

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Hanch Enterprises Ltd. v. Simply Ballet
Performing Arts Society,*
2024 BCSC 1143

Date: 20240628
Docket: S240074
Registry: New Westminster

Between:

Hanch Enterprises Ltd.

Plaintiff

And

Simply Ballet Performing Arts Society

Defendant

And

Hanch Enterprises Ltd.

Defendant by Counterclaim

Before: The Honourable Justice Bantourakis

Reasons for Judgment

Counsel for the Plaintiff:

K. Barron

Counsel for the Defendant:

J.P. Nay

Place and Date of Trial:

New Westminster, B.C.
May 6-10, 2024

Place and Date of Judgment:

New Westminster, B.C.
June 28, 2024

INTRODUCTION

[1] The parties to this litigation worked together to open a new location for a dance studio. Hanch Enterprises bought and renovated a property and Simply Ballet planned to lease it. They signed an Offer to Lease, in which they agreed on the essential terms of the tenancy and that they would soon execute a formal lease agreement. Simply Ballet moved in.

[2] That formal lease agreement was not to be. The parties were unable to agree on its terms and over time the relationship between their principals, which had become increasingly strained, soured. What had been a positive association rooted in a shared interest in dance ended in acrimony and mutual distrust.

[3] This litigation represents the unfortunate culmination of that relationship breakdown. Hanch Enterprises started these proceedings in August 2021 seeking, among other things, a writ of possession for the premises, which Simply Ballet was refusing to vacate, and damages for trespass. Simply Ballet counterclaimed, alleging Hanch Enterprises had breached certain terms of the Offer to Lease which, in the absence of a formal lease, governs their contractual relationship.

[4] Hanch Enterprises' claims have now been stayed at its request, because the Offer to Lease's five-year term is very soon reaching its end and the tenancy will lapse in any event. It says that time has abated the need for its litigation. The matter went ahead on Simply Ballet's counterclaim only, and the issues on that counterclaim were narrowed at trial to the following:

- a. Did Hanch Enterprises, through its principals Loretta or Myron Hanch, disclose confidential information in violation of the Offer to Lease's confidentiality clause, or otherwise wrongfully disclose information?
- b. Did Hanch Enterprises unreasonably withhold its consent to the assignment of Simply Ballet's interest in the property in violation of the Offer to Lease's assignment clause?

- c. If the answer to either of those questions is yes, what if any damages is Simply Ballet entitled to?

BACKGROUND

[5] Jennifer Hill-Bernard is the sole director and principal of Simply Ballet Performing Arts Society. She is a graduate of the National Ballet School and qualified to teach the Cechetti method of classical ballet. She has over 25 years of ballet instruction to her credit. Most of those years, until recently, have been dedicated to teaching high-level dancers preparing for potential careers in dance and dance competitions, including at the international level. This is a limited subset of talented and motivated young dancers, who train multiple hours daily each week. The environment is competitive, with students exempted from portions of the school day to accommodate hours of ballet and other complementary training.

[6] The daughters of Myron and Loretta Hanch were among Ms. Hill-Bernard's students. By all accounts they initially had a good relationship. Ms. Hill-Bernard taught the Hanch daughters for several years and the Hanches entrusted their daughters to her, for example, when traveling to attend international competitions.

[7] In 2017 or 2018, Mrs. Hanch and Ms. Hill-Bernard began discussing the possibility of Simply Ballet moving to a new studio space. Though the parties now disagree on who was dissatisfied with Simply Ballet's previous location, nothing turns on it. What matters is that it was decided that the Hanches would buy a property suitable for outfitting as a dance studio and Simply Ballet would then lease it and operate from that space.

[8] The Hanches incorporated Hanch Enterprises Ltd. solely for that purpose and eventually found a property located at 1130-580 Nicola Avenue in Port Coquitlam, B.C., that had the necessary features for a dance studio and also seemed well-situated from an investment point of view. When the Hanches took possession of it around December 2018 it consisted of little more than concrete walls and needed to be finished with additional plumbing, electrical, drywall, bathrooms and the like. It was agreed that once that renovation work completed, Simply Ballet, in turn, would

attend to tenant improvements necessary to convert the finished space into a dance studio, including things like specialized flooring, mirrors and ballet barres.

[9] As the renovation work progressed there were delays and the relationship between Ms. Hill-Bernard and the Hanches became more distant, and then more strained.

[10] On September 24, 2019, Simply Ballet and Hanch Enterprises signed an Offer to Lease for the Nicola Avenue studio and Simply Ballet moved in to the premises. That offer provided that the parties would enter into a full lease agreement shortly thereafter and Hanch Enterprises was to deliver its standard form lease reflecting what had been agreed in the Offer to Lease to Simply Ballet in short order. However, because of the renovation delays and because the dance season had already started, they agreed that Simply Ballet could begin operating in the new location before a lease had actually been signed, which it did on September 29, 2019.

[11] That decision proved fateful, as no lease agreement was ever reached. Hanch Enterprises did belatedly deliver a standard form lease to Simply Ballet, but the parties disagreed on whether it was consistent with what had been agreed to in the Offer to Lease. In the absence of a lease, the Offer to Lease became the only operative contractual agreement governing their relationship. Simply Ballet paid rent according the terms of the Offer to Lease and eventually negotiations over a formal lease agreement petered out.

[12] In the summer of 2020, the Hanch daughters left Simply Ballet to pursue their dance instruction elsewhere. By this point, the Hanches and Ms. Hill-Bernard had no personal relationship to speak of anymore, and were communicating through their lawyers.

[13] In the first half of 2021, Ms. Hill-Bernard was considering her future. She had received a serious medical diagnosis and had had to navigate the many challenges the COVID-19 pandemic posed for the operation of a dance studio. One of the

instructors at Simply Ballet, Jennifer Zschoerper, was interested in taking over and Ms. Hill-Bernard was interested in retiring.

[14] Their discussions spanned several months leading up to the summer of 2021. Ms. Hill-Bernard took steps in view of an eventual transition, including appointing Ms. Zschoerper to Simply Ballet’s Board of Directors and apparently offering Ms. Zschoerper’s sister a position at Simply Ballet. Ms. Zschoerper, in turn, incorporated a numbered company for the purposes of the deal.

[15] By June 2021 they say they had reached a tentative agreement to effect the handover by way of a sale of Simply Ballet’s assets to Ms. Zschoerper’s company for \$125,000, of which \$124,900 was allocated to “the Goodwill” and \$100 to all other assets (the “Asset Sale”). The draft agreement defined “the Goodwill” as including but not limited to all customer lists and the right of the purchaser to represent itself as carrying on Simply Ballet’s business in continuation of Simply Ballet and to use the name “Simply Ballet” or any variation thereof.

[16] The draft asset purchase agreement included Simply Ballet’s leasehold interests. Ms. Zschoerper intended to continue operating out of the Nicola Avenue premises and would not go ahead with the Asset Sale otherwise. Starting in late June 2021, Simply Ballet approached Hanch Enterprises about assigning its interest in the Nicola Avenue property to Ms. Zschoerper’s company. Simply Ballet’s current claims arise from what occurred in the aftermath of that assignment request.

ANALYSIS

[17] Simply Ballet claims that Hanch Enterprises, through Loretta and Myron Hanch, disclosed information about the Asset Sale to others in the dance community, in breach of the Offer to Lease’s confidentiality provision. It also says that in so doing Hanch Enterprises was responsible for gossip in the dance community that Simply Ballet would be closing its business, and another studio would be taking its place at the Nicola Avenue location.

[18] Simply Ballet says that as a consequence, and within a very short period of time, high-level students and teachers left Simply Ballet essentially *en masse*, causing Simply Ballet loss of reputation, goodwill and revenue from which it has yet to recover. Since that time, Simply Ballet says it has been unable to operate as the high-level dance studio it once was, catering instead to recreational dancers including younger children and other non-competitive dancers.

[19] Simply Ballet also alleges that Hanch Enterprises wrongfully withheld consent to the assignment of its interest in the Nicola Avenue premises. When that consent was withheld, Simply Ballet says, the Asset Sale collapsed. It wishes to be compensated for what it says is the resulting financial loss.

[20] Simply Ballet advances its claim for wrongful withholding of consent to the assignment on two alternative bases. The first is a claim in breach of contract, specifically that the withholding of consent breached the Offer to Lease's assignment clause. The second is based on tortious interference with economic relations. I agree with Hanch Enterprises that the latter claim is without merit because any withholding of consent cannot have been unlawful *vis-à-vis* Ms. Zschoerper or her numbered company: *Low v. Pfizer Canada Inc.*, 2015 BCCA 506 at paras. 77, 79. Accordingly, if this claim is to succeed, it must be in breach of contract.

Did Hanch Enterprises Breach the Offer to Lease's Confidentiality Provision or Otherwise Wrongfully Spread Gossip?

[21] The evidence persuades me that the summer of 2021 was a time of uncertainty and concern for some parents, students and teachers at Simply Ballet. I accept that there was discussion among at least some in those groups about the future of the studio that could fairly be qualified as gossip about whether Simply Ballet would be continuing to operate and, if so, under whose leadership.

[22] I also accept that that uncertainty and concern about Simply Ballet's future influenced the departure of at least some of the 13 high-level students and four teachers who left Simply Ballet between the end of the 2020 – 2021 season (which ended in June 2021) and the beginning of the 2021 – 2022 season (which began in

September 2021), though it is unclear how many. I find this was not a typical amount of turnover, far from it.

[23] The threshold issue, however, is whether Hanch Enterprises engaged in wrongful conduct in that regard sufficient to attract liability for the resulting business and other losses, if any have been proven. Though much was said about “gossip” during the trial, gossiping on its own is not wrongful at law. Simply Ballet has not, for example, advanced a claim in defamation. On the claim as it was advanced at trial, the only apparent basis upon which Hanch Enterprises could be said to bear liability under this heading is in breach of contract, and specifically breach of the Offer to Lease’s confidentiality clause, which reads:

19. CONFIDENTIALITY

The parties will keep the terms of both this Offer and the Lease strictly confidential. Neither party nor any of their advisors, may make any public disclosure of the existence of this Offer or the Lease or the terms therein, without the other party’s prior written consent.

[24] Simply Ballet says that Hanch Enterprises, through Loretta and/or Myron Hanch breached this provision by disclosing the proposed Asset Sale or related information to one or more other people in the dance community. Leaving aside whether this disclosure would run afoul of that clause, I note that Simply Ballet and Ms. Hill-Bernard acknowledge they have no direct evidence of such disclosure by the Hanches.

[25] Instead, Simply Ballet asks this Court to infer that the uncertainty, concern and talk about Simply Ballet’s future referred to above originated in a disclosure about the Asset Sale, and that the Hanches made that disclosure. The basis for these proposed inferences, in substantial part, is the particular timing of certain events.

[26] Simply Ballet first approached Hanch Enterprises about the proposed assignment to a numbered company on June 21, 2021. On July 6, 2021, Simply Ballet told Hanch Enterprises that the principal of the numbered company was Ms. Zschoerper. On July 15, 2021, Ms. Zschoerper had a Zoom call with Mrs. Hanch

about her plans for acquiring Simply Ballet’s assets and the assignment.

Ms. Zschoerper thought that call went well, and that she would be able to lease the studio. However, the next day, Mrs. Hanch sent her a text message saying she wished to sell the property “instead”. Then on July 28, 2021, Hanch Enterprises delivered a Notice to Quit to Simply Ballet, and the next day a Demand for Possession, requiring it to vacate the premises by the end of August.

[27] Also around this time, in July 2021, the mother of two of Simply Ballet’s high-level students, Bridgette Hong, invited two Simply Ballet instructors (Donna Perperidis and Pamela Williams) to run a new dance studio she was opening nearby, with some indication that studio might eventually move into Simply Ballet’s location. Ms. Hong’s two daughters were among the 13 who left Simply Ballet during the summer of 2021. Ms. Hong and Mrs. Hanch are friends.

[28] Simply Ballet reasons that because the rumours about Simply Ballet’s future roughly coincided with the Hanches learning of and allegedly withholding consent to the Asset Sale (I say “roughly” because Simply Ballet concedes it cannot say when those rumours began circulating), the source of the concern within Simply Ballet’s community in the summer of 2021 must have been the proposed Asset Sale, or at least originated in disclosure of the Asset Sale, and the only people who knew about the Asset Sale at the time were the Hanches, Ms. Hill-Bernard and Ms. Zschoerper. Since Ms. Hill-Bernard and Ms. Zschoerper would have had no interest in prematurely disclosing this information, Simply Ballet says this Court can infer that it is more likely than not that it was Hanches who made the disclosure.

[29] However, on the evidence I accept, I cannot draw the inferences Simply Ballet asks me to draw.

[30] On July 6, 2021, Ms. Hill-Bernard sent an email to all of the Simply Ballet parents, informing them that she was stepping back for the month of July and that Ms. Zschoerper would be taking over as Simply Ballet’s Artistic Director during that time. The evidence is that Ms. Zschoerper was and is a skilled instructor, but I also find that she is younger and less experienced than Ms. Hill-Bernard. I accept the

evidence at trial that the Artistic Director is a key leadership role in the dance studio and find that a change at that level would on its own likely have generated discussion within Simply Ballet's community of parents, dancers and teachers.

[31] Though the July 6, 2021 email said the handover to Ms. Zschoerper was for the month of July (Ms. Hill-Bernard did not wish to communicate the plan for a more permanent change as it was not finalized), I find that it is at least as likely that this email along with Ms. Hill-Bernard's previous illness and the fact she was not around or communicating as much as usual, would have prompted speculation within Simply Ballet's community regarding its future. To that end, I accept the evidence of Donna Perperidis and Pamela Williams, two former Simply Ballet dance instructors who were called to testify as part of Simply Ballet's case, that Ms. Hill-Bernard was not around as much as she had previously been, and Ms. Williams' additional evidence that there was not much communication from Ms. Hill-Bernard. These two witnesses presented as neutral to the parties' dispute, were forthright in their answers and clear about what they could and could not remember. I find them to have been credible and reliable witnesses.

[32] Leaving this aside, I find there were also other potential sources of information that could have led those in the Simply Ballet community to speculate about its future during the relevant time. I do so on the basis of Ms. Perperidis' testimony which, as noted, I accept as credible and reliable. One of the reasons she chose to leave Simply Ballet in mid-July 2021 was that she had had a conversation with Ms. Zschoerper around the time of her departure in mid-July 2021 in which Ms. Zschoerper said in a "not nice way" that she was in charge now and was taking over control at Simply Ballet. Contrary to Simply Ballet's submission, I find that it is not the case that Ms. Zschoerper can be assumed not to have made any relevant disclosures and thus that the Hanches were the likely source.

[33] Nor do I find that the evidence regarding Ms. Hong's dance studio is sufficient to support the inferences Simply Ballet is asking me to draw. Questions surrounding Simply Ballet's future arising from the circumstances outlined above could just as

easily explain her decision to approach Ms. Perperidis and Ms. Williams, and any interest she may have had in taking over the studio space.

[34] Added to this, on August 1, 2021, Ms. Hill-Bernard sent another email to parents, this time telling them Simply Ballet’s landlords had asked it to leave the premises within 30 days, and that she would be taking legal action. She also said that two of Simply Ballet’s instructors were leaving, and would be taking some of Simply Ballet’s students with them. To the extent that parents, students and teachers may already have been speculating about Simply Ballet’s future, the August 1, 2021 email can only have compounded matters. Simply Ballet did not call any of the high-level students who left that summer, or their parents, to testify.

[35] To put it simply, Simply Ballet has not discharged its burden of establishing the facts necessary to this aspect of its claim on a balance of probabilities. The counterclaim for losses in revenue, reputation and goodwill flowing from the alleged breach of confidentiality is therefore dismissed.

Did Hanch Enterprises Wrongfully Withhold Consent to Assign?

[36] Simply Ballet also alleges that Hanch Enterprises wrongfully withheld consent to the assignment of its interest in the Nicola Avenue premises, as a result of which the Asset Sale collapsed. It claims damages it says it suffered consequent upon that collapse. This claim depends on whether:

- 1) Hanch Enterprises was indeed contractually bound not to unreasonably withhold consent to the assignment;
- 2) if yes, whether consent was unreasonably withheld; and
- 3) if so, whether Simply Ballet suffered compensable damage as a consequence.

Was Hanch Enterprises Bound Not to Unreasonably Withhold its Consent?

[37] Whether Hanch Enterprises was contractually bound not to unreasonably withhold its consent to the assignment requested by Simply Ballet turns on clause 8 of the Offer to Lease:

8. ASSIGNMENT AND SUBLETTING

Notwithstanding the provisions of Paragraph 7 of this Offer to Lease, the Tenant may assign or sublet the Lease with respect to the Premises or a portion of the Premises with the Landlord's consent, such consent not to be unreasonably withheld.

[38] Advancing a strict interpretation of that clause, Hanch Enterprises asserts that it cannot have breached this provision of the Offer to Lease because it does not expressly refer to assignment of the tenancy created by the Offer to Lease, but only to assignment of "the Lease" itself. It emphasizes that the term "Lease" is defined in the Offer to Lease as "the Landlord's standard form lease", and that no such document was ever signed. It says that other provisions of the Offer to Lease (for example the confidentiality provision referred to above) refer to both the Offer to Lease and the Lease. It reasons that where the parties intended that a provision apply to both the Offer and the Lease, the parties did so expressly.

[39] The interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine the intent of the parties and the scope of their understanding. The contract must be read as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 47.

[40] While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never overwhelm the words of the contract and the words must be grounded in the text and read in light of the entire contract. The goal of examining such evidence is to deepen a decision-maker's understanding of the

mutual and objective intentions of the parties as expressed in the words of the contract: *Sattva Capital Corp.* at para. 57.

[41] The meaning of words in a contract is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement: *Sattva Capital Corp.* at para. 48. The purpose of the Offer to Lease and the nature of the relationship it created were considered at an earlier stage in these proceedings, in the context of Hanch Enterprises' application for relief under s. 19 of the *Commercial Tenancy Act*, R.S.B.C. 1996, c. 57: *Hanch Enterprises Ltd. v. Simply Ballet Performing Arts Society*, 2022 BCSC 1063 ("*Hanch*").

[42] In that decision, this Court found that the Offer to Lease constitutes a binding legal agreement between Hanch Enterprises and Simply Ballet, which contains all the terms necessary to constitute a tenancy agreement: *Hanch* at paras. 14 – 17. A tenancy in the Nicola Avenue premises was in fact constituted, the tenancy agreement giving Simply Ballet a leasehold estate in the premises: *Hanch* at paras. 17, 35, 40. This Court also found that the form of lease Hanch Enterprises eventually tendered to Simply Ballet was not consistent with the bargain it had struck in the Offer to Lease and instead included material substantive changes relating to the terms governing assignments and subletting. As a consequence, Simply Ballet was within its rights not to sign that lease: *Hanch* at paras. 25 - 28.

[43] I do not consider it consistent with the mutual objective intentions of the parties at the time of contract formation to interpret clause 8 of the Offer to Lease to apply only to the Lease document strictly construed, and not the tenancy or leasehold interest created by the Offer to Lease. The Offer was intended to be and was a binding agreement governing the tenancy and resulting leasehold interest: *Hanch* at paras. 14 – 17, 35; Offer to Lease, clauses 15, 20. Its terms were expressly to survive and continue to bind the parties even after the Lease was signed, to the extent there was no inconsistency between the two documents: *Hanch* at para. 15; Offer to Lease, clause 15. Other sections of the Offer to Lease that refer

solely to the Lease were, on this Court's previous findings, binding upon the parties including the term of the tenancy, the commencement date and the rent payable: Offer to Lease, clause 3, 4, 11, 15, 20. Clause 8 of the Offer to Lease on its face also operates hand in hand with clause 7, governing use of the premises by Simply Ballet ("Notwithstanding Paragraph 7 of this Offer to Lease...").

[44] My task is to determine the meaning of the contested provision by reading it in the context of the Offer to Lease as a whole: *Trenchard v. Westsea Construction Ltd.*, 2020 BCCA 152 at para. 6. On such a reading, I cannot accept that the Offer to Lease's assignment and subletting provision applies only to "the Landlord's standard form lease", as Hanch Enterprises suggests, and not to the tenancy and leasehold interest established by the bargain the parties had struck.

[45] Accordingly, Hanch Enterprises had a contractual obligation not to unreasonably withhold consent to assignment.

Did Hanch Enterprises Unreasonably Withhold Consent to the Assignment?

[46] The next question then becomes whether Hanch Enterprises unreasonably withheld consent to the assignment. It says the answer to that question is "no", for two reasons. First, it says that it never refused to assign the leasehold interest, but simply asked for more information, which never came. Second, it says that if it did refuse its consent, that refusal was reasonable.

[47] I find as a fact that Hanch Enterprises did refuse Simply Ballet's assignment request. After some initial back and forth between the parties' counsel ending on July 6, 2021, Ms. Zschoerper and Mrs. Hanch agree that they spoke via Zoom on July 15, 2021. There is also some agreement between them that during the call they discussed matters such as negotiating a formal lease document, Ms. Zschoerper's ability to pay the rent, and her immigration status in Canada.

[48] I accept that during that call Mrs. Hanch requested information regarding Ms. Zschoerper's immigration and financial status. I also accept Ms. Zschoerper's

evidence that she felt the call was straightforward and that she felt positive enough about it that she subsequently forwarded to Ms. Hill-Bernard a message she had sent to her lawyer saying he could get in touch with the Hanches' lawyer about preparing a lease agreement, as she wanted Ms. Hill-Bernard to know that the negotiations were moving forward.

[49] However, the next day, Mrs. Hanch sent Ms. Zschoerper a text message in which she agrees that she said:

Hi Ms Z, After our call yesterday, I think more about the situation. I decided that I will sell the unit instead. Thought I should let you know. It was nice chatting with you, just hope that it was under a different circumstance.

[50] Hanch Enterprises argues that this was not a refusal, relying to a significant extent on the testimony of Mrs. Hanch that what she meant was simply that Ms. Zschoerper should know that if she took on the premises via an assignment, she might end up dealing with a different landlord. Mrs. Hanch testified that she expected discussions about the assignment (including the additional information she said she required) would continue after this text message. That is, she says she was not withholding consent but merely updating Ms. Zschoerper on what the situation might look like for her landlord-wise if the assignment went ahead.

[51] I find as a fact that the text message was a withholding of consent, both in light of its wording, and the broader body of evidence I have accepted. In the text message, Mrs. Hanch says that she has decided to sell the property "instead" and that she wishes the circumstances had been different. I find that she was saying that she would sell the property "instead" of consenting to the assignment. Mrs. Hanch's explanation that she was merely telling Ms. Zschoerper that she might end up with a different landlord down the road if the deal went ahead is not consistent with the wording or tenor of that text message. Her subsequent message to Ms. Zschoerper asking about the status of the proposed Asset Sale does not alter this in my view.

[52] It follows that I do not agree with counsel for Hanch Enterprises that the text message should not be viewed as a refusal because Hanch Enterprises' counsel

had requested additional information from Simply Ballet's counsel on July 6, 2021. The text message post-dates those communications and, I find as a fact, effectively shut down any further discussion. In addition, counsel for Simply Ballet responded to the July 6 communication asking for clarification on what information was required. There is no evidence before me of any response from Hanch Enterprises' counsel or any continued discussion on that front. That is, on the evidence, the last communication between the parties' representatives was one in which Simply Ballet asked Hanch Enterprises for information, not the other way around.

[53] To this end, I find that Mrs. Hanch was not credible in her evidence that she had not withheld consent and that she was simply waiting for further information from Ms. Zschoerper. My reasons for so finding include the following.

[54] As explained above, I find Mrs. Hanch's explanation is inconsistent with what she said in the text message itself. Additionally, less than two weeks after the text message, Hanch Enterprises tried to terminate the tenancy by delivering a Notice to Quit and, the next day, a Demand for Possession. The Hanches' decision to terminate the tenancy in those premises such a short time after the text message is inconsistent with the notion that they had not already decided to withhold consent to assignment of those very same premises.

[55] The tenor of much of Mrs. Hanch's evidence on this point was that they had been waiting for information that simply never came and negotiations petered out. If that were so, I do not consider it plausible that Hanch Enterprises would have tried to end the tenancy when it did (i.e. less than two weeks later). Mrs. Hanch was also evasive and tried to minimize the significance of events or aspects of the evidence that did not assist her. For example, her testimony that a reason for her Zoom call with Ms. Zschoerper was also to "catch up" because they had not spoken in a long time, is inconsistent with the broader body of evidence I have accepted and the circumstances prevailing at that time. In my view, this was an attempt to minimize the significance of the assignment discussions.

[56] I should add that I also found Mr. Hanch's evidence on this front problematic, though it was more circumscribed given he was not directly involved in the discussions. For example, his indication that he and Mrs. Hanch are still waiting for the additional information from Ms. Zschoerper to inform a decision on the assignment is, in the circumstances, incapable of belief.

[57] As I have found that Hanch Enterprises withheld consent to the assignment, the next question becomes whether that was unreasonable or not. The discretion to withhold consent must be exercised in good faith and not for any collateral or ulterior purpose. If the landlord made its decision for a collateral purpose, unrelated or extraneous to the lease, the refusal will be found to be unreasonable. There is both a subjective and objective component to the landlord's decision. The landlord must act honestly and in good faith, and must make a fair and reasonable assessment of the proposed tenant, but may rely on whatever facts and arguments it may choose, as long as the conclusions reached are ones that might have been reached by a reasonable person in the same circumstances: *Persica Consulting Inc. v. Wescana Properties Inc.*, 2021 BCSC 2268 at para. 41.

[58] The reasonableness of a refusal to assign is based on the information available to, and the reasons given by, the landlord at the time: *Tabriz Persian Cuisine Inc. v. Highrise Property Group Inc.*, 2021 ONSC 4065 at paras. 30 – 32, aff'd 2022 ONCA 272. A landlord's failure to communicate the reasons for its refusal to consent to an assignment will also be an unreasonable withholding of consent: see *Jens Hans Investments Co. Ltd. v. Bridger*, 2004 BCCA 340 at paras. 42 – 43.

[59] In *Persica*, some of the factors held to be reasonable for a landlord to refuse to assign a lease included fears that the new tenant would be unable to pay rent when the new tenant was a newly incorporated company with no financial or credit history, with principals who had little business experience: *Persica* at para. 46. In that case, the Court found it was also reasonable to consider the deal underlying the assignment request was falling apart, or that the transaction was otherwise uncertain: *Persica* at para. 54.

[60] Hanch Enterprises argues that these factors, among others, militate in favour of the conclusion that the refusal to consent was reasonable here. It notes Ms. Zschoerper's financial and immigration situations were uncertain and that Hanch Enterprises had no information regarding her creditworthiness or business experience.

[61] These are considerations that could reasonably have factored into a decision on whether to consent to the assignment or not. However, I find as a fact that any opportunity to provide that information was shut down by the text message Mrs. Hanch sent on July 16, 2021. That is, these are not the bases upon which consent was withheld and no reasonable opportunity was given to address them.

[62] I find that the reason for the withholding of consent was not that Ms. Zschoerper seemed inexperienced, or that Hanch Enterprises did not have her credit history, or any of the other reasons Hanch Enterprises sought to advance at trial. Rather, the reason for withholding consent was as stated by Mrs. Hanch in her text message of July 16, 2021: she had decided she wanted to sell the property "instead."

[63] On Mrs. Hanch's own evidence, however, this cannot have been a reasonable basis upon which to refuse consent, because Hanch Enterprises could not sell the property under the *status quo* prevailing at the time. In fact, an assignment with the prospect of a formal lease would have left Hanch Enterprises in a better position to sell than it otherwise was. Mrs. Hanch testified that she understood that she was effectively unable to sell the property so long as Simply Ballet remained in the premises without a formal lease. And, of course, discussions with Ms. Hill-Bernard regarding a formal lease had reached an effective stalemate. The assignment of Simply Ballet's interest in the property to Ms. Zschoerper's numbered company and attendant prospect for a lease agreement offered a potential solution to that problem. Put otherwise, wanting to sell the property was not a reasonable basis upon which to refuse consent because assignment and sale were not mutually exclusive propositions, far from it.

[64] It is likely the case that Hanch Enterprises had not only decided it wished to sell the property, but that it wished to sell it with the premises vacant. This view best accords with the text message and Hanch Enterprises' attempt to end the tenancy less than two weeks later. But that attempt was in issue in the previous *Hanch* decision, and this Court concluded that Hanch Enterprises was not entitled to terminate the tenancy as it tried to do. Accordingly, I cannot find that a desire to sell the property vacant offered a reasonable basis to withhold consent either.

What are Simply Ballet's Damages for Breach of the Assignment Clause?

[65] The final question is whether Simply Ballet has suffered compensable damage as a consequence of Hanch Enterprises' breach of its contractual obligation not to unreasonably withhold consent to the assignment.

[66] Traditionally, there could be no claim for damages from a landlord's unreasonable failure to consent to an assignment of lease, the only remedy being an order permitting the assignment. In the aftermath of *Highway Properties Ltd. v. Kelly, Douglas & Co.*, [1971] S.C.R. 562, that is no longer the case: see e.g. *Cudmore v. Petro Can. Inc.*, 1986 CanLII 1030 (BCSC), 2 BCLR (2d) 113; *Tabriz* at para. 72 - 75.

[67] Damages for breach of contract should, as far as money can accomplish it, place the plaintiff in the same position as if the contract had been performed. Recoverable damages are those that naturally flow from the breach and should have been reasonably within the contemplation of the parties, or which were actually known by them, at the time the contract was made: *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30 at para. 27.

[68] Simply Ballet encourages this Court to award it \$125,000 in damages, which is the amount it would have received if the Asset Sale had gone through. Even assuming the Asset Sale would have gone ahead but for the breach, I cannot accept that measure of damages on the evidence.

[69] Effectively, Simply Ballet says that it is entitled to both the assets (which it retained, because the sale did not go through) and the sale price for the assets. The double-recovery concern is obvious. Simply Ballet has not provided evidence of the residual value of the assets it had intended to sell. Its submission also fails to account for the reality that the Asset Sale price of \$125,000 would not have netted Simply Ballet that amount, as it would presumably have been reduced by applicable taxes and fees.

[70] There is no specific evidence here of the value of the assets as at the breach of contract that would allow calculation of loss in the form of diminution in value. Simply Ballet did not seek out any other buyers and so there is no subsequent offer price that might assist in the analysis. Nor was any expert valuation evidence provided. The following concerns expressed in *Tabriz* are apposite:

[76] ... with respect to the plaintiff's claim for compensatory damages, I note that it sought \$200,000, which was the sale price of the business under the agreement of purchase and sale with the third purchaser. The plaintiff's damages claim suffers from two significant problems. First, the plaintiff has adduced no evidence of the value of the business. I can see no principled reason why the plaintiff is entitled to both, the business with whatever residual value it has, and the full amount of the purchase price. Second, the claim for damages has not been reduced by the costs that the plaintiff would have incurred to close the sale, including real estate commissions and legal fees. The plaintiff's damages are thus, at the very least inflated. Depending on the residual value of the business, the damages may be non-existent. Damages have not been adequately proven.

[71] Contract damages are generally assessed as of the date of the breach. It is possible that the assets were not as valuable upon Hanch Enterprises' contractual breach, in which case the breach of contract would have caused Simply Ballet loss. However, the evidence is insufficient to the task of determining whether that is so and, if yes, by how much.

[72] All but \$100 of the Asset Sale price was ascribed to "the Goodwill". The valuation of property and goodwill in a business requires specialized testimony: *Stolba v. Comwave*, 2019 BCCA 120, at para. 41. Here, none was tendered. Nor do Simply Ballet's financial statements assist me in this regard: *Kim v. Kim*, 2019 BCSC

222 at para. 48. This is not a case where quantifying the alleged loss is merely difficult, but rather one where necessary evidence has not been led on the issue.

[73] Nominal damages may be awarded for breach of contract where damages have not been proven; they serve to affirm that there has been an infraction of a legal right: *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at paras. 67, 105. In my view this is an appropriate case in which to make an award of nominal damages considering Simply Ballet has established a breach of contract, which is actionable, but has failed to establish its loss.

[74] In my discretion, I find that a nominal damage award of \$1,000 is appropriate in this case: see e.g. *Sabo v. Canada (Attorney General)*, 2013 YKCA 2 at para. 83; *Park v. 1096303 B.C. Ltd.*, 2023 BCCA 78 at para. 34; *Imraj Holding Enterprises Ltd. v. 650273 Alberta Limited*, 2023 BCSC 256 at para. 54; *Dove v. Destiny Media Technologies Inc.*, 2023 BCSC 1032 at para. 111.

[75] Accordingly, Simply Ballet’s counterclaim for breach of the assignment clause is allowed and nominal damages for that breach are awarded in the amount of \$1,000. If the parties wish to make submissions on costs, they may do so in writing. Their submissions should not exceed five pages in length and should be exchanged according to a schedule to be agreed between counsel, with the first submission to be filed with the registry within 30 days of the release of these reasons.

“Bantourakis J.”