IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

Citation: *O'Connor v. Nolan*, 2024 NLSC 5
Date: January 15, 2024
Docket: 201401G7843

BETWEEN:

ROXANNE O'CONNOR

FIRST PLAINTIFF/
DEFENDANT BY COUNTERCLAIM

AND:

CYNTHIA MANNERS

SECOND PLAINTIFF/
DEFENDANT BY COUNTERCLAIM

AND:

LYNN CALAFIORE

THIRD PLAINTIFF/
DEFENDANT BY COUNTERCLAIM

AND:

MARTHA O'CONNOR

FOURTH PLAINTIFF/
DEFENDANT BY COUNTERCLAIM

AND:

ANNE HARRISON

FIFTH PLAINTIFF/
DEFENDANT BY COUNTERCLAIM

AND:

LOUISE PAQUETTE-NEVILLE

SIXTH PLAINTIFF/
DEFENDANT BY COUNTERCLAIM

AND:

KATHRYN SINCLAIR

SEVENTH PLAINTIFF/
DEFENDANT BY COUNTERCLAIM

AND:

FRANK O'CONNOR

EIGHTH PLAINTIFF/
DEFENDANT BY COUNTERCLAIM

AND:

KEVIN NOLAN

FIRST DEFENDANT/
PLAINTIFF BY COUNTERCLAIM

AND:

ROBERT HALL

SECOND DEFENDANT/
PLAINTIFF BY COUNTERCLAIM

AND:

NOLAN HALL REAL ESTATE SERVICES LIMITED

THIRD DEFENDANT/
PLAINTIFF BY COUNTERCLAIM

AND:

DENIS BARRY, trading as Denis G. Barry Professional Law Corporation

FOURTH DEFENDANT/
PLAINTIFF BY COUNTERCLAIM
(DISCONTINUED)

AND:

ROY NOEL

FIRST THIRD PARTY
(DISCONTINUED)

AND:

APPRAISAL ASSOCIATES LTD.

SECOND THIRD PARTY
(DISCONTINUED)

CORRECTED JUDGMENT: The text of the original judgment was corrected on January 18, 2024 and a description of the correction is appended.

Before: Justice Garrett A. Handrigan

Place of Hearing: St. John's, Newfoundland and Labrador

Dates of Hearing: October 10-13; 16-18, 2023

Summary:

The Plaintiffs sued the Defendants for negligent misrepresentation in selling a property to them as a collection of stand-alone, fully equipped "residential condominiums" when the property could only be used as a lodging house or a B&B because of municipal zoning. The Plaintiffs claim that they relied on the Defendants' representations and that they suffered losses because of that reliance.

The Court allowed the action and ordered the Defendants to pay damages of $1,847,381 less the global amount that the Plaintiffs recovered in a settlement with Denis Barry before trial and the net amount after the deduction will be

allocated amongst the Plaintiffs in proportion to their interests in The Merchant's House. The Defendants are jointly and severally liable to pay this amount.

The Defendants counterclaimed against the Plaintiffs, alleging that they wrongfully terminated a leaseback arrangement they had with the Plaintiffs, by which they say they suffered losses; and further that the Plaintiffs slandered the Defendants' title to the Ryan Mansion, adjacent to The Merchant's House property by filing a *lis pendens* against it. In each instance the Defendants offered no evidence to support their counterclaim and the Court dismissed both parts of it.

The Court ordered that the individual Defendants pay the Plaintiffs their costs of the claim and counterclaim, to be taxed as stated herein.

The Court declined to find Nolan Hall Real Estate Services Limited liable to the Plaintiffs by default of its appearance for trial. It also dismissed the corporation's counterclaim against the Plaintiffs and ordered Nolan Hall Real Estate Services Limited to pay the Plaintiffs' costs of the counterclaim to be taxed as stated herein.

Appearances:

Geoffrey Adair, KC	Appearing on behalf of the First, Second and Third Plaintiffs
Martha O'Connor	Appearing on her own behalf
Anne Harrison	Appearing on her own behalf
Louise Paquette-Neville	Appearing on her own behalf
John B. French	Appearing on behalf of the Seventh Plaintiff
Frank O'Connor	Appearing on his own behalf
Kevin Nolan	Appearing on his own behalf
Robert Hall	Appearing on his own behalf

Nolan Hall Real Estate Services Limited	No appearance
Daniel W. Simmons, KC	Appearing on behalf of the Fourth Defendant
Roy Noel	No appearance
Appraisal Associates Ltd.	No appearance

Authorities Cited:

CASES CONSIDERED: *Redmond v. Densmore* (1997), 153 Nfld. & P.E.I.R. 181, 73 A.C.W.S. (3d) 160 (Nfld. C.A.); *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87; *Doiron v. Haché*, 2005 NBCA 75; *Ratych v. Bloomer*, [1990] 1 S.C.R. 940; *Bedard (Next Friend of) v. Martyn*, 2010 ABCA 3; *Almas v. Spenceley* (1972), 25 D.L.R. (3d) 653, [1972] 2 O.R. 429 (Ont. C.A.); *Monument Mining Ltd. v. Balendran Chong & Bodi*, 2012 BCSC 1769; *O'Neill et al v. Edmanson*, 2017 NBCA 33; *Cabana v. Newfoundland and Labrador*, 2016 NLCA 75

STATUTES CONSIDERED: *Condominium Act, 2009*, S.N.L. 2009, c. C-29.1

RULES CONSIDERED: *Rules of the Supreme Court, 1986* S.N.L. 1986, c. 42, Schedule D

TEXTS CONSIDERED: John Sopinka, Sidney N. Lederman & Alan W. Bryant, *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999)

REASONS FOR JUDGMENT

HANDRIGAN, J.:

INTRODUCTION

[1] 23 Rennies Mill Road is an historic property in St. John's heritage district. It was reportedly built about 150 years ago and is said to have been designed by famed architect John Thomas Southcott for the Honourable Dan Ryan, a fabulously wealthy businessman of the time. Eventually, the First and Second Defendants, Kevin Nolan and Robert Hall, acquired the property. They subdivided it into eight residential units in or about 2009, styled it "The Merchant's House" then and in 2012 set out to sell the eight units as exclusive parts of a condominium development.

[2] Ultimately the eight Plaintiffs acquired the eight units from the First and Second Defendants, not as one Plaintiff to each unit, but more randomly, as I will show later. The Defendants created the Merchant's House Condominium Corporation to operate the development. Then they sold the units to the Plaintiffs personally to be administered according to a Declaration and Plan that the Defendants filed for the Corporation at the Registry of Deeds for the province.

[3] Seven of the eight Plaintiffs also entered into an agreement with the Defendants, by which the Plaintiffs leased their units back to the Defendants for three years, and for which the Defendants guaranteed the Plaintiffs that they would pay them monthly rentals. The Plaintiff, who did not avail of the leaseback arrangement, followed a similar arrangement for her units, except that she directed the process herself with the help of a third party.

[4] About a year and a half after the Plaintiffs bought the eight units, they learned that the City of St. John's was concerned about how The Merchant's House was being operated and the Plaintiffs soon learned that the rental operation contravened the St. John's Development Regulations. Before long the City advised the Plaintiffs and the Defendants to cease operations for all units and to vacate those located on the second and third floors of the property.

[5] In effect, the City found that Plaintiffs and/or the Defendants operated the units as standalone residential properties, either offering or intending to provide full

services to tenants who rented them, including kitchen services. The City had permitted the Defendants to operate the property generally as a B & B or a lodging house and not as self-sufficient residential units. The Plaintiffs say they tried to get the Defendants to remediate the property to comply with the City's Development Regulations but the Defendants declined or failed to act. The Plaintiffs filed their Statement of Claim in this Court on November 7, 2014, about six months after the City shut The Merchant's House down.

[6] Initially, the Plaintiffs sued Kevin Nolan, Robert Hall, Nolan Hall Real Estate Services Limited and Denis Barry, the lawyer who represented both the Plaintiffs and the Defendants when they acquired the units from the Defendants. However, matters between the Plaintiffs and Mr. Barry were resolved before trial. When I refer to the "Defendants" collectively in these reasons, unless I note otherwise, I mean Mr. Nolan and Mr. Hall. I may refer to the corporate entity occasionally and when I do I will name it. As for the Plaintiffs, I will use the same collective designation as for the Defendants; but where appropriate I will name the Plaintiffs or Defendants individually.

[7] The Plaintiffs claimed that the Defendants negligently misrepresented the properties to them. They say that the Defendants presented the Merchant's House as a collection of stand-alone, fully equipped "residential condominiums" when the City actually limited the use of the property to no more than a lodging house or a B&B. The Plaintiffs claim that they relied on the Defendants' representations and that they suffered losses because of that reliance.

[8] The Plaintiffs also claimed initially that the Defendants were both negligent in the work they did on the property and that the Defendants terminated the leaseback arrangement between them by which they suffered losses; but because the Plaintiffs did not pursue either of these latter claims at trial, I will not consider them here.

[9] The Defendants counterclaimed against the Plaintiffs, alleging that they wrongfully terminated the leaseback arrangement they had with the Plaintiffs, by which they say they suffered losses; and further that the Plaintiffs slandered the Defendants' title to the Ryan Mansion, an adjacent property to The Merchant's

House by filing a *lis pendens* against it. I will deal with both aspects of the Defendants' counterclaim in these reasons.

[10] I note further, simply to provide context for this matter: When the Plaintiffs issued their statement of claim all eight were represented by one counsel. That changed as the matter progressed so that at trial four Plaintiffs had counsel and four represented themselves. To that end, Roxanne O'Connor, Cynthia Manners and Lynn Calafiore were represented by Geoffrey D.E. Adair, K.C. of Adair, Goldblatt Bieber LLP of Toronto, ON and John French of French & Associates of St. John's, NL represented Kathryn Sinclair.

[11] The Fourth, Fifth, Sixth and Eighth Plaintiffs represented themselves. As to the Defendants, all three, like the Plaintiffs, were represented by counsel when the proceedings began but at trial the First and Second Defendants represented themselves. The corporate Defendant, Nolan Hall Real Estate Services Limited, did not have counsel at trial, so it did not appear for the proceedings and offered no defence.

[12] Finally, I note that all Plaintiffs except for Frank O'Connor and Anne Harrison testified, but Martha O'Connor spoke for them. Neither of the Defendants testified, despite several representations early in the trial from the First Defendant, Kevin Nolan that he intended to do. Counsel for the Plaintiffs submitted that I may, if appropriate, draw adverse inferences against the Defendants for not testifying and not presenting themselves to the Plaintiffs for cross-examination. I will come back to possible adverse inferences that I may draw later in these reasons.

ISSUES

[13] Let me summarize the issues the pleadings raise and those of them that the parties focused on at trial:

1. Did the Defendants misrepresent to the Plaintiffs the character of the units that they acquired from the Defendants in The Merchant's House? Did the Plaintiffs suffer damages, if so?

2. Did the Plaintiffs unlawfully terminate the leaseback arrangement with the Defendants? Did the Defendants suffer damages, if so?

3. Did the Plaintiffs slander the Defendants' title to the Ryan Mansion by filing a *lis pendens* against it? Did the Defendant suffer damages, if so?

4. May I draw adverse inferences against the Defendants for not testifying? If so, what may I infer?

THE LAW

Negligent Misrepresentation – Case Law

[14] Our Court of Appeal gave close consideration to the legal framework for claims based on negligent misrepresentation in *Redmond v. Densmore* (1997), 153 Nfld. & P.E.I.R. 181, 73 A.C.W.S. (3d) 160 (Nfld. C.A.), the facts of which are uncannily proximate to the background of this matter. For that reason, I quote the facts from it at greater length than I ordinarily would do. This from Cameron, J.A., who wrote for the majority of the Court, pertains:

> 2 In February of 1990, Redmond [the buyer] contacted Densmore, a real estate agent, requesting information about property at 32 Circular Road, St. John's, Newfoundland. The property had been advertised for sale in a local newspaper. The listing described the property as having a bedsitting room on the second floor, which was rented at $500 per month, and a third floor, two-bedroom in-law apartment, renting at $600 per month. Densmore [the real estate agent] confirmed the 4900 sq. ft. house had, in addition to the main living quarters, two apartments.

3 Prior to offering to purchase the property, Redmond visited 32 Circular Road on two occasions. Densmore told him that the two apartments were unregistered, meaning that the City of St. John's was unaware of their existence, or at least, had not given approval for the apartments. When Redmond inquired if the apartments being unregistered created a problem, Densmore advised him that if the City became aware of the apartments, to have them registered the owner might be required to pay a fee and, perhaps, carry out alternations. As examples of the type of alternations which were suggested to him by Densmore or subsequently by French [Redmond's lawyer] as being typical of those demanded by the City, Redmond listed upgrading the plumbing, placing additional gyproc or constructing a fire escape. Densmore also advised Redmond that some urea formaldehyde foam insulation remained in the premises.

4 Densmore testified that he knew the zoning in the area to be R1 and that R1 zoning permitted only one apartment. However, he did not tell Redmond of the zoning nor the risk that Redmond might not be able to keep the two apartments because his experience with other properties led him to believe it was unlikely that would happen. Redmond was not aware that zoning went beyond whether residential or commercial properties were permitted and did not, at the time of purchase, appreciate that there might be different types of residential zoning.

5 On the 14th of February 1990, Redmond entered into an Agreement of Purchase and Sale with the vendor. The purchase price was $235,000. However, prior to completion of the purchase, it was discovered that the rental generated by one of the apartments was not as stated in the listing and a reduction in purchase price was negotiated as a result. Clause 18 of the Agreement provided that the tenants were "to remain at current rents."

6 Redmond retained the second respondent, French, to act as his solicitor in the purchase of the property. This also involved the refinancing of a second property owned by Redmond. The sale closed on April 4, 1990. Under the Agreement of Purchase and Sale, Redmond was to assume an existing mortgage with Canada Trust. Canada Trust required that the urea formaldehyde foam insulation (UFFI) be removed, though Redmond was not given a time frame in which to complete this work.

7 What none of the parties knew was that the City had received complaints from neighbours of the vendor about the presence of apartments at the Circular Road property and that, in January of 1990, the City had written to the then owner advising that it intended to inspect the premises for non-compliance with zoning requirements. It was not established that the vendor received the letter.

> 8 Redmond did not become aware of the City's interest in the apartments until June 1990, when he received a letter stating the City's intention to inspect the property. After the inspection, the City, by a letter dated July 20, 1990, advised Redmond that he had 30 days to restore the premises to a single-family dwelling.
>
> 9 Sometime in late July, after receipt of the letter of July 20, 1990, Redmond entered into a contract for the removal of the UFFI (valued at $35,000) and for the carrying out of certain improvements (valued at $10,000).
>
> 10 In addition, at the time of the purchase none of the parties was aware that on February 28, 1990 (two weeks after the signing of the Agreement of Purchase and Sale), the City had adopted Minutes of meetings seeking to amend the St. John's Development Regulations so as to change the zoning of the portion of Circular Road on which the premises are located from R1 to RA (which did not permit apartments). This amendment did not become law until publication in the Newfoundland Gazette on September 21, 1990. So then, at the date of closing the zoning permitted only one apartment and by September 21, 1990, no apartments were permitted.
>
> 11 In August of 1990, Redmond advised French of the City's order that the apartments be removed. It was French's evidence that this was when he first learned that the apartments were unregistered, though Redmond said he advised French of that fact before the closing and again in July 1990. French had not checked the zoning prior to the closing as he had lived in the area and had extensive knowledge of the area. He believed the area to be zoned R1 and further he was aware of a number of houses in the area in which more than one apartment was permitted, additional apartments having been "grandfathered". (Apartments which do not comply with existing zoning, but which existed lawfully and were built in good faith prior to the enactment of the zoning provision which it now offends and are therefore permitted to continue to be used as apartments). French offered to assist Redmond in trying to have the apartments approved by the City, but Redmond refused, stating he would handle it himself. However, French did obtain from City Hall the forms to have the apartments approved and had them delivered to Redmond. Redmond took no action until after the zoning change became effective by which time the City would not permit any apartments.

[15] The trial judge, as Cameron, J.A. reported, held "…that Densmore had made a negligent misstatement to Redmond when explaining the consequences of having two unregistered apartments in the premises; that he should have explained Redmond could be forced to remove one of the apartments, and further, that

Redmond had relied on these misrepresentations" (para. 13); but the trial judge dismissed the claim against French, the solicitor who represented Redmond, because "…[while] French may have been negligent in failing to confirm the zoning … no damage arose because of that negligence: that even if French had discovered the true nature of the zoning and the status of the apartments, Redmond had already signed the Agreement of Purchase and Sale and would have been obligated to complete the transaction" (para. 14).

[16] Ultimately, the Court of Appeal upheld the trial judge's finding that Densmore was liable to Redmond, but it overturned the trial judge about French, finding him liable, too: "At the time of the breach of duty by French, therefore, it was still within Redmond's right to rescind the contract for negligent misrepresentation should he have wished to do so. French's negligence deprived Redmond of that opportunity" (para. 54). Marshall, J.A. agreed with the majority in finding both Densmore and French liable to Redmond for damages but wrote separate reasons for his findings.

[17] As interesting as the facts of *Redmond v. Densmore* are because of how they align with this case, the decision is even more relevant for what it says about proving a claim based on negligent misrepresentation. Mr. Redmond hired Mr. Densmore who was a real estate agent to help him buy the property at 32 Circular Road, St. John's so Densmore was on that account, a "professional" as to Redmond.

[18] However, Cameron, J.A. found that Densmore's "professional" status *vis-à-vis* Redmond was not necessary to find him liable to Redmond for negligent misrepresentation:

> Initially in the development of the tort [of negligent misrepresentation], there was, indeed, some question as to whom the duty of care would apply. Some have thought that the duty was limited to professional people and those in the business of giving advice to any individual who gives information and advice to others, expecting it will be relied upon … However, it cannot now be said, as a matter of principle, that the tort only applies to statements made by professionals who are in the business of giving advice" (para. 20).

[19] And, in fact, Cameron, J.A. held Densmore liable simply because "… the evidence here is that the information provided was untrue, inaccurate and misleading when Densmore knew the difference" (para. 30); so, it was immaterial what "… was reasonably expected of a real estate agent …" in the same circumstances.

[20] Overall, Cameron, J.A. relied on *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87, released just two months before the trial judge's decision, for "… the elements which must be present to succeed in cases of negligent misstatement":

> (1) there must be a duty of care based on a "special relationship" between representor and the representee;
> (2) the representation in question must be untrue, inaccurate, or misleading;
> (3) the representor must have acted negligently in making said representation;
> (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and
> (5) the reliance must have been detrimental to the representee in the sense that damages resulted.

[21] As for when a "special relationship" exists, Cameron, J.A. adopted these words from Iacobucci, J. in *Queen v. Cognos Inc.*: "a 'special relationship' exists wherever '(a) the defendant ought reasonably to foresee that the plaintiff will rely on his or her representation; and (b) reliance by the plaintiff would, in the particular circumstances of the case, be reasonable'" (para. 23).

Case Law – Adverse Inferences

[22] John Sopinka, Sidney N. Lederman & Alan W. Bryant stated the general rule of evidence for drawing adverse inferences in civil proceedings in *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999) at paragraph 6.321. (I pulled this quotation from *Doiron v. Haché*, 2005 NBCA 75, paragraph 106, quoted by Richard, J.A., as he was then):

> In civil cases, an unfavourable inference can be drawn when, in the absence of an explanation, a party litigant does not testify, or fails to provide affidavit evidence on an application, or fails to call a witness who would have knowledge of the facts and would be assumed to be willing to assist that party. In the same vein, an adverse

> inference may be drawn against a party who does not call a material witness over whom he or she has exclusive control and does not explain it away. Such failure amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it.

[23] In *Doiron v. Haché*, Richard, J.A. also noted that drawing adverse inferences is a "discretionary" matter; and as he explained:

> The power to draw an adverse inference when a party fails to call a witness who would have given material evidence is discretionary, but the discretion can only be exercised upon the satisfaction of a precondition. As explained by the Ontario Court of Appeal in *Lambert v. Quinn* (1994), 68 O.A.C. 352 (Ont. C.A.), *Levesque v. Comeau*, [1970 SCC 4] only stands for the proposition that an adverse inference "may be drawn against a party for failure to call a witness who may give material evidence *where that party alone could bring the witness before the court*." [Emphasis in original.] (para. 108)

[24] This is the law I will apply to the issues that I stated earlier in these reasons, arising from the Plaintiffs' claim:

1. Did Defendants misrepresent to the Plaintiffs the character of the units that they acquired from the Defendants in The Merchant's House? Did the Plaintiffs suffer damages, if so?
2. May I draw adverse inferences against the Defendants for not testifying? If so, what may I infer?

[25] I turn now to analyze those issues, starting with the background to them.

ANALYSIS

Background

[26] In or about 2008 the Defendants retained Philip Pratt of the PHB Group to renovate 23 Rennies Mill Road, St. John's converting it from a 3-apartment building into 8 units. Mr. Pratt is a registered architect and has practiced that discipline for about 50 years. Mr. Pratt drew the plans to present to the City of St. John's for converting the property and described in his evidence what the work involved:

> In this particular case, it was, basically, the application, the discretionary use application, as I recall, to work with the three apartments into eight separate units and joining the two buildings and the heritage issues related to that and discussions with the City in regard to those items (Volume VI, page 11, lines 8-12 of transcript).

[27] From that process, the City issued a Building Permit on July 30, 2009 which was effective for six months until January 29, 2010. The Permit cited the description of the work as "FOR CHNG OF OCC/RENOVTNS OF LODGING HOUSE" and added the following "Remarks or Conditions": CONVER 23A [Rennies Mill Road], B & C INTO 16 PERSON – BEDROOM SUITES – B & B RENOVATE" (Consent #6).

[28] Mr. Pratt described the process that ensued:

> A. The City issued the Building Permit, construction was carried out, the City makes periodic inspections, at a certain point in time construction work is completed, the City makes a final inspection and if everything is in order, as they see it, they will issue an Occupancy Permit, basically the process (Volume VI, page 19, lines 2-6 of transcript).

[29] The City did issue an Occupancy Permit to the Defendants for 23 Rennies Mill Road, on February 11, 2010. It described the "Approved Use: Lodging House" and stated "#Units/Suites: 1" in "Zone: RA" as a "Residential Special", and added

these "Conditions or Remarks": "MAXIMUM OCCUPANCY OF 16 PERSONS (8-ROOMS). THERE IS NO COOKING OR FOOD PREPARATION AREAS AT THIS PROPERTY AND THERE IS TO BE NO COOKING OR SERVING OF FOOD FROM THE ADJOINING PROPERTY (21 RENNIES MILL ROAD) FOR THE GUESTS OF THIS LODGING HOUSE" (Consent # 28).

[30] Meanwhile the City also issued a "Lodging House License" on February 11, 2009 for 23 Rennies Mill Road, in which it described the "Permitted Occupancy" as "16 persons/guest/caretaker" and included the same condition prohibiting food preparation on site and brought in from next door. The License was effective until December 31, 2010 and was "…to be affixed in a visible area of the Lodging House…" (Consent #2). The City renewed the Lodging House License on April 28, 2011 and stated it was effective until December 31, 2011 (Consent #14).

[31] In 2012 the Defendants decided to market 23 Rennies Mill Road as "The Merchant's House". They produced a brochure in their names, offering the property through "THE MERCHANT'S HOUSE Condominium Corporation". After providing some of the historic background of the property, the Defendants included this promotional pitch:

> More recently, The Merchant's House, had been redeveloped to 8 luxury condominiums which are now being offered for sale to the keen investor. This is in response to the surge in oil and gas activity resulting in a huge demand for downtown accommodations. These *pied-à-terre* style units have been created with the busy executive in mind. Fully furnished and all inclusive, The Merchant's House custom condominiums provide hassle free living in a luxurious downtown setting (R.O'C. # 1).

[32] Roxanne O'Connor, the First Plaintiff found out about The Merchant's House and was interested in it. She knew Kevin Nolan, the First Defendant, whom she met when she visited St. John's in 2007. Andrew Anderson, a friend of Ms. O'Connor, accompanied her on that trip, and they were in St. John's looking for investment opportunities. From that trip Ms. O'Connor bought a house at 31 Gower Street in St. John's from the Defendants and a condominium in a 16-unit building on Flavin Street that the Defendants also owned. Ms. O'Connor also bought other investment properties in St. John's from the Defendants in 2008 and 2009.

[33] Ms. O'Connor said she was in St. John's again around May 2012 and on meeting Mr. Nolan he told her "… I want to show you something" (Volume I, page 37, line 15 of transcript), by which Mr. Nolan meant The Merchant's House, which he saw as another investment property in which Ms. O'Connor might be interested. Mr. Anderson accompanied Ms. O'Connor again on this trip and he joined her when Mr. Nolan invited Ms. O'Connor to view The Merchant's House.

[34] Ms. O'Connor said Mr. Nolan suggested the property as a possible investment opportunity for her:

> Ms. O'Connor: And he was saying that you know there was a demand you know for this type of apartment or condos in St. John's due to the boom that was going on and he was going to…
>
> Adair, K.C.: What kind of boom?
> Ms. O'Connor: There was a boom going on with oil and gas in Newfoundland and he said there was a big demand for this [kind] of units. He was converting these to condominiums and providing the opportunity to me ah to invest in these units, and I was interested in that.
>
> (Volume I, pages 39-40, lines 18-20, lines 1-5 of transcript)

[35] More particularly, Ms. O'Connor said that Mr. Nolan provided her with details of how he proposed to market the units, how they would be used and also how they would be equipped:

> Ms. O'Connor: He said they would be condominiums and that he would be providing me with ah brochure detailing everything and that he would be sending that to me. And um that they would be used for residents, but that they would be condominiums. When we were in the king unit he pointed to the fireplace and said the kitchen will be located here on either side, it would be custom kitchens … the kitchen will go into the suite.
>
> (Volume I, page 41, lines 3-8 of transcript)

[36] Ms. O'Connor said Mr. Nolan sent "six or eight" brochures to her home in Toronto "in early June [2012]" and she had some friends that knew of her

investments in Newfoundland, who wanted to learn more about them. I referred to the brochure that Ms. O'Connor received from Mr. Nolan earlier in these reasons and noted that it is Exhibit R.O'C. #1. The brochure is an all-inclusive document that includes pictures from inside the property, floor plans for each of the eight "suites", and a "common area" budget for the Condominium Corporation.

[37] The brochure also included "Unit Specifications and Sales Information" for each of the 8 units and their purchase prices; and this additionally: "…the purchaser is also **GUARANTEED A 3 YEAR LEASE** starting the date of possession. Pricing and guaranteed lease rates are as follows (bold in original):" A table below that heading lists the unit numbers; the floor space of each unit; its price; included amenities such as parking and furniture; the guaranteed lease amount for each unit; projected condo fees; and the net lease value. The lease proposal that the Defendants offered in that package became known as the "leaseback arrangement" that I also referred to earlier in these reasons.

[38] Ms. O'Connor said a group friends who were interested in investment opportunities in Newfoundland visited her home in Toronto in June 2012 and she told them about The Merchant's House; and she also provided them with copies of the brochures that Mr. Nolan sent to her. Her counsel asked Ms. O'Connor "…what did you understand that you were getting?":

> Ms. O'Connor: I understood that I was getting, was purchasing a property ah that I would be the sole owner of, that I could live in and use. That I could lease the property if I chose to lease it, and that I could sell the property if I wanted to sell it. And that I would have with… [clear title]. That the property would be identified as a condominium, that it would contain a bathroom, a living room, a bedroom, and a kitchen.
>
> (Volume I, page 49, lines 10-15 of transcript)

[39] Ms. O'Connor bought two units in The Merchant's House, Unit 101 that she described as "the larger king suite" and Unit 103. She signed an Agreement of Purchase and Sale for each unit (Exhibit R.O'C. #'s 2 &3) on July 30, 2012, agreeing to pay $423,750 for the larger unit and $254,250 for the smaller one. The transactions were set to close "on or before the 17 Day of September, A.D. 2012" and Ms.

O'Connor had until August 31, 2012, to get financing to complete the transactions. In fact, the transactions did not close until November 10, 2012.

[40] As it turned out, Ms. O'Connor did not enter into a leaseback arrangement with the Defendants, opting instead to deal with Premier Executive Suites/Atlantic Limited, represented by Matthew Girard. In an email that Ms. O'Connor sent to Mr. Nolan on October 21, 2012, Ms. O'Connor noted that "They [Premier Executive Suites] lease my Flavin condo. They approached me on MH [Merchant's House]" (Exhibit R.O'C. # 6). In the same email string, Mr. Nolan asked Ms. O'Connor for more details about her arrangement with Premier Executive Suites: "Roxanne will they be renting nightly or by the month? What type of deal will they give that allows you to occupy? How long will they lease for?"

[41] In response, Ms. O'Connor, offered the following:

> 1 year lease, could be longer – 70/30 split on revenue, they do all the marketing, them may rent out min 3 night but likely monthly/longer term on smaller unit & shorter term on larger unit. Anytime I need the unit I can block and book. If both units r in use long term they w put me up in another property – no charge. I m negotiating 75/25. PS [Premier Suites] is unloading less desirable properties and increasing higher end. They are desperate for 1 b/r furnished units. No kids, no pets, no smoking in/on property.
>
> (Exhibit R.O'C. # 6)

[42] Ms. O'Connor was back in St. John's in September 2012. The units were still under construction then and the kitchens that the Defendants promised would be installed in them were not in place. She was not back in St. John's again until March 2013 and said during the latter visit, "I found in the units kitchen cabinetry, ah um small dishwasher, a full fridge, and a half fridge in 103 and a sink. There was no cooktop" (Volume I, page 54, lines 18-19 of transcript).

[43] Ms. O'Connor's leasing arrangement with Premier Executive Suites ended eventually when, according to her, Premier shifted its focus so that it would no longer work with her units in The Merchant's House. Ms. O'Connor then retained

Royal LePage to list her units for lease and Royal LePage placed a sign on the lawn outside The Merchant's House to that effect. Ms. O'Connor estimated that "…would have been in the spring or thereabouts of 2014" (Volume I, page 57, line 1 of transcript).

[44] Soon after Royal LePage advertised Ms. O'Connor's units for lease she received a call from the agent who was handling the property:

> Ms. O'Connor: So, she was leasing the units, she put them on the market and there was a high level of interest of my units. Practically the larger unit [101] was entertaining an offer actually at the time to lease it for a year, as well as 103. I got a call from an agent, and she said I just received a call from someone at the city saying that, sent the listing and they got back to me and said there are no kitchens allowed in the units. No cooktops. That this is not zone for condominiums, it is a lodging house and that they wanted to come inspect the unit.
>
> (Volume I, page 57, lines 3-9 of transcript)

[45] Ms. O'Connor said the City inspected the units as they said and then shut the operation of The Merchant House down. Ms. O'Connor said she told the city "'Oh, I was not aware of that', ah that's a problem" (Volume I, page 58, line 1 of transcript) and she also contacted Mr. Nolan to advise him of the development:

> Ms. O'Connor: Well, when they inspected the units as I recall, the cooktops had been removed from the units. Kevin Nolan removed the cooktops and replaced them with cutting boards, and I was unaware that's what he did. The city came and inspected the units and noticed in fact that they met their usage I assume of a boarding house or B&B or lodging house but that they also then needed to inspect other areas of the building for fire safety. Oh, and as I recall they visited and shut our property down later in the spring.
>
> (Volume I, page 58, lines 6-12 of transcript)

[46] The City got actively involved very quickly in the fate of The Merchant's House. On March 18, 2014, Dennis Easton, Senior Building Inspector with the City wrote to the Defendants advising that "Inspection staff will be at the subject property [The Merchant's House] on **Thursday, April 3, 2014 at 1:00 pm**" and "…is

requesting permission to carry out an inspection of the above captioned property in response to a complaint received".

[47] On April 14, 2014, Dwayne Keats, an Electrical Inspector with the City wrote to the Defendants to advise amongst other things, that "[b]efore a certificate of approval can be issued access must be provided and approval given for sheet up to the following area(s). (kitchenette's in 8 rooms, boiler in basement, stairwells, all areas no complying with plans that this department has from last submissions)".

[48] Finally, on April 15, 2014, Dennis Easton wrote again to the Defendants, advising:

> 3. As a result of the changes to the building floor plans, the installation of new kitchens, this is also a violation of the terms and conditions of the Development Agreement as outlined under **Sections 5.1.1 and 5.4.2 of the St. John's Development Regulations**. Furthermore, this constitutes a change of occupancy with respect to the original approved use as a Bed and Breakfast. Therefore, in accordance with **Section 5.4.6 of the St. John's Development Regulations, and sections 38 and 43 of the St. John's Building By-Law**, the City may take further action on this matter.

[49] He also advised the Defendants that they should "… immediately vacate the second and third floors of the above noted property…" because of "life safety issues" (All quotations for the letters the City sent to the Defendants on March 18, 2014, April 14, 2014, and April 15, 2014, come from the correspondence presented to the Court as Consent Exhibit #3).

[50] The City's intervention ended rentals at The Merchant's House through the leaseback arrangement. Eventually, the Plaintiffs regrouped and made the changes that the City required for them to operate as a B&B. That use of The Merchant's House continues presently, and it is now and has been since 2014 operating as "Bannerman Park Suites". Roxanne O'Connor and Cynthia Manners, the First and Second Plaintiffs, operate the B&B on behalf of all Plaintiffs. Ms. Manners, who does the accounting, reported on the profits and losses they experienced since they took over the operation themselves in 2014.

[51] Cynthia Manners bought one unit in The Merchant's House, # 203, on the second floor. Ms. Manners, like Roxanne O'Connor was neither a stranger to Newfoundland real estate nor to the Defendants. She met them on a trip to St. John's some time in 2008 or 2009 when she and Ms. O'Connor were in St. John's looking for investment opportunities. She recalled that they stayed in Ryan Mansion at 21 Rennies Mill Road on that trip and "…Mr. Nolan took us out during the day ah, showing us a few of his properties" (Volume II, page 16, line 15 of transcript).

[52] Ms. Manners said she invested in a property that the Defendants owned in Topsail from that trip but "…I didn't step foot in 23 Rennie's Mill" (Volume II, page 16, line 20 of transcript). She acknowledged that she met Mr. Hall on the same trip but she and Ms. O'Connor dealt primarily with Mr. Nolan.

[53] Ms. Manners said she found out from Ms. O'Connor about the investment opportunity at 23 Rennies Mill Road:

> Adair, K.C.: Ok. And tell me how you got introduced, tell me about how you got introduced to 23 Rennies Mill Road?
>
> Ms. Manners: Ah, through Roxanne. She mentioned that she was interested in purchasing a unit ah, at 23 Rennies Mill Road and, um, wanted to just tell myself and others about it to see if there was any interest, of it.
>
> (Volume II, page 19, lines 2-6 of transcript)

[54] Ms. Manners also attended the meeting at Ms. O'Connor's house in Toronto in June 2012 when the investment opportunity was discussed by some, if not all the final investors:

> Adair, K.C.: And I want you to tell us to the best of your recollection about that meeting, what was said and who was there, all about the meeting.
>
> Ms. Manners: Yes, I believe all of the eventual investors were there, save for ah, I don't know if Martha [O'Connor] and Frank [O'Connor] were all there, one of them, those three [Martha O'Connor, Frank O'Connor & Anne Harrison] purchased one unit, but certainly one of the three was there. I think Martha definitely was there. Um, we were presented with a brochure that Kevin [Nolan] had provided

> Roxanne. And we all just talked about the possibilities, um, what the investment environment was in St. John's. Roxanne liked the idea, and we just had a discussion about, and left it at that. There were no decisions made at that time, is my understand - as I recall.
>
> (Volume II, pages 19 & 20, lines 17-20 & 1-6 of transcript)

[55] Ms. Manners eventually decided to buy a unit in 23 Rennies Mill Road and signed an Agreement of Purchase and Sale on August 8, 2012, for Unit 203 at $254,250. Her counsel asked her "…what did you understand you were purchasing" when she agreed to buy the property:

> Ms. Manners: I understood that I was purchasing a property that one could reside in, ah solely, like, ownership and that would be suitable for long term residential living, which would include everything that one would expect to do so, a bedroom, a kitchen, a bathroom, a living room.
>
> (Volume II, page 23, lines 7-11 of transcript)

[56] Ms. Manners visited the property around the end of September 2012 as did most, if not all of the eventual purchasers. She recounted the visit during her testimony, noting that Mr. Nolan accompanied them and what she observed:

> Ms. Manners: Um, my recollection is, concerning 23 Rennies Mill Road, we, ah, I was shown throughout 23 and in particular, my unit, by Kevin [Nolan] and went through my unit, he, you know, I looked at all the furniture, I was impressed with the quality, and he showed me where the kitchen was going. At the time there was a sink, um, I believe a mini fridge, but he described how the cupboards would be upgraded, integrated, which is you know, hidden behind a cupboard, that all the cupboards are, sort of, look the same and your dishwasher is behind them. And that the cook top would be going in, um, and besides, he showed me where that would be. And he said the work still had to be done, there was some painting touch ups that had to be done and, um, that's what we talked about. He said the access would be, um, between the two houses at that point, 21 and 23 was still open, so he said that would be closed off. And, um, that was, you know, what I saw at, what I was expecting to receive on closing.
>
> (Volume II, page 26, lines 5-18 of transcript)

[57] When Ms. Manners returned to Toronto she followed up on her visit with a lengthy email to the Defendants with questions about her unit and "the building in general". As to the former she noted:

> Hello, Kevin, I understand closing of the units at 23 Rennies Mill Road is scheduled for Tuesday, October 9, 2012. Would you kindly respond to the following questions pertaining to the building and operation.
>
> Personally, I would like to know whether a new kitchen was installed in my unit, Suite 203. My understanding was that a new kitchen was going in. Would you please confirm this. Also, there are several places that require a paint touch up. Please confirm that this was done as well.

[58] The balance of Ms. Manners' email is about "the building in general" and not especially relevant to this matter other than it shows how deeply Ms. Manners was involved in the project. I note as well that she concluded the email, "Cindy Manners, On behalf of the purchasers of Rennies Mill Road". (Consent Exhibit # 8) Ultimately, Ms. Manners' purchase of Unit 203 did not close until November 7, 2012, well beyond her expectation when she signed the Agreement of Purchase and Sale on August 8, 2012.

[59] Ms. Manners opted into the leaseback arrangement with the Defendants under the terms and conditions they offered in the promotional brochure she got from Roxanne O'Connor. She explained why and how the arrangement operated:

> Ms. Manners: What, well, because it came with an offer of three year leaseback for the first three years, I, and because I was fully employed, I really didn't have intention to occupy it myself, but I did intend to lease it full time, ah, long term, to somebody, or that's, if I had been managing it myself, that would have be the type of tenant I would be looking for. Having the lease with Kevin, it, we were told that the, that he would be marketing the oil company executives in that needed long term stays in St. John's and that's who he would be marketing to. But I had no control, and I was happy to accept the leaseback eventually.
>
> (Volume II, pages 23 & 24, lines 16-20 & 1-3 of transcript)

[60] Ms. Manners confirmed that "I relied on the brochure" (Volume II, page 25, line 13 of transcript) when she decided to buy Unit 203.

[61] Ms. Manners did not visit the property from September 2012 until the spring of 2014 when she received notice from the City that it did not comply with its zoning regulations. Ms. Manners described her reaction when she found out about the zoning problem:

> Adair, K.C.: Alright. So, once you found this out, ah, what, what happened. What did you do?
>
> Ms. Manners: Well, I was devastated because I'm learning that I didn't purchase what I thought I did and we just followed the instruction that the group, what the City required from us, ah, in order to bring the property into compliance or we could function and generate income as a lodging house, which is what we are, so…
>
> (Volume II, page 31, lines 11-16 of transcript)

[62] Elsewhere, Ms. Manners expressed her frustration at being limited to a B&B or lodging house operation at 23 Rennies Mill Road:

> Adair, K.C.: Alright. And tell me, when all is said and done, if you'd known the situation with respect to the, ah, lack of cooking and the, being forced to participate in running a B&B with whomever had made this investment in the first place.
>
> Ms. Manners: Absolutely not. I was not in the market for a B&B or a Lodging House.
>
> (Volume II, page 32, lines 145-18)

[63] Kathryn Sinclair, like Roxanne O'Connor and Cynthia Manners met the Defendants some time in 2008 or 2009. She invested in the same "Topsail property" in Newfoundland as Ms. O'Connor and Ms. Manners did, and she also learned about The Merchant's House from Roxanne O'Connor. Ms. Sinclair recalled that her introduction to The Merchant's House occurred "… a bit before June 2012 um and basically it started off with a brochure and then we sat down in a meeting, can't

remember exactly who was there but was a meeting with other people interested in learning about this investment" (Volume II, page 47, lines 10-13 of transcript).

[64] Ms. Sinclair visited The Merchant's House sometime in June 2012 and again in September of the same year. Eventually, Ms. Sinclair bought two units, # 102, the smaller one, on the first floor and # 201, the larger one, on the second floor. She paid $242,950 for Unit # 102 and $423,750 for Unit # 203. Ms. Sinclair closed the transactions on November 16, 2012.

[65] During her direct examination, Ms. Sinclair's counsel asked her about whether she would have bought the units if she had known The Merchant's House did not comply with the City's zoning regulations and cooking could not be done on site:

> Mr. French: Would you have proceeded with the purchases of units 102 and 201 if Mr. Nolan and I understand your visits you did not meet with Mr. Hall, is that correct?
>
> Ms. Sinclair: To talk to him, but don't think we had any notable discussions.
>
> Mr. French: Okay. So would you have proceeded with the purchase of your units if Mr. Nolan had informed you either during your visit in or about June 2012 or September 2012 or prior to closing for that matter, that cooking in the units was not permitted and that the property was designated as a lodging house or bed and breakfast.
>
> Ms. Sinclair: No, would I would not purchase the units.
>
> (Volume III, page 74, lines 1-10 of transcript)

[66] Lynn Calafiore was also involved in the Topsail investment that Roxanne O'Connor, Kathryn Sinclair and Cynthia Manners undertook with the Defendants in St. John's. Ms. Calafiore recalled that she met Mr. Nolan through that process when he visited Toronto and she attended a meeting at Roxanne O'Connor's house when Mr. Nolan gave a presentation on that project. (Note: The meeting referred to here is not the meeting that the investors attended at Roxanne O'Connor's home when the brochure about The Merchant's House was circulated.)

[67] She also found out about The Merchant's House from Roxanne O'Connor and then attended the meeting at Ms. O'Connor's home in Toronto, as did several of the other ultimate purchasers:

> Ms. Calafiore: I attended a meeting and I received some information about mid-June [2012] and then I attended a meeting in June at Roxanne's place and there was a few other people there.
>
> Adair, K.C.: Alright and what was the purpose of that meeting?
>
> Ms. Calafiore: There was a brochure that I received and had details on these condo units – they were going to become available and yeah, I was interested.
> Adair, K.C.: Alright so the group chatted about it did they?
>
> Ms. Calafiore: Yes, we chatted about it and – yeah just talked about the lease back program which I was quite interested in – they were lovely condos they were very – pretty suites and of course I had dealt with Kevin [Nolan] before and I was very happy with the Topsail investments so I thought this might be something to look at.
>
> (Volume III, pages 142 & 143, lines 10-18 & lines 1-2 of transcript)

[68] Ms. Calafiore bought Unit 302 for $265,500. She signed the Agreement of Purchase and Sale on August 9, 2012, and expected that the transaction would close on September 27, 2012. In fact, Ms. Calafiore had already seen The Merchant's House a year before when she accompanied Roxanne O'Connor and Andrew Anderson to St. John's and they stayed at Ryan Mansion, 21 Rennies Mill Road, the adjoining property to The Merchant's' House. She saw that 23 Rennies Mill Road was "under construction" at the time and she could not say if the Defendants had designated 23, "The Merchant's House" by then.

[69] Ms. Calafiore explained what she expected to get when she signed the Agreement of Purchase and Sale, in this exchange with her counsel:

> Ms. Calafiore: Well, I thought I was buying a residential high-end condominium that I could live in or maybe rent out, loan to friends eventually. I liked the lease back agreement which worked out well for me I thought it was as a great opportunity.

> Adair, K.C.: Ok and what did when you say high-end residential condominium, what did that include in your mind at the time?
>
> Ms. Calafiore: Well, it was going to have nice little setting area and it had a fireplace and the unit in particular that I was looking at and a nice bathroom and bedroom area and kind of a small area for stove top, small fridge you know just small cooking area.
>
> Adair, K.C.: Ok and what gave you the understanding as to what was that you expected to be purchasing?
>
> Ms. Calafiore: Well, it was listed in the brochure that I saw it was called a nice condo, it was high-end – my mortgage I was going for a mortgage for a condo, and I thought it was something I could rent it would be nice and I could sell eventually and that I owned on my own.
>
> (Volume III, pages 145 & 146, lines 9-19 & 1-4 of transcript)

[70] Ms. Calafiore's transaction, like the others, closed in November 2012, again well beyond her expectation that it would close on September 27, 2012. She was back in St. John's from March 22-25, 2013, when she accompanied Roxanne O'Connor to the city. Ms. Calafiore saw her unit at the time and she "…remembered that but it was finished it had a little countertop stove or whatever you want to call that, and a little fridge and the sink was there that's what I remember" (Volume III, pages 148 & 149, lines 19 & 1-2 of transcript).

[71] She also recalled the letter that Ms. Manners received from the City advising them "…they had to close second and third floor and that's when we found out that it was zoned as a B&B and not as we thought as individual condominium units". This, of course, was in March 2014:

> Adair, K.C.: Alright and what was your reaction when you found this out?
>
> Ms. Calafiore: Well I was stumped. I was – you know I thought I had total confidence that what I bought was a condo and instead what I had was an eighth of a B&B that wasn't worth anything, not worth what I thought it was that's for sure.
>
> (Volume III, pages 149 & 150, lines 18 & 1-7 of transcript)

[72] Ms. Calafiore also reflected on the condition of her unit in March 2014, compared to a year earlier:

> Adair, K.C.: And tell me the was – you mentioned this cook top what happened to the cook top in the unit?
>
> Ms. Calafiore: They got removed before the inspection. It was supposed to be an inspection happening and from what I remember Kevin [Nolan] removed the cooktops before the inspection.
>
> Adair, K.C.: And were they replaced with anything?
> Ms. Calafiore: I think if I remember correctly, they were just replaced with a piece of solid wood you know to look like a butcher's block that's what I remember.
>
> (Volume 11, page 150, lines 8-15)

[73] Martha O'Connor, Frank O'Connor, and Anne Harrison bought Unit 202 in The Merchant's House for $242,950. None of the three knew the Defendants previously. Ms. O'Connor attended the meeting at Roxanne O'Connor's home in Toronto but neither Mr. O'Connor, her husband nor Ms. Harrison, their co-purchaser did. Martha O'Connor received information from Roxanne O'Connor about the investment opportunity that The Merchant's House presented, and she reviewed the brochure that Ms. O'Connor made available to her.

[74] Latterly Martha O'Connor advised her husband and Ms. Harrison about her findings and then she and Ms. Harrison visited the property in September 2012. They found the leaseback arrangement particularly attractive since they were looking to the property as an investment.

[75] Ms. O'Connor said they expressed an interest in purchasing Unit 202 before she and Ms. Harrison visited the property in September but did not feel committed to buying it. She noted that the meeting at Roxanne O'Connor's house in Toronto and the brochure that she received at that meeting, coupled with what she and Ms. Harrison saw when they visited the property, satisfied them it was a good investment opportunity:

> So, based on all of that and – we made a decision that, yes, we would purchase. Prior to going [to St. John's] in September, although we had indicated an intention to purchase, we had in no way felt we were committing to purchase. We were wanting to see the properties and get – and do, you know, better research on the property, on the opportunity. In any case, we purchased, closed in November and then a year and a half later we got a note that the St. John's that, that we did not purchase what we had thought. It was, it was not a legal residential condo. It was zoned for a lodging house and, and even if that it was not compliant at that point as a lodging house.
>
> (Volume IV, Page 26, lines 12-20)

[76] Nor did Louise Paquette-Neville have any prior knowledge of the Defendants. She attended the meeting at Roxanne O'Connor's house in Toronto. She thought the meeting actually happened on July 3, 2012, and not in June 2012 as several others reported and said she referred to her notes from the meeting to confirm the date. Ms. Paquette-Neville knew Cynthia Manners, who was also there, from some earlier contact the two had "on a weekend at the cottage" but none of the other attendees. In fact, she did not even really know Roxanne O'Connor, who invited her to the meeting, and described Ms. O'Connor as "…the acquaintance of my (inaudible) spouse Ray Michael" (Volume IV, page 50, lines 7-8).

[77] Ms. Paquette-Neville bought Unit 301 for $446,350. She noted the following factors in her decision to buy:

- Information she received at the meeting from Roxanne O'Connor.
- Knowledge that others present had dealt with the Defendants before to buy investment properties in St. John's.
- The brochure that Ms. O'Connor provided from the Defendants.
- She attended the property in St. John's in September 2012, accompanied by her husband and daughter and they stayed in Unit 301 for two nights.
- The leaseback arrangement was attractive.

[78] Ms. Paquette-Neville stated her reaction when she learned along with the others who purchased units in The Merchant's House that the property did not comply with the City's zoning regulations and could only be operated as a B&B or a lodging house:

> Ms. Paquette-Neville: Again, at no time did I ever know that I was buying a suite within a lodging house. I would never have purchased anything that I couldn't cook in, that I couldn't live in, that I couldn't rent, couldn't sell. I really believed that I was purchasing a residential condominium… .
>
> (Volume IV, page 55, lines 17-20 of transcript)

[79] Denis Barry is a lawyer, who was called to the Bar of Newfoundland and Labrador in 1972 and practiced for 50 years; he is recently retired. Mr. Barry said he joined with others in practice early in his career but operated as a sole practitioner for the last decade and a half when he focused exclusively on real estate law.

[80] Mr. Barry represented both the Plaintiffs and Defendants on the transactions between them for The Merchant's House. He also incorporated The Merchant's House Condominium Corporation, registered the property as a condominium under the *Condominium Act, 2009,* S.N.L. 2009, c. C-29.1 and drafted the Declaration and By-laws that related to it; all at the direction of Mr. Nolan.

[81] Adair, K.C., counsel for three of the Plaintiffs, drew several articles of the Condominium Declaration to Mr. Barry's attention when he cross-examined him. As to Article 3.06, Adair, K.C. asked: "3.06 (a) will you tell the Court, according to that declaration, what the use is permitted?"; to which Mr. Barry responded:

> Mr. Barry: Single family housing, no other purpose, only adults over age of 19. No person under the age of 19 shall own or permanently reside therein.
>
> Adair, K.C.: Right. So, actually only as a residence for single family housing, correct?
>
> Mr. Barry: Um-hm.
>
> Adair, K.C.: Sorry, you have to say yes or no for the record.
>
> Mr. Barry: Oh, sorry, yes.
>
> (Volume V, page 75, lines 9-14 of transcript)

[82] And similarly, as to Article XII, which Adair, K.C. described as "provisions governing use of common elements":

> Adair, K.C.: And it says, "In addition to the provisions of the Declaration, the use and occupation shall be in accordance with the following restrictions and stipulation". And then (r) "no owner shall lease or otherwise allow the occupation of his/her unit by others for a term less than one month in duration and without immediately advising the Board of the name and telephone number of the tenant or tenants".
> Mr. Barry: Um-hm. Yes.
>
> Adair, K.C.: You drew those documents on Mr. Nolan's instructions, correct?
>
> Mr. Barry: I drew them.
>
> (Volume 5, pages 76 & 77, lines 16-19 & lines 1-3)

[83] Matthew Girard has been the General Manager of Premier Executive Suites for 12 years. Roxanne O'Connor engaged Premier Executive Suites to lease her units in The Merchant's House, when she declined the leaseback arrangement which the Defendants offered. Mr. Girard was familiar with Units 101 and 103 of The Merchant's House which Ms. O'Connor owned and leased through his firm.

[84] Adair, K.C. asked Mr. Girard about the presence of cooktops in Ms. O'Connor's units when Ms. O'Connor engaged Premier Executive Suites in November 2012 and Mr. Girard inspected her two units in the lead-up to leasing:

> Adair, K.C.: Mr. Girard, you have talked about your inspection I think it was, in or about November 2012?
>
> Mr. Girard: It would have been about that time, yeah.
>
> Adair, K.C.: Yeah, and at that time did you ask Roxanne O'Connor where the cook tops were?
>
> Mr. Girard: I would have, yeah. I would have asked her about ovens, yeah.
>
> Adair, K.C.: Yeah, what did she tell you?

Mr. Girard: That there weren't any ovens in the units.

Adair, K.C.: All right.

Mr. Girard: Yeah.

Adair, K.C.: Did she indicate there would be?

Mr. Girard: I believe they were looking into it.

Adair, K.C.: All right, and were you aware, sir, that in March of 2013, Kevin Nolan purchased cook tops and convection ovens for all the units?

Mr. Girard: Convection ovens?

Adair, K.C.: Yeah, microwave/convection ovens:

Mr. Girard: Yes.

Adair, K.C.: And cook tops?
Mr. Girard: Yes.

Adair, K.C.: You were aware of that and were you aware that Mr. Nolan installed them in the units, in or about late March 2013?

Mr. Girard: I do recall that being done, yes.

Adair, K.C.: Yes, and were you also aware, sir, that in April, after receiving notice of a pending inspection from the City, Mr. Nolan got a chap by the name of Craig Lewis to take all the cook tops out?

Mr. Girard: Yes.

Adair, K.C.: And were you aware that Mr. Nolan had Craig Lewis cover the cook top space up with a cutting board, so it looked like there had never been cook tops there?

Mr. Girard: Yes, I remember the cutting boards.

Adair, K.C.: And, of course, you were aware, or quickly became aware that the zoning for that area, did not permit cooking or food preparation, correct?

Mr. Girard: Yes, I found that out after.

Adair, K.C.: All right, so that accounted for the disappearing cook tops?

Mr. Girard: Yes.

(Volume V, pages 163 & 164, lines 11-20 & 1-13 of transcript)

[85] That is the background to the issues I stated earlier. While Mr. Nolan called several witnesses, Mr. Hall did not and neither defendant testified on his own behalf. I turn now to discuss the issues against this background, using the framework from Cameron, J.A.'s reasons in *Redmond v. Densmore*.

DISCUSSION

Negligent Misrepresentation

[86] To succeed against the Defendants, in their claim of negligent misrepresentation, the Plaintiffs must prove on a balance of probabilities:

1. that the Defendants owed them a duty of care based on a "special relationship" between them. To prove that a "special relationship" existed, the Plaintiffs must show:
    a. the Defendants ought reasonably to have foreseen that they would rely on their representations; and
    b. it would be reasonable for them to rely on the Defendants' representations in the circumstances of this case.
2. the Defendants' representations are either untrue, inaccurate, or misleading or all of these;
3. the Defendants acted negligently when they made the representations;
4. they relied, in a reasonable manner, on the Defendants' representations; and
5. they suffered damages because they relied on the Defendants' representations.

1. Negligent Misrepresentation – Duty of Care

[87] The Defendants were prominent in the St. John's real estate market in the early 2000's and actively promoted their enterprises by word-of-mouth, promotional materials and other forms of advertising. For at least five years leading up to 2012 they were in contact with Roxanne O'Connor and some of her friends, selling investment properties to them and extending their network through those contacts.

[88] So, for example, Roxanne O'Connor came to St. John's in 2007, where she met Mr. Nolan and eventually bought "a large beautiful historical home, three stories with a rental unit in the basement" (Volume I, page 35, line 17 of transcript) at 31 Gower Street, St. John's from the Defendants. Ms. O'Connor owned that property for "approximately four years" and said it "worked out very well" (Volume I, page 36, lines 6-8 of transcript) for her.

[89] Ms. O'Connor also bought a condominium unit from the Defendants, at 22 Flavin Street, St. John's. She described it in her testimony as "…a four-storey building with approximately four units per floor with an elevator and mine was on the main floor approximately 1400 square feet luxury, all furnished two bedroom with a den, kitchen, two bathroom, one en suite in there"; and a "full kitchen" as well as "washer, dryer, dishwasher" (Volume I, page 37, lines 3-8 of transcript).

[90] She also explained how she met Mr. Nolan on that trip:

> Adair, K.C.: Okay. And when and how did you first come to meet Mr. Nolan.
>
> Ms. O'Connor: I met Mr. Nolan around 2007 ah when we were visiting St. John's. He was at this thing, I met at the breakfast room of B&B we were staying at.
>
> Adair, K.C.: I see, and was that an arranged meeting or a casual meeting?
>
> Ms. O'Connor: It was not an arranged meeting, introduced himself to me at the table.
>
> (Volume I, page 33, line 14-18 of transcript)

[91] On the same trip, Ms. O'Connor said she saw a postcard in the hallway of the B&B she was staying at, promoting oceanfront properties for sale in Portugal Cove, just outside St. John's. She called the phone number on it and eventually Mr. Nolan called back when he found out she was interested in the properties. And this was how the investment relationship developed between the Defendants and Ms. O'Connor: they had properties to sell and they knew that Ms. O'Connor was interested in investing in real estate in the St. John's area.

[92] The Defendants' connection with Ms. O'Connor also gave them access to some of her associates. I note, for example, that Cynthia Manners accompanied Ms. O'Connor on a trip to St. John's some time in 2008 or 2009 and they met with Mr. Nolan who took the two of them "out during the day ah, showing us a few of his properties". From that trip, Ms. Manners invested in a property the Defendants owned in Topsail as did Ms. O'Connor, Kathryn Sinclair and Lynn Calafiore. Ms. Manners noted that she had a "14/15%" return on the Topsail property over two years and she was "happy with that" (Volume II, page 68, line 5 of transcript).

[93] By 2012, the Defendants had established a working relationship with the core of the Plaintiffs, Roxanne O'Connor, Cynthia Manners, Kathryn Sinclair and Lynn Calafiore. Together those Plaintiffs bought six of the eight units that were available in The Merchant's House, excepting only Ms. Paquette-Neville and the O'Connor/O'Connor & Harrison threesome who bought the remaining two. The Defendants knew that the Plaintiffs were looking for properties to buy and they welcomed the chance to sell to them.

[94] For all their interest in investing in Newfoundland real estate the Plaintiffs were relatively new to the local market and looked to the Defendants for their guidance and direction, as well as opportunities to buy from them. The Merchant's House presented a more intricate and complex proposition than the parties had considered between them previously. In the first place, it involved eight units, which the Defendants were selling for a total of $2,599,000, inclusive of HST.

[95] Additionally, the Defendants insisted that all units had to be sold together, preferably to a cohesive body. To that end, the Defendants say they offered a 7.5%

"designer credit" to all buyers, contingent on all units being sold. They also offered a guaranteed 3-year leaseback arrangement by which the Defendants would lease the properties back from the buyers, they would pay the buyers monthly rentals for their units and then the Defendants would market the properties themselves to generate the revenue to support the arrangement. The marketability of the units lay at the root of the operation and it was fundamental to its success.

[96] All of these contingencies were largely outside the knowledge and control of the Plaintiffs. As events would eventually reveal, municipal zoning was critical to the marketability of the units and ultimately to the success of the financing exercise in which the parties were engaged.

[97] The Defendants were better placed and more capable of discerning the zoning environment in St. John's and to understand how it would affect marketing the properties. By 2012 the Defendants had been working for about 3-4 years to redevelop The Merchant's House, converting it from a 3-apartment residential property to an 8-unit structure. They engaged architect Philip Pratt to envision and redesign the property and to steer the historic structure through City's zoning web.

[98] To a trusting observer the Defendants achieved all of that and some - to such an extent, that they were confident enough in their success to claim in their promotional brochure that the "8 luxury executive condominiums" would "provide hassle free living in a luxurious downtown setting". The Plaintiffs were trusting observers and the Defendants owed them a duty to ensure that they could deliver on their promises.

[99] Mr. Hall cross-examined a number of the Plaintiffs. He suggested to them that they could have done more to protect themselves; and he suggested that they could not simply count on the Defendants to make sure that the enterprise succeeded. This exchange between Mr. Hall and Cynthia Manners underscores Ms. Manners' justification for buying two units in The Merchant's House and for relying on the Defendants to ensure that all was in order:

Mr. Hall: No. So, and would you recommend, actually I think earlier you said you purchased the property sight unseen, correct?

Ms. Manners: Well, it wasn't unseen to me, I did stay at 21 Rennies Mill, I had met the both of you, I had done investments with both of you that was successful, there was trust that I had. I thought it was a good opportunity with people that I trusted.

Mr. Hall: Based on a brochure?

Ms. Manners: Based on a meeting with you, based on other investments with you.
Mr. Hall: The one investment.

Ms. Manners: Yes. And working with you in the sale in Toronto.

Mr. Hall: Mhmm. So, I am not sure how the two relate? How do they relate?

Ms. Manners: It was a relationship of trust.
Mr. Hall: So, then you are telling me you would buy a property based solely on a brochure and a relationship?

Ms. Manners: Yes.

Mr. Hall: Mhmm and it's interesting cause would you then agree that you're buying a property based on a brand, is that correct?

Ms. Manners: I don't know if I would call it that. I was basing it on a relationship that I had with you that I was comfortable with.

Mr. Hall: So, what was our relationship?

Ms. Manners: I just mentioned.

Mr. Hall: I want you to describe, how many years did you know us?

Ms. Manners: Three, four.

Mr. Hall: And did you meet us via Roxanne O'Connor?

Ms. Manners: Did I meet you through Roxanne O'Connor? Yes that is how I was introduced to you.

Mr. Hall: So, did you just say and the brand is Nolan Hall, had nothing, did not factor into your decision to purchase the property at Rennies Mill Road?

Ms. Manners: I purchased it because I knew who you were. And I trusted you.

> Mr. Hall: And you trusted us for what reason?
>
> Ms. Manners: For having done business with you in the past.
>
> Mr. Hall: Business with us in the past was what exactly?
>
> Ms. Manners: An investment and sale, selling your condominiums in Toronto, visiting your home at 21 Rennies Mill.
>
> (Volume II, pages 79 & 80, lines 1-20 & 1-13 of transcript)

[100] It is evident from this exchange between Mr. Hall and Ms. Manners that a "special relationship" existed between the Plaintiffs and Defendants. The core of the Plaintiffs – Roxanne O'Connor; Cynthia Manners; Kathryn Sinclair; and Lynn Calafiore – had dealt with the Defendants to good effect previously and trusted them.

[101] Their trust should have been self-evident to the Defendants who should have foreseen that they had to deal openly and fairly with the Plaintiffs. It is also inherent in that trust that the Plaintiffs would rely on the Defendants and the Defendants would know it. Finally, it is just as self-evident that it is reasonable for the Plaintiffs to rely on any representations the Defendants made to them about The Merchant's House.

[102] These are the components of the association between the Plaintiffs and the Defendants that give rise to the "special relationship" between them and impose a duty of care on the Defendants towards the Plaintiffs:

- They were associated in property investment approximately 4 years.
- Four of the Plaintiffs looked to the Defendants for investment properties in the St. John's area during that time.
- The Defendants courted those four Plaintiffs and sold properties to them.
- Those Plaintiffs did well with the properties they bought from the Defendants.
- The Defendants pitched The Merchant's House to those Plaintiffs and relied on them to recruit sufficient numbers to sell all units in the property.
- Those Plaintiffs delivered on the Defendants' expectations and the Defendants had a duty to all Plaintiffs to ensure that The Merchant's House would meet the Plaintiffs' expectations for it.

2. Representations - Untrue, Inaccurate, or Misleading

[103] That the Defendants misrepresented The Merchant's House to the Defendants is not in doubt. And this is the misrepresentation: The Merchant's House was an 8-unit fully equipped condominium development; the units accommodated full service living, including on site food preparation; the units were freely alienable; and the development complied with the City's zoning bylaws. It is equally clear that most aspects of that misrepresentation were untrue, inaccurate or misleading; and just maybe, all of these adjectives can be applied to them. Let me explain.

[104] The Defendants hired Philip Pratt to convert The Merchant's House from a 3-apartment residential structure to an 8-unit development. Mr. Pratt did as the Defendants asked him and from his work the City issued a Building Permit so Mr. Pratt could proceed and then an Occupancy Permit when he finished the conversion.

[105] Consent Exhibit #6 is a copy of the Building Permit which the City issued on July 30, 2009. I referred to it earlier in these reason and noted then that it authorized the Defendants to "CONVER 23A [Rennies Mill Road], B & C INTO 16 PERSON – BEDROOM SUITES – B & B RENOVATE"; which Mr. Pratt did. Consent Exhibit # 28 is a copy of the Occupancy Permit the City issued when Mr. Pratt finished his work.

[106] The Occupancy Permit was dated February 11, 2010 and authorized the Defendants to operate 23 Rennies Mill Road as a "Lodging House", subject to these "Conditions or Remarks": "MAXIMUM OCCUPANCY OF 16 PERSONS (8-ROOMS). THERE IS NO COOKING OR FOOD PREPARATION AREAS AT THIS PROPERTY AND THERE IS TO BE NO COOKING OR SERVING OF FOOD FROM THE ADJOINING PROPERTY (21 RENNIES MILL ROAD) FOR THE GUESTS OF THIS LODGING HOUSE".

[107] Eventually, the City issued a succession of Lodging House Licenses for the property, which permitted "16 persons/guest/caretaker" to occupy the premises but carried the same prohibition on cooking or preparing food in the units and on

bringing it into them from next door at 21 Rennies Mill Road. And so, it continues until now.

[108] Yet, when the Defendants produced their promotional brochure for The Merchant's House they represented the property as "…redeveloped to 8 luxury condominiums which are now being offered for sale to the keen investor" (Exhibit R.O'C. #1). In particular, the Defendants did not say the property could only operate as lodging house, that it could not accommodate more than 16 people on site (including caretaking staff) and that no food could be prepared in the units.

[109] As well, when the Plaintiffs agreed to buy all 8 units as "condominiums", the Defendants instructed Mr. Barry, their lawyer to incorporate The Merchant's House Condominium Corporation and to register it under the *Condominium Act, 2009*. They also instructed Mr. Barry to draft the Declaration, including Article 3.06 which covered **"Occupation and Use"**. It provided:

> The occupation and use of the Units shall be in accordance with the following restrictions and stipulations and those provided in the By-Laws:
>
> (a) each residential Unit shall be occupied and used only as a residence for single family housing and no other purpose…

[110] Article XII of the By-Laws also provided for "THE USE AND OCCUPATION OF UNITS". By-Law XII (r) reads:

> (r) no Owner shall lease or otherwise allow the occupation of his/her unit by others for a term less than one month in duration and without immediately advising the Board of the name and telephone number of the tenant or tenants.

[111] Otherwise, from a general review of the Condominium Declaration and By-Laws it is evident that the Plaintiffs were informed by them that they could expect to engage in full condominium living, subject, of course, to the usual limitations and

restrictions of that lifestyle, but certainly not limited to a B&B or a lodging house occupancy.

3. Defendants were Negligent with Representation

[112] The Defendants presented The Merchant's House as a fully equipped, 8-unit, permitted and authorized condominium development when they knew its operation was limited to a lodging house/B&B; and there is compelling evidence that their malfeasance extended beyond mere negligence.

[113] In documenting the extent of the Defendants' misrepresentation just then, I showed clearly that the Defendants were not authorized to use The Merchant's House for any purpose than a lodging house and that they knew it. Yet while they passed it off to the Plaintiffs as a condominium development, the Defendants were able to misrepresent The Merchant's house as such and sustain that perception only because of how they marketed the development and sold it to the Plaintiffs.

[114] The Defendants sold The Merchant's House development to the Plaintiffs as a "complete package", of which these were the 5 key elements:

i. All units had to be sold and a 7.5% designer credit was given for each of the units as an incentive if all units were sold, but not otherwise.

ii. Roxanne O'Connor received a 3% commission on all sales for relaying sales information to potential buyers and sharing her investment background with the Defendants to them.

iii. Denis Barry represented both buyers and sellers, drafting and witnessing the execution of deeds of conveyance, setting up the condominium corporation, receiving funds from the Plaintiffs and disbursing them to the Defendants and otherwise overseeing all aspects of the transactions.

iv. The Defendants designated Nolan Hall Real Estate Services as the Vendor's Agent for selling the units; and

v. The Defendants offered the Plaintiffs a guaranteed leaseback arrangement which assured the Plaintiffs rental income for three years.

i. Designer Credits

[115] For all of the talk about them in the evidence, I actually know little about the designer credits. For example, I am unclear about when the buyers were informed of them, who conceived of them and the rationale for them. The Plaintiffs understood that the Defendants extended the credits to them as an incentive to buy all of the units so that The Merchant's House was fully formed and operational immediately as they closed the transactions.

[116] While the Defendants may have stated that as their intention for the credits, what did they hope to gain by offering the generous incentive to the Plaintiffs; or did they even need to do so? Overall, I saw nothing to say that the Plaintiffs may not have bought all the units, unless the Defendants gave them the credits or that the Plaintiffs negotiated with the Defendants to get the credits.

[117] Generally, it was never clear to me, what if any benefit the Defendants derived from foregoing 7.5% of the purchase prices for each of the 8 units. Assuming that the Defendants applied the credits to the purchase prices before the HST was added, the Plaintiffs saved $172,500 ($2,300,000 x .075%) and the Defendants lost the corresponding amount.

[118] Mr. Barry who handled the property transactions was also concerned about the incentive for the credits and their rationalization and he was genuinely troubled by them. Mr. Nolan called Mr. Barry as a witness and Mr. Hall questioned him about the credits:

> Mr. Hall: And so, there were rebates and designer credits issued to every purchaser, is that correct?
>
> Mr. Barry: I'll tell you now, I mean, if you're going to ask me a question, I'm going to answer it. There was no rebate, I was aware of, 7.5 percent. That's a rebate of a purchase price. So, if the unit was $100,000, they were getting 7,500 bucks back. I wasn't aware of that, but I became aware of a thing called designer credits and designer credits meant nothing to me at the time because I wasn't focused on that… ….

> So, I was doing as much as I could in a limited period of time, that I could and in doing that, in my effort to complete this, because the Plaintiffs were anxious to acquire their properties, I did what I thought was as good as I could do but in doing that, I made sort of judgmental errors, and the designer credit was one of them.
>
> (Volume V, page 56, lines 5-11 & 15-20 of transcript)

[119] Mr. Hall also questioned several of the Plaintiffs including Cynthia Manners about the designer credits they received and suggested to some of them that the Plaintiffs may have misled the banks from which they borrowed the money to buy the units by not disclosing the credits:

> Mr. Hall: Mhmm and so the bank ordered the appraisal mmm and so did you make this bank aware of the designer credit you received?
>
> Ms. Manners: No.
>
> Mr. Hall: You did not. And um ah ah as an experienced realtor, guided by the regulations and laws in financing, why did you not disclose the rebate to your financial institution?
>
> Ms. Manners: It wasn't in place when I um applied for the mortgage. The application went in long before closing.
>
> Mr. Hall: But you were supposed to disclose that. So, the bank is financing based on your purchase price not on the ultimate price, less the rebate. So therefore, they did not know so the purchase price what I am trying to get at is misrepresented.
> Ms. Manners: It was not accurate at the time of closing when the rebate was applied.
>
> (Volume II, page 75, lines 1-12 of transcript)

[120] I am as perplexed about the designer credits as Mr. Barry was. However, for now let me simply say that they may have their place in the "package" the Defendants offered to the Plaintiffs, as the other elements.

ii. Roxanne O'Connor's Commission

[121] The Defendants paid Ms. O'Connor a commission of 3% in addition to the 7.5% designer credit that she received along with the other Plaintiffs. Once again, I know little about Ms. O'Connor's commission; if she negotiated it with the Defendants, how the amount was determined or if there were any conditions on her receiving it.

[122] There was little discussion of the commission in the evidence, save these questions that Mr. Nolan put to Ms. O'Connor when he cross-examined her:

> Mr. Nolan: Ok and from that you would have received 7.5% rebate is that right?
>
> Ms. O'Connor: Credit.
>
> Mr. Nolan: Yes, ok credit plus 3% credit.
>
> Ms. O'Connor: Correct.
>
> Mr. Nolan: Because you operated as the agent and you sold the units and you got the money from yours as well, is that right?
>
> Ms. O'Connor: Is that a question?
>
> Kevin Nolan: Yes.
>
> Ms. O'Connor: I was not an agent.
>
> Kevin Nolan: But you represented the buyers?
>
> Ms. O'Connor: No I did not.
>
> (Volume I, page 124, lines 10-20 of transcript)

[123] That excerpt clarifies little about the reason Ms. O'Connor received the commission, since she denied in it both that she was an agent for the sellers and that she represented the buyers. Ms. O'Connor's 3% "commission" is even more

ambivalent than the 7.5% rebate but it adds to my belief of a pattern of behaviour that explains their relevance.

iii. Mr. Barry Represented all Parties

[124] Mr. Hall questioned Mr. Barry about how his retainer to represent the Plaintiffs in the transactions was established:

> Mr. Hall: Did you know all the purchasers prior to the day of closing?
> Mr. Barry: Prior to the day of closing?
>
> Robert Hall: Yeah.
>
> Mr. Barry: No, I did not know them, no. I knew, I had met Roxanne O'Connor, I think I met Martha [O'Connor], I've had communication with them through emails.
>
> Mr. Hall: So, all the purchasers engaged you to represent them for the purchase of their agreement is that correct?
>
> Mr. Barry: Well, that's one way of putting it. How that evolved was through Roxanne making contact with me and I indicated to her some time in that process, sometime in October, November, I said, well, who's your lawyer and she said, well, I'll check it out with Kevin [Nolan] and Kevin came back and said, to me, directly, you take care of the eight of them. That was the first indication that I was acting for them, and I can give you the date, but I mean that's how it evolved.
>
> Mr. Hall: Right.
>
> Mr. Barry: And I had met Roxanne before.
>
> Mr. Hall: Right, so, in essence, Roxanne sort of connected you to all of the purchasers.
>
> Mr. Barry: She connected the purchasers, yes, I guess.
>
> (Volume V, pages 51, & 52, lines 19-20 & 1-13)

[125] Elsewhere in the same context, Mr. Barry described Ms. O'Connor as "…in my view, the spokesperson for that group and dealt with, and she was my primary contact" (Volume V, page 52, lines 17-18).

[126] While this is clearly an inauspicious beginning to a legal retainer, especially on the scale of what Mr. Barry was required to do here, his engagement has a tone and quality to it that is consistent with the Defendants paying designer credits to the Plaintiffs and a 3% commission to Roxanne O'Connor.

iv. NHRES as the Vendor's Agent

[127] NHRES is the acronym for "Nolan Hall Real Estate Services Limited". It is a corporation which the Defendants owned and operated when they bought, sold, and developed properties and promoted their investments. Of course, it is also the Third Defendant in these proceedings. I noted earlier that it did not have counsel so it could neither "appear" before the court nor defend itself at trial.

[128] Nothing was made of the fact that "NHRES" appears on the Agreements of Purchase and Sale that the Plaintiffs signed with the Defendants as the "Vendor's Agent". I note, in particular these exhibits, Consent # 7, a copy of the Agreement of Purchase and Sale between Cynthia Manners and the Defendants and Exhibit R.O'C. #3, a copy of the Agreement of Purchase and Sale between Roxanne O'Connor and the Defendants.

[129] In each of those documents, this is the salient portion of the clause: "I/We Roxanne O'Connor/Cynthia Manners…offer to purchase the property from Nolan Hall…through the Vendor's Agent(s)…NHRES…at the price of…." [emphasis added]. On its face, this representation seems to confirm that Roxanne O'Connor was not the "Vendor's Agent" and could not have earned the 3% commission on the sales because of it, not to mention getting the credit for the two units she bought herself. However, I think it is even more significant than that, as I will show shortly.

v. Guaranteed Leaseback Arrangement

[130] I have referred to the leaseback arrangement repeatedly throughout these reasons so its existence is generally well-established. However, as with the designer credits and Roxanne O'Connor's commission, the incentive for the Defendants to offer it is vague and uncertain to me. As well, and again like the designer credits and commission, I know nothing of how the arrangement worked in practice, other than that the Plaintiffs who opted for the arrangement did receive monthly rental payments from the Defendants as promised; at least until the City shut down the property in April 2014.

[131] For example, I do not know to whom the Defendants rented the six units they leased back from seven of the Plaintiffs or, in fact, if they even rented those six units at all. Nor do I know how the properties operated if they were rented. Thus, and most pertinent here, did the tenants who rented them from the Defendants have kitchen facilities in the units and prepare their own food on site? Were the rentals long or short term? How many tenants did the Defendants permit per unit? And so on.

[132] What I do know is that Roxanne O'Connor was the outlier for the leaseback arrangement. All other Plaintiffs joined in it except Ms. O'Connor. And it seems certain that her opting out precipitated the collapse of the whole enterprise. Let me explain.

[133] Ms. O'Connor owned a condominium at #22 Flavin Street in St. John's. She bought it from the Defendants a couple of years earlier and rented it through Premier Executive Suites, under the auspices of Matthew Girard. So, she decided that she would follow the same process to rent her two units in The Merchant's House. When she told Mr. Nolan of her plans for the units, he inquired of the terms she had with Premier Executive Suites. Ms. O'Connor related the details to him, including the flexibility that Premier Executive Suites offered to make one of her units available to her if she wanted to stay in them and that they would provide another unit in their service if both of hers were engaged.

[134] However, over time, Premier Executive Suites changed the terms on which it engaged with the rental market and Ms. O'Connor's units no longer fit their profile. Premier Executive Suites dropped Ms. O'Connor's units from their portfolio, and she looked elsewhere for a manager for them. In that behalf, she contacted Royal LePage and an agent placed a sign on the lawn outside The Merchant's House advertising her units for rent. Someone complained to the City about the advertising and the City stepped in, it inspected the property and it shut down the rental service; and the leaseback arrangement collapsed.

[135] It was quite clear when the City inspected The Merchant's House that it was concerned about more than that the Plaintiffs may have had kitchens in their units. Life safety issues were a primary concern, and they led the City to demand that all units on the second and third floors be vacated forthwith. It is also clear from Richard Cook's testimony that the City's was primarily concerned about life safety within the property.

[136] As he put it somewhat wryly in his evidence:

> "When I bought Winterholme [my own residence], it had to be upgraded and we put a new sprinkler system right through the building for example and we put in new electrical, they had to do new plumbing, fire doors, so you know, that kind of thing and anything like that, is for life safety, you know, and I hate to put it this way but the building can burn but you want to get the people out". [emphasis added]
>
> (Volume VI, page 45, lines 9-14)

[137] The Royal LePage rental sign triggered a complaint to the City and its inspection revealed serious flaws with The Merchant's House, both as to its improper usage as well as the risks to those who occupied the units. It was readily apparent that the Plaintiffs could not operate their units as standalone condominiums but were limited to a B&B or a lodging house operation as the City allowed when Mr. Pratt finished his work. The precipitous collapse of the operation lies at the root of how the Defendants' misrepresented The Merchant's House to the Plaintiffs as I will now show.

[138] In the preceding paragraphs, I reviewed in detail the 5 key elements of the "complete package" by which the Defendants sold The Merchant's House to the Plaintiffs. They are, to summarize:

i. offering them designer credits of 7.5% of the purchase prices;
ii. paying Roxanne O'Connor, a 3% sales commission;
iii. retaining Mr. Barry to represent both buyers and sellers;
iv. designating NHRES as the vendor's agent; and
v. offering the guaranteed leaseback arrangement.

[139] Some of these measures, such as the designer credits, Ms. O'Connor's commission, and retaining Mr. Barry to represent the Plaintiffs seem unnecessary to the dealings between the Plaintiffs and the Defendants. The Plaintiffs indicated their interest in buying the units in June/July 2012 before those factors were in play. This leaves for me only one reasonable explanation for them and that I infer: the Defendants knew of the zoning problems that The Merchant's House presented for them. However, they also saw the opportunity to extract more than $2,000,000 from the property if they could convince the Plaintiffs to buy it from them.

[140] The Defendants may have thought to try and convince the City to accept the condominium development after the Plaintiffs bought the property, but the Defendants needed time and they might get it if they could continue to assert full control over the project while they pursued that goal. The 3-year leaseback arrangement would give them a window of opportunity. Otherwise, the Plaintiffs were a cohesive group who fit the Defendants' expectations for putative owners and with the designer credits and the guaranteed leaseback payments that the Defendants extended to the Plaintiffs, the Defendants offered the Plaintiffs a deal that seemed too good for them to pass on.

[141] The irony of the collapse of the Defendant-managed rental program for The Merchant's House is that it was Roxanne O'Connor's choice to manage her units herself that triggered the breakdown of the entire enterprise.

[142] Having Mr. Barry represent both sides also removed the risk that a solicitor of their own representing the Plaintiffs might discover the zoning problem. And most telling of all is this part of the exchange that took place between Mr. Hall and Mr. Barry over how his retainer with the Plaintiffs was established:

> Mr. Hall: So, all the purchasers engaged you to represent them for the purchase of their agreement is that correct?
>
> Mr. Barry: Well, that's one way of putting it. How that evolved was through Roxanne making contact with me and I indicated to her some time in that process, sometime in October, November, I said, well, who's your lawyer and she said, well, I'll check it out with Kevin [Nolan] and Kevin came back and said, to me, directly, you take care of the eight of them. That was the first indication that I was acting for them, and I can give you the date, but I mean that's how it evolved. [emphasis added]

[143] I note here, in particular, the order of things: Mr. Barry asked Ms. O'Connor who was representing them; she said she would check with Mr. Nolan; and Mr. Nolan, not Ms. O'Connor, reported back to Mr. Barry that he was representing the Plaintiffs. I also note that Mr. Barry said Mr. Nolan told him "directly" to represent all Plaintiffs.

[144] I am satisfied on the evidence that the Defendants knew The Merchant's House was not zoned as a condominium development and that they misrepresented it to the Plaintiffs knowingly. They tried to establish and maintain complete control of the project so the Plaintiffs would not uncover the truth and, in the meantime, duped the Plaintiffs into buying the units as zoning compliant.

[145] Aside from the evidence that I have already reviewed in detail, I also note the "sleight of hand" that Defendant Nolan executed to remove the kitchens and to cover up the cooktops so the City would not see them when it inspected the property. Three witnesses attributed that behaviour to Mr. Nolan: Roxanne O'Connor; Lynn Calafiore and Matthew Girard. Mr. Nolan's machinations are clear evidence of his complicity and of a guilty mind at work.

[146] Let me be clear about my belief that the Defendants deliberately misrepresented The Merchant's House to the Plaintiffs as a permitted and properly zoned condominium development. I set out the evidentiary basis for my belief, but I also draw on an inference adverse to the Defendants for it as well.

[147] In *Doiron v. Haché*, Richard, J.A. said that an adverse inference "may be drawn against a party for failure to call a witness who may give material evidence *where that party alone could bring the witness before the court*." That pre-condition is satisfied here. The Defendants might have testified or even offered themselves to the Plaintiffs for cross-examination, but did neither. Hence it is fair to infer, and I do, that they are hiding something and based on the evidence I have here, it is equally fair to infer that they are hiding that they knew The Merchant's House was not the condominium development that they sold to the Plaintiffs.

4. Plaintiffs' Reliance on Defendants' Misrepresentations Reasonable

[148] I discussed the duty of care that the Defendants owed to the Plaintiffs earlier in these reasons. I found that while several of the Plaintiffs, those whom I describe as the "core" group – Roxanne O'Connor, Cynthia Manners, Kathryn Sinclair, and Lynn Calafiore – were somewhat familiar with St. John's investment market, they still relied on the Defendants for access to it from which I attributed the Defendants' duty of care to the Plaintiffs.

[149] I do not want to understate the competence of the Plaintiffs. They come from various professional backgrounds and are intelligent, knowledgeable investors who are sensibly self-reliant. I note, for example, that Roxanne O'Connor is a consultant for a Canadian company operating out of New York City and has been doing that for 30 years. Cynthia Manners handles accounting for a family business and also works part-time as a real estate agent. She is licensed with an Ontario real estate firm and has worked casually in that capacity for 35 years. Louise Paquette-Neville is a retired adjudicator with the Immigration and Refugee Board of Canada.

[150] While Kathryn Sinclair is retired now, she has a university degree and took various business courses over the years, allowing her to deal with human resources and financial accounting matters. She also worked with a mortgage investment corporation. Lynn Calafiore has a university degree as well and worked as a sales representative and in management in a food company. Finally, I note that several of the Plaintiffs had invested in properties in the St. John's area that the Defendants introduced them to.

[151] Mr. Hall cross-examined the Plaintiffs about whether they exercised due diligence when they purchased their units in The Merchant's House; if they were content to be represented by Mr. Barry, who also represented the Defendants; if they disclosed the designer credits to the lenders who provided the funds for them to buy their units; how influential the leaseback arrangement was in their decisions to buy units; if they bought their units "sight unseen"; how important the promotional brochure was in the process; and so forth.

[152] In his closing argument, Mr. Nolan even suggested that the Plaintiffs could have taken things into their own hands and inquired of the City how The Merchant's House was zoned: "…they could have walked down the hill to City Hall, literally walk wouldn't need a cab and ask what is the zoning, what is this, what can I do with the zoning?" (Volume VII, page 63, lines 5-7 of transcript).

[153] Ultimately, though the Plaintiffs relied on the Defendants when they bought their units in The Merchant House. I quoted a lengthy passage earlier in these reasons from Mr. Hall's cross-examination of Cynthia Manners. Ms. Manners came back repeatedly to how much she trusted the Defendants as Mr. Hall pushed her about why she invested in the project. This short excerpt from that quotation captures the importance of the trust she had for the Defendants:

> Ms. Manners: I purchased it because I knew who you were. And I trusted you.
>
> Mr. Hall: And you trusted us for what reason?
>
> Ms. Manners: For having done business with you in the past.
>
> (Volume II, page 80, lines 8-10 of transcript)

[154] Others of the Plaintiffs were also adamant about the importance of the trust they had for the Defendants when they decided to buy units in the development. This exchange between Mr. Hall and Kathryn Sinclair pertains:

> Mr. Hall: As so you felt comfortable then with any kind of opportunity that Roxanne O'Connor might introduce.
>
> Ms. Sinclair: I did not buy the property at 23 Rennie Mills solely based on her recommendation.
>
> Mr. Hall: So why did you buy it?
>
> Ms. Sinclair: I was led to believe and trusted my real estate broker and my lawyer that this was a real condominium and that the conversion was legal and that it could be rented out on a long term basis and it had full cooking facilities in it and that it was legal to cook in the condominium.
>
> Mr. Hall: So, who was you real estate broker?
> Ms. Sinclair: You, and Mr. Nolan
>
> (Volume III, page 77, lines 1-11 of transcript)

[155] Martha O'Connor, Frank O'Connor (her husband) and Anne Harrison bought Unit 202 for $215,000 plus HST between them. They had no prior investment dealings with the Defendants and were relatively unknown to the other five Plaintiffs. Ms. O'Connor attended Roxanne O'Connor's when the Plaintiffs met there and the brochure for The Merchant's House went around, including to her.

[156] Ms. O'Connor knew that Roxanne O'Connor had invested with the Defendants before. She went to the meeting "to get some information" and noted succinctly what transpired at the meeting in this exchange with Mr. Hall when he cross-examined her:

> Mr. Hall: So, she [Roxanne O'Connor] told you about the investment opportunity [in The Merchant's House]?
>
> Martha O'Connor: Yes.
>
> Mr. Hall: And what details did she did give you?

> Martha O'Connor: She gave the brochure; I knew of her successful history and relationship with Nolan and Hall and um that was it.
>
> (Volume IV, page39, lines 15-17 of transcript)

[157] It is clear that the Plaintiffs invested in The Merchant's House because they trusted the Defendants. In most cases, such as for Roxanne O'Connor, Cynthia Manners, Kathryn Sinclair and Lynn Calafiore, the trust arose from previous personal experiences investing through the Defendants. Others, such as for Martha O'Connor and her co-investors and Louise Paquette-Neville who had no prior experience with the Defendants, adopted the trust vicariously through the "core" group and their stories of earlier successful ventures with the Defendants.

[158] Most, if not all the Plaintiffs would, I suspect, seriously question the trust they place in the Defendants now but that is with the benefit of hindsight and how poorly the Defendants served that trust. But, in all of the attending circumstances, I am satisfied that the Plaintiffs acted reasonably when they relied on Defendants.

[159] There is one final aspect to the relationship between the Plaintiffs and the Defendants that bears consideration. I refer here to Roxanne O'Connor's role in facilitating the purchase and sale of the units in The Merchant's House. Mr. Hall submitted several times during the proceedings that neither he nor Mr. Nolan made any representations to the Plaintiffs about the property before they decided to buy their units. In his estimation, Mr. Hall claimed that the Plaintiffs relied on Roxanne O'Connor so that any representations about The Merchant's House that the Plaintiffs acted on came from Ms. O'Connor and not from them.

[160] These are some excerpts from Mr. Hall's closing argument in which he addressed the point.

[161] In this submission, he refers to the meeting that took place at Roxanne O'Connor's house in Toronto in June 2012 at which the brochure was made available:

> Up to this point or at that point I should say 50% of the prospective investors had not even met Nolan and Hall and the other 50% did meet Nolan and Hall but for a different reason, they invested in another business opportunity which was presented to Roxanne by Nolan and Hall in return presented the offering to her group of investors. So, um it is fair to say that you cannot misrepresent something that you didn't represent in the first place.
>
> (Volume VII, page 46, lines 4-10 of transcript)

[162] And elsewhere he submits:

> So, Roxanne O'Connor as the evidence shows she was the primary representor through the entire process and the closing. And so, because she was receiving a sales commission and because she was receiving very generous rebates and credits, one can infer that she was anxious that these sales were going to be completed. There was a lot of personal gain and um.
>
> (Volume VII, page 50, lines 13-17)

[163] It is clear that Roxanne O'Connor was involved in the process, such that it is unlikely that Plaintiffs would have assembled as a group of investors without her intervention. The enterprise was effectively launched when she visited St. John's in May 2012 and on meeting Mr. Nolan he told her "… I want to show you something"; and it went from there.

[164] However, Mr. Hall misses the critical point of these proceedings when he says that Ms. O'Connor was the "primary representor throughout the entire process and the closing". Ms. O'Connor did not make the misrepresentation that this matter turns on; which is, as I stated above, that The Merchant's House was a fully equipped, 8-unit, permitted and authorized condominium development. That characterization of the property originated with the Defendants, and they maintained it throughout until the City intervened and shut down the operation; and Roxanne O'Connor was as much duped by that misrepresentation as were the other Plaintiffs.

[165] In late March 2014, the City gave notice that it intended to inspect the property because of the complaint that it received when the Royal LePage went on the lawn,

advertising Roxanne O'Connor's units for rent. Dennis Easton, Senior Building Inspector with the City, wrote a letter to the Defendants seeking permission to inspect the property (Consent Exhibit #3). Ms. O'Connor received notice of the letter and then she sent this email to Mr. Nolan at 11:01 pm on March 25, 2104:

> Kevin,
>
> I am concerned regarding this notice from Dennis Easton, Building Inspector. I did leave a vm [voice mail] earlier this week and he never returned my call – that is disconcerting. The notice is addressed to yourself and Robert – not to us, yet we own the property.
>
> The inspection is scheduled for April 3rd, next Thursday and no one has responded to them to postpone/delay. Dennis Barry advised when we purchased the units that the City had been informed about the sale and that the process to change the name as far as taxes takes time. As far as the City is concerned you still own the property.
>
> This is very confusing. How should we proceed? What are the concerns here? What is the inspector concerned about – should I fly to St. John's to deal with this?
>
> Should I contact Dennis Barry?
>
> As you can see, I am losing sleep over this.
>
> Regards,
> Roxanne
>
> (Exhibit R.O'C. # 10)

[166] I will refer in more detail to that email shortly, but it begs the other question that Ms. O'Connor put to Mr. Nolan of why the City still regarded the Defendants as the owners almost a year and a half after the units were sold. That is also consistent with my belief that the Defendants wanted to maintain full control of The Merchant's House even after they sold the units to the Plaintiffs to hide that it was not properly zoned for the use on which they sold it to the Plaintiffs.

[167] As matters transpired, the City inspected The Merchant's House on April 10, 2014, and as I have shown already, on April 15, 2014, Dennis Easton issued a letter,

addressed to the Defendants and, this to The Merchant's House Condominium Corporation (c/o the Defendants), shutting down the property (Consent Exhibit # 3).

[168] Roxanne O'Connor reacted to that notice by sending another email to Mr. Nolan, this at 8:58:34 pm on April 6, 2014:

> Kevin,
>
> You read my e-mail to Dennis Easton (see below and copied to Denis Barry) Mr. Easton NEVER acknowledged my e-mail.
>
> You are informing me that you received legal notice that MH [Merchant's House] will be shut down and that is alarming for us. You asked that I push back the inspection until September as I am out-of-province. Please call me on this.
> What do you mean by 'a simple authorization as per your e-mail five days ago' – I don't understand. "Not engagement what can you do after you get a letter" What does this mean. I am so worried. What have I gotten myself into with all of this? What have I gotten my friends into? Can you please help us here.
>
> Tell me what to do tomorrow morning? Do I call Dennis Easton and make appointments for Wednesday inspection? Is it because the cooktops are in the units, and they are not allowed? You must help me here – if MH shuts down how can the owners possibly handle this – some do not have mortgages – cash in. We've done nothing wrong here.
>
> My life savings are with you. PLEASE help me here. Where are you?
>
> Roxanne
>
> (Exhibit R.O'C. # 12)

[169] These emails demonstrate the disbelief, dismay, and consternation that Roxanne O'Connor felt when it became clear to her that The Merchant's House did not comply with the City's zoning for the area. They show that she relied on the Defendants and was oblivious to the zoning issue until it came to light as dramatically as it unfolded for her and the other Plaintiffs. They also show that she was not complicit with the Defendants in hiding zoning problems from the Plaintiffs and duping them into buying the units.

5. Damages from Relying on the Defendants' Representations

[170] The Plaintiffs engaged Tony Hurley of the Altus Group to provide "…an opinion of the retrospective and current market value on an all-cash basis of the condominium interest in the 8 individually owned units located within the Merchant's House Condominium Corporation property located at 23 Rennie's Mill Road, St. John's". (Exhibit T.H. #2, page i). Mr. Hurley submitted a CV (Exhibit T.H. #1) setting out his work history and professional background.

[171] I note, in particular, that he is qualified as an AACI (from the Appraisal Institute of Canada) and a MRICS (a Chartered Member of the Royal Institute of Chartered Surveyors) and has 39 years of industry experience. I accepted Mr. Hurley as an expert in the "…valuation for a large variety of commercial and industrial properties specializing in major investment property valuation and due diligence" and allowed him to express opinions about The Merchant's House because of his background.

[172] Mr. Hurley appraised the 8 units in The Merchant's House for three effective dates: October 1, 2021; January 1, 2017; and December 1, 2012. He noted that the City of St. John's zoned the property R1 and confirmed that it had no present plans to change the designation. He offered this opinion about the prospective use of the property: "Given the limited options for the 8 individually owned units, it is my opinion that the highest and best use of all 3 effective dates in this report is for collective bed and breakfast use" (Exhibit T.H. # 2, page ii).

[173] I adopted generally the approach that Mr. Hurley used to calculate the individual losses and will set those amounts out in a table shortly. However, I departed slightly from the original purchase prices that he used and the resultant percentages that Mr. Hurley relied on to calculate the differences. One of my primary concerns was to ascertain when the designer credits were applied to the purchase prices; and, in particular, whether the credits were applied before or after the HST was added to them.

[174] From examining these exhibits, I am satisfied that HST was applied to the purchases prices before the designer credits were applied:

- Consent Exhibits # 21 and 22, for units 102 and 201, sold to Kathryn Sinclair, being statements of account that Denis Barry provided to her for those units;
- Consent Exhibit # 27, for unit 302, sold to Lynn Calafiore, being her Agreement of Purchase and Sale for that unit;
- Consent Exhibit # 7, for unit 203, sold to Cynthia Manners, being her Agreement of Purchase and Sale for that unit;
- Consent Exhibits # 17, 18, 19 & 20, for units 102 and 201, sold to Kathryn Sinclair, being her Agreements of Purchase and Sale for those units, two of which (# 19 & # 20) are copies of unsigned agreements; and
- Exhibits R.O'C. # 2 & 3, for units 101 and 103, sold to Roxanne O'Connor, being her Agreements of Purchase and Sale for those units.

[175] For clarity, the "original purchase price" as I calculate it for each unit, includes the prices the parties agreed on, plus the HST for each but minus the 7.5% designer credits that the Plaintiffs received for them. As to Roxanne O'Connor's units, I deducted an additional 3% to the designer credits for both her units (or 10.5% in total) to account for the 3% commission that the Defendants paid to her.

[176] In the result, I find that the Plaintiffs lost these amounts because of the Defendants' misrepresentations:

Unit #	Owner	Original Purchase Price	% Split	Current Value	Differences/ Losses
101	Roxanne O'Connor	$379,256	16.52%	$74,340	**$304,916**
102	Kathryn Sinclair	$224,729	9.78%	$44,010	**$180,719**
103	Roxanne O'Connor	$227,554	9.90%	$44,550	**$183,004**
201	Kathryn Sinclair	$391,969	17.06%	$76,770	**$315,199**

202	Martha & Frank O'Connor/Anne Harrison	$224,729	9.78%	$44,010	**$180,719**
203	Cynthia Manners	$235,181	10.24%	$46,080	**$189,101**
301	Louise Paquette-Neville	$365,375	15.90%	$71,550	**$293,825**
302	Lynn Calafiore	$248,588	10.82%	$48,690	**$199,898**
Total		**$2,297,381**	**100%**	**$450,000**	**$1,847,381**

Deducting Settlement Proceeds from Damages

[177] When the Plaintiffs started these proceedings on November 7, 2014 they named "DENNIS BARRY TRADING AS DENIS G. BARRY PROFESSIONAL LAW CORPORATION" as Fourth Defendant, behind Kevin Nolan, Robert Hall and Nolan Hall Real Estate Services Limited as First, Second and Third Defendants.

[178] Mr. Barry, of course, was the lawyer who represented all parties in the sale of the units in The Merchant's House and was also a witness at trial. Mr. Barry advised that the issues between him and the Plaintiffs were settled before trial and a notice of discontinuance was filed to confirm the settlement. Mr. Barry was neither a party to the settlement negotiations which were handled by his liability insurer nor was he privy to the terms of the settlement.

[179] In *Ratych v. Bloomer*, [1990] 1 S.C.R. 940, McLachlin, J. for the majority of the Supreme Court of Canada addressed the need to avoid "double recovery" in tort damage awards:

> The general principles underlying our system of damages suggest that a plaintiff should receive full and fair compensation, calculated to place him or her in the same position as he or she would have been in had the tort not been committed, in so far

> as this can be achieved by a monetary award. This principle suggests that in calculating damages under the pecuniary heads, the measure of the damages should be the plaintiff's actual loss. It is implicit in this that the plaintiff should not recover unless he can demonstrate a loss, and then only to the extent of that loss. Double recovery violates this principle. (para. 71)

[180] The Alberta Court of Appeal referred to *Ratych* in *Bedard (Next Friend of) v. Martyn*, 2010 ABCA 3 (ACA) when it upheld the trial judge's decision to deduct settlement proceeds from the damage award at trial:

> Under the *Ratych* approach to tort damages, both under-compensation and over-compensation of the plaintiff are to be avoided. The task of the court is to assess actual loss and to ensure, to the extent possible, that the injured person is compensated for the amount of that loss: no more and no less. (para. 11)

[181] Here the Plaintiffs' "actual loss" is $1,847,381 based on the assessment I conducted in the preceding paragraphs. In the interests of fairness and to ensure that the Plaintiffs are not doubly indemnified for their losses, the Defendants will pay the Plaintiffs $1,847,381 **less** the global amount that the Plaintiffs recovered from Mr. Barry, with the net amount resulting allocated to the Plaintiffs by the **% Split** in the preceding table.

Defendants' Counterclaim

[182] On June 18, 2018, as ordered by Hurley, J. of this Court, the Defendants filed an Amended Defence and Counterclaim in these proceedings. By the amended document they carried forward their counterclaim against the Plaintiffs for breach of contract as it related to the leaseback agreement. In effect, the Defendants claimed that the "…[Plaintiffs] on June 30, 2014 unilaterally and without cause terminated the agreements with the…[Defendants] effective July 1, 2014 thereby causing the …[Defendants] damages" (para. 5).

[183] The Defendants also added to their counterclaim with this filing by claiming that the "…[Plaintiffs] have unlawfully slandered the title of 21 Rennies Mill Road,

St. John's, Newfoundland and Labrador and wrongfully filed a *lis pendens* on the property" (para. 11).

Breach of Contract

[184] The Defendants set out in detail in their Amended Defence and Counterclaim what they claimed to be their losses from the Plaintiffs' "unilateral and unlawful termination" of the leaseback arrangement. In effect, they claimed a loss of revenue totalling a net amount of $155,200 for the 19½ months from July 1, 2014 to the end of the 3-year leaseback agreement period. The Plaintiffs denied in their Defence to the Counterclaim that they breached the leaseback arrangement or that the Defendants suffered any damages because of its termination.

[185] I dismiss this part of the Defendants' Counterclaim. In effect, the Defendants called no evidence of the circumstances under which the agreement ended and, in particular, they offered no evidence of how the Plaintiffs unilaterally and unlawfully terminated it. Nor did they offer any evidence to support the losses they claim they incurred because of its termination.

[186] I understand, of course, that the City shut down the operation of The Merchant's House and I assume its closure interrupted the rental arrangement but I have no evidence of how the leaseback arrangement formally ended. I note as well from what I know of the leaseback arrangement that it was separate and apart from the rental arrangement and created a contractual obligation that the Defendants owed to the Plaintiffs regardless of whether they rented the units or not.

Filing *Lis Pendens*

[187] The Defendants set out the substance of their counterclaim for the Plaintiffs' filing of a *lis pendens* in paragraphs 15 and 16 of their Amended Defence and Counterclaim. This from paragraph 15:

> "…the *lis pendens* was filed with malicious intent as the *lis pendens* was placed on the entirety of 21 Rennies Mill Road when the actual alleged discrepancy between the properties was less than two feet in width in critical areas of both parcels of land".

[188] The Plaintiffs, owners of the 8 units in The Merchants' House at 23 Rennies Mill Road did file a *lis pendens* on the Ryan Mansion, at 21 Rennies Mill Road, the adjacent property owned by the Defendants. They did so because there was a boundary issue to be resolved between the two properties and they wanted to give notice of it in the Registry of Deeds for Newfoundland and Labrador.

[189] The Defendants also claimed in paragraph 13 of their Amended Defence and Counterclaim that they "…entered into a purchase and sale agreement to sell 21 Rennies Mill Road…[on January 19, 2017] for $750,000"; but that the sale was not completed because "…[the Plaintiffs] slandered and clouded the title to 21 Rennies Mill Road and [the purchase and sale agreement] is proof of loss, less the impact of market conditions, of $900,000". They contended further that "…the purchaser was bona fide and all other avenues to sell the property had been exhausted".

[190] It is true, as I have noted, that the Plaintiffs filed a *lis pendens* against 21 Rennies Mill Road. However, there was a boundary problem between 21 and 23 Rennies Mill Road that required rectification and the Plaintiffs filed the *lis pendens* to abide the situation until the problem was resolved.

[191] In an email that Denis Barry sent to Defendant Nolan at 9:13 am on January 12, 2015, he explained the need for rectification:

> Kevin,
>
> attached is a copy of the description which is raising issue for Darren O'Keefe [then counsel for the Plaintiffs] i believe historically that 21 and 23 were separate dwellings and that you acquired both and converted firstly into a joint business and then created the access points from 21 to 23 you places a false wall between the 2 houses and the space between the 2 properties was approximate 2 feet, however if you look at the diagram it appears that the foyer (shown as 2.76 x 2.72) of 23 is

> inside the survey boundary line and part of it sits within the boundary of 21. If that is the case then the boundary line between the two properties should be adjusted to make 23 wholly within its own boundary and the survey line would have to be moved essentially to address the situation. If this real property report is correct, you cannot have a portion of 23 sitting within the boundaries of 21 and a new line would have to be agreed and new surveys created to rectify the situation. i am having a chat with Dave vallis [land surveyor] to determine if what is shown an the attached is correct and needs to be rectified.
>
> I'll be in touch later
>
> denis
>
> (Exhibit D.B. #7)

[192] Ultimately, a new survey was completed; the boundary line was adjusted so that number 23 did not encroach on 21 Rennies Mill Road; the parties executed and registered a deed of rectification; and the Plaintiffs lifted the *lis pendens*.

[193] Citing *Almas v. Spenceley* (1972), 25 D.L.R. (3d) 653, [1972] 2 O.R. 429 (Ont. C.A.), Richard B.T. Goepel, J., in *Monument Mining Ltd. v. Balendran Chong & Bodi*, 2012 BCSC 1769, stated the elements of the tort of slander of title:

> (a) the words are published in disparagement of the plaintiff's title to property;
> (b) the words were false;
> (c) the words were published with express or actual malice; and
> (d) the plaintiff suffered special damages. (para. 128)

[194] To a similar effect is this quotation from the New Brunswick Court of Appeal in *O'Neill et al v. Edmanson*, 2017 NBCA 33: "There must be evidence of a dishonest or improper motive which goes beyond mere carelessness before the tort [of slander of title] is sustainable" (para. 46).

[195] The Defendants offered no evidence that the Plaintiffs acted with dishonest or improper motives when they filed the notice of *lis pendens* against 21 Rennies Mill

Road nor that anything they stated in the notice was false or intended to disparage the Defendants' title to the property. The Plaintiffs did so because there was a boundary problem between their and the Defendants' property and they removed the filing when the problem was resolved.

[196] Mr. Barry summed it up this way in his evidence:

> The *lis pendens*, and I again, recollection, you [Mr. Hall] might know better than I, was done for a purpose. There was, they [the Plaintiffs] didn't file it just to be an irritant. There was a reason for it, the specifics of which I can't remember but it had something to do with the survey, boundary line, I think.
>
> (Volume V, lines 2-5, page 69 of transcript) [emphasis added]

[197] I also note that while the Defendants claimed they had suffered damages because of the *lis pendens*, but, as with the breach of contract claim, they offered no evidence to support their claim of damages from the slander of title claim. I dismiss their claim that the Plaintiffs "slandered and clouded their title" to 21 Rennies Mill Road by filing a *lis pendens* against it and for damages resulting thereon.

Liability of Nolan Hall Real Estate Services Limited

[198] The Plaintiffs also sued Nolan Hall Real Estate Services Limited naming the corporation as Third Defendant in its claim. Nolan Hall Real Estate Services Limited was not represented by counsel at trial and took no part in the proceedings. Counsel for the First, Second, Third and Seventh Plaintiffs moved at the beginning of the proceedings both for judgment against the corporation by default and to dismiss the corporation's counterclaim. I reserved my ruling on their motions and undertook to give it after trial.

[199] I have considered counsels' motions and find there is no evidence that Nolan Hall Real Estate Services Limited contributed to the misrepresentation that the Plaintiffs relied on in their claim against Defendants Nolan and Hall. It is clear that

the individual Defendants dealt personally with the Plaintiffs to the extent that they proposed and sold units in The Merchant's House to them. Thus, I decline to grant judgment against the corporation.

[200] Nolan Hall Real Estate Services Limited also counterclaimed against the Defendants on the same bases as the individual Defendants. There is no merit to the corporation's counterclaim, just as there was not to the other Defendants' counterclaim. Thus, I dismiss the corporation's counterclaim.

COSTS

[201] The Plaintiffs will have their costs to be taxed. I note that four of the Plaintiffs – Martha O'Connor, Frank O'Connor, Anne Harrison and Louise Paquette-Neville – represented themselves at trial. However, this was not always so. From the filing of the statement of claim on November 7, 2014 until 2018 they were represented by one counsel and another counsel into 2019. They have been representing themselves since that time.

[202] Roxanne O'Connor, Cynthia Manners and Lynn Calafiore have had counsel throughout, as has Kathryn Sinclair (although, in both instances, neither the same counsel throughout, nor the same counsel for all four). Thus, costs for the Plaintiffs will be taxed this way:

- First, Second, Third & Seventh Plaintiffs: Column III of the Scale of Costs under *Rule 55* of the *Rules of the Supreme Court, 1986* S.N.L. 1986, c. 42, Schedule D*,* for the entirety of the proceedings.

- Fourth, Fifth, Sixth & Eighth Plaintiffs: Column III of the Scale of Costs from 2014-2019 and Column I of the Scale of Costs from 2020-present.

[203] As to the taxation of costs, I commend to the officer taxing costs for the self-represented Plaintiffs for the period from 2020-present, the principle, among other

relevant considerations, that Green, J.A. articulated in *Cabana v. Newfoundland and Labrador*, 2016 NLCA 75:

> Accordingly, I hold that in principle a successful self-represented litigant may claim, as part of taxed costs, an amount representing at least a portion of the time and effort he or she put into the case in the place of that which otherwise would have been expended on the case by a lawyer had one been retained. (para. 36)

SUMMARY AND DISPOSITION

[204] The Plaintiffs sued the Defendants for negligent misrepresentation in selling a property to them as a collection of stand-alone, fully equipped "residential condominiums" when the property could only be used as a lodging house or a B&B because of municipal zoning. The Plaintiffs claim that they relied on the Defendants' representations and that they suffered losses because of that reliance.

[205] The Court allowed the action and ordered the Defendants to pay damages of $1,847,381 less the global amount that the Plaintiffs recovered in a settlement with Denis Barry before trial and the net amount after the deduction will be allocated amongst the Plaintiffs in proportion to their interests in The Merchant's House. The Defendants are jointly and severally liable to pay this amount.

[206] The Defendants counterclaimed against the Plaintiffs, alleging that they wrongfully terminated a leaseback arrangement they had with the Plaintiffs, by which they say they suffered losses; and further that the Plaintiffs slandered the Defendants' title to the Ryan Mansion, adjacent to The Merchant's House property by filing a *lis pendens* against it. In each instance the Defendants offered no evidence to support their counterclaim and the Court dismissed both parts of it.

[207] The Court ordered that the individual Defendants pay the Plaintiffs their costs of the claim and counterclaim, to be taxed as stated herein.

[208] The Court declined to find Nolan Hall Real Estate Services Limited liable to the Plaintiffs by default of its appearance for trial. It also dismissed the corporation's counterclaim against the Plaintiffs and ordered Nolan Hall Real Estate Services Limited to pay the Plaintiffs' costs of the counterclaim to be taxed as stated herein.

ORDER

[209] In the result, I order that:

1. The Plaintiffs' claim for negligent misrepresentation is allowed.

2. The Defendants will pay the Plaintiffs damages of $1,847,381, less the global amount that the Plaintiffs recovered in a settlement with Denis Barry before trial, and the net amount after the deduction will be allocated amongst the Plaintiffs in proportion to their interests in The Merchant's House. The Defendants are jointly and severally liable to pay this amount.

3. The individual Defendants' counterclaim is dismissed.

4. The Plaintiffs' motion for judgment against Nolan Hall Real Estate Services Limited in default of appearance is dismissed.

5. Nolan Hall Real Estate Services Limited's counterclaim against the Plaintiffs is dismissed.

6. The individual Defendants and Nolan Hall Real Estate Services Limited will jointly and severally pay the Plaintiffs' costs of the claim and counterclaim respectively to be taxed as follows:

    i. First, Second, Third & Seventh Plaintiffs: Column III of the Scale of Costs under *Rule 55* of the *Rules of the Supreme Court, 1986,* for the entirety of the proceedings.

ii. Fourth, Fifth, Sixth & Eighth Plaintiffs: Column III of the Scale of Costs from 2014-2019 and Column I of the Scale of Costs from 2020-present.

GARRETT A. HANDRIGAN
Justice

APPENDIX

Correction made on January 18, 2024:

1. In relation to paragraph 209, subparagraph 2, the numerical figure should have read $1,847,381, and not $1,789,999.