IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Gracorp West End Investment Limited Partnership v. Fiera Real Estate Core Fund LP,* 2024 BCSC 1762

Date: 20240906
Docket: S245361
Registry: Vancouver

Between:

Gracorp West End Investment Limited Partnership and Gracorp Properties Limited Partnership

Plaintiffs

And:

Fiera Real Estate Core Fund LP

Defendant

Before: The Honourable Mr. Justice Riley

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiffs:	M.B. Morgan M.C. Ohama-Darcus
Counsel for the Defendant:	J.C. McArthur, K.C. M. Lutsky
Place and Date of Hearing:	Vancouver, B.C. August 26, 2024
Place and Date of Judgment:	Vancouver, B.C. September 6, 2024

Introduction

[1] This is a ruling on an application by the plaintiff Gracorp for an interlocutory injunction prohibiting the defendant, Fiera, from acting under the default provisions of certain contracts entered into by the parties in connection with their involvement in a real estate project. The project is concerned with the construction and operation of an apartment building in Vancouver's West End.

[2] Fiera says that Gracorp is in default under the contracts based on an alleged failure to obtain proper approval for a major decision in the development project. Gracorp denies any breach of contract and further argues that Fiera's refusal to allow Gracorp to cure any such breach was made in bad faith. Gracorp seeks an interlocutory injunction to preserve what it says is the status quo under the contracts, thereby allowing the real estate project to continue unhindered until a trial on the merits of its claim.

Facts

The Parties

[3] Collectively, the two plaintiffs, Gracorp West End Investment LP and Gracorp Properties LP, carry on business in the field of real estate development. Currently, the plaintiffs have 13 ongoing real estate development projects, nine of which are in the Vancouver area. In these proceedings, counsel have consistently referred to Gracorp West End Investment as “Gracorp Owner,” and Gracorp Properties as “Gracorp Developer” in keeping with their respective roles in the development project which is the subject of the litigation.

[4] The defendant, Fiera Real Estate Development Core Fund LP is a Canadian investment fund with real estate interests in cities across Canada. Fiera routinely engaged in local firms – that is, firms that have a physical presence in a particular city or region – to build, develop, and manage its properties. The parties emphasize that Fiera has no physical office or presence in British Columbia. This is an important part of the context in that Fiera entered into the arrangement described below with the idea that

Gracorp has a local presence and would play a more active part in implementing the development plans as agreed upon by the parties through the joint decision-making process.

The Development Project

[5] The development project which is the subject of the current action is focused on the construction and subsequent operation of a 16-storey concrete purpose-built rental building located at 1045 Burnaby Street, Vancouver. It is stated to be a $125 million project. In the arrangement described below, Fiera is the beneficial owner of a 90 percent interest in the project, and Gracorp is the beneficial owner of the remaining 10 percent.

[6] The project has progressed to the point of development permits having been issued, but actual construction has not gotten underway, to my understanding. The initial plans were for the project to be completed in late 2025, although I am told that even before the current dispute arose, the completion deadline was expected to be pushed back sometime into 2026.

[7] The interests of the two parties are structured as follows. The legal owner of the property is a holding company called 1318743 BC Ltd., which I will refer to as "HoldCo" Fiera owns 90 percent of the shares in HoldCo, and Gracorp owns the remaining 10 percent of the shares. Basically, Fiera is the majority owner, and Gracorp is the minority owner, whose related company Gracorp Developer is tasked with overseeing the construction of the project.

[8] This arrangement is achieved through the combined operation of two contracts. The first is the Co-Owners Agreement (COA), pursuant to which Fiera and Gracorp own or contracted to jointly own, develop, and build the apartment building and ultimately lease out the units. The second is the Development Management Agreement (DOA), pursuant to which Fiera and Gracorp Owner both contracted for Gracorp Developer to supervise the development, construction, and operation (leasing out) of the building.

The Relevant Contractual Terms

[9] Under both the COA and the DMA, "major decisions" in relation to the project cannot be made without the agreement of both parties, Gracorp, and Fiera. The phrase "major decision" is defined in the COA to be: (a) an increase to the approved budget of $50,000 or more, (b) entering into a material agreements, the subject value of which exceeds $50,000, (c) entering into any encumbrances against the title to the property, including easement agreements in relation to adjacent properties., or (d) any action taken by or a document that has had to be executed by HoldCo

[10] Under the DMA, it was expressly agreed that any “major decision” as defined in the COA has to be approved by the owner, namely both Fiera and Gracorp Owner, and the developing manager, namely Gracorp Developer. Further, failure to obtain such approval for a major decision would be a breach of the DMA. If one party gave notice of such a breach, the other party had 30 days to seek to cure it under a process described in the DMA. Any breach that was not cured within the 30-day period would lead to a default under the DMA.

[11] The COA provided that a default under the DMA was also a default under the COA. If one party gave notice of such an event, the other party had 45 days to cure it. Further, the COA provided that in the event of such a default, the non-defaulting party had certain remedies, including the right to buy out the defaulting co-owner's interest in the project either: (i) at a negotiated price, (ii) if no agreement could be reached on the price, 90 percent of the fair market value.

Alleged Breach and Default

[12] Fiera claims that Gracorp Developer breached the DMA by causing HoldCo to enter into easements allowing for mutual encroachments on the neighbouring property and on the subject property in order to operate construction cranes or to carry out underpinning work. One such easement operated in favour of HoldCo for encroachments on the neighbouring property, and the other easement operated in favour of the neighbouring property owner to allow for encroachments onto the subject

property. These easements were dealt with in an easement agreement that HoldCo entered into with the owner of the neighbouring property, Francis Drake Holdings Limited, or "FDH." Under the associated compensation agreement, HoldCo was to pay $200,000 plus taxes to FDH.

[13] There is a dispute between the parties as to whether Gracorp Developer in fact breached the DMA by failing to obtain Fiera's approval for the easement agreement and the associated easements. Fiera said no such approval was ever given. Gracorp disputes that, alleging that Fiera's representatives were aware of the easement agreement negotiations, and approved of a decision to enter into the easements in a context in which the development of the project could not proceed without the contemplated easements. Further, Gracorp says that even if there was no upfront approval, Fiera acted in bad faith by refusing to allow Gracorp Developer to cure the breach under the provisions of either the DMA or the COA, again taking into account that the development could not proceed without crane swing and underpinning easements in place.

[14] Taking the position that Gracorp Developer was in breach, Fiera served notice of the breach under the DMA, refused to allow Gracorp Developer to cure the breach by obtaining retroactive approval, and ultimately gave notice of default under both the DMA and the COA with the intent of exercising the buyout provisions in the COA to acquire Gracorp Owner's interest in HoldCo

The Timeline

[15] The timeline of relevant events is as follows:

a) In December 2020, Gracorp Owner initially acquired the property at 1045 Burnaby Street.

b) On 11 August 2021, Gracorp Owner and Fiera entered into the COA and at the same time retained Gracorp Developer to provide development management services in respect of the project.

c) In April 2023, a rezoning permit was approved to allow the development of the property to proceed.

d) In November 2023, Gracorp's developer's executives had preliminary negotiations with FDH's principal, Mr. Boxer, with respect to the mutual easements in favour of 1045 Burnaby Street and the adjacent property.

e) In December 2023 a conditional development permit was approved.

f) On 20 February 2024, at a co-owner's meeting, there was the discussion of the easement negotiations. Gracorp says Fiera approved the decision to negotiate an easement arrangement with FDH. Fiera says the topic was discussed, but Fiera did not give approval to actually enter into an easement agreement as the terms were not known.

g) On 28 February 2024, Fiera's development director, Mr. Tansley, sent an email to Mr. Rahbar, an executive of Gracorp Developer, requesting that Gracorp "keep [Fiera] posted" with respect to the status of the easement negotiations.

h) In March 2024, with direct negotiations between Gracorp and FDH regarding the easements having been unfruitful up to that point in time, Gracorp's solicitors took over the negotiations on behalf of Gracorp.

i) On 8 April 2024, FDH sent a revised proposal to Gracorp's solicitors. It appears that FDH was using time limits or deadlines as a pressure tactic to obtain a favourable outcome. In particular, FDH's revised proposal set a deadline of April 10, 2024, for the parties to execute an easement agreement, failing which the payment that FDH would accept as part of the agreement would increase from $200,000 to $250,000, and would increase incrementally at subsequent deadlines thereafter.

j) On 10 April 2024, HoldCo and FDH executed: (i) an easement agreement, (ii) a compensation agreement under which FDH would receive $200,000 plus tax for its agreement to provide an easement.

k) On 11 April 2024, at a co-owner's meeting, the parties discussed the status of the easement negotiations. There is now a dispute between them as to what exactly was said at the meeting. Fiera's head of real estate development, Ms. Black, claims to have stated at the meeting that Fiera expected to see a copy of the final easement agreement "before it is signed and registered." Mr. Rahbar denies this. The minutes of the meeting state only that the easement negotiations were discussed. The minutes make no reference to any formal approval of the easement agreement or the associated compensation agreement.

l) On 18 April 2024, Gracorp Owner paid the $200,000 compensation to FDH in accordance with the compensation agreement.

m) On 19 April 2024, Gracorp Owners submitted a cash call to Fiera. It would appear that the only disbursement covered by this cash call was the $200,000 payment to FDH in connection with the easement arrangement.

n) On 26 April 2024, Fiera's representative, Mr. Tansley, sent an email to his counterpart at Gracorp stating that Fiera would need to approve the easement agreement "before releasing the payment."

o) On 29 April 2024, Gracorp Owner's legal counsel sent an email enclosing a copy of the executed easement agreement to Fiera.

p) On 2 May 2024, Fiera's representative Mr. Tansley responded with an email stating "we are still reviewing this agreement" and asking Gracorp not to execute or release it prior to Fiera's approval. It appears that when this email was sent, Mr. Tansley had not realized that the easement agreement had already been executed.

q) On 3 May 2024, Fiera made a payment to Gracorp on the 19 April 2024 cash call associated with the compensation payment for the easement.

r) On 25 June 2024, Fiera issued notices of default under both the DMA and the COA, asserting that Gracorp's conduct in causing HoldCo to execute the easement and incur the associated $200,000 expense was undertaken without proper major-decision approval under both contracts.

s) On 9 July 2024, Gracorp Owners sent a letter to Fiera: (i) disputing that there had been any breach of the agreements, and (ii) seeking approval from Fiera to cure any such breaches by retroactively approving the decision for HoldCo to enter into the easement agreement and associated compensation agreement.

t) On 12 July 2024, Fiera responded to Gracorp's request, refusing to allow Gracorp to cure the alleged breaches. Among other things, Fiera took the position that Gracorp's conduct in proceeding with the easement arrangement without proper approval created a lack of trust or confidence as to Gracorp's future compliance with the decision-making process provided for in the contracts.

u) On 25 July 2024, Fiera issued a notice of termination under the DMA and announced an intention to begin the process of exercising its option to buy out Gracorp Owner's interest in the project.

v) On 8 August 2024, Gracorp filed a notice of civil claim together with an application for interim injunction and an interlocutory injunction barring Fiera from continuing with the default process under the contracts.

w) On 9 August 2024, the Court issued a consent interim injunction pending a hearing of the plaintiff's application for an interlocutory injunction. That order was subsequently extended by consent until the hearing of the application

before me on 26 August 2024. I later extended that interim injunction until the date of today's judgment.

Legal Principles

[16] The well-known test for interlocutory injunctive relief has three elements. The first element involves a consideration of the merits of the plaintiff's claim. On the conventional formulation of the test, the plaintiff is expected to show that there is a serious question to be tried, although in some cases a higher threshold applies, as explained in greater detail below. The second element of the analysis focuses on whether the plaintiff would suffer irreparable harm if the injunction were not granted. The third element of the test involves a consideration of the balance of convenience as between the plaintiff and the defendant: *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5 [*CBC*] at para. 12, applying *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. The "fundamental question" is "whether the granting of an injunction is just and equitable in all of the circumstances.": *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395 [*Vancouver Aquarium*] at para. 37.

[17] The three elements of the test are not necessarily water-tight compartments: *Vancouver Aquarium* at para. 38, citing *Potash Corp. Of Saskatchewan Inc. v. Mosaic Potash Esterhazy Limited Partnership*, 2011 SKCA 120 at para. 26. The relative strength of a party's position in relation to one element of the test may compensate for weaknesses of that party's position in other elements of the test: *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2019 BCCA 29, (Chambers) at para. 19.

Analysis

(1) The Merits Threshold

[18] Gracorp says the conventional test applies and that it has met the threshold of demonstrating that there is a serious question to be tried. Counsel emphasizes that the threshold is a relatively low one. It is not necessary for Gracorp to demonstrate that it

will succeed at trial. By contrast, Fiera says the higher merit threshold applies given the "extraordinary nature" of the application.

[19] More specifically, counsel for Fiera says the plaintiff must meet the higher threshold of establishing a strong *prima facie* case because: (i) in substance, the relief sought is in the nature of a mandatory injunction, as contemplated in *CBC* at para. 15, and (ii) granting the interlocutory injunction sought by Gracorp will effectively result in a final determination of the merits of the claim as discussed in *Taseko Mines Limited v. Tsilhqot'in National Government*, 2019 BCSC 1507, at paragraph 33; applying *RJR-MacDonald* at para. 56.

[20] I am not convinced by either of Fiera's arguments on the applicable merits threshold. With regard to Fiera's first point, it is now settled law that where a mandatory injunction is sought, the question at the first stage of the analysis is "not when there is a serious issue to be tried, but rather whether the applicant has shown a strong *prima facie* case.": *CBC* at para. 15. However, in the context of a contract dispute, the analysis is somewhat more nuanced. As explained by Justice Fisher, as she then was, in *8640025 Canada Inc. v. TELUS Communications Company*, 2016 BCSC 2211, at para. 31:

> ... In a contractual setting, an order that establishes a new right is considered mandatory and one that requires parties to act in accordance with the contract is considered prohibitory: *Setanta Sports NA Ltd. v. Score Television Network Ltd.*, 2009 CanLII 41213 (Ont SCJ) at para. 42; *Look Communications Inc. v. Bell Canada*, 2007 CanLII 30476 (Ont SCJ) at para. 12. Given the nature of a mandatory injunction, the onus resting on an applicant is higher.

[21] Counsel for Fiera emphasizes that *TELUS* was decided before *CBC*, but in my view that does not change anything. The point made in *TELUS* had to do with what is considered a mandatory as opposed to a prohibitory injunction in the context of a contract dispute. The underlying reasoning is that an interlocutory order preventing a defendant from withdrawing from obligations willingly undertaken pursuant to the terms of a contract is not mandatory in nature, in the sense that the order does not compel the defendant to do anything more than that which the defendant contracted to do in the first place.

[22] Applying that reasoning to the facts in the present matter, I find that the order sought by the plaintiff here is simply to prevent Fiera from acting under the default provisions in both contracts, the DMA and the COA, so as to pursue the buyout process in the COA before there can be a trial on the merits of Gracorp's claims. This is not a case where the breach of contract is conceded and the plaintiff is simply seeking to avoid the implications through an injunction, the effect of which would be to confer new rights upon the plaintiff and to impose corresponding new obligations on the defendant.

[23] Gracorp's position is that: (i) It did not breach the contract, and (ii) in the alternative, if there was a breach, then Fiera's refusal to allow Gracorp to cure that breach was contrary to Fiera's contractual duty of good faith. On either branch of this argument, Gracorp maintains that Fiera had no right to act under the default provisions in the COA. So, as I say, this is a situation where the plaintiff is merely seeking to prevent the defendant from walking away from its contractual obligations until a determination can be made as to whether there was actually a breach, the cure for which was improperly refused. I therefore do not agree with Fiera that what is being sought here is in the nature of a mandatory injunction.

[24] Turning to Fiera's second point, the higher merit threshold under which a strong *prima facie* case must be made out also applies where granting the requested injunctive relief would be "tantamount to granting the relief sought in the main action" or would "amount to a final determination of the action.": *Taseko Mines* at para. 33; see also *West Moberly First Nations v. British Columbia*, 2018 BCSC 1835 at para. 229.

[25] I do not agree with Fiera that this principle is engaged in the case at bar. Fiera's position is that if the injunction sought by Gracorp is granted pending a trial on the merits, then by the time the case gets to trial and is finally determined on its merits, the development project which is the subject of the dispute will be completed, and the issue between the parties, whether Fiera lawfully terminated the DMA, would be moot. In my respectful view, this concern is not supported by the evidence in the record.

[26] When the parties entered into their contractual arrangement, the estimated project completion date was in late 2025. Even before the current dispute arose, the parties recognized that this date was not likely to be met, and the completion date would probably have to be pushed back into 2026. All of this was before the current dispute, which appears to have slowed the project down even more. Indeed, although the necessary permits are now in place, actual construction has not gotten underway, and of course, whether or not the injunction is granted, the commencement of construction appears to have been delayed for at least several months due to the falling out between the parties. For all of these reasons, I cannot agree that an order preventing Fiera from exercising the buyout provisions in the contract prior to the determination of the merits of the plaintiff's claim would amount to a final determination of the plaintiff's action.

[27] I should not leave this point without acknowledging the merit in the somewhat related point that granting an interlocutory injunction would place Fiera in an awkward position by effectively compelling Fiera to continue working with Gracorp on a construction project that involves considerable risk and capital expenditure in a context where the two parties are embroiled in ongoing litigation. In my view, this concern is properly addressed at the balance of convenience stage of the analysis.

[28] I turn, then, to the central question under the first branch of the analysis. That is, whether the plaintiff has established that there is a serious question to be tried. Again, to summarize Gracorp's position, as I understand it, Gracorp alleges that Fiera has wrongfully invoked the default provisions in both contracts and therefore wrongfully sought to initiate the buyout process in the COA. Gracorp denies that it was in default under the contracts because: (i) there was no breach of the DMA, abd (ii) even if there was a breach, the refusal to allow Gracorp to cure that breach was a violation of Fiera's contractual duty of good faith.

[29] I will briefly consider the merit in each point, albeit in reverse order.

[30] On the record before me, I do not find the breach of good faith argument to have any merit. If indeed Gracorp breached the terms of the DMA or the COA by causing

HoldCo to enter into the easement agreement and by entering into the associated compensation agreement involving a capital expenditure of some $200,000 without proper approval, the case for saying that Fiera acted contrary to its contractual duty of good faith by refusing to allow any cure of the breach is exceedingly weak.

[31] Fiera had a reason for refusing Gracorp's request to cure the breach. Namely, that Gracorp's conduct in committing HoldCo to an easement against the property and incurring a $200,000 expense without proper approval caused Fiera to suffer a loss of trust in Gracorp going forward. In other words, Fiera's stated concern was that it no longer trusted Gracorp to follow the decision-making process set out in the two contracts.

[32] If indeed Gracorp acted contrary to the contractual approval process and proceeded unilaterally by encumbering the subject property and incurring an unauthorized $200,000 expense, Fiera's concern would not, in my view, be objectively unreasonable. The stated concern is tied to the purpose of the contractual arrangement and could not be fairly described as conduct undertaken in bad faith.

[33] Gracorp says Fiera's stated reason is spurious but concedes there is no direct evidence to contradict it. Gracorp merely relies on the overall context, namely: (i) that as a practical matter, the construction of the apartment building could not get underway without the easement negotiated by Gracorp, and (ii) Fiera would stand to benefit from Gracorp's default by acquiring Gracorp's interest in the property at 90 percent of market value. I cannot say that Gracorp's theory is irrational or makes no sense, but at this point, beyond the context cited above there is no actual evidence to support it. I therefore conclude that there is no serious issue to be tried in respect of this branch of the plaintiff's argument on the merits.

[34] I return then to the plaintiff's first point, which is the contention that there was no breach of the DMA in connection with the easement arrangement that had been negotiated with the neighbouring property owner. It is important to note the relevant terms of both the DMA and the COA. Both the DMA and the COA require approval of

"major decisions," but the form the approval must take is different between the two agreements.

[35] The relevant provision of the DMA states that "Approved by Owner" means the written approval, whether by resolution or otherwise, of the owner and "Approval by Owner," "Approval," Approved" and similar terms will have corresponding meanings.

[36] The relevant provision of the COA states that "Approval" means either "approval in writing or as otherwise mutually agreed by the co-owner or by representatives of the co-owners." The COA also contains a provision stating that once a major decision has been approved, "no further approval shall be required" to carry out the major decision."

[37] Taken together, this means that the two owners, Fiera and Gracorp Owner, must approve any major decision in writing or by other means mutually agreed upon as provided for in the COA. Then in order to implement the major decision, the owners must give approval in writing to Gracorp Developer under the terms of the DMA.

[38] With those parameters in mind, there is conflicting evidence as to whether Gracorp received proper approval to cause HoldCo to execute the easement agreement and make the corresponding $200,000 payment under the compensation agreement.

[39] On the plaintiff's side of the ledger, counsel says firstly that it was not Gracorp Developer that caused HoldCo to execute the easement agreement and issue the compensation payment to the neighbouring property owner. The plaintiff says this because the meetings at which the easement issue was discussed were Co-Owners meetings, that is, meetings between the Co-Owners, Fiera and Gracorp Owner, as opposed to meetings between Fiera and Gracorp Developer.

[40] Further, the plaintiffs point out that Mr. Rahbar is both an executive of Gracorp Developer and the secretary of Gracorp Owner. The plaintiffs claim that Mr. Rahbar was wearing the hat of Gracorp Owner at the Co-Owners meeting and that he therefore entered the easement agreement on behalf of HoldCo in his capacity as a representative of the Co-Owner, not as a representative of Gracorp Developer. In this

way, the plaintiff claims that Gracorp Developer did not breach the DMA by entering any major decisions without the required approval. The plaintiff says to the extent the failure to obtain approval is at issue is a question of whether approval was obtained by Gracorp Owner "in writing or as otherwise mutually agreed by the co-owner or by representatives of the co-owners" as required under the COA.

[41] The plaintiff further relies on the following evidence to show that the decision was properly authorized under the COA: (i) Mr. Rahbar's evidence about the discussion at the 28 February 2024 Co-Owners meeting, (ii) the conflicting evidence about how the decision-making process contemplated under both the DMA and the COA actually worked in practice, and (iii) the fact that Fiera actually met the cash call and delivered the funds to cover the $200,000 compensation payment. Although this final event took place after the easement agreement had been executed, it could be evidence from which one might infer that Fiera had previously given its approval for the easement. Alternatively, it could be evidence of a decision by Fiera to waive any breach of the approval process. Alternatively, the payment coupled with the silence and delay in initiating the default process under the DMA could be taken as conduct amounting to estoppel.

[42] On the other side of the ledger, Fiera asserts that Mr. Rahbar's conduct in causing HoldCo to enter into the easement agreement and to pay the associated $200,000 compensation fee to FDH clearly implicated Gracorp Developer and constituted a breach of the major decision approval requirements in the DMA. Fiera emphasizes the relevant provisions of the DMA require Gracorp Developer to obtain approval for major decisions in writing. Further and in any event, Fiera says the required approval to create the easement and pay the associated $200,000 compensation fee to the neighbouring property owner was never given.

[43] The defendant relies upon:

i. Ms. Black's express denial that Fiera gave approval for the easement at the 28 February 2024 Co-Owners meeting;

ii. The fact that the easement agreement was formally signed by both HoldCo and FDH on 10 April 2024, prior to the next Co-Owners meeting on April 11, 2014;

iii. The content of Mr. Tansley's email of 2 May 2024, instructing Gracorp not to execute the agreement until Fiera had reviewed it, and Mr. Rahbar's response that Gracorp "couldn't wait on this one" and that Gracorp "has made the decision to proceed on an emergency basis"; and

iv. Ms. Black's evidence about her subsequent request for a clarification in a meeting with Gracorp's representative, Mr. Black, on 28 May 2024, in which Mr. Black allegedly said that he would look into what occurred and provide an explanation, with no further explanation ever being given.

[44] I bear in mind that the merits threshold establishes a low bar and that a "prolonged examination of the merits is generally neither necessary nor desirable." See *Taseko Mines* at para. citing *RJR-MacDonald* at p. 335 to 338.

[45] With that standard in mind, I conclude that the plaintiff has succeeded in showing that there is a serious issue to be tried. I am in no position to weigh the evidence or to make findings of fact on conflicting affidavit evidence. Indeed, the merits threshold does not require me to do so. I need only decide whether the plaintiff has presented an arguable case that is not frivolous or bound to fail. I find that this relatively low bar is met.

[46] I will go on to observe, however, that in my view the plaintiff's claim is not strong. Indeed, it is, in my view, quite weak. I say that for three reasons.

[47] First, the argument that Mr. Rahbar was acting in his capacity as an executive of Gracorp Owner such that Gracorp Developer has no role to play in causing HoldCo to execute the easement and make the corresponding $200,000 compensation payment seems to me to be extremely technical and ignores the fact that Mr. Rahbar was not only the secretary of Gracorp Owner but also the chief executive of Gracorp Developer.

[48] Second, none of the contemporaneous written records, including the minutes of the Co-Owners meetings, nor the email communication between the parties, include any objective evidence to support the plaintiff's claim that Fiera gave the necessary approval, either under the DMA or the COA.

[49] Third, Mr. Rahbar's response to Mr. Tansley's 2 May 2024 email is in my view particularly damaging to the plaintiff's position. This email contains changes of tense that are internally inconsistent and is at best confusing in its description of the then-current status of the easement. However, what is most telling is Mr. Rahbar's assertion that Gracorp could not wait and "has made the decision to proceed on an emergency basis."

[50] Again, this particular statement is arguably misleading because, in fact, HoldCo had already executed the easement, and the associated compensation payment had already been made. In any event, the key point is Mr. Rahbar's express statement about Gracorp having decided to proceed unilaterally on an emergency basis. This appears to be a clear acknowledgment that Gracorp did not follow the terms of either the DMA or the COA or both in seeking prior approval for a major decision.

[51] Now, I take the plaintiff's point that this is merely one piece of contemporaneous correspondence and that the evidence at trial could cause the trier of fact to view it in a different way. However, based on the record before me, I consider Mr. Rahbar's email to be compelling evidence that weighs heavily against the merit of the plaintiff's position.

[52] The relative weakness of the plaintiff's position on the merits is relevant because, as explained above, the three elements of the test for injunctive relief are not water-tight compartments. Even though the plaintiff has met the relatively low bar of establishing a serious issue to be tried, the weakness of the plaintiff's case on the merits is relevant in the balance of the analysis.

(2) Irreparable Harm

[53] The question on this branch of the analysis is whether the plaintiff will suffer irreparable harm if the injunction is not granted. “Irreparable harm” refers to the nature of the harm that will be suffered, not its magnitude. It must be a kind of harm that either cannot be quantified in monetary terms, or which cannot be cured by a damages award: *RJR-MacDonald* at p. 341.

[54] The plaintiff cites clause 5.02 of the COA, which provides that either co-owner can bring proceedings "for specific performance, injunction, or other equitable remedy" and includes an express acknowledgment that "damages at law may be an inadequate remedy for a default or a breach" of the agreement.

[55] I accept the submission that this clause gives rise to a permissible inference of irreparable harm. In other words, while the law generally requires assertions of irreparable harm to be supported by a "sound evidentiary foundation" as contemplated in *Vancouver Aquarium* at paras. 58 to 60, the contract between these parties included an express acknowledgment of the possibility that damages "may" not be an adequate remedy for a particular breach of the contract. In my view, the use of the term "may" implies that the inference is permissible and not mandatory or automatic. I will bear in mind the language of the agreement when assessing the plaintiff's claim that it will suffer irreparable harm if the injunction is refused.

[56] To begin with, I agree with Fiera's assertion that Gracorp's ownership interest in the development project is readily quantifiable such that the loss of this interest through a forced buyout at a 10% discount can be remedied by an award of damages if Gracorp is successful at trial.

[57] Mr. Rahbar also asserts in his affidavit that if an injunction is not granted and Fiera proceeds with the forced buyout, Gracorp will suffer a loss of control in the property development. What Mr. Rahbar is referring to here is really the loss of opportunity that Gracorp will suffer if bought out by Fiera.

[58] I see no reason why prejudice of this sort could not be remedied by a damages award. I agree with Fiera that the case law cited by Gracorp in which loss of control was found to give rise to irreparable harm is distinguishable from the case at bar.

[59] In *Hawkes v. Levelton Holdings Ltd.*, 2011 BCSC 861, the Court found that a loss of a shareholder interest constituted irreparable harm because of the difficulty in ascertaining the value of the shares based on the particular facts of this case.

[60] In *733505 Ontario Ltd. v. 686817 Ontario Inc.*, 2006 CanLII 5600 (ON SC) and 2006 CanLII 5601, the Court recognized that a shareholder could be irreparably harmed by the loss of control arising from a change in ownership of the company. However, in that situation, the aggrieved party continued to be a shareholder in the company, and the prejudice flowed from the loss of control over a company in which the plaintiff continued to have a financial interest. This is distinguishable from the present matter where Gracorp would no longer have any interest in HoldCo if Fiera exercises the buyout provision. The prejudice arising from this loss of control may be substantial, but it is also quantifiable and therefore not irreparable.

[61] I would add that this is not a case where the development project in issue is all or substantially all of the plaintiff's business. It is one of 13 projects in which Gracorp is presently engaged, and there is no evidence that a refusal to grant the injunction will cause Gracorp to go out of business.

[62] I turn next to a consideration of Gracorp's claim that it will suffer irreparable reputational harm in the absence of injunctive relief. Mr. Rahbar asserts that Gracorp's reputation in the local construction industry will suffer if an injunction is not granted. He says Gracorp's eight other local construction projects would "suffer" if Fiera is allowed to exercise the buyout option but does not explain how. It is not readily apparent to me how a case-specific disagreement between Gracorp and Fiera would impact on Gracorp's other existing construction projects.

[63] Mr. Rahbar also offers the specific example of an institutional investor with investments in both Gracorp and Fiera as evidence that Gracorp's reputation with

investors may suffer. This is possible, although it is by no means a certainty that a sophisticated institutional investor would draw any broader conclusions about Gracorp's competence or profitability from a single instance in which its relationship with a real estate development counterparty broke down, particularly where there is ongoing litigation in which Gracorp continues to dispute the validity of Fiera's actions.

[64] Finally, with regard to Ms. Rahbar's assertion that future business prospects would suffer, no details are offered as to how this might happen. Again, it is possible that a forced buyout in the present matter could have some reputational impact on Gracorp, although once again it is fair to question the extent to which the breakdown of the particular relationship between Gracorp and Fiera will have any broader implications for Gracorp's business or reputation.

[65] Further, there is no evidence of any current public or media interest in the matter, and even if the injunction is refused, Gracorp will be at liberty to pursue its claim in order to vindicate its position at trial. For all of these reasons, I consider Gracorp's claim about potential reputational harm to be relatively weak.

[66] To sum all of this up, even after acknowledging the language in clause 5.02 of the COA stating that a breach of the agreement may cause irreparable harm warranting an application for injunctive relief, I do not find the plaintiff's claim about irreparable harm to have much merit on the record before me.

(3) Balance of Convenience

[67] Because the three elements of the test for injunctive relief are not water-tight compartments, the relative strength or weaknesses of the parties' positions on the first two elements of the test may be factored into the court's assessment of the third element, balance of convenience.

[68] In this particular case, I have found the plaintiff's case on the merits to be arguable but weak. The plaintiff's assertions of irreparable harm are also weak.

[69] Against this backdrop, the factor which I consider to be most telling in assessing the balance of convenience is that an injunction would require Fiera to continue in a working relationship with Gracorp in relation to a capital-intensive real estate development project where construction has yet to begin. For the project to continue to its successful completion, the parties would have to work together closely and cooperatively for an extended period of time. Fiera would also be required to cover substantial development and construction costs incurred on its behalf by Gracorp. All of this weighs against an interlocutory injunction that would effectively compel these parties to work closely together in the field while engaged in an ongoing dispute in the courtroom.

[70] Weighing on the other side of the scale is Gracorp's contention that the injunction will preserve the status quo until the contract dispute can be resolved at trial. Fiera takes issue with Gracorp's contention that the injunction would preserve the status quo. Fiera says the status quo would be to allow Fiera to proceed with the default process under the COA. I do not agree. Rather, I accept Gracorp's position supported by *Homestead Development Ltd. v. Lehman Resources Ltd.*, 1988 CanLII 3292 (BCSC) at para. 29 that in the context of a contract dispute of the sort in issue here, the status quo is the situation that pertained prior to the alleged breach that is the focus of the court action. Here, I agree with Gracorp that Fiera's actions in seeking to invoke the default process involve the disruption of the status quo.

[71] However, even after accounting for this point, the weakness of the plaintiff's position on the first two branches of the test for injunctive relief coupled with the inconvenience and impracticality of requiring these two counterparties to work together in a cooperative endeavour despite the divergence of positions arising from the current dispute, all leads me to conclude that it would not be just and equitable for the court to grant an injunction. This will leave the plaintiff free to pursue its claim to seek damages for any losses it had suffered along with any other remedies deemed appropriate by the trial judge if the defendant's actions are ultimately deemed at trial to have been wrongful.

Conclusion

[72] The application is dismissed. The existing injunction was in place until today, pending my decision. I have now given my decision, so there is no further injunction.

"Riley, J."