IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Vandev Consulting Limited v. Pacific Maple Manufacture Inc.*, 2024 BCSC 1781

Date: 20240912
Docket: S207055
Registry: Vancouver

Between:

Vandev Consulting Limited

Plaintiff

And

Pacific Maple Manufacture Inc.

Defendant

- and -

Docket: S212897
Registry: Vancouver

Between:

Pacific Maple Manufacture Inc.

Plaintiff

And

Vandev Consulting Limited and Jiangming Zhu

Defendants

And:

1147979 B.C. Ltd. and Zhiping Yang

Defendants by Way of Counterclaim

Before: The Honourable Mr. Justice Veenstra

Oral Reasons for Judgment

In Chambers

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Counsel for Vandev Consulting Limited and Jiangming Zhu:	W. Zhang N. Ng
Counsel for Pacific Maple Manufacture Inc. and 1147979 B.C. Ltd. and Zhiping Yang:	D.W. Gibbons F. Liedl Pierce
Place and Dates of Summary Trial:	Vancouver, B.C. August 29-30, 2024
Place and Date of Judgment:	Vancouver, B.C. September 12, 2024

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[1] **THE COURT:** Vandev Consulting Limited ("Vandev") has applied for an order pursuant to Rule 9-7, the summary trial rule, in these two related actions. It seeks judgment on its claims in Vancouver action S207055. In Vancouver action S212897, it seeks a declaration that it says will render most of the claims in that action legally or practically moot.

[2] Underlying both actions is a contract made on February 6 or 7, 2018. A key issue in both actions is whether that contract violates the provisions of the *Real Estate Services Act*, S.B.C. 2004, c. 42 [*RESA*]. An earlier decision in action S207055, striking the claims and dismissing the action on the basis that the contract was made unenforceable by *RESA*, was set aside by the Court of Appeal and the matter referred back to this court. Action S212897 was commenced between those two judgments, at a time when the initial Supreme Court order was in force, and is largely predicated on *RESA* being applicable to exclude the claims of Vandev in the first action.

[3] Vandev says that there is a sufficient factual foundation now for this Court to decide the *RESA* issue.

[4] Pacific Maple Manufacture Inc. ("Pacific Maple"), which is defendant in action S207055 and plaintiff in action S212897, argues that this application is not suitable for decision by way of summary trial. It says that the court cannot find the facts necessary to come to a decision, that Vandev inappropriately seeks to litigate in slices, and that it would be unjust to decide those matters that have been put before the Court. To the extent this Court is going to decide the matters, Pacific Maple says that Vandev has not established on a balance of probabilities that its claims are not barred by *RESA*, and that in any event, Pacific Maple has raised a defence of unconscionability that cannot be determined on a summary basis.

[5] Vandev responds that it is clear from the evidence before the court that the defence of unconscionability is without merit – hence, it says that the entirety of action S207055 can be decided at this time.

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Background Facts

[6] Given the orders I intend to make today, I will not go into a great deal of depth on the evidence tendered to this point. I would note, however, that based on the comments of Justice Abrioux in the Court of Appeal judgment, the key factual issue underlying the applicability of *RESA* is whether Vandev was contracting on its own behalf in respect of the real estate transactions in issue. Pacific Maple submits that the true principal in those transactions was Mr. Zhu and, because Vandev is a separate legal entity, the exception in *RESA* identified by the Court of Appeal does not apply.

[7] Vandev was incorporated in April 2017. Its shares are wholly owned by Vandevelop Properties Limited ("Vandevelop"). At all material times, Vandevelop was owned by three other companies – a company controlled by Mr. Zhu owned 40%, a company controlled by Gordon Tang owned 40%, and a company controlled by Patrick Lynch owned 20%. In 2018, all three of Messrs. Zhu, Tang, and Lynch were directors.

[8] Pacific Maple was incorporated in June 2017. It is controlled by Zhiping Yang, who was the sole director. The company has two officers, Ms. Yang as president and a Mr. Jerry Li as CEO.

[9] Mr. Zhu and Ms. Yang met in 2016 or 2017. Both originally came from China. Although most of the individuals involved in this matter speak both Mandarin and English, Ms. Yang says that her English language skills are not very good.

[10] Mr. Zhu's evidence was that he and Ms. Yang spoke about various of her businesses in both Canada and China, including a farm and a health centre in Canada and a real estate project in Zhengzhou, China. As well, in 2017 both Vandev and Pacific Maple were minority investors in a large real estate project in the Marpole area of Vancouver. That project subsequently fell apart, and there is ongoing litigation in respect of it.

[11] At some point in late 2017 or early 2018, one or more of Vandev's principals learned of two adjoining Burnaby properties that were available for purchase, one at 6688 Willingdon Avenue (the "6688 Property") and the other at 6622 Willingdon Avenue (the "6622 Property"). One of them was publicly listed for sale. The other was not.

[12] On January 5, 2018, 1147979 B.C. Limited ("1147979") was incorporated. At the time of its incorporation, its sole director and sole shareholder was Mr. Zhu. Mr. Zhu has deposed that he held legal title to 100% of the shares in 1147979 as a bare trustee for Vandev.

[13] Mr. Zhu and Mr. Tang have both asserted in their affidavits that:

> As the majority of the board of directors of Vandev, as well as the ultimate majority shareholders of Vandev, in January, 2018, Mr. Zhu and I discussed and agreed that:
>
> (a) Vandev would be the corporate entity that we would use to enter into the transaction with [1147979] and [Pacific Maple];
>
> (b) Mr. Zhu would personally hold shares in [1147979 B.C. Ltd.] in trust for Vandev; and
>
> (c) As a result, Vandev would pay the [initial deposits in respect of each of the two properties].

[14] By way of an offer dated January 9, 2018, that was accepted on January 10, 2018, 1147979 entered into an agreement to purchase the 6688 Property for a purchase price of $28 million. The contract of purchase and sale (the "6688 CPS") provided for a deposit of $50,000 to be paid to Macdonald Realty Westmar in Trust within 48 hours of acceptance, with a further deposit of $2 million to be paid upon subject removal, which was to occur by February 8, 2018. The completion date was April 30, 2018. The 6688 CPS indicates that 1147979 was represented by Homeland Realty, while the vendor was represented by Macdonald Realty Westmar.

[15] On January 12, 2018, Vandev paid the $50,000 deposit to Macdonald Realty Westmar. Unfortunately, the image of this cheque is not available so it is not known which of Vandev's directors signed the cheque.

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[16] At some point between January 19 and 24, 2018, there was a discussion between Mr. Zhu and Ms. Yang of which the possibility of investing in the two Willingdon properties was at least one of the topics discussed. Ms. Yang's evidence was that this discussion did not occur until January 24, 2018, while Mr. Zhu's evidence was that it occurred on January 19, 2018, following which Mr. Zhu and Ms. Yang and Mr. Lynch all visited the properties on January 20, 2018, and Ms. Yang, Mr. Li, and two others came to Vandev's office on January 24, 2018, to review information on the properties.

[17] On January 29, 2018, a different numbered company – 0808607 B.C. Ltd. – made an offer to purchase the 6622 Property for a purchase price of $14.5 million. The offer was accepted on or about February 1, 2018. It provided for a deposit of $50,000 to be paid to Homeland Realty within 48 hours of acceptance and a further deposit of $1 million to be paid upon subject removal, which was to take place on March 1, 2018. Completion was to occur on July 31, 2018. The offer was prepared on behalf of the numbered company by Homeland Realty, with the vendor being represented by NAI Commercial.

[18] Ms. Yang's evidence is that while she was at a conference on February 3, 2018, at the office shared by Vandev and Vandevelop, Mr. Zhu provided her with further information about the two Willingdon properties. She said that at this meeting Mr. Zhu promised to "guarantee" her investment. Mr. Zhu described a similar meeting but said that it occurred on February 4, and that at that time, they discussed the general parameters of an agreement. He denied promising to guarantee the investment.

[19] A Vandev cheque was used to pay the $50,000 deposit to Homeland Realty. The cheque was signed by Mr. Zhu and Mr. Lynch and was processed through Vandev's bank account on February 5, 2018.

[20] Also on February 5, 2018, 1147979 agreed with 0808607 B.C. Ltd. to take an assignment of the 6622 Contract at the original $14.5 million purchase price.

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[21] Mr. Zhu's evidence was that, based on the discussions he had with Ms. Yang, he prepared a brief form of agreement written in the Chinese language and made an appointment to meet with Ms. Yang at her residence. That meeting occurred on February 6, 2018. Mr. Zhu's evidence was that he spent an hour going through the agreement with her and left it with her overnight so that she could further review and consider it. Ms. Yang does not dispute that she and Mr. Zhu met, and that Mr. Zhu provided her with the documents, but she said that Mr. Zhu never explained the $1 million fee, but rather just talked about how they would flip the property and share the profits.

[22] Mr. Zhu's evidence, which was not disputed, was that he picked up the signed agreement from Ms. Yang on February 7, 2018.

[23] As noted above, the agreement that was signed was written in the Chinese language. Two similar but not identical translations are in the evidence. The first portion of the document is translated (according to the translation obtained by Pacific Maple) as follows:

> **Cooperation Agreement**
>
> Party A: Vandev Consulting Limited
>
> Party B: Pacific Maple Manufacture Inc.
>
> Party A has signed the agreements through the project company under Party A actual control, 1147979 B.C. Ltd., to purchase Plot A (6688 Willingdon Ave, Burnaby) at the price of 28 million Canadian dollars and Plot B (6622 Willingdon Ave, Burnaby) at the price of 14.5 million Canadian dollars respectively, and Party A has already paid 50 thousand Canadian dollars to the listing agencies of Plot A and Plot B respectively.
>
> According to the sale and purchase agreements, if the project company decides to remove subjects and complete the transactions, the project company should pay a non-refundable deposit of 2 million Canadian dollars to the listing agency of Plot A by February 8, 2018 and a non-refundable deposit of 1 million Canadian dollars to the listing agency of Plot B by March 2, 2018.
>
> Party A and Party B have decided to cooperate in participation in the transactions for the above two plots. On matters related to the cooperation, Party A and Party B have reached the following agreement:
>
> 1. Party A is responsible for the purchase signing of the two plots, paying the signing deposits and also transferring the two plots with premiums to the third-party buyer (by means of transfer agreements)

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> by the completion dates respectively specified in the agreements for the two plots to realize the trading arbitrage;
>
> 2. Party B is responsible for paying the deposit of 2 million Canadian dollars for Plot A and the deposit of 1 million Canadian dollars for Plot B on schedule;

[24] The next section provides for what is to happen if the two properties are resold prior to completion. Section 4 then provides that:

> 4. To guarantee the safety of Party B's investment, when Party B delivers the bank draft in the amount of 2 million dollars as the deposit for the purchase of Plot A, Party A should sign the document to transfer 50% of the equity of the project company to Party B (or a subject controlled by Party B) and in the meantime appoint Party B as a direct of the project company. The structure of the equity and directors of the project company after such a change will be as follows: Party A has 50% of the equity and one director, and Party B has 50% of the equity and one director.

[25] Section 6 dealt with what was to happen if the properties were not resold prior to completion:

> 6. If neither of the two plots can be transferred to a third party by the completion dates specified in the sale and purchase agreements, Party B will purchase the two plots at the original prices in the sale and purchase agreements for the two plots. Upon completion of the deal for one plot afterwards, Party B will pay a service fee of 1 million Canadian dollars to Party A plus 100 thousand Canadian dollars for the signing deposits paid by Party A;

[26] Also on February 7, 2018:

a) Ms. Yang caused Pacific Maple to pay the $2 million second deposit on the 6688 Property to Macdonald Realty Westmar in Trust;

b) 50% of the shares in 1147979 were transferred from Mr. Zhu to Pacific Maple; and

c) Ms. Yang was appointed as a second director of 1147979 (as noted above, Mr. Zhu was already a director).

[27] Over the next several weeks:

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a) The parties obtained a preliminary architectural and development proposal from an architecture firm, which contemplated the combined properties being redeveloped into a 200-unit residential complex; and

b) The parties commissioned appraisals for mortgage financing purposes – which appraisals were received on April 5, 2018.

[28] As well, Mr. Zhu's evidence is that the parties received an offer from a potential purchaser of the two properties, who proposed to pay a total purchase price $2 million in excess of the existing contracts. While the offer was prepared by one realtor and communicated through another, it does not appear that the properties themselves had actually been formally listed for sale, or that the contracts that were in place with respect to each of these properties had been formally listed as available for assignment.

[29] The parties exchanged WeChat messages on March 19, 2018. The messages were in the Chinese language and were a mix of text and voice memos. The translation of those messages includes the following:

> Zhu: The buyer offered $45 million. After deducting the 2% commission, only 1.6 million profit remains.
>
> Yang: What are your thoughts right now? What are your thoughts right now? 1.6 million, how much do you want to take. How much do you want to take? Then just tell me how much you want me to agree to, and that will be fine.
>
> Zhu: Oh, I think, it's hard to say, the price is indeed a bit … But I'm also worried about whether your funds will come through smoothly, and I don't want you to feel pressured. Letting him wait for a few days would be fine; in the meantime, we should proceed with our loan work. As for the profit, we originally agreed that you would take half, and we would split the other half with the [person of Indian origin] who helped us find this contract and secure this land.
>
> If it's 1.6 million, you take 800,000, my company takes 400,000, and the Indian takes 400,000. That's how it is.
>
> My company, it's me and [Gordon and Patrick], the three of us, right, the three of us take 400,000. I'll get around 100,000, about 140,000 or around 120,000 to 130,000, 40%. I'll get about 100,000, that's the idea. But I'm not very satisfied with the price, to be honest.
>
> So it's up to you, it's up to you to decide, because only you know how the funds and all the arrangements will be.

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> I'm fine with it, it's not like I absolutely have to sell. I'm fine with it.
>
> Yang: Alright, let's leave him hanging for a few days and pursue both options simultaneously.

[30] Further WeChat messages on March 20, 2018, reflect a focus on the potential to obtain financing to complete the purchases. In one of the messages, however, Mr. Zhu advised Ms. Yang that:

> The buyer hasn't given up on our land yet. The agent will continue to mediate tomorrow. My opinion is to accept if we can net 2 million profit. The one-month process is exhausting for you, and it's causing me a lot of stress.

[31] Mr. Zhu's evidence was that by late March 2018, he understood that Pacific Maple wanted to complete the purchase and develop the properties itself rather than finding an assignee. Ms. Yang disputed this – saying that she never had the intention of purchasing the properties but felt "trapped."

[32] The parties had a conversation in early April 2018. Mr. Zhu's evidence is that he promised that, after completion of the purchase contract and payment of the $1 million fee provided for in section 6 of the Cooperation Agreement, he would arrange for all of the shares in 1147979 to be transferred to Pacific Maple and would resign as a director. Both Ms. Yang and Mr. Li, who said he was a witness to this discussion, say that there were no conditions imposed on Mr. Zhu's agreement to transfer all of the shares.

[33] The purchase of the 6688 Property was completed on April 30, 2018. It was financed by a first mortgage of $10.5 million and a second mortgage of $4 million. Both mortgages were guaranteed by Pacific Maple, Ms. Yang and Mr. Zhu. As well, Mr. Zhu provided various funds to cover a shortfall in closing funds and fees connected with the mortgage financing. His evidence was that he personally loaned 1147979 a total of $215,000 through a series of payments. Otherwise, the closing funds were provided by Pacific Maple.

[34] The purchase of the 6622 Property was completed on August 17, 2018. Mr. Zhu's evidence was that he also personally guaranteed this mortgage.

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[35] It seems to be common ground that Mr. Zhu was reimbursed the funds he personally advanced to 1147979 with respect to these two purchases, that Vandev was reimbursed the $100,000 it paid in respect of the two initial deposits, and that the properties were subsequently refinanced without Mr. Zhu's covenant.

[36] At some point, the exact timing of which is not clear from the documents, Mr. Zhu transferred all but 5% of his remaining shares of 1147979 to Pacific Maple. He said that was done as a good-faith gesture and that he is holding the remaining 5% until the $1 million fee has been paid.

[37] Ms. Yang's evidence was that it was in 2019 that Mr. Zhu asked her to pay a $1 million fee, that she was surprised and upset, and that she insisted that the Cooperation Agreement "was not realized."

[38] Mr. Zhu tendered in his reply evidence a WeChat message from Ms. Yang on March 5, 2020, in which among other things she comments that “I have promised the 1 million, so I won't go back on my word.”

[39] Before moving on from this summary of the background facts, I note that Pacific Maple has tendered and relied on a brief affidavit of Mr. Lynch, who describes himself in the affidavit as a former director of both Vandev and Vandevelop. Mr. Lynch says that:

a) In general, Vandev's primary business was to be a development consultant, while Vandevelop was generally used as a holding company;

b) Mr. Lynch was not aware of Vandev having had any ownership interest in the two Willingdon properties or of the shares of 1147979; and

c) His understanding was that Vandev's only role with respect to the Willingdon properties was to obtain a finder's fee and serve as a development consultant.

[40] In Vandev's reply affidavits, it is suggested that after Mr. Lynch left Vandev, he continued to work with Pacific Maple.

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Litigation History

[41] Action S207055 was commenced on July 13, 2020. The original pleading was relatively brief. It pleaded a breach of the Cooperation Agreement through failure to pay the $1 million fee, and claimed a certificate of pending litigation based on an equitable lien.

[42] A week later, Ms. Yang caused a notice of change of directors to be filed, representing that Mr. Zhu was no longer a director of 1047979 and that he was replaced in that capacity by her son-in-law, Mr. Wang. I gather that Ms. Yang did so on the basis of her view that Pacific Maple was the *de facto* 100% shareholder, as a result of Mr. Zhu's allegedly unconditional promise to transfer the remaining 5%. As a result, she acted on the basis that Pacific Maple had full control of the shares of 1147979 and could remove and replace a director without a shareholders meeting.

[43] Pacific Maple filed a response to civil claim on January 11, 2021, in which it pleaded that the claim for a $1 million fee was in breach of *RESA*. The response to civil claim also pleads a limitation defence, although that defence was not vigorously advanced at the hearing before me. Finally, the response to civil claim pleads in Part 3 that:

> 7. Further or in the alternative, the defendants plead and rely on the doctrines of unconscionability, *non est factum* and *ex turpi causa non oritur actio*. This Court ought to deny recovery to the plaintiff on the ground that to provide recover would undermine the integrity of the justice system.

No particulars of any of the defences raised in paragraph 7 are provided – other than the alleged breach of *RESA* and the reference to “the integrity of the justice system”.

[44] Three days after filing this pleading, Pacific Maple filed its application to dismiss the claim. That application was heard on February 2, 2021. The chambers judge gave an oral judgment that day dismissing the action on the basis that the claim was in violation of *RESA*.

[45] The order dismissing the action was appealed. The appeal was not heard until January 11, 2022, and not decided until March 15, 2022.

[46] After the initial chambers judgment, but before the appeal, Pacific Maple commenced action S212897 against Vandev and Mr. Zhu. In that action, it sought an order that Mr. Zhu transfer the remaining 5% of the shares of 1147979 or alternatively damages.

[47] On May 3, 2021, Vandev and Mr. Zhu filed a counterclaim in action S212897 against Pacific Maple and Ms. Yang. That counterclaim raised claims of oppression in respect of the removal of Mr. Zhu as a director of 1147979, its failure to hold any annual general meetings or produce financial statements, and its unilaterally increasing the mortgage debt on the properties owned by 1147979. Vandev and Mr. Zhu allege that they had reasonable expectations that until the $1 million fee was paid, Vandev would have continued involvement in the management of 1147979.

[48] After the Court of Appeal referred the matter back to this court in March 2022, the parties had protracted discussions over amendments to pleadings, which included the filing of a notice of application. Ultimately, a consent order was made on November 15, 2023, granting Vandev leave to amend and removing 1147979 as a party to the action.

[49] I am advised that in about June 2023, Vandev's counsel advised of an intention to apply for judgment pursuant to Rule 9-7. I am advised that there were difficulties obtaining a long chambers hearing date, and it took several months to secure the hearing date that was eventually obtained. Finally, in June 2024, the hearing was scheduled for August 29, 2024. Vandev's notice of application in respect of action S207055 was filed on July 23, 2024.

[50] I am advised that Vandev has produced a list of documents, although it was brief, and Pacific Maple suggests that it was not complete. Pacific Maple has not produced a list of documents. Neither party has conducted examinations for discovery.

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[51] All of that said, both parties acknowledge that in this case, Vandev's intent to bring a summary trial application has been known for over a year. Neither party alleges that it did not have adequate time or opportunity to take steps by way of discovery in order to prepare for this application.

[52] Pacific Maple filed its application response materials on August 14, 2024 (15 days before the hearing). Those materials include affidavits from Ms. Yang, Mr. Li, and Mr. Lynch. Vandev then filed reply materials on August 26, 2024 (three days before the hearing), including affidavits from Mr. Zhu and Mr. Tang.

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Objections to Affidavits

[53] Pacific Maple has objected that Vandev's reply material includes material that is not proper reply. It says that much of what is in those affidavits should have been included in Vandev’s primary affidavits, and that Vandev is in effect case-splitting. It does not seek any remedy other than to have the court disregard those affidavits. Specifically, there is no request that Pacific Maple be allowed to provide any further responsive affidavit materials itself, or to cross-examine the deponents of the affidavits tendered by Vandev.

[54] I have reviewed the affidavits. They respond in part to Ms. Yang's evidence in support of claims of unconscionability based on assertions that she was in a vulnerable position due to her reliance on Mr. Zhu and her lack of facility with the English language. They respond to Mr. Lynch's assertions that effectively challenge the evidence of Mr. Zhu with respect to the nature of Vandev's involvement. They also deal at some length with the litigation surrounding the Marpole projects.

[55] In my view, given the lack of any particulars as to the unconscionability pleading, it is not reasonable to have expected Vandev to anticipate the assertions made in Ms. Yang's affidavit.

[56] The response to Mr. Lynch's affidavit, including the production of the Vandev cheque used to pay one of the deposits that is said to contain his signature, appears to me to be appropriate reply. While it does appear that the parties were aware that

Mr. Lynch has had some connection with Pacific Maple since he left Vandev (the exact nature of which is not is entirely clear on the evidence), nothing I have seen suggests that Vandev or its counsel knew or should have been aware of the evidence Mr. Lynch was going to give. Thus, this evidence appears to me to be proper reply.

[57] The evidence with respect to the Marpole investment appears to be largely collateral. Although the fact that the parties had worked together in respect of another real estate project prior to their dealings on the Willingdon properties was referenced in Mr. Zhu's initial evidence, the lengthy allegations about that investment – which appeared to be aimed primarily at disparaging Mr. Zhu's character – were new in Pacific Maple's material. While the Marpole matters appear to me to have little if any relevance to this action, it is not inappropriate for Mr. Zhu to have wanted to respond to the allegations made given their nature.

Positions of the Parties

[58] At the hearing before me, the basic positions advanced were, on behalf of Vandev, that the application should be granted on the current evidentiary record, and on behalf of Pacific Maple, that the entire matter was unsuitable for summary trial and had to be referred to a full trial. The parties appear to be agreed that a full trial would last in the range of four weeks, a time estimate that reflects the need for Mandarin interpretation for some witnesses. No trial date has been scheduled. It is likely that any trial would occur in 2026 or possibly even later depending on the schedules of counsel.

[59] When pressed on whether the court should consider whether this matter might be suitable for summary trial, if cross-examination on affidavits or other such steps were taken, counsel for Vandev accepted that as an alternative position, while counsel for Pacific Maple maintained their position that the matter is simply unsuitable.

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The Court of Appeal Judgment

[60] Justice Abrioux gave the judgment of the Court of Appeal, which is indexed at 2022 BCCA 97. He summarized the matter concisely at paras. 2-6 of his reasons:

> [2] At the heart of the dispute between the parties is a two-page agreement entered into between [Vandev] and the respondent Pacific Maple Manufacture Inc. ("Pacific"), drafted in Chinese and apparently without legal assistance. This agreement pertained to the purchase and sale of two commercial properties and the assignment of one or both of those contracts to the respondents. [Vandev] alleged it was owed $1 million for the service fee referred to in the agreement. The respondent 1147979 B.C. Ltd. (The "Numbered Company") is a company incorporated pursuant to the laws of British Columbia. Prior to entering into the agreement, all of the shares of the Numbered Company were held by Mr. Jiangming Zhu, a director of [Vandev].
>
> [3] The respondents were successful in satisfying the judge that no fee was payable since the services in question were barred by the operation of s. 4(1) of the *Real Estate Services Act*, S.B.C. 2004, c. 42 [*RESA*], which prohibits the payment of remuneration to non-licenced and non-exempted individuals who provide real estate services.
>
> [4] As I shall explain, there were two discrete issues that should have been considered in relation to both applications:
>
> > a. Was [Vandev] exempt from the provisions of the *RESA* since it was providing the services in question to itself?
> >
> > b. Were the services performed by a non-licensed individual and, if so, did any of the exemptions in the *RESA* apply?
>
> [5] [Vandev] also seeks to adduce fresh evidence relating to the beneficial interest it alleges it held in the Numbered Company.
>
> [6] For the reasons that follow, I have concluded that the judge was unfortunately led astray by the confusing and inarticulate submissions made on behalf of [Vandev's] then counsel. This resulted in him considering only the second question and not the first. In my view, the materials before the court on the applications were sufficient such that neither the relief under Rule 9-5-(1)(a) nor the relief under Rule 9-6(1)(a) should have been granted, and the appeal should be allowed. It follows that the order cancelling the CPLs registered against both properties should also be set aside.

[61] Justice Abrioux identified the relevant legislative provisions at paras. 19-20:

> [19] Underlying both applications are the following sections of the *RESA*:
>
> Requirement for licence to provide real estate services
>
> 3 (1) A person must not provide real estate services <u>to or on behalf of another</u>, for or in expectation of remuneration, unless the person is

> (a) licensed under this Part to provide those real estate services, or
>
> (b) exempted by subsection (3) or the regulations from the requirement to be licensed under this Part in relation to the provision of those real estate services.
>
> …
>
> No recovery of remuneration by unlicensed person
>
> 4 (1) No action may be brought or continued for remuneration in relation to real estate services unless, at the time the real estate services were provided, the person claiming the remuneration was
>
> (a) licensed under this Part to provide those real estate services, or
>
> (b) exempted by this Act or the regulations from the requirement to be licensed under this Part in relation to the provision of those real estate services.
>
> …

[20] Furthermore, the *Real Estate Services Regulation*, B.C. Reg. 506/2004 [*Regulation*] provides, in part:

> 2.1 (1) An individual is exempt from the requirement to be licensed under Part 2 of the Act in respect of real estate services if all the following apply:
>
> (a) the real estate services are provided <u>to or on behalf of a principal in relation to those services</u>;
>
> (b) the individual is the employee of the principal referred to in paragraph (a);
>
> (c) the individual is not providing real estate services to or on behalf of any person other than the principal referred to in paragraph (a).
>
> (2) Subsection (1) does not apply in respect of the provision of trading services if
>
> (a) the trading services are provided with respect to a development unit, as defined in the *Real Estate Development Marketing Act*, and
>
> (b) the principal to or on behalf of whom the services are provided is a developer, as defined in the *Real Estate Development Marketing Act*, of that development unit.
>
> …

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> 2.11 A person who is providing trading services only by referring a party to a trade in real estate to a licensee, or by referring a licensee to a party, for the purpose of the licensee providing trading services, is exempt from the requirement to be licensed under Part 2 of the Act in relation to the person's provision of those referral services if
>
> (a) the person does not engage, for the purpose of making a referral, in activities to solicit the names of persons who may be interested in acquiring or disposing of real estate, and
>
> (b) the practice of making referrals and receiving referral fees is incidental to the main business of the person.
>
> [Emphasis in original.]

[62] Justice Abrioux identified the key issue as follows:

> [23] In my view, the principal issue on the application to strike is whether the Notice of Claim supports the allegation that the *RESA* does not apply to [Vandev] because it did not, in the language of s. 3(1), "provide real estate services to or on behalf of another" as any services were provided to the Numbered Company which, at the time the agreement was entered into, it beneficially owned through Mr. Zhu.
>
> [Emphasis in original.]

[63] His conclusions with respect to the application to strike pursuant to Rule 9-5(1) are set out at paras. 39-40:

> [39] Although the issue was not addressed as clearly as it ought to have been by [Vandev's] then counsel, I agree with [Vandev] that the judge failed to engage in analyzing the proper question. He ought to have considered whether the Notice of Claim, read generously and on the assumption the pleaded facts were true, was capable of sustaining the interpretation that [Vandev] was acting on its own behalf as the beneficial owner of the properties. His failure to do so amounted to an error in law: *0843003 B.C. Ltd. v. Inspire Group Development Corporation*, 2022 BCCA 3 at para. 26.
>
> [40] In my view, it was not plain and obvious that [Vandev] was providing services "to or on behalf of another", as required under s. 3(1) of *RESA*, nor was it plain and obvious that the transaction was not exempted pursuant to s. 2.1 and 2.11 of the *Regulation*, the latter exemption relating to the involvement of a licensed real estate agent in the transactions. Accordingly, I would accede to this ground of appeal.

[64] With respect to the dismissal of the action pursuant to Rule 9-6, he concluded at paras. 47-49:

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> [47] The judge committed the same error with respect to granting the summary dismissal application as he did in allowing the application to strike. He did not consider whether the fundamental question—whether [Vandev], as controlling shareholder of the Numbered Company, was acting on its own behalf as the beneficial owner of the properties—constituted a genuine issue of material fact requiring trial.
>
> [48] There are also other aspects of the principal issues I have identified which, in my view, should have resulted in the conclusion that [Vandev] was not bound to lose, including:
>
> - Is the agreement a "Real Estate Services Contract" or a "Cooperation Agreement" and does anything turn on that description in deciding whether s. 3(1) of the *RESA* applies in this case?
> - Do any of the exemptions in the *Regulation* apply?
>
> [49] In light of the above conclusions that the judge erred in failing to consider whether [Vandev] was acting on its own behalf as a beneficial owner, and that as such the appeal should be allowed, it is not necessary for me to consider [Vandev's] application to adduce fresh evidence.

Appropriateness for Summary Trial

[65] Rule 9-7(15) sets out the key questions to be considered in determining appropriateness for summary trial:

> On the hearing of a summary trial application, the court may
>
> (a) grant judgment in favour of any party, either on an issue or generally, unless
>
> (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
>
> (ii) the court is of the opinion that it would be unjust to decide the issues on the application, …

[66] Rules 9-7(12) and (13) provide for the making of orders for cross-examination and other steps to complete the evidentiary record where appropriate. As set out in Rule 9-7(12):

> On or before the hearing of a summary trial application, the court may order that
>
> (a) a party file and serve, within a fixed time, any of the following on which the party intends to rely in support of the application:
>
> (i) an affidavit;
>
> (ii) a notice referred to in subrule (9),

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> (b) the person who swore or affirmed an affidavit, or an expert whose report is relied on, attend for cross-examination, either before the court or before another person as the court directs,
>
> (c) cross-examinations on affidavits be completed within a fixed time,
>
> (d) no further evidence be tendered on the application after a fixed time, or
>
> (e) a party file and serve a brief, with such contents as the court may order, within a fixed time.

[67] Factors to be considered in determining whether a matter is suitable for summary trial were discussed in *Gichuru v. Pallai*, 2013 BCCA 60, at paras. 30-31. Factors to be considered in determining whether it is appropriate to grant judgment on an issue, rather than the entire action, are set out in *Ferrer v. 589557 B.C. Ltd.*, 2020 BCCA 83, at paras. 25-28 and 33-34.

[68] I note as well the comments of Chief Justice McEachern in the seminal case on Rule 9-7 (then referred to as Rule 18A), that being *Inspiration Mgmt. Ltd. v. McDermid St. Lawrence Ltd.* 1989, 36 B.C.L.R. (2d) 202, 1989 CanLII 229 (C.A.):

> [54] The test for R. 18A, in my view, is the same as on a trial. Upon the facts being found the chambers judge must apply the law and all appropriate legal principles. If then satisfied that the claim or defence has been established according to the appropriate onus of proof he must give judgment according to law unless he has the opinion that it will be unjust to give such judgment.
>
> [55] In deciding whether the case is an appropriate one for judgment under R. 18A, the chambers judge will always give full consideration to all of the evidence which counsel place before him but he will also consider whether the evidence is sufficient for adjudication. For example, the absence of an affidavit from a principal player in the piece, unless its absence is adequately explained, may cause the judge to conclude either that he cannot find the facts necessary to decide the issues, or that it would be unjust to do so. But even then, as the process is adversarial, the judge may be able fairly and justly to find the facts necessary to decide the issue.
>
> [56] Lastly, I do not agree, as suggested in *Royal Bank v. Stonehocker* [1985, 61 B.C.L.R. 265 (C.A.)], that a chambers judge is obliged to remit a case to the trial list just because there are conflicting affidavits. In this connection I prefer the view expressed by Taggart J.A. in *Placer* [*Dev. Ltd. v. Skyline Explor. Ltd.* (1985), 67 B.C.L.R. 366 (C.A.)], quoted at p. 15 [pp. 212-13] of these reasons. Subject to what I am about to say, a judge should not decide an issue of fact or law solely on the basis of conflicting affidavits even if he prefers one version to the other. It may be, however, notwithstanding sworn affidavit evidence to the contrary, that other admissible

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> evidence will make it possible to find the facts necessary for judgment to be given. For example, in an action on a cheque, the alleged maker might by affidavit deny his signature while other believable evidence may satisfy the court that he did indeed sign it. Again, the variety of different kinds of cases which will arise is unlimited. In such cases, absent other circumstances or defences, judgment should be given.
>
> [57] But even if there is a conflict of evidence which cannot easily be resolved on affidavits, as is often the case, the chambers judge is still not required to remit the case to the trial list. He could, for example, adjourn the application and order cross-examination on one or more affidavits, or he could order the deponents to appear to be cross-examined before him or another judge after which time it may be possible to find the facts necessary to give judgment. The chambers judge also has the option of employing any of the other procedures included in R. 18A(5) [now Rule 9-7(12)] instead of remitting the case to the trial list.
>
> [58] I have no doubt that R. 18A is destined to play an increasingly important role in the efficient disposition of litigation, and experience has already shown that its use is not limited to simple or straightforward cases. Many complex cases properly prepared and argued can be resolved summarily without compromising justice in any way.
>
> [59] But it is necessary to recognize that it is essential on all applications under R. 18A for counsel to bring an appropriate measure of professional skill to the preparation of both the substance and the form of their material. It is unfair to scoop-shovel volumes of disjointed affidavits and exhibits upon the chambers judge and expect him or her to make an informed judgment. While I also have the view that many of these applications will in future be heard In Chambers Division III which will inevitably be expanded, many of these applications will continue to be heard on a chambers list or by a referral judge where there is little or no opportunity for judicial preparation. Thus it is incumbent upon counsel to ensure, as the old pleaders used to say, that there is a proper joinder of issues on all questions on fact and law, and the practice of serial affidavits as in this case should be avoided.

Analysis

[69] I am concerned about the manner in which this case has proceeded. Vandev has clearly taken the view for over a year that the determination of the *RESA* issue by way of summary trial is the appropriate way to determine the case. That view was communicated to counsel for Pacific Maple and presumably reiterated each month as long chambers hearing date availability was sought. Given the state of the pleadings, I see it as reasonable for counsel for Vandev to have inferred that the general references to unconscionability, *non est factum*, and *ex turpi causa* in Part 3 of the response to civil claim were focused on the RESA breaches in Part 1, and not

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on the allegations of vulnerability advanced, in what appears to me to be for the first time, in the materials filed two weeks before the summary trial hearing date.

[70] This has led to a situation in which there has been less than a full joinder of issues on the question of unconscionability. That said, Ms. Yang appears from the background material that was available to have some degree of sophistication as well as experience in real estate investment, and it thus appears to me that if a proper evidentiary record was available, it might be possible to deal with this allegation by way of summary trial.

[71] With respect to the *RESA* issue, Pacific Maple relies on (a) the lack of any formal documentation of a bare trust arrangement as between Mr. Zhu and Vandev, and (b) the statements of Mr. Lynch as to what he was aware of. Nothing in the materials suggests to me that Vandev was aware at any time prior to receiving Mr. Lynch's affidavit as to what his evidence would be. That said, it is noteworthy that Mr. Lynch signed at least one of the deposit cheques on behalf of Vandev. It would, however, be unfair to Mr. Lynch in my view to draw any conclusions without Mr. Lynch having the opportunity to respond to that either by way of affidavit or cross-examination.

[72] It does seem to me that the question of whether Vandev had any interest as a principal in the Willingdon property transactions is one that will be determined largely on the basis of the documentary record. However, I am of the view that a proper evidentiary record would include permitting the opposing parties to challenge each of Mr. Zhu, Mr. Tang, and Mr. Lynch on the evidence they have given, which can be done by way of cross-examination.

[73] Thus, while I am of the view that the evidentiary record as it currently stands is not sufficient to decide one or both of the outstanding issues in action S207055, I conclude that that is because of the way in which the evidentiary record has developed, and also reflects the failure of either party to undertake other significant discovery steps.

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[74] I am thus of the view that this is a case in which it would be appropriate to make orders pursuant to Rule 9-7(12), subject to any concerns about the fact that it may not be possible at the end of the day to decide all of the outstanding issues – that is, the question of whether it would amount to impermissible “litigating in slices”.

[75] I turn now to that question. I am mindful in this case of the caution that must be exercised in granting judgment on one or two issues in complex litigation. However, and while I do not see it as appropriate to come to a final conclusion on this point at this time, it does appear to me that if a determination can be made with respect to the *RESA* issue identified by Justice Abrioux, then this litigation will at the very least simplify greatly. If a decision can also be made with respect to the unconscionability issue, then action S207055 can be decided in its entirety.

[76] I recognize that the parties consented in July 2024 to orders that the two actions be tried together. The first of the two consent orders to that effect was made subsequent to Vandev filing its summary trial application. In my view, the making of such an order does not prevent the Court from deciding one or both of the issues in action S207055 even if the remaining issues in action S212897 are not decided at this time.

[77] More generally, and without coming to a final conclusion on this matter, it does appear to me that the two actions, while arising from a common factual matrix, have little in the way of intertwined issues. The *RESA* issue will largely depend on the factual determination as to the nature of Vandev's involvement in the Willingdon properties at the time the contracts of purchase and sale were entered into. The unconscionability issue will largely depend on an assessment of the parties' relationship and Ms. Yang's alleged vulnerability leading up to the cooperation agreement. The issues in action S212897 will largely depend on factual findings as to the negotiations in April 2018, on a proper interpretation of the written terms of the Cooperation Agreement, if it is found to be in effect, and as to the subsequent steps taken in respect of the management of the numbered company.

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Conclusion

[78] In my view, this is an appropriate case in which to adjourn the summary trial application pursuant to Rule 9-7(12) to order cross-examination of the principal witnesses on their affidavits. By "principal witnesses," I mean to exclude the various legal staff who have made affidavits putting documents before the court and whose evidence has not been challenged.

[79] I am open to submissions on what, if anything, should be done in advance of those cross-examinations in order to ensure that they are reasonably informed. In that regard, I am concerned about the lack of full document disclosure in this case, but also mindful of not imposing unnecessary steps on the parties, whose counsel are more familiar with the situation than am I.

[80] As noted above, I am also concerned about the lack of joinder of the evidence on the unconscionability issue given the manner in which it emerged in the days leading up to the hearing of the summary trial application. It may be that the evidentiary record can be adequately developed through the cross-examination that I have ordered. I am open, however, to submissions on whether there should be any further affidavit evidence filed. My view would be that the affidavit record should be complete before cross-examination occurs.

[81] It may make sense, rather than deciding right now exactly what steps are required, to adjourn and to give counsel an opportunity to consider their positions and see if they are able to agree as to the appropriate steps. We could then schedule a judicial management conference in two or three weeks, at which time I could give directions on any procedural steps as to which the parties are unable to agree.

[82] Once cross-examinations are complete, the parties should attend before me for a further day in which they can make additional submissions based on the final evidentiary record. If the parties believe that the cross-examination should occur in front of me, a question as to which I have not made any determination, they can

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address that when they come back before me to finalize any further directions on procedural steps (as set out above).

"Veenstra J."

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