KING'S BENCH FOR SASKATCHEWAN

Citation: **2024 SKKB 71**

Date: **2024 04 23**
Docket: QBG-SA-00477-2007
Judicial Centre: Saskatoon

BETWEEN:

MICHAEL HOLMES & JOSEPH BICHEL

PLAINTIFFS/APPLICANTS

- and -

JASTEK MASTER BUILDER 2004 INC., JASTEK VALENCIA PROJECT INC., 585323 SASKATCHEWAN LTD.

DEFENDANTS/RESPONDENTS

- and -

RANDALL PICHLER, GDP CONSTRUCTION CORP., 626040 SASKATCHEWAN LTD., & GLENN PICHLER

NON-PARTIES

Counsel:

George A. Green, Curtis J. Onishenko and Allan J. Stonhouse — for the plaintiffs
Faith H.C. Baron — for the defendants

JUDGMENT — CLACKSON J.
April 23, 2024

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I. Introduction

[1] The plaintiffs represent the class of persons who agreed to purchase residential condominium units at 103 Wellman Crescent in Saskatoon. The condominium units were to be constructed by the defendants, collectively [Jastek].

[2] After applying for a building permit, Jastek advised the purchasers that it would not be proceeding with construction of the condominium buildings and purported to cancel the purchase agreements. Shortly thereafter the plaintiffs commenced class action proceedings against Jastek and others claiming specific performance of the purchase agreements and damages in lieu thereof.

[3] The plaintiffs' class action was certified on June 8, 2010. The causes of action alleging breach of contract, inducing a breach of contract, and conspiracy were determined to be common to all class members. The plaintiffs also alleged a breach of fiduciary duty but this cause of action was not certified as part of the class action. The amount of each class member's loss and whether punitive damages should be awarded to any of the class members were also not among the common issues in the class action. The plaintiffs' claim for specific performance of the purchase agreements was abandoned prior to the certificate hearing.

[4] In an unreported judgment, *Holmes v Jastek* (13 January 2017) Saskatoon, QBG-SA-00477-2007 (Sask QB), Mills J. found that Jastek Master Builder 2004 Inc. [Jastek MB] and Jastek Valencia Project Inc. [Valencia] were liable to the plaintiffs for breach of contract. He dismissed the causes of action grounded in conspiracy and inducing a breach of contract against all defendants. On appeal, *Holmes v Jastek Master Builder 2004 Inc.*, 2019 SKCA 132, the Court of Appeal overturned Justice Mills' decision regarding the liability of 585323 Saskatchewan Ltd. [585 SK] and found that 585 SK was also liable to the class members for the breach of contract

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by Jastek MB and Valencia. Justice Mills' dismissal of the remaining causes of action against all defendants was upheld.

[5] The class members now apply under Rules 7-2 and 7-5 of *The King's Bench Rules* for summary determination of the quantum of damages due to each of them as a result of Jastek's breach of contract and for punitive damages.

[6] In addition to the evidence filed on this application, Mills J. made factual findings in his decision of January 13, 2017 and certain additional factual circumstances were identified in the decision of the Court of Appeal. Many of these findings bear upon the issues in this application and will be considered in my analysis.

II. Background

[7] Jastek planned to develop a condominium project at 103 Wellman Crescent in Saskatoon by constructing two buildings; A and B, which contained 47 and 41 residential condominium units respectively [project]. At the time Jastek was not the owner of the land upon which the project would be built, but 585 SK possessed an option to purchase the land.

[8] Between late 2006 and early 2007, each of the claimants entered into an agreement with Jastek to purchase a condominium unit in building A. Possession dates varied between September 30, 2007 and January 25, 2008.

[9] In a letter dated February 12, 2007, Jastek informed the plaintiffs that the project was behind schedule and "it has become increasingly apparent that it will not be possible for us to obtain a building permit in time to allow the project to be completed on time." At the date of this letter, Jastek had yet to apply for a building permit.

[10] The February 12th letter also informed the plaintiffs that they must sign an amending agreement, which was attached to the letter, within three days or the

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purchase agreement would be terminated. In the case of the plaintiffs the amending agreement deferred possession of the plaintiffs' condominium unit from October 5, 2007 to November 15, 2007 and permitted Jastek to unilaterally extend the possession date by a further three months. The February 12th letter also informed the plaintiffs that all other purchasers must "consent" before the project would proceed. The plaintiffs signed the amending agreement and returned it within the time stipulated in the letter. Many other claimants also received the February 12th letter and signed a similar amending agreement, which resulted in deferral of their possession dates to either November 15, 2007 or November 30, 2007.

[11] The February 12th letter also informed the plaintiffs that Jastek would advise them "… the week of February 19, 2007 whether or not we received adequate consent to proceed with the development." Jastek never did so.

[12] With no sign of any construction activity at the project site and with knowledge gained from the City of Saskatoon that Jastek had yet to apply for a building permit, the plaintiff Joseph Bichel sent a letter to Jastek on March 1, 2007 asking when Jastek would be applying for a building permit.

[13] On March 9, 2007 Jastek submitted an application to the City for a building permit. The City identified concerns with the configuration of the proposed building and Jastek revised the building plans to allay the City's concerns.

[14] On March 29, 2007 the City sent a letter to Jastek advising that the building permit had been "taken out of circulation" due to concerns about water and sewer connections. Jastek did not respond to this letter nor contact the City to determine when the building permit might be issued.

[15] On March 30, 2007, Jastek's principal, Randy Pichler, concluded that Jastek would be unable to meet the extended possession dates set out in the amending

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agreements and directed Jastek's legal counsel to inform all purchasers that their purchase agreements were cancelled and to return their deposits.

[16] Glenn Pichler is Randy Pichler's brother. Both Glenn and Randy were engaged in condominium developments in Saskatoon through various companies. At paragraph 31 of the Court of Appeal decision Ottenbreit J.A. noted:

> [31] Glenn had been assisting Randy for free with various tasks on the Valencia Project, including preparing the building permit application. Sometime between March 30, 2007 and April 9, 2007, Randy told Glenn that he could not get a permit for the Valencia Project and was not going to proceed with it. Glenn contemplated building his own condominium project on the land and had discussions about that prospect with Randy.

[17] On April 9, 2007, citing Jastek's inability to obtain a building permit, Jastek's legal counsel wrote to all purchasers stating:

> The Agreement was conditional upon the Builder obtaining a building permit. Due to factors beyond the control of the Builder, the building permit had not been obtained. The Agreement was predicated on the timely issuance of a building permit. The Builder is no longer in a position to complete the project as originally planned due to the rising and uncontrollable construction and development costs or to deliver possession within the time line as set out in the Agreement.
>
> The condition to the Agreement is not satisfied and accordingly the Agreement is hereby terminated. We are returning herein your deposit in the amount of ....

[18] The purchase deposit of each claimant was returned to them with this letter. Jastek did not invoke the clause in the amending agreements permitting it to unilaterally extend possession dates for a further three months.

[19] On April 12, 2007, GDP Construction Corp. [GDP] was incorporated for the purpose of developing a condominium project at 103 Wellman Crescent consisting of two condominium buildings; A and B containing 47 and 41 residential condominium units respectively [Project Villagio]. The sole director and officer of GDP was Glenn

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Pichler. The only shareholder of GDP was 626040 Saskatchewan Ltd. [626 SK] of which Glenn Pichler was the sole director, officer, and shareholder.

[20] On April 16, 2007, Jastek cancelled its application for a building permit for the project. But for this letter the City would have approved Jastek's application for a building permit, but Jastek was not aware of that at the time.

[21] Also on April 16, 2007, the plaintiffs initiated this class action. In the statement of claim the plaintiffs sought specific performance of the purchase agreements and damages in lieu of specific performance. The statement of claim alleged that the plaintiffs were ready, willing, and able to fulfill the terms of the purchase agreement.

[22] On April 20, 2007, GDP applied for a building permit to construct the Villagio project. The City approved GDP's application on May 17, 2007, but GDP withdrew the application and resubmitted an application for a building permit for two buildings at the same location each containing 41 residential condominium units. This application was approved by the City on June 4, 2007.

[23] The Court of Appeal noted at paragraph 32 of its decision that after the City's June 4th approval, "585 SK Ltd. eventually exercised the option for 103 Wellman Crescent and transferred it to GDP. The purchase price for the land was paid by GDP."

[24] Starting at paragraph 33 of its decision the Court of Appeal further noted:

> [33] Building A of Villagio Court was completed in December 2008 and Building B was completed in June 2009. The units were sold between January 2009 and January 2012. It is not disputed that Glenn hired the same architect used by the Jastek parties and an additional engineering firm to assist with developing Villagio Court, and that he also used an altered version of the Valencia Project's designs.
>
> [34] At some point after the cancellation of the Valencia Project, a payment of approximately 500,000 was made by the GDP parties to

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> the Jastek parties (or Jastek Management) for services provided by the employees of Jastek Management for the development of Villagio Court. There is little evidence regarding the nature of this payment and other financial dealings between GDP and the Jastek parties and Jastek Management. No records of the labour or services provided by Jastek Management employees were kept.

[25] The plaintiffs' claim for specific performance was abandoned in April of 2010, shortly before the application for certification of the class action was heard.

III. Statement of issues

[26] Before embarking upon an analysis of the issues it should be noted that the plaintiffs' Notice of Application seeks a summary determination only with respect to an assessment of each claimant's damages and entitlement to costs. In their written brief and in oral argument the plaintiffs argued for a summary determination of the question of punitive damages and liability for breach of fiduciary duties. The defendants raised no objection to the inclusion of these issues and substantively addressed both issues in argument. Accordingly, for the sake of efficiency, I will also address these additional issues.

[27] Thus, the following issues are in play in this application:

1. Is summary judgment appropriate?
2. How are damages to be assessed?
3. Does an obligation to mitigate the loss arise?
4. Should damages be reduced to account for the expense of selling?
5. Are claimants Rob Chan and Liza Morrell bound by the terms of the releases they signed?
6. Should punitive damages be awarded?
7. What interest is payable on each award of damages?

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8. Costs.

IV. Analysis

1. Is summary judgment appropriate?

[28] Disposition of an application for summary judgment is addressed in Rule 7-5 of *The King's Bench Rules*, thus:

> **Disposition of application**
> **7-5**(1) The Court may grant summary judgment if:
>
> (a) the Court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or
>
> (b) the parties agree to have all or part of the claim determined by summary judgment and the Court is satisfied that it is appropriate to grant summary judgment.
>
> (2) In determining pursuant to clause (1)(a) whether there is a genuine issue requiring a trial, the Court:
>
> (a) shall consider the evidence submitted by the parties; and
>
> (b) may exercise any of the following powers for the purpose, unless it is in the interest of justice for those powers to be exercised only at a trial:
>
> (i) weighing the evidence;
>
> (ii) evaluating the credibility of a deponent;
>
> (iii) drawing any reasonable inference from the evidence.
>
> (3) For the purposes of exercising any of the powers set out in subrule (2), a judge may order that oral evidence be presented by one or more parties, with or without time limits on its presentation.
>
> (4) If the Court is satisfied that the only genuine issue is a question of law, the Court may determine the question and grant judgment accordingly.
>
> (5) If the Court is satisfied that the only genuine issue is the amount to which the applicant is entitled, the Court may order a trial of that issue or grant judgment with a reference or an accounting to determine the amount.

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> (6) If the Court is satisfied there are one or more genuine issues requiring a trial, the Court may nevertheless grant summary judgment with respect to any matters or issues the Court decides can and should be decided without further evidence.
>
> (7) If an application for summary judgment is dismissed, either in whole or in part, a judge may order the action, or the issues in the action not disposed of by summary judgment, to proceed to trial in the ordinary way.
>
> (8) If an application for summary judgment is dismissed, the applicant may not make a further application pursuant to rule 7-2 without leave of the Court.

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[29] In *Tchozewski v Lamontagne*, 2014 SKQB 71 at para 30, 440 Sask R 34, Barrington-Foote J. (as he was then) concisely summarized the steps to be taken and principles to be applied in assessing an application for summary judgment:

> [30] …
>
> 1. The court must first decide if there appears to be a genuine issue requiring a trial within the meaning of Rule 7-5(1)(a)), based solely on the evidence before the court, and without using the powers provided by Rule 7-5(2)(b) to weigh the evidence, evaluate credibility and draw inferences. (*Hryniak*, [2014 SCC 7] para. 66)
>
> 2. There will be no genuine issue requiring a trial if the judge is able to reach a fair and just determination on the merits based on the affidavit and other evidence. That will be so if the summary judgment process:
>
>   (a) allows the judge to make the necessary findings of fact;
>
>   (b) allows the judge to apply the law to the facts; and
>
>   (c) is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial. (*Hryniak*, para. 49)
>
> 3. The issue is not whether the summary judgment process is as thorough or the evidence is as complete as at trial. It is whether the judge is confident he or she can find the facts and apply the relevant legal principles so as to fairly resolve the dispute. If the judge has that confidence, proceeding to trial is generally not proportionate, timely or cost effective. A process that does not give the judge confidence in his or her

conclusions, on the other hand, is never proportionate. (*Hryniak*, paras. 50 and 57)

4. If there appears to be a genuine issue requiring a trial, the court should next determine if a trial can be avoided by using Rule 7-5(2)(b) powers to weigh evidence, evaluate credibility and draw inferences, and whether it is in the interests of justice that those powers be exercised only at trial. (*Hryniak*, para. 56)

5. In deciding whether there is a genuine issue requiring trial, and whether it is in the interests of justice to use the powers provided by Rule 7-5(2)(b) to avoid a trial, the court must consider the nature of the evidence and issues. It must also consider proportionality in the context of the litigation as a whole. The relevant factors may include, but are not limited to:

   (a) the complexity of the claim;

   (b) the amount at issue;

   (c) the importance of the issues;

   (d) the relative cost and speed of a summary judgment application, as compared to trial;

   (e) whether better evidence will be available at trial than on the application, and the nature and extent of the conflict in the evidence, including:

      (i) whether there is competing evidence from multiple witnesses, the evaluation of which would benefit from cross-examination;

      (ii) whether credibility determinations are at the heart of the issues to be determined; and

      (iii) whether credibility determinations are made more difficult by the shortage of reliable documentary yardsticks.

   (f) whether the court is able to fairly evaluate the evidence, including the extent to which it would assist the court to have evidence presented by way of a trial narrative, to hear and observe witnesses and to have the assistance of counsel in reviewing the facts and the law within the conventional trial process;

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> (g) whether summary judgment would resolve all claims against all parties, or whether a trial will be necessary in any event, raising, among other things, the possibility of duplicative proceedings or inconsistent findings of fact; and
>
> (h) whether the application could dispose of an important claim against a key party, thereby reducing cost and delay. (Rule 1-3, *Hryniak, supra*, paras. 58, 60 and 66, and *Pervez* [2013 SKQB 377], para. 48)
>
> 6. The court also has the discretion to permit a party to present oral evidence pursuant to Rule 7-5(3) if it would allow the court to reach a fair and just adjudication on the merits and is the proportionate course of action. (*Hryniak*, para. 63)

[30] In *Peter Ballantyne Cree Nation v Canada (Attorney General)*, 2016 SKCA 124 at paras 30 and 31, 485 Sask R 162, Herauf J.A. addressed the onus and shifting burden of proof in an application for summary judgment, thus:

> [30] Simply put, the onus and shifting burden of proof can be gleaned from the Rules. The applicant(s) for summary judgment … bear the evidentiary burden of showing there is no "genuine issue requiring a trial" (see Rule 7-2). The applicant must do so with supporting material or other evidence. In essence, an applicant for summary judgment must put its best foot forward. Failure to do so may result in the dismissal of the application since the court will assume that the record contains all the evidence the parties would present if there was a trial: see *Canadian Broadcasting Corporation v Whatcott*, 2016 SKCA 17 at paras 17 and 27, 395 DLR (4th) 278.
>
> [31] If the applicant for summary judgment discharges its evidentiary burden by proving there is no genuine issue which requires a trial, the burden shifts to the responding party to counter this by showing "there is a genuine issue requiring a trial" (see Rule 7-3(1)). Once again, the party responding to an application for summary judgment must file supporting affidavits or evidence in support of its position and put its best foot forward.

[31] In this case, Jastek takes no position with respect to the appropriateness of proceeding under Rule 7-5. From this circumstance I infer that Jastek is content to have the above-stated issues determined summarily if the plaintiffs can demonstrate that there are no genuine issues requiring a trial.

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[32] As will become apparent in the reasons that follow, it was unnecessary to resolve the conflicting opinion evidence as to the value of the condominium units, which was the only true controversy in the evidence, to quantify each claimant's loss. Nor did I find any real conflict in the evidence relevant to the other points in issue. Consequently, I am satisfied that I am able to make the necessary findings of fact on uncontested evidence to permit me to properly apply the law. I therefore conclude that a fair and just determination on the merits may be achieved without the need for a trial.

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2. How are damages to be assessed?

[33] The purpose of an award of damages for breach of contract is to restore to the innocent party the value of his bargain. That purpose cannot be achieved unless the innocent party is placed, so far as money can do, in the same position he would have occupied had the contract been performed in accordance with its terms. This principle is fundamental to the assessment of damages for breach of contract.

[34] Where, as here, the contract is one for the purchase and sale of real estate, the contract is performed when the contractual purchase price is paid and title to the property is transferred to the purchaser. In such contracts the purchaser's contractual expectation is that, regardless of the market value of the property at the time of transfer, she will receive title to the property upon payment of the agreed-upon purchase price. The vendor's contractual expectation is that, regardless of the market value of the property at the time of transfer, she will receive the agreed-upon purchase price and must transfer title of the property to the purchaser.

[35] Given the fundamental principle to be applied in assessing damages – to place the innocent party in the same position he would have occupied had the contract been performed – the proper measure of damages in a failed real estate transaction is the difference between the contractual purchase price and the value of the property at

the moment that performance under the contract is due. Therefore, in the context of a failed real estate transaction, the date upon which to assess the innocent party's damages is the date of breach, that is, when performance was due. This very point is made by the Ontario Court of Appeal in *Akelius Canada Ltd. v 2436196 Ontario Inc.*, 2022 ONCA 259 at paras 22 and 23, 161 OR (3d) 469:

> [22] It has long been the case in the real estate context that the starting point for the assessment of damages for breach of contract is the date of breach. This principle was set out in *100 Main Street Ltd. v. W.B. Sullivan Construction Ltd.* (1978), 20 O.R. (2d) 401 (Ont. CA) and reaffirmed in *Fleischer* [(2001), 56 OR (3d) 417]. In *Fleischer*, at para. 41, Laskin J.A. summarized the six propositions articulated by Morden J.A. in *Main Street* as follows:
>
> (1) The basic principle for assessing damages for breach of contract applies: the award of damages should put the injured party as nearly as possible in the position it would have been in had the contract been performed.
>
> (2) Ordinarily courts give effect to this principle by assessing damages at the date the contract was to be performed, the date of closing.
>
> (3) The court, however, may choose a date different from the date of closing depending on the context. Three important contextual considerations are the plaintiff's duty to take reasonable steps to avoid its loss, the nature of the property and the nature of the market.
>
> (4) Assessing damages at the date of closing may not fairly compensate an innocent vendor who makes reasonable efforts to resell in a falling market. In some cases, the nature of the property -- for example an apartment building-- hampers the vendor's ability to resell quickly. Thus, if the vendor takes reasonable steps to sell from the date of breach and resells the property in some reasonable time after the breach, the court may award the vendor damages equal to the difference between the contract price and the resale price, instead of the difference between the contract price and the fair market value on the date of closing.
>
> (5) Therefore, as a general rule, in a falling market the court should award the vendor damages equal to the difference between the contract price and the "highest price obtainable within a reasonable time after the contractual date for

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> completion following the making of reasonable efforts to sell the property commencing on that date"
>
> (6) Where, however, the vendor retains the property in order to speculate on the market, damages will be assessed at the date of closing.
>
> [23] As Laskin J.A. explains in *Fleischer*, at para. 42, "underlying these propositions is the simple notion of fairness." In determining the appropriate date for the assessment of damages, the court must have regard to what is fair in the circumstances.

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[36] Jastek accepts that damages are to be assessed as at the date of breach but contends that the date of breach in this case is not the date it was contractually bound to transfer title of each condominium unit (variously between September 30, 2007 and January 25, 2008) but rather April 9, 2007 when it terminated the purchase agreements.

[37] Unsurprisingly, the plaintiffs contend that, as is usually the case in failed real estate transactions, the date of breach is the date Jastek failed to deliver title to each condominium unit as agreed, that is, the date each sale transaction was to close.

Should the plaintiff's damages be assessed as at April 9, 2007?

[38] Jastek responds affirmatively to this question relying upon three alternative arguments:

1. Justice Mills determined that Jastek breached the agreement in failing to use its best efforts to obtain a building permit;
2. Jastek unilaterally terminated the purchase agreements via letter dated April 9, 2007; or
3. The plaintiffs admitted April 9, 2007 was the date upon which to assess damages.

[39] Before addressing each of these contentions I remind myself of the fundamental principle underlying the assessment of damages. Placed in the context of

these proceedings, that principle requires that each of the claimants be placed, so far as money can do, in the position he or she would have occupied had Jastek performed its contractual obligations. Had Jastek performed its contractual obligations each of the claimants would have received title to a condominium unit having a specific market value at the time of transfer.

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Did Justice Mills conclude that the date of breach was April 9, 2007?

[40] While Justice Mills concluded that Jastek breached the purchase agreements his decision does not specifically identify the date upon which the breach occurred. His findings respecting Jastek's breach are found at paragraphs 79 to 81 of his January 13, 2017 decision as follows:

> [79] Jastek Project Valencia Inc. had committed to construct the condominiums and sell them to the purchasers at a fixed price within a certain time frame. The duty of good faith should not allow Jastek Project Valencia Inc. to utilize the building permit application issue as an escape hatch.
>
> [80] Clearly by February 12, Jastek was reluctant to proceed with the project but did not cancel outright because it had not yet even submitted the building permit application and would be hard-pressed to justify that the appropriate efforts had been taken to obtain one to satisfy the condition imposed upon themselves.
>
> [81] I find that Jastek Valencia Project Inc. did not make its best efforts to obtain a building permit as required under the terms of the contract and therefore is in breach of it.

[41] Jastek contends that the finding in paragraph 81 is that Jastek breached the purchase agreements when it failed to use its best efforts to obtain a building permit. However, it must be noted that it was not a specific act or omission by Jastek that led Justice Mills to his conclusion but rather a series of acts and omissions spread over a few months preceding Jastek's letter of April 9, 2007. The judgment therefore does not identify a specific date as the "date of breach". Jastek argues that its letter of April 9,

2007 is the culmination of its failure to use best efforts and thus April 9, 2007 is the date of breach and thus the date upon which to assess the plaintiffs' damages.

[42] Paragraph 79 of the decision demonstrates that Justice Mills accepted that Jastek's contractual obligation was to construct and deliver the condominium units it had promised to the plaintiffs and concluded that Jastek could not use its own delinquency to avoid performing that obligation. Performance of that contractual obligation required Jastek to transfer title to finished condominium units. While certainly obtaining a building permit was necessary to Jastek meeting its contractual obligations, its failure to do so was not a breach of its contractual obligation. The breach occurred when Jastek failed to transfer title of finished condominium units to each of the claimants. Justice Mills clearly had in mind that Jastek's contractual obligation was transfer of title, not obtaining a building permit, and the finding in paragraph 81 must be understood in this context. In my view, the finding in paragraph 81 is that Jastek's failure to use best efforts to obtain a building permit resulted in a breach of the purchase agreements, which breach was Jastek's failure to deliver title to finished condominium units as agreed. On this analysis, the date of breach is the date each transaction was to close and that is the date upon which to assess damages.

[43] This conclusion is consistent with the fundamental principle underlying the assessment of damages. Each claimant's contractual expectation is to obtain title to a property with a particular value on the date title was to transfer. Assessing damages as at April 9, 2007 rather than the date title was to transfer, particularly in a rising market, would not put each claimant in the position he or she would have occupied had title been transferred to them when it was due. Instead, Jastek would retain that increased value of the condominium units for itself by the simple expedient of putting itself in a position where it was unable to perform the contract while the claimants would each receive damages in an amount that is less than the value of their bargain.

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[44] I am not persuaded that Justice Mills found or intended that the date of breach of the purchase agreements was any date other than the date the transactions were to close.

Is the date of breach the date Jastek purported to terminate the agreements: April 9, 2007?

[45] Jastek's letter of April 9, 2007 purports to unilaterally terminate all purchase agreements. Jastek contends that this letter determines the date of breach and damages are therefore to be assessed as at April 9, 2007. Jastek's argument on this point does not explain why its letter of April 9, 2007 constituted a breach of the agreements even though its performance was not due for many more months. Rather, Jastek's argument proceeds on the assumption that it's letter of April 9, 2007 was sufficient to bring the agreements to an end and thus establishes the date upon which Jastek breached the agreements. That assumption, in my view, is incorrect.

[46] Jastek's letter of April 9, 2007 is a textbook example of an anticipatory breach of contract. "Anticipatory breach occurs when a party, by express language or conduct, or as a matter of implication from what he has said or done, repudiates his contractual obligations before they fall due."; G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed (Toronto: Thomson Reuters, 2011) at 585. In its letter, Jastek advised all claimants that it would not be fulfilling its contractual obligations even though the time for fulfilling those obligations was six to nine months in the future.

[47] Faced with Jastek's anticipatory breach each claimant had an option: reject Jastek's repudiation and hold Jastek to the terms of the agreement, or accept the repudiation and bring the agreement to an end. The effect and consequence of repudiating a contract is explained in *Guarantee Co. of North America v Gordon Capital Corp.*, [1999] 3 SCR 423 at para 40, thus:

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> 40 … Contrary to rescission, which allows the rescinding party to treat the contract as if it were void *ab initio*, the effect of a repudiation depends on the election made by the non-repudiating party. If that party treats the contract as still being in full force and effect, the contract 'remains in being for the future on both sides. Each (party) has a right to sue for damages for *past or future breaches*' (emphasis in original): *Cheshire, Fifoot & Furmston's Law of Contract* (12th ed. 1991), by M.P. Furmston at p. 541. If, however, the non-repudiating party accepts the repudiation, the contract is terminated, and the parties are discharged from future obligations. Rights and obligations that have already matured are not extinguished. Furmston, *supra*, at pp. 543-44.

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[48] Repudiation of a contract before performance is due does not terminate the contract. If the repudiation is rejected the contract continues in force and all parties are bound to perform their obligations in accordance with its terms. An unaccepted repudiation made before performance is due has no impact on the rights of the parties to the contract. As Asquith L.J. noted in *Howard v Pickford Tool Co.*, [1951] 1 KB 417 (CA) at 421 "…it is a thing writ in water and of no value to anybody; it confers no legal rights of any sort or kind."

[49] On the other hand, if the innocent party accepts the repudiation, then the contract is at an end. In such case, the refusal to perform is accepted as a breach of the agreement and the date of breach is the date upon which the innocent party communicated his acceptance of the repudiation to the repudiating party; see *Cull v Heritage Mills Development Ltd.* (1974), 49 DLR (3d) 521 (WL) (Ont H Ct J) at para 65; *Dosanjh v Liang*, 2015 BCCA 18 at paras 54-55, 380 DLR (4th) 137; *Luhning v Hnatyshyn*, 2021 SKCA 121 at para 17 [*Luhning*]. If repudiation of a contract is made before performance is due and accepted by the innocent party, then the date of breach is the date acceptance is communicated to the repudiating party.

[50] Rejection or acceptance of a repudiation impacts the parties' obligations in another way as well. If the repudiation occurs before performance is due from the repudiating party and the innocent party rejects the repudiation then there is no breach,

the parties remain bound to perform the contract in accordance with its terms, and the innocent party is not obligated to mitigate his loss as no loss exists. If the innocent party accepts the repudiation there is a breach of the agreement and the innocent party has an immediate obligation to engage in reasonable mitigation of his loss.

[51] Applying these principles in the context of this case, Jastek's letter of April 9, 2007 did not terminate the purchase agreements and does not define the date upon which the agreements were breached. The date of breach can only be ascertained by determining whether any of the claimants communicated acceptance of the repudiation to Jastek.

What constitutes acceptance of a repudiation?

[52] An election to accept a repudiation of the contract must be clearly and unequivocally communicated to the repudiating party. If it is not, the contract will continue in full force and effect; see *Luhning* at paras 17-18; *Fram Elgin Mills 90 Inc. v Romandale Farms Limited*, 2021 ONCA 201 at para 259; *Brown v Belleville (City)*, 2013 ONCA 148 at para 45, 359 DLR (4th) 658 [*Brown*].

[53] The party asserting acceptance of the repudiation bears the burden of proving it; *Brown* at para 55.

[54] In *White v E.B.F. Manufacturing Ltd.*, 2005 NSCA 167, 239 NSR (2d) 270, the Nova Scotia Court of Appeal considered the question of what constitutes acceptance and concluded that the innocent party must, by word or deed, clearly and unequivocally communicate her acceptance of the repudiation. Later, in *Brown*, the Ontario Court of Appeal concluded that mere silence by the innocent party or a failure to encourage compliance with the contract does not serve to demonstrate the innocent party accepted the repudiation; *Brown* at para 51.

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Did any of the claimants accept Jastek's repudiation of their purchase agreement?

[55] Jastek's written brief does not address the principles of repudiation and anticipatory breach. In oral argument Jastek asserted that by accepting the return of their deposits and, in the case of some claimants, by re-entering the real estate market to locate another residential property the claimants all accepted Jastek's repudiation. I have difficulty with this proposition. The jurisprudence is clear, unless acceptance is clearly and unequivocally communicated to the repudiating party the contract continues in full force and effect. While all claimants acknowledge their purchase deposit was returned, I do not accept by that fact alone that each claimant clearly and unequivocally communicated acceptance of Jastek's repudiation. In fact, that inference is directly contradicted by the claim for specific performance in a statement of claim served on Jastek a month after the deposits were returned. In the statement of claim the plaintiffs assert that they are ready, willing, and able to complete the purchase agreements thus signaling to Jastek that the plaintiffs intended to hold Jastek to the terms of their agreements. Indeed, as counsel pointed out in argument, the claimants were anxious to complete the purchase agreements given that housing prices were rising rapidly at the time and affordability was a critical factor.

[56] As to Jastek's argument that some of the claimants re-entered the housing market soon after receiving Jastek's letter, I note that a total of ten claimants re-entered the Saskatoon housing market in the period between April 9, 2007 and the date their specific transaction with Jastek was due to close, as follows:

4. Shiv Adapa: "After the Agreement was terminated by Jastek, I was unable to purchase a comparable property. Prices were increasing around this time period, and I had to settle for an inferior property." Purchased a 25-year-old condominium in July of 2007.

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5. Joseph Bichel: “After the Agreement was terminated by Jastek, Michael Holmes and I were forced to purchase a different property in a hostile housing market.” Their offer to purchase was accepted April 24, 2007.

6. Robert Coad: “After Jastek terminated the Agreement, I tried hard to find an alternative property. My realtor stressed to me that I had ‘needed to get something’ in order to avoid being priced out of the market due to rising prices.” Purchased a smaller existing condominium in June of 2007

7. Genelle Hamoline (*nee* Godbout): “After my Agreement was terminated by Jastek, I was unable to purchase a comparable property in Saskatoon. Housing prices in Saskatoon were increasing substantially around this time period, and I could not afford to buy a comparable new property.” Ultimately this claimant purchased a one-half interest in a duplex property in Saskatoon in July of 2007.

8. Dustin Hicke: “After the Agreement was terminated by Jastek, I was unable to purchase a comparable property. Housing prices were increasing substantially around this time…. I delayed looking for a different condominium to purchase because I was still hoping that the Jastek project would proceed.” In his affidavit he states he purchased a replacement property in 2008 but this is likely a typographical error as the certificate of title exhibited to his affidavit identifies the date of purchase as July of 2007.

9. Mai Luong: “I had intended to purchase the Jastek Condo Unit as an investment.” Purchased an investment condominium in Fort

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Saskatchewan in September of 2007.

10. Curtis Osatchuk: “After the Agreement was terminated by Jastek, I was unable to purchase a comparable property. Housing prices were increasing substantially around this time period, and I had to settle for an inferior property…. When I received notice that the Agreement was terminated by Jastek, I only had a 3-day window to purchase a different property as I had to leave Saskatoon for a 3-week time period for work. I felt rushed to purchase a property before leaving Saskatoon to ensure that I secured a home before housing prices increased any further. If I did not act quickly, I was concerned that housing prices would increase to an extent that I would be unable to afford to purchase a property.” Purchased a “less-desirable” condominium elsewhere in Saskatoon in April of 2007.

11. Meghan Rauckman: “After the Agreement was terminated by Jastek, I was unable to purchase a comparable property. Housing prices were increasing significantly around this time period, and I had to settle for an inferior property.” Purchased a 25-year-old duplex unit elsewhere in Saskatoon in July 2007.

12. Erin Robertson: “After the Agreement was terminated by Jastek, I was unable to purchase a comparable property. Housing prices were increasing substantially around this time period, and I had to settle for an inferior property.” On May 21, 2007 agreed to purchase an older and smaller condominium elsewhere in Saskatoon.

13. Gina Smith: “After the Agreement was terminated by Jastek, I was

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> unable to purchase a comparable property." Purchased a one bedroom home in Saskatoon in September of 2007.

[57] There is no evidence that Jastek was aware of these efforts at the time. In fact, the affidavits filed by all claimants consistently state there was no communication between Jastek and any of the claimants after the letter of April 9, 2007. Given the affidavit evidence of the ten claimants described above, it appears that Jastek's precipitous cancellation of their purchase agreement forced each of them into a hostile housing market to locate alternative accommodations while they could still afford to do so. Nevertheless, the fact that each of these ten claimants entered the market in Saskatoon to find a replacement property and presumably would have used the refunded purchase deposit to do so demonstrates only that none of them were prepared to risk their opportunity to find housing for the chance that Jastek might change its mind and complete the project.

[58] It is Jastek's onus to demonstrate that its repudiation of each purchase agreement was accepted by the claimant to whom it relates. In my view the evidence upon which Jastek relies to demonstrate clear and unequivocal acceptance of its repudiation is insufficient for that purpose, and I conclude that Jastek has not demonstrated on a balance of probabilities that any of the claimants clearly and unequivocally communicated their acceptance of Jastek's repudiation.

[59] If I am wrong in that conclusion, I nonetheless conclude that the date upon which to assess each claimant's damages is not the date they accepted Jastek's repudiation, but the date when Jastek's performance under each purchase agreement was due. While acceptance of a repudiation made before performance is due may establish a "date of breach" it does not define the date upon which damages are to be assessed. Acceptance of a repudiation serves only to create an obligation to engage in reasonable mitigation even though performance under the contract is not yet due, which

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otherwise does not arise unless and until the party in breach fails to perform when performance is due. This point is made in *100 Main Street East Ltd. v W.B. Sullivan Construction Ltd.* (1978), 88 DLR (3d) 1 (WL) (Ont CA) at paras 57 and 58 [*100 Main Street*] of that decision where Morden J.A. concluded that:

> 57 …. Accepting that the basic principle of damages is that the plaintiff should be put in the position it would have been in if the contract had been performed it appears to me that even in the case of an accepted anticipatory repudiation the proper date for taking the market value should be as of the time fixed by the contract for completion, subject to the duty of the vendor to mitigate following acceptance of the repudiation. The approach which I adopt is set forth in an earlier part of *McGregor, supra* [McGregor on Damages, 13th ed (1972)], at p. 149:
>
> > Where a party to a contract repudiates it, the other party has an option to accept or not to accept the repudiation. If he does not accept it there is still no breach of contract, and the contract subsists for the benefit of both parties and no need to mitigate arises. On the other hand, if the repudiation is accepted this results in an anticipatory breach of contract in respect of which suit can be brought at once for damages, and, although the measure of damages is still prima facie assessed as from the date when the defendant ought to have performed the contract, this amount is subject to being cut down if the plaintiff fails to mitigate after his acceptance of the repudiation.
>
> 58 The fact that these principles are illustrated by the sale of goods cases referred to in McGregor on p. 150 in my view does not make them any the less applicable to contracts to sell land and McGregor does not restrict his statement of them to contracts relating to the sale of goods. The significance of the distinction in the dates relates solely to the incidence of the burdens of proof relating to damages and to mitigation, to which I shall be making reference.

[60] In my view, this conclusion is entirely in sync with the fundamental principle underlying the assessment of damages for breach of contract. The claimants are each entitled to damages equivalent to the value of their bargain. They will not receive that value if damages are assessed as at a date that is many months before the closing date – a date of Jastek's choosing. Assessing damages on this earlier date, particularly in a rising market, would confer the value of each claimant's bargain on

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Jastek, the party in breach. Jastek refused to be bound by its agreements, retained the properties, and could dispose of them on the closing date for the value the claimants would have received had Jastek not been in breach. Meanwhile the claimants receive only the lower market value of the property that existed on the date Jastek refused to be bound by the agreement.

[61] The conclusion in *100 Main Street* is also consistent with mitigation principles. A claimant who accepts an anticipatory breach has no expectation that the party in breach will render performance and convey the property to him. Knowing this the innocent party must immediately take reasonable steps to mitigate the loss arising from the failed performance. If the innocent party is unable to mitigate his loss he is entitled to the full value of his bargain calculated at the date performance was due. If he is successful in mitigating his loss by acquiring comparable property then the value of his loss is the difference, if any, between the contractual price and the price of the replacement property together with the difference in the market value of the replacement property and the contracted property as at the date of closing. In this latter instance, the claimant must provide evidence that the value of the replacement property is less at the closing date than the value of the property for which he originally contracted.

[62] Consequently, in my view whether a claimant accepted Jastek's repudiation of the purchase agreement impacts only upon that claimant's obligation to engage in reasonable mitigation. The date upon which damages are to be assessed remains the date of closing.

Did the claimants admit that April 9, 2007 is the date of breach?

[63] Jastek contends that regardless of the actual date of breach the plaintiffs are bound by an admission made in answer to an undertaking given during questioning

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in the class action. Specifically, when asked to provide their position with respect to damages the plaintiffs responded as follows:

> The damages suffered are reflected in the loss of the benefit from the rising property prices in Saskatoon that the Plaintiffs would have enjoyed had the contract not been cancelled. Further particulars of the quantification of damages will be provided in advance of the pre-trial.

Jastek sought clarification of this response as follows:

> We require full particulars of the quantification of damages at this time.
>
> The response to this undertaking states that the damages suffered are reflected in the loss of benefit from the rising property prices in Saskatoon. What time period are you alleging is at issue?

To which the plaintiffs replied:

> The Plaintiffs damages are not at issue in the common issues at trial. In any event the Plaintiffs individual quantification damages is the fair market value of the condominium they contracted with Jastek to purchase at the time of breach or shortly thereafter. An expert opinion will be provided pursuant to the rules of court opining on such fair market value in accordance with the Rules of Court prior to the pre-trial

[64] Jastek argues that this response is an admission by the plaintiffs that damages are to be assessed as at April 9, 2007, which Jastek regards as the date of breach. I am not persuaded by the argument.

[65] Absent from this exchange is any admission by the plaintiffs that the date of breach is April 9, 2007. What the plaintiffs meant when they used the phrase "at the time of breach" was never clarified. Jastek asserted in argument that until this application for summary judgment everyone was operating under the assumption that the date of breach was April 9, 2007. However, no evidence was offered from which I can draw that inference, but there is affidavit evidence that in 2015 and subsequently the plaintiffs' expert appraiser assessed the market value of the condominium units at

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various dates other than April 9, 2007, including the closing date of each transaction. In my view, Jastek simply assumed the plaintiffs meant April 9, 2007 when they used the phrase "the time of the breach" because that assumption accorded with Jastek's own belief about the date of breach. However, the phrase "at the time of breach" is equally consistent with the plaintiffs' position articulated on this application: "the time of the breach" is the date Jastek failed to perform its obligation to deliver title to the condominium unit identified in each purchase agreement.

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[66] In my view, the plaintiffs did not represent to Jastek that the proper date upon which to assess damages is April 9, 2007 and Jastek's contention on this issue must therefore be rejected.

Conclusion with respect to date upon which to assess damages

[67] I am not persuaded by Jastek's arguments. Jastek has not demonstrated on a balance of probabilities that any claimant clearly and unequivocally accepted its repudiation of that claimant's purchase agreement. Jastek therefore remained bound to perform each purchase agreement according to its terms, that is, to transfer title to the agreed upon condominium unit on the date of closing established in the agreement. Jastek failed to perform this obligation and is therefore liable to pay to each claimant the difference between the agreed upon purchase price and the market value of the condominium unit on the date Jastek's performance was due: the closing date of the transaction.

3. Does an obligation to mitigate the loss arise?

Principles of Mitigation

[68] In *Southcott Estates Inc. Toronto Catholic District School Board*, 2012 SCC 51, [2012] 2 SCR 675 [*Southcott*], the Supreme Court of Canada addressed the obligation to engage in reasonable mitigation. In that case the vendor School Board was

required to obtain certain approvals prior to the date of closing. The School Board was lackadaisical in seeking the approvals and six weeks before the closing date of the transaction purported to terminate the sale agreement on the basis that it was unable to obtain the necessary approvals. *Southcott* alleged the School Board had failed to use its best efforts as required by the agreement and sued for specific performance and damages in the alternative. While the focus of the Supreme Court's decision concerned how the obligation to mitigate meshes with a claim for specific performance, which issue is not before me, the decision provides a useful summary of mitigation principles, thus:

> [23] This Court in *Asamera Oil Corp. v. Seal Oil & General Corp.*, [1979] 1 S.C.R. 633, cited (at pp. 660-61) with approval the statement of Viscount Haldane L.C. in *British Westinghouse Electric and Manufacturing Co. v. Underground Electric Railways Company of London, Ltd.*, [1912] A.C. 673, at p. 689:
>
> > The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps.
>
> [24] …. Where it is alleged that the plaintiff has failed to mitigate, the burden of proof is on the defendant, who needs to prove both that the plaintiff has failed to make reasonable efforts to mitigate and that mitigation was possible (*Red Deer College v. Michaels*, [1976] 2 S.C.R. 324; *Asamera; Evans v. Teamsters Local Union No. 31*, 2008 SCC 20, [2008] 1 S.C.R. 661, at para. 30).
>
> [25] ... The valuation of damages is therefore a balancing process: as the Federal Court of Appeal stated in *Redpath Industries Ltd. v. Cisco (The)*, [1994] 2 F.C. 279, at p. 302: "The Court must make sure that the victim is compensated for his loss; but it must at the same time make sure that the wrongdoer is not abused." Mitigation is a doctrine based on fairness and common sense, which seeks to do justice between the parties in the particular circumstances of the case.

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[69] At its core the obligation to mitigate damages exists to balance the interests of the parties by ensuring that the party in breach is not abused by the plaintiff's unreasonable failure to limit her losses.

Are any of the claimants under an obligation to mitigate?

[70] It should firstly be noted that the claimants seek to recover as damages the difference between the price they each agreed to pay and the market value of the condominium unit they each would have received, assessed as at the date each transaction was to close.

[71] As explained earlier in these reasons, Jastek failed to demonstrate that any of the claimants accepted its repudiation of their agreement. Consequently, the purchase agreements remained in full force and effect and Jastek remained contractually obligated to perform as it had agreed. Jastek's failure to deliver possession of the condominium unit identified in each purchase agreement therefore constituted a breach of each purchase agreement entitling each claimant to damages. The closing date of each transaction is the date upon which each claimant became obligated to engage in reasonable mitigation. While housing prices were increasing at the time each transaction was to close, all claimants seek to have their damages assessed as at the date of closing. Thus, whether any of the claimants took reasonable steps to mitigate their loss after the date of closing is irrelevant to the assessment of damages.

What are the claimants' damages?

[72] The parties both engaged real estate appraisers to provide an opinion on the value of the finished condominium units at various dates. Jastek relies on the opinion of Todd Adams who prepared a written report dated May 13, 2020. Mr. Adams opines as to the market value of all condominium units on April 9, 2007 on the assumption that each condominium unit was complete and ready for occupancy on that

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date. Curiously, the fact that this assumption bears no relation to Jastek's actual contractual obligations did not cause Jastek to question the value of the opinion.

[73] The plaintiffs rely on the opinion of Kimberly Maber. Ms. Maber prepared two written reports on September 11, 2015 and November 13, 2020 respectively. Each report sets out her opinion concerning the market value of each condominium unit on various dates in 2007 and 2008 including the date upon which each purchase agreement was to close. Ms. Maber also prepared a third written report critiquing the opinion and methodology of Mr. Adams.

[74] Although the parties criticize the opposing expert for considering and failing to consider circumstances relating to the properties or the comparison properties that they believe impact the reliability of the opinion, neither party contests the qualifications of the opposing expert to offer an opinion on the market value of the condominium units. The evidence demonstrates that both appraisers are well qualified by training and experience to offer opinion evidence on the retrospective market value of the condominium units. Both appraisers have acknowledged their duty to the court to provide evidence that is impartial, independent and unbiased and the subject matter of the opinions is such that people of ordinary knowledge and experience are unlikely to draw the correct factual inference unless assisted by someone with specialized knowledge. I am therefore satisfied that the opinion evidence of both appraisers satisfies the criteria for admission set out in *R v Mohan*, [1994] 2 SCR 9, and is admissible. That said, Mr. Adams' opinion on market value is restricted to one date: April 9, 2007. As I have determined that the date of closing is the date upon which each claimant's loss is to be assessed, Mr. Adams' opinion does not assist me in quantifying each claimant's loss.

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[75] In her report of November 13, 2020, Ms. Maber opines about the market value of the condominium units at the closing date of each purchase agreement as follows:

Summary of Resdidential Condominium Unit Values Summarizing the Dates of Possession 103 Wellman Crescent, Saskatoon, SK		
Suite Number	**Final Value at Contractual Possession Date**	**Contractual Possession Date (Effective Dates)**
103	$249,000	November 15, 2007
104	$218,000	November 30, 2007
105	$216,000	December 20, 2007
107	$221,000	November 30, 2007
108	$243,000	November 30, 2007
109	$216,000	December 20, 2007
110	$221,000	November 15, 2007
111	$251,000	November 19, 2007
112	$254,000	November 15, 2007
114	$214,000	December 20, 2007
201	$222,000	December 20, 2007
202	$254,000	November 30, 2007
203	$254,000	November 30, 2007
204	$228,000	November 30, 2007
205	$224,000	December 20, 2007
206	$224,000	December 20, 2007
207	$231,000	November 15, 2007
208	$256,000	November 30, 2007
209	$228,000	January 25, 2008
210	$223,000	November 15, 2007
211	$254,000	November 15, 2007
212	$256,000	November 30, 2007
214	$228,000	November 30, 2007
215	$239,000	November 15, 2007
216	$224,000	December 20, 2007
217	$213,000	December 20, 2007
301	$229,000	November 15, 2007
302	$256,000	November 15, 2007
303	$256,000	November 15, 2007
304	$224,000	December 20, 2007
305	$233,000	November 30, 2007
306	$233,000	November 30, 2007
307	$233,000	November 30, 2007
308	$258,000	November 30, 2007
309	$230,000	November 30, 2007
310	$222,000	December 3, 2007
311	$255,000	November 19, 2007
312	$256,000	November 15, 2007
314	$233,000	November 15, 2007
315	$241,000	November 15, 2007
316	$230,000	December 3, 2007
317	$222,000	November 30, 2007

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[76] Jastek offers no critique of this assessment nor of Ms. Maber's methodology, other than her estimates might be slightly higher than they properly should be given the relative newness of the neighbourhood in which the condominiums were being constructed. As I stated, Mr. Adams offered no opinion on market value as at the date of closing. Ms. Maber's assessment of market value therefore stands alone and uncontested. I accept Ms. Maber's opinion as a reasonable estimate of the market value of each condominium unit on the date of closing.

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4. Should damages be reduced to account for the expense of selling?

[77] Jastek argues that the expense each claimant will incur when selling their condominium unit must be deducted from that claimant's damages. Jastek contends "that a true measure of damages is really about assessing the equity that a person has in any real property at any given time." [emphasis in original]. No authority is cited in support of this novel proposition. What is the "cost of selling"? Jastek simply assumes that the cost of selling includes real estate commissions, but it is not at all clear to me why that should be so. Many real estate transactions are completed without the involvement of a real estate agent. When are the costs of selling to be assessed? At the date of closing or some point after the date of closing? These questions demonstrate the shaky ground beneath Jastek's argument, but the fallacy in the argument is starkly revealed in the light cast by the fundamental principle underlying the assessment of damages for breach of contract: the innocent party is entitled, so far as money can do, to be put in the same position she would have occupied had the party in breach performed her obligations. While the innocent party is compensated in monetary terms, the money is only an approximation of the value lost. The innocent party has also lost the esthetic, prestige, and utility value of her bargain. The innocent party's loss is not simply the "equity" in the property. Assessing the innocent party's loss based only on

the amount she could receive if she sold the property does not compensate her for the value of her bargain. I am not persuaded by Jastek's argument on this point.

5. Are claimants Rob Chan and Liza Morrell bound by the terms of the releases they signed?

[78] The claimants Liza Morrell (unit #210) and Rob Chan (unit #309) each signed a release document in favour of Jastek and other defendants in the class action. Each release named the releasor specifically and contained the following terms:

> IN CONSIDERATION OF GDP Construction Corp. accepting an offer from the undersigned [identified as Liza Morrell or Rob Chan as the case may be] (the "Releasor") to purchase a condominium unit in a project known as being developed by GDP Construction Corp and known as Project Villagio, and more particularly described as unit 306, Building A, 103 Wellman Crescent, Saskatoon, Saskatchewan, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by the Releasor, the Releasor does hereby release, acquit, and forever discharge GDP Construction Corp., 626040 Saskatchewan Ltd., Glenn Pichler, Randall Pichler, 585323 Saskatchewan Ltd., Jastek Valencia Project Inc. and· Jastek Master Builder 2004 Inc. (the "Releasees"), of and from any and all claims, actions, causes of action, and demands of any nature or kind, including for interest, costs, expenses, benefits and compensation, and however arising, and whether known or unknown, arising from or in any way related to the cancellation of a certain condominium purchase agreement entered into between the Releasor (as purchaser) and Jastek Valencia Project Inc. (as vendor), for the purchase of a condominium unit in a condominium project known as Project Valencia, and whether made or brought by the Releasor on his own behalf, or with others, including as part of or as a member of a class of plaintiffs in a certain action brought under the *Class Actions Act* by Michael Holmes and Joseph Bichel (as plaintiffs) against the Releasees (as defendants) and currently pending in the Court of Queen's Bench for Saskatchewan, Judicial Centre of Saskatoon and known as Q.B No. 477 of 2007.

[79] Other than the name of the releasor, both releases contain precisely the same wording.

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Release by Liza Morrell

[80] It will be recalled that "Project Villagio" was constructed by Glenn Pichler and his companies on the same parcel of land upon which Project Valencia was to have been constructed. Project Valencia was Randy Pichler's endeavour while Project Villagio was Glenn Pichler's endeavour.

[81] In her affidavit sworn November 6, 2020, Ms. Morrell states that she purchased a condominium unit from GDP in Project Villagio in January of 2009 [GDP condo]. Later in the same affidavit she states that "[a]t the time I purchased the GDP Condo Unit, I signed [the release]". However, the release bearing Ms. Morrell's signature is dated March 17, 2009, not January of 2009. No explanation was offered for this discrepancy.

[82] In a subsequent affidavit, Ms. Morrell states that she received the release from her real estate agent in the evening of March 16, 2009 and was told she must sign it or she would not be able to purchase the GDP condo. She states that she read the release and signed it the next day believing she had no choice but to sign it.

[83] Ms. Morrell now attacks the enforceability of the release primarily on the basis that she received no consideration for signing it and therefore it is not a valid agreement. However, Ms. Morrell's contention is not supported by her evidence.

[84] There is no direct evidence as to the status of the sale transaction involving the GDP condo when the release was presented to Ms. Morrell on March 16, 2009. Ms. Morrell's evidence is that she was told she would not be permitted to purchase the GDP condo unless she signed the release. The release itself states that it is given in consideration of GDP accepting Ms. Morrell's offer to purchase the GDP condo. From this evidence I infer that execution of the release was a condition of the sale of the GDP condo. Consequently, consideration was given for the promise in the

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release: GDP's acceptance of Ms. Morrell's offer to purchase the GDP condo. The release is not invalid for lack of consideration.

[85] Ms. Morrell argues in the alternative that even if consideration was given for the release the terms of the release are unconscionable and therefore unenforceable. As *The Unconscionable Transactions Relief Act*, RSS 1978, c U-1, is not invoked, whether unconscionability exists falls to be determined under common law rules.

[86] The doctrine of unconscionability has two elements; ". . . inequality of bargaining power, stemming from some weakness or vulnerability affecting the claimant and . . . an improvident transaction": see *Uber Technologies Inc. v Heller*, 2020 SCC 16 at para 62, [2020] 2 SCR 118 [*Heller*]. The party alleging unconscionability bears the onus of proving both elements.

[87] "An inequality of bargaining power exists when one party cannot adequately protect their interests in the contracting process." (*Heller* at para 66). To demonstrate an inequality of bargaining power the party must demonstrate that the disadvantages that were working to impair that party's ability to freely negotiate, "… compromised [that] party's ability to understand or appreciate the meaning and significance of the contractual terms, or both." (*Heller* at para 68).

[88] An improvident bargain is one that, "… unduly advantages the stronger party or unduly disadvantages the more vulnerable…. Improvidence is measured at the time the contract is formed; unconscionability does not assist parties trying to 'escape from a contract when their circumstances are such that the agreement now works a hardship upon them'" (*Heller* at para 74).

[89] In *Input Capital Corp. v Gustafson*, 2021 SKCA 56 at paras 13 and 18, [2021] 4 WWR 604, the Saskatchewan Court of Appeal summarized the reasons in *Heller*, thus:

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> [13] In *Heller*, the Supreme Court held that the arbitration clause was void under the doctrine of unconscionability, thereby sustaining the result in *Heller* ONCA [2019 ONCA 1]. Under the reasons of the majority, the Supreme Court refashioned the language of the doctrine of unconscionability in some respects and clarified the framework for its application. Setting aside those aspects of *Heller* that have no bearing on this case or the Decision, the majority's reasons may be summarised in relevant terms as holding that:
>
> (a) the analytic framework for assessing whether a transaction is unconscionable is a two-part test that involves:
>
> (i) proof of inequality in the positions of the parties; and
>
> (ii) proof of an improvident bargain (at para 64);
>
> (b) unconscionability may be established without proof that the stronger party has knowingly taken advantage of the weaker (at para 82); and
>
> (c) courts must take a contextual approach to determining whether a transaction is unconscionable (at para 78).
>
> ….
>
> [18] Accordingly, although we may have expressed the applicable two-part test in different words, the analytic approach this Court undertook in the Decision (and that which was undertaken by the trial judge in the Trial Decision) did not differ in substance from the approach later confirmed by the Supreme Court in *Heller*. Putting the Decision in the language of Heller, we found that the proper analytic framework for assessing whether a transaction is unconscionable involves a two-part test that requires:
>
> (a) proof of inequality in the positions of the parties; and
>
> (b) proof of an improvident bargain.

[90] Ms. Morrell's evidence on either leg of the two-part test is thin. The evidence establishes that GDP is the developer of Project Villagio and Ms. Morrell is a purchaser of a condominium in that project. There is no other evidence to assist in assessing the relative strength of either party in the negotiation process. On the other hand, Ms. Morrell's evidence establishes that she understood she was being asked to sign a release, the terms of which would prevent her participation in the class proceedings then in motion. There is no evidence that Ms. Morrell's ability to choose

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was impeded. It was open to her to refuse to sign the release. Doing so may well have resulted in GDP refusing to enter into a sale agreement of the GDP condo, but that possibility did not place Ms. Morrell in an unequal bargaining position any more than it would any other purchaser of real estate who is confronted with a condition of sale they find unpalatable. On the evidence presented, I am not convinced there was an inequality of bargaining power between Ms. Morrell and GDP such that she could not adequately protect her interests in the bargaining process or that she lacked the ability to appreciate the nature and effect of the release. In my view, Ms. Morrell knew the consequences of signing the release and placed a higher value on acquiring the GDP condo than on her participation in the class action.

[91] Nor am I convinced that the release agreement was improvident. The class action had been commenced by the time the release was signed. At that time, the action had not been certified and thus the question of whether the action would be allowed to proceed and on what basis was unknown. Additionally, even if certified, the success of the action was uncertain as was the compensation, if any, each class member would receive if the action was successful. In my view, Ms. Morrell traded these uncertainties for the certainty of acquiring the GDP condo.

[92] On the question of the enforceability of the release Jastek argued that, although it is not a party to the release it is still entitled to shelter under its provisions. Curiously, the plaintiffs label this a “strawman issue” and decline to address it, stating their argument focuses on the lack of consideration for the release agreement. I have considered Jastek’s arguments on this issue and the authorities cited in support. I am in agreement with Jastek’s position and conclude that Jastek is entitled to the benefit of the release provisions as a shield to Ms. Morrell’s claim.

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Rob Chan

[93] Mr. Chan's argument on enforceability of the release he signed proceeds on a slightly different basis. Mr. Chan contends that he received no consideration for the promise in the release because the release erroneously identifies him personally as the purchaser of the GDP condo rather than the true purchaser, 101006525 Saskatchewan Ltd. [101 SK]. He argues that as he received no benefit from the purchase of the GDP condo there is no consideration for his personal promise in the release. Regrettably, Jastek did not address this argument.

[94] Mr. Chan signed the release on January 28, 2009. In his affidavit sworn October 8, 2020, he states that when 101 SK, of which he is president, a director, and a shareholder, "… sought to purchase the GDP Condo Unit, I was advised by my realtor, Lionel Wong, that GDP would not allow 101 SK to purchase the Condo unit unless I signed a release." In a supplemental affidavit sworn February 15, 2022 he states the release "was part of the documents I was told I needed to sign for the company to purchase the condo from GDP."

[95] I am not persuaded by Mr. Chan's argument. I infer from his evidence that execution of the release was required before GDP would accept 101 SK's offer to purchase the GDP condo. A promise is supported by consideration when the party receiving the promise gives something of value in return. Mr. Chan is a director and shareholder of 101 SK and thus is in a position to benefit from its capital acquisitions. Mr. Chan relinquished his interest in the class action in exchange for a promise from GDP to permit his corporation to make this capital acquisition. GDP therefore provided value to Mr. Chan in exchange for his promise to release the defendants in the class action. Mr. Chan specifically acknowledged the sufficiency of that consideration when he signed the release.

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[96] Mr. Chan also argues in the alternative that the release he signed is unconscionable. Little evidence is offered in support of this assertion other than the implications of the release were not explained to him and he was not told to consult a lawyer. In my view this evidence falls well short of the sort of evidence needed to demonstrate an inequality in bargaining positions, that Mr. Chan did not and could not understand the nature and effect of the document he signed, or, considering the uncertainties of the class action, that the release agreement was improvident. I therefore cannot conclude on the evidence that the release agreement is unconscionable. I am satisfied that Mr. Chan remains bound by the terms of the release and, for the reasons previously stated, Jastek is entitled to shelter under its provisions.

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6. Should punitive damages be awarded?

Can punitive damages be awarded in cases of breach of contract?

[97] In *Vorvis v Insurance Corporation of British Columbia*, [1989] 1 SCR 1085 (QL) [*Vorvis*], McIntyre J., writing on behalf of the majority, concluded that punitive damages may be awarded in cases of breach of contract provided the defendant's conduct is itself an actionable wrong and causative of the plaintiff's injury. Thus, if the defendant's conduct is independently actionable and causes or contributes to the plaintiff's loss then punitive damages may be awarded; see *Vorvis* at para 25.

[98] The plaintiffs argue that an independent actionable wrong is demonstrated in this case in two ways: 1) Jastek owed a fiduciary duty to each of the claimants and breached that duty; and 2) Jastek breached its duty of honest performance of the purchase agreements.

[99] Jastek contends that in the circumstances of this case it did not owe a fiduciary duty to any of the claimants and therefore cannot be found in breach of that duty. With respect to the allegation of breach of the duty of honest performance, Jastek

points out that the time for advancing alternate theories for liability ended when Justice Mills heard and determined the issue of liability for all class members. Breach of a duty of honest performance was not advanced then and cannot be advanced now.

The duty of honest performance

[100] In *Bhasin v Hrynew*, 2014 SCC 71, [2014] 3 SCR 494 [*Bhasin*], the Supreme Court of Canada recognized that good faith contractual performance is a general organizing principle of the common law of contract. As a manifestation of that general organizing principle the Court further recognized that there is a common law duty, applicable to all contracts, obligating the parties to act honestly in the performance of their contractual obligations (*Bhasin* at para 33). "This means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract." (*Bhasin* at para 73).

Did Jastek breach the duty of honest performance?

[101] The decision in *Bhasin* makes it clear: Jastek owed the claimants a duty of honest performance.

[102] Given the findings of Mills J. there can be no question that Jastek sought to avoid performance of the purchase agreements by invoking the building permit escape clause. Jastek knowingly led the claimants to believe that it could not obtain a building permit in a timely manner due to circumstances beyond its control while failing to make any effort, much less best efforts, to obtain a building permit. There can be no question but that Jastek deliberately misled the claimants as to the status of the building permit and thus breached its duty of honest performance.

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Is a breach of the duty of honest performance an independent actionable wrong?

[103] Writing for the majority in *Whiten v Pilot Insurance Co.*, 2002 SCC 18 at para 82, [2002] 1 SCR 595 [*Whiten*], Binnie J. noted that while an independent actionable wrong is required to ground a claim for punitive damages, "… it can be found in breach of a distinct and separate contractual provision or other duty such as a fiduciary obligation."

[104] Jastek was found to have failed to use it best efforts to secure a building permit and was thus in breach of the agreements. Jastek's attempt to beguile the claimants into believing that it could not obtain a building permit through no fault of its own was a breach of a distinct and separate contractual obligation – the duty of honest performance. Breach of a duty of honest performance is an actionable wrong giving rise to damages: see *Concord Pacific Acquisitions Inc. v Oei*, 2019 BCSC 1190 at para 496, 97 BLR (5th) 199. Consequently, I am satisfied that Jastek's breach of the duty of honest performance is an independent actionable wrong sufficient to ground a claim for punitive damages.

Are the plaintiffs barred from relying on the breach of the duty of honest performance to ground a claim for punitive damages?

[105] Jastek argues that the time for advancing alternate theories of liability for breach of contract has passed. It contends that Mills J. made a determination of liability that did not include breach of a duty of honest performance and thus the plaintiffs may not rely on breach of this duty to ground a claim for punitive damages. I am not convinced by this argument. The issue of punitive damages was specifically excluded from the common issues of the class action because Justice Mills believed that the entitlement to punitive damages was more properly decided based on the circumstances of each case. While Mills J. noted that punitive damages would not be available unless one or more of the common issues were decided in favour of the plaintiffs, I do not read

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this explanation as synonymous with the proposition that unless his findings on the common issues ground a claim for punitive damages then punitive damages are absolutely foreclosed. Justice Mills specifically declined to include the entitlement to punitive damages among the common issues. It would be anomalous to exclude punitive damages from the common issues while at the same time foreclosing entitlement to punitive damages unless findings are made on the common issues supporting entitlement.

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[106] Accordingly, I do not see Justice Mills' decision as in any way limiting the bases upon which any claimant may advance a claim for punitive damages and reject Jastek's contention otherwise.

Did Jastek owe a fiduciary duty to any of the claimants?

[107] While this was a pleaded issue in the class action, it was determined not to be a common issue and thus was not resolved in the proceedings before Mills J.

[108] The question of whether a condominium developer enters into a fiduciary relationship with unit owners was considered in *York Condominium Corp. No. 167 v Newrey Holdings Ltd.* (1981), 122 DLR (3d) 280 (Ont CA) [*Newrey*], leave to appeal refused. Writing for a unanimous court Wilson J.A. concluded that where the developer begins to sell units before a condominium plan is registered the developer has committed itself to the character of the project as a condominium. Each purchaser acquires an equitable interest in the unit purchased and common elements, even though there is no registered condominium plan in existence, and the developer …

> … has also placed himself in a fiduciary relationship to the unit purchasers not only with respect to their units but also with respect to the interests appurtenant thereto. He therefore holds the property in trust for the unit purchasers, present and prospective, and for the condominium corporation which will come into being upon registration of the declaration. I believe he is under a duty to protect the interests of all unit owners, present and prospective, and cannot

> put his own interests in conflict with theirs even although he himself continues to be an owner as long as any units remain unsold.

[109] In *Condominium Plan No. 86-S-36901 (Owners) v Remai Construction (1981) Inc.* (1991), [1992] 1 WWR 66 at para 28 (Sask CA) [*Remai Construction*], the Court considered the principles espoused in *Newrey* regarding the developer's fiduciary relationship with the unit owners and the condominium corporation and stated:

> [28] The principles stated in *Frontenac* [(1975), 11 OR (2d) 649] and *Newrey* apply in Saskatchewan. The trial judge erred in finding that they could not apply because the Ontario legislation imposed a "declaration regime" as opposed to the "registration regime" in the Saskatchewan legislation. The fact that the Ontario legislation makes provision for registration of a declaration describing the condominium project as well as registration of the condominium plan itself was irrelevant to the ratio decidendi in both *Frontenac* and *Newrey*. In *Frontenac*, the declaration was silent as to the superintendent's suite. The decision was not founded on any representation or statement in the declaration, or any failure to make disclosure in the declaration, or any failure to comply with the legislation. In *Newrey*, the declaration had not even been registered at the relevant times, but it was also silent as to the janitor's suite except for an incidental reference to it in a bylaw governing access to common areas, and this was only one of many factors which led the court to conclude that there was proven a common intention that the suite be a part of the common area. Since the judgments in *Frontenac* and *Newrey* depended in no way upon the legislative provisions providing for declarations, the fact of whether or not declarations were registered, or upon the contents of them, but rather on a combination of the common law respecting fiduciaries and the scheme of the condominium legislation in general, there is no reason that the principles stated should not be found to apply in this jurisdiction.

[110] Jastek argues that the *Remai Construction* case is distinguishable from the current case because the developer's role in *Remai Construction* had progressed beyond that of a "simple vendor" of the condominium units to control of the board of the condominium corporation, which power the developer used to benefit itself at the expense of the unitholders. Jastek contends it was only ever a "simple vendor" of the condominium units.

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[111] The Court of Appeal makes no such distinction in the *Remai Construction* case. The Court's determination in that case flows from the premise established in *Newrey*, which the Court adopted as the law in Saskatchewan: when the developer sells a condominium unit, irrespective of whether the units are physically in existence or the condominium plan is registered, the developer commits itself to the character of the project as condominium project and places itself in a fiduciary relationship with the unit purchaser, not only with respect to the unit sold but also with respect to the interests appurtenant to that unit.

[112] I am satisfied that Jastek entered into a fiduciary relationship with each of the claimants on the date it agreed to sell a condominium unit in the Valencia Project to that claimant. From that point forward Jastek held the project property in trust for the unit owners and could not put its interests in conflict with theirs. And yet it did, thus breaching its fiduciary obligations to the claimants and placing each of them in an inferior position to its own. That breach is an actionable wrong independent of the breach of contract itself and is sufficient to ground a claim for punitive damages.

What are punitive damages and when are they appropriate?

[113] While punitive damages are paid to the plaintiff, they are awarded not as compensation to the plaintiff but to punish the defendant. Punitive damages express the Court's outrage at the defendant's egregious conduct and are imposed to deter the defendant and others from such conduct in the future. In *Lynch v Hashemian*, 2006 SKCA 126 at para 18, 289 Sask R 105, the Saskatchewan Court of Appeal summarized the nature and purpose of punitive damages:

> [18] The objective of punitive damages is to punish the defendant rather than compensate a plaintiff, whose just compensation will already have been assessed. They are confined to exceptional cases where the defendant's conduct was so malicious, oppressive and high-handed that it offends the court's sense of decency. See *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130. In *Whiten v. Pilot Insurance Co.*,

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> *supra*, at paras. 100-101, Binnie J. enunciated a test of "rationality", explaining that punitive damages should only be awarded where the misconduct of the defendant is so outrageous that punitive damages are rationally required to act as deterrence in the future. The test of rationality is to be applied both to the question of the availability of punitive damages and to the quantum. Thus, for example, if compensatory damages are adequate to punish and deter the defendant, punitive damages will not be awarded. In this sense, the quantum of punitive damages serves as a "topping up" award to achieve the goals of punitive damages, and, in particular, deterrence both general and specific.

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[114] In *Whiten* at para 94, the Supreme Court of Canada set out a helpful summary of the points to be considered by the trier of fact in assessing whether punitive damages should be awarded and if so in what amount:

> 94 … (1) Punitive damages are very much the exception rather than the rule, (2) imposed *only* if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour. (3) Where they are awarded, punitive damages should be assessed in an amount reasonably proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant, (4) having regard to any other fines or penalties suffered by the defendant for the misconduct in question. (5) Punitive damages are generally given only where the misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation. (6) Their purpose is not to compensate the plaintiff, but (7) to give a defendant his or her just desert (retribution), to deter the defendant and others from similar misconduct in the future (deterrence), and to mark the community's collective condemnation (denunciation) of what has happened. (8) Punitive damages are awarded *only* where compensatory damages, which to some extent are punitive, are insufficient to accomplish these objectives, and (9) they are given in an amount that is no greater than necessary to rationally accomplish their purpose. (10) While normally the state would be the recipient of any fine or penalty for misconduct, the plaintiff will keep punitive damages as a "windfall" in addition to compensatory damages. (11) Judges and juries in our system have usually found that moderate awards of punitive damages, which inevitably carry a stigma in the broader community, are generally sufficient.

Did Jastek engage in high-handed, malicious, arbitrary or highly reprehensible misconduct?

[115] It is important to note that neither Randy Pichler, Glenn Pichler nor any of Glenn Pichler's corporations are in jeopardy in these proceedings. All causes of action against these persons and entities were dismissed by Mills J. and that dismissal was upheld on appeal.

[116] As well, the plaintiffs took pains to categorize the condominium units in the Valencia Project as "starter condos", implying that the purchasers of such condominiums were all somehow more vulnerable to Jastek's conduct. There is absolutely no evidence before me that the condominium units were so designated by Jastek or anyone else and I reject the premise inherent in the plaintiffs' use of that phrase. I do not fault counsel for the fearless advancement of this client's rights in the best possible light, but hyperbole and invective with no grounding in the facts is not helpful.

[117] The plaintiffs contend that "…Jastek's conduct was oppressive and incredibility high-handed and deceptive." They argue that Jastek "blatantly" breached the terms of the purchase agreements, "with the sole view of maximizing their own financial gain" and with "utter disregard" for how the plaintiffs would be impacted. However, the plaintiffs' evidence offers nothing in the way of facts to support this hyperbole. The affidavits of each claimant address only the impact Jastek's letter of April 9, 2007 had on the housing plans of each going forward. All claimants admit this knowledge would not have been known to Jastek at the time. Indeed, aside from the letters described below there was no direct communication between Jastek and any of the claimants. In this factual desert, I am left to determine whether Jastek's conduct rose to a level worthy of sanction by reference to the facts as found by Mills J. and subsequently by the Court of Appeal.

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[118] A review of those findings reveals that in early January of 2007 Jastek was alive to the fact that the residential condominium market in Saskatoon was heating up. The sale prices Jastek had received for the condominium units it sold to the claimants were now below market value and that trend looked like it would continue. Indeed, by February of 2007 Jastek had raised the starting price of the Valencia condominiums by $20,000.

[119] On February 12, 2007 Jastek warned the claimants that it was behind on development of the project, set up the possibility that it may not be possible to obtain a building permit in time to complete the project, and directed that each claimant sign an amending agreement changing the possession date and granting Jastek the unilateral right to defer possession for a further three months in its discretion. On the evidence, Mills J. concluded that Jastek was reluctant to proceed with the project at this time and inferred that Jastek sent the letter hoping to bring the purchaser agreements to an end while laying the fault for termination at the feet of the claimants. While he made no specific finding as to Jastek's objectives at the time, Mills J. observed that had the tactic been successful Jastek would have been free to continue development of the project without any obligation to the claimants. In other words, Jastek would be free to develop the project as a clean slate. However, that did not occur. All of the claimants completed and returned the amendment within the tight deadline set by Jastek and Jastek was forced to move forward with the project.

[120] An application for a building permit for the project was submitted to the City of Saskatoon on March 9, 2007. This was two days after Jastek received the building drawings from the project architect. Jastek advised the claimants of the application for a building permit on March 14, 2007. The project architect was instructed in August of 2006 to prepare building drawings for the project. The delay in securing the drawings between January of 2007 and March 7, 2009 is not explained in

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the evidence. Mills J. attributed the delay to a lack of effort by Jastek. The Court of Appeal labelled this lack of effort, “astounding”.

[121] The next communication that occurred between Jastek and the claimants was Jastek’s letter of April 9, 2007 terminating the purchase agreements. Jastek purported to rely on the condition in each purchase agreement that the agreement was conditional upon Jastek obtaining a building permit. Jastek asserted that the inability to obtain a building permit was beyond its control, but given the factual findings of Mills J., it can be concluded that this statement was untrue and Jastek was aware of its untruth when the statement was made.

[122] However, the lack of a building permit was merely a convenient contractual hook upon which to hang termination. The true reasons for the termination of the purchase agreements can be discerned later in the letter where Jastek states that it was no longer in a position to complete the project due to rising and uncontrollable construction and development costs. The upward pressure on real estate prices was also exerting upward pressure on construction costs. Jastek’s profit margin on the project was under threat, perhaps even of being wiped out entirely. Evidence in Randy Pichler’s affidavit sworn July 20, 2021 identifies that the Valencia project ultimately recorded a loss of $88,000.

[123] Factual findings by the Court of Appeal indicate that sometime before the letter of April 9, 2007, Randy Pichler informed his brother, Glenn Pichler, that he could not obtain a building permit for the Valencia project and would be abandoning it. They discussed the possibility that Glenn would build his own condominium project on the site.

[124] Within a week of this letter Jastek cancelled its application for a building permit. Rapidly thereafter Glenn Pichler and his companies applied for and received a

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building permit for a strikingly similar project on the same construction site but then withdrew that application and resubmitted an application for a similar but smaller project. Ultimately 585 SK exercised its option to purchase 103 Wellman Crescent and transferred it to GDP. GDP paid the purchase price of the land.

[125] At some point after the Valencia Project was cancelled, approximately $500,000 was paid to Jastek by GDP ostensibly for services by Jastek's personnel in developing the project. The plaintiffs made much of this payment in their conspiracy argument before Mills J. referring to it as a "kickback" from Glenn to Randy in exchange for the Valencia project. That argument was rejected by Mills J. There is nothing in the evidence to suggest this payment occurred for reasons other than business.

[126] These are the facts underlying the claim for punitive damages. While they demonstrate that Jastek acted intentionally to prevent financial loss to itself I cannot find in these circumstances the sort of "… high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour."

[127] Even if I am wrong in that conclusion I am not convinced that an award of punitive damages is necessary in the circumstances of this case. In my view, the need for retribution, denunciation and deterrence are all sufficiently achieved by the award of compensatory damages, which will be approximately $3,264,000 plus pre-judgment interest. I again note that Jastek sustained an $88,000 operational loss with respect to this project which, with the addition of compensatory damages, will now be an operational loss of approximately $3.34 million. In my view that is sufficient to satisfy the need for retribution, denunciation and both general and specific deterrence of Jastek's conduct.

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7. What interest is payable on each award of damages?

[128] The plaintiffs contend that it is just for the Court to exercise its discretion under s. 5(3) of *The Pre-Judgment Interest Act*, SS 1984-85-86, c P-22.2 [*PJIA*], to award 6% simple pre-judgment interest to each claimant. Section 5(3) of the *PJIA* provides:

> **5** …
>
> (3) If it is proven to the satisfaction of the court that it is just to do so having regard to the circumstances, the court may, with respect to the whole or any part of the amount for which judgment is given, refuse to award interest under this Act or award interest under this Act at a rate or for a period, or both, other than a rate or period determined pursuant to section 6.

[129] The plaintiffs' argument on this issue is curious as it is advanced only if the Court does not award punitive damages. Presumably, had the Court been inclined to award punitive damages the plaintiffs would have been content with pre-judgment interest calculated under section 6 of *PJIA*. The plaintiffs' approach to the issue of enhanced interest suggests that if punitive damages are not awarded then it would be "just" to award interest at a higher rate. The logic of this proposition is shaky. The Court has determined that the compensation awarded is sufficient to achieve the objectives of punitive damages and thus no award of punitive damages is necessary. To award interest at a higher rate because no punitive damages were awarded flies directly in the face of that analysis.

[130] Furthermore, the percentage rate of interest proposed by the plaintiffs bears no relation to the contractual obligations Jastek undertook in each purchase agreement. While the claimants each agreed to 6% simple interest to be charged on their past due accounts, I am at a loss to discern how that translates into a similar obligation on Jastek.

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[131] Lastly, the plaintiffs' request for this relief is unsupported by any evidence from which the Court may determine whether deviation from pre-judgment interest under section 6 would be just in the circumstances.

[132] Without an evidentiary basis for doing so I decline to exercise my discretion under s. 5(3) and award interest to each claimant in accordance with section 6 of *PJIA*.

8. Costs

[133] All parties are content to have the question of costs of this application reserved to be spoken to at a later date. Costs are accordingly reserved to be spoken to.

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V. Conclusion

[134] Each claimant is entitled to enter judgment against Jastek as follows:

Claimant	Unit Number	Purchase price	Value at possession date	Judgment
Boyanchuk, Felecia	103	$ 146,999.00	$ 249,000.00	$ 102,001.00
Anderson, Karen	104	$ 142,299.00	$ 218,000.00	$ 75,701.00
Robertson	105	$ 152,164.00	$ 216,000.00	$ 63,836.00
Tabachniuk, Darlene	107	$ 147,299.00	$ 221,000.00	$ 73,701.00
Lee	108	$ 158,999.00	$ 243,000.00	$ 84,001.00
Palen	109	$ 151,894.00	$ 216,000.00	$ 64,106.00
Bichel, Joe	110	$ 136,939.00	$ 221,000.00	$ 84,061.00
Hamoline, Genelle	111	$ 146,999.00	$ 251,000.00	$ 104,001.00
Raukman	112	$ 150,039.00	$ 254,000.00	$ 103,961.00
Smith	114	$ 149,394.00	$ 214,000.00	$ 64,606.00
Xu	201	$ 153,299.00	$ 222,000.00	$ 68,701.00
JJCH Holdings	202	$ 160,264.74	$ 254,000.00	$ 93,735.26
JJCH Holdings	203	$ 160,264.74	$ 254,000.00	$ 93,735.26
Jaremko	204	$ 150,939.00	$ 228,000.00	$ 77,061.00
Wong	205	$ 167,992.19	$ 224,000.00	$ 56,007.81
Ruskin	206	$ 153,299.00	$ 224,000.00	$ 70,701.00
Coad	207	$ 152,664.00	$ 231,000.00	$ 78,336.00
Adapa, Shiv	208	$ 153,134.00	$ 256,000.00	$ 102,866.00
Luong	209	$ 145,299.00	$ 228,000.00	$ 82,701.00
Hicke, Wade	211	$ 150,039.00	$ 254,000.00	$ 103,961.00
Tabachniuk, Michael	212	$ 156,999.00	$ 256,000.00	$ 99,001.00
Jachyra-Cmolassowski	214	$ 150,164.00	$ 228,000.00	$ 77,836.00
Gorieu, Tyler	215	$ 153,469.00	$ 239,000.00	$ 85,531.00
Kawa, Lucja	216	$ 150,939.00	$ 224,000.00	$ 73,061.00
Osatchuk	217	$ 145,299.00	$ 213,000.00	$ 67,701.00
Jones	302	$ 154,499.00	$ 256,000.00	$ 101,501.00
Murphy	303	$ 154,039.00	$ 256,000.00	$ 101,961.00
Shemko	304	$ 153,439.00	$ 224,000.00	$ 70,561.00
Baier (orig Brose)	305	$ 152,069.00	$ 233,000.00	$ 80,931.00
Baier, Robert	306	$ 152,844.00	$ 233,000.00	$ 80,156.00
Baier & Brose	307	$ 156,023.21	$ 233,000.00	$ 76,976.79
Adapa, Phani	308	$ 155,634.00	$ 258,000.00	$ 102,366.00
Harstad	310	$ 139,299.00	$ 222,000.00	$ 82,701.00
Melrose	311	$ 151,999.00	$ 255,000.00	$ 103,001.00
Hicke, Dustin	312	$ 152,539.00	$ 256,000.00	$ 103,461.00
Onasanya	314	$ 155,839.56	$ 233,000.00	$ 77,160.44
Onwuama	315	$ 161,862.29	$ 241,000.00	$ 79,137.71
Harstad	316	$ 150,873.36	$ 230,000.00	$ 79,126.64
Johnson	317	$ 148,069.00	$ 222,000.00	$ 73,931.00
				$ 3,263,881.91

together with pre-judgment interest on such amount in accordance with section 6 of *PJIA*.

"C.D. CLACKSON" J.
C.D. CLACKSON

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