IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Boat Harbour Legacies Ltd. v. Tiara (BHL) Holdings Inc.,* 2024 BCSC 799

Date: 20240513
Docket: S235722
Registry: Vancouver

Between:

Boat Harbour Legacies Ltd.

Plaintiff

And

Tiara (BHL) Holdings Inc., Alvin Hui, Kenary Cove #1 Holdings Inc., Kenary Cove #2 Holdings In., Kenary Cove #3 Holdings Inc., Kenary Cove #4 Holdings Inc., Kenary Cove #8 Holdings Inc., Kenary Cove #9 Holdings Inc., Kenary Cove #10 Holdings Inc., Tiara (BHM) Holdings Inc., Tiara (BHM2) Holdings Inc., and Tiara (BHM3) Holdings Inc.

Defendants

And

Robert Hallsor and Reegan Evans

Defendants by counterclaim

In Chambers

Before: The Honourable Mr. Justice Gomery

Reasons for Judgment

Counsel for the Plaintiff and Defendants by counterclaim:	T.R. McDonald
Counsel for the Defendants:	E. Bojm H. Yu
Place and Date of Hearing:	Vancouver, B.C. April 12, 2024
Place and Date of Judgment:	Vancouver, B.C. May 13, 2024

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Overview

[1] All but one of the corporate defendants collectively hold legal title to lands intended for development in Nanaimo, British Columbia. The remaining company, "Tiara", owns the shares in the others and owns beneficial title to the lands. Alvin Hui is a director of Tiara.

[2] Robert Evans was an experienced developer of real estate. He entered into discussions with Mr. Hui to purchase Tiara's shares and so acquire the lands with a view to developing them. Mr. Evans was the majority shareholder and principal of a company, Boat Harbour, which is the plaintiff.

[3] Boat Harbour and Tiara entered into a share purchase agreement dated July 18, 2020 (the "SPA"). The SPA contemplated Boat Harbour's purchase of Tiara's shares and its beneficial title for a stipulated price that would vary depending on how long it took for Boat Harbour to conduct due diligence and remove subject clauses. Apart from the purchase price, Boat Harbour agreed in cl. 2.5 to pay Tiara $300,000 in exchange for which Tiara would not entertain offers from any other party to purchase the lands for a period of 18 months, during which time Boat Harbour could conduct due diligence. It was open to Boat Harbour to extend the exclusivity period for a further 18 months by paying Tiara a further $380,000 at the end of the due diligence period.

[4] At some point shortly after negotiating the SPA, Boat Harbour and Tiara executed an amending agreement termed an Addendum. It provided that Boat Harbour would have until August 18, 2020 to (1) sign the SPA and pay the $300,000 and (2) it would be a condition precedent to the SPA being deemed effective that they would have:

> … executed a Share Capital Purchase Agreement and Shareholders Agreement for a new company to act as the assignor of the Purchaser with to the [SPA] …

[5] Prior to August 18, 2020, Boat Harbour did not pay the $300,000 and it did not execute the two further agreements contemplated in the Addendum. However,

Boat Harbour did pay the $300,000 shortly afterwards, in two instalments, on August 21 and 27, 2020.

[6] The two further agreements were never prepared. Mr. Hui says that is because, in early August, after the Addendum was drawn up and presumably before August 18, Mr. Evans asked that "the Condition Precedent not be effective for more flexibility with investors and that we proceed with the SPA but without the Condition Precedent". Mr. Hui says that he agreed to this request and the parties carried out their obligations under the SPA as if the condition precedent had been waived.

[7] Mr. Evans died in August 2021. His daughter, Reegan Evans, inherited Boat Harbour. She was without experience in property development and hired advisors to assist her. In January 2022, she caused Boat Harbour to make the $380,000 payment required to secure an extension of the exclusivity period under the SPA.

[8] In June 2023, Boat Harbour and Tiara had a falling out. This lawsuit is the result. Boat Harbour takes the position that the SPA was always subject to a condition precedent that was never satisfied. It maintains that the SPA was void from the outset and seeks the return of the $680,000 it had paid to Tiara.

[9] The defendants seek dismissal of Boat Harbour's claims on an application for summary judgment or, alternatively, on a summary trial. They also seek an order pursuant to s. 215 of the *Land Title Act,* R.S.B.C. 1996, c. 250 [*LTA*], cancelling certificates of pending litigation ("CPLs") registered by Boat Harbour against title to the lands.

[10] For the reasons that follow, I allow the defendants' application for summary judgment. Boat Harbour's claims do not raise a triable issue. The only plausible explanation of Boat Harbour's $300,000 and $380,000 payments is that they were to secure the full period of exclusivity contemplated by the SPA. This is consistent with Mr. Hui's evidence, and there is no evidence to the contrary.

[11] I refuse the defendants' application to cancel the CPLs. Dismissal of the action will cause them to be cancelled at the end of the appeal period, or when an

appeal is disposed of, but the defendants seek immediate cancellation on the basis that Boat Harbour's pleading does not support its claim for an interest in land. Assuming the facts pleaded to be true, the claim is supported.

The application for summary dismissal of the action

Test for summary judgment

[12] This is an application for summary judgment pursuant to *Supreme Court Civil Rule* 9-6. Pursuant to subrule (5)(a), I must pronounce judgment if I am satisfied that there is no genuine issue for trial with respect to Boat Harbour's claim. I may pronounce judgment if I am satisfied that the only genuine issue is a question of law; subrule (5)(c).

[13] The defendants bear the burden of showing, on the evidence, that there is no genuine issue of material fact requiring a trial; *Canada (Attorney General) v. Lameman,* 2008 SCC 14 at para. 11 [*Lameman*]. Each side must put its best foot forward with respect to the existence or non-existence of material issues to be tried.

[14] I am not permitted to weigh evidence beyond determining whether it is incontrovertible; *Beach Estate v. Beach,* 2019 BCCA 277 at para. 49. I may draw inferences of fact based on the undisputed facts before the court, so long as the inferences are strongly supported by the facts; *Lameman*, at para. 11.

[15] In *Lameman,* the Supreme Court of Canada stressed the importance of the summary judgment procedure to the administration of justice. In a passage quoted in *McLean v. Law Society of British Columbia,* 2016 BCCA 368 at para. 36, leave to appeal to SCC ref'd [2016] S.C.C.A. No. 490, it stated:

> 10. … The summary judgment rule serves an important purpose in the civil litigation system. It prevents claims or defences that have no chance of success from proceeding to trial. Trying unmeritorious claims imposes a heavy price in terms of time and cost on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage. Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial.

Did clause 2.5 of the SPA fail to come into effect due to the failure of a condition precedent?

Relevant provisions of the SPA and Addendum

[16] The SPA is a lengthy, professionally drafted document. Tiara is the "Vendor" and Boat Harbour is the "Purchaser". The subject of the sale is "Shares" identified in Recital D as shares in the "Legal Owners" of the "Lands". Recital A identifies Tiara as the beneficial owner of the Lands and Recital B states:

> B. The Lands were historically used to ship coal beginning in the latter part of the nineteenth century. As a result, there may be coal and coal slag on the sea bed of the Lands. The Purchaser will need time to determine if remediation will be necessary and, if so, to what extent.

[17] Clause 2.1 sets out the Purchaser's agreement to purchase the Shares from the Vendor and the Vendor's agreement to pay the Purchase Price on the terms set out in the SPA. The Purchase Price is established in cl. 2.2. It is $16.8 million in the event of subject removal and closing before March 31, 2021, $17.35 million in the event of a closing between April 1, 2021 and March 31, 2022, and $17.98 million in the event of a closing between April 1, 2022 and March 31, 2023.

[18] Clause 2.3 provides for the incorporation of a new company, termed "NewCo", by the Purchaser prior to closing to be assigned the Purchaser's right to purchase the Shares. The Vendor is to be granted an option to purchase up to 25% of the capital of NewCo, in non-voting shares, as part of a separate option to purchase agreement.

[19] Clause 2.4 requires the Vendor to transfer its beneficial interest in the Lands to NewCo on closing, and states that NewCo will also become the sole shareholder of the Legal Owners.

[20] Clause 2.5 is of central importance to this case because it provides for the payments that Boat Harbour wishes to recover from the defendants. Boat Harbour's claim that it is entitled to recover these payments requires it to establish that something occurred to nullify the bargain constituted by cl. 2.5. The essence of the bargain is that, in exchange for the payments, Boat Harbour will have exclusivity

during a due diligence period and Tiara will not entertain offers to purchase the Lands from anyone else. Clause 2.5 states:

> **2.5 Payments by the Purchaser**
>
> The Purchaser shall make the following payments:
>
> (a) the Purchaser shall pay a $300,000.00 partially refundable payment to the Vendor at the time this Agreement is signed (the "First Payment") which will commence an 18 month period for the Purchaser to undertake a due diligence process (the "Due Diligence Period") during which time the Vendor will not be able to entertain any offers from anyone other than the Purchaser to purchase the Lands. $150,000.00 of this payment shall be refunded by the Vendor if the Purchaser cancels the contract in writing within ninety (90) days of signing this Agreement and requests the Vendor for such a refund;
>
> (b) the Purchaser may pay a further $380,000.00 irrevocable payment to the Vendor at the end of the Due Diligence Period (the "Additional Payment") to extend the Due Diligence Period for an additional eighteen (18) months, during which time the Vendor will not be able to entertain any offers from anyone other than the Purchaser to purchase the Lands;
>
> (c) the Purchaser shall pay the Purchase Price to the Vendor on the Closing Date, …
>
> [Emphasis added.]

[21] Boat Harbour relies on the Addendum for its argument that the SPA was nullified. The Addendum states, in its entirety:

> The Vendor and the Purchaser further agree to the following terms notwithstanding anything to the contrary in the Share Purchase Agreement (the "Original Agreement"):
>
> 1) the Purchaser shall have until August 18, 2020 at 12:00 pm to execute the Original Agreement and pay the 1st deposit to the Vendor.
>
> 2) There shall be the following condition precedent before the Original Agreement is deemed effective:
>
> the Vendor and the Purchaser shall have executed a Share Capital Purchase Agreement and Shareholders Agreement for a new company to act as the assignor of the Purchaser with to the Original Agreement on or before August 18, 2020.

Facts established by contemporaneous documentation and the defendants' evidence

[22] Boat Harbour had two directors: Mr. Evans, and a lawyer, Robert Hallsor, Q.C. (now K.C.). Mr. Hallsor practiced with Crease Harman LLP, a law firm in Victoria.

[23] Boat Harbour paid Tiara the $300,000 contemplated under cl. 2.5(a) of the SPA in two instalments: $256,250 by a Crease Harman trust cheque dated August 21, 2020, and the balance of $43,750 by a Crease Harman trust cheque dated August 27, 2020.

[24] Following Mr. Evans' death in August 2021, Ms. Evans caused Boat Harbour to retain Mark Stephenson as a real estate consultant with a view to finding a buyer for the project. She retained Bryce Geoffrey, a lawyer, to assist her in dealing with Boat Harbour's minority shareholders. Mr. Hallsor remained a director of Boat Harbour.

[25] On November 16, 2021, Mr. Geoffrey emailed Mr. Hallsor requesting information concerning the SPA and the Addendum (among other matters). He requested copies of the Share Capital Purchase Agreement and Shareholders Agreement for NewCo contemplated in the Addendum. Mr. Hallsor replied, with a copy to Ms. Evans, on November 24, 2021 stating:

> The initial $300,000 payment was made. I do not believe that the other conditions have been met.

[26] Ms. Regan borrowed $400,000 personally to enable Boat Harbour to make the $380,000 payment contemplated under cl. 2.5(b) of the SPA to extend the due diligence period. Boat Harbour paid Tiara the $380,000 on January 16, 2022.

[27] On July 11, 2023, Boat Harbour first took the position that the SPA had never come into effect due to a failure to satisfy the condition precedent set out in cl. (2) of the Addendum. It did so in an emailed letter from Mr. Hallsor to Mr. Hui.

Mr. Hui's evidence concerning the condition precedent in the Addendum

[28] Mr. Hui affirms in his affidavit #1:

> 6. In or around early August 2020, Robert Evans, the primary shareholder and controlling director of Boat Harbour who is now deceased, requested that the Condition Precedent be no longer effective as he desired more flexibility in dealing with investors interested in the development of the Lands.

[29] Mr. Hui affirms in his affidavit #3:

> 12. … [T]he reason a Share Capital Purchase Agreement was not signed was because Mr. Evans expressly requested in or around early August 2020 that the Condition Precedent be not effective for more flexibility with investors and that we proceed with the SPA but without the Condition Precedent. I accepted Mr. Evans' request on behalf of Tiara in August 2020 and the parties carried out the obligations of the SPA as if the Condition Precedent had been waived.

[30] Mr. Hui states that, having received the payments contemplated under the cl. 2.5 of the SPA, Tiara considered itself bound by the SPA not to entertain expressions of interest in the Lands from potential purchasers during the Due Diligence Period. In his affidavit #2, he affirms:

> 6. … There were several third parties interested in purchasing the Lands during the Due Diligence Period but Tiara immediately rebuffed any such interest. If Tiara was not subject to the terms of the SPA concerning the Due Diligence Period, it most likely would have bene able to sell the Lands to an interested third party at some time during the Due Diligence Period which lasted for three years.

[31] Mr. Hui's evidence is uncontroverted. Boat Harbour did not apply for leave to cross-examine Mr. Hui on his affidavits.

Is there a triable issue as to whether the parties intended to waive the condition precedent in the Addendum?

[32] In my opinion, there is no triable issue as to whether the parties intended to waive the condition precedent and bring the SPA into effect. Boat Harbour's decision to pay $300,000 after August 18, 2020 even though the parties had not settled on and executed the agreements required by the condition precedent set out in cl. (2) of the Addendum, only makes sense on the footing that the parties had

agreed to waive the condition precedent. The condition precedent required execution of the agreements on or before the August 18 deadline. Mr. Evans and Boat Harbour knew that the documents had not been drawn and executed. They made the payment anyway. Unless the condition precedent was waived, the SPA failed to come into effect and there was no reason to make the payment, but they made it.

[33] Mr. Hui's evidence offers an explanation for what occurred. His evidence is uncontradicted, and there is no plausible alternative explanation on offer.

[34] I find that the evidence incontrovertibly establishes that the parties intended to waive compliance with the Addendum and proceed with the SPA. The waiver took place no later than August 27, 2020, when Boat Harbour completed payment of the $300,000 initial payment. Mr. Hui's evidence is that it was orally agreed in early August, before the August 18 deadline.

[35] Boat Harbour further affirmed the ongoing validity of the SPA by making the $380,000 payment contemplated under s. 2.5(b) on January 16, 2022.

Was the intended waiver legally effective?

[36] Boat Harbour relies on s. 54 of the *Law and Equity Act,* R.S.B.C. 1996, c. 54. It sets out legal requirements for a waiver of a condition precedent to performance of a contract. Section 54 provides as follows:

> **Conditions precedent**
>
> 54 If the performance of a contract is suspended until the fulfillment of a condition precedent, a party to the contract may waive the fulfillment of the condition precedent, even if the fulfillment of the condition precedent is dependent on the will or actions of a person who is not a party to the contract if
>
> (a) the condition precedent benefits only that party to the contract,
>
> (b) the contract is capable of being performed without fulfillment of the condition precedent, and
>
> (c) where a time is stipulated for fulfillment of the condition precedent, the waiver is made before the time stipulated, and where a time is not stipulated for fulfillment of the condition precedent, the waiver is made within a reasonable time.

[37] In my view, s. 54 is not an obstacle to Tiara's reliance on the intended waiver. Early agreement on the Share Capital Purchase Agreement and Shareholders Agreement must have been intended for the benefit of both parties, and the subsequent intention to waive was mutual. The contract was capable of being performed without fulfillment of the condition precedent. Mr. Hui's evidence is that the waiver was agreed in early August, before the August 18 deadline.

[38] It is important that, after the August 18, 2020 deadline, both parties treated the SPA as a valid and subsisting agreement; *Smale v. Van der Weer,* 17 O.R. (2d) 480, 1977 CanLII 1384 (O.N.S.C.). In effect, the parties renewed the SPA by agreeing to proceed with it even though the condition stated in the Addendum had not been satisfied.

[39] In her affidavit, Ms. Evans affirms that she did not understand Boat Harbour's legal position and, in particular, "that the SPPA was (at least potentially) void due to the non-fulfillment of the Condition Precedent".

[40] Ms. Evans' assertion is premised on an assumption that in January 2022, it was open to Boat Harbour to renounce the waiver and take the position that the SPA was void. It was not. Boat Harbour had obtained the benefit of a period of exclusivity in which it could conduct due diligence. A court of Equity would not permit it to alter course only at the end of that period.

[41] Moreover, Ms. Evans' understanding in 2021 of Boat Harbour's legal position misses the point. It is Boat Harbour's understanding in 2020, when the waiver occurred, that matters.

[42] Even focusing on the position after Mr. Evans' death, Boat Harbour still must be taken to have known of the waiver. Mr. Hallsor was a director of Boat Harbour throughout. It is plain from his email of November 24, 2021 that he was aware that the $300,000 had been paid and the other conditions contemplated in the Addendum had not been satisfied. As a fiduciary, his knowledge and understanding

of matters pertaining to Boat Harbour must be attributed to Boat Harbour; G.H.L. Fridman, *Canadian Agency Law,* 3rd ed (LexisNexis Canada: 2017), at 10.10.

Did the SPA fail to come into effect on some other ground?

[43] Boat Harbour pleads, in the alternative, that the SPA and Addendum are unenforceable because they constitute no more than an agreement to agree. I disagree. At the very least, cl. 2.5 of the SPA was enforceable.

[44] Enforceability requires that the parties have objectively intended to enter into contractual relations and reached agreement on essential terms that is sufficiently certain to enforce; *Concord Pacific Acquisitions Inc. v. Oei,* 2022 BCCA 16 at para. 18, aff'g 2019 BCSC 1190 at para. 311, leave to appeal to SCC ref'd, 40089 (18 August 2022). It is obvious on the face of the SPA that the first requirement of an objective intention to enter into contractual relations was satisfied. In my opinion, the bargain constituted by cl. 2.5 of the SPA was sufficiently certain to allow enforcement by the court. Having accepted payment in exchange for exclusivity during the Due Diligence Period, Tiara was bound and, if Tiara had dealt with another potential purchaser, the court could have enforced Boat Harbour's right to exclusivity by granting injunctive relief or awarding damages.

[45] Boat Harbour pleads that the Lands are "landlocked" and inaccessible, that this renders performance of the SPA radically different from what was contemplated under the SPA, and that it was justified in terminating the SPA within the Due Diligence Period on this basis. However, the evidence unequivocally establishes that the Lands are accessible by public roads. Boat Harbour took a contrary position in discussions with Tiara in mid-2023, but there is no substance to it.

Can any of Boat Harbour's claims succeed if the SPA came into effect?

[46] Most of Boat Harbour's claims cannot survive my finding that the SPA came into effect. The essential difficulty is that the law will not permit Boat Harbour to claw back money that it paid to Tiara in exchange for a benefit – a period of exclusivity – that it received.

[47] Boat Harbour relies on the law of unjust enrichment. Its claim in unjust enrichment must fail because cl. 2.5 of the SPA constitutes a juristic reason for Tiara's enrichment by the payments; *Kerr v. Baranow,* 2011 SCC 10 at para. 41.

[48] Boat Harbour claims that it made the payments by mistake, "without knowledge that the SPA was null and void". This is probably just another way to frame the unjust enrichment claim, because mistake negates donative intent; Mitchell McInnes, *The Canadian Law of Unjust Enrichment and Restitution,* (LexisNexis Canada: 2014), ch 7. Regardless, the claim fails because the SPA was not null and void, and Boat Harbour was not mistaken.

[49] Boat Harbour pleads that Tiara received the payments subject to a resulting trust in its favour. The legal theory of the plea is that the payments were made without consideration and without an intention of conferring a gratuitous benefit, such as a gift; *McKendry v. McKendry,* 2017 BCCA 48 at para. 35. The plea fails because the payments were made pursuant to the SPA for good consideration.

[50] Boat Harbour pleads that, by virtue of the payments, it is entitled to an interest in the lands by way of an equitable purchaser's lien. This plea requires that the payments be characterized as payments on account of the purchase price under a contract to purchase the lands; *Pan Canadian Mortgage Group III Inc. v. 0859811 B.C. Ltd.,* 2014 BCCA 113 at para. 32. The payments did not have the required character. It is clear from cl. 2.1 and 2.5, read together, that they were not payments on account of the purchase price.

[51] Boat Harbour's notice of civil claim advances a claim of misrepresentation that raises somewhat different considerations. It pleads that, prior to entering the SPA, Tiara and Mr. Hui represented to Boat Harbour that the Lands could be developed and sold to a third-party buyer. It pleads that Mr. Hui was personally interested in adjacent lands that were required to obtain access to the Lands and that this was a material fact that should have been disclosed prior to entering into the SPA.

[52] In my view, the misrepresentation claim fails to raise a triable issue. The SPA contains extensive Vendor's representations. Boat Harbour does not plead that any of them were false and the SPA contains an "entire agreement" clause. The real burden of Boat Harbour's plea is Tiara and Mr. Hui failed to disclose certain matters rather than that they affirmatively misrepresented matters but, in a commercial context, a failure to disclose is only actionable if the defendant owed the plaintiff a positive duty to disclose or in the case of statements that are positively misleading because they are half-truths, as in *C.R.F. Holdings Ltd. v. Fundy Chemical International Limited,* 33 B.C.L.R. 291, 1981 CanLII 488 (B.C.C.A.), leave to appeal to SCC ref'd, 16974 (15 March 1982). There is nothing in the pleading or the evidence in this case to support a finding that Tiara and Mr. Hui owed Boat Harbour a duty to disclose.

Conclusion

[53] For these reasons, I conclude that all of Boat Harbour's claims are bound to fail. None of them raises a triable issue. The defendants are entitled to summary judgment dismissing the action.

[54] There is no need for me to address the defendants' alternative application for judgment on a summary trial pursuant to Rule 9-7. However, I should state that, if I had found a triable issue, I think that it would not have been just to have decided the case on a summary trial on the record to this point. The time limited for an exchange of document lists pursuant to Rule 7-1(1) has passed and none have been delivered. Nor have the parties conducted examinations for discovery. The case is not yet ripe for determination of a summary trial. This is not an obstacle to its determination on an application for summary judgment, in the absence of a triable issue.

Must the CPLs be cancelled pursuant to s. 215 of the *LTA*?

[55] Dismissal of the action does not result in immediate dismissal of the CPLs; *Berthin v. Berthin,* 2018 BCCA 57 at paras. 31 and 41. However, the court may order that CPLs be cancelled on the ground that they fail to meet the threshold

criterion of a pleading claiming an interest in land as required by s. 215 of the *LTA; Bilin v. Sidhu,* 2017 BCCA 429 at paras. 54-56; *Berthin* at para. 40.

[56] An application for cancellation is not an application on evidence, and the merits are irrelevant. It is an application on the pleadings. The applicant must show that the pleading – in this case, the notice of civil claim – is incapable of supporting a claim to an interest in land, assuming the facts pleaded to be true; *Yi Teng Investment Inc. v. Keltic (Brighouse) Development Ltd.,* 2019 BCCA 357 at paras. 35-39.

[57] The interest in land claimed in the amended notice of civil claim ("ANoCC") is "a resulting and/or constructive trust over … the Lands". There is nothing in the ANoCC to support a claim for a resulting trust over the lands. Entitlement to a CPL depends on the claim for a constructive trust.

[58] The ANoCC pleads that Boat Harbour made payments of $300,000 and $380,000 to Tiara and describes these payments as "Deposits". It pleads that:

> 23. The Deposits were paid pursuant to the terms of the SPA as partial payment of the purchase price for Boat Harbour to acquire the beneficial and legal interest in the Lands.

[59] In Part 3 (Legal Basis), the ANoCC claims a constructive trust on the basis of an equitable purchaser's lien. It pleads:

> 35. Boat Harbour has a secured interest in the Lands by way of an equitable purchaser's lien. The Deposits were monies paid in pursuance of the SPA as part performance and execution to purchase the Lands which transaction was not completed through no fault of Boat Harbour. In equity, Boat Harbour obtained an interest in the Lands to the extent of the amount paid and is entitled to a return of the Deposits and a constructive trust over the Lands.

[60] The defendants submit that it is obvious, on the face of the ANoCC, that the claim of an equitable purchaser's lien cannot succeed because the ANoCC pleads that the SPA was null and void from the outset, due to the failure of the condition precedent contained in the Addendum. Citing *Kang v. Steveston Public Market Inc.,*

2017 BCSC 544 at para. 35, they submit that a purchaser's lien is only security for monies paid under a binding contract of purchase and sale.

[61] In my opinion, the defendants' argument fails because the ANoCC advances the alternative claim stated in para. 33:

> 33. Further, and in the alternative, the status of the Lands as landlocked renders performance of the SPA radically different from that which was originally undertaken by the SPA, and the SPA was terminated within the due diligence period on that basis.

[62] The theory of this alternative claim is that the SPA was initially valid and subsequently failed. If that were so and the payments were deposits on account of the purchase price as alleged, a claim for an equitable purchaser's lien would not be legally doomed to failure, if the evidence supported it.

[63] I conclude that the CPLs cannot be struck pursuant to s. 215 of the *LTA* because the ANoCC is capable of supporting a claim for an interest in land – an equitable purchaser's lien – if the facts pleaded are assumed to be true.

Disposition

[64] For these reasons, the action is dismissed, with costs.

"Gomery J."