Phoenix Homes and the Khelas still had an interest in the 199A Property at the time of this meeting in late 2008. The argument is not persuasive, given Mr. Sandhu's acknowledgement in cross-examination that no mention was made of any partnership in the 199A Property Project, merely "partnership" in general.

[262] In his examination-in-chief at trial, Mr. Takhar admitted that he called Mr. Khela shortly after the March 2009 settlement:

> I phone Mr. Khela … and I told Mr. Khela settlement is reached and I have six months to close on 199A. And also told him the price we agree … and I told him if … if he can … if he want to be … come back in this deal and, "if you have the money". Two things I told him. I said first of all, match your contribution on 208 Street property, even though for the contribution, and plus if you can have it, $1.5 million that earlier we discussed to need to do this project because the calculation kind of similar because it's not much difference in the price. And I invite him to come back with this deal ... and the second thing I mentioned to him, if he knew anybody interested to … to buy … buy … even buy this property.

[263] Mr. Takhar went on to say in his evidence that Mr. Khela told him he "did not have the money" for the project but that he could perhaps introduce Mr. Takhar to a buyer. He said one such introduction was actually made to an individual by the name of "Brar" and a meeting was held to review architect's drawings, however Mr. Takhar heard nothing from this "Brar" individual thereafter.

[264] In his first affidavit sworn November 16, 2011, Mr. Khela says nothing about being "invited back into the deal" or, indeed, anything about looking for buyers. He does acknowledge contact by Mr. Takhar during April 2009 and being informed that "we had six months to complete the purchase and there was the potential for tremendous profit".

[265] Mr. Khela swore his second affidavit on September 25, 2012 in response to Mr. Takhar's affidavit. In that affidavit, Mr. Khela denies informing Mr. Takhar he had no funds for the project. He says this was a transaction where a property worth over $4 million could be purchased for a little over $2 million and that he "wanted to flip the 199A [P]roperty for a large profit". He also denied Mr. Takhar's assertion that an introduction had only been made to one potential buyer when in fact three such potential purchasers were introduced by Mr. Khela, two of whom actually made offers (Mr. Harjinder Berar at $3,500,000 and Mr. Satwinder Sharma at $3,950,000). He testified to the same effect at trial.

[266] Each of Satwinder Sharma, Harjinder Berar and Balbir Raiwal gave evidence at trial in support of Mr. Khela's version of events.

[267] Mr. Berar confirmed meeting at Mr. Takhar's office to review plans for the 199A Property Project. He said he made a verbal offer of between $3 million and $3.5 million to Mr. Khela for the property. In a later conversation, Mr. Khela (evidently without consulting with Mr. Takhar) made a counter-offer for a partnership at a price in the low $4 million range. That offer was declined. Nothing was reduced to writing and nothing further came of the matter.

[268] Mr. Raiwal is a principal of Raiwal Developments Ltd. and has known Mr. Khela for a number of years. He testified that Mr. Khela was looking for a partner in the 199A Property and Mr. Khela made a verbal offer to accept $4,500,000. None of his conversations with Mr. Khela were reduced to writing. Mr. Raiwal never met Mr. Takhar and does not know who he is. He acknowledged he never made any formal offer to purchase the property.

[269] Mr. Sharma is the same individual who was present at the meeting where Mr. Khela obtained the false Banwait letter which was appended to one of Mr. Khela's affidavits in the petition proceedings. Mr. Banwait was Mr. Sharma's partner in a sawmill venture at one point in time. Mr. Sharma's main business is labour contracting, however he has engaged in several construction ventures "on the side" over the years, essentially as a "silent investor" in various projects through a company known as Sharma Custom Homes Ltd., owned by his wife but which he "managed".

[270] Mr. Sharma testified that, on behalf of Sharma Custom Homes Ltd., he signed a five-page CPS dated June 15, 2009 for the purchase of the 199A Property. A photocopy of the CPS was marked as an exhibit at trial. Mr. Sharma says he visited the property with Mr. Khela a few days before he signed the CPS. The document was filled out by Mr. Khela's son, Harpreet Khela, who was a licensed realtor. The purchase price was $3,950,000 with a $100,000 deposit payable "within 24 hours of

acceptance of this contract" and a further $500,000 deposit payable "within 24 hours after all subjects are removed". The completion date was to be August 31, 2009.

[271] The first two pages of the CPS are standard form Real Estate Board documents where the blanks have been filled in by handwriting. The third and fourth pages are a typewritten addendum prepared by Harpreet Khela. Among other things, the addendum includes three "subject to" clauses and five other clauses stipulating "conditions for the sole benefit of the buyer". The three "subject to" clauses had to be removed on or before July 30, 2009 and included "financing at a rate suitable to the buyer" and "buyer's lawyers' approval of terms/conditions of the contract". One of the other terms set out in the addendum reads:

> The buyer acknowledges that he is purchasing the property by assignment from Phoenix Homes Ltd and there will be [an] Assignment Sales Contract drawn by the buyer's lawyer after both parties have agreed to the terms and subjects.

[272] The fifth page of the CPS is a photocopy of the layout plan for the proposed development. That page, along with pages one and two of the document, have initial boxes in which appear the initials "SS" (presumably Mr. Sharma) and "KK" (Kamaljit Khela on behalf of Phoenix Homes). Both pages of the addendum are signed by Mr. Sharma on behalf of the buyer, Sharma Custom Homes Ltd., and Mrs. Khela on behalf of Phoenix Homes. Those pages also contain a blank signature line for Mr. Takhar's signature on behalf of Phoenix Homes Ltd. Neither Mr. Takhar's signature nor his initials appear anywhere on the document.

[273] On the first page of the CPS photocopy put into evidence, the handwritten purchase price of $3,950,000 is scrawled out and the numerals 3,950,000 are crossed out with a large X. Both the handwritten and numerical purchase price of $4,200,000 is substituted and in the margin are two circles for initials, one of which is blank and the other of which contains the initials "KK" (presumably Mrs. Khela). There is no date on the document to indicate when the revised purchase price (presumably a counter-offer) was inserted.

[274] Mr. Sharma testified that his offer was for $3,950,000 and that he never received any counter-offer from the seller. He says he never saw the handwritten counter-offer that appears on the CPS marked as an exhibit. His evidence was that he “wanted to tie up the property for two months and see what [he] could do with it”. He noted that if he did not remove the “subject to” conditions, then he would “get the $100,000 back”.

[275] It is apparent that Mr. Sharma knew nothing about the court order in the 199A Property litigation requiring the property to be sold by the then owner to Phoenix Construction on or before September 20, 2009. He did not know the identity of the registered owner, nor that the property was in foreclosure. Given the language in the document he prepared, it is also apparent that Harpreet Khela (and most probably Mrs. Khela as well) had never seen the court order either.

[276] Mr. Khela says he informed Mr. Takhar of the $3,950,000 offer for the 199A Property. He testified that Mr. Takhar instructed him to counter at $4,200,000, which is when the changes to the price in the CPS were made and initialed by Mrs. Khela. He says he told Mr. Sharma that Mr. Takhar was countering at $4,200,000 and went to see Mr. Takhar to secure his signature on the document. Mr. Takhar said he would sign but did not do so at that time and the papers were left with him. Later, when Mr. Khela was following up, Mr. Takhar informed him that “we are going to carry out the construction, we are not going to sell it”.

[277] Mr. Khela is not sure on what date Mr. Takhar informed him of this decision, but it could have been two weeks to one month after the offer had been made. He says Mr. Takhar told him more money would be made proceeding in this fashion and that:

- the property had more than doubled in value;
- the rest of the money for the purchase and development would be obtained from the bank; and

- even if some additional contribution was required, Mr. Takhar would let him know.

[278] According to Mr. Khela, that remained of the state of affairs until December 2009 when, upon further follow-up with Mr. Takhar, he was informed that Phoenix Construction had purchased the property and a confrontation then ensued (discussed a little later in these reasons).

[279] Mr. Takhar's response to all of this is essentially as follows:

- Mr. Khela's evidence is again false—no offers to purchase were ever presented to him;
- like the Oceanview Star cheque, the CPS with Mr. Sharma is evidence fabricated long after the fact and is yet another example of the Khelas abusing the litigation process;
- the Khelas were investing their monies in other projects and did not have the resources to, or simply chose not to, contribute equally to the purchase and development of the 199A Property (beyond the $150,000 they contributed back in 2005); and
- as a result of the Khelas' refusal to contribute, it was necessary for Mr. Takhar/Phoenix Construction to "go it alone" and, after spending $122,000 in legal fees on the 199A Property litigation, contribute all the equity necessary to complete the purchase and undertake the development (somewhere in the range of $1–1.5 million by the end of November 2009).

[280] I find as a fact that Mr. Khela did not secure any written offer from either Mr. Raiwal or Mr. Berar. Any tentative oral expressions of interest by those two individuals were, ironically enough, not worth the paper they were written on and absent a written formal offer, cannot be given any weight.

[281] I am not persuaded that the CPS with Mr. Sharma is genuine. Like Mr. Khela, Mr. Sharma's credibility on the matter is significantly impaired by his involvement in procuring false evidence from Mr. Banwait.

[282] Even if the CPS was in fact drafted and signed on the date it purports to reflect, I am not satisfied that Mr. Sharma was seriously interested in completing any purchase. At best, I find Mr. Sharma was interested only in a quick "flip", a possibly difficult task given the somewhat still depressed nature of the real estate market in the aftermath of the 2008/9 financial markets collapse. His claim that he had $100,000 available to make the initial deposit was not corroborated in any way and I do not accept his testimony to that effect without such corroboration. In any event, there are serious concerns about the enforceability of the CPS given that it was to be structured as an "assignment transaction", the terms of which had yet to be agreed by all parties including Phoenix Homes and the registered owner of the property.

[283] At the same time, I also find that Mr. Takhar had no serious intention to sell the 199A Property. Mr. Takhar protested several times in his evidence that he most certainly was not a "flipper" and that he always developed the properties he purchased.

[284] Mr. Takhar is a sophisticated individual who has, seemingly with considerable success, managed to put together a pool of "investors" who supply him cash (high-interest personal loans) for equity injection necessary for purchase/development expenses not covered by conventional mortgage financing. He knew full well, based on a recently acquired appraisal, that a "developer's profit" of approximately $5 million could be generated by the 199A Property Project and he was intent on pursuing that goal. He appears to have convinced himself, wrongly as it turns out, that Phoenix Homes no longer had any legal interest in the 199A Property Project and that, in the absence of any funding contribution from Mr. Khela, he was at liberty to complete the purchase in accordance with the court orders, and this is precisely what he did.

[285] Counsel for Mr. Khela argues that his client was not presented with any demand for funds or even provided an opportunity to raise money to contribute to the 199A Property purchase. He submits that the Khelas had "access to sufficient funds to complete the transaction", if they had only been called upon to do so in a timely manner.

[286] This submission has no merit.

[287] Mr. Khela knew full well that the purchase transaction would close in September 2009 and that, pursuant to the original joint venture/shareholders' agreement between the principals, he was obliged to contribute 50 percent of the cash (equity) required to complete the purchase and development. It was not incumbent upon Mr. Takhar to make some sort of "demand". To the contrary, it was incumbent upon Mr. Khela to inquire and to ensure he had the necessary funds available in a timely way. He did neither of these things, because, and I find this as a fact, he did not actually wish to proceed with that development. Instead, his only interest at the time was to try and sell the 199A Property to secure a quick profit for Phoenix Homes as a result of the increase in value over the intervening years.

[288] I also find as a fact that the Khelas did not have the necessary funds available to contribute 50 percent of the cash required to close the court-ordered sale transaction. Between the beginning of May and the end of October 2009, they had purchased four different properties for their increasing investment portfolio. While they may not have known the precise amounts, they were well aware their total contributions to the joint venture were already lagging behind those of Mr. Takhar. They may possibly have had access to additional capital from wealthy friends such as Mr. Aujla, but they did not actually ask him for any such assistance. This is because they were intent on selling, not buying.

[289] In the result, the 199A Property was ultimately purchased by Phoenix Construction pursuant to the court orders. In all the circumstances, this is

perhaps not properly categorized as “usurping a maturing business opportunity which Phoenix Homes was actively pursuing”, but rather as the result of a disagreement between the two joint venture principals whether and how to proceed given Mr. Khela’s refusal to contribute the funds required to perfect the acquisition. Mr. Khela wanted to sell and Mr. Takhar wanted to buy and develop. When the former failed to contribute, the latter stubbornly proceeded with the transaction believing he was entitled to do so.

f. The alleged December 2009 confrontation

[290] Mr. Khela described the alleged December 2009 confrontation in his first affidavit in the petition proceedings as follows:

> [69] In early December 2009, I telephoned Mr. Takhar to inquire about the 199A property. Specifically, I asked whether the … lawsuit had settled. He told me that he registered title to the 199A property under the name of Phoenix Construction. I was surprised, angry and demanded to meet with him immediately.
>
> [70] Later that day, I went to Mr. Takhar’s house in Surrey and met with him. After arguing, I told him I would sue him if the 199A property was not transferred to Phoenix Homes. He told me that:
>
> > (a) the 160th Street properties were purchased and not registered to Phoenix Homes either, but rather registered to Phoenix Star; and
> >
> > (b) if I attempted to sue him, or if I told anyone about the 199A property being transferred to Phoenix Construction, then he would ensure that the construction of the 208 Street properties would be delayed indefinitely thus causing financing costs and other expenses to accumulate and leaving no profit in the project. He told me that he had several other projects providing him with sufficient income and that he could afford for this project to fail.
>
> I was concerned and very worried about our investments in financial commitments. We had invested almost all of our life savings into Phoenix Homes.
>
> [70] I did not see any way to get any money out of Phoenix Homes without cooperating with Mr. Takhar. He reiterated that I would make a substantial profit on the 208 Street property if I did not create any problems with respect to the 199A property and the 160th Street properties.

[291] Mr. Khela’s testimony at trial was much the same. It was supported by Mrs. Khela who testified that her husband had told her about the meeting and how

Mr. Takhar had taken the 199A and 160th Street Properties for himself. She said both of them were “very worried” and “scared” and they had a lot of conversations about “how are we going to get out of this?”.

[292] Mr. Takhar flatly denied that any such meeting occurred, that any such advice was given to Mr. Khela, and that any such threat was made. His view is that his relationship with Mr. Khela remained healthy and there were no disputes before Mr. Khela terminated the CareVest Capital loan for the 208th Street Properties in 2011.

[293] I find that neither of the protagonists has been completely truthful with the Court. I am satisfied that they did discuss the 199A Property in late 2009 and that Mr. Khela became aware at that time, if not before, that the property was registered in the name of Phoenix Construction rather than Phoenix Homes. However, I do not accept Mr. Khela’s evidence regarding the 160th Street Properties disclosure or any threat made by Mr. Takhar respecting the 208th Street Properties Project designed to dissuade further protest or litigation by the Khelas.

[294] I have already found the claim that Mr. Takhar “stole” the 160th Street Properties opportunity to be unfounded and false. It follows that the Khelas’ evidence about a 160th Street Properties disclosure at a December 2009 meeting of the parties is also false. In these circumstances, I conclude the alleged 208th Street Properties threat is likewise simply a fabrication.

[295] I find the same with Mr. Takhar’s evidence regarding a satisfactory relationship with the Khelas. It conflicts with his evidence regarding the substantial “over contribution” on his part which the Khelas continually refused or failed to equalize. He was also well aware that his decision to proceed with the court-ordered purchase of the 199A Property conflicted with Mr. Khela’s desire to sell, an objection which he had simply ignored. He knew the Khelas believed Phoenix Homes still had a legal interest in the 199A Property (as it actually does). Mr. Takhar’s assertions of “smooth sailing” in such circumstances have no credibility.

g. Conclusions on the 199A Property

[296] It will be recalled the derivative action issued by Phoenix Homes frames its claim respecting the 199A Property as a “misappropriation of corporate opportunity”. It alleges:

- a joint venture existed between Mr. Takhar and the Khelas, pursued through the corporate plaintiff, to acquire and develop the 199A Property;
- Phoenix Homes’ right to purchase the property was acquired through an addendum signed by both Mr. Takhar and the vendor;
- further to this joint venture, Phoenix Homes contributed $150,000 towards the 199A Property, including a $90,000 deposit for the purchase (disbursed to the vendor) and payments on account of professional services in relation to the development;
- Mr. Takhar owed fiduciary and statutory duties to Phoenix Homes which he breached by purchasing the 199A Property on November 12, 2009 in the name of Phoenix Construction and not Phoenix Homes, and without the latter’s consent;
- Mr. Takhar was one or more of a director, agent or principal of Phoenix Construction, and the latter is jointly and severally liable along with Mr. Takhar to Phoenix Homes for its assistance in Mr. Takhar’s breaches of fiduciary and statutory duty which resulted in a loss of opportunity for Phoenix Homes to purchase, develop and sell for a profit the 199A Property; and
- Phoenix Construction has been unjustly enriched to the detriment of Phoenix Homes by acquiring, developing and profiting from the 199A Property Project.

[297] The relief sought against Mr. Takhar and Phoenix Construction in relation to the 199A Property includes:

- a declaration that the property (as subdivided) and any profits from its development and sale are held in trust for the benefit of Phoenix Homes;
- a declaration that Mr. Takhar has breached his fiduciary duties and statutory duties owed to Phoenix Homes;
- a declaration that Phoenix Construction is jointly and severally liable for the actions of Mr. Takhar;
- an order that Mr. Takhar and Phoenix Construction account to Phoenix Homes for all proceeds and profits received by them in relation to the 199A Property; and
- an order requiring Mr. Takhar and Phoenix Construction to disgorge to Phoenix Homes any and all profits or benefits derived from their tortious conduct in relation to the 199A Property.

[298] In their final written submissions, counsel for Phoenix Homes states “the only remedy sought as it relates to the 199A Property….is a declaration that Mr. Takhar breached his fiduciary obligation….with the remedy to be determined at the second phase of the trial”.

[299] The parties generally agree on the legal principles applicable to breaches of fiduciary and statutory duties owed in relation to commercial opportunities belonging to or being actively pursued by that corporation. Those principles include:

- a director is a fiduciary of the corporation which requires them to act honestly and in good faith with a view to the best interests of the corporation;
- the scope and content of that fiduciary duty will vary depending on the factual context of each case, however, in the absence of full disclosure and consent, it will generally preclude fiduciaries from “usurping for

themselves" a maturing business opportunity which belongs to the corporation or which it is actively pursuing;

- whether that has occurred is a fact-intensive, case-specific and contextual analysis involving many different factors; however
- one such factor will be the extent to which the corporation secured the opportunity, intended to actually pursue it, and had the financial ability to do so.

See generally *First Majestic Silver Corp.*, citing *Can. Aero. v O'Malley*, [1974] S.C.R. 592, 1973 CanLII 23, and its progeny, *Sonic Holdings Ltd.*; see also Mark Vincent Ellis, *Fiduciary Duties in Canada* (Toronto: Thompson Reuters Canada) (loose-leaf updated 2022).

[300] There is no doubt that the 199A Property was an "opportunity" which had been actually secured by Phoenix Homes. It was the rightful purchaser of the property pursuant to the addendum to the 199A Property CPS signed on April 29, 2005, and it had paid the deposit amount which was immediately released to the vendor and which was part of the purchase price ultimately paid to secure title in the name of Phoenix Construction. Indeed, Phoenix Homes should have been the plaintiff in the specific enforcement litigation that was later issued by McQuarrie Hunter, a step that would likely have prevented the court-ordered transfer of title to Phoenix Construction.

[301] In the circumstances I find that, in litigating the 199A Property claim or lawsuit, Phoenix Construction was essentially acting as an agent or trustee for Phoenix Homes which at all times had the beneficial right to complete the transaction when and if the time to do so later materialized.

[302] At all material times, Mr. Takhar was a director of Phoenix Homes. It was he who was also the shareholder and joint venturer, not Phoenix Construction. He owed Phoenix Homes a fiduciary and statutory duty to protect and advance its beneficial interest in the 199A Property, a duty that was clearly breached throughout the 199A

Property litigation, and particularly so following November 2006, by which time Mr. Takhar had (wrongly) come to believe that the Phoenix Homes joint venture had relinquished any further interest in the 199A Property. The ongoing duty was again breached when Mr. Takhar caused title to the 199A Property to be conveyed to Phoenix Construction in November 2009 without prior full disclosure to, and consent of, Mr. Khela and Phoenix Homes.

[303] Quite apart from Mr. Takhar's fiduciary and statutory duties to Phoenix Homes, I would also observe that Mr. Takhar's conduct constituted a breach by him of one or more of the terms of the joint venture/shareholders' agreement with Mr. Khela.

[304] Among other things, the agreement generally required all significant decisions regarding the joint venture project to be made through discussion and consent and, in the event of a disagreement between the parties (which had in fact arisen before the 199A Property closing), Mr. Takhar did not have the right to unilaterally proceed in complete disregard of Mr. Khela's wishes.

[305] For sure, Mr. Takhar found himself in a very difficult position. He was navigating a complicated web of conflicting interests concerning not only his own economic self-interest but also his obligations as a joint venturer, director and shareholder in both Phoenix Homes and Phoenix Construction, and as a debtor to his investor-creditors. The parties had not provided for any summary dispute resolution mechanism in their agreement which might have helped to resolve the disagreement. And, of course, the court order formally required title to be transferred into the name of Phoenix Construction by a certain specified date.

[306] These difficulties were of Mr. Takhar's own making.

[307] As noted, Mr. Takhar was the owner and directing mind of Phoenix Construction at all material times. While Phoenix Construction was the plaintiff in the 199A Property litigation, the claim was intended for the benefit of the Phoenix Homes' joint venture. I have already found as a fact that neither Mr. Khela nor

Phoenix Homes consented to or acquiesced to any relinquishment of Phoenix Homes' contractual right to purchase the 199A Property and to transfer the $150,000 "credit" to the 208th Street Properties Project. That contractual right continued in existence at the time of the court-ordered sale even though it had not been brought to the court's attention, arguably another breach of Mr. Takhar's fiduciary and statutory obligations to Phoenix Homes.

[308] In all these circumstances, I have no hesitation in declaring that Mr. Takhar did indeed breach his fiduciary and statutory duties to Phoenix Homes in relation to the 199A Property and that the plaintiff is entitled to a remedy against Mr. Takhar and Phoenix Construction, and also with respect to the land itself (or the net proceeds of sale of such land which remain in trust pending the outcome of this litigation).

[309] Precisely what that remedy might be, if not resolved by the parties following this phase of the trial, will be determined when and if the second half of this bifurcated proceeding takes place.

[310] What is also clear from all of the above, is that Phoenix Homes had at the relevant time a valid claim sufficient to support the filing of a certificate of pending litigation against title to the 199A Property. Contrary to the counterclaim and submissions of Phoenix Construction and Mr. Takhar, the filing of those certificates was not "wrongful", "baseless" or "malicious" and did not amount to an abuse of process. Accordingly, the counterclaim by Phoenix Construction and Mr. Takhar for "wrongful filing" damages against Phoenix Homes, and Mr. and Mrs. Khela, jointly and severally, must be and is dismissed.

IX. WAS THE VIEW SIDE CONTRACT A VALID AND ENFORCEABLE CONTRACT WITH PHOENIX HOMES?

[311] Earlier in these reasons, I set out the chronology of the 208th Street Properties acquisition as part of the framework for determining whether Mr. Takhar and Mr. Khela agreed that Phoenix Homes would relinquish its interest in the 199A

Property. That chronology concluded with the closing of the 208th Street Properties purchase on November 30, 2006.

[312] The joint venture relationship ruptured in late April 2011 when Mr. Khela unilaterally terminated the CareVest Capital financing, the documents of which had been signed by all parties but which had not yet been funded by CareVest Capital. That financing had been obtained for the purpose of further advancing the development and construction of the 208th Street Properties Project.

[313] I will address the validity of Mr. Khela's purported termination of the joint venture financing in the next section of this judgment. Suffice it to say for the moment that much turns on the View Side Contract pursuant to which Phoenix Homes purported to sell a portion of the 208th Street Properties to View Side by way of a CPS dated May 1, 2010. In this derivative action, Phoenix Homes claims that this was an unauthorized and unenforceable sham transaction orchestrated by Mr. Takhar in breach of his fiduciary and statutory obligations to the corporation. Phoenix Homes seeks to have the transaction set aside and/or declared unenforceable and claims damages jointly and severally against Mr. Takhar and View Side for the resulting loss alleged to have occurred.

[314] There are many events regarding the 208th Street Properties which occurred in the period between November 30, 2006 and May 2010, but it is not necessary to address them all in detail. The following is a chronology of some of the more notable matters:

April 24, 2007	View Side Development Ltd. is incorporated.
August 3, 2007	The Khelas deposit $40,000 into the NSCU account which was opened for the 208th Street Properties Project.
August 18, 2007	View Side enters into a CPS for the purchase of 947 Ash Street, White Rock, B.C. (the "Ash Street Property").

	Mr. Takhar and Phoenix Construction have a significant role in the financing and construction of that single-family residence (the “Ash Street Project”).
December 17, 2007	First and second reading by the Township of Langley of the development application for the western parcel of the 208th Street Properties.
January 21, 2008	Third reading by the Township of Langley of the development application for the western parcel of the 208th Street Properties. The municipality identifies 12 “development prerequisites” that must be completed before any final reading might proceed, including roadwork and utility upgrades/extensions.
February 5, 2008	The Township of Langley rejects Phoenix Homes’ request for a temporary access and servicing corridor and insists that road and servicing access along the 209th Street alignment to 83rd Avenue must be provided before any development proposals can be finalized (right-of-way negotiations with the relevant property owner were proving difficult and matters were not resolved until the fall of 2009 when the Township approved the redirection of 209th Street around the property of that problematic owner).
April 15, 2008	The Khelas deposit $100,000 into the NSCU bank account for the 208th Street Properties Project. That same day, Mr. Takhar writes a cheque from the NSCU account to Phoenix Construction for $100,000.

July 28, 2008	CWPC issues an appraisal report to Phoenix Homes opining that the market value for the 208th Street Properties was $9,365,000 (the western portion of the proposed development contemplated 106 townhouse units and 55 apartment units. The preliminary concept for the eastern portion of the site envisaged 40 townhouse units). Mr. Takhar does not provide a copy of this appraisal to Mr. Khela at this time.
August 13 & September 4, 2008	NSCU extends the Mortgage Interest Reserve on the 208th Street Properties mortgage loan to June 30, 2009 and provides $250,000 for that purpose. Mrs. Khela and Mr. Takhar sign the necessary documents at McQuarrie Hunter's office, increasing the 208th Street Properties mortgage from $3,400,000 to $3,675,000.
November 30, 2009	The Mortgage Interest Reserve is depleted.
December 11, 2009	As agent for Phoenix Homes, Phoenix Construction submits a development application to the Township of Langley for the 8170 Lot (the eastern portion of the two 208th Street Properties) proposing a 48-townhouse unit development.
March 23, 2010	Mr. Lally, on behalf of HDS Investments Ltd. ("HDS"), signs two CPS offers to purchase the 8184 Lot for $2,600,00 and the 8170 Lot for $8,200,000 (i.e., an aggregate sum of $10.8 million) (the "HDS Offer").

April 6, 2010	Harpreet Khela prepares and faxes to Mr. Takhar two Exclusive Listing Contracts for the 8184 Lot ($3 million) and the 8170 Lot ($11 million).
May 1, 2010	Initial View Side CPS documents prepared.
June 1, 2010	Mr. Khela becomes a director of Phoenix Homes and Mrs. Khela transfers her 50 percent shareholding in Phoenix Homes to Mr. Khela.

[315] I will first address the HDS Offer and Harpreet Khela's listing matters before undertaking a more comprehensive review of the View Side Contract.

a. HDS Offer and Harpreet Khela listing

[316] Mr. Khela testified that, following his discovery that title to the 199A Property had been put in the name of Phoenix Construction and not Phoenix Homes, he decided to explore the possibility of selling the 208th Street Properties. He contacted Yamamoto Architecture, the designer for the proposed project, and on January 18, 2010 was emailed a copy of the architectural drawings for the development. A copy of that email was put into evidence as an exhibit.

[317] On March 23, 2010, Mr. Khela received the HDS Offer. The realtor for the purchaser was Mr. Deepak Verma of RE/MAX. Both he and the principal of HDS, Mr. Lally, testified at the trial.

[318] At trial, Mr. Lally claimed he would have been prepared to offer more than the purchase price set out in the CPS. He says he acknowledged to Mr. Verma that "our offer is low". He also acknowledged on cross-examination that HDS "could have been" a shell company.

[319] Mr. Verma testified that he was approached by Mr. Lally to draft the offer. He met with the Khelas and Mr. Lally to discuss the terms and conditions of that offer.

He testified he did not say anything to the Khelas about HDS being prepared to offer more than the $10.8 million set out in the CPSs.

[320] Mr. Verma's testimony was presented by way of a video deposition which occurred on October 12, 2021. He testified that Mr. Lally called him about two weeks before the deposition asking him to say HDS had been prepared to offer over $12 million for the 208th Street Properties. He says he refused the request, he admonished Mr. Lally, and he hung up.

[321] The terms of the HDS Offer included the following:

- aggregate deposits totaling $700,000 payable within two business days following removal of all "subject clauses", but to be held in trust pending completion of the sale, and not immediately disbursed to Phoenix Homes;
- "subject to the buyer obtaining and approving a feasibility study by May 31, 2010";
- completion to occur on the later of August 31, 2010 or "within 60 days after the seller has provided to the buyer a Letter of Approval from the Township of Langley" for 155 or more townhomes and 67 or more condominium units "to be built on" the two properties;
- the price included all drawings, plans, surveys, consultant reports, etc. "up to and including the issue of the Letter of Approval"; and
- the offer was open for acceptance until 5:00 p.m. on March 30, 2010 (there is an earlier typewritten date on the document which was overwritten by the handwritten numbers "30").

[322] Mr. Takhar admits, and I find as a fact, that Mr. Khela and his son, Harpreet Khela, presented the HDS Offer to Mr. Takhar on or shortly after March 23, 2010.

[323] Mr. Takhar says he remembers Mr. Khela bringing him an offer in "early 2010" for "10 million is just as or something". He says "I do not agree at all" with the offer. The various reasons he gives include:

- they had already invested a lot of money in the project and he personally had spent a lot of time over the years with the city and consultants—it just "made no sense";
- he knew Mr. Deepak Verma was involved with people who "tied up the property so they can sell for a higher price"; and
- all the work necessary for the Township's approval would have to be done at Phoenix Homes' expense.

[324] Mr. Takhar says he ended the meeting by telling Mr. Khela:

> I do not want to sell the property. I… I spent so much time. Just come with the money and… And we continued proceed… proceed the development.

Mr. Khela agreed to this proposition, saying he would "bring the money"—something Mr. Takhar says he had "heard many times before".

[325] Mr. Takhar says he remembers receiving a fax from Harpreet Khela enclosing the proposed Listing Agreement for the 208th Street Properties. He says that he had no discussion with Mr. Khela or Harpreet about listing the properties before receiving this document and that when Harpreet followed up with a later phone call, Mr. Takhar informed him he would not be listing the properties.

[326] Once again, the parties' testimony under oath conflicts on various points. It is, however, perhaps not necessary to resolve each conflict.

[327] What is clear, and what I find as fact, is that when the HDS Offer was presented to Mr. Takhar, he rejected it. The price was too low. He believed HDS had no substance and had structured the offer to simply tie up the land for two months, and with no deposit, just to try and "flip" it. The Khelas nevertheless got the impression that Mr. Takhar might be persuaded by a more substantial offer and

hence Harpreet seized the opportunity to present a Listing Agreement at $14 million, a listing which Mr. Takhar rejected.

[328] What is also clear from all of the above, and what I find as a fact, is that, like the 199A Property before it, Mr. Khela wanted to sell the 208th Street Properties in the first part of 2010 and, once again, Mr. Takhar refused to sell.

b. Manjit Gill's background and credibility

[329] Mr. Gill was the only witness called by the defendant/plaintiff by counterclaim, View Side. As noted earlier, that company was incorporated on April 24, 2007. Mr. Gill is listed on the corporate records as the only shareholder and director of the company.

[330] View Side is the entity which, in the spring/early summer of 2010, entered into a CPS for the eastern portion of the 208th Street Properties where between 40 to 48 townhouses were proposed to be developed. The View Side Contract comprises not just of the View Side CPS documents but also certain additional terms agreed orally at the time between Mr. Takhar and Mr. Gill. The oral terms include (1) the provision of services to the proposed subdivided property and (2) the promise by Mr. Takhar to assist Mr. Gill and View Side with various aspects of the anticipated construction and development process.

[331] As part of the View Side Contract, View Side paid a series of deposits to Phoenix Homes which were not held in trust pending completion of the sale but were immediately disbursed to Phoenix Homes. The only "security" View Side received in respect of the transaction was a certain option agreement which was registered on title to the 208th Street Properties in January 2011.

[332] Phoenix Homes claims that Mr. Takhar is the sole beneficial owner of View Side, that the payment of deposits by View Side were sham transactions using Mr. Takhar's own money, that the View Side Contract was a thinly disguised attempt by Mr. Takhar to secure the properties for himself, and that all of this "self-dealing" was an egregious breach of his fiduciary and statutory duties to Phoenix Homes.

Mr. Gill's testimony and credibility on these matters is therefore critical to the outcome of this case.

[333] Mr. Gill was born in 1968 and is currently 54 years old. He is the youngest child in his family and has seven siblings. His family moved from India to Canada in 1980, settling in Alberta when he was 12 years old. Two of his brothers had already moved to Alberta and they sponsored the balance of the family into Canada.

[334] Mr. Gill started Grade 6 in Alberta. He found school extremely hard. He did not speak or read English at all when he started Grade 6. He struggled and found himself repeating grades. The highest grade he completed was Grade 10, following which he moved to British Columbia with one of his brothers. The family had relations in Surrey at the time.

[335] At trial, Mr. Gill testified with the assistance of an interpreter. He had previously testified at examinations for discovery in this action without an interpreter.

[336] Mr. Gill was by no means a perfect witness. There were several inconsistencies between his discovery and trial evidence and also between his trial evidence on direct and cross-examination. His memory of some events was poor, particularly on cross-examination. At one point he stated that he did not remember "a whole lot of things" because his doctor had advised him that if he does, he would "have a very short life", a decidedly unusual rationale not previously encountered by this particular judge.

[337] I have therefore approached Mr. Gill's evidence with caution. Nevertheless, I am satisfied he has told the truth about, and I accept his evidence regarding, some of the most critical issues in dispute with respect to the 208th Street Properties claims. In particular, I generally accept Mr. Gill's evidence regarding his loan history with Mr. Takhar, his "ownership" of both of View Side and the Ash Street Project, and his version of events surrounding the View Side Contract. My assessment of these events follows.

c. Mr. Gill's relationship with Mr. Takhar

[338] After arriving in British Columbia, Mr. Gill worked almost seven days a week at several different jobs including assembly work at a furniture factory, assisting his brother-in-law, Palwinder Samra, with plumbing jobs, and cutting branches in the bush for floral arrangements that his wife would sell. However, he has no formal trade qualifications.

[339] Mr. Gill bought his first house at 11450-82nd Avenue, Delta, in 1994. His brother-in-law, Mr. Samra, was registered on title as a co-owner of the property so that Mr. Gill could qualify for a mortgage.

[340] Mr. Gill then bought the house next door at 11438-82nd Avenue and thereafter demolished that residence and built a new home on the land. After that home was completed in 1998, he moved in and sold the previous property. He then purchased and developed a further single-family residence property, a cycle that repeated several times. For these projects, he did the demolition, plumbing and landscaping work himself but hired trades as necessary for the rest of the work. Mr. Gill says he was still working full-time seven days a week while also making money and building his savings with these serial transactions.

[341] Mr. Gill met Mr. Takhar in 1996. Mr. Takhar was distantly related to Mr. Gill's wife through marriage. Mr. Gill was aware that Mr. Takhar made his money in both a plumbing business and by building townhouses.

[342] In 2002, Mr. Gill and his brother-in-law, Mr. Samra, purchased an interest in the Hampton Inn in Kamloops (the "Kamloops Motel").

[343] Mr. Gill believes it was in late 2006 that he was approached by Mr. Takhar about investing in Mr. Takhar's development projects. The proposed investment was by way of a loan to Mr. Takhar at 10% interest, compounded annually, which would be repayable upon demand provided reasonable advance notice was given.

[344] Mr. Gill initially testified that his first advance to Mr. Takhar was by way of a $300,000 bank draft payable to Phoenix Construction in mid January 2007 (these were the proceeds of a sale of a property Mr. Gill owned on 80th Avenue in Delta). It became clear in the course of Mr. Gill's evidence, however, that in fact the first loan Mr. Gill made to Mr. Takhar was by way of two $50,000 advances to another company owned by Mr. Takhar, Phoenix Holdings Ltd. ("Phoenix Holdings"), on December 8 and December 15, 2006, respectively. I draw no negative inferences from this lapse of memory and reject Phoenix Homes' submissions to that effect.

[345] In May 2007, Mr. Gill provided a bank draft to Phoenix Construction for $415,000. The source of the funds included the proceeds of selling Mr. Gill's/Mr. Samra's interest in the Kamloops Motel, funds from Mr. and Mrs. Gill's lines of credit, and additional funds from Mr. Samra and other family members in Ontario.

[346] A book of documents related to the financial transactions between Mr. Gill/View Side and Mr. Takhar/Phoenix Homes was marked as an exhibit at trial. It is clear from these documents that, unlike the deposit payments in connection with the View Side Contract (addressed later), the source of the funds for the loans by Mr. Gill to Mr. Takhar during this period of time were indeed Mr. Gill himself and other third parties. The documents corroborate Mr. Gill's testimony regarding the existence and amounts of these loans.

[347] I also accept Mr. Gill's testimony that after the second tranche of funds was advanced to Mr. Takhar, he and Mr. Gill agreed to retroactively increase the interest rate payable on the aggregate loan from 10% per annum to 15% per annum compounded annually.

[348] Counsel for Mr. Gill submits, and I am inclined to agree, that his client is a hard-working but poorly educated and relatively unsophisticated individual who has trusted Mr. Takhar with his own and his family's money on the strength of Mr. Takhar's promise of generous returns. I find as a fact that Mr. Takhar reciprocated with assistance on the Ash Street Project (discussed below), and

ultimately the promise of similar assistance with the much more challenging but potentially lucrative 208th Street Properties deal, where Mr. Takhar's expertise in such developments was very much a precondition for Mr. Gill's agreement to participate.

d. Incorporation and ownership of View Side

[349] View Side was incorporated on April 24, 2007 by Mr. Gill's accountant, Mr. Rajit Sidhu, on Mr. Gill's instruction. He later decided to change accountants because of certain performance problems he was having with Mr. Sidhu and, on the recommendation of Mr. Takhar, retained Mr. Takhar's accountant, Sarb Sandhu, in that regard.

[350] Mr. Sandhu testified at trial that the only person he ever took instruction from on View Side matters was Mr. Gill, who was the company's sole director, officer (president) and shareholder. He also assumed responsibility for Mr. Gill's personal accounting and tax returns. Mr. Sandhu said he had never had any meetings with, nor taken instructions from, Mr. Takhar regarding View Side's accounting work in all the years he has worked for the company.

[351] Again, on the recommendation of Mr. Takhar, in October 2009 Mr. Gill retained McQuarrie Hunter to be the Registered and Records Office for View Side. One of McQuarrie Hunter's first tasks was to bring the View Side records up to date by way of a director's resolution, effective September 29, 2009, authorizing the issuance of a share certificate to Mr. Gill and registering his appointment as the director of the company and the signing authority on its behalf.

[352] Various documents from BC Housing were put into evidence regarding the registration of new homes covered by View Side's home warranty insurance. It is apparent, and I find as a fact, that View Side has been a licensed residential builder pursuant to the *Homeowner Protection Act*, S.B.C. 1998, c. 31 since 2007. The evidence at trial connected Mr. Takhar with only one of these properties, namely the Ash Street Property in White Rock. There was no evidence linking Mr. Takhar to any of the other properties associated with View Side's license or warranties.

[353] I am satisfied by the evidence, and I find as a fact, that the formal ownership structure of View Side was at no time a "sham", that Mr. Gill was the owner and operating mind of the company at all material times, and that Mr. Takhar has never had any beneficial interest in the corporation.

e. The Ash Street Project

[354] One of the properties built by View Side under the new home warranty program was located at 947 Ash Street, White Rock, B.C. Mr. Takhar had considerable involvement in both the purchase and construction of the Ash Street Project. Phoenix Homes/the Khelas rely on this evidence to urge a conclusion that Mr. Takhar was the "real owner" of View Side.

[355] There are indeed "optics" associated with the Ash Street Project which might support the inference sought by the plaintiff. Among other things, they include:

- Mr. Takhar, through his companies, provided funds to Mr. Gill/View Side that were used to complete the purchase of the property;
- Mr. Takhar had McQuarrie Hunter prepare an assignment of the CPS for the Ash Street Property, although no assignment transaction actually occurred;
- Mr. Takhar was the "point man" for dealing with the municipality of White Rock regarding planning, engineering, and permit approvals;
- Mr. Takhar was also the "point man" for obtaining many of the required consultants and subtrades for the project and was the person who paid many of those subtrades (including his own company, Standard Plumbing), albeit by way of View Side cheques that had been pre-signed by Mr. Gill; and
- all of this "assistance" was provided by Mr. Takhar for almost two years without any compensation, something that might be expected of someone who was the true owner of the project.

[356] Mr. Gill acknowledges all of these things occurred for various reasons but flatly denies Mr. Takhar's involvement was that of an owner rather than a friend:

> Q. Mr. Gill, you know that in this legal proceeding, the plaintiffs have alleged that the Ash Street project was really a project of Mr. Takhar, and he was just using you and your company as a sham to do work that was for him. You know those allegations have been made, do not you?
>
> A. Yes, I know.
>
> Q. What do you say about that? Is that true?
>
> A. They are absolutely incorrect.
>
> Q. Other than the Ash Street project, did Mr. Takhar provide assistance to you or View Side with the construction or design work on any of your other View Side projects?
>
> A. No.
>
> Q. Are you sure?
>
> A. Yes, I am sure.

[357] I accept Mr. Gill's testimony on these matters. In particular, I also accept his testimony regarding, and I find as a fact that:

- Mr. Gill had arranged financing for the Ash Street Property through Coast Capital, but the funding was delayed so Mr. Gill approached Mr. Takhar for repayment of monies previously loaned to him;
- the possibility of an assignment of the contract to Mr. Takhar was discussed but Mr. Gill preferred to proceed with the purchase;
- once the Coast Capital funds became available, Mr. Gill made further advances to Mr. Takhar ($294,000 to Phoenix Construction and $100,000 to Phoenix Holdings);
- the Ash Street Property offered the opportunity for a very large, top-of-the-line custom home which included a rooftop patio and high-end fixtures and finishes, although construction was complicated by shoring and retention wall requirements with which Mr. Gill had little or no experience;

- Mr. Gill asked Mr. Takhar for help with the project and the latter volunteered his time and expertise to deal with the municipality and to oversee the construction, however Mr. Gill "did not pay Mr. Takhar for his help"; and
- sale proceeds from the Ash Street Property were used by View Side to purchase and develop a single-family lot on 83rd Avenue in Langley, a property in which Mr. Takhar had no direct or indirect interest or involvement.

[358] The burden of proof regarding the allegation that Mr. Takhar was the beneficial owner of the Ash Street Property, whether through View Side or otherwise, lies with Phoenix Homes/the Khelas. The evidence falls far short of proof on the balance of probabilities.

[359] Counsel for Mr. Takhar submits:

> Mr. Gill needed help building a much more expensive, custom home, with shoring requirements, something that was new to him. Mr. Gill had loaned Mr. Takhar hundreds of thousands of dollars by that time. Mr. Gill had helped Mr. Takhar in a real financial way for years. It makes sense Mr. Takhar would continue to foster that relationship [by providing Mr. Gill the help he required with the Ash Street Property].

[360] I agree, and I find as a fact that this was indeed Mr. Takhar's motivation. I find as a fact that during the two years of the Ash Street Project, Mr. Gill sent monies to and received monies from Mr. Takhar as part of the ongoing loan transactions between them, and that Mr. Gill and View Side were at all times the beneficial owners of the Ash Street Property and the proceeds of its sale. The alleged sham in that regard did not in fact exist.

f. The making of the View Side Contract

[361] The circumstances leading up to the View Side Contract were broadly described by both Mr. Takhar and Mr. Gill as follows:

- Mr. Gill had become interested in a couple of lots in Langley and approached Mr. Takhar for the return of some $700,000 to purchase and develop the land as single-family homes;
- Mr. Takhar then introduced to Mr. Gill the possibility of him acquiring an un-subdivided portion of the 208th Street Properties—Mr. Gill understood such a sale would generate money required for the development by Mr. Takhar of the remaining larger parcel of land;
- Mr. Gill expressed concern to Mr. Takhar over his inexperience in building townhouse developments and also informed Mr. Takhar that he did not have the money available for such an undertaking;
- Mr. Takhar then:

    (1) offered to repay Mr. Gill's loans so as to fund the deposits required;

    (2) advised that his company for the project, Phoenix Homes, was already in the process of doing and would complete the necessary off-site service work for both parcels; and

    (3) promised to provide all necessary assistance to Mr. Gill with respect to development, financing and construction of the townhouses, services that would be provided by Mr. Takhar without any charge and which would allow Mr. Gill to expand his business into multi-family unit developments;

- Mr. Takhar had the View Side CPS prepared, which was reviewed with Mr. Gill page by page, including an addendum setting out a schedule for deposit payments totalling $700,000 to be paid by View Side to Phoenix Homes. The CPS was for a 40-unit townhouse development located on the eastern parcel of the 208th Street Properties, and the agreed sale price was $3.2 million, based on a cost of $80,000 per door. None of the deposits were to be held in trust, and View Side's security would instead

be in the form of a registrable option on the title of the 208th Street Properties; and

- Mr. Takhar informed Mr. Gill that he was the signing authority for the company that owned the property, Phoenix Homes, but he made no mention of Mr. Khela.

[362] Cross-examination revealed various inconsistencies and contradictions in the evidence of both Mr. Takhar and Mr. Gill. For example, contrary to Mr. Gill's assertion that he had no money for the proposed 208th Street Properties transaction, it appears he acquired a property on April 30, 2010 and developed both that and the adjacent property as single-family residences in the following year.

[363] When pressed, both Mr. Takhar and Mr. Gill were unable to recall details regarding the timing of changes to the CPS and the execution of those documents. Phoenix Homes/the Khelas say the circumstances surrounding the creation and execution of these documents are "demonstrably uncertain" and "wholly consistent with the finding that the View Side [Contract] is a sham transaction which exists only on paper and which was entered into so that in the future, the transaction documents might be produced by the parties if it was expedient to do so".

[364] Much of the plaintiff's argument is founded on the premise that the alleged substantial loan relationship between Mr. Gill and Mr. Takhar is a fabrication and that the ostensible ownership of View Side by Mr. Gill was also a sham. I have already found against Phoenix Home/the Khelas on these points and my findings in that regard lend support to the validity of the View Side Contract.

[365] The defendants acknowledge that the CPS documents produced at trial constituted "sloppy paperwork" and that the "circling" of deposit funds (addressed later in these reasons) was "unconventional". They say, however, that the View Side Contract was legitimate, the deposit payments were real, and that, at the end of the day, the terms of the transaction can be ascertained with sufficient certainty to support its enforcement as a matter of law.

[366] I will address each of these issues separately.

g. The View Side CPS documents

[367] Two versions of the View Side CPS were put into evidence and marked as Exhibits 25 and 26, respectively. The documents are photocopies, indeed multigenerational photocopies. No original documents were produced at trial and the Court was advised that no such originals were located or produced during the course of the litigation.

[368] Exhibit 25 purports to be the final iteration of the View Side CPS and is part of a 12-page fax sent by Mr. Takhar to Mr. Jeevan Khunkhun, then VP of Lending for CareVest Capital, on March 11, 2011. Exhibit 25 comprises eight pages and there was no evidence before the Court to explain what the other four pages of the fax might have been.

[369] Exhibit 26 comprises seven pages and purports to be an earlier iteration of the View Side CPS before the deposit structure for the transaction was changed from $700,000 to $1.2 million (discussed below). This version of the document is the one which Mr. Khela testified, both at trial and in his November 16, 2011 affidavit, was first shown to him by Mr. Takhar at a meeting on July 15, 2010. It is also the version found in the files of Mr. Gregory van Popta, the lawyer at McQuarrie Hunter who prepared the “Option Agreement Dated for Reference the 31st day of May 2010” between Phoenix Homes and View Side, which was registered on title to the eastern parcel of the 208th Street Properties on January 6, 2011 (the “View Side Option Agreement”). The View Side Option Agreement is unsigned but registration was made by way of a “Form C” document executed that same day by each of Mr. Takhar and Mr. Gill before Mr. van Popta.

[370] Mr. van Popta swore an affidavit in these proceedings, marked as an exhibit at trial, in which he testified the client for the file was Phoenix Homes, the file was opened on December 23, 2010, the CPS was provided to him by Mr. Takhar and that all instructions on the matter came from Mr. Takhar without any instructions

from Mr. Khela. As a witness at trial, however, Mr. van Popta had little or no recollection of events beyond the paperwork itself.

[371] Notable terms in the View Side Option Agreement include the following:

- the option relates to a parcel of land to be created by subdivision as approximately delineated on a plan attached as a schedule;
- the option was only exercisable after subdivision had occurred creating the View Side parcel;
- Phoenix Homes had exclusive conduct of the subdivision and would be responsible for all related costs and expenses;
- View Side had 55 days immediately following the date of subdivision within which to deliver written notice of its intention to exercise the option;
- the purchase price for the subdivided parcel was to be $3,200,000;
- the option expired on the earliest of (1) failure to deliver timely notice of exercise; (2) any View Side "default under any other written agreement between the parties"; or (3) December 31, 2025; and
- "to the extent there is any inconsistency between this Option to Purchase Agreement and any written (though possibly unregistered) agreement between the parties relating to the subject matter set out herein, whether such other written agreement be dated prior to or subsequent to the date of this Option to Purchase Agreement, such other written agreement, if any, shall prevail".

[372] Except for Mr. Takhar's fax header and handwriting on the top of the first page of Exhibit 25, the first four pages of both versions of the View Side CPS are identical and have the following features:

- they are standard form industry precedent documents (version "BC 2000 REV: APR/10");

- the date “May 1, 2010” is typewritten on the front page and in paras. 23/24, dating the offer by View Side and the acceptance by Phoenix Homes respectively;
- the purchase price in clause one is typewritten as $3,200,000;
- the words “see addendum” are typewritten in clauses two, four, five and six relating to deposit, completion, possession and adjustments respectively;
- the first three pages are initialled by Mr. Gill and Mr. Takhar; and
- on the fourth page is Mr. Gill’s signature witnessed by his brother-in-law Palwinder Samra and Mr. Takhar’s signature witnessed by Surjit Samra, Palwinder Samra’s brother.

[373] At this point, the similarities between the two versions of the CPS end.

[374] The addendum to Exhibit 26 is also a standard form industry precedent document, partially typewritten and partially handwritten. The typewritten date on the addendum is June 6, 2010, and it is identified as “page 5 of 5 pages”. It provides for a $700,000 deposit structure payable as follows:

> 1st deposit: $200,000 – 24 hours after [acceptance] — 2nd deposit: $100,000 – July 2, 2010 — 3rd deposit: $100,000 – August 2, 2010 — 4th deposit: $100,000 — after 1st reading — 5th deposit: $100,000 – after 2nd reading — 6th deposit: $100,000 — after 3rd reading.

[375] The rest of the typewritten addendum wording reads:

> Purchase price is for a 40 unit townhome development. The purchase price will be allocated on a per unit basis dependent on the number of units that have been approved by the municipality.
>
> Completion date, adjustment date, possession date: 60 days after subdivision registered to Land Title Office.

[376] Mr. Takhar’s handwritten notes, each of which have his and Mr. Gill’s initials beside them, provide:

- “all deposit pay directly to seller part of purchase price [*sic*]”;
- “buyer has right to register on title opoistion to buy affter paid the first deposit [*sic*]”;
- “buyer has right to assign this contract to other party”; and
- “buyer buy the piece of land east side from 209 Street and part of north of 209 Street, layout attch to the contract [*sic*]”.

[377] Mr. Gill’s signature on this page is again witnessed by Mr. Palwinder Samra, and Mr. Takhar’s signature is again witnessed by Mr. Surjit Samra.

[378] The next page, bearing handwritten “page 6 [of] 6”, is part of a plan of the proposed 40-unit townhouse development bearing the fax header of Yamamoto Architecture, dated June 9, 2010. Obviously, notwithstanding the May 1, 2010 date appearing on some of the other pages of the CPS, this iteration of the agreement was not compiled until on or after June 9, 2010 at the earliest.

[379] The second iteration of the View Side CPS (Exhibit 25) was clearly prepared after June 9, 2010, although at least two of its pages have been clumsily backdated in Mr. Takhar’s handwriting.

[380] On the page five addendum, the earlier typewritten June 6 date has been scratched out and the date “May 1, 2010” has been handwritten in its place. That page of the document otherwise remained unchanged.

[381] However, another addendum, said to be “page 8 of 8 pages”, has been added. Although the form is again the standard real estate industry precedent, all of the added information is in Mr. Takhar’s handwriting.

[382] On this new page 8 of the agreement, the date “15 May 2010” is handwritten at the top. The substantive changes then read as follows:

> both buyer and seller agree to change the deposit dates as follow
> 1st deposit paid $200,000 1 June 2010

> 2nd deposit paid $100,000 5 July 2010
>
> 3rd deposit paid $200,000 15 Jan 2011
>
> 4th deposit paid $100,000 15 Feb 2011
>
> 5th deposit paid $200,000 within 30 days after 1st and 2nd reading approve by Township of Langley
>
> 6th deposit paid $200,000 within 30 days after 3rd reading approved by Township of Langley
>
> Final deposit paid $200,000 within 30 days after public hearing
>
> All above deposit paid directly to the seller. Part of purchase price. All the other condition stay same.

[383] On this page is Mr. Gill's signature witnessed by Surjit Samra and Mr. Takhar's signature witnessed by his daughter, Mansuk Takhar.

h. Disclosure of the View Side Contract to Mr. Khela

[384] Mr. Takhar testified that before any View Side CPS was drawn up, he had explained his relationship with Mr. Gill to Mr. Khela, informing him that Mr. Gill had invested money with him before and was a good friend. He says he proposed to Mr. Khela that they sell the eastern portion of the 208th Street Properties to Mr. Gill as a means of generating funds for the development and he discussed with him market prices for "tandem units" ($60,000 to $65,000 a door) and for double garage units ($75,000 to $80,000 per door).

[385] Mr. Takhar says he told Mr. Khela that his relationship with Mr. Gill meant the money would be paid directly to Phoenix Homes rather than into a trust account and would "solve the problem" of ongoing expenses for development and mortgage payments. He says Mr. Khela agreed with his approach of selling only a portion of the site as that would allow Phoenix Homes to retain the bigger parcel for development.

[386] Mr. Takhar also says he showed the View Side CPS to Mr. Khela before it was signed by Mr. Gill. He met Mr. Khela at a Tim Hortons restaurant where the following occurred:

> I show the contract to him, explain him these… the price we already discussed before is on the contract and that discuss before. I get through that

> contract with him I remembers on Abbotsford, Tim Horton Mount Lehman that meeting I explain him that price and also show this deposits, the structure of deposit. So when that deposit come in and that deposit also explain him that deposit come directly to Phoenix Homes. And these… Manjit Gill paying these deposit step by steps and that's the way… whatever is discussed with Mr. Kundan before, that's the way his contract put it together to whatever discussion is fulfilled according to the contract. And I told him and make him understand so as soon as that money come from… come from Manjit Gill and… View Side and Manjit I consider is one person. View Side… I can save View Side or Manjit paid the money to Phoenix Homes, it can solve the problems for financial difficulty… difficulty Phoenix Homes throughout all… I want to say throughout all the years. And he is okay with the contract and terms.

[387] Mr. Khela denies having any discussions with Mr. Takhar about the View Side CPS before it was signed by Mr. Gill. He says he first discovered the existence of the agreement on July 15, 2010 when meeting Mr. Takhar at a restaurant in Langley. That meeting was called by Mr. Takhar in response to Mr. Khela's telephone calls to him about wanting to sell the property.

[388] Mr. Khela says that when he again pressed Mr. Takhar about selling the property, the latter produced both a July 14, 2010 letter from NSCU regarding a proposed $11,475,000 loan for site servicing and phase one construction on the 208th Street Properties and a copy of the View Side CPS that was later marked as Exhibit 26 at the trial.

[389] Mr. Khela says he immediately protested the sale, querying Mr. Takhar about how any such transaction could have occurred without Mr. Khela being involved (at his specific request, Mr. Khela had become a director of the company on June 1, 2010). Mr. Takhar responded that he had made the deal before Mr. Takhar became a director. He said it was only after selling the back portion that he, Mr. Takhar, was able to obtain the mortgage "with great difficulty". He said nothing could be done because "they (View Side) are big people and if we do not complete the sale, they will sue us". According to Mr. Khela, Mr. Takhar then qualified the last statement by saying that he would "go on their side and then (Mr. Khela) will be the only person sued".

[390] Mr. Khela flatly denied Mr. Takhar had told him about the principal of View Side (Mr. Gill) or about Mr. Takhar's debts to View Side/Mr. Gill. He says he was never given a copy of the second version of the View Side CPS (Exhibit 25) until he went to the McQuarrie Hunter offices in April or May 2011. He also says he did not learn about the registration of the View Side Option Agreement against title to the 208th Street Properties until the litigation was underway.

[391] Once again, we have diametrically opposed evidence from the two principal witnesses, Mr. Takhar and Mr. Khela. Mr. Takhar says he essentially informed Mr. Khela about and secured his consent to the View Side Contract before it was formalized. Mr. Khela, on the other hand, says he only learned of the existence of the View Side Contract in mid July 2010 and that it was a transaction made against his wishes (i.e., his intent that the entire property be sold).

[392] Once again, I conclude that neither version of events is completely truthful. I am not satisfied on the balance of probabilities that Mr. Takhar informed Mr. Khela of the View Side Contract before it was transacted, let alone secured his consent. He knew full well that Mr. Khela was intent on selling the 208th Street Properties instead of continuing the parties' development joint venture. As with the 199A Property, I find that he ignored Mr. Khela's wishes and pressed ahead with the View Side Contract as a means not only of securing financing for the continued development of the lands but, in the process, also eliminating the very substantial personal debt he owed to Mr. Gill.

[393] Mr. Takhar was not in the habit of giving Mr. Khela copies of contracts, consultant reports, applications to municipalities, plans/drawings, or formal financing agreements. His practice was to undertake or direct this work himself and to provide oral reports to Mr. Khela in a summary fashion when and if he saw fit to do so. I find that he did not disclose to Mr. Khela the nature and extent of his indebtedness to Mr. Gill, nor did he inform Mr. Khela of the "circling deposit funds" (discussed below).

[394] At the same time, I also do not accept all of Mr. Khela's version of events. I accept his evidence that, following the 199A Property dispute, he had "stopped

believing in Mr. Takhar", that he "wanted to sell the whole thing", and that he substituted himself for his wife as director and shareholder in Phoenix Homes for the purpose of exerting some formal control over the corporation's business affairs.

[395] I also accept Mr. Khela's evidence that he was only informed of the View Side Contract in mid July 2010, at which time Mr. Takhar showed him an executed copy of the View Side CPS, most likely a copy of the version marked as Exhibit 26 at the trial.

[396] I do not, however, accept Mr. Khela's implausible evidence that he thereafter went along with the View Side Contract because of a litigation threat from "big people". Rather, I find he realized he was not a director of Phoenix Homes on May 1, 2010, the ostensible date of the View Side CPS. He was well aware that he had "under-contributed" to the Phoenix Homes projects, and he understood Mr. Takhar had entered into the View Side Contract for fundraising purposes. He had not taken legal advice and was not aware of available options other than "going along", which is what he ultimately chose to do. It was not until much later, when confronted with the uncomfortable possibility of $14 million personal liability to CareVest Capital, that he finally baulked.

i. "Circling" of deposit payments

[397] One notable feature of the View Side Contract is that the deposit amounts payable by View Side were not to be held in trust but rather were receivable directly by Phoenix Homes and were available for its immediate use. Mr. Takhar's primary justification for the View Side Contract was that Phoenix Homes could immediately use the deposits to finance the ongoing development of the 208th Street Properties.

[398] Although it was not disclosed to Mr. Khela at the time, it turns out that the deposit monies paid by View Side were provided to the latter by Mr. Takhar through a combination of Phoenix Construction, Phoenix Star, his law firm (McQuarrie Hunter) and friendly third parties (Harpreet and Mandip Mander), and that, once received by Phoenix Homes, Mr. Takhar caused Phoenix Homes to immediately transfer the monies to Phoenix Construction. The plaintiff refers to these

transactions as “payment circles”. They rely heavily on these circling deposit payments in support of a finding that the entire View Side Contract was a sham.

[399] On May 31, 2010, View Side made the first deposit payment of $200,000 to Phoenix Homes. The documents put into evidence combine with Mr. Takhar’s testimony during direct and cross-examination to establish, and I find as a fact that, the following occurred:

- on May 28, 2010, a construction draw of $578,286.45 was received by Phoenix Construction from CareVest Capital in relation to the 199A Property Project. In his statutory declaration regarding that progress draw, Mr. Takhar solemnly declared that the proceeds would be used to settle accounts payable for only that project;

- on May 31, 2010, Phoenix Construction issued a draft from its Coast Capital Savings account in the amount of $200,000 to View Side which was then deposited by the latter on the same date;

- also on the same date, May 31, 2010, View Side issued a cheque in the amount of $200,000 drawn on its Van City Savings account payable to Phoenix Homes; and

- on June 1, 2010, Phoenix Homes deposited the $200,000 cheque in its NSCU account and, on the same day, issued a cheque in the amount of $186,000 to Phoenix Construction. That cheque was deposited into the latter’s Coast Capital account on June 2, 2010.

[400] On July 2, 2010, View Side made the second deposit payment to Phoenix Homes in the amount of $100,000. The evidence confirms, and I find as a fact that, the following occurred:

- on June 30, 2010, Phoenix Construction received a progress payment from CareVest Capital on the 199A Property Project in the amount of $405,604.56.

Mr. Takhar again signed the same statutory declaration in connection with these funds;

- on July 2, 2010, Phoenix Construction issued a cheque drawn on its Coast Capital account in the amount of $100,000 payable to View Side;

- on July 2, 2010, View Side deposited the $100,000 cheque in its Van City bank account and issued a cheque on the same day payable to Phoenix Homes in the amount of $100,000; and

- on July 6, 2010, the $100,000 was deposited into the Phoenix Homes NSCU account, and a cheque was issued to Phoenix Construction in the amount of $86,000, which was deposited into Phoenix Construction's Coast Capital account on the same day.

[401] On January 10, 2011, View Side made the third deposit payment to Phoenix Homes in the amount of $200,000. The evidence confirms, and I find as a fact that, the following occurred:

- on January 7, 2011, Phoenix Star received a $263,790 progress draw from WSCU for the 160th Street Project, again supported by the same type of statutory declaration made by Mr. Takhar;

- on January 10, 2011, View Side received a $200,000 cheque from Phoenix Star and deposited it into its Van City bank account and, on the same day, issued a cheque in the same amount payable to Phoenix Homes; and

- on January 10, 2011, Phoenix Homes deposited the View Side cheque into its NSCU bank account and, on the same day, issued a cheque payable to Phoenix Construction in the amount of $180,000. That cheque was deposited in the latter's Coast Capital Bank account on the same day.

[402] On February 10, 2011, View Side made the fourth deposit payment to Phoenix Homes in the amount of $100,000. The evidence confirms, and I find as a fact that, the following occurred:

- on February 9, 2011, at Mr. Takhar's instruction, McQuarrie Hunter issued a trust cheque to View Side in the amount of $100,000, representing a portion of sale proceeds derived from the sale of certain real property owned by Mr. Takhar, his wife and daughter;

- on February 10, 2011, View Side deposited the McQuarrie Hunter cheque in its Van City bank account and on the same day issued a cheque payable to Phoenix Homes in the amount of $100,000; and

- that same day, February 10, 2011, the View Side cheque was deposited into Phoenix Homes' NSCU account and a cheque in the amount of $80,000 was issued to Phoenix Construction, which was deposited to the latter's Coast Capital account the following day.

[403] On April 5, 2011, View Side made the fifth deposit payment to Phoenix Homes in the amount of $200,000. The evidence confirms, and I find as a fact that, the following occurred:

- on April 5, 2011, on the instructions of Harpreet Mander, McQuarrie Hunter issued a trust cheque in the amount of $200,000 payable to View Side, deposited in the latter's bank account at Van City the same day;

- on April 5, 2011, View Side issued a cheque in the amount of $200,000 to Phoenix Homes, which was deposited in the latter's bank account at NSCU the same day; and

- on April 6, 2011, Phoenix Homes issued a cheque to Phoenix Construction in the amount of $184,700, which was deposited in the latter's Coast Capital bank account the following day.

[404] On April 29, 2011, View Side made the sixth deposit payment to Phoenix Homes in the amount of $200,000. The evidence confirms, and I find as a fact that, the following occurred:

- on April 27, 2011, a $177,390 progress draw was paid by WSCU to Phoenix Star Enterprises in relation to the 160th Street Project;
- on April 28, 2011, Phoenix Star paid $162,000 to Harpreet and Mandip Mander who, on the following day, issued a cheque to View Side in the same amount;
- on April 29, 2011, the $200,000 was deposited into View Side's Van City account and a cheque in the same amount was drawn on that account payable to Phoenix Homes;
- on April 29, 2011, Phoenix Homes deposited the $200,000 into its NSCU account and on the same day issued a cheque payable to Phoenix Construction in the same amount, a cheque which was deposited into Phoenix Construction's Coast Capital account on April 30, 2011; and
- on April 30, 2011 Phoenix Construction issued a cheque in the amount of $200,000 drawn on their Coast Capital account and payable to Harpreet Mander.

[405] On May 2, 2011, View Side made the seventh deposit payment to Phoenix Homes in the amount of $200,000. The evidence confirms, and I find as a fact that, the following occurred:

- on April 29, 2011, a progress draw of $292,645.25 was advanced by Canadian Western Bank to Phoenix Construction in relation to the "Luna Project" (another of Mr. Takhar's developments);
- on May 2, 2011, Phoenix Construction issued a cheque drawn on its Canadian Western Bank account in the amount of $200,000 payable to View

Side, a cheque that was deposited that same day in View Side's Van City bank account;

- on May 2, 2011, View Side issued a cheque to Phoenix Homes in the amount of $200,000; and

- that same day, May 2, 2011, Phoenix Homes issued a cheque in the amount of $180,000 payable to Phoenix Construction.

[406] What is clear from the above is that: (1) by May 2, 2011, View Side had paid to Phoenix Homes the seven deposits totaling $1,200,000 contemplated by the second addendum (page 8 of 8 pages) to the most recent iteration of the View Side CPS (Exhibit 25); (2) the source of the funds for View Side was Mr. Takhar (either personally or through his corporations or friendly third parties); and (3) substantially all of those deposit monies were immediately paid out by Phoenix Homes to Phoenix Construction. All of these transactions occurred at the instruction and direction of Mr. Takhar without prior consultation with and/or express consent from Mr. Khela.

[407] The evidence also establishes, and I find as a fact that, at the insistence of the Khelas, Phoenix Homes opened a new bank account with Coast Capital savings on April 4, 2011. That account required two signatories for the withdrawal of any funds. Instead of that account being used for the fifth, sixth and seventh deposits totaling some $600,000, Mr. Takhar deposited those funds into the Phoenix Homes' NSCU account and immediately withdrew them in favour of Phoenix Construction. In doing so, Mr. Takhar took advantage of his own signing authority as permitted by that particular account, knowing full well that Mr. Khela would not have authorized the withdrawals had the monies been deposited into the Coast Capital account.

[408] Indeed, the last two withdrawals from the NSCU account on April 29 and May 2, 2011 in the aggregate amount of $380,000 were made by Mr. Takhar with the full knowledge that Mr. Khela had expressly revoked his approval for the CareVest Capital financing. Mr. Takhar was clearly "scooping" the money to place it beyond Mr. Khela's control.

[409] Whatever might be the benefits derived by Phoenix Homes from the View Side Contract, it is clear that the transaction bestowed a very significant benefit on Mr. Takhar personally; the circling of the deposit monies reduced or entirely eliminated Mr. Takhar's substantial personal indebtedness to Mr. Gill. This material fact was not disclosed to Mr. Khela by Mr. Takhar and, as discussed below, amounts to a breach of his good-faith obligation to both Phoenix Homes and Mr. Khela.

[410] View Side submits, however, and I am inclined to agree, that the disputes between the Khelas, Phoenix Homes and Mr. Takhar cannot and do not determine the legal rights of View Side in this case. They emphasize, and again I agree, that the contractual relationship between Phoenix Homes and View Side is analytically separate and distinct from any underlying issues between Phoenix Homes, the Khelas and Mr. Takhar. They say the common law "indoor management rule", as codified in s. 146 of the *BCA*, protects View Side from any shareholder dispute within Phoenix Homes and requires a "stand alone" assessment of enforceability based on the substantive law of contract, a subject to which I now turn.

j. Phoenix Homes' challenges to enforceability of View Side Contract

[411] The Phoenix Homes challenges to the validity of the View Side Contract are manifold and are framed in paras. 29 to 34 of its Second Further Amended Notice of Civil Claim filed February 28, 2018 and its Amended Response to the View Side Counterclaim filed the same date. For the purposes of these reasons, I organize and summarize them as follows:

- the essential terms of the contract are so vague, ambiguous, incomplete and uncertain as to be unenforceable at common law and, in any event, run afoul of s. 59 of the *Law and Equity Act* and s. 73 of the *Land Title Act*;

- the transaction is not an arm's length, *bona fide*, purchase for value (the price was too low and imposed servicing costs on Phoenix Homes) but rather was a "sham" transaction designed to prevent the sale of the 208th Street Properties (as Mr. Khela wished), to secure financing for the 208th Street

Properties Project, and also to enable Mr. Takhar to receive all the profits from developing the 40-unit parcel;

- Mr. Takhar failed to make proper disclosure to, and to secure prior approval from, Mr. Khela for the View Side Contract and his dishonesty and lack of good faith in that regard entitles Phoenix Homes to void that transaction, whether pursuant to s. 150 of the *BCA* or otherwise; and

- View Side was aware of and "knowingly assisted" in Mr. Takhar's breaches of his fiduciary and statutory duties, and therefore cannot claim the benefit of the View Side Contract. To the contrary, View Side is jointly liable with Mr. Takhar to Phoenix Homes in respect of such breaches and also for "wrongfully impairing title" to the 208th Street Properties by registration of the View Side Option Agreement.

[412] I will deal with each of these challenges separately.

k. Certainty of terms and statutory requirements

[413] In *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, 2021 SCC 22, the Supreme Court of Canada recently reiterated the common law on the formation of an enforceable contract. The reasoning in that case has been adopted by the British Columbia Court of Appeal in *Oswald v. Start Up SRL*, 2021 BCCA 352, which in turn was succinctly summarized by my colleague, Marzari J., in *Ai Kang Yi Yuan Enterprises Corp. v. 1098586 B.C. Ltd.*, 2022 BCSC 1416:

> [204] The test and the considerations relevant to determining whether a contract has been formed were recently affirmed and summarized by the BC Court of Appeal in *Oswald v. Start Up SRL*, 2021 BCCA 352 at para. 34 as follows:
>
> > (a) there must be an intention to contract;
> >
> > (b) the essential terms must be agreed to [by] the parties;
> >
> > (c) the essential terms must be sufficiently certain;
> >
> > (d) whether the requirements of a binding contract are met must be determined from the perspective of an objective reasonable bystander, not the subjective intentions of the parties; and

> (e) the determination is contextual and must take into account all material facts, including the communications between the parties and the conduct of the parties both before and after the agreement is made.

[414] As well, s. 59 of the *Law and Equity Act* provides in part:

> **Enforceability of Contracts**
>
> …
>
> (3) A contract respecting land or a disposition of land is not enforceable unless
>
> > (a) there is, in a writing signed by the party to be charged or by that party's agent, both an indication that it has been made and a reasonable indication of the subject matter,
> >
> > (b) the party to be charged has done an act, or acquiesced in an act of the party alleging the contract or disposition, that indicates that a contract or disposition not inconsistent with that alleged has been made, or
> >
> > (c) the person alleging the contract or disposition has, in reasonable reliance on it, so changed the person's position that an inequitable result, having regard to both parties' interests, can be avoided only by enforcing the contract or disposition.
>
> (4) For the purposes of subsection (3) (b), an act of a party alleging a contract or disposition includes a payment or acceptance by that party or on that party's behalf of a deposit or part payment of a purchase price.
>
> …
>
> (7) A writing can be sufficient for the purpose of this section even though a term is left out or is wrongly stated.

[415] S. 73 of the *Land Title Act* provides in part as follows:

> **Restrictions on Subdivision**
>
> **73** (1) Except on compliance with this Part, a person must not subdivide land into smaller parcels than those of which the person is the owner for the purpose of
>
> > (a) transferring it, or
> >
> > (b) leasing it, or agreeing to lease it, for life or for a term exceeding 3 years.
>
> …
>
> (4) A person must not grant an undivided fractional interest in a freehold estate in land or a right to purchase an undivided fractional interest in a

> freehold estate in land if the estate that is granted to or that may be purchased by the grantee is
>
> (a) a fee simple estate on condition subsequent, or
>
> (b) a determinable fee simple estate
>
> that is or may be defeated, determined or otherwise cut short on the failure of the grantee to observe a condition or to perform an obligation relating to a right to occupy an area less than the entire parcel of the land.

[416] The essential terms of an enforceable contract for the purchase and sale of land include sufficient identification and clarity of the proverbial "3Ps"—i.e., the parties, the property and the price: *First City Investments Ltd. v. Fraser Arms Hotel Ltd*., 13 B.C.L.R. 107, 1979 CanLII 606 at paras. 19–20 (C.A.), most recently cited in *1132080 B.C. Ltd. v. 1055616 B.C. Ltd.*, 2022 BCSC 1452 at para. 40.

[417] The courts are generally hesitant to find that a contract the parties intended to be binding is void for uncertainty. This is particularly true when the parties draft their contract without the assistance of legal counsel, in which circumstances the courts will do their best to make the contract work rather than upsetting it. In that regard, the court will make every effort to find a meaning of the terms of an agreement by looking at substance and not mere form, by determining the real intention of the parties from the language they employed, and by giving effect to such intentions through necessary inference: *Ai Kang Yi Yuan Enterprises Corp*. at paras. 257–61.

[418] In this case, Phoenix Homes submits the View Side CPS lacks the necessary certainty regarding the specific property to be sold and the price mechanism specified in the contract. They also note that there appears to have been at least three iterations of the written View Side CPS: (i) May 1, 2010 (a copy of which has not been produced); (ii) mid June 2010 (the date on the Yamamoto Architecture plan addendum); and (iii) some unspecified time between mid June 2020 and March 11, 2011, the date on which the second full version of the CPS was faxed by Mr. Takhar to CareVest Capital.

[419] Setting aside any "sham" allegations for the moment, there is no dispute that Phoenix Homes and View Side are the parties to the View Side CPS.

[420] Both versions of the completed CPS contained the handwritten words “buyer buy the piece of land east side from 209 Street and part of North of 209 Street. Layout attch to the contract [*sic*]”, however both versions also contain the Yamamoto Architecture layout plan indicating the proposed location of the development. The land had been subject to multiple appraisals, preliminary layouts and submissions to the Township of Langley. It was clear to all concerned that the subject matter of the sale was to be the land created by the subdivision once that subdivision was finally approved by the municipality. Both completed versions contemplated payments of deposits at different stages of the municipal subdivision process.

[421] This Court has on several occasions recognized the common practice in land development transactions of making agreements contingent on subdivision. It has held that such agreements are legally enforceable and do not offend s. 73 of the *Land Title Act*: see *Bank of British Columbia v. TRI Holdings Ltd.*, 17 B.C.A.C. 264 at 11, 1992 CanLII 1089 (C.A.) and *Wildstone Holding Ltd. v. Hansberg*, 2021 BCSC 1702 at paras. 51–52.

[422] By the time the final iteration of the View Side CPS was agreed to between the parties, Mr. Takhar and his consultants (Yamamoto Architecture) were aware that subdivision would likely only be approved for the 40-unit proposal and this was the representation made to Mr. Gill at the time. The parties agreed that the purchase price of $3,200,000 was for such a 40-unit townhome development. It is true that the contract includes a somewhat confusing “purchase price re-allocation” clause dependent upon the number of units approved by the municipality, but that potential ambiguity is insufficient to render unenforceable the fundamental agreement to sell a 40-unit development for the stated purchase price.

[423] Furthermore, and perhaps more importantly, View Side paid and Phoenix Homes received (and continues to retain) deposit payments, part performance of the contract which fulfils the requirements of s. 59(3)(b) and (c) of the *Law and Equity Act* and one which, in my opinion, estops Phoenix Homes from raising lack of certainty or other flaws in the formal contract as a defence to the claim. Our Court of

Appeal has held that the court should particularly strive to uphold agreements where partial performance has occurred: *Hanif v. TJM Management Consultants Ltd*., 2012 BCCA 485 at para. 38.

[424] For all these reasons, I reject Phoenix Homes' challenge to the validity of the View Side Contract based on uncertainty of terms or noncompliance with statutory requirements.

I. Sham transaction or *bona fide* purchase for value?

[425] In urging the Court to conclude that the View Side Contract is a sham transaction that should be set aside, Phoenix Homes relies on several somewhat related factors including:

- certain traditional "badges of fraud", such as a close relationship between the parties (here, a friend and relative) and grossly inadequate consideration (purchase price less than market value and servicing to be done at Phoenix Homes' expense);
- the "circling" of the deposit monies from/by Mr. Takhar to View Side and then ultimately back to Mr. Takhar;
- Mr. Takhar's knowledge that Mr. Khela wanted to sell the 208th Street Properties and the need/desire of Mr. Takhar to take steps to prevent that occurrence;
- the need to satisfy prospective lenders regarding demonstrable equity injections supporting development cost financing;
- Mr. Takhar's role as *de facto* owner/controller of View Side; and
- Mr. Takhar's demonstrated propensity for dishonesty including false ownership façades for corporations to deceive banks and circumvent their loan restrictions, fictional invoices and false

> statutory declarations to secure progress draws, and forging signatures on cheques and corporate resolutions.

[426] I have already made a finding that Mr. Gill was at all material times the actual sole shareholder and director of View Side and that Mr. Takhar had no beneficial interest in that corporation. In other words, unlike Oceanview Star, View Side's corporate structure was legitimate and was not a sham.

[427] Similarly, I have already made a finding that there did in fact exist an ongoing debtor-creditor relationship between Mr. Takhar and Mr. Gill and that the former owed the latter a substantial amount of money as of May 2010, a debt that was accumulating compound interest at 15% per annum.

[428] These findings militate very strongly in favour of the legitimacy of the View Side Contract. Mr. Takhar's demonstrated propensity for dishonesty in other contexts is not proof that the View Side Contract was a sham. It simply increases the balance of probabilities that Mr. Takhar structured the View Side Contract so as to eliminate that debt without first informing and securing the prior consent of his joint venture partner, Mr. Khela, a much more likely scenario and one which I find as a fact to have occurred in this case.

[429] I am also not persuaded that the $3.2 million purchase price for the eastern 40-unit parcel of the 208th Street Properties was less than market value, let alone "grossly inadequate". Mr. Dutton of CWPC prepared an appraisal of that parcel effective May 31, 2011 for financing purposes. He appraised the value, with the benefit of underground site services and roadworks completed by Phoenix Homes, at $2.8 million. Mr. Dutton testified, and I accept as a fact, that property values likely increased to some degree between May 2010 and May 2011.

[430] The parties each prepared retroactive appraisal evidence from experts retained for that purpose. The plaintiff's appraiser initially opined that the market value of the 40-unit parcel was $4.1 million (with off-site services provided by the vendor) but later revised that number downward to $3.9 million in a supplemental

report in recognition of certain flaws pointed out in the expert report tendered by the defendants.

[431] The expert report tendered by the defendants assessed market value of the 40-unit parcel at $2.6 million as at the effective date of March 1, 2010, again, with the off-site services provided by Phoenix Homes.

[432] The parties have made various submissions regarding erroneous methodology and analysis by the other side's expert. I am inclined to agree that the appraisal performed on behalf of the plaintiff suffers from several material flaws, however I do not consider it necessary to determine a precise value at this time. I consider Mr. Dutton's report to be somewhat conservative since it was prepared for financing purposes but suffice it to say I am satisfied that, and I find as a fact that, the purchase price of $3,200,000 specified in the View Side CPS is well within the range of a reasonable market value for the property at the relevant time.

[433] In the result, I conclude that the View Side Contract was not a sham transaction but rather was indeed a *bona fide* purchase for an appropriate value as Mr. Gill and View Side claim.

[434] I note this conclusion does not necessarily mean the contract is susceptible to specific enforcement at this late date. Completion of the transaction and the payment by View Side of the purchase price balance was subject to a future condition precedent, namely approval by the municipality of the subdivision and proposed townhouse development. As a matter of law, that condition precedent may result in an implied obligation on Phoenix Homes' part to make reasonable efforts to achieve that result (*Dynamic Transport Ltd. v. O.K. Detailing Ltd.*, [1978] 2 S.C.R. 1072 at 1084–85, 1978 CanLII 215), but it has not been realized to date and may not have been realized in 2011/12 either given the intervening fractured relationship between Mr. Takhar and Mr. Khela.

[435] There remains the further question of whether the View Side Contract should be set aside as a remedy for any breach of statutory or fiduciary duty by Mr. Takhar

and/or for any knowing assistance by View Side in that regard. I turn to that issue now.

m. Setting aside the View Side Contract for breach of statutory/fiduciary duty

[436] Earlier in these reasons for judgment I set out my findings regarding the terms of the oral joint venture/shareholders' agreement between Mr. Takhar and Mr. Khela. The terms included that:

- Mr. Takhar did not have unilateral control of the joint venture enterprise;
- all significant decisions affecting the joint venture project would be made through discussion and consent;
- both parties would be honest with each other in the joint venture dealings, would fully disclose all significant information related to the venture, and would not lie to or mislead each other about such matters; and
- each party would act honestly and in good faith in the best interests of the joint venture corporation and the joint venture itself, and would disclose and secure approval for any contract or transactions made on behalf of or related to the joint venture in which either of the principals had a direct or indirect material interest.

[437] The source of these implied terms included, in part, the statutory duties of directors and shareholders of a (joint venture) corporation pursuant to ss. 142 and 147–49 of the *BCA*.

[438] Section 148 of the *BCA* makes a director liable to account to the corporation for any profit accruing to them as a result of certain types of contracts or transactions in which the director held a "disclosable interest". If disclosure is made, s. 149 of the

BCA permits the contract or transaction to be approved by the other directors or by a "special resolution" of shareholders.

[439] Section 150 of the *BCA* authorizes the court to make certain orders depending on whether the impugned contract or transaction was "fair and reasonable". That section provides:

> **Powers of court**
>
> **150** (1) On an application by a company or by a director, senior officer, shareholder or beneficial owner of shares of the company, the court may, if it determines that a contract or transaction in which a director or senior officer has a disclosable interest was fair and reasonable to the company,
>
> (a) order that the director or senior officer is not liable to account for any profit that accrues to the director or senior officer under or as a result of the contract or transaction, and
>
> (b) make any other order that the court considers appropriate.
>
> (2) Unless a contract or transaction in which a director or senior officer has a disclosable interest has been approved in accordance with section 148 (2), the court may, on an application by the company or by a director, senior officer, shareholder or beneficial owner of shares of the company, make one or more of the following orders if the court determines that the contract or transaction was not fair and reasonable to the company:
>
> (a) enjoin the company from entering into the proposed contract or transaction;
>
> (b) order that the director or senior officer is liable to account for any profit that accrues to the director or senior officer under or as a result of the contract or transaction;
>
> (c) make any other order that the court considers appropriate.

[440] Of particular importance to View Side in this case is s. 151 of the *BCA* which provides as follows:

> **Validity of contracts and transactions**
>
> **151** A contract or transaction with a company is not invalid merely because
>
> (a) a director or senior officer of the company has an interest, direct or indirect, in the contract or transaction,
>
> (b) a director or senior officer of the company has not disclosed an interest he or she has in the contract or transaction, or

> (c) the directors or shareholders of the company have not approved the contract or transaction in which a director or senior officer of the company has an interest.

[441] View Side also invokes the so-called common law "indoor management rule" codified in s. 146 of the *BCA* as follows:

> **Persons may rely on authority of companies and their directors, officers and agents**
>
> **146** (1)Subject to subsection (2), a company, a guarantor of an obligation of a company or a person claiming through a company may not assert against a person dealing with the company, or dealing with any person who has acquired rights from the company, that
>
> (a) the company's memorandum or notice of articles, as the case may be, or articles have not been complied with,
>
> (b) the individuals who are shown as directors in the corporate register are not the directors of the company,
>
> (c) a person held out by the company as a director, officer or agent
>
> (i)is not, in fact, a director, officer or agent of the company, as the case may be, or
>
> (ii)has no authority to exercise the powers and perform the duties that are customary in the business of the company or usual for such director, officer or agent,
>
> (d) a record issued by any director, officer or agent of the company with actual or usual authority to issue the record is not valid or genuine, or
>
> (e) a record kept by or for the company under section 42 is not accurate or complete.
>
> (2) Subsection (1) of this section does not apply in respect of a person who has knowledge, or, by virtue of the person's relationship to the company, ought to have knowledge, of a situation described in paragraphs (a) to (e) of that subsection.

[442] View Side refers to extensive jurisprudence addressing the indoor management rule, but the law in that regard is not disputed and it is not necessary to canvass it in detail here. Suffice it to say that third persons dealing with a corporation's director, officer or agent are entitled to assume the latter has requisite authority to transact on behalf of the company and that such transactions comply with internal corporate governance procedures.

[443] Phoenix Homes submits, and I agree, that on any of the parties' version of events, Mr. Takhar had a disclosable interest in the View Side Contract.

[444] Mr. Gill was Mr. Takhar's friend and relative but, more importantly, also a creditor to whom Mr. Takhar owed a very significant amount of money. The genesis for the View Side Contract was a demand by Mr. Gill for the return of some $700,000, only part of the debt due and owing to him by Mr. Takhar. By converting that demand into an investment in the 208th Street Properties and by "circling" the resulting deposit monies related to that investment, Mr. Takhar not only sold off a portion of the 208th Street Properties but also eliminated his personal debt in the process. All of this should have been fully disclosed to both Phoenix Homes and to Mr. Khela, a disclosure Mr. Takhar deliberately chose not to make because he knew full well Mr. Khela was unlikely to approve the proposed transaction.

[445] The question then, at least for the purposes of the *BCA*, is whether the View Side Contract was "fair and reasonable" to Phoenix Homes in the circumstances of the case and, if not, what remedy might be appropriate.

[446] The case law is unsettled regarding the onus of proof respecting determinations of "fairness and reasonableness" under s. 150 of the *BCA*. Two recent Court of Appeal cases have acknowledged this state of affairs but both expressly declined to resolve the matter: *Eisler Estate v. GWR Resources Inc.*, 2021 BCCA 113 at para. 83; *Sonic Holdings Ltd*. at para. 96. I, for one, am inclined to agree with Mr. Justice Butler's *dicta* in para. 93 of *Sonic Holdings Ltd.* that the conflicted fiduciary, here Mr. Takhar, generally bears the onus to show that an impugned transaction is fair and reasonable.

[447] The parties do not disagree on the criteria applicable to determining whether or not a transaction is fair and reasonable for the corporation, here, Phoenix Homes:

- it is a context-specific inquiry that depends on all the surrounding circumstances;
- the inquiry reviews both procedure and substance;

- the procedural aspect of the inquiry examines how the transaction was initiated, structured and negotiated and, if disclosed to directors, the nature of that disclosure and the manner in which any director's approval was obtained;

- in the case of a closely-held corporation, informal disclosure can suffice; and

- the substantive inquiry relates to the content of the contract or transaction, including its purpose and the possible ramifications for the corporation in the circumstances.

[448] I have already found that neither the formal corporate ownership/control of View Side (by Mr. Gill) nor the View Side Contract itself were shams—i.e., façades or frauds to advance Mr. Takhar's personal interests. I have also found that the View Side Contract was an enforceable and partially performed contract, albeit one that may not be subject to specific enforcement remedies given, among other things, the unfilled and perhaps unfillable condition precedent for closing. The View Side Contract thus cannot be set aside on these grounds.

[449] I have no hesitation in concluding that the View Side Contract was not procedurally fair to either Phoenix Homes or Mr. Khela. The latter were not informed how the transaction was initiated (Mr. Gill's demand for partial repayment of the debt) nor of the extent of Mr. Takhar's indebtedness to Mr. Gill and how the transaction would substantially reduce or eliminate that personal debt. Mr. Khela was not presented with a copy of the View Side CPS until mid July 2010 and he did not see the final iteration of that agreement until almost a year later when a copy was secured from the offices of McQuarrie Hunter.

[450] No matter how informally business may have been conducted by the two joint venture partners in the past, the negotiation and structure of the View Side Contract can in no way be considered to have been procedurally fair to either Phoenix Homes or Mr. Khela.

[451] Whether the View Side transaction was reasonable in both purpose and substance is a somewhat more difficult question.

[452] From Mr. Takhar's perspective, Mr. Khela had stopped funding Phoenix Homes in April 2008. By his calculation, Mr. Takhar had "over contributed" to Phoenix Homes' expenses by a wide margin. The Mortgage Interest Reserve was spent by the end of November 2009 and a monthly mortgage payment in the amount of $13,500 was required. Other development expenses were also required to move both the eastern and western parcel of the 208th Street Properties through fourth reading and ultimate subdivision approval.

[453] Mr. Takhar knew Mr. Khela wanted to sell the 208th Street Properties. He knew from the HDS Offer that Mr. Khela had been prepared to sell the eastern portion of the 208th Street Properties for $2,600,000 to a "flipper" without any immediate deposit payment. A sale of part of that eastern parcel to Mr. Gill for $3.2 million with substantial deposits that did not have to be held in trust made attractive commercial sense to Mr. Takhar and would facilitate the financing required to develop the balance of the properties.

[454] In all these circumstances, it is certainly arguable the View Side Contract was commercially reasonable and in the best interests of Phoenix Homes. The problem, however, is that the other 50 percent shareholder in the corporation, Mr. Khela, did not agree and Mr. Takhar was not entitled to unilaterally break that deadlock. In doing so, here by forging ahead with the View Side transaction, he was arguably breaching his obligations to act in the best interest of the joint venture corporation but he was most certainly breaching the implied terms of the joint venture/shareholders' agreement he had made with Mr. Khela. In such circumstances, the Court cannot find that the View Side Contract was fair and reasonable to Phoenix Homes.

[455] The question of remedy is a different matter altogether. Here, the distinction between View Side's entitlements and those of the Phoenix Homes joint venturers comes to the fore. In reliance on the validity of the View Side Contract, View Side

has paid aggregate deposits of $1.2 million, monies which were not held in trust and for which it has no meaningful security. In a very real sense, it has become the victim of the deadlock between Mr. Khela and Mr. Takhar.

[456] The “usual” remedy for non-disclosure of a director’s material interest in a contract or transaction involving the corporation is liability to account for any profit accrued. Section 150 of the *BCA* does grant the court jurisdiction to “make any other order that the court considers appropriate” and should the circumstances warrant, it is certainly possible for this Court to issue an order setting aside the View Side Contract as Phoenix Homes indeed requests. In my view, such a remedy is not appropriate here.

[457] The absence of proper disclosure and/or of director/shareholder approval of contracts/transactions in which a director has a material interest are issues relating to internal governance of the corporation, here Phoenix Homes. As s. 151 of the *BCA* provides, without more, those issues do not invalidate the contract or transaction itself. As well, View Side enjoys the benefit of the “indoor management rule” both at common law and as codified in s. 146 of the *BCA*. Mr. Takhar had ostensible authority to bind Phoenix Homes to the View Side CPS and perhaps also to make the additional oral commitments which together with that CPS comprise the View Side Contract.

[458] Finally, and perhaps most importantly, the View Side Contract has been partially performed. Mr. Khela took no steps to repudiate or set aside the View Side Contract when he became aware of its existence in July 2010 and he, like Mr. Takhar and Phoenix Homes itself, has accepted and has not returned the multiple deposits paid by View Side in 2010–2011. Whatever might be Mr. Khela’s or Phoenix Homes’ remedy against Mr. Takhar regarding the creation of the View Side Contract, neither Mr. Khela nor Phoenix Homes should be able to set aside, and indeed in my opinion they are estopped from setting aside, the View Side Contract.

[459] I conclude this section of these reasons with the question of whether View Side/Mr. Gill provided “knowing assistance” to Mr. Takhar’s breaches of duty and/or

are in “knowing receipt” of benefits derived from such breaches. In my view, there is no merit to any such claims.

[460] I have already found that that neither the View Side Contract nor the related deposit payments were a sham. From View Side’s perspective, the transaction was legitimate and the deposit payments were real.

[461] I have already found that Mr. Gill is a poorly educated and relatively unsophisticated individual who trusted Mr. Takhar implicitly. He had neither the knowledge nor experience to recognize any wrongdoing on the part of Mr. Takhar insofar as the View Side Contract was concerned.

[462] There is no evidence, and certainly none that constitutes proof on the balance of probabilities, that Mr. Gill knew about or was otherwise privy to the “circling” of deposit funds. He knew little or nothing about Mr. Khela’s involvement with Phoenix Homes or his dealings (including disagreements) with Mr. Takhar.

[463] Mr. Gill often displayed a poor memory for important details respecting discussions and transactions with Mr. Takhar generally and in connection with the View Side Contract in particular. I understand how this has given rise to scepticism on the part of the Khelas. But the loan relationship with Mr. Takhar has been substantiated by other reliable evidence, and the fact that Mr. Gill is a relation (albeit distant) and long-term friend of Mr. Takhar’s is insufficient to impute knowledge to Mr. Gill, constructive or otherwise, of Mr. Takhar’s dishonesty or impropriety with others. There is simply no evidence, beyond speculation, that Mr. Gill and/or View Side are guilty of “knowing assistance” or “knowing receipt” as alleged.

X. WAS MR. KHELA ENTITLED TO TERMINATE THE CAREVEST CAPITAL LOAN IN 2011 AND THEREBY EFFECTIVELY TERMINATE THE AGREEMENT TO DEVELOP THE 208TH STREET PROPERTIES?

[464] I do not intend to address every piece of evidence related to the events in early 2011 culminating in Mr. Khela’s termination of the CareVest Capital loan. However, helpful context is provided by the steps taken to advance the development of the View Side 40-unit townhouse project (the “View Side Project”), the accounting

demands made by the Khelas, and the development/structure of the CareVest Capital loan. I will address each separately.

a. Advancing the development of the View Side Project

[465] There were a great many dealings between Mr. Takhar's consultants and the Township of Langley regarding the lands that came to be the subject matter of the View Side Contract. A chronology of some key events is as follows:

December 11, 2009	Mr. Takhar, on behalf of Phoenix Construction, as authorized agent for the registered owner Phoenix Homes, files a development application form with the Township of Langley which includes a site plan for 48 townhouse units prepared by Yamamoto Architecture. The Township assigns the file project number 08-25-0083. The application seeks an amendment of the Official Community Plan, a zoning bylaw amendment (rezoning) and a development permit.
February 11, 2010	The Township of Langley formally acknowledges receipt of the application and identifies additional planning, engineering and design requirements necessary for matters to proceed.
March 28, 2011	Phoenix Homes' application for rezoning receives first and second reading before Langley Council subject to completion of various development prerequisites. Issuance of a development permit was approved subject to various conditions, and scheduling of the required public hearing was authorized.
April 11, 2011	The public hearing is held regarding the proposed development.

April 18, 2011	The rezoning bylaw regarding the proposed Phoenix Homes development receives third reading by the Council.
April 21, 2011	The Township of Langley issues a formal notice to Phoenix Homes regarding third reading and sets out various development prerequisites to be completed before any final reading can procced.
May 25, 2011	A building permit application is filed for Phase I of the development. The property owner is identified as View Side Development Ltd., the designer is listed as Yamamoto Architecture, and the contractor is Nirmal Takhar. Attached to the application is an authorization form whereby Phoenix Homes appoints Mr. Gill/View Side as its agent with respect to all matters relating to the development.

[466] Throughout this period of time, various expenses were incurred related to the View Side Project, including those of Yamamoto Architecture, Hunter Laird Engineering, and others.

[467] In May 2011, Mr. Takhar commissioned an appraisal of the View Side parcel from Mr. Dutton of CWPC and informed him that he should be treated as the client for billing purposes instead of View Side. That appraisal, effective May 31, 2011, was delivered under cover of a June 21, 2011 letter addressed to “Mr. Nirmal Takhar/View Side Development Ltd.”.

[468] Mr. Takhar testified that as part of the View Side Contract he had agreed to provide Mr. Gill with all the help he needed for financing, construction, and development to “take the project up to the building permit [stage]”. He testified all of this had been discussed with and agreed to by Mr. Khela, but as noted earlier, I

have found that no such discussion or agreement occurred before the View Side CPS was first signed by Mr. Gill.

b. Mr. Sandhu's accounting of contributions and expenses related to the 208th Street Properties Project

[469] To this date there has been no formal accounting of the expenses incurred by or on behalf of the joint venture and or paid by Phoenix Homes, the Khelas or Mr. Takhar (whether through Phoenix Construction or otherwise).

[470] Counsel for Phoenix Homes/the Khelas says that the "first real attempt at a project accounting" was made by Mr. Takhar when his lawyers issued a Notice to Admit dated March 8, 2018, which attempted to identify the expenses incurred with respect to the 208th Street Properties Project and for which Mr. Takhar allegedly paid. This Notice to Admit was marked as Exhibit 14 at the trial.

[471] Building on that exhibit and other documents produced at trial, counsel for the Takhar defendants has produced a 16-page spreadsheet purporting to tabulate each of the Takhar/Khela "contributions" to the joint venture. The accuracy of that schedule is not seriously challenged by counsel for Phoenix Homes/the Khelas but has not been formally admitted. It should be noted that the schedule relates only to the 208th Street Properties Project and purports to "credit" the $150,000 initially paid by the Khelas in 2005 in relation to the 199A Property Project.

[472] What is clear, however, is that the first attempt at some sort of meaningful reconciliation of expenses/contributions did not occur until February 2011. A booklet of documents related to that reconciliation was also marked as an exhibit at trial and consists of schedules, cheques, invoices and written communications between the Khelas and Mr. Takhar's accountant, Mr. Sandhu.

[473] Mr. Khela's version of events is that by late 2010 he had become wary of investing any further monies in the joint venture and that he asked Mr. Takhar for copies of Phoenix Homes' financial documents, including invoices for the expenses Mr. Takhar was saying he had incurred in relation to the 208th Street Properties

Project. Mr. Takhar directed him to Mr. Sandhu but the latter claimed not to have any supporting documents.

[474] At the end of January 2011, Mr. Khela went to Mr. Sandhu's office and was provided with a copy of Phoenix Homes' financial statements for fiscal years ending 2007–2010 and for the period ending December 31, 2010. He was also given a schedule entitled "Phoenix Homes expenses paid by Nirmal Takhar" and copies of numerous cheques issued mostly by Phoenix Construction and Phoenix Holdings. One such cheque was the June 30, 2010 cheque from Phoenix Construction to View Side in the amount of $100,000 which was part of the "circular deposit payments" made in connection with the View Side Contract.

[475] That schedule indicated that expenses in the amount of $688,190.13 had been paid. It identified the date and amount of each payment, the expense or payee, the payor corporation, and indicated with an 'X' whether supporting documentation had been "found".

[476] On February 9, 2011, Mrs. Khela emailed Mr. Sandhu attaching the earlier schedule and inquiring when she could pick up the invoices corroborating the claimed expenses. Mr. Sandhu evidently did not have any invoices on hand as he emailed Mr. Takhar the same day inquiring about the requested documents.

[477] On February 11, 2011, Mr. Sandhu emailed the Khelas an "updated summary and payments as per Nirmal [*sic*]" and asked them to "make notes beside each question so when Nirmal comes in I can get explanations". The attachments included an updated schedule entitled, "Phoenix Homes expenses paid by Nirmal Takhar" (now showing expenses totaling $758,264.13), and a document entitled "Reconciliation of Shareholders Disbursements". The latter document indicated a "total invested" by Mr. Takhar of $1,776,100 and by the Khelas of $1,640,000, giving rise to a net "overpayment" by Mr. Takhar off $136,100.

[478] Thereafter, the reconciliation purported to identify "monies taken by Nirmal" (including some of the View Side payments taken from the NSCU account), then

offset those by the $758,264.13 “expenses paid by Nirmal”, thereby resulting in an overall “overpayment” by Mr. Takhar of $283,073.46.

[479] Later the same day, Mrs. Khela faxed to Mr. Sandhu correspondence pointing out that he had missed a $100,000 deposit payment made by the Khelas on April 15, 2008, and she attached the NSCU account statement confirming the payment. As well, she attached Mr. Sandhu’s “Reconciliation of Shareholders Disbursements” document on which she had made certain notes clarifying not only that deposit but also the fact that the earlier payments “credited” to the Khelas related to the 199A Property. She amended the “total invested by Khela” to read $1,740,000 and she blacked out the claimed “overpayment by Mr. Takhar”, stating in her cover letter that his “expenses still have to be checked yet”.

[480] The Booklet of Reconciliation Documents marked as an exhibit at trial contains one further, undated version of the Sandhu “Reconciliation of Shareholders Disbursements” document—a document which Mr. Khela acknowledged receiving in February, 2011.

[481] That document purports to credit each party with a “share of revenue for partial properties sold to View Side” and also debits for “extra portion withdrawals” by Mr. Takhar, his “withdrawal from Westminster Savings Account to close” (the forged $8,000 check), and various “deposit[s] in Phoenix Construction from Phoenix Homes”. After again including “expenses paid by Nirmal Takhar” (as per an attached schedule), the “total invested” by Mr. Takhar was stated as $2,208,364.13 and by the Khelas as $1,891,290.67, resulting in an “overpayment” by Mr. Takhar of $317,073.46

[482] Mrs. Khela testified that she was confused by these documents and it is not difficult to see why. At one level, it might be argued that the last Reconciliation Document amounts to a disclosure by Mr. Takhar of at least some of the monies that he had been causing Phoenix Homes to pay Phoenix Construction. What is clear, however, and what I have already found as a fact, is that he did not inform the Khelas of these events when they were occurring.

[483] The “contribution reconciliation” prepared by counsel as an *aide memoire* at trial factors in the “circulating” deposit payments received by Phoenix Homes from View Side and their subsequent (essentially immediate) payment by Phoenix Homes to Phoenix Construction. Even assuming the accuracy of all the 208th Street Properties expenses said to have been paid by Mr. Takhar as part of his “contribution" to the project, that reconciliation indicates that by mid February 2011, Mr. Takhar’s “over contribution” was approximately $50,000 and that by April 6, 2011, the contribution pendulum had swung the other way such that Mr. Takhar had “under contributed” by approximately $100,000. Indeed, by “scooping” the later View Side deposit payments, Mr. Takhar’s “under contribution” increased to a high of $462,255.96 as of May 2, 2011 and did not thereafter “equalize” with the Khelas until the end of December 2012.

[484] In their final submissions, Phoenix Homes/the Khelas say:

> As a result of the above, the plaintiff originally advanced a claim for damages for misappropriation of corporate funds. Since the date of filing the claim, Mr. Takhar has arranged the payment of mortgages which have effectively repaid the funds taken out so damages are not sought for this misappropriation. It is, however, relevant to consider this evidence as it…[informs] Mr. Khela's decision to sever his relationship with Mr. Takhar.

[485] I am inclined to agree, and I now turn to that very event.

c. The CareVest Capital loan

[486] One document included as an exhibit at trial was an NSCU letter dated July 14, 2010, entitled “Letter of Interest – Commercial Construction Financing” (the “NSCU LOI”). The letter was directed to Mr. Takhar at Phoenix Homes as a response to his request for financing for “Phase 1” of the “106 unit townhouse and 55 unit condo project” to be located at the 208th Street Properties.

[487] The NSCU LOI was signed by two representatives from NSCU. Page six of the document was an “Acknowledgement and Acceptance” whereby the borrower (Phoenix Homes) and the guarantors (Mr. Takhar and Mrs. Khela) accept the terms

and conditions set out in the letter and “request NSCU to proceed with a formal application for loan approval."

[488] The trial evidence is somewhat unclear about what happened with this NSCU financing proposal. Mr. Khela admits that he signed the letter in mid July 2010 after it was brought to his attention at that time by Mr. Takhar as part of the View Side Contract disclosure. He says he did so unwillingly and only following Mr. Takhar’s threat of litigation by View Side whereby the project would be frozen and Mr. Khela's investment would be consumed by interest payments on the Phoenix Homes debt (approximately $4 million at the time).

[489] A copy of the NSCU LOI was attached as an exhibit to Mr. Khela's affidavit of November 16, 2011. It does not include the acknowledgement and acceptance form, signed or otherwise. It does, however, contain a handwritten note on page three substituting the name Kundan for the scratched out name Kamaljit.

[490] Mr. Takhar acknowledges that he met with Mr. Khela in mid July 2010 and presented him with the NSCU LOI. He said Mr. Khela agreed to proceed with the loan, however NSCU later advised him they would not be able to fund the project and so he continued to look for other potential lenders.

[491] I find as a fact that Mr. Khela was presented with and signed the NSCU LOI in mid July 2010. However, as with the View Side CPS, I do not accept Mr. Khela's evidence that he went along with the NSCU LOI because of threats by Mr. Takhar related to litigation and loss of his investment in the joint venture. As with the View Side Contract to which Mr. Khela thought Phoenix Homes was bound, he reluctantly decided to “go along” and signed the letter knowing that a substantial financial commitment to NSCU would likely result.

[492] It is unclear when Mr. Takhar approached CareVest Capital to seek financing for the first phase (15 townhouse units) of the 208th Street Properties Project. A December 24, 2010 letter from CareVest Capital to Mr. Takhar was included as an exhibit at trial and is a preliminary “financing proposal outline” for the project.

Mr. Khela had no role in the negotiations for this financing and, indeed, testified that he was unaware of Mr. Takhar's dealings with CareVest at the time. I accept his testimony on this point.

[493] In January/February 2011, the "contribution/expense reconciliation" communications between the Khelas and Mr. Takhar's accountant (Mr. Sandhu) ensued, as set out above. As part of that process, the Khelas became aware of at least one cheque from Phoenix Construction to View Side in the amount of $100,000 issued around the time the View Side Contract was created. Mr. Sandhu's "Reconciliation Document" contained further, admittedly unexplained, entries relating to "revenue" from View Side and Mr. Takhar's "extra portion withdrawals".

[494] On February 11, 2011, on behalf of Phoenix Homes, Mr. Khela signed a membership agreement to join a home warranty insurance program. The application was approved and a membership certificate and warranty registration forms were mailed to Phoenix Homes at Mr. Khela's home address on February 25, 2011.

[495] This home warranty registration process is further evidence of Mr. Khela advancing Phoenix Homes' ability/intention to continue the development of the 208th Street Properties. Mr. Khela again says he took this step because of Mr. Takhar's threats of litigation and resulting loss of investment. I do not accept Mr. Khela's evidence on this point. I find he was again "going along".

[496] On March 25, 2011, CareVest Capital sent a letter to Mr. Takhar at Phoenix Homes confirming the terms and conditions of a first mortgage interim financing for Phase 1 of the 208th Street Properties Project. The letter is 16 pages long and every page was initialed by each of Mr. Khela and Mr. Takhar, who also signed the acceptance pages on behalf of Phoenix Homes and/or in their capacity as guarantors. The terms and conditions were very extensive and will not be repeated here, however they included that:

- the principal amount of the loan was $14,661,000 "on a cost to complete basis including interest reserve and fees associated with this transaction";

- the interest rate was 8.25% per annum compounded monthly;
- the term was 15 months, subject to an option to extend;
- the borrower was Phoenix Homes, however "joint and several unconditional guarantees" were required from Mr. Khela, Mr. Takhar and two of Mr. Takhar's companies (Phoenix Construction and Standard Plumbing);
- acceptance of the terms triggered a "lender's commitment fee" in the amount of $294,000 to be secured by a $10,000 "deposit" payable upon return of the commitment letter;
- the project budget was $15,461,000 including, among other things, a payout/discharge of the pre-existing NSCU mortgage ($3.7 million), municipal charges of $2.661 million, an "interest reserve" of $1,013,000 (the information for these items came from a ConEcon quantity surveyor report provided by Mr. Takhar to CareVest);
- security included assignment of the "Purchase and Sale Agreement with View Developments [*sic*] Ltd.";
- conditions precedent to advances included: (1) a detailed project appraisal report confirming market value of the property of not less than $10 million "as is" and completed value of the first phase of 15 townhouse units not to be less than $5,186,000; and (2) "satisfactory review of the Purchase and Sale Agreement dated May 1, 2010 with View Developments [*sic*] Ltd."; and
- "the Lender will discharge [its security upon] the residual three acres as per the Purchase and Sale Agreement dated May 1, 2010 with View Development [*sic*] Ltd. upon receipt of $2 million".

[497] Although Mr. Khela signed and initialed the March 25, 2011 CareVest Capital letter, he was not given a copy by Mr. Takhar. Nor, for that matter, had Mr. Takhar provided Mr. Khela with copies of the appraisals or quantity surveyor reports which

Mr. Takhar had commissioned for financing purposes. Mr. Khela may have been "going along" and he may have had some grasp of the "big picture", but some six years after the joint venture was first formed, neither he nor Mrs. Khela had yet undertaken the construction of any multi-unit townhouse development and they did not fully understand the complexities involved. I find as a fact that this lack of experience contributed to their sudden rejection of the financing less than one month later.

[498] On April 19, 2011, Mr. Takhar and Mr. Khela attended at the offices of McQuarrie Hunter to sign the formal CareVest Capital loan documents. The lawyer at McQuarrie Hunter attending to the transaction on their behalf was again Mr. Gregory van Popta. The documents signed by Mr. Khela at that meeting included:

- a directors' resolution authorizing the CareVest loan transaction and the granting of related security;
- a guarantee by Mr. Khela to CareVest of the payment of the loan and Phoenix Homes' liability to CareVest;
- a general security agreement between Mr. Khela and CareVest; and
- an environmental liability indemnity agreement, also guaranteed by Mr. Khela, for the benefit of CareVest.

[499] Mr. Takhar also signed the directors' resolution and, on behalf of Phoenix Homes, the various documents required to be executed by that company. One of those documents was an assignment agreement, "dated effective the 19th day of April 2011", between Phoenix Homes and CareVest pertaining to the May 1, 2010 "offer to purchase" a certain parcel of the 208th Street Properties, "a copy of which is attached as Schedule 'A'".

[500] The copy of this assignment agreement put in evidence at trial did not actually have any such Schedule "A" attached but did contain on page three a written "Assignment Acknowledgement" by View Side on which Mr. Gill's signature appears.

The evidence at trial is not clear in relation to how or when Mr. Gill signed this document.

[501] As with the execution of the View Side Option Agreement registered on title to the 208th Street Properties in January 2011, Mr. van Popta had no meaningful recollection of the April 19, 2011 meeting with Mr. Khela and Mr. Takhar. He did testify that he would have explained and discussed all of the documents with the parties before they signed. He had no recollection of Mr. Khela raising any objections or concerns to the documents and, had that occurred, he said he would never have allowed Mr. Khela to sign. He also said he would have recalled if Mr. Khela was unable to converse in English since he, Mr. van Popta, does not speak other languages.

[502] In his November 16, 2011 affidavit, Mr. Khela said that Mr. van Popta did not explain the loan documents to him but merely told him where to sign. I do not accept this evidence. I am satisfied that Mr. van Popta did indeed provide some explanation in English of the meaning and content of the documents he asked Mr. Takhar and Mr. Khela to sign during the April 19, 2011 meeting at the McQuarrie Hunter offices.

[503] However, I have already made a finding that, while Mr. Khela speaks some broken English, he cannot read English with much competence and he has very limited comprehension of legal documents written in English unless they are explained or translated to him in Punjabi. I am satisfied, and I find as a fact, that, while Mr. Khela had a very basic understanding of some of the loan documents, including his personal guarantee, he did not read them at the time (and he would not have fully understood them had he done so) and he was not given a copy of the documents to take away with him at the conclusion of the meeting.

[504] The parties agree that on the following day, April 20, 2011, a meeting occurred between Mr. Takhar, Mr. Khela and Harpreet Khela to discuss the CareVest loan and the 208th Street Properties Project. Mr. Khela had become very worried about the size of the loan, how it would be paid off and his potential exposure under the personal guarantee for very substantial amounts of money.

[505] The parties also agree that Mr. Takhar provided a detailed explanation respecting the potential profit from the 208th Street Properties development and that he illustrated his explanation to Mr. Khela by way of handwritten notes/calculations on a piece of paper (a copy of which was marked as an exhibit at trial).

[506] The handwritten notes/calculations are difficult to understand without an accompanying explanation. Essentially, Mr. Takhar used a (possibly conservative) $300,000 per door sale price to indicate how the $14.6 million loan would be paid off after 90 townhouses had been constructed. The value of the serviced land for the unbuilt 67 apartment units and 17 townhouses was set out at $6.8 million. The profit from building out those units would be an additional $4.2 million. Mr. Takhar then estimated an $11 million profit could be achieved based on these conservative numbers.

[507] I am not satisfied that Mr. Khela fully understood, let alone accepted, Mr. Takhar's explanation and calculations. However, his subsequent November 16, 2011 affidavit captures what I consider to be the nub of the matter from his perspective:

> The calculations demonstrated that we would need to construct and sell 90 units before paying off the loan. Further, the calculations demonstrated that the projected profit from constructing the entire project and selling it would be less than the profit of selling the property immediately.

[508] Mr. Khela has constructed an elaborate justification for his decision to terminate the CareVest loan, but the heart of the matter is, and I find as a fact, that Mr. Khela's risk tolerance for personal exposure on guarantees arising from a project that would take several years to complete was far lower than that of Mr. Takhar's. I find that Mr. Khela decided he much preferred the proverbial "bird in the hand" (profit from an immediate sale) rather than the "bird in the bush" (future profit from completing the development).

[509] Counsel for Mr. Takhar describes the situation as follows:

> The [Khelas] stopped the CareVest financing because after agreeing to proceed in signing off on the loan documents, they got "cold feet", plain and

> simple… They wanted to back out of the personal guarantee of $14.661 million… They were property flippers and this risk scared them.

[510] I am inclined to agree, although I would employ less derisive terminology. The real question is whether, as a matter of law, Mr. Khela was entitled to retreat, a question to which I will return later.

[511] In any event, on April 21, 2011, Mr. and Mrs. Khela inquired of Mr. van Popta whether all of the loan documents had been sent to CareVest. They learned that the material had not yet been delivered whereupon they asked him to place the matter on hold. Later that evening, Mrs. Khela sent Mr. van Popta an email on behalf of her husband:

> As per our discussion with you today, this is written confirmation that the CareVest Capital Mortgage Financing deal should NOT be completed until you have heard from me. You agreed not to send CareVest lawyers the final paperwork until the end of next week, but I would like you to wait until I give you instructions to do so.
>
> Nirmal and I have some issues that need to be resolved before the financing is forwarded to Phoenix Homes Ltd.

[512] In the following 24 hours, the Khelas firmed up their intention to terminate the CareVest loan. In the early morning of April 23, 2011, they emailed to Mr. van Popta a letter dated the day before advising:

> …We have decided to terminate this transaction i.e. we do not wish to proceed with the financing as detailed. Thus, please do not action any papers previously filed. Please terminate this refinancing.
>
> Please confirm that this process has been halted… Please note Mr. Nirmal Takhar is not authorized to act on my behalf… If you have any questions please contact me directly.

[513] On April 26, 2011, Mr. van Popta emailed the Khelas confirming their "advice to put this mortgage on hold for now" and also pointing out:

- CareVest can cancel the loan commitment if it is not put in place by the end of the month;

- in that case the company and the guarantor would still be liable to CareVest for their full commitment fee plus their legal fees;

- “in addition, you’ll need to consider whether or not Mr. Takhar will suffer damages on account of your termination of the commitment and whether or not you’ll be liable to him for those damages”; and

- independent legal advice is recommended.

[514] On April 27, 2011, Mr. Khela and Mr. Takhar met again at the latter's request. At that time Mr. Takhar again attempted to explain the profitability of the 208th Street Properties development, using similar handwritten calculations on a note of paper. The conservatively estimated profit was again demonstrated to be in the vicinity of $10–11 million. Mr. Khela remained unconvinced.

[515] The parties do not agree on precisely what was said at this April 27, 2011 meeting. Mr. Khela testified that Mr. Takhar threatened lawsuits by both CareVest and View Side should the loan and the development not proceed. He also says that, by this time, he and Mrs. Khela had become convinced Mr. Takhar was lying when he denied any relationship with View Side. He says he was suspicious the View Side Contract reflected a low price that reduced the profitability of developing the remaining portion of the land and was designed to provide more profit in the hands of Mr. Takhar.

[516] Counsel for Mr. Takhar submits these are baseless accusations designed to justify the unjustifiable—i.e., Mr. Khela's unreasonable refusal to proceed with the 208th Street Properties development. I agree that Mr. Khela's speculation regarding the validity of the View Side Contract lacked merit and, indeed, I have made a finding of fact to that effect. However, it turns out that Mr. Khela's suspicions regarding self-serving misconduct on Mr. Takhar’s part were not entirely without foundation, matters which I will address next.

d. Entitlement to terminate the loan and the 208th Street Properties Project

[517] Mr. Khela's refusal to proceed with the CareVest financing resulted in the cancellation of that transaction. Thereafter, the development of the 208th Street Properties petered out and has not proceeded since. Nor, of course, has any sale occurred of the proposed 40-unit eastern parcel to View Side.

[518] On May 5, 2011, Mr. and Mrs. Khela again attended at the offices of McQuarrie Hunter to review documents. It was at this time that they first discovered the “final” version of the View Side CPS (Exhibit 25), the version which changed the deposit structure from $700,000 to $1.2 million (the deposits paid by the “circling” of monies described earlier in these reasons).

[519] It was also at this time that the Khelas discovered the existence of the Phoenix Homes shareholder resolutions on which the signature of Mrs. Khela had been forged. As noted earlier, these resolutions had also been signed by Mr. Takhar and, among other things, purported to appoint him as the sole director of the company, waived the preparation of annual financial statements, and “approved, ratified and confirmed” contracts, acts, and payments made by Mr. Takhar as director.

[520] In late May or early June 2011, Mrs. Khela sent an email on behalf of Mr. Khela to Mr. Dutton of CWPC requesting copies of their appraisals for the 208th Street Properties. On June 3, 2011, CWPC emailed the Khelas a copy of their June 15, 2010 “hypothetical appraisal” of the lands, excluding that portion of the property that was the subject matter of the View Side Contract. That appraisal assessed market value at $10 million as of May 18, 2010.

[521] Mr. Dutton informed Mr. Khela that, with respect to the 40-unit View Side Project, the client for appraisal purposes was “View Side Development and Nirmal Takhar, not Phoenix Homes” and that he would not be able to release the appraisal for that parcel to Mr. Khela unless consent was first obtained from both Mr. Takhar

and View Side. He also advised: “Nirmal indicated that I should not send you a copy [of the appraisal] when it has been completed”.

[522] CWPC completed its appraisal of the 40-townhouse View Side parcel on June 21, 2011. A copy of that appraisal was eventually produced in the course of the litigation. The value of that parcel as of May 31, 2011 was appraised at $2,800,000 “as if vacant”, a value that excluded the cost of site servicing (approximately $500,000) which was payable by Phoenix Homes as part of the View Side Contract.

[523] Mr. Takhar testified that at the end of the April 27, 2011 meeting, Mr. Khela told him he did not want to proceed with the development of the 208th Street Properties and that Mr. Takhar should make an offer to buy out Mr. Khela's interest in Phoenix Homes.

[524] On June 27, 2011, Mr. Takhar made a written offer to purchase Mr. Khela's interest in Phoenix Homes (a shareholder loan and 50 class A shares) for $2,140,000. He proposed a closing date of July 15, 2011, payment of $1,000,000 in cash on closing, and an unsecured promissory note in the amount of $1,140,000, due without interest by January 31, 2012.

[525] Given that the western portion of the 208th Street Properties had been appraised at $10 million one year earlier, Mr. Takhar’s offer was substantially less than 50 percent of Phoenix Homes’ equity in the property. Mr. Khela did not respond to the offer and instead initiated the petition proceedings several months later.

[526] In all the circumstances and based on my findings of fact, I conclude as a matter of law that Mr. Khela was entitled to withdraw his support for the CareVest financing transaction and ultimately to terminate the joint venture with Mr. Takhar.

[527] At its most basic, this case involves a situation where two equal joint venture shareholders have become deadlocked following a breakdown of the mutual trust and confidence upon which their original undertaking was founded. Both of the joint venture principals breached the terms of their initial oral joint venture/shareholders’

agreement and both have at various times acted dishonestly not only as between themselves (and with other third parties) but also before the court.

[528] Mr. Takhar's misconduct, whether as a joint venturer in or as a director of Phoenix Homes, includes but is not limited to:

- forging Mrs. Khela's signature on corporate resolutions, including resolutions purporting to appoint him as the sole director of the company and approving transactions made by him on the company's behalf;

- forging Mrs. Khela's signature on a January 5, 2009 $8,000 Phoenix Homes' cheque payable to Phoenix Construction;

- pursuing the 199A Property specific enforcement litigation in the name of Phoenix Construction instead of Phoenix Homes and ultimately securing a court order requiring the property to be sold to Phoenix Construction rather than Phoenix Homes, all without discussing and securing Mr. Khela's express consent to such matters beforehand;

- ignoring or overriding Mr. Khela's wish to sell the 199A Property (in which Phoenix Homes had a beneficial interest by virtue of the April 2005 addendum and related initial deposit and expense payments) and proceeding to purchase that property in the name of Phoenix Construction, again without approval and consent from Mr. Khela beforehand;

- entering into the View Side Contract in 2010, thereby committing Phoenix Homes to sell part of the 208th Street Properties to View Side and to fund the municipal approvals and off–site servicing required for its development, all without first informing and securing Mr. Khela's consent to the transaction;

- failing to provide Mr. Khela with the "final" version of the View Side CPS (the additional terms of which were also negotiated by Mr. Takhar without Mr. Khela's prior knowledge and consent) and providing for the execution and registration of the View Side Option Agreement on title to the 208th Street

Properties, again without informing or securing Mr. Khela's consent beforehand;

- failing to disclose to Mr. Khela or Phoenix Homes Mr. Takhar's history of substantial personal indebtedness to Mr. Gill, the principal of View Side, and orchestrating the “circling” of deposit monies in a manner which not only eliminated that debt but also resulted in $1.2 million being received by Phoenix Homes and then immediately paid out to Phoenix Construction; and

- paying the last three deposits into, and then immediately and inappropriately “scooping” them from Phoenix Homes’ NSCU bank account into the hands of Phoenix Construction to circumvent any objection by Mr. Khela to their withdrawal.

[529] Much of the problem here is of Mr. Takhar’s own making. In his testimony he himself stated that “partners” should “discuss and agree everything”, yet he did not do this. Both joint venture principals were 50/50 shareholders and directors in Phoenix Homes and both were entitled to be fully informed about and to have equal say in the conduct of the company’s business, including decisions about whether to sell or develop the properties Phoenix Homes had acquired and whether to proceed with significant financial transactions.

[530] Some of the misconduct listed above was not actually known to the Khelas at the time of the CareVest financing and only came to light during this litigation. But I find as a fact that their trust and confidence in Mr. Takhar had already been eroded by his unilateral decision making, including the sale against their wishes of the 199A Property to Phoenix Construction and entering into the View Side Contract regarding the 40-unit parcel of the 208th Street Properties without their prior knowledge and consent. They were questioning the validity of the expenses reconciliation provided by Mr. Takhar’s accountant and had become understandably suspicious of Mr. Takhar’s relationship with View Side. All of this combined with their very real concern about personal liability for the substantial CareVest debt obligation and resulted in their decision to back away notwithstanding Mr. Takhar’s assurances of profitability.

[531] I also find that the Khelas' decision to terminate the financing and ultimately the joint venture development of the 208th Street Properties was further reinforced and justified by: (1) their discovery at the McQuarrie Hunter offices of forged directors' resolutions and the "final" version of the View Side CPS; (2) the refusal, on Mr. Takhar's instruction, of CWPC to release the appraisal of the View Side parcel; and (3) the additional wrongful conduct of Mr. Takhar subsequently disclosed in this litigation.

[532] I referred earlier in these reasons to authority supporting the proposition that termination of a joint venture is warranted when the mutual trust underlying the original undertaking has dissolved. That is precisely what occurred here, and Mr. Khela exercised his right to terminate the joint venture accordingly. In these circumstances he has no liability to Mr. Takhar for breach of contract.

[533] In the absence of any contractual term regarding mechanics for dispute resolution or any settlement between the parties, the parties ultimately have recourse to the deadlock procedures and remedies provided in the *BCA*. That may entail liquidation of Phoenix Homes pursuant to s. 324(1) of the *BCA* should the court consider it just and equitable to do so, or any of the other remedies contemplated in s. 227(3) of the act. Any such proceeding would necessarily involve the creditors of Phoenix Homes including, of course, those prosecuting counterclaims in this litigation, a matter to which I now turn.

XI. THE COUNTERCLAIMS FOR WRONGFUL FILING OF CPLS AND FOR BREACH OF CONTRACT

[534] As noted much earlier in this already far too lengthy judgement, all of the defendants (except Phoenix Homes 2011) have issued counterclaims in this action. I will deal with each of them separately.

a. The Phoenix Star counterclaim

[535] The Phoenix Star counterclaim seeks general and punitive damages against Phoenix Homes and the Khelas personally on the basis that the former never had an arguable claim to an interest in the 160th Street Properties and that the latter caused

Phoenix Homes to file certificates of pending litigation ("CPLs") against title to those lands knowing full well they did not have a valid claim. Phoenix Star alleges that the Khelas caused these CPLs to be filed "for the collateral purpose of creating leverage for the plaintiff in this litigation", a wrongful purpose constituting an abuse of process.

[536] The Response to Counterclaim filed by Phoenix Homes and the Khelas simply alleges that Phoenix Homes did indeed have an arguable case for an interest in the 160th Street Properties and that the filing of the CPLs was therefore neither wrongful nor an abuse of process. The pleading also alleges that "there is no basis to pierce the corporate veil of Phoenix Homes for a claim personally against the Khelas".

[537] Section 215 of the *Land Title Act* authorizes registration of a CPL against title where a person who has commenced or is a party to a proceeding claims an estate or interest in land.

[538] Sections 252–58 of the *LTA* provide for the cancellation of a registered CPL. Sections 256 and 257 provide a process whereby the court may cancel the registration on application of the registered owner or another interested party. On the hearing of any such application, the court has the discretion to order cancellation if the CPL claimant gives satisfactory security or it may refuse cancellation but order the CPL claimant to provide an undertaking "as to damages properly payable to the owner as a result of the registration of the CPL".

[539] Our Court of Appeal has held that ss. 256 and 257 of the *LTA* create a "statutory cause of action". In *Liquor Barn Income Fund v. Becker*, 2011 BCCA 141, the Court stated:

> [23] The statutory cause of action created by ss. 256(1) and 257(1) of the Act is different from the common law cause of action for damages for the wrongful filing of a *lis pendens* (now referred to as a CPL). In order to succeed at common law, the plaintiff must establish the defendant had a malicious or unlawful purpose in filing the CPL that amounts to an abuse of process. To recover damages, the successful defendant land owner (in the underlying action) must establish that they suffered or were likely to suffer adverse consequences that flowed from the registration of the CPL. In other words, there must be a causal connection between the registration of the

CPL and the damages suffered: *Sagoo v. Reyat,* [1985] B.C.J. No. 612, 1984 CarswellBC 1795 (B.C.S.C.) at para. 6.

[24] The statutory scheme under the Act was first introduced by the legislature in 1921. It removes the inherent difficulties in the common law cause of action which requires *mala fides* or improper motive to be established before damages can be awarded for the wrongful filing of the CPL. The only requirement of s. 256(1) is that the registered owner of the property, or a person who "claims to be entitled to an estate or interest in the land" against which the CPL is registered, is able to demonstrate hardship and inconvenience that is caused or is likely to be caused by the registration of the CPL. Liability for damages will follow where the plaintiff provides an undertaking to abide by any court order for damages "as a result of the registration of the certificate of pending litigation" (s. 257(1)(b)(i)). Absent such an undertaking, there can be no recovery of damages in the event the plaintiff's action fails.

[25] This statutory claim for damages based on the plaintiff's undertaking as to damages was described in *Rosinante* as follows:

> [23] In *Marshall v. Heidi* [1984 CanLII 788 (BC CA), [1984] 56 B.C.L.R. 107] Mr. Justice Hutcheon also discusses the separate statutory claim for damages that may arise under sections 235 and 236 [now 256 and 257] of the *Land Titles Act* where the court orders a party, as part of the terms for refusing to order cancellation of the registration of the *lis pendens,* to give an undertaking to abide by any order that the court may make as to damages. In those circumstances the liability for damages would arise, of course, from the giving of the undertaking. The court may properly require such an undertaking without, of course, any demonstration of malice or the other ingredients which would underlie a cause of action for abuse of process.

[540] The common law cause of action respecting an improperly filed CPL as an abuse of process is described in *Taylor v. Banicevic*, 2017 BCSC 1538 as follows:

> [245] The registration and maintenance of certificates of pending litigation against lands may be actionable as an abuse of process where it was done maliciously or for an improper purpose collateral to the ostensible purpose of the proceeding: *Marshall v. Heidi* (1984), 1984 CanLII 788 (BC CA), 56 B.C.L.R. 107 (C.A.).
>
> [246] To similar effect is *Palmer v. Palmer*, 2014 BCSC 1364, var'd on other grounds at 2015 BCCA 438. In this court, Justice Kloegman found no such abuse in that case. She observed:
>
> > [45] The tort of abuse of process is made out when a party shows a misuse or perversion of the Court's process for an exterior or ulterior purpose. In other words, using a certificate of pending litigation to tie up a property and prevent it being sold to anyone else as a negotiation tactic regarding an unrelated agreement would be an abuse of process: *D.K. Investments Ltd. v. S.W.S. Investments*

> *Ltd.*, 1984 CanLII 398 (BC SC), [1984] 59 B.C.L.R. 333 (S.C.), aff'd 1986 CanLII 920 (BC CA), [1986] 6 B.C.L.R. (2d) 291 (C.A.).

[247] The Court of Appeal in *Palmer* adopted this statement of the law. In addition, the court stated:

> [51] In the cases to which we have been referred, the judges made clear findings that the purpose for filing a lien or CPL or similar instrument was completely collateral to the litigation. It served no purpose other than extraneous to the litigation and realistically was substantively unsupportable. In *Hundal*, Fenlon J., as she then was, stated:
>
> > [104] In considering whether Mr. Hundal had an unlawful or malicious purpose in filing the CPL, I set aside the question of whether the constructive trust pleaded by Mr. Hundal is Border Carrier's claim rather than his personally, and further set aside the question of whether there was any real prospect of recovery of an interest in property rather than an award of damages if unjust enrichment could be established. **The question I am left with is not whether the plaintiff properly framed and pleaded his cause of action in unjust enrichment, but whether he framed his case in this way knowing that there was no basis for a claim against Mr. Bains' home and for the improper purpose of filing a CPL to inconvenience Mr. Bains and obtain an advantage in the litigation**: *Seville Properties Ltd. v. Coutre*, *et al*, 2005 BCSC 1105.
> >
> > [Emphasis in original.]
>
> [248] What I take from the above authorities is that it must be proven that the plaintiff knew and intended that the filing of the CPL was inappropriate (for example, knowing no such claim existed or it was done for an improper purpose). This requirement of showing the plaintiff's intent remains throughout the maintenance of the CPL's registration. To simply show that the plaintiff was ultimately proven wrong in registering the CPL through the litigation process is not sufficient to prove malice or improper purpose.

[541] In *Oei v. Hui*, 2020 BCCA 214, the Court of Appeal recently clarified at para. 34 that "advancing a false claim, for wrongful motives, is not enough to establish the [common law] tort of abuse of process." While such claims are unethical and "odious to the court process", liability for abuse of process will only occur when a claim is both "improper" (i.e., it is knowingly false and meritless) and advanced for a purpose that is truly "collateral" to and "outside the ambit of" the litigation between the parties: *Oei* at paras. 35–37.

[542] In this case, Phoenix Homes filed a CPL against some of the strata lots forming part of the 160th Street Property development on January 10, 2014, the same date on which it filed its Amended Notice of Civil Claim in the derivative action to correct the PID numbers for 11 of the strata lots collectively defined as the "Belcroft Properties".

[543] It is not seriously contested by Phoenix Star or the other Takhar defendants that the derivative action claims an interest in the 160th Street Properties—after all, Phoenix Homes is claiming beneficial title to the properties and seeks a declaration they are being held in trust for its benefit. Phoenix Star also concedes that, in the absence of any court-ordered undertaking by Phoenix Homes to pay damages to Phoenix Star, an abuse of process must be established at common law in order to substantiate Phoenix Star's Counterclaim. It says that the facts of this case "comfortably satisfy the balance of probabilities standard" that the Khelas have made, indeed fabricated, a baseless claim that they knew from the outset had no merit whatsoever.

[544] I have already made a finding that Mr. Khela's evidence regarding his introduction of the 160th Street Properties to Mr. Takhar is fabricated and entirely false. I have also found that, not only did he himself lie to the Court on the matter, he procured and presented to the Court evidence which he knew to be untrue (the Banwait letter) and a document which is not genuine (the Oceanview Star cheque).

[545] This is not a case where the plaintiff had a weak but arguable case which failed on the merits. Instead, this is a case where the derivative claim regarding the 160th Street Properties was brought, and the CPL was filed, by the Phoenix Homes shareholder/director who knew full well that it had no merit. Based on the case law referred to above, I have no hesitation in concluding that the CPL was filed for an improper collateral purpose, namely, as a litigation strategy to pressure or leverage settlement of the other unrelated claims, and was actionable by Phoenix Star as an abuse of process.

[546] The question remains whether, as a matter of law and on the facts of the case, the Khelas have personal liability to Phoenix Star as a party to the abuse of process. It is, after all, an intentional tort and the shareholder/director who initiated the claim, albeit with leave of the court, has a statutory and fiduciary duty to act honestly and in good faith in the best interests of the corporation, Phoenix Homes.

[547] The law regarding personal liability of employees, directors or other agents of a corporation for tortious conduct committed while acting on behalf of the corporation is not entirely clear and was reviewed in detail in *XY, LLC v. Zhu*, 2013 BCCA 352. Generally speaking, the corporate veil will protect such persons from personal liability except where their conduct is sufficiently deceitful or dishonest so as to take them outside their corporate role or is itself sufficient to create an "independent" cause of action against them: *XY, LLC* at paras. 61, 73. Furthermore, "fraudulent conduct has historically fallen into an established category in which personal liability has been imposed on agents and employees": *XY, LLC* at para. 74. In my view, Mr. Khela's conduct is sufficient to meet either test in this case.

[548] I am, however, mindful that the derivative action is in substance a contest between individual shareholders in Phoenix Homes (see *Discovery Enterprises Inc. v. Ebco Industries Ltd.*, 41 B.L.R. (2d), 1998 CanLII 6453 at para. 9 (C.A.)) and that one of those shareholders, Mr. Takhar, is the "real" or beneficial owner of Phoenix Star notwithstanding the sham ownership/governance structure he created in order to deceive banks. While the Phoenix Star counterclaim against Phoenix Homes is a tort claim which does not ordinarily trigger equitable doctrines regarding "clean hands" before becoming entitled to a remedy, one cannot overlook that Mr. Takhar himself has been guilty of numerous deceits in furtherance of his self-interest in conducting the business of Phoenix Homes and Phoenix Star. To put it bluntly, and as noted earlier in these reasons, he is not a sympathetic plaintiff when it comes to allegations of abuse of process. Any damages to which Mr. Takhar or Phoenix Star may be entitled should arguably only be nominal in the circumstances.

[549] I have already dismissed Phoenix Homes' derivative claim against Mr. Takhar and Phoenix Star related to the 160th Street Properties. In its counterclaim and final submissions to the Court, Phoenix Star seeks:

- a “pronouncement” of liability on the part of Mr. and Mrs. Khela and Phoenix Homes, jointly and severally, for abuse of process and the filing of the CPL, with damages to be assessed at the second phase of these trial proceedings;
- an order discharging the CPL as against the remaining 160th Street Properties from which it has not already been discharged and also as against the funds from earlier sales of the strata lots in the development which remain in lawyers’ trust accounts pursuant to an agreement between the parties; and
- an order that Phoenix Star is at liberty to access and use the said funds and the further interest accrued thereon.

[550] I decline to pronounce liability on the part of Mrs. Khela. She was neither a shareholder nor a director of Phoenix Homes at the time the CPL was filed. It was Mr. Khela who was granted leave to file the derivative action and who caused Phoenix Homes to file the related CPL. While Mrs. Khela supported and assisted Mr. Khela in the pursuit of the derivative action, she is really just a witness in this proceeding, albeit a dishonest one at times, and she has no independent tort liability to Phoenix Star arising from the filing of the CPL. The counterclaim against her is dismissed.

[551] However, in the circumstances of the case and as discussed above, I agree it is appropriate to find both Phoenix Homes and Mr. Khela jointly and severally liable for abuse of process in filing the CPL against the 160th Street Properties and judgement is pronounced accordingly, with damages to be assessed.

[552] As well, I grant an order discharging the CPLs from both title and the substituted funds held in trust. However, I decline as inappropriate the request for an order granting liberty to Phoenix Star to disburse the trust funds as it sees fit.

Whatever private agreement the parties have put in place regarding these funds will presumably prevail.

[553] The parties have agreed that the question of costs will be addressed at a later date.

b. The View Side counterclaim

[554] The View Side counterclaim seeks relief only against Phoenix Homes. The claim for specific performance, damages, interest and costs has been severed and will be determined in the second phase of the trial proceedings. The remaining relief sought by View Side is as follows:

- a declaration that the View Side Contract is a valid and binding contract and that the View Side Contract remains extant;
- a declaration that View Side has an enforceable interest in the 40-unit portion of the 208th Street Properties and that the right to purchase registered by View Side against title to the 208th Street Properties on January 6, 2011 is a valid and enforceable charge against title.

[555] Earlier in these reasons, I dismissed the plaintiff's various challenges to the validity of the View Side Contract. In particular, I held:

- the View Side Contract neither offends s. 73 of the *Land Title Act* nor s. 59 of the *Law and Equity Act*, nor does it fail for vagueness, ambiguity or uncertainty as to its essential terms;
- in any event, the View Side Contract has been partially performed to the extent that View Side has paid substantial deposits to Phoenix Homes that have not been returned and this is sufficient to estop the latter from challenging the transaction on these grounds;
- the View Side Contract was not a sham transaction but rather was a *bona fide* purchase for an appropriate value;

- Mr. Takhar's breaches of his oral joint venture/shareholders' agreement with Mr. Khela and also his statutory and fiduciary duties to Phoenix Homes does not, in the circumstances of this case, warrant this Court making an order setting aside the View Side Contract; and

- neither Mr. Gill nor View Side are guilty of "knowing assistance" in Mr. Takhar's misconduct or are in "knowing receipt" of benefits derived therefrom, but instead are simply innocent victims of the deadlock between Mr. Khela and Mr. Takhar.

[556] In the result, I declare that the View Side Contract, as defined in this case, was and remains a valid and binding contract between Phoenix Homes and View Side and that the View Side Option Agreement is a validly registered charge against title to the 208th Street Properties. Whatever additional relief may be available to View Side is to be determined at the second phase of these trial proceedings.

c. The Takhar and Phoenix Construction counterclaim

[557] Assessing this counterclaim is made difficult by the muddling of the claimants and their claims, the use of defined terms in the pleadings, and a certain lack of clarity in the orders severing liability and quantum. I will attempt to unbundle matters as best I can.

[558] First, Mr. Takhar/Phoenix Construction attempt to impose contractual liability upon Mrs. Khela by alleging that Mr. Khela had "actual, implied and/or ostensible authority" to act on her behalf by entering into the "199A Agreement" and the "208 Agreement" on their joint behalf. The Khelas are then alleged to have breached the "208 Agreement" (by failing to contribute the required additional money towards the development of the 208th Street Properties), thereby causing Mr. Takhar loss and damage. They are also alleged to have "caused [Phoenix Homes] to wrongfully register certificates of pending litigation against [the 199A Property]" thereby causing both Phoenix Construction and Mr. Takhar to suffer loss and damage.

[559] Next, Mr. Khela's breach of the “208 Agreement” (and the “construction loan agreement”, an undefined term) is alleged to have “directly prevented the [208th Street Properties] from being developed, subdivided. constructed and sold” which has also caused Mr. Takhar loss and damage.

[560] Then there are claims for relief against Phoenix Homes alone, namely:

- all “208 Development Costs” (a term defined in the Takhar/Phoenix Construction Second Further Amended Response to Civil Claim), which are claimed to be one or more of

    (a) a “loan” for which Phoenix Homes is “indebted” to “Takhar and/or Phoenix Construction";

    (b) “money had and received” by Phoenix Homes which it is obliged to repay to the two counterclaimants; and

    (c) “unjust enrichment” of Phoenix Homes; and

- a “*quantum meruit*” award for further “unjust enrichment” of Phoenix Homes based on the value of “management services” provided by Mr. Takhar to advance the development of the 208th Street Properties.

[561] Two further claims are made by Mr. Takhar/Phoenix Construction in the alternative and relating to each of the 199A Property and the 160th Street Properties, in the event this Court declares that either or both of them “rightfully belong to Phoenix Homes”. If so, then Mr. Takhar/Phoenix Construction claim that Phoenix Homes has been “unjustly enriched by the value of the services and money” they provided to purchase and develop the projects in question and they seek compensation on the basis of *quantum meruit* or unjust enrichment.

[562] The “208 Agreement” referred to above is defined in the Takhar/Phoenix Construction Second Further Amended Response to Civil Claim. It is the alleged agreement between Mr. Khela and Mr. Takhar in 2006 to substitute the 208th Street

Properties for the 199A Property as their joint venture development and to credit the Khela's initial $150,000 investment in the former to the latter.

[563] This is an agreement or transaction which I have found as a fact did not actually occur. However, I also found as a fact that there existed an oral joint venture/shareholders' agreement between the principals that they would equally share the expenses and profits of their joint venture, and I will treat this obligation as the basis for any counterclaim for alleged breaches related to any failure to contribute or failure to proceed with financing agreements (the latter in this instance being the CareVest loan).

[564] I first start with the counterclaim insofar as it relates to Mrs. Khela.

[565] While Mr. and Mrs. Khela considered themselves to be a team for family business purposes, the actual transactions in this case occurred between the husbands and did not include their spouses. I have already found that, because of her superior education and fluency in English, Mrs. Khela was appointed as the initial shareholder and director in Phoenix Homes, however this was at the request of Mr. Khela and she was at all times acting as his nominee. The counterclaims against her related to breach of contract must therefore be dismissed.

[566] I also dismiss the claims made by Phoenix Construction against Phoenix Homes framed as any loan, indebtedness, money had and received, and/or unjust enrichment. The agreement between the two joint venture principals was to make equal financial contribution towards the development projects, something which Mr. Khela did by direct payments into the Phoenix Homes' bank accounts but which Mr. Takhar did by having Phoenix Construction directly pay project expenses and creditors. Mr. Takhar's accountant, Mr. Sandhu, testified that his client's "contributions" in this regard would be booked as shareholder loans to the joint venture corporation, which in my view is likely the most reasonable characterization. These are matters that will be taken into account when the final reckoning occurs in phase two of these trial proceedings.

[567] On the other hand, Phoenix Construction became the owner and developer of the 199A Property Project and is presumably the owner of the net sales proceeds held in trust in substitution for the land, albeit subject to Phoenix Homes' interest protected by the CPLs registered against title. I have found that Phoenix Homes has a valid beneficial interest in those lands notwithstanding the court-ordered sale of the property to Phoenix Construction. The appropriate remedy in respect of that interest is also to be determined at the second phase of this trial, however it will presumably take into account that all acquisition, litigation and development costs above and beyond the initial $150,000 contributed by Mr. Khela were paid directly or indirectly by Mr. Takhar and Phoenix Construction.

[568] My finding that Phoenix Homes retained an interest in the 199A Property notwithstanding the court-ordered sale to Phoenix Construction is dispositive of the claim for damages based on “wrongful” registration of CPLs against title. As held above, that counterclaim against Phoenix Homes and the Khelas by Mr. Takhar and Phoenix Construction is dismissed.

[569] That leaves the counterclaim by Mr. Takhar for damages against Mr. Khela on account of his alleged breach of contract for failure to make timely contributions to the development project after April 2008 and for terminating the project financing to which he and Mr. Takhar had agreed with CareVest Capital in April 2011.

[570] This claim must be dismissed based on my conclusions of fact and law that Mr. Khela was entitled to withdraw his support for the CareVest financing transaction and ultimately to terminate the joint venture with Mr. Takhar as a result of the latter's misconduct and the breakdown of mutual trust and confidence upon which their original undertaking was founded. Mr. Takhar bears much of the blame for that occurrence, however his disproportionately higher contribution towards the expenses of Phoenix Homes both before and after April 2011 will no doubt be taken into account when an appropriate remedy between the parties is fashioned in the second phase of this trial proceeding.

XII. SUMMARY AND CONCLUSION

[571] I summarize my key findings of fact and law and my conclusions to the questions posed in the plaintiff's version of the “Agreed Issues” in this litigation as follows:

a. 199A Property

- At all material times, Phoenix Homes was the rightful purchaser of the 199A Property pursuant to the April 29, 2005 addendum to the CPS signed by the parties and at no time did Phoenix Homes, or its two principals, Mr. Takhar and Mr. Khela, agree to relinquish its interest in that property and to substitute the 208th Street Properties Project in its place or to transfer to the latter any Phoenix Homes' payments made in relation to the former.

- In litigating the 199A Property specific enforcement lawsuit, Phoenix Construction was acting as an agent and trustee for Phoenix Homes which at all times had the beneficial right to complete the purchase of that property when and if the time to do so later materialized.

- By ignoring Phoenix Homes' beneficial interest in the 199A Property, overriding Mr. Khela's wish to sell that property, and proceeding to purchase that property in the name of Phoenix Construction in accordance with the court order secured in that regard, all without the approval and consent of Mr. Khela or Phoenix Homes beforehand, Mr. Takhar breached the terms of his joint venture/shareholders’ agreement with Mr. Khela and also his fiduciary and statutory duties to Phoenix Homes.

- As a result, Phoenix Homes is entitled to a remedy against Mr. Takhar and Phoenix Construction and with respect to the land itself (or the net proceeds of sale of such land which remain in trust pending the outcome of this litigation), to be more precisely determined at the second phase of these trial proceedings.

- At all relevant times, Phoenix Homes had an interest in the 199A Property sufficient to support the filing of a certificate of pending litigation against title and the counterclaim by Phoenix Construction and Mr. Takhar seeking damages for “wrongful filing” of such CPL is dismissed.

b. 160th Street Properties

- Mr. Khela did not first discover the availability of the 160th Street Properties in early 2006 and he did not bring this development opportunity to Phoenix Homes or to Mr. Takhar at that time. Mr. Khela's evidence in that regard is fabricated and entirely false. The 160th Street Properties did not form part of the Phoenix Homes joint venture and Mr. Takhar did not breach any statutory or fiduciary obligations owed to Phoenix Homes in that regard.

- The Phoenix Homes claims against Mr. Takhar and Phoenix Star related to the 160th Street Properties have no merit and are dismissed.

- The CPL registered in the name of Phoenix Homes against title to the 160th Street Properties was filed for an improper collateral purpose, namely, as a knowingly false/meritless litigation strategy to leverage settlement of other unrelated claims, and was thus actionable by Phoenix Star as a tortious abuse of process.

- Mrs. Khela has no liability for the abuse of process and Phoenix Star’s counterclaim against her for damages in that regard is dismissed. However, Phoenix Homes and Mr. Khela are jointly and severally liable to Phoenix Star for the tort of abuse of process and for damages to be assessed at the second phase of these trial proceedings.

- An order is granted discharging any CPL that may remain registered against any 160th Street Properties or standing as a charge against the funds from sales of the strata lots which remain in trust pursuant to an agreement between the parties. The requested order granting permission to Phoenix Star to disburse the trust funds is declined for being inappropriate in the

circumstances as its disbursement is to be determined by the parties in accordance with their agreement.

c. View Side

- The View Side Contract does not offend either s. 73 of the *Land Title Act* or s. 59 of the *Law and Equity Act*, nor does it fail for vagueness, ambiguity or uncertainty as to its essential terms.

- The View Side Contract was not a sham transaction but rather was a *bona fide* purchase for an appropriate value.

- By entering into the View Side Contract without first making full disclosure and securing the fully informed consent of Phoenix Homes and Mr. Khela, Mr. Takhar breached his oral joint venture/shareholders' agreement with Mr. Khela and also his statutory and fiduciary duties to Phoenix Homes. However, in the circumstances of this case, this does not warrant the Court making an order setting aside the View Side transaction and Phoenix Homes' claim for that relief is dismissed.

- Neither Mr. Gill nor View Side provided "knowing assistance" to Mr. Takhar in relation to his breaches of statutory and fiduciary duty to Phoenix Homes. Mr. Takhar did not have any legal or beneficial interest in View Side and was not acting as its agent when making the View Side Contract and breaching his statutory and fiduciary duties. Phoenix Homes' claim that View Side is jointly and severally liable for the actions of Mr. Takhar is dismissed.

- The View Side Contract was and remains a valid and binding contract between Phoenix Homes and View Side and the related View Side Option Agreement was validly registered as a charge against title to the 208th Street Properties. Phoenix Homes' claim for damages against View Side for "wrongful registration" of the View Side Option Agreement against title is dismissed.

- The Court grants View Side's request for a declaration that the View Side Contract is a valid and binding contract between the parties, however it declines to make any declaration at this time regarding enforceability of the View Side Contract in light of the as yet unfulfilled condition precedent for completion of the sale. That issue, along with whatever additional relief may be available to View Side in the circumstances, is to be determined at the second phase of these trial proceedings;

d. Takhar/Phoenix Construction counterclaim

- Mrs. Khela was not a party to the joint venture/shareholders' agreement and was merely a nominee for Mr. Khela when initially acting as a shareholder and director in Phoenix Homes. The Takhar/Phoenix Construction counterclaims against Mrs. Khela related to breach of contract are dismissed.

- The joint venture/shareholders' agreement required all expenses and profits to be shared equally but also required that each party would act honestly and in good faith and that all significant business decisions would be made through discussion and consent. Mr. Khela failed to make further financial contributions to the joint venture after April 2008 and Mr. Takhar has made a disproportionately higher contribution towards the expenses of Phoenix Homes following that date.

- However, Mr. Takhar's multiple breaches of his own obligations as a joint venturer in and as a director of Phoenix Homes, and the resulting breakdown of mutual trust and confidence upon which the original undertaking was founded, entitled Mr. Khela to terminate the CareVest financing transaction and ultimately to terminate the joint venture with Mr. Takhar. Mr. Takhar's claim against Mr. Khela for damages for breach of contract is dismissed, however his "over contribution" towards the expenses of Phoenix Homes is to be taken into account when an appropriate remedy between the parties is fashioned in the second phase of this trial proceeding.

- The Phoenix Construction claim against Phoenix Homes, whether framed as any loan, indebtedness, money had and received, and/or unjust enrichment obligation, is dismissed. To the extent Phoenix Construction has properly paid for any expenses rightly attributable to the joint venture, such amounts form part of Mr. Takhar's "over contribution" and will be taken into account when the remedy as between the two joint venture principals is determined in the next phase of these trial proceedings.

[572] The parties have already agreed that the question of costs will be addressed at the second phase of this trial and I therefore make no order in that regard at this time.

"Kent J."