

CANADA / JUDGMENT

AD General Partner Inc. v. Gill

2018 BCCA 436

COURT

British Columbia Court of Appeal

DECIDED

21 November 2018

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2018 BCCA 436 AD General Partner Inc. v. Gill

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

AD General Partner Inc. v. Gill,

2018 BCCA 436

Date: 20181121

Docket: CA45198

Between:

AD General Partner Inc., 0927566 B.C. Ltd. and

Illahae Dairy Farms Ltd.

Appellants

(Plaintiffs)

And

Julie Maureen Gill and Kalvan Gill,

also known as Kalvinder Gill, also known as Calvin Gill

Respondents

(Defendants)

Before:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Groberman

The Honourable Mr. Justice Goepel

On appeal from: An order of the Supreme Court of British Columbia, dated June 15, 2018 (AD General Partner Inc. v. Gill, 2018 BCSC 497, Vancouver Docket No. S175024).

Counsel for the Appellant:

D.P. Church, Q.C.

I.G. Schildt

Counsel for the Respondent:

D.B. Kirkham, Q.C.

D.W. Burnett, Q.C.

Place and Date of Hearing:

Vancouver, British Columbia

September 13 and 14, 2018

Place and Date of Judgment:

Vancouver, British Columbia

November 21, 2018

Written Reasons by:

The Honourable Mr. Justice Groberman

Concurred in by:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Goepel

Summary:

A contract gave the defendants an option to purchase the plaintiffs' shares in a company that owned land. It allowed the defendants to place fill on the land prior to exercising the option, but required that they first obtain a development permit. A clause in the agreement rendered the option void if the defendants breached their contractual obligations. In the area where the land was located, no development permit was, in fact, available for merely placing fill. The defendants obtained a soil deposit permit and placed fill on the land. The plaintiffs sought a declaration that the placement of fill rendered the option void. The defendants counterclaimed for an order that the plaintiffs transfer their shares to them on payment of the option price. The judge agreed that the defendants breached a covenant by placing fill but declined to declare the option void. Instead, he relieved the defendants from forfeiture, relying on the Law and Equity Act. He also declined to grant the relief sought in the counterclaim, considering it premature and

unnecessary. Both parties appealed. Held: Appeal and cross appeal dismissed. In allowing fill to be deposited on the land, the defendants acted outside the provisions of the contract. They committed a trespass, but their actions did not constitute a breach of their contractual obligations. In the result, the option was not rendered void. The judge was correct in characterizing the counterclaim as premature and unnecessary.

Reasons for Judgment of the Honourable Mr. Justice Groberman:

- [1] This appeal concerns an option agreement (the "Agreement") under which Julie Gill acquired the right to purchase the shares of Illahae Dairy Farms Ltd. ("Illahae") from 0927566 B.C. Ltd. (also known as "AM Properties").
- [2] The plaintiffs (which I will refer to collectively as the "Aquilini companies") sought a declaration that the Gills had engaged in conduct that violated the Agreement and disentitled Ms. Gill from exercising the option. The Gills counterclaimed, seeking an order that AM Properties transfer the shares to Ms. Gill upon payment of the purchase price under the Agreement.
- [3] The judge found that the Gills' conduct breached the Agreement, and engaged a clause in the Agreement that would nullify the option. He declined to give effect to the clause, however, relying on s. 24 of the Law and Equity Act, R.S.B.C. 1996, c. 253 to grant relief from forfeiture.
- [4] The judge also declined to grant the order sought by the Gills in their counterclaim, finding that it was premature to do so and, in any event, unnecessary.
- [5] The Aquilini companies appealed from the judge's decision to relieve Ms. Gill from forfeiture, and the Gills brought a cross appeal.
- [6] While my reasoning differs from that of the trial judge, I agree with his disposition of the case, and would dismiss both the appeal and the cross appeal.

The Agreement

- [7] Illahae owns a 26.75 acre parcel of land in the District of Mission. In the 1990s, the shares in Illahae were owned by Ms. Gill, though it appears that Mr. Gill directed the company's operations.
- [8] In the early 2000s, Mr. Gill began to make efforts to have the parcel removed from the Agricultural Land Reserve as a first step toward developing it. He continued to work toward that goal over the course of several years, and engaged the assistance of the Aquilini family and its companies. In August 2011, the Agricultural Land Commission gave Mr. Gill conditional approval[1] to remove the land from the Reserve. He was, however, deeply in debt. He says that companies controlled by the Aquilini family were, at that time, "[taking] steps to seize control of the [Illahae] property". Mr. Gill arranged for Ms. Gill to sell her shares in Illahae to an Aquilini company[2].

- [9] In 2013, at Mr. Gill's behest, Ms. Gill commenced an action against AD General Partner Inc. and Luigi Aquilini (among others), alleging that the share transfer had been a product of coercion and intimidation. On February 4, 2016, the action was settled by way of the Agreement.
- [10] The parties to the Agreement were the Gills, AD General Partner Inc., and AM Properties[3]. The Agreement gives Ms. Gill the option to re-purchase the Illahae shares at a specified price up until February 4, 2019. During the option period, she is required to make annual payments of "interest" to Illahae in an amount equal to 4.25% of the option price. She is also required to pay Illahae amounts equal to the property taxes and insurance on the property. The Agreement provides that the Aquilini companies will authorize Mr. Gill to act as Illahae's agent in dealing with rezoning issues and requires Ms. Gill to pay all costs and fees required "to deal with the Municipality of Mission."
- [11] The key provision of the Agreement, for the purposes of this appeal, is clause 4.1(l), dealing with the deposit of fill on the land. I reproduce that clause, along with other clauses that are relevant to the appeal:

2. Definitions

2.3 "Contaminants" means those substances, pollutants, waste and special waste which presently are defined as hazardous, toxic, or a threat to public health or to the Environment under any applicable Environmental Laws, including, without limitation, any radioactive materials, urea formaldehyde insulation, asbestos or polychlorinated biphenyls (PCBs).

2.4 "Environment" means all components of the earth, including without limitation, all layers of the atmosphere, air, land (including all underground spaces and cavities and all lands submerged under water), soil, water (including surface and underground water), organic and inorganic matter and living organisms, and interacting natural systems that include the components referred to this definition.

2.5 "Environmental Laws" means any Laws relating, in whole or in part, to the protection and enhancement of the Environment, occupational safety, product liability, public health, public safety and transportation of dangerous goods, including the Environmental and Land Use Act (British Columbia), the Environmental Assessment Act (British Columbia), the Environmental Management Act (British Columbia), the Health Act (British Columbia), the Transportation of Dangerous Goods Act (British Columbia), the Water Act (British Columbia), the Canadian Environmental Protection Act, 1999 (Canada), the Fisheries Act (Canada) and the Transportation Act of Dangerous Goods Act, 1992 (Canada).

2.9 "Laws" means all constitutions, treaties, laws, statutes, codes, ordinances, orders, decrees, rules, regulations and municipal by-laws, whether domestic, foreign or international, any judgments, orders, writs, injunctions, decisions, rulings, decrees, and awards of any governmental body, any published policies or guidelines of any governmental body and including, without limitation, any principles of common law and equity.

4. Option to Purchase

4.1 Illahae hereby grants to Julie the sole, exclusive and irrevocable option to purchase the Shares (the "Option") free and clear of all liens, charges and encumbrances on the following terms and conditions:

- j. During the term of this Option, Julie and her agents shall have the full right and liberty of ingress, egress and regress, in, upon and under the Lands provided that no damage shall be done to the Lands. If any damage is done to the Lands, Julie shall indemnify and save harmless Illahae therefrom and shall at her own cost and expense immediately rectify same.
- l. During the term of this Option, fill may be placed upon the Lands, provided a development permit is authorised in advance by the Municipality of Mission, the Directors [of Illahae] are provided notice of the application for and issuance of such permit, and provide their approval, not be unreasonably withheld, and the fill meets all environmental and quality standards required by law and section 6.1 of this Agreement. Any amounts received on account of the placement of fill on the Lands must be paid directly to Illahae by the person depositing the fill.

5. Default

5.1 (a) [I]f Julie fails to observe or perform any of her covenants and obligations, or breaches any of her covenants and obligations, then the Option and this Agreement shall be null and void and no longer binding upon the parties and Illahae shall be entitled to retain all amounts, including the Option Payments that It has received.

6. Environmental

6.1 During the term of the Option Julie shall:

- (a) Not use or permit to be used all or any part of the Lands for the sale, storage, manufacture, disposal, use, or any other dealing with any Contaminants;
- (b) Strictly comply and cause any person for whom she is in law responsible to comply with all Environmental Laws;
- (c) Promptly notify Illahae in writing of any release of any Contaminants or any other occurrence or condition at the Lands or any adjacent property which would contaminate the Lands or subject Illahae to any fine, penalties, orders, investigations or proceedings under Environment Laws.

6.2 Julie shall keep the Lands clean and tidy and in good order. Upon written notice to Julie from Illahae or to Illahae from any lawful authority having jurisdiction, Julie shall forthwith, at her expense, abate any nuisance caused by Julie or arising directly or indirectly out of the use of the Lands.

Discussions Concerning Fill

[12] As the land lies within the Fraser Valley flood plain, fill needed to be deposited on the land before it could be developed. It is the depositing of fill that resulted in the controversy currently before the Court.

[13] I will outline, in some detail, the parties' communications respecting the deposit of fill because they illustrate the nature of the dispute, the concerns that each exhibited, and the modification of their positions over time. In the end, however, this case does not turn on those communications.

[14] During the final drafting of the Agreement the Gills raised the issue of fill. On February 4, 2016, their solicitor asked the Aquilini companies' solicitor to add a clause to the Agreement permitting fill to be placed on the property:

The Gills have indicated that without the ability to apply for a development permit, and if the development permit is granted to start filling the land, they are unwilling to sign the settlement agreements. If your client is going to refuse to allow the Gills to obtain the development permits and start filling the land until the option is exercised, can you let us know. Your email mentioned "if permitting is approved and AD General approves it, then fill could be deposited". If your client is willing to have the Gills apply for the development permit and then let the fill process start, subject to quality and environmental controls this could be added to the agreement.

Your client will understand that the fill would add to the value of the land and would meet environmental standards.

[15] The Aquilini companies' solicitor drafted clause 4.1(l) to meet the Gills' concerns and the Agreement was then finalized.

[16] In March 2016, Mr. Gill sought permission from the Aquilini companies to "clean" the property and prepare it for the deposit of fill by removing blackberry bushes and saplings. Renzo Barazzuol, the representative of the Aquilini companies, granted permission to clean the property, but was clear that he was not authorizing fill, saying:

Please ensure that no fill or any other substances are placed on the property. This requires our specific pre-approval on a case by case basis.

[17] Mr. Gill confirmed that he would not place fill:

[A]s far as any fill placed on the property I would never do that with out a specific request from [sic] you and we are far from ready for that .

[18] On May 5, 2016, Mr. Gill advised that the cleanup was underway and sought approval to level fill that had previously been placed on the property. He assured Mr. Barazzuol that "no new soil [would] be brought in". Mr. Barazzuol did not respond so Mr. Gill repeated the request in an email on May 9, 2016. On May 11, Mr. Barazzuol responded, saying:

We are ok with you cleaning up the fill that has been previously deposited. No new fill can be added.

[19] Mr. Gill reiterated that no new fill would be placed:

[T]hank you for your reply[.] [P]ositively no new fill would be added without your prior permission, and the district approval as well, which will be asked for at a later date, and a new request at that time .

[20] On May 27, 2017, Mr. Gill sought clarification of the provision of the agreement that required companies depositing fill to pay Illahae directly:

[G]oing over my option agreement, it states when we have permits, and your permission, all fill funds will be paid directly from the fill [company] to Illahae[.] [F]or clarity purposes for me that would come off of the mtge [sic] amount owing on [Illahae] by us to you in the end[.] [I]s that correct[?]

[21] Mr. Barazzuol replied that the funds would go to Illahae right away, and would not be credited to the Gills. On July 6, 2016, Mr. Gill proposed an alternative:

I have been talking with two separate trucking [companies] hauling clean structural fill[.] [T]he usual practice is the truckers pay between thirty to forty dollars per load to dump on site and prior to dumping all of the topsoil has to be removed and set aside for neighbouring farms[:] an expensive proposition and would require purchasing a cat and an excavator as well as two employees[.] [T]he other and best way [-] in my opinion only and asking your permission[-] is to let the trucking [company] remove the topsoil aside and [store it] and let them fill and place the fill at no cost but also no dump fee[.] I think this would be a very clean deal[.] I would not want to be responsible and counting loads and collecting funds . [A]gain I need your permission . [I]t's fine with the [Agricultural Land Commission] and the [District of Mission, from] which we would get the required permits .

[22] On July 11, 2016, Mr. Barazzuol replied, "Let's hold off on that. We are concerned with the quality of fill and the monitoring".

[23] In late July, 2016, Mr. Gill sought written authorisation from the Aquilini companies to act as Illahae's agent in dealing with the Municipality of Mission to seek rezoning of the property. On August 8, 2016, in correspondence dealing primarily with that request, Mr. Barazzuol again addressed the issue of fill. He said:

[W]ith respect to your fill requests we do not want any fill placed on the site. Once Julie exercises her option, you can do as you wish.

[24] Mr. Gill was taken aback by the correspondence, as he continued to be of the view that the deposit of fill should commence before the exercise of the option. On the same day he responded:

I am working hard to get you paid as soon as possible[.] [P]art of getting you paid is also getting to fill the land[.] [A]s it states in our agreement section [4.1(l),] fill may be place on the land subject to the district [T]ony [P]ellet[t] [, the Regional Planner with the Agricultural Land Commission, is] on side to fill the land as stated and permission [is] not to be unreasonably [withheld]. Filling the land makes it much more valuable and gives you better security[.] [A]s far as quality of fill the land will be spotless . [Y]ou would have no valid reason not to see it filled in my opinion and no one does it cleaner than me[.] Even [T]ony [P]ellet[t] would tell you that I done the north side spotless and the [Agricultural Land Commission] and the [District of Mission] were very pleased .

[25] The evidence on this appeal does not indicate that there was any direct response to this email. In October, 2016, Mr. Barazzuol ceased to act as the Aquilini companies' representative with respect to the property, and Geoffrey Hughes assumed that role.

[26] On November 22, 2016, Mr. Gill informed Mr. Hughes that he would be going ahead with geotechnical testing, to conform with the requirements of the District of Mission prior to "getting fill permits".

[27] Mr. Gill engaged the services of Slade Dyer & Associates to assist him in dealing with the District. Mr. Dyer learned that it was not, in fact, necessary to obtain a Development Permit under the Local Government Act, R.S.B.C. 2015, c. 1 to deposit fill, due to the location of the property. Instead, only a Soil Deposit Permit under the district's Soil Deposit Bylaw was required. In the result, Mr. Dyer and Mr. Gill took the position that the requirements set out in clause 4.1(l) were inapplicable and that Mr. Gill could, once he obtained a Soil Deposit Permit, deposit fill on the property.

[28] On January 24, 2017, Mr. Gill wrote to Mr. Hughes to advise that he intended to begin stripping the topsoil immediately and then commence filling as soon as the District issued a permit. The following day, he sent another email to Mr. Hughes and to Matthew Singerman, General Counsel for the Aquilini companies, in which he stated:

[R]egarding your soil concerns, [I] am in total compliance with the terms of the option agreement[.] [A]s to the fill, this letter is to advise you, [I] will be starting to fill as soon as the permits are issued, and [I] will promptly send you a copy[.] [I]n the [meantime,] to strip soil for fill deposit no permit is required, as long as we stay [within] the boundaries provided by Tony Pellett of the ALC .

[29] In response to that email and other communications, Mr. Singerman advised that he needed to "reconfirm the requirements of the agreement". He next wrote to Mr. Gill on March 6, 2017, saying:

I find your and [Mr. Dyer's] interpretation of the settlement agreement incorrect and, frankly, extremely disconcerting. Accordingly, I wish to remind you of your obligations under the following Sections of our settlement agreement .:

· 4.1(l) - while you may place fill on the Lands (if they meet all environmental/quality standards required by law and Section 6.1), you are in any event first required to obtain a development permit (and/or[4] other required permits) and Illahae directors' approval in advance of placing any such fill, with all proceeds of same to be paid directly to Illahae (i.e., all monies must be paid to us) .

[30] Mr. Gill responded with an email stating that the Gills would do nothing unless they received approval from Mr. Hughes. He also attached a letter in which he explained his interpretation of the agreement:

I agree that Section 4.1(l) makes reference to a development permit but there is no reference to "and/or other required permits" as a condition of filling the land. Section 4.1(l) stipulates that "fill may be placed upon the lands, provided a development permit is authorized in advance by the Municipality of Mission." A development permit is defined under the Local Government Act as "a permit under section 490". A development permit is not required for soils deposit in the District of Mission. However for purposes of filling the land, as allowed, a Soils Deposit Permit under Bylaw 5506-2015 must be applied for and issued by the District of Mission. Such an application has been submitted to the District and a copy provided to Geoff Hughes as required under the Settlement Agreement.

As noted above a development permit is not required for the placement of fill upon the land. As such:

- A development permit cannot be authorized in advance by the Municipality of Mission; as such an application cannot be made.
- The Directors cannot be provided notice of a development permit application; as such an application cannot be made.
- The Directors cannot be provided with notice of issuance of such a permit; as such a permit cannot be issued.
- There is no, and cannot be, a development permit for the Directors to provide their approval for.

Notwithstanding the above, I appreciate the intent of Section 4.1(l) and upon issuance of the Soil Deposit Permit; I will provide a copy to Geoff Hughes for his input and comments, prior to placing any fill on this property.

[31] Mr. Gill noted the comment in Mr. Singerman's letter with respect to direct payments to Illahae for any fill and agreed that such payment was required.

[32] In the meantime, Mr. Gill had applied for a Soil Deposit Permit on March 2, 2017. On March 10, 2017, he forwarded a copy of the application to Mr. Hughes. On April 3, 2017, he provided copies of additional correspondence between himself and the District of Mission to Mr. Singerman. On April 28, 2017, Mr. Gill again wrote to Mr. Singerman:

I have had my engineer send in a fill approval plan to the [D]istrict[.] [T]o keep you current[, I] will send you a copy if its approved, or would you like to see the anticipated application[?] [A]s per out agreement[,] fill can be place on the site, with prior permits from the [D]istrict and approvals in place[,] which I am now waiting for[.]

[P]lease give me you[r] instructions of what you would like, and also your approval, which will not be [un]reasonably withheld[.] [O]nce you have the permits, there will be geotechnical reports from the source of fill material to be placed on site.

[33] Mr. Singerman responded:

Please send us the fill approval plan now[,] in advance of the District's approval, as well as any other supporting reports and other documents (including any geotechnical reports from the source of the fill material), so that we can review and consider.

[34] Mr. Gill forwarded two documents on May 1, 2017, indicating that they constituted the application for a permit. The District of Mission granted Mr. Gill a Soil Deposit Permit on May 11, 2017. Mr. Gill forwarded copies to the Aquilini Companies' representative on May 12, saying that the Gills would "be starting to fill as soon as possible".

The Fill Operations

[35] On May 18, 2017, Mr. Gill provided the Aquilini companies' representative with photos that showed that fill operations had begun.

[36] Normally, persons who deposit fill on a property pay a dumping fee to the landowner. On the other hand, the process of stripping topsoil from property and stockpiling it can be costly and landowners usually have to pay for those services. Mr. Gill engaged contractors who agreed to strip and stockpile the topsoil on the land without charge, in exchange for being allowed to deposit the fill without payment. While the parties do not agree on what amount would normally be charged for accepting the deposit of clean fill, estimates ranging from thirty to sixty dollars per load are mentioned in the evidence.

[37] On May 19, Mr. Singerman wrote to the Gills, alleging that the stripping of soil on the land constituted damage, contrary to clause 4.1(j) of the Agreement, and that the placing of fill violated clause 4.1(l). The letter demanded that the Gills terminate the stripping and filling operations, and threatened legal action. Mr. Gill took the position that there was no violation of the Agreement.

[38] The plaintiffs commenced the current legal proceedings on May 26, 2017, and applied for an interlocutory injunction to prohibit further depositing of fill on the property. On June 29, 2017, in reasons indexed as 2017 BCSC 1099, the Supreme Court dismissed the application. On June 30, 2017, at the behest of the Aquilini companies, the District of Mission suspended the Soil Deposit Permit. On July 11, 2017, after reviewing a copy of the Supreme Court decision on the injunction application, the District lifted the suspension.

- [39] It appears that the fill placed on the property was free of "Contaminants" and that its placement on the land did not violate any "Environmental Laws" as those terms are defined in the Agreement. Indeed, the appellants do not raise any issues regarding the quality of the fill or the fill operations.

The Decision Under Appeal

- [40] The first issue considered by the trial judge was whether clause 4.1(l) of the Agreement authorized the Gills to place fill on the land. He considered that the main question was whether the Soil Deposit permit was a "development permit".
- [41] The judge received expert evidence tendered on behalf of the Aquilini companies to the effect that the term "development permit" is a term of art. He quoted the affidavit evidence at para. 64 of his reasons for judgment:

In the context of local government development approvals practices and development industry parlance in BC, the term "development permit" in BC is not a generic reference to "some sort of permit that might be needed to allow development". It is a very specific term that would be known to developers, development consultants, and others in the industry, and it is clearly distinct from building permits, fill permits, highway access permits, or other approvals that may be needed for a project to proceed.

- [42] The judge accepted that evidence as accurate. He then considered whether a Soil Deposit Permit is a "development permit" as that term is defined in the Local Government Act, and found that it is not. Finally, the judge considered whether the accepted use of the term "development permit" could be applied to clause 4.1(l) without absurdity. He found that it could, as it was technically possible for the Gills to obtain a development permit for construction of a development on the property, though such a permit would not be available merely for the deposit of fill.
- [43] The Gills argued that it made no sense to interpret the Agreement as requiring them to obtain a development permit for construction of structures before being allowed to deposit fill, but the judge disagreed:
- [79] The Gills argue that it [would] make no sense for the fill clause to be interpreted as referring to a development permit to construct on the property, because the Gills are not entitled to build prior to exercising the option. I do not agree. The option agreement allows Mr. Gill to take certain steps at his cost before the option is exercised. The risk of those steps being wasted in the event the option is not exercised is inherent in the arrangement; it was a risk the Gills were prepared to assume. In other words, there is nothing absurd in the contract allowing Mr. Gill to apply for a development permit in advance of exercising the option so that he could move the project forward quickly after exercising the option. Presumably that is why he was willing to fill the land.

- [44] Having found that the Gills were not entitled to deposit fill without having obtained a development permit, the judge found it unnecessary to address the question of whether they breached the requirement to obtain approval from the directors of Illahae to deposit fill.
- [45] One other issue arose with respect to the deposit of the fill. Clause 4.1(l) of the Agreement states that "[a]ny amounts received on account of the placement of fill on the Lands must be paid directly to Illahae by the person depositing the fill." The judge found that, in allowing contractors to deposit fill in exchange for stripping and stockpiling topsoil, the Gills were in breach of that clause:
- [91] [C]ause 4.1(l) clearly provides for fill payments to be paid directly to Illahae. There is nothing in the agreement that allows Mr. Gill to receive the benefit of the topsoil payment up-front instead of having the amounts adjusted at closing as provided for [in] clause 2.8, which defines land costs and provides for adjustments made for expenses and credits from the date of the agreement to the date of closing.
- [92] I therefore find that the Gills breached this term of the contract.
- [46] The judge found that these breaches engaged clause 5.1(a) of the Agreement. He found that the effect of clause 5.1(a) was to make strict compliance with the Agreement essential to the exercise of the option. He considered that, on the face of it, the Gills' breach of their covenants disentitled them from exercising the option.
- [47] He went on, however, to consider s. 24 of the Law and Equity Act, R.S.B.C. 1996, c. 253, which gives the Supreme Court broad powers to relieve a party from penalties and forfeitures. Citing *Sechelt Golf & Country Club Ltd. v. District of Sechelt*, 2012 BCSC 1105, the judge found s. 24 to be applicable, and exercised his discretion in favour of the Gills. He noted that nothing done by the Gills constituted damage to the property.
- [48] Having found that the plaintiffs were not entitled to the declaration they sought, the judge turned to consider the relief claimed by the Gills in their counterclaim. He declined to grant the relief:
- [138] [T]he Gills in their counterclaim ask for an order requiring the plaintiffs to transfer the shares upon the purchase price being tendered. I do not think this order is necessary. Moreover, it is premature because the option is still extant and an order should not be made that might prevent the plaintiffs from raising matters that might occur.

Issues on the Appeal and Cross Appeal

- [49] A number of issues are raised by the parties in the appeal and cross appeal:
- The Gills contend that the judge erred in finding that they breached the Agreement
 - The Aquilini companies contend that the judge erred in relieving the Gills from forfeiture
 - The Gills argue that the judge should have granted the relief sought in their counterclaim.

- [50] As I will explain, I am of the view that the Gills did not breach the Agreement in ways that engaged clause 5.1(a). Accordingly, it is not necessary to address the question of whether relief from forfeiture is available in the circumstances of this case.
- [51] I am also of the view that the judge did not err in refusing the relief sought in the counterclaim. Ms. Gill has not yet tendered the option price, and we do not know what events might occur before she does so. Further, there is no reason to expect that the Aquilini companies will fail to respect the terms of the option agreement. Accordingly, the judge was correct in finding that the order sought in the counterclaim was premature and unnecessary.

The Interpretation of the Phrase "Development Permit"

- [52] Over the course of this dispute, the parties have put forward three different possible interpretations of the phrase "development permit" in clause 4.1(l). Before it became apparent that there was no municipal requirement for one, both parties appear to have taken the position that the phrase referred to a development permit under the Local Government Act authorizing the deposit of fill on the property.
- [53] The parties later learned that no such permit was necessary or available in respect of the property. Eventually, the parties settled on the positions that they argued on the summary trial and on appeal. The Aquilini companies argued that "development permit" meant a development permit in respect of proposed construction on the land. The Gills argued that the words "development permit" were used in a generic sense to describe any municipal permits that might be required for the deposit of fill. They contended, in the result, that the Soil Deposit Permit they obtained was the "development permit" described in clause 4.1(l).
- [54] The judge ultimately adopted the Aquilini companies' position. For reasons that follow, it is my opinion that he erred in doing so. Instead, the agreement was properly interpreted the way it was originally understood by the parties: as a development permit to deposit fill on the land.
- [55] As I have indicated, the judge found that within the context of local government and of land development in British Columbia, a "development permit" refers to a development permit under Part 14 of the Local Government Act. He considered that to be the only possible use of the term in clause 4.1(l). He therefore rejected the contention that the requirement to obtain a development permit was satisfied when the Gills obtained a Soil Deposit Permit. I am not persuaded that the judge made any error in reaching that conclusion.
- [56] The judge went on to find that, in speaking of a "development permit", clause 4.1(l) must be referring to a permit related to the proposed construction of buildings and other structures on the land. In reaching this conclusion, his view was that clause 4.1(l) should be interpreted solely by reference to the words in the clause, without reference to the parties' actual intentions:

- [82] The intent of the parties to a contract is determined from the wording of their agreement. The wording does not support the contention that the parties intended that Mr. Gill be able to place fill before obtaining a development permit. Mr. Gill may have thought that was what he was agreeing to. The plaintiffs may have even thought that is what they were agreeing to. Even if that is the case (I make no finding) it is beside the point, because the wording does not indicate that intent and there is no claim of mistake or rectification here.
- [57] In my view, the judge's reasoning on this point does not accord with the law as set out in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53:
- [47] [T]he interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:

No contracts are made in a vacuum: there is always a setting in which they have to be placed. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

(*Reardon Smith Line [v. Hansen-Tangen*, [1976] 3 All E.R. 570], at p. 574, per Lord Wilberforce)

- [48] The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement As stated by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.):

The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [p. 115]

- [58] The judge, then, should not have dismissed the intentions of the parties as "beside the point". Those intentions, to the extent they could be inferred from objective evidence of the circumstances surrounding the formation of the Agreement, were important to its interpretation.
- [59] The parties inserted clause 4.1(l) into the Agreement to deal with the Gills' demand that they have the right to place fill on the property before exercising the option. From the standpoint of the Aquilini companies, the placement of fill raised potential problems. Mr. Barazzuol describes the nature of their concerns in his affidavit:

[T]hroughout the period in which I was involved with the Property after February 2016, one of my primary concerns about fill being placed on the Property was the quality of the fill. I had previously been involved in a project where the fill deposited on the property was unsuitable and it had been a very difficult and expensive proposition to remove it.

- [60] In this context, it made sense for the Aquilini companies to allow fill to be placed, but to insist on conditions that protected them. Those conditions included a requirement for municipal approval for the fill and also a right to prohibit the deposit of fill where there were reasonable grounds for doing so.
- [61] The municipal development laws that were in place also cast light on the parties' intentions. At the time they entered the Agreement, the District of Mission's Official Community Plan was embodied in its bylaw 4052-2008. Part 4 of that bylaw designated development permit areas, including Area P, the area in which the property is located[5]. Under the bylaw, any alteration of land required a development permit.
- [62] The bylaw, however, exempted "property protected by a dyke" where the requirements of the District of Mission Floodplain Management Bylaw were met. It is reasonable to assume, from the communications of the parties and the positions taken by them, that they were unaware of the exemption, or unsure of its applicability.
- [63] All of these factors strongly suggest that the "development permit" referred to in clause 4.1(l) was a development permit directed specifically at the deposit of fill and not at some more elaborate future development of the land.
- [64] Indeed, nothing in the circumstances surrounding the Agreement suggested that the Aquilini companies had any interest in ensuring that the ultimate development of the land was approved before filling took place. The judge's finding that the words "development permit" in clause 4.1(l) referred to a permit for the ultimate development of the land was not supported by the evidence.
- [65] Despite the judge's error in interpreting 4.1(l), he was correct in finding that the Gills had not satisfied its provisions. The Gills did not meet the requirements of clause 4.1(l) because they did not, prior to depositing fill, obtain a development permit. As the Gills did not seek rectification or relief from mistake in their pleadings, the fact that a development permit was not required or available does not assist them. That said, the evident mistaken understanding of municipal requirements does indicate that the failure was markedly less serious than the failure the trial judge attributed to the Gills.

The Requirement to Pay Illahae for Placement of Fill

[66] As the judge found, clause 4.1(l) of the Agreement mandated that contractors dumping fill on the land pay Illahae directly for that privilege. I agree with the trial judge's conclusions that, in acting as Illahae's agent in arranging for fill, Mr. Gill had a duty to enter into arrangements that resulted in payment to Illahae. Without Illahae's approval, the Gills were not entitled to reach agreements that bargained away Illahae's right to payment.

Was there any Breach Engaging Clause 5(1)(a)?

[67] I am not, therefore, persuaded that the judge erred in concluding that the Gills' conduct did not conform to the requirements of clause 4.1(l). The key question on this appeal is whether their failure to fulfill the requirements of clause 4.1(l) rendered the option void.

[68] The judge found that clause 5.1(a) allowed the plaintiffs to treat the Agreement as void when the defendants failed to strictly comply with the requirements of clause 4.1(l). In reaching that conclusion, the judge relied primarily on *Sail Labrador v. Challenge One (The)*, [1999] 1 S.C.R. 265.

[69] *Sail Labrador* concerned an option to purchase a vessel. *Sail Labrador* leased the *Challenge One* from Navimar Corporation Ltée. It had a right to purchase the vessel at the end of the lease period. Key clauses in the Charter Party are set out at para. 2 of the judgment:

10. The Charterer shall pay to the Owner for the use of the vessel a rate of \$85,000. Canadian currency per year for each year commencing on and from the day of delivery or June 10, 1985 which ever is the later; hire to continue until the date of redelivery .
11. The annual Charter hire shall be payable in seven (7) monthly instalments each and every year of the Charter in accordance with the following schedule [there follows a list of dates and amounts] .
30. Subject to full performance of all its obligations in this Charter Party including but not limited to payments being made promptly and in accordance with the schedule of Clause 10 throughout this Agreement, the Charterer shall have an option to purchase the vessel after the five (5) year period of this Charter for the sum of Two Hundred Thousand Dollars (\$200,000.00) cash if he notifies the Owner in writing of his intention to purchase by no later than March 31, 1990.

[70] *Sail Labrador* supplied Navimar with thirty-five post-dated cheques to make the lease payments. The cheque for the twenty-ninth payment was, in error, not honoured by the bank. *Sail Labrador* made a late payment, with interest, and made all subsequent payments on time. Nonetheless, at the end of the lease period, Navimar took the position that *Sail Labrador* had forfeited its option because it did not make all of its payments "promptly and in accordance with [the] Agreement".

- [71] Justice Bastarache, speaking for the majority of the Court, affirmed that the parties to a contract may stipulate that the contract can be rescinded, even for minor breaches, if they do so in clear terms:
- [50] Courts will generally give effect to the parties' intentions by upholding any clear contractual provisions which provide that the breach of a certain term, no matter how slight, will justify rescission of the entire contract by the non-offending party (Waddams, [S. M. The Law of Contracts, 3rd ed. Toronto: Canada Law Book, 1993], pp. 400-401; Treitel, [G. H. The Law of Contract, 9th ed. London: Sweet & Maxwell, 1995], pp. 694-95; Lombard North Central Plc. v. Butterworth, [1987] Q.B. 527 (C.A.)).
- [72] The Court found that the language of clause 30 was insufficient to make strict adherence to the payment schedule a pre-condition to the exercise of the option:
- [57] In my opinion, the words used in clause 30 are simply not precise enough to satisfy this Court that these parties intended to make timely lease payments the essence of this contract. The word "promptly" adds nothing to the words "in accordance with the schedule". Read together, these words call for regular payment. Nothing exceptional about the obligations of the parties can be inferred. This conclusion is bolstered by the respondent's admission in oral argument that contracts used in this industry often include the actual words "time is of the essence" when the parties intend to, in fact, make time of the essence.
- [73] The Court also noted that clause 30 referred to the "schedule of clause 10" rather than the "schedule of clause 11", and found the discrepancy to be significant:
- [59] Even if it could be said that the words of clause 30 are adequate to make time of the essence in relation to the lease payments, the actual wording of clause 30 could only support a finding that time is of the essence in relation to Clause 10, since it reads: "payments being made promptly and in accordance with the schedule of clause 10 throughout this Agreement". The respondent urges this Court to find that the reference to clause 10 in the option clause is a typographical error and was meant to read "clause 11". It appears that the Federal Court of Appeal proceeded on this assumption since its reference to the option clause includes the notation "[sic]" after the words "clause 10". As noted, no such finding was made by the trial judge. Both clauses 10 and 11 contain schedules. Furthermore, a reference to clause 10 in the option clause is more consistent with what the parties would reasonably have intended had they addressed their minds to this issue upon entering the charter party. Indeed, it makes more commercial sense that the respondent would be more insistent on receiving a total of \$85,000 per year than each monthly payment on the exact day it falls due. In addition, it is unlikely that the parties could have intended that a single late payment among 35 payments made over a five year term, caused by no fault of the appellant and quickly remedied with interest, would void the option, given its importance to the contract as a whole.

- [60] Since the option clause expressly refers to clause 10 and not clause 11, it is logical to conclude that the parties could only have intended that time be of the essence in relation to clause 10, should the words used in fact be sufficient to imply a time of the essence clause .
- [74] Sail Labrador stands for the proposition that contractual clauses may require the parties to abide strictly by the terms of the agreement, and may provide that the contract can be rescinded (or rendered void) even for minor breaches. It also illustrates, however, that courts will treat such clauses with caution, reading them strictly and refusing to give them greater scope than their wording requires.
- [75] In the case before us, the judge determined that clause 5.1(a) gave the Aquilini companies the right to rescind. He said:
- [124] The clause in issue here is drafted more widely and specifically than that in Sail Labrador. It is hard to think of any clearer wording that the parties here could have adopted.
- [76] The language of clause 5.1(a) of the Agreement is undoubtedly broad in scope. I repeat it, here, for convenience:
- [I]f Julie fails to observe or perform any of her covenants and obligations, or breaches any of her covenants and obligations, then the Option and this Agreement shall be null and void and no longer binding upon the parties and Illahae shall be entitled to retain all amounts, including the Option payments that it has received.
- [77] In the Court below, the parties did not specifically address the question of what parts of the Agreement constituted Ms. Gills' "covenants and obligations". That question, though, is critical to the interpretation of clause 5.1(a) of the Agreement.
- [78] The Agreement contains many express covenants and obligations, including positive obligations to make payments, negative covenants to refrain from damaging the lands, and other obligations, such as following environmental laws and not storing contaminants on the site. Clause 4.1(l), however, does not impose any obligations on Ms. Gill; rather it furnishes her with the right, in specified circumstances, to place fill on the property. A failure to meet the pre-conditions of clause 4.1(l) meant that Ms. Gill did not acquire that right, but did not put her in breach of any covenant or obligation under the Agreement.
- [79] The Agreement did not contain any express provision that prohibited the Gills from placing clean fill on the property in accordance with environmental laws and without damaging the property.
- [80] I do not suggest that the Gills were entitled to place fill on the property with impunity or that their failure to ensure payments to Illahae for the dumping of fill leave the Aquilini companies without remedies. What is important here, however, is that their remedies do not arise from the Agreement, but rather from the common law or from equity. The placement of fill may have constituted a trespass, and the agreements with contractors that failed to provide payments to Illahae may give rise to claims, but those acts do not constitute

breaches of covenants or obligations imposed by the Agreement.

- [81] Sail Labrador illustrates the principle that draconian clauses terminating contractual rights for failure to strictly comply with the provisions of an agreement are not to be interpreted broadly. I do not see any justification for interpreting the words "covenants and obligations" in clause 5.1(a) to mean anything other than the covenants and obligations expressly set out in the Agreement.
- [82] Accordingly, I am of the view that the judge erred in finding that the Gills' conduct engaged clause 5.1(a) of the contract.
- [83] Apart from clause 5.1(a), I am unable to see that the Gills' conduct can give rise to any claim that the option was rendered void or that the Agreement could be rescinded. Accordingly, I would affirm the judge's decision to deny the claim for a declaration that the option is void.

Costs

- [84] There is no reason to depart from the normal allocation of costs in this case. Accordingly, the Gills are entitled to their costs of the appeal, and the Aquilini companies are entitled to their costs of the cross appeal. The only complication is that the Gills followed a procedure that resulted in some confusion of issues between the appeal and cross appeal.
- [85] The operative provisions of the order in the court below were as follows:
1. The Plaintiffs' claim for a declaration that the February 4, 2016 Option Agreement is null and void is dismissed.
 2. The claim by the defendants in their counterclaim for an order requiring the plaintiffs to transfer the shares of Illahae Dairy Farms Ltd. upon the purchase price being tendered under the Option Agreement is dismissed, without prejudice to similar relief being sought in the future.
- [86] The Aquilini companies brought an appeal from the first provision of the order. The Gills wished to uphold that provision on the basis of the judge's reasons and also on the basis that the judge erred in finding that they breached the Agreement. They improperly raised the latter contention by way of a cross appeal.
- [87] As we indicated in the course of the hearing, a cross appeal is not the appropriate procedure for making such an argument. It is well-established that appeals (and cross appeals) lie from orders of the court below, not from passages in the reasons for judgment: see Senkpiel, Ohama-Darcus and Brinton, Civil Appeal Handbook (Continuing Legal Education Society of British Columbia, 2002, looseleaf, updated to March 2018), §1.6.

- [88] Where a party does not take issue with an order granted in the court below, but wishes to uphold it on a basis other than the one that found favour in that court, it is required to raise the argument in its response to the appeal, not in a cross appeal: *Cambie Surgeries Corp. v. British Columbia (Attorney General)*, 2017 BCCA 287 at para. 28; *Moore v. Expansion Holdings Ltd.* (1994), 96 B.C.L.R. (2d) 178 (CA) at para. 7.
- [89] We allowed the respondents to make all of their arguments despite the fact that some were improperly included in the cross appeal portion of their factum rather than the appeal portion. Lest there be any question arising in the assessment of costs, the costs of the appeal should include the costs relating to all issues that were properly part of the appeal and the costs of the cross appeal should be restricted to costs arising from the question of whether the judge should have made the order sought in the counterclaim.

Conclusion

- [90] I would dismiss both the appeal and the cross appeal.

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Mr. Justice Goepel"

- [1] The conditions of removal were later removed, but not until July 2016.
- [2] While it appears that the discussions between the Gills and the Aquilini family initially contemplated the shares being sold to AD General Partner Inc., Ms. Gill ultimately transferred the shares to AM Properties.
- [3] Illahae was not a party to the Agreement, though the Agreement confers rights and imposes obligations on it.
- [4] In an affidavit filed in these proceedings, Mr. Singerman says that his use of the words "and/or" was in error, and that he wished to convey to Mr. Gill that "no fill could be placed without first obtaining a development permit, as well as any other permits required by Mission, and the necessary approval."
- [5] The bylaw in respect of Area P indicated that it was enacted pursuant to s. 919.1(1)(b) of the of the Local Government Act, R.S.B.C. 1996, c. 323. The statute was consolidated in 2015, and the section, unchanged, is now s. 488(1)(b).

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