IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Rosenbrock v. Van der Wath,* 2024 BCSC 1667

Date: 20240910
Docket: 132718
Registry: Victoria

Between:

Johannes Schalk Rosenbrock, Paul Stub Rosenbrock Sr., Maria Magdalena Rosenbrock and Paul Rosenbrock Jr.

Plaintiffs

And

Jennifer June van der Wath, Hendry van der Wath and Monkeynastix (Canada) Inc.

Defendants

Before: The Honourable Justice Elwood

Reasons for Judgment

Counsel for the Plaintiffs: G.T. Rhone

Counsel for the Defendants: J.D. West

Place and Date of Hearing: Victoria, B.C. March 4-5, 2023

Place and Date of Judgment: Victoria, B.C. September 10, 2024

2024 BCSC 1667 (CanLII)

Table of Contents

I. INTRODUCTION 3
II. FACTS 4
III. ANALYSIS 12
A. The Issues 12
B. Is This Matter Suitable for Summary Trial? 15
C. Did the Parties Form a Contract Based on the Immigration Promise? 16
D. What is the Proper Interpretation of the Contract? 19
E. Are the Plaintiffs Entitled to a Return of their Investments? 22
F. The Claim Against Hendry Personally 25
IV. CONCLUSION 25

2024 BCSC 1667 (CanLII)

2024 BCSC 1667 (CanLII)

I. <u>INTRODUCTION</u>

[1] The plaintiffs are citizens and residents of South Africa. At a time, two of them were interested in moving to British Columbia. To this end, they investigated investment opportunities to facilitate their immigration to Canada. Following discussions with the defendants, they invested in a franchise opportunity on Vancouver Island.

[2] The parties structured the investment in hopes that the plaintiffs who planned to move to British Columbia could take advantage of the entrepreneur immigration stream of the British Columbia Provincial Nominee Program ("BC PNP"). The BC PNP is an immigration program through which the Province selects nominees whom it invites to apply to Immigration, Refugees and Citizenship Canada ("IRCC") for permanent residence in Canada.

[3] The BC PNP applications were rejected by the Province. At about the same time, one of the plaintiffs who had planned to move to British Columbia decided for personal reasons that he would stay in South Africa. Despite these developments, the plaintiffs continued to invest time and money on the franchise. One of them came to Victoria on a temporary work permit. Unfortunately, the franchise was not financially viable. Ultimately, the plaintiffs decided to cease operations and return to South Africa.

[4] The plaintiffs now apply on a summary trial application for judgement in an amount equal to their total investments in the franchise. They rely on an alleged representation or warrantee that "the defendants would return the plaintiffs their total investment if they were unable to immigrate to Canada for any reason."

[5] The defendants argue that the alleged representation or warrantee did not become a term of the franchise agreement and is not grounds for a claim of misrepresentation. Alternatively, the defendants argue that the plaintiffs waived any entitlement they may have had to a return of their investments.

2024 BCSC 1667 (CanLII)

II. FACTS

[6] The plaintiffs are family members. Johann and Paul Rosenbrock Jr. are brothers. Maria and Paul Rosenbrock Sr. are their parents. For purposes of clarity and brevity, I will refer to them by their first names. In doing so, I mean no disrespect.

[7] Monkeynastix is a movement education program for children that was started in South Africa by a former gymnast. The corporate defendant Monkeynastix (Canada) Inc. ("Monkeynastix") is an Ontario company. From 2009 to 2019, Monkeynastix was licenced by Monkeynastix International (PTY) Ltd. to sell franchise rights in Canada.

[8] The defendant, Hendry van der Wath, was an employee of Monkeynastix. He is married to the defendant Jennifer van der Wath, who is the president and sole shareholder of Monkeynastix. Again, without meaning any disrespect, I will refer to the personal defendants by their first names.

[9] As of 2010, Johann and Paul Jr. were interested in leaving South Africa with their families. They researched various locations, including British Columbia, and considered various investment opportunities. They were familiar with Monkeynastix from its origins in South Africa. In June 2010, they contacted Hendry, who was acting as a representative of Monkeynastix in Canada.

[10] Many of the initial discussions between the parties took place in Afrikaans. Jennifer does not speak Afrikaans. Hendry took the lead on behalf of Monkeynastix and kept Jennifer updated on developments.

[11] Johann and Paul Jr. told Hendry that they hoped to emigrate from South Africa to British Columbia and that they were looking for a business opportunity to facilitate their immigration to Canada. Hendry told them that Monkeynastix was new to Canada, and that, while it had franchises operating in Ontario, it had no presence in British Columbia. He told them that establishing Monkeynastix in British Columbia

would require a significant personal commitment and time to develop the brand awareness.

[12] On June 10, 2010, Hendry sent an email to Paul Jr. attaching a business model for a regional Monkeynastix franchise and information about the entrepreneur immigration stream of the BC PNP.

[13] Entrepreneur Immigration under the BC PNP is a "temporary to permanent" immigration pathway. The program has various financial requirements, including minimum investment and ownership levels. Applicants submit a business plan to the Ministry of Jobs, Tourism and Immigration. If they are approved, the successful applicants come to British Columbia, initially as temporary residents, and then apply to IRCC to stay permanently once they have successfully started a business.

[14] On June 19, 2010, Hendry sent an email to Paul Jr. attaching a draft offer to purchase Monkeynastix franchises on South and North Vancouver Island. He based the draft on an offer to purchase Monkeynastix had used in Ontario. In the cover email, originally written in Afrikaans, Hendry set out a number of points connecting the franchise opportunity with the BC PNP requirements. Explaining the purchase price and why he included North Vancouver Island, Hendry wrote:

> - It is purely for the sake of your immigration:
> - FIRST, to make up the $200,000 for the minimum requirements -
> - SECOND, we can convert it back to shares later in the regional franchise, or give it back to you for use as cash flow to get going here etc. -
> - THIRD, I just want to make sure, as you can see on the immigration document I forwarded, it says you need to own more than 30% of the equity …
> - FOURTH, I did not want to end on exactly $200,000, it could make them lift their eyebrows, in this way your money is safe in a whole extra area until we decide what to do –
> - FIFTH – <u>we will also add an addendum for you to get your money back should anything not expected go wrong with the immigration process</u>. Just to protect you and give you piece of mind –
>
> [emphasis added]

2024 BCSC 1667 (CanLII)

2024 BCSC 1667 (CanLII)

[15] On June 21, 2010, Johann emailed an outline of a proposal to Hendry based on a telephone discussion the previous day. The outline set out terms for an investment by Johann, Paul Jr., and Paul's wife, Tania, pursuant to which they would acquire: (a) a 40% interest in a regional British Columbia franchise; (b) full ownership of a South Vancouver Island franchise; and (c) full ownership of a Central Vancouver Island franchise. The proposal from the Rosenbrocks included a term picking up on the fifth point from Hendry's email of June 19, underlined above:

> As offered an addendum will also be included in our agreement catering for a return of invested monies should the emigration process be unsuccessful for any reason.

[16] In his cover email, Johann invited Hendry to point out any part of the proposal outline that did not accurately capture the discussions. There is no evidence Hendry disagreed with any of the deal points in the outline.

[17] Paul Jr. and Johann prepared two offers to purchase based on the original draft provided to them by Hendry. The first offer was to purchase 20% of a regional British Columbia franchise and 100% of a South Vancouver Island franchise, to be operated through a company owned by Paul Jr. and Tania. The second offer was to purchase an additional 20% of the regional British Columbia franchise and 100% of a Central Vancouver Island franchise, to be operated through a company owned by Johann.

[18] Paul Jr. and Johann signed the offers to purchase on July 2, 2010. Jennifer accepted the offers on behalf of Monkeynastix.

[19] The accepted offers to purchase required: (a) deposits of $50,000 on July 15, 2010; (b) additional payments of $50,000 on October 15, 2010; and (c) balances of $170,648 and $151,037, respectively, on August 31, 2011.

[20] The accepted offers to purchase provided that the commencement of business by the franchises would be within one year after the payment of the deposit or "when immigration to Canada has been completed," whichever occurred first,

during which period various “business set-up functions” were to be undertaken by the parties, including “finalizing the relevant Master Franchise Agreement.”

[21] On August 18, 2010, the plaintiffs paid $100,000 to Monkeynastix. (Paul Jr. and Johann depose that “the plaintiffs” made various payments to Monkeynastix. Their evidence is uncontradicted; however, it is unclear who, amongst the named plaintiffs, advanced the funds.)

[22] On November 11, 2010, the plaintiffs paid a further $100,000 to Monkeynastix.

[23] On March 2, 2011, the parties incorporated 0904439 BC Ltd. to carry on business as the regional franchise in British Columbia (“Monkeynastix B.C.”). 60% of the shares of Monkeynastix B.C. were retained by Monkeynastix. 40% were ultimately issued to the plaintiffs (although it is unclear who amongst the named plaintiffs became shareholders).

[24] On March 15, 2011, the parties entered into a sub-master franchise agreement pursuant to which Monkeynastix licenced Monkeynastix B.C. to sell franchise rights in British Columbia.

[25] In the Spring of 2011, Johann, Paul Jr., and Tania incorporated 0908121 B.C. Ltd. to operate a franchise in Victoria (“Monkeynastix Victoria”). They also hired at least one employee in Victoria.

[26] Johann and Paul Jr. retained the Montreal law firm of Campbell Cohen to assist them with their applications to the BC PNP. They prepared a business plan for the Victoria franchise and a regional operation on Vancouver Island, which they submitted in support of the applications. The business plan stated that Johann, Paul Jr., and Tania would take over the day-to-day running and administration of the business once they arrived in Canada.

[27] Johann and Paul Jr. planned to travel to Victoria in August 2011 to continue setting up the business. Their plan was for Johann to stay in Victoria under a

2024 BCSC 1667 (CanLII)

temporary work permit while they waited for the BC PNP applications to be approved. When they ran this plan by Campbell Cohen, the lawyers advised against commencing operations before the BC PNP applications had been approved.

2024 BCSC 1667 (CanLII)

[28] In July 2011, Johann and Paul Jr. asked Hendry to extend the deadline for full payment of the balance owing under the agreements while the Rosenbrocks dealt with the process of starting a business in a new country.

[29] In an email in response to this request dated July 10, 2011, Jennifer expressed a concern that the Rosenbrocks had started Monkeynastix in British Columbia before they had arrived to oversee it. However, she also acknowledged that she understood the connection between the franchise purchase and their immigration status in Canada:

> I understand your frustration as well at not being able to speed up the visa process, and know that your Franchise is unique to others because it is tied in with immigration.

[30] Jennifer agreed to accept 50% of the balance owing on August 10, 2011, and the remaining 50% by October 31, 2011.

[31] On August 12, 2011, the plaintiffs paid $155,000 to Monkeynastix.

[32] Around this time, Paul Jr. realized that his marriage was in trouble and decided that he would not emigrate to Canada. As Paul Jr. explains in his affidavit, Tania did not want to move with him to British Columbia, and he did not want to leave his children behind in South Africa.

[33] On August 22, 2011, the program director of the BC PNP advised Johann and Paul Jr. that their applications to the BC PNP had been rejected.

[34] Johann and Paul Jr. decided to attempt to find an alternate course of action to proceed with their investment in Monkeynastix. Johann deposes:

> As we had already invested more than $350,000 in the franchises at that point, we attempted to find an alternate course of action, in order to ensure our presence in Canada to salvage the investment we had made in purchasing the franchises.

2024 BCSC 1667 (CanLII)

[35] On September 12, 2011, Johann wrote to Jennifer and Hendry, advising them of the PNP decision by the Province. Johann did not ask for a return of the plaintiffs' investments. Instead, he alerted Hendry and Jennifer to the need to "try and address our immigration by following a different route" and proposed to "discuss the remaining terms of the agreement":

> We have some bad news to discuss, see the attached letter from the BC Authorities regarding our PNP application. <u>Our current process has been rejected, hence we need to try and address our immigration by following a different route.</u> There is however only a limited number of options available, hence our uneasiness in not knowing whether the final outcome will be a positive one. This is obviously a huge stumbling block that has been placed in our way, which none of us expected nor could control.
>
> We need to seriously discuss the remaining terms of our agreement, bearing in mind the news we received – we received the correspondence regarding the PNP application form Campbell Cohen on Thursday past. <u>We will be communicating with them to try and arrive at a different route to follow in order to achieve PR status</u>, however we cannot at the moment know the end result, nor the timing involved.
>
> [emphasis added]

[36] After consulting with the immigration lawyers, the parties decided that the best route forward was for Johann to apply for at least a temporary work permit. To facilitate his application, Monkeynastix created a position for Johann as an employee of the company in Victoria.

[37] Paul Jr. and Johann proposed amendments to the agreement to delete the Central Island franchise, reduce the overall purchase price to $444,648, and include Paul Sr. and Maria as investors in exchange for shares in Monkeynastix B.C. Although the parties never signed amended offers to purchase, they agreed on an amended payment plan and a revised share structure reflecting these changes to the agreements.

[38] On December 8 and 23, 2011, the plaintiffs paid a further total of $89,648 to Monkeynastix.

[39] On July 9, 2012, Johann received a one-year temporary work permit that allowed him to work in Canada through to July 10, 2013. The temporary work permit

could be extended, and potentially could have provided a pathway to permanent resident status for Johann.

[40] Johann arrived in Victoria on September 28, 2012, and began work on marketing and development of the Victoria franchise. Hendry joined him for four days in November 2012 to promote the Monkeynastix brand. Johann's parents visited in February 2013, and his mother, Maria, extended her stay to June 2013 to help with the business. Throughout this period, Johann deposes, he and his family expended tremendous efforts to get the business up and running.

[41] In an email dated February 11, 2013, Paul Sr. and Maria raised a number of concerns with Jennifer and Hendry, including the uncertainty of any return on their investment, the absence of a meaningful marketing plan for British Columbia, and what they perceived to be a lack of support from the national Monkeynastix operation.

[42] Johann decided not to extend his temporary work permit. On examination for discovery, he gave two reasons for this decision: the PNP applications had been denied, so his immigration status was uncertain; but also, he had lost confidence in the business and saw no feasibility going forward.

[43] In a letter dated April 17, 2013, Johann gave notice to Jennifer and Hendry that he and his family had decided to cease operations and begin winding up their business interests in preparation for a return to South Africa. He wrote: "We have now been forced to make the very difficult decision not to continue with the business of Monkeynastix, it is just not feasible."

[44] After setting out various "practical matters of the business already present" and "financial implications of not moving forward," Johann proposed that:

> … we look at going back in time and placing everyone in the position they would have been if we did not pursue this business venture at all.
>
> This would entail the return of all of the legal interests in the different Monkeynastix entities (and the rights to operate the brand) to Monkeynastix Canada Inc, and also conversely a return of the financial investments made by us.

2024 BCSC 1667 (CanLII)

[45] In an email dated April 18, 2013, following up on a telephone conversation the previous day, Johann confirmed that:

a) Monkeynastix was not willing to "stand in for the financial consequences of our business results, [but was] willing to assist in trying to market and sell these interests"';

b) the Rosenbrocks were willing to investigate going the route of putting their interests up for sale.

[46] In an email dated May 2, 2013, Johann sought a written proposal from Monkeynastix. He wrote:

> In an ideal world everything would just be returned to the status quo prior to our venture. Reality is obviously not as straight forward and hence we need to take the grey areas out of play and give as much structure and clarity to the way forward as possible.

[47] The parties did not reach an agreement on the way forward.

[48] On July 30, 2013, the plaintiffs filed the notice of civil claim. In it, they alleged seven representations and warrantees, which they pleaded had induced them to enter into agreements with Monkeynastix, including:

> vii. the Defendants would return the Plaintiffs their total investment if they were unable to immigrate to Canada for any reason.
>
> (the "Alleged Immigration Promise")

[49] The plaintiffs filed the summary trial application on February 12, 2021, with a focus on the Alleged Immigration Promise. The summary trial application was delayed for various reasons. In oral submissions at the outset of the eventual hearing, plaintiffs' counsel confirmed that the plaintiffs abandoned all other representations and warrantees in the notice of civil claim. Plaintiffs' counsel also confirmed that the plaintiffs consent to an order dismissing the claims against Jennifer personally.

2024 BCSC 1667 (CanLII)

2024 BCSC 1667 (CanLII)

III. ANALYSIS

A. The Issues

[50] The plaintiffs advance their case under a number of legal theories: collateral contract; warrantee; implied term; and negligent misrepresentation. They rely primarily on the reasons for judgment of Justice Lambert for the Court of Appeal in *Zippy Print Enterprises v. Pawliuk* (1994), 100 BCLR (2d) 55 (CA).

[51] *Zippy Print* was a franchise case. The defendants entered into a licencing agreement after having reviewed materials provided to them by a representative of Zippy Print. The materials included estimated gross sales and cost of sales in Prince George. The actual results of the business were much worse than the projections. Justice Lambert found it was possible to consider what occurred either in terms of tort principles or contract principles. The Court held that, where a commercial enterprise makes an oral representation designed to persuade a purchaser to enter into a standard form contract of adhesion:

> 41 … the oral representation will be regarded as forming an essential element in the relations between the parties, either on the basis that the written contract document was not intended to form the entire agreement between the parties (the one contract theory), or, alternatively, on the basis that the oral representation, when it was acted upon by the person to whom it was made entering into the written contract, became a separate or collateral contract on which liability may be founded (the two contract theory).

[52] In this case, the plaintiffs argue that the signed offers to purchase were not intended to form the entire agreement between the parties. They say the parties intended to enter into a formal franchise agreement that would include the Alleged Immigration Promise (the one contract theory). Alternatively, they argue that they invested in the franchise opportunity in reliance on the Alleged Immigration Promise (the two contract theory or negligent misrepresentation).

[53] The plaintiffs also plead in the notice of civil claim that the signed offers to purchase are void for uncertainty. They did not press this argument strenuously at the summary trial. In my view, it is without merit.

[54] The parties conducted themselves as if they had a binding agreement. The plaintiffs paid the agreed-on purchase price and acquired rights to a franchise in Victoria and a 40% interest in a regional British Columbia franchise. The parties incorporated a company, issued shares and entered into a sub-master franchise agreement, giving effect to the terms of their agreement. The plaintiffs commenced operations in Victoria, hired staff, purchased assets, promoted the business, negotiated with venues, and otherwise held themselves out as Monkeynastix franchisees.

2024 BCSC 1667 (CanLII)

[55] The plaintiffs have not identified any essential terms of a franchise agreement that still required negotiation or agreement. Their real argument is that the Alleged Immigration Promise formed a part of the franchise agreement or otherwise entitles them to a return of their investments.

[56] The plaintiffs claim the full amount of $444,648 that they paid for the franchise rights as damages for breach of contract or negligent misrepresentation. They claim additional damages of $28,000 for promotional expenses and $15,250 for expenses related to their immigration applications and legal fees to incorporate in British Columbia.

[57] Tania is not a plaintiff in the proceedings. The plaintiffs propose to deduct her share of the investment, which they say was $36,000, from any damages award.

[58] The plaintiffs also recognize that the defendants incurred expenses related to the franchise in British Columbia. They propose a reference to the Registrar if the parties cannot agree on an appropriate set-off.

[59] The defendants argue that the Alleged Immigration Promise did not become a term of the franchise agreement or an enforceable collateral contract.

[60] Further, the defendants argue that Paul Sr. and Maria could not have relied on the Alleged Immigration Promise because they invested knowing that the PNP applications had been rejected and Paul Jr. had decided to stay in South Africa.

[61] Lastly, the defendants argue that the plaintiffs waived any rights they may have had to a return of their investments because, rather than ask for their money back when the PNP applications were rejected, they continued to invest and accept assistance from the defendants and did not raise the alleged promise to return their investments until they filed the notice of civil claim.

[62] The defendants acknowledge that they did not plead waiver in the response to civil claim; however, they argue that waiver need not be pleaded; alternatively, they argue that leave should be granted to amend the response.

[63] In my view, this case is best analysed as a breach of contract claim. The Alleged Immigration Promise does not suit a negligent misrepresentation claim because it was not a representation of fact, such as, for example, a statement of market numbers for Victoria. Instead, it was, as alleged, a representation that the defendants would return the plaintiffs' investments if they were unable to immigrate to Canada. The real issue, in my view, is whether the parties formed a contract based on this representation, and, if so, the proper interpretation of that contract.

[64] The overarching question is whether the plaintiffs have shown that they are entitled to a return of their investments. As Justice Lambert said in *Zippy Print*, the legal route chosen by the trial judge should not affect the outcome; the outcome should be determined by the relevant facts (para. 32).

[65] I would therefore frame the issues as follows:

a) Is this matter suitable to be resolved by summary trial?

b) Did the parties form a contract based on the Alleged Immigration Promise?

c) If so, what is the proper interpretation of the contract?

d) Are the plaintiffs entitled to a return of their investments?

2024 BCSC 1667 (CanLII)

[66] For the reasons that follow, I have concluded that the plaintiffs are not entitled to a return of their investments. Given this conclusion, it is not necessary for me to determine whether the plaintiffs waived that entitlement.

B. Is This Matter Suitable for Summary Trial?

[67] The parties agree the issues are suitable for summary trial. The plaintiffs argue that the court may grant judgment on liability and order a reference to the Registrar, if necessary, to assess damages. The defendants argue that the claims can all be dismissed on the summary trial materials.

[68] Rule 9-7 of the *Supreme Court Civil Rules* makes the presiding judge a gatekeeper on a summary trial application. Sub-rule (15) provides that judgment should not be given if the court is unable, on the evidence, to find the necessary facts or if it would be unjust to do so: *Main Acquisitions Consultants Inc. v. Yuen*, 2022 BCCA 249, at para. 89.

[69] The court must be able to resolve any material disputes in the evidence on the critical issues, for example, by referring to documentary evidence. A summary trial judge cannot "simply choose between one affidavit and another": *Cory v. Cory*, 2016 BCCA 409, at para. 10. However, conflicts in the evidence do not necessarily mean the issues are unsuitable for a summary trial: *PHS Community Services Society v. Canada (Attorney General)*, 2010 BCCA 15, at para. 182.

[70] In this case, the issues can be decided based on the affidavit evidence, the documents, and transcripts of the examinations for discovery. Most of the evidence on the critical issues is undisputed. Where it conflicts, those conflicts can be resolved with reference to the contemporaneous correspondence. There is additional conflicting evidence about the parties' efforts to establish a viable franchise in British Columbia. However, given the nature of the legal arguments on the summary trial, it is unnecessary to resolve those conflicts.

[71] I find that the issues are suitable for summary trial.

2024 BCSC 1667 (CanLII)

2024 BCSC 1667 (CanLII)

C. Did the Parties Form a Contract Based on the Immigration Promise?

[72] The party relying on a contract must prove on a balance of probabilities the terms of the contract that it seeks to enforce. To put it another way: the party alleging a certain term of a contract must satisfy the Court that the existence of that term is more probable than not. *Malaspina Coach Lines Ltd. v. Anani,* 2003 BCSC 700, at para. 6.

[73] The test for whether a contract was formed is whether it would be clear to an objective reasonable bystander, informed of the material facts, that the parties intended to contract on those terms: *Lacroix v. Loewen,* 2010 BCCA 224, at para. 36.

[74] A contract arises from the outward manifestation of the parties' intentions – from their words and their actions - and not from their unspoken expectations or understandings. In G.H.L. Fridman, *The Law of Contract in Canada* (Toronto: Thompson Carswell, 2006), the author states, in a passage cited by the Court of Appeal in *Lacroix,* at para. 35:

> The law is concerned not with the parties' intentions but with their manifested intentions. It is not what an individual party believed or understood was the meaning of what the other party said or did that is the criterion of agreement; it is whether a reasonable man in the situation of that party would have believed and understood that the other party was consenting to the identical terms …:

[75] To the same point, the Court of Appeal said in *Berthin v. Berthin*, 2016 BCCA 104, leave to appeal to SCC ref'd, 37338 (9 March 2017) at para. 46:

> The test, of course, is not what the parties subjectively intended but "whether parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract": see G.H.L. Fridman, *The Law of Contract in Canada* (6th ed, 2011) at 15.

[76] These principles were summarized by the Court of Appeal in *Oswald v. Start Up SRL*, 2021 BCCA 352 at para. 34, quoting with approval from the respondent's factum:

> (a) there must be an intention to contract;

> (b) the essential terms must be agreed to [by] the parties;
>
> (c) the essential terms must be sufficiently certain;
>
> (d) whether the requirements of a binding contract are met must be determined from the perspective of an objective reasonable bystander, not the subjective intentions of the parties; and
>
> (e) the determination is contextual and must take into account all material facts, including the communications between the parties and the conduct of the parties both before and after the agreement is made.

[77] In this case, the communications between the parties in June 2010 contain the basic requirements of a binding contract. Hendry's email of June 19 contained an offer: "We will also add an addendum for you to get your money back should anything not expected go wrong with the immigration process." Johann's outline of June 20 contained an acceptance: "As offered an addendum will also be included in our agreement catering for a return of invested monies should the emigration process be unsuccessful for any reason."

[78] The plaintiffs' affidavits provide evidence of consideration. Paul Jr. deposes that the addendum offered in Hendry's June 19 email was a "significant factor" in the Rosenbrocks' decision to proceed with the Monkeynastix purchase. He deposes that, from their perspective, the purchase price was "very high and somewhat arbitrary," but Monkeynastix "promised to return the funds if things did not work out with our relocating to Canada."

[79] The defendants note that there was no term in the offers to purchase, originally drafted by Hendry, but then revised by Paul Jr. and Johann, which provided that Monkeynastix would return the plaintiffs' investment if they were unable to immigrate to Canada. Hendry deposes that this was something that Paul Jr. and Johann raised as a possibility during the negotiations, but he always made it clear that Monkeynastix was not prepared to agree to that term.

[80] I do not accept Hendry's evidence on this point. It cannot be reconciled with his email of June 19 in which he proposed the term he now says Monkeynastix was not prepared to accept. There is no evidence of any communication in which he

2024 BCSC 1667 (CanLII)

made it clear to Paul Jr. or Johann that Monkeynastix would not agree to the term he had proposed.

[81] It is undeniable that the signed offers to purchase did not have a term providing for a return of the monies invested by the purchasers if they were unable to immigrate to Canada. However, as the decision in *Zippy Print* illustrates, a written agreement may not include all of the terms agreed on by the parties.

[82] A common understanding of an "addendum" is something that is added to a contract that modifies the terms of the original contract. Paul Jr. deposes that the Rosenbrocks expected the addendum would be finalized and captured in a final agreement if they accepted the basic terms of the offer to purchase.

[83] In my view, the parties' outward manifestation of their intentions when they entered into the franchise agreement was that an addendum would be added to the contract providing the additional term offered by Hendry and accepted by Johann.

[84] Jennifer deposes that she did not authorize Hendry to enter into an agreement that Monkeynastix would return the plaintiffs' investments if they were unable to immigrate to Canada. She deposes that a term to that effect would have made no sense to Monkeynastix because it would transfer all of the risk of a British Columbia franchise onto Monkeynastix, even though the plaintiffs operated the business for more than two years by the time they decided to cease operations.

[85] I do not accept Jennifer's evidence that Hendry acted without authority when he offered the addendum. Jennifer acknowledges that she authorized Hendry to negotiate an agreement with the Rosenbrocks. If she placed any limits on his authority, those limits were never communicated to the Rosenbrocks. Hendry never told them that the addendum he offered was subject to approval by Jennifer.

[86] Jennifer's evidence is more in the nature of argument. In effect, she argues that the interpretation asserted by the plaintiffs is commercially unreasonable.

2024 BCSC 1667 (CanLII)

[87] I find that the parties formed a contract to add an addendum to the franchise agreement. The next question is: what is the proper interpretation of the terms of the addendum on which they agreed?

D. What is the Proper Interpretation of the Contract?

[88] In *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, the Supreme Court of Canada instructed that the words of a contract must be given a meaning that is consistent with the surrounding circumstances known to the parties at the time they made the contract. The overriding concern is to determine "the intent of the parties and the scope of their understanding": para. 47.

[89] In my view, the intent of the parties in this case was to provide that Johann and Paul Jr. could demand a return of the purchase price if their PNP applications were rejected by the Province. This was the scope of their agreement "catering," in Johann's words, "for a return of invested monies should the emigration process be unsuccessful for any reason."

[90] The surrounding circumstances support this interpretation. Finding a suitable investment that could facilitate their immigration to Canada was a large part of the reason why Johann and Paul Jr. invested in Monkeynastix. It was important to them when they entered into the franchise agreement that they be able to live and work in British Columbia. They were investing in Monkeynastix as owner-operators to start a new life in Canada. They were not investing as offshore owners.

[91] It was also important to Monkeynastix for Johann and Paul Jr. to live and work in British Columbia. Jennifer recognized as much in her email of July 10, 2011, when she expressed her concern that they had started the operation before they had arrived to oversee it.

[92] Hendry acknowledged on his examination for discovery that immigration to Canada was "a sort of *sine qua non*" for Johann and Paul Jr. to get a franchise in British Columbia. Jennifer also acknowledged, in her email of July 10, that there was a connection between the franchise investment and the immigration process.

2024 BCSC 1667 (CanLII)

2024 BCSC 1667 (CanLII)

[93] The parties structured the original investment specifically in hopes of qualifying Johann and Paul Jr. for the entrepreneur immigration stream of the BC PNP. The BC PNP was the preferred pathway to permanent resident status for Johann and Paul Jr. at the time they entered into the franchise agreement. Hendry understood this objective, and sought to provide Johann and Paul Jr. with “protection and peace of mind.”

[94] The plaintiffs allege an obligation to return their “total investments” if they were unable to immigrate to Canada “for any reason.” I disagree; it is clear from the surrounding circumstances that the basis of the agreement was the purchase price and the anticipated PNP applications; not <u>any</u> investment by the plaintiffs, and not <u>any</u> reason why the plaintiffs might not be able to immigrate whatsoever. The meaning of the words they used in context was simply that Johann and Paul Jr. could demand a return of the purchase price if their PNP applications were rejected.

[95] Other reasons why Paul Jr. or Johann might not emigrate to Canada, such as a breakdown in one of their marriages, were outside the scope of the parties understanding. Other reasons why their immigration might not be successful, such as a failure to establish a viable business in British Columbia, were also outside the scope of their understanding.

[96] The investments by Paul Sr. and Maria were very clearly outside the scope of the parties’ understanding. There was no mention of Paul Sr. or Maria, or of any plans for them to emigrate, in the June 2010 emails, the offers to purchase, the BC PNP materials, or the business plan for the Victoria franchise.

[97] The plaintiffs argue that the obligation was, in effect, self-executing, such that Monkeynastix was required to return their investments upon notice that the PNP applications had been rejected. I disagree; in my view, the only reasonable interpretation of the parties’ words in context is that the addendum required a demand by Paul Jr. or Johann for a return of the purchase price.

[98] The reasons for this are clear from the nature of the immigration process. The BC PNP is not a guarantee of permanent resident status. Nor is it the only pathway for a person to immigrate to Canada. Moreover, there is no evidence that a decision by the program director of the BC PNP is final.

[99] Accordingly, Paul Jr. and Johann might have sought a review of the decision. They might have amended their business plan and resubmitted the applications. They also might have decided to accept the decision and try a different route to permanent resident status.

[100] This is in fact what Johann communicated to Monkeynastix when he informed them that the PNP applications had been rejected: “Our current process has been rejected, hence we need to try and address our immigration by following a different route.”

[101] Further, Johann and Paul Jr. might not want to terminate the franchise agreement just because the BC PNP applications had been rejected. They might decide to proceed with the investment despite the setback.

[102] This is in fact what they did. Johann and Paul Jr. proceeded with the franchise opportunity. They paid the remainder of the purchase price, amended the share structure, operated the business and conducted themselves, from all outward appearances, as if they had moved on from the PNP rejections.

[103] The defendants might not have provided any further assistance setting up a British Columbia franchise if they had known that Johann and Paul Jr. would later demand their total investments back.

[104] The only reasonable interpretation is that the addendum offered by Monkeynastix required a timely demand from Johann and Paul Jr. that they wanted their money back if their BC PNP applications were rejected.

[105] For these reasons, I find that the proper interpretation of the contract is that the parties agreed to an addendum that provided Paul Jr. and Johann with a right to

2024 BCSC 1667 (CanLII)

demand a return of the purchase price on reasonable notice to Monkeynastix after their BC PNP applications were rejected by the Province.

E. Are the Plaintiffs Entitled to a Return of their Investments?

[106] Paul Jr. and Johann did not demand a return of their investments based on the PNP rejections until the plaintiffs filed the notice of civil claim on July 30, 2013, almost two years after the applications were rejected.

[107] The plaintiffs only filed the notice of civil claim after they had invested additional funds and concluded that the franchise was not sustainable. By then, the defendants had expended additional time and money without notice that Paul Jr. or Johann wanted their money back.

[108] The plaintiffs argue that their investments after the PNP applications were rejected were all in the nature of mitigation of damages. I disagree. In my view, their continued investment constituted a deliberate decision to proceed with the franchise opportunity and not demand their money back.

[109] As discussed, the addendum related to the plans at the time for Paul Jr. and Johann to move to Canada and their BC PNP applications specifically. Its purpose was to give Paul Jr. and Johann peace of mind if the applications were rejected. Mitigation in this context would be reasonable steps to secure an alternate pathway to permanent resident status. If anything, it could be argued that Johann failed to mitigate his damages when he decided not to apply to renew his temporary work permit.

[110] The plaintiffs have also not shown that they suffered any loss as a result of the BC PNP applications being rejected. Put another way, they have not shown that the business was less successful because Paul Jr. and Johann were rejected by the BC PNP. Paul Jr. decided that he would stay in South Africa in any event because he wanted to remain close to his children. Johann came to Victoria and worked on the ground to get the business up and running. He might have been able to stay longer or permanently, but he decided not to apply to extend his work permit

2024 BCSC 1667 (CanLII)

because he lost confidence in the business. While Johann testified on his examination for discovery that his immigration status was uncertain, I find that he did not know whether he could stay because he did not try.

[111] More to the point, in my view, Monkeynastix did not breach the contract because neither Paul Jr. nor Johann demanded their money back.

[112] As a result, I cannot accept the plaintiffs' submission that everything they invested in the franchise business should be characterized as mitigation of damages resulting from a breach of contract by Monkeynastix.

[113] Moreover, the plaintiffs' eventual decision to cease operations and return to South Africa was not related to the PNP rejections or any difficulty as a result of Johann's uncertain immigration status. The evidence is that they decided to close the business because they found that the market for Monkeynastix was insufficient to sustain a viable franchise. This was not because any of them was unable to immigrate to Canada. Quite simply, the investment was a failure from their perspective.

[114] The purpose of the addendum was to give Paul Jr. and Johann peace of mind if their PNP applications were rejected; it was not to provide them with a warrantee that the franchise would be financially viable.

[115] Paul Jr. and Johann understood this in my view. When the business failed, they did not demand a return of their investments based on Hendry's email from June 2010. Instead, they proposed a new agreement to return the parties to the places they were before the investment. Alternatively, they indicated that they were open to selling their interests. They would not have made these proposals if they honestly believed they were entitled to a return of their investments based on the PNP rejections.

[116] In seeking a resolution, the Rosenbrocks did not cite the Alleged Immigration Promise or any problem with their immigration status. Instead, they cited the scope of the family's personal and financial efforts to make the business a success.

2024 BCSC 1667 (CanLII)

[117] I have found that the franchise agreement included an addendum that provided Paul Jr. and Johann with a right to demand a return of the purchase price on reasonable notice if their BC PNP applications were rejected by the Province.

[118] In *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District,* 2021 SCC 7, the Supreme Court of Canada held that a discretion conferred by a contract must be exercised reasonably. A party who has a discretionary power under a contract must exercise that discretion in accordance with the purposes for which it was conferred. A failure to do so is a breach of the duty of good faith in contract performance recognized by the Court in *Bhasin v. Hrynew,* 2014 SCC 71.

[119] In other words, the terms of the contract I have found required Paul Jr. and Johann to exercise the right to demand a return of their investments reasonably and in accordance with the purposes for which it was conferred.

[120] The contractual claim in the notice of civil claim is not made reasonably or in accordance with the purposes for which the right to demand a return of the purchase price was conferred. The gravamen of the plaintiffs' claim is not that any of them were unable to immigrate to Canada, but rather that the business was a failure.

[121] I find that a return of the plaintiffs' investments in these circumstances is outside the scope of the parties' agreement.

[122] I would reach the same conclusion if the claim was analysed under negligent misrepresentation. In my view, the plaintiffs have failed to prove reasonable reliance on a representation by Monkeynastix.

[123] For the reasons discussed above, the only reasonable understanding of the representation by Hendry is that Monkeynastix would enter into an addendum to return the purchase price on demand if the BC PNP applications were rejected by the Province. Paul Jr. and Johann may have entered into the franchise agreement based in part on this representation, but circumstances changed. The plaintiffs decided to proceed with the franchise opportunity after the applications were rejected. Paul Jr. decided to remain in South Africa. Johann came to Canada, but

2024 BCSC 1667 (CanLII)

decided not to stay. Paul Sr. and Maria only invested after the Province had rejected the applications. None of the plaintiffs reasonably relied on the representation by Hendry when they invested further funds in the business.

[124] The damages that the plaintiffs claim were not caused by the alleged misrepresentation, but rather by factors arising from the viability of the business unrelated to their immigration status in Canada.

[125] For these reasons, the claim against Monkeynastix must be dismissed.

F. The Claim Against Hendry Personally

[126] The claim against Hendry personally must also be dismissed.

[127] The plaintiffs have not pleaded or proved any facts to support a claim in damages against Hendry for breach of contract or negligent misrepresentation. Hendry acted at all times as a representative of Monkeynastix. There is no evidence that he was personally a party to any agreement with the plaintiffs. Nor is there any evidence that he made any representation to the plaintiffs in his personal capacity. The only allegations against Hendry are that he made the same representation, owed the same obligation, committed the same breach, and caused the same damage as Monkeynastix. In the circumstances, there is no basis in fact or law for a claim against him personally: *The Owners, Strata Plan No. VIS3578 v. John A. Neilson Architects Inc.*, 2010 BCCA 329, at paras. 72 - 75.

IV. CONCLUSION

[128] The action is dismissed.

[129] Unless the Court orders otherwise, the defendants are entitled to costs of the action. If the parties wish to make submissions on costs, they may do so in writing. Their submissions should not exceed two pages in length and should be exchanged

2024 BCSC 1667 (CanLII)

according to a schedule to be agreed between counsel, with the first submission to be filed with the registry within 28 days of the release of these reasons.

"Elwood J."

2024 BCSC 1667 (CanLII)