IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *RBD Victoria Homes Inc. v. 0717227 B.C. Ltd.,* 2024 BCSC 114

Date: 20240126
Docket: S212804
Registry: Vancouver

Between:

RBD Victoria Homes Inc. and GRD Victoria Homes Inc.

Plaintiffs

And

0717227 B.C. Ltd. and Kenneth Helm

Defendants

Before: The Honourable Mr. Justice Riley

Reasons for Judgment

Counsel for the Plaintiffs:	C.R. Bacon
Counsel for the Defendants	R.A. Millar
Place and Date of Hearing:	Vancouver, B.C. November 16-17, 2023
Place and Date of Judgment:	Vancouver, B.C. January 26, 2024

Introduction

[1] This is a ruling on an application to set aside or cancel an order requiring the defendants to post security. The security order was granted as a consent variation of a *Mareva* injunction that the plaintiffs had obtained by way of an *ex parte* application. The defendants say that the *Mareva* injunction was obtained on the basis of material non-disclosure and ought to be set aside on that basis alone. They argue in the alternative that even if there was a basis for granting the *ex parte* order at first instance, it is now apparent that the claims advanced by the plaintiffs do not meet the strong *prima facie* case threshold, and further that the balance of convenience weighs heavily against a continued *Mareva* injunction in any form. For their part, the plaintiffs maintain that there was no material non-disclosure, there was and continues to be a strong *prima facie* case or a good arguable case against the defendants, and the balance of convenience weighs in favour of requiring the defendants to maintain the posted security. The plaintiffs say any prejudice to the defendants could be addressed by the plaintiffs themselves posting security sufficient to cover the carrying costs associated with the defendants having to maintain the $1,300,000 in security required under the current order.

Facts

The Parties and the Contract that is the Subject of the Claim

[2] The underlying action is a claim for breach of contract arising out of a real estate transaction. Both the plaintiffs and the defendants are involved in real estate development.

[3] The plaintiffs RBD Victoria Homes Inc. (“RBD”) and GRD Victoria Homes Inc. (“GRD”) are related companies controlled by Mr. Richardson. GRD, the company that originally entered the contract with the defendants, later assigned its rights under the contract to RBD. For ease of reference I will refer to the plaintiffs collectively as RBD.

[4] The defendant company 0717227 B.C. Ltd. (“0717”) is controlled by the personal defendant Mr. Helm. Again, for ease of reference I will refer to the defendants collectively as 0717.

[5] The contract in issue relates to a property referred to in these reasons as Lot 10. At the time the contract was signed, Lot 10 did not actually exist. It was one of a number of properties that were to be created by subdivision following a land assembly project orchestrated by Mr. Helm. RBD contracted to purchase the property that was to become Lot 10 from 0717 for $8,250,000. The contract was originally signed in 2016 with a closing date in 2017, but the closing date was extended on multiple occasions for a number of reasons, the most salient of which had to do with complications in the re-zoning and subdivision process, and delays in the construction of off-site servicing per the terms of the contract. The fourth and final addendum to the contract was signed in 2018 and the closing took place on 28 January 2019, at which point RBD paid the outstanding balance of the purchase price, which by that time had been increased to $8,550,000, and 0717 transferred title to Lot 10.

The Alleged Breach of Contract

[6] In the notice of civil claim, RBD claims that (i) 0717 breached a warranty commitment to ensure that the off-site servicing was substantially complete by the closing date; (ii) after the completion date, RBD contracted to sell the property to a third party; (iii) the third party sale was delayed because the off-site servicing was not completed in time; and (iv) RBD suffered losses of some $1,300,000 as a result. So, the thrust of the claim advanced by RBD is 0717’s alleged breach of a contractual warranty commitment to ensure substantial completion of the off-site servicing by the closing date. RBD also advances an alternative claim of negligent misrepresentation in relation to assertions by 0717’s principal Mr. Helm about when the off-site servicing would be completed.

The *Mareva* Injunction Application

[7] RBD filed its claim on 8 March 2021. On 30 March 2021, RBD brought an *ex parte* application for a *Mareva* injunction seeking to restrain 0717 from transferring, disposing of, or encumbering any assets. RBD's application was supported by the affidavit of its principal, Mr. Richardson. The gist of RBD's position on the *ex parte* application was that (a) RBD had a strong *prima facie* case for showing that 0717 breached its warranty commitment to ensure that the off-site servicing was substantially complete by the closing date or within any reasonable time proximate to the closing date; and (b) 0717 was basically a land holding company which had over the past several years disposed of a number of parcels of real property, some in non-arm's length transfers for nominal consideration.

[8] I ruled on RBD's *ex parte* application on 31 March 2021, in reasons for judgment indexed as *RBD Victoria Homes Inc. v. 0717227 B.C. Ltd.*, 2021 BCSC 774. Based on the contents of Mr. Richardson's affidavit, and after hearing the oral submissions of counsel for RBD, I reached the following factual conclusions with respect to the relationship between the parties, and the alleged breach of contract:

a) RBD entered an agreement to purchase a parcel of real property in Coquitlam from 0717.

b) The agreement included a warranty that 0717 would take steps to have the property zoned and basic off-site municipal services installed.

c) The agreement also included a provision giving the purchaser the option to complete the sale without prejudice to its right to claim damages in the event of the vendor's breach of the warranty in relation to, among other things, the off-site servicing for the property.

d) The original completion date was 28 October 2016.

e) 0717 was unable to complete the necessary zoning and arrange for the off-site servicing of the lot before the original completion date, so the

completion date was extended a total of three times by agreement, the final completion date being 28 January 2019.

f) By that date, the subject property had still not yet been serviced, but believing, on assertions given by 0717's principal, that this was soon to be taken care of, RBD opted to proceed with the sale.

g) RBD paid the purchase price of some $8,550,000 and the sale completed.

h) Thereafter, the off-site servicing for the lot was not completed on time and was not substantially completed until 14 December 2020.

i) In the meantime, RBD had sold the subject property to another party, but did not complete the sale because the off-site servicing was not finished.

j) RBD alleges that in the period of time during which it owned the property, but the site servicing was delayed, it suffered damages of some $1,279,000, consisting principally of interest, bank charges, and property taxes for holding the property without being able to complete its sale to the third party purchaser.

[9] Also, based upon Mr. Richardson's affidavit and the *ex parte* submissions of RBD's counsel, I reached the following factual conclusions with respect to the financial position of 0717, and the risk that it would dispose of, encumber, or dissipate assets in a manner that warranted consideration of a *Mareva* injunction:

a) At one point in time, 0717 owned a number of parcels of real property, but over time had disposed of the lion's share of them, as described in subparagraphs (b) and (c) below.

b) 0717 originally owned a total of 12 lots. Of those:

i. Lot 10, which is the subject of the current lawsuit, was sold to RBD on 28 January 2019 pursuant to the terms of the contract;

ii. Lot 3 was transferred in or about December 2018 to a family member of the personal defendant Mr. Helm for $1;

iii. Lot 4 was transferred in or about December of 2018 to a third party for an unspecified sale price or unspecified consideration;

iv. Lot 5 was transferred in or about April 2020 to a family member of the personal defendant for $1;

v. Lots 1, 2, 6, 7, 8, and 9 were all transferred on or about 15 January 2021, to an arm's length company, Vancor Development (“Vancor”), for unspecified consideration in connection with what appeared on the evidence presented during the *ex parte* application to be a joint venture arrangement between 0717 and Vancor. Those lots were actively being developed in the joint venture arrangement. RBD had “no information” about the precise nature or value of 0717's continuing financial interest in the property in connection with that joint venture.

c) Consequently, by the time of the *ex parte* application 0717 still held title to only two of the 12 lots previously owned by the company, being:

i. Lot 20, which had a tax-assessed value of $4,140,000; and

ii. A northwest quarter of a parcel entitled Section 8, which had a tax-assessed value of $4,458,000.

d) RBD had “no information” about any unsecured debt, obligations, or even *inter alia* mortgages that might affect 0717's interest in the two remaining parcels of property held by it.

e) Apart from its continued ownership of these two properties, 0717 did not appear to have any substantial assets. It appeared to be a land holding company.

f) RBD's concern and reasoning for bringing the *ex parte* application for a *Mareva* injunction application was that 0717 only had title to two remaining properties, and given the "demand for real estate in British Columbia", there was "a real risk" that 0717 could "quickly dispose of these properties in a way that would insulate it from judgment": at para. 7.

[10] On the basis of these findings, I determined that the plaintiff had made out a case for a *Mareva* injunction.

[11] On the first branch of the *Mareva* injunction analysis, I was satisfied based on the evidence presented at the *ex parte* hearing that RBD had established a "strong *prima facie* case": at para. 14. The terms of the contract were "straightforward and did not appear to be ambiguous": at para. 15. The nature of 0717's alleged breach of the warranty provision with respect to off-site servicing was clearly identified in the supporting affidavit of Mr. Richardson, and the damages were ascertainable and easy to determine. This was "not to say that there is not another side to the story that might be brought out in the *inter partes* hearing", but based on the material filed in the *ex parte* application, RBD's claim met the strong *prima facie* case threshold: at para. 15.

[12] The second branch of the analysis, the balance of justice and convenience, was not as straightforward. On the one hand, 0717 was a British Columbia-based company, with assets in the jurisdiction, and there was no evidence that either 0717 or Mr. Helm had engaged in any conduct that might be regarded as fraudulent, disreputable, or legally dubious, from which one might infer a risk that they would dissipate or remove assets from the jurisdiction so as to frustrate a judgment. On the other hand, 0717 was a "real estate holding company with no substantial assets other than the parcels of real estate or real property that it owns": at para. 18. Further, the evidence indicated that 0717 had recently effected multiple non-arm's length transfers of real property for nominal consideration, within a time frame in which the company was alleged by RBD to be in breach of its warranty to ensure completion of the off-site servicing as of the closing date. Thus, while the case was

"very close to the line indeed", I found that the balance of convenience favoured the issuance of a *Mareva* injunction: at para. 23. I was satisfied that there was potential for irreparable harm to RBD if no action was taken, and an order preventing the defendants from dissipating or disposing of assets of a certain value would "preserve the status quo until the other side can at least be heard on the matter": at para. 24.

Consent Variation of the *Mareva* Injunction Order

[13] On 3 June 2021, by consent, the *Mareva* injunction was dissolved, on agreement of the parties that the defendants would pay $1,300,000 into trust until further court order.

The *Inter Partes* Hearing

[14] By way of an application filed on 30 August 2023, the defendants applied for an order providing that they no longer be required to post security. The application came on for hearing before me on 16 and 17 November 2023.

[15] The evidence presented on the *inter partes* hearing included (i) the first affidavit of Mr. Richardson, who as noted above holds controlling interests in the plaintiff companies, initially filed on 24 March 2021 in support of the *ex parte* application; (ii) the first affidavit of the personal defendant Mr. Helm, a director of the corporate defendant 0717, filed on 30 August 2023; and (iii) the second affidavit of Mr. Richardson, filed on 6 November 2023 in reply to Mr. Helm's affidavit.

[16] Mr. Helm's affidavit is 38 pages long and attaches a further 129 pages of documentary exhibits. It also purports to adopt as true all of the facts alleged in the 38-page Notice of Application, an affidavit drafting practice that lacks rigour and ought to be avoided. In his affidavit, Mr. Helm sets out, among other things, an extensive history of the multi-phase land assembly arrangement that led up to the contract that is the subject of the current action. He also goes through each step in the land assembly, the multi-step municipal re-zoning and subdivision approval process, and the installation of the off-site servicing. I have read through the affidavit several times, but I do not intend to recount all of its contents in these reasons.

Mr. Helm's Background in Real Estate and Land Assembly

[17] In his affidavit, Mr. Helm deposes that he has lived in Coquitlam and carried on business in the community for over 30 years. He worked as a real estate agent and in the latter part of his career he has focussed on land assembly and development projects. His general practice has been to conduct this business through closely-held corporations.

[18] Mr. Helm considers himself to be a fair and honest businessman, and he values his reputation in this regard. He denies ever engaging in any kind of "improper conduct", including efforts to secrete or dissipate personal or corporate assets as was unfairly attributed to him by the plaintiffs in the *ex parte* application. Mr. Helm says he has never engaged in any "improper transfers of assets within or outside British Columbia".

The Land Assembly Project

[19] Mr. Helm's affidavit goes on to discuss the history of the land assembly project that led to the contract between 0717 and RBD that is the subject of the current court action. The land assembly, re-zoning and subdivision project envisioned by Mr. Helm was expected to proceed in two phases. The contract that is the subject of the current court action relates to Phase 1, which was to involve the assembly and subsequent subdivision of three "parent parcels" into (i) nine individual lots that would be zoned for single family homes and (ii) a tenth lot (Lot 10), that would be zoned for higher density to allow for construction of at least 33 and potentially 62 townhouse units. Mr. Helm's intention was for his company to acquire the three "parent parcels", and then arrange for them to be subdivided into nine lots zoned for single family homes and a tenth lot zoned for townhouses. Once the re-zoning and subdivision was completed, Mr. Helm would then sell the lots to builders who would carry out the construction. Mr. Helm never had any intention for himself or his company 0717 to be involved in the construction of either the single-family residences or the townhouses. Mr. Helm's focus was, rather, on the land assembly, re-zoning and subdivision.

[20] Mr. Helm's affidavit states that prior to 2014, his son Peter owned one of the three parent parcels. On 21 February 2014, as a step in the land assembly process, Peter Helm and 0717 entered into a written contract under which 0717 would purchase the parent parcel, for stated consideration of $1,980,000, by way of a cash payment of $615,000 on the closing date, and the subsequent transfer of three serviced lots zoned for single family residences with a deemed value of $455,000 each. The contract between Peter Helm and 0717 envisioned that the transfer of the three serviced single-family residence lots would take place at some future time, after the land hand been assembled, re-zoned and subdivided, and the off-site servicing was completed. A copy of this contract is attached as an exhibit to Mr. Helm's affidavit. This particular transaction is not the subject of the law suit between the plaintiffs and the defendants, but it is important because it provides an explanation for the "non-arm's length" property transfers cited by the plaintiffs in their *ex parte* application as support for a finding that 0717 was at risk of dissipating or disposing of assets to place them beyond the reach of any judgment against it.

Preliminary Discussions Between Mr. Helm (0717) and the Richardsons (RBD)

[21] Mr. Helm's affidavit goes on to discuss the history of his dealings with Mr. Richardson, a principal of the plaintiff companies, with regard to the land assembly arrangement that led up to the contract that is the subject of the litigation. In particular, Mr. Helm avers that some time in December 2015 he was approached by Mr. Lamb, a real estate agent acting on behalf of the Richardsons, expressing an interest in acquiring the portion of the land assembly that eventually became Lot 10, with the intent that the Richardsons would be the builders for the townhouse development. Mr. Helm did not know the Richardsons personally, but was aware that they had been in the construction industry for several generations and were known to be "quality builders", so he agreed to meet with them.

[22] Mr. Helm deposes that some time in December 2015, he, Mr. Lamb, Mr. Richardson, and Mr. Richardson's brother met at a restaurant in Coquitlam. Mr. Helm deposes that at the meeting, he specifically told those in attendance (the

Richardson brothers and Mr. Lamb) that his children had been involved in the land assembly and had a right to receive three of the nine lots intended for single family home construction. In his reply affidavit, Mr. Richardson does not deny that this meeting took place, but claims to have no recollection of it, and in particular has no memory of ever being told about the pre-existing agreement in which three of the nine lots would be transferred to Mr. Helm's children.

[23] To continue with Mr. Helm's account of the meeting, he also avers that the Richardsons gave assurances that they had the building experience and the funds required to build 33 townhouse units on what was to become Lot 10. Mr. Helm deposes later in his affidavit that at the same restaurant meeting in December 2015, the Richardsons assured Mr. Helm that they would not assign the contract to a third party or deal with Lot 10 except with their continued involvement as the builders. The plaintiffs argue that this assertion does not make sense in view of the fact that the contract later agreed to by both parties contains an express provision that RBD was free to assign its rights to a third party, without notice to 0717.

Negotiation of the Contract Between 0717 and RBD

[24] Mr. Helm deposes that after the December 2015 restaurant meeting, the parties exchanged multiple drafts of the contract. I will not recount the various drafts or versions of the contract referred to in Mr. Helm's affidavit. I do note that Mr. Helm appears to have retained copies of some of these drafts, with proposed revisions written next to some of the terms. One of the drafts contains a handwritten notation from Mr. Helm that there were to be "no conditions precedent" to the closing.

[25] Mr. Helm further deposes that in the course of the negotiations there were "no specific discussions" regarding the timing for completion of off-site servicing to Lot 10. In this regard, Mr. Helm asserts in his affidavit that "at no time" did the defendants ever state a date or deadline for the completion of off-site servicing to Lot 10. In any event, whether or not the negotiations included any "specific discussions" as to when the off-site servicing was to be completed, the written

contract that was signed by both parties on 7 January 2016 does in fact include terms pertaining to the off-site servicing.

The Terms of the Contract Between 0717 and RBD

[26] On 7 January 2016, the parties signed a contract under which 0717 (the Vendor in the contract) would sell the property to be designated Lot 10 in the proposed re-zoning and subdivision process to RBD. I would summarize all of the relevant terms of the 7 January 2016 contract as follows:

a) The original "Purchase Price" as set out in Term 1(e) was $8,250,000, with a "First Deposit" of $400,000 (per Term 1(b)), and a "Second Deposit" of $800,000 (per Term 1(f)).

b) Term 1 also set out a number of other defined terms. Term 1(a) defined the "Closing Date", to be 28 October 2016. Term 1(g) defined "Serviced" to mean "all services required to be completed by the City of Coquitlam to be listed in the servicing agreement for rezoning have been substantially completed".

c) Term 3.1, "Vendor's Representations and Warranties", provided that 0717 "represents and warrants", with the intent that the Purchaser shall rely on them in entering into the agreement and in concluding the purchase and sale contemplated in the agreement that the Vendor would do a number of things. One of the Vendor's warranties, as provided for in term (1)(f) was that:

> The Vendor will continue at its best efforts to move the application forward to achieve and receive third and fourth readings for a 33 unit RT-2 townhouse site approved by the City of Coquitlam. The seller will deliver a serviced and zoned RT-2 site which will substantially meet those requirements stated by the City of Coquitlam in their subdivision and rezoning approvals.

d) Term 3.2, "Survival of Vendor's Representations and Warranties", stated that the representations and warranties set out in Term 3.1 survive the closing date and continue in full effect for the benefit of the Purchaser.

e) Term 3.3, “Vendor’s Indemnity”, provided that 0717 would indemnify the Purchaser for any loss, cost, or damage suffered by the Purchaser directly or indirectly as a result of a breach of any of the Vendor’s warranties or representations.

f) Term 3.4, “Election”, stated that if on the Closing Date any of the representations or warranties made by the Vendor are untrue in any material respect or the Vendor is in default in any material respect under any of its covenants or agreements, the Purchaser “may elect not to complete the purchase of the Property under this Agreement or to purchase the Property under this Agreement in either case without prejudice to any rights or remedies the Purchaser may have in respect of the Vendor’s breach or default.”

g) Term 10.2 stated that time was of the essence in the agreement and the transactions contemplated in it, notwithstanding the extension of any dates in the agreement.

h) Term 10.7 provided that the provisions of the agreement are to survive the Closing Date.

i) Under Term 10.15, “Assignment”, the Purchaser was permitted to assign the Agreement, in whole or in parts, to a third party, without notice to the Vendor, at the Purchaser’s sole discretion.

Subsequent Agreements to Extend the Closing Date

[27] As it turns out, there were delays in the subdivision approval process, resulting in extensions of the closing date as agreed upon by the parties in the four written contract addenda described in more detail below. In his affidavit, Mr. Helm deposes that two major hurdles for the re-zoning and subdivision approval process were (i) complications relating to the street design of the subdivided area; and (ii) uncertainty about the location of the B.C. Hydro high voltage transmission line for the subdivision. Mr. Helm deposes that “the complications relating to the design of

the transmission line" did not become apparent until much later in the process. Later in his affidavit, Mr. Helm sets out several other reasons for delay, including the fact that the City of Coquitlam official with whom he was dealing went on leave and later resigned, requiring a new official to take over, and delays associated with the COVID-19 pandemic. It is not necessary to descend any further into the details regarding the various reasons for the delay in obtaining subdivision approval from the City of Coquitlam.

[28] The first addendum to the contract was dated 31 August 2016. It extended the closing date from 28 October 2016 to 1 February 2017, and provided that the first deposit of $400,000 would be released immediately to the vendor. The first addendum also included a term stating that if the vendor could not provide "property titles and remaining approvals from the City of Coquitlam" by the new closing date, the parties would "continue to extend the Closing Date to a mutually agreed date, until the Purchaser is able to provide the said subdivision, titles and zoning", and further that once the subdivision, zoning, and titles were obtained, the vendor would give the purchaser 15 days notice to complete the sale.

[29] The second addendum to the contract was dated 15 July 2017. It extended the closing date to 30 May 2018. It also deleted the term in the first addendum governing further extensions, and replaced it with a term stating that the vendor would continue to make "utmost best efforts to obtain all property titles, subdivision and zoning approvals" as soon as possible, and in the event that these were obtained prior to the new closing date, the closing date would be amended to 15 days after the vendor gave notice that these steps had been completed.

[30] In his affidavit, Mr. Helm explains that as a condition for approval of the subdivision plan, the City of Coquitlam required 0717 to post a bond in the amount of 110% of the projected cost of the off-site servicing. Mr. Helm goes on to explain that when the contract between 0717 and RBD was initially executed, the particular lot that RBD was to acquire — Lot 10 — was not yet in existence because the property had yet to be subdivided. Mr. Helm avers that he was not prepared to pay for and

complete the off-site servicing prior to Lot 10's creation, as he did not want to pay as much as $2,000,000 on off-site servicing without a high degree of confidence that the City of Coquitlam would ultimately approve the subdivision of the property.

[31] This topic was raised in an email sent from Mr. Helm to Mr. Richardson on 19 February 2018. Mr. Helm said he did not have the funds for the off-site servicing bond, and his lender would only approve financing for the bond "upon titles being created", which of course could not occur until the municipality approved the subdivision plan. To address this problem, Mr. Helm proposed an agreement under which "closing will occur upon titles being created". Mr. Helm surmised that if the parties proceeded on these terms, the off-site servicing work could get under way "by March or early April", although it was "a bit uncertain" how much work would be done by the existing closing date of 30 May 2018.

[32] Following this email, the parties executed the third addendum to the contract, dated 15 March 2018, under which (i) the completion date was changed to 30 September 2018; (ii) the purchase price was increased by $50,000 per month from May 2018 to September 2018, for a total increase of $250,000 (bringing the total Purchase Price to $8,550,000); and (iii) the vendor was to continue to make "utmost best efforts" to obtain "substantial completion as defined with the City of Coquitlam, property titles, subdivision and zoning approvals" as soon as possible, and if these steps were accomplished prior to the ultimate closing date, then the closing date was to be amended to 10 business days after the vendor gave notice. Further, if the vendor was unable to obtain "substantial completion" by 30 September 2018, the purchaser would have a right to extend the closing date for up to six months.

[33] On 26 September 2018, the parties executed a fourth addendum to the contract, extending the outside closing date to 19 April 2019. The fourth addendum also deleted the terms of the third addendum providing that the vendor was to make utmost best efforts to obtain "substantial completion, titles, subdivision and zoning", and replaced that term with language that was comparable to the terms of the second addendum. Thus, the vendor was obliged to make "utmost best efforts to

obtain all property titles, subdivision, and zoning approvals", but there was no reference in this term to "substantial completion". If the vendor achieved the necessary steps prior to the ultimate closing date of 19 April 2019, the closing date would be moved up to 10 business days after the vendor gave notice. Finally, the fourth addendum provided that if the vendor did not obtain the necessary titles, subdivision and zoning by the outside closing date of 19 April 2019, the purchaser would have the right to extend for up to 60 days.

[34] Meanwhile, 0717 was able to obtain bank financing for a bond in the amount of $1,962,750, representing 110% of the projected off-site servicing costs for the subdivided lands. In September 2018, 0717 started looking for a contractor to do the off-site servicing work. On 20 December 2018, Mr. Helm on behalf of 0717, executed a contract with Beaverdale Construction (2002) Ltd. for construction of the off-site servicing, with the work to commence on 21 January 2019.

[35] Mr. Helm deposes that RBD was well aware that the off-site servicing for Lot 10 was not complete and would not be completed as of the closing date in the contract. In support of this averment, Mr. Helm cites a collection of emails appended to Mr. Richardson's first affidavit. The most recent of these was an email dated 18 December 2018 from Mr. Helm to Mr. Richardson, enclosing a draft construction schedule for the off-site servicing, running from January through to April of 2019. While it is clear from this schedule that as of 18 December 2018 the off-site servicing work had yet to be commenced, it is not at all clear that the work would not be completed by the ultimate closing date of 19 April 2019 as provided for in the fourth addendum to the contract.

Subdivision Approval and Issuance of Titles

[36] Mr. Helm deposes in his affidavit that the subdivision plan was registered with the Land Title Office on 18 December 2018, and the titles for all ten lots (Lots 1 to 9, intended for single family homes, and Lot 10, which was intended for the townhouse development) were issued on 9 January 2019. On 14 January 2019, Mr. Helm on behalf of 0717 sent an email to Mr. Richardson on behalf of RBD, serving as the

required notice per the fourth addendum to the contract, thus setting 28 January 2019 (10 business days later) as the closing date for 0717's sale of Lot 10 to RBD.

Further Communications Between the Parties Preceding Contract Completion

[37] Mr. Richardson deposes in his first affidavit that upon receipt of notice that 0717 had obtained the titles, zoning and subdivision approvals required to complete the sale of Lot 10, he enquired about the status of the off-site servicing, directly with Mr. Helm and through counsel. Attached to Mr. Richardson's affidavit are two emails speaking to this point. In particular:

a) In an email dated 14 January 2019 from RBD's counsel to 0717's counsel, RBD requested a copy of the "servicing agreement" between 0717 and the City of Coquitlam for the completion of the off-site servicing. This email also stated RDB's position that, as provided for in Terms 1(g) and (1)(f) of the original contract, the Vendor was "obligated to deliver a serviced site, with 'serviced' being specifically defined in the contract to mean 'all services required by the City of Coquitlam to be listed in the servicing agreement for rezoning have been substantially completed'".

b) In an email dated 16 January 2019, Mr. Richardson stated to Mr. Helm that the parties needed to address the status of the servicing work on the property. Mr. Richardson cited the parts of the contract referencing 0717's obligation to provide a "serviced" site. He stated that it appeared that the servicing would not be "substantially completed" by the closing date. Mr. Richardson indicated that RBD would be agreeable to "allowing the servicing work to be completed after the closing date" on the basis of either (i) a holdback equal to the amount of the uncompleted servicing work, plus 10%; or (ii) the posting of a bond with the City of Coquitlam. Mr. Helm responded to this email confirming that 0717 had in fact posted a bond with the City of Coquitlam in the amount of $1,926,750, equal to the estimated cost of the off-site servicing plus 10%.

[38] Mr. Richardson deposes in his first affidavit that after this email exchange, he relied on 0717's "performance guarantee" and Mr. Helm's representation that the construction company he had hired would complete the off-site servicing by April 2019. Thus, Mr. Richardson on behalf of RBD decided to proceed with the purchase of Lot 10 pursuant to the contract. Mr. Richardson further deposes that RBD "reserved the right to seek damages for any costs arising from the lack of servicing" under Term 7.8 of the contract, if "as was likely, [Lot 10] was not serviced by the closing date".

[39] By contrast, Mr. Helm avers in his affidavit that it was "his belief" that 0717's conveyancing counsel had communicated to RBD's closing counsel that "all terms and conditions necessary to cause the [c]losing to be carried out were satisfied" and that "substantial completion of the off-site servicing of [l]ot 10 was not a requirement to be performed by the [c]losing [d]ate". However, this particular assertion is hearsay. There is no affidavit from Mr. Helm's conveyancing solicitor, and no contemporaneous documentation to support Mr. Helm's assertion on this point.

[40] Mr. Helm further deposes in his affidavit that at the time of the closing on 19 January 2019, RBD was clearly aware that the off-site servicing had not been completed, and further that, "At no time prior to the Closing Date was it suggested by the Richardson's [sic] or Mr. Rainey [their counsel] that 071 was in default or breach of the Contract by reason that off-site servicing was not then substantially complete for Lot 10".

[41] In response, Mr. Richardson deposes in his second affidavit that the contract gave RBD the right to close on the purchase of the property without prejudice to its right to sue 0717 for its failure to substantially complete the off-site servicing by the closing date, and the contract did not include any requirement for RBD to give 0717 notice of any reservation of such rights. Mr. Richardson further deposes that at the time, he believed notifying Mr. Helm of any intent by RDB to sue for damages arising from 0717's failure to substantially complete the off-site servicing by the closing date

would have led Mr. Helm and 0717 to refuse to "close the transaction" and withhold the deposits, resulting in litigation.

Contract Completion

[42] On 28 January 2019, the sale of Lot 10 was completed. Pursuant to the terms of the contract, 0717 transferred title to Lot 10 to RBD, and RBD paid the balance of the revised purchase of $8,550,000 to 0717.

RBD's Agreement to Sell Some of the Subdivided Properties

[43] Mr. Richardson's first affidavit indicates that on 13 March 2019, RBD entered into a written agreement to sell several of the subdivided properties, including Lot 10, to a third party buyer described in Mr. Richardson's affidavit as "Infinity". The sale of the property was to take place upon "substantial completion" of the off-site servicing by 0717.

[44] Mr. Helm deposes in his affidavit that Mr. Richardson did not tell him about RBD's intention to sell any of the subdivided properties to a third party. Had he been informed, Mr. Helm "would have stated his objections" on the basis that this was "contrary to our prior discussions that [the Richardsons] would build out Lot 10 and our other discussions that they would not 'flip' or re-sell Lot 10 to another builder". This is a reference to the restaurant meeting between Mr. Helm and the Richardsons in December 2015.

[45] In his second affidavit, Mr. Richardson does not respond directly to the allegation that he and his brother had agreed not to "flip" or re-sell Lot 10. However, Mr. Richardson does aver that "it was always [RBD's] intention to reserve the right to assign the contract at any time without notice to [0717] with respect to this property and it has always been general practice and indeed, that is how the contract is written".

Further Delays in Substantial Completion of the Off-Site Servicing

[46] To continue with the narrative, the evidence as a whole reflects that there were considerable further delays in the completion of the off-site servicing for Lot 10.

Mr. Helm discusses the various reasons for the delay in his affidavit. The details are not germane. It does appear that much of the delay arose due to issues and developments that were beyond 0717's control. Regardless, the result was that substantial completion of the off-site servicing for Lot 10 was not achieved until 14 December 2020.

RBD's Alleged Damages

[47] In the meantime, RBD had extended its agreement to sell Lot 10 to Infinity a number of times, awaiting substantial completion of the off-site servicing. The last extension was on 15 June 2019. Ultimately, the sale did not complete until 7 January 2021. Mr. Richardson avers in his first affidavit that as a result of the delay in completing this sale, due to the inability to provide a fully serviced property, RBD had to pay a penalty of $145,325 to Infinity. Mr. Richardson further avers in his first affidavit that due to delays in substantial completion of the off-site servicing for Lot 10, RBD suffered a total loss which I calculate to be roughly $1,278,000, consisting of the aforementioned penalty, bank fees, property taxes, and carrying costs and interest in respect of the initial purchase price.

Mr. Helm's Explanation of the Property Transfers by 0717

[48] Recall my conclusion in the ruling on RBD's *ex parte* application that of the 12 parcels of real property owned by 0717, the company had disposed of all but two of them by the time of the *ex parte* application, and that three of the properties disposed of by 0717 appear to have been the subject of non-arm's length transfers for nominal consideration. Those findings were based on information included in Mr. Richardson's first affidavit. Of course, Mr. Richardson was not a party to any of the transactions in question, and therefore only had limited information about the circumstances in which those property transfers took place.

[49] To address this, Mr. Helm's affidavit filed on the *inter partes* application describes the history of the land assembly undertaking that preceded the contract in issue in this litigation. This included, as noted in paragraph 20 above, the written agreement between Mr. Helm's son and 0717, under which Mr. Helm's son

transferred one of the parent parcels to 0717 in exchange for an immediate cash payment of $615,000 and the subsequent transfer of three serviced lots zoned for single family residences with a deemed value of $455,000 each. This meant that the three non-arm's length property transfers for nominal consideration which were a particular cause of concern in the ruling on the *ex parte* application were, in fact, part of a pre-existing commercial real estate transaction orchestrated by Mr. Helm as part of the land assembly project that led to the contract in issue between 0717 and RBD.

[50] Mr. Helm's second affidavit also explains what happened with the other six lots zoned for single family residences. Mr. Helm deposes that 0717 sold all six of these lots to a builder, Vancor. This was consistent with Mr. Helm's original intent to use 0717 for the land assembly, re-zoning and subdivision, and then sell the individual lots to builders. Thus, the transfer of the six lots to Vancor was part of the ordinary business operations of 0717, and not part of any plan to dissipate or divest 0717 of its assets.

Evidence of 0717's Current Holdings and Financial Position

[51] Mr. Helm's affidavit also goes on to discuss the current real property holdings of 0717, as of the date of the *inter partes* application. In particular, Mr. Helm explains in his affidavit that 0717 continues to be the registered owner of a real property with a residential address of 3620 Victoria Drive in Coquitlam. For ease of reference I will refer to this property using a shorthand of its legal description, Lot 3.

[52] Mr. Helm avers that 0717 has owned Lot 3 since 2015, that it is "free and clear" of any financial charges, and that 0717 has no present intention to transfer or otherwise encumber Lot 3. A copy of the title search for Lot 3 is appended to Mr. Helm's affidavit, which confirms that 0717 is the sole owner of the property and there are no charges registered against the title. Mr. Helm's affidavit also attaches the 2023 tax assessment for this property, indicating that its 2022 tax assessed value is $6,306,000, which, Mr. Helm points out, is vastly in excess of the total amount of RBD's claim for slightly less than $1,300,000 in damages.

[53] Finally, Mr. Helm explains that although 0717 currently has no plans to sell or encumber Lot 3, even if it were to do so the company "would be obligated to deal with the sale proceeds as regulated by" federal and provincial law. On this evidence, counsel for 0717 says it is unrealistic to expect that the company would disregard its legal and corporate governance obligations by divesting itself of property without receiving market value consideration in exchange.

[54] I should note here that in argument, counsel for RBD pointed out two potential limitations in Mr. Helm's affidavit insofar as the financial status of 0717 is concerned.

[55] First, the evidence as a whole reflects that when the *Mareva* injunction was granted, 0717 was in fact the registered owner of two separate real properties, namely: (a) the aforementioned Lot 3, which at the time of the *ex parte* application had a tax assessed value of $4,458,000 (although, as noted, the most recent tax assessed value is $6,306,000); and (b) a property that I will refer as Lot 20, again based on a shorthand for its legal description, which at the time of the *ex parte* application had a tax assessed value of $4,140,000. Mr. Helm's affidavit makes no reference to 0717's continued ownership of Lot 20. This leads to an inference, says counsel for RBD, that at some point after the *Mareva* injunction was replaced with a deposit of $1,300,000 in trust, 0717 disposed of Lot 20. Mr. Helm's affidavit says nothing about the sale of this property or the status of the proceeds.

[56] Second, counsel for RBD emphasizes that apart from speaking to 0717's continued ownership of Lot 3, Mr. Helm's affidavit says nothing about the company's current financial position, assets, liabilities or debts. Counsel for RBD says this speaks to a lack of transparency, or an unwillingness on the part of Mr. Helm and 0717 to furnish affirmative evidence that the company is solvent and not at risk of being unable to pay a judgment of as much as $1,300,000 if the funds currently held in trust pursuant to the consent variation of the *Mareva* injunction are released.

[57] In response to all of this, counsel for 0717 asserts that there is no affirmative legal burden on the party opposing a *Mareva* injunction to prove its solvency, disclose its assets, or volunteer information about its financial position. Here, 0717

had presented uncontested evidence that it owns at least one substantial asset, namely a completely unencumbered real property with a value that greatly exceeds the entire amount of RBD's claim.

Evidence of Borrowing Costs

[58] In his second affidavit, Mr. Richardson deposes that he made enquiries about the current cost for a company with real property worth over $6,000,000 to obtain a loan or line of credit in the amount of $1,300,000. Mr. Richardson deposes that in such circumstances it would be possible to obtain a line of credit for one year at an annual interest rate of 1.5%, plus transaction fees of some $1,500 to $2,000. This would result in a total annual carrying cost of some $21,000 to $21,500. I note that the evidence given by Mr. Richardson on this topic consists of a hearsay quote furnished to him by a named representative of a particular banking institution in Canada. Under Rule 22-2(13) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, hearsay evidence is admissible in an affidavit provided that the source of the information is identified and the affidavit is not made in support of a final order. Here, the source of the information is identified, and the order sought is interlocutory in nature. Further, no formal objection was taken to this evidence by opposing counsel. Finally, the evidence is on a rather straightforward financial matter, the parameters of which would be relatively easy for the opposing party to verify or refute. I would therefore admit this evidence.

Additional Evidence Not Considered or Relied Upon

[59] I should note that, evidently in response to the allegation that Mr. Richardson withheld or failed to disclose relevant evidence in his first affidavit, relied upon in the *ex parte* application, Mr. Richardson's second affidavit refers to additional email correspondence, between 19 January 2018 and 23 January 2018, in which the parties discussed issues concerning proper interpretation of the contract. This string of emails, attached as Exhibit "C" to Mr. Richardson's second affidavit, includes many references to litigation, and efforts to resolve the differences or amend the contract without the need for litigation. At least one of these emails states that it is

written on a “without prejudice” basis. Because I have some concern that this particular string of emails is protected by settlement privilege, I have declined to consider or rely on this correspondence.

Legal Principles

[60] In the current application, the defendants seek to set aside or cancel the existing order requiring them to post security. This order was made, by consent, in place of the initial *ex parte Mareva* injunction granted on 31 March 2021. Hence, this is an *inter partes* hearing to determine whether the defendants should continue to be bound by any order in the nature of a *Mareva* injunction, thereby engaging the principles set out in *MacLachlan v. Nadeau*, 2017 BCCA 326.

[61] In *MacLachlan*, the plaintiff originally applied for and was granted a *Mareva* injunction on an *ex parte* basis. In a subsequent *inter partes* application heard by a second judge, the injunction was continued with a slight variation of the terms. When the original injunction expired, a further application was brought before yet another judge, who found that there had been “potentially serious” material non-disclosure in the initial *ex parte* application, but went on to decide the application on a *de novo* basis, concluding that the injunction should remain in place *vis a vis* the corporate defendant, but not *vis a vis* the personal defendant: *MacLachlan* at para. 11. The defendants sought leave to appeal that decision, arguing that the third judge failed to give due consideration to the implications of the plaintiff’s material non-disclosure in the original *ex parte* application. Mr. Justice Savage refused to grant leave, and the defendant then sought reconsideration by a full division of the Court of Appeal.

[62] In affirming the decision refusing leave, Justice Dickson, speaking for the Court, identified (at para. 37) seven principles emerging from the case law:

> i. on an application, *inter partes*, for a Mareva injunction following the grant of an *ex parte* injunction, the judge is to proceed with a *de novo* hearing;
>
> ii. on the *de novo* hearing, the whole of the facts, including any incorrect or incomplete facts upon which the *ex parte* injunction was based, are to be taken into account;

> iii. if the applicant failed to comply with the duty to make full and frank disclosure on the *ex parte* application, the nature of the failure and the degree and extent of the applicant's culpability are highly material factors for consideration;
>
> iv. the degree and extent of the applicant's culpability may range from innocent non-disclosure to bad faith, which may include deliberate misstatements;
>
> v. where material non-disclosure is established, the applicant should be deprived of any advantage derived by the breach of duty on the *ex parte* application;
>
> vi. in every case, the judge has a discretion in determining, on the whole of the facts, whether, and, if so, on what terms to grant a new Mareva injunction; and
>
> vii. the discretion is to be exercised judicially, in accordance with established principles, including those outlined in *Brinks-MAT*.

[63] Earlier in the decision Dickson J.A. cited the following passage from *Brink's-MAT Ltd. v. Elcombe*, [1988] 3 All E.R. 188 (C.A.), delineating the contours of the duty of full and frank disclosure, also in seven discrete points, as follows (*MacLachlan* at para. 34, quoting from *Brinks-MAT* at 192):

> (i) The duty of the applicant is to make a full and fair disclosure of all the material facts.
>
> (ii) The material facts are those which it is material for the judge to know in dealing with the application as made; materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers.
>
> (iii) The applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.
>
> (iv) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application, (b) the order for which application is made and the probable effect of the order on the defendant..., and (c) the degree of legitimate urgency and the time available for the making of inquiries....
>
> (v) If material non-disclosure is established the court will be astute to ensure that a plaintiff who obtains ... an *ex parte* injunction without full disclosure is deprived of any advantage he may have derived by that breach of duty.
>
> (vi) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the

> applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.
>
> (vii) Finally it is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded.... The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate.

[64] It is also necessary to consider the test for issuance of a *Mareva* injunction. A compendious and yet succinct description of the legal test can be found in *Kepis & Pobe Financial Group Inc. v. Timis Corp*, 2018 BCCA 420, in which Justice D. Smith carefully traced the history of the law, starting with *Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2, 1985 CanLII 55, and continuing with the subsequent decisions of the courts in this province in *Mooney v. Orr (No. 2)* (1994), 100 B.C.L.R. (2d) 335, 1994 CanLII 16698 (S.C.), *Silver Standard Resources Inc. v. Joint Stock Co. Geolog* (1998), 59 B.C.L.R. (3d) 196., (1998) CanLII 6468 (C.A.), *Tracy v. Instaloans Financial Solutions Centres (BC) Ltd.*, 2007 BCCA 481, and *ICBC v. Patko*, 2008 BCCA 65. Justice Smith reached the following conclusion with respect to the state of the law in this jurisdiction:

> [18] In sum, British Columbia has forged a flexible approach to applications for *Mareva* injunctions from the more stringent rules-based approach in *Aetna*. Under this approach, "[t]he fundamental question in each case is whether the granting of an injunction is just and equitable in all the circumstances of the case": *Mooney v. Orr No. 2* at para. 43. The legal test requires an applicant to establish: (1) the threshold issue of a strong *prima facie* or good arguable case; and (2) in balancing the interests of the parties, to consider all the relevant factors, including (i) the existence of exigible assets by the defendant both inside and outside the jurisdiction, and (ii) whether there is evidence of a real risk of disposal or dissipation of those assets that would impede the enforcement of any favourable judgment to the plaintiff.

[65] *Tracy* is also instructive. In that case, a five-member division of the Court was asked to reconsider the state of the law on *Mareva* injunctions in British Columbia. Writing for a unanimous Court, Justice Saunders affirmed the "flexible approach" first articulated in *Mooney v. Orr (No. 2)*, but also issued a reminder that a *Mareva* injunction is a "species of interlocutory injunction with special requirements", representing an exception to the general rule against pre-judgment execution: *Tracy*

at para. 44. The manner in which those "special requirements" are assessed "may vary depending on the nature of the exception into which the injunction fits": *Tracy* at para. 44. Further, in every *Mareva* injunction case, "great caution is to be shown" to "avoid the mischief of litigious bullying", and "due regard must be paid to the basic premise that a claim is not established until the matter is tried": *Tracy* at para. 46.

[66] Finally, the following passage from *Patko* helps to underscore the flexibility of the legal test, while also acknowledging the special character and exceptional nature of the *Mareva* injunction:

> [25] Under the flexible *Mooney No. 2* approach, the fundamental question in each case is whether the granting of an injunction is just and equitable in all the circumstances of the case: *Mooney No. 2* at para. 43. In order to obtain an injunction, the applicant must first establish a strong *prima facie* or good arguable case on the merits. Second, the interests of the two parties must be balanced, having regard to all the relevant factors, to reach a just and convenient result. Two relevant factors are evidence showing the existence of assets within British Columbia or outside, and evidence showing a real risk of their disposal or dissipation, so as to render nugatory any judgment: *Mooney No. 2* at para. 44.
>
> [26] The root of the *Mareva* injunction is the risk of harm either through dissipation of assets or removal of assets to a place beyond the court's reach: *Tracy* at para. 45. In most cases it will not be just or convenient to tie up a defendant's assets merely on "speculation that the plaintiff will ultimately succeed in its claim and have difficulty collecting on its judgment if the injunction is not granted": *Silver Standard* at para. 21. Thus, though a party may apply for and obtain an injunction as security for damages sought in the litigation without showing that there is a real risk the defendant will dissipate assets, in most cases a real risk of dissipation must be established before a party will be granted a *Mareva* injunction in British Columbia.

[67] A helpful list of the points that ought to be addressed in an *ex parte* application for a *Mareva* injunction can be found in *Third Chandris Shipping Corp. v. Unimarine S.A.*, [1979] Q.B. 645 (C.A.), cited with approval in *Fine Gold Resources Ltd. v. 46205 Yukon Inc.*, 2016 YKCA 15 at para. 11. In my view, this list usefully knits together the rules of full and frank disclosure in *ex parte* applications and the legal requirements for the issuance of a *Mareva* injunction. Paraphrasing from *Third Chandris Shipping*, I would describe the relevant propositions as follows. First, the applicant must make "full and frank disclosure" of all matters within that party's knowledge that are material and ought to be made known to the issuing judge.

Second, the applicant should "give particulars of the claim" against the responding party, stating the grounds for the claim, the amount in issue, and "fairly stating the points made against it by the respondent". Third, the applicant should give grounds for believing the respondent has assets within the jurisdiction. Fourth, the applicant should give grounds for believing that there is a "real and genuine risk of assets being removed, dissipated, or disposed of" if the requested injunction is not granted. Fifth, the applicant is expected to give an undertaking as to damages.

Analysis

(1) Full and Frank Disclosure in the *Ex Parte* Application

[68] The defendants argue that the plaintiffs failed to make full and frank disclosure in the *ex parte* application, by (i) "exaggerating the strength of their case" and failing to fairly present any "contrary facts or law" as to the merits of the claim to the issuing justice; and by (ii) failing to inform the issuing justice about the nature of the real estate transactions outlined in Mr. Richardson's first affidavit, thereby overstating the risk that the defendants would dispose of or dissipate assets unless the *Mareva* injunction were granted. I will deal with each of these arguments in turn.

(i) Alleged Failure to Fairly State the Strength of the Case

[69] The law is clear that in an *ex parte* application, the applicant has a duty to inform the issuing justice about any material facts that would tell against the order sought. The applicant also has a duty to fairly present the case, which duty includes an obligation to outline any defences or contrary legal positions that would likely be put against the applicant if the opposing party were present to argue its case.

[70] The former duty, that is, to advise the issuing justice about all material facts, is relatively straightforward. A material fact is any fact that would weigh either for or against the granting of the order sought. The applicant cannot be selective in presenting the facts, and indeed has an obligation to advise the issuing justice about any material fact that would tend to weaken or undermine the applicant's position. This includes material facts either within the applicant's knowledge, or that ought

reasonably to have been known to the applicant at the time the application was brought, based on a proper investigation of the matter.

[71] The latter duty, that is, the applicant's duty to fairly present its case, is more contextual and thus more difficult to regulate. Certainly, the applicant cannot skip over or, worse yet, obfuscate any clear defences or manifest legal obstacles that would stand in the way of the relief sought on the *ex parte* application. However, the applicant can only anticipate so much, and may not be able to discern much less fully develop contrary arguments that might later be advanced by the opposing party. This is one of the reasons why the *ex parte* application process is so fragile. It also helps to explain Justice Huddart's comment in *Mooney v. Orr (No. 2)* at 350 that the analysis is likely to be "given flesh only at the *inter partes* continuation hearing".

[72] In this particular case, while counsel for 0717 argued forcefully at the *inter partes* hearing that RBD's position on the alleged breach of contract is exceedingly weak, counsel did not identify any particular material facts that RBD knew or ought to have known about but failed to disclose in the *ex parte* application.
Mr. Richardson's first affidavit attached copies of the contract and the four addenda, along with email correspondences cited by both parties at the *inter partes* hearing in support of their respective positions. Indeed, both counsel rely primarily, though perhaps not entirely, on the terms of the written agreement itself in support of their respective legal positions on the merits. For example, 0717's notice of application (at p. 27, para. 26) asserts that RBD's *ex parte* application failed to set out the "…differing interpretations of the Contract as amended by at least the Fourth Addendum…". Thus, the complaint advanced by the defendants is not so much that the plaintiffs failed to disclose material facts, but rather that the plaintiffs (or their counsel) failed to fairly state the position that would be put against them by the opposing party.

[73] I find it telling that in outlining this submission, 0717's notice of application leads with the qualifying phrase (again, at p. 27, para. 26), "While counsel for the Defendants was obviously not present at the hearing…". The implication of this

qualifying phrase would appear to be that counsel for the defendants is unable to say what the issuing justice was or was not told during oral submissions at the *ex parte* application. However, it was open to 0717 to obtain a transcript of the submissions on the *ex parte* hearing, to know exactly what counsel for the plaintiffs said or did not say about the position of the plaintiffs, and the likely or anticipated position of the defendants. At least in this particular case, in the absence of a transcript of the *ex parte* proceedings, I would not put much stock in the position now taken by 0717 that counsel for RBD failed to fairly state the case, or failed to fairly describe any obvious defences or legal obstacles to the application that emerged from the record.

[74] In the result, I am not satisfied that counsel for the plaintiffs breached the duty of full and frank disclosure or otherwise abused the *ex parte* application process in addressing the merits of the breach of contract claim advanced by the plaintiffs.

(ii) Alleged Overstatement of the Risk of Dissipation or Disposal of Assets

[75] Recall my finding in my initial ruling on the *ex parte* application that by the time of the application, 0717 had disposed of all but two of the 12 properties that it held at the height of the land assembly arrangement that spawned contract now in issue between the parties.[1] I further found that 0717 had transferred at least two of these properties to family members of 0717's principal Mr. Helm, substantially below market value. These findings — which undergirded the conclusion that 0717 posed a risk of dissipating or disposing of its assets — were based on the evidence in Mr. Richardson's first affidavit, tendered in support of the *ex parte* application.

[76] It is now clear from the affidavit evidence of Mr. Helm that all of the relevant property transfers were part of a pre-conceived land assembly, re-zoning and subdivision project. All of the impugned property transfers were, in effect, part of 0717's business operations, and on the record as a whole there could be no realistic

[1] This finding was in error to the extent that 0717 was in fact the registered owner of only 11 properties, not 12.

suggestion that any of these transfers were intended to place assets beyond the reach of a civil judgment. Mr. Helm avers, and I fully accept, that these transfers to family members were the end result of a pre-existing written agreement in which Mr. Helm's son initially transferred one of the larger parent parcels to 0717 for due consideration, in exchange for an up-front cash payment and a commitment to later transfer three of the subdivided properties back to Mr. Helm's son or his assignees. The written agreement between Mr. Helm's son and 0717 is appended as an exhibit to Mr. Helm's affidavit, and it leaves no room for debate on this point.

[77] Against this backdrop, counsel for 0717 now argues that both Mr. Richardson on behalf of RBD and counsel for RBD failed to disclose material facts on the *ex parte* application, and that this non-disclosure had the effect of misleading the court on a key issue in the *Mareva* injunction analysis. Counsel for 0717 submits that Mr. Helm expressly informed Mr. Richardson about the intention to transfer certain properties to Mr. Helm's children at the end of the subdivision process, during the December 2015 restaurant meeting. On this basis, it is submitted that Mr. Richardson knew the non-arm's length transfers were a legitimate part of the land assembly, re-zoning and subdivision scheme, and that he intentionally withheld this information in the *ex parte* application. Counsel for 0717 further submits that both Mr. Richardson and counsel for RBD failed to make reasonable inquiries into the circumstances surrounding 0717's property transfers, resulting in a further breach of the duty to make full and frank disclosure of all material facts.

[78] I will deal firstly with the contention that Mr. Richardson knew of and intentionally withheld information about the pre-existing plan for 0717 to transfer some of the subdivided properties to Mr. Helm's children. In his second affidavit, Mr. Richardson claims to have no recollection of Mr. Helm saying this at any meeting. In order to find that Mr. Richardson intentionally withheld this information I would have to conclude that he is lying when he claims to have no memory of this discussion. I am not prepared to reach that conclusion on the basis of affidavits, in the absence of any *viva voce* testimony or cross-examination, and in the absence of any independent or objective evidence supporting Mr. Helm's account.

[79] I should note that at least one other point allegedly discussed at the December 2015 restaurant meeting does not appear to fit with the independent record. Mr. Helm claims that during the meeting, the Richardsons made a commitment not to transfer any of the subdivided properties to any third party, and gave assurances that they would be the builders of the townhouse development on Lot 10. That claim seems on its face to be entirely inconsistent with Term 10.15 of the 7 January 2016 contract, which states that the purchaser (RBD) had the right to assign its contractual rights to any third party, without notice to the vendor (0717). This gives at least some reason to question the accuracy of Mr. Helm's account of the December 2015 restaurant meeting.

[80] Further, there is the possibility that even if Mr. Helm did in fact clearly advise the Richardsons about the pre-arranged plan to transfer three of the subdivided properties to the Helm children, Mr. Richardson did not at the time consider it salient or important enough to remember, and thus had no recollection of it when he swore his first affidavit. Even reading the detailed description of the meeting as set out in Mr. Helm's affidavit does not appear to have jogged Mr. Richardson's memory on this particular point.

[81] In the result, I am not satisfied that Mr. Richardson intentionally withheld material facts in his first affidavit. This is not to be interpreted as a conclusion that Mr. Helm's account is not credible or worthy of belief. However, on all of the evidence before the court, and in the absence of any independent or objective evidence, I cannot reach an affirmative conclusion that Mr. Richardson is lying when he claims to have no memory of a discussion in which Mr. Helm advised of a pre-existing arrangement in which 0717 would transfer some of the subdivided properties to the Helm children.

[82] That brings me to the second branch of 0717's argument on this point. Counsel submits that as the applicant on the *ex parte* application, RBD had an obligation to advise the issuing justice of all material facts that were known or ought reasonably to have been known about the subject matter of the application. As

explained in *Brink's-MAT* at 192, the applicant must "make proper inquiries" in contemplation of the application, and the duty of disclosure "applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries". In this case, when Mr. Richardson swore his first affidavit, he appears to have relied only on property title searches to conclude that 0717 had transferred a number of properties in circumstances from which one could infer a risk of disposal or dissipation of assets in a manner that would frustrate a civil judgment. Counsel for 0717 says that RBD failed to make proper inquiries into the property transfers before advancing unfounded allegations about the propriety of those transactions.

[83] The case law instructs that "the extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case": *Brink's-MAT* at 192. In this particular case, it is not clear to me what sources of information Mr. Richardson or his counsel might have consulted about the circumstances surrounding 0717's property transfers, without alerting Mr. Helm or 0717 to the pending *Mareva* injunction application. This is not a case where the applicant could easily have consulted information within its own control, or publicly available sources, to obtain more detail about 0717's property transfers. Enquiries might have been with the contractor, Vancor, but it would have been impossible to know whether Vancor would then communicate with Mr. Helm about the fact that such inquiries were being made. At the hearing, counsel for 0717 did not point to any independent sources of information or avenues of investigation that RBD ought reasonably to have pursued to get more detail about the impugned property transfers in advance of the *ex parte* application.

[84] In these circumstances, I am not satisfied that either Mr. Richardson or counsel for RBD failed to make reasonable enquiries or failed to properly inform themselves about matters that were material to the *Mareva* injunction application. RBD clearly did not have the full picture with respect to 0717's property transfers, but there is nothing in the record to suggest that RBD was in a position to obtain

more information about these matters, without tipping off the defendants to the pending *Mareva* injunction application.

(2) *De Novo* Assessment of the Case for a *Mareva* Injunction, in any Form

(2)(a) The Merits of RBD's Claim

[85] The first element of the test for a *Mareva* injunction is the requirement for the moving party to establish a strong *prima facie* case or a good and arguable case on the merits of its claim. In *Tracy*, the Court was asked to consider whether the "good arguable" case threshold as applied by the chambers judge was sufficient to justify the issuance of a *Mareva* injunction, considering that in *Aetna* the Supreme Court of Canada applied the "strong *prima facie* case" threshold. Writing for the Court in *Tracy*, Saunders J.A. reasoned at para. 54 that the difference between the two thresholds will often be a matter of no practical consequence. Under either formulation, the moving party is required to present a case that is "more than arguable", but is not required to show that the claim is "bound to succeed". In this particular case, out of an abundance of caution, I will apply the strong *prima facie* case threshold, although in my view the result would be the same even if one were to adopt the good arguable case standard.

[86] On my assessment of the case, the merit of RBD's claim turns largely on an issue of contract interpretation.

[87] On the one hand, RBD asserts that 0717 made a contractually binding commitment to ensure that the off-site servicing was "substantially complete" as of the closing date. On RBD's interpretation of the contract, 0717 had given a warranty that the off-site servicing would be substantially complete as of the closing date. The four addenda altered the closing date without modifying any of the other terms of the agreement, including 0717's warranty that the subject property would be fully serviced by the closing date. RBD says that under Term 7.8 of the contract, it had the right to proceed with the sale without prejudice to its right to later sue for breach of the warranty in the event of any damages.

[88] On the other hand, 0717 maintains that it had no contractual obligation to ensure that the off-site servicing for Lot 10 was "substantially complete" as of the closing date. Counsel submits that on a proper interpretation of the contract, 0717 had warrantied that it would take all steps to ensure that the off-site services were substantially complete, but timing of substantial completion was not tied to the closing date. Further, the requirement for substantial completion was dependant upon the actions of third parties including re-zoning and subdivision approval from the City of Coquitlam, and work performed by the off-site servicing contractor, such that Mr. Helm would never have accepted a contractual obligation to ensure that the off-site servicing was substantially complete by the closing date. It was apparent when the third and fourth addenda to the contract were executed that the off-site servicing would not be substantially complete by the closing date. The fourth and final addendum is clear that the contract would be completed on 28 January 2019 and the off-site servicing would continue thereafter. Finally, RBD proceeded with the purchase of the subject property without giving any notice of an intention to reserve rights to sue on an alleged breach of the warranty to provide off-site servicing.

[89] Considering the terms of the contract, the four addenda, and all of the other extrinsic material placed before the court in the *inter partes* hearing, I conclude that the plaintiff has met the strong *prima facie* case threshold. The case is more than arguable. There is a strong case to be made that 0717 warranted and represented in Terms 1(g) and 3.1(1)(f) of the contract that the off-site servicing would be substantially complete as of the closing date, that the four contract extensions did not alter the temporal element of 0717's warranty obligation, and that under Terms 3.2 and 7.8 of the contract RBD had the right to complete the property purchase while reserving the right to sue for breach of the warranty. None of this should be taken as a conclusion that RBD's case is certain to succeed, but RBD's position is compelling enough to meet the strong *prima facie* case requirement.

[90] At the *inter partes* hearing, counsel for 0717 advanced a number of arguments to support his position on the proper interpretation of the contract. I will

address four of them here, although not necessarily in the order that they were presented by counsel in the hearing or the notice of application.

[91] One of 0717's arguments is that under Term 3(f) of the contract, 0717 warranted that it "will deliver a serviced and zoned" site. Counsel submits that, properly interpreted, this means 0717 warranted that it "will" in the future deliver a serviced and zoned site. This argument is rational, although it may not fully account for Term 1(g) providing that "serviced" means "all services [required by the City of Coquitlam] have been substantially completed", which is framed in the past tense.

[92] A second argument put forward by 0717 is that there were no conditions precedent to the contract. I do not see how that helps the defendants. The plaintiffs do not assert that substantial completion of off-site servicing was a condition precedent to the formation or execution of the contract. Rather, the plaintiffs say that the defendant 0717 warranted that the off-site servicing would be substantially completed by the closing date. The plaintiffs say that despite the breach of the warranty, the contract could still proceed with the transfer of the property from 0717 to RBD in exchange for payment of the purchase price. Nevertheless, RBD still had the right, counsel submits, to sue for 0717's breach of the warranty that the off-site servicing would be substantially complete by the closing date.

[93] A third submission put forward by 0717 is that, according to counsel, the fourth addendum effectively "supersedes" the terms of the original contract as regards the timing of the commitment to ensure substantial completion of the off-site servicing. In my view this point is arguable either way. 0717's position on this issue may be strengthened by the text of the third addendum, which expressly refers to "substantial completion" whereas the fourth addendum does not. On the other hand, the fourth addendum also expressly states that apart from the change in the actual closing date, all other terms and conditions in the original contract "remain the same and in full force and effect", which strengthens RBD's argument for saying that the warranty provisions, including the warranty that the off-site servicing would be substantially complete by the closing date, remained in effect.

[94] A fourth submission advanced by 0717 is that RBD proceeded with the closing and took title to the property without ever notifying 0717 that RBD was reserving its right to sue for a breach of the warranty obligation to provide a fully serviced lot as of the closing date. However, Term 7.8 of the contract gave RBD the right to proceed with the closing, without prejudice to its right to pursue remedies for any breach or default by 0717. Term 7.8 does not contain any express requirement for RBD to give formal or express notice of its reservation of rights. Nor did counsel for 0717 cite any case law holding that a contracting party has a positive legal duty to advise the counterparty of its intention to proceed with a closing while reserving the right to sue for the counterparty's breach of a non-fatal warranty or performance obligation.

[95] I would not dismiss entirely the first, third, and fourth arguments advanced by 0717 as I have just outlined them. In my view, these points are rational and arguable. I have taken them into account, but in my view, they do not undercut the conclusion that RBD has a strong *prima facie* case on the merits of its claim. That is not to say that RBD will inevitably succeed, or that the positions put against it are meritless. I do not consider it helpful to say any more about the relative strength of each party's case.

(2)(b) Balance of Convenience

[96] There is no dispute that 0717 has "exigible assets" within the jurisdiction. However, that is merely one consideration. I question whether this fact, standing alone, could ever be enough to justify the special remedy of a *Mareva* injunction in any form. Although the approach in this jurisdiction is meant to be flexible, and there is no requirement in law for the applicant to establish an affirmative risk that assets will be disposed of or dissipated in the absence of injunctive relief, evidence upon which such a risk can be inferred is a highly relevant factor in balancing the interests of the parties.

[97] Counsel for RBD submits that if his client had known about Mr. Helm's pre-existing plan to transfer three of the subdivided properties to family members, and to

sell the remaining subdivided properties to a developer as a culmination of the land assembly, re-zoning and subdivision plan, RBD would still have brought an application for a *Mareva* injunction, albeit on an *inter partes* basis.

[98] Although counsel for RBD did not frame his argument this way, I would break his submission on the balance of convenience into four points.

[99] First, there is counsel's submission that even if all of 0717's recent property transfers were executed as part of the company's ordinary business operations, the fact remains that the company has now transferred all but one of the real properties that it held several years ago. In the absence of a continuing security order there would be nothing to stop 0717 from transferring or otherwise encumbering its single remaining real property in a manner that could imperil RBD's ability to collect on a judgment in this action.

[100] Second, counsel for RBD emphasizes the vagueness and lack of transparency in Mr. Helm's affidavit as to 0717's current financial position. Mr. Helm simply deposes that the company presently owns one property which is currently unencumbered, without saying anything about what has become of the proceeds of sale from the six lots that 0717 transferred to Vancor on 15 January 2021. Mr. Helm's affidavit also says nothing of the circumstances surrounding 0717's transfer of Lot 3 and what, if anything, the company did with any proceeds from that transaction. Counsel for RBD submits that based on all the information, the court can infer that 0717 is nothing more than a "flow through" company. Counsel submits that in the absence of the existing security order, there is indeed a risk that 0717 could dispose of or dissipate assets. Regardless of whether any future disposition or encumbrance of 0717's sole remaining real property might be carried out for a business purpose, any such transaction could still prejudice RBD by dissipating or putting 0717's assets out of the reach of a civil judgment.

[101] Third, counsel for RBD says there is no concrete evidence that the continuation of the security order will cause any prejudice to 0717, beyond the minimal prejudice of having to bear the carrying costs associated with maintaining

the posted security. Although Mr. Helm asserts in his affidavit that there are lost opportunity costs associated with 0717's inability to access the $1,300,000 currently being held as security, he has not furnished any details. There is no evidence that 0717 is prejudiced by the inability to pursue a specific business opportunity.

[102] Fourth, to mitigate prejudice to 0717 associated with having to keep the posted security of $1,300,000 in place until the December 2024 trial date, counsel for RBD says his client would be prepared to post its own security sufficient to cover 0717's carrying costs. In particular, RBD is prepared to post security in the amount of $38,000, which according to Mr. Richardson's banker, would be the borrowing cost on $1,300,000 at 1.5% per year, for two years.

[103] Wrapping all of these submissions together, counsel for RBD emphasizes that the legal requirements for obtaining a *Mareva* injunction are flexible. The key question will always be whether the order sought is in the interests of justice, which turns on an assessment of the balance of convenience between the parties. There is no hard and fast rule requiring proof of a concrete risk that the defendant will dispose of or dissipate assets with the intention to avoid judgment. In this case, the potential prejudice to RBD is that 0717 will dispose of, dissipate, or encumber assets — whether for a genuine business purpose or not — thereby depriving RBD of the ability to collect on judgment in this action. By contrast, counsel submits, the prejudice to 0717 associated with a continuation of the existing order is limited to the carrying charges associated with maintaining the posted security until the trial date, which prejudice could be substantially mitigated by an order requiring RBD to also post security, sufficient to compensate 0717 for those carrying costs in the event that the plaintiffs are unsuccessful at trial.

[104] Having carefully considered these arguments, in my view they are not sufficient to tip the balance in favour of maintaining the *Mareva* injunction. In my ruling on the *ex parte* application, I reasoned that this case was "very close to the line indeed", given the evidence then before me, most notably the evidence of "a recent history of disposal or transfer of significant assets, some of which transfers do

not appear to have been done at arm's length for market value”: at paras. 23, 24. I therefore concluded that a *Mareva* injunction would “preserve the status quo at least until the other side can be heard on the matter”: at para. 24. I have now heard “the other side”, as to the merits of the case but more importantly as to the nature of 0717’s property transfers, the complexion of which weighs heavily in the balance of convenience in this case. What appeared at first instance to be a series of recent land transfers reflecting an affirmative risk of disposal or dissipation of assets has now been shown on uncontroverted evidence to be the culmination of Mr. Helm’s pre-existing plan, namely a land assembly, re-zoning and subdivision undertaking. In the result, the totality of the evidence adduced on the *inter partes* hearing undercuts RBD’s contention that there is a genuine risk of dissipation or disposal of assets.

[105] I have specifically considered RBD’s submission that there is a dearth of information in Mr. Helm’s affidavit about 0717’s current financial position. In considering this argument, I take guidance from *Patko*. In that case, although the plaintiff had made out a strong *prima facie* case that the defendant had committed a fraud, the chambers judge was not convinced that the defendant was likely to “continue to act in the same way” by dissipating assets in a manner that would thwart the plaintiff’s ability to realize on a successful judgment: *Patko* at para. 31. The Court of Appeal held that the chambers judge made no error in refusing a *Mareva* injunction. In doing so, the Court was not convinced that the defendant’s failure to file any affidavit evidence as to his assets and means was fatal to his position, because “the law in this province does not impose an onus on the defendant to show that his assets would not be dissipated before [the plaintiff] could execute on a judgment”: *Patko* at para. 30. Thus, counsel for 0717 is correct in his submission that the company has no legal obligation to lay out its finances in an affidavit in response to RBD’s request for a continuation of the *Mareva* injunction, in any form. This is particularly so where there is no affirmative evidence of a risk that 0717 will dissipate or dispose of assets in a manner that would frustrate a judgment against it.

[106] Nor am I swayed by RBD's argument that there would only be minimal prejudice to 0717 in requiring the company to maintain the posted security until the trial. As Chief Justice Finch explained in *Patko* at para. 26, "[t]he root of the *Mareva* injunction is the risk of harm" through dissipation or removal of assets, and "[i]n most cases it will not be just or convenient to tie up a defendant's assets" on the mere "speculation" that the plaintiff will succeed in its claim and "have difficulty collecting on its judgment if the injunction is not granted". I find this reasoning resonant in the case at bar.

[107] Counsel for RBD repeatedly emphasized that the approach to *Mareva* injunctions in British Columbia is "flexible", as reflected in Justice Huddart's seminal decision in *Mooney v. Orr (No. 2)*. However, that was a case involving potential abuse of the courts, in that the party against whom the interlocutory injunction was granted was a plaintiff (against whom a counterclaim had been brought) in a context where the plaintiff had a demonstrated history of arranging his affairs in a way that insulated him from judgments. This included evidence that, in the past, the plaintiff had shown a "predilection" for concealing his assets "in an impenetrable web designed to frustrate creditors": at 344. Hence, the party against whom the injunction was granted was a "marauding deal-maker" who had sought to structure his business and personal affairs in a manner that would keep assets out of reach: at 351.

[108] In *Tracy*, the Court of Appeal affirmed the "flexible approach" articulated in *Mooney v. Orr (No. 2)*, but also issued a "reminder" that a *Mareva* injunction is a special kind of injunctive order that represents an exception to the "general rule against pre-judgment execution": *Tracy* at para. 44. In all cases, courts must be wary of the potential misuse of a *Mareva* injunction merely as a means of gaining a strategic litigation advantage over the opposing party: *Tracy* at para. 46. I am in no position to make an affirmative finding that this is what is driving the position of the plaintiffs in this case, but I have a lingering concern that a continuation of the current security order would have that effect. Based on all of evidence presented and

submissions advanced at the *inter partes* hearing, I am not satisfied that a continuation of the *Mareva* injunction, in any form, would be just and convenient.

Conclusion

[109] The application is granted. The order dated 2 June 2021, requiring the defendants to post security for the claims brought against them by the plaintiffs is hereby discharged. The $1,300,000, plus any accrued interest, currently held in trust at Fasken Martineau Dumoulin LLP, is to be released to the defendants.

"Riley J."