

CANADA / JUDGMENT

Dhami v. Redekop

2020 BCSC 630

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 630 Dhami v. Redekop

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Dhami v. Redekop,

2020 BCSC 630

Date: 20200424

Docket: S169908

Registry: Vancouver

Between:

Kulwant Dhami and Greenland Growers Nursery Ltd.

Plaintiffs

And

Aldergrove Nursery Ltd. and Lorne Redekop

Defendants

Before: The Honourable Chief Justice Hinkson

Reasons for Judgment

Counsel for the plaintiffs:

I.D. MacKinnon

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G. Cadman, Q.C.

R. Veerapen

Place and Date of Trial:

Chilliwack, B.C.

July 22 - 26, 2019 and

November 18 - 21, 2019

Place and Date of Judgment:

Vancouver, B.C.

April 24, 2020

Introduction

- [1] The plaintiff Kulwant Dhami is a businessman and a shareholder, director and officer of the plaintiff Greenland Growers Nursery Ltd. ("Greenland"). Greenland's nursery is located at 3834 - 272nd Street in Aldergrove, British Columbia.
- [2] The defendant Lorne Redekop is a businessman and a shareholder, director and officer of the defendant Aldergrove Nursery Ltd. ("Aldergrove"). Aldergrove was incorporated in 1973 and has five properties, including one located at 28080 and 28110 Fraser Highway in Abbotsford, British Columbia where it had its offices. Mr. Redekop's wife Shirley is also a shareholder, director and officer of Aldergrove and their son Jeremiah is a director of Aldergrove.
- [3] For some 18 years the individual parties operated in peaceful co-existence, if not harmony. Mr. Redekop was an experienced nursery operator, and Mr. Dhami was a less experienced nursery operator eager to advance his place in the nursery community in British Columbia. Greenland and Aldergrove were within a four to five minute drive from each other, and engaged in business relations, buying and selling plants to and from each other.
- [4] The convivial relationship between the parties continued into 2015, and on February 6, 2015, a document entitled "Lease Agreement" was signed by the two personal parties. It is this document that is the center of the proceedings before me and I will refer to it as the "challenged document". The document is appended to these reasons for judgment as Appendix A.
- [5] The "Lands" purporting to be leased under the challenged document are described as follows:

Lot: A Sec: 21 Twn: 13 Plan: 3678

P.I.D. 001-437-593

16.87 Acres

- [6] The Fraser Highway runs east west in the area of Aldergrove. Maclure Road is the road running east-west to the immediate north of the Fraser Highway. The address of the property purporting to be leased under the challenged document is 28080 Maclure Road. I will refer to this property as the "Maclure Lands", as counsel did.
- [7] To the west of the Aldergrove property is Lefeuve Road, and across the Fraser Highway from 28080 and 28110 Fraser Highway is 16.87 acres of property with the legal description of PID 001-437-593 - Lot A Section 21 Township 13, Plan 3678. This property is the Maclure lands and is owned by Aldergrove and is the subject of the challenged document.

The Trial of this Action

- [8] On March 22, 2019, Master Cameron granted an order that the trial in this action be tried at the same time as the trial in action number CW S34283. The trial in this action began before Mr. Justice Brown on July 22, 2019. At the outset of the trial in this action counsel agreed that they would only proceed with this action and leave the trial in action CW S34283 to be heard at a later date.
- [9] The trial of this action thus proceeded before Brown J. from July 22 through July 26, 2019, when it was adjourned generally to a date to be fixed. The date for the resumption of the trial was set for October 15, 2019.
- [10] On October 7, 2019, I advised counsel that Mr. Justice Brown would be unable to complete the trial, and offered them the option of starting the trial over in front of another judge of the Court, or having another judge review the transcripts and the audio recording of the proceedings before Brown J. and continue the trial. Counsel opted for the latter, and in the result, I appointed myself as the trial judge, pursuant to Supreme Court Civil Rule 23-1(10). I listened to the audio recordings of the proceedings before Brown J. and read the transcripts of the evidence that he heard. I then continued the trial November 18 through November 21, 2019.

Background

- [11] Mr. Dhami completed his high school education in India, and came to Canada in 1993 when he began working in the nursery industry, for an established nursery. In 2000, he started his own nursery on 272nd Street in Aldergrove on 35 acres of property that he purchased with his brother Gurmail Dhami and his brother-in-law Jagbir Deol.
- [12] Greenland began as a partnership, but was incorporated as the corporate plaintiff in 2003. Greenland grew shrubs, ground covers, hedging and trees for sale to other nurseries or to retailers, all in containers.

- [13] In 2007, Mr. Dhami and his two original partners purchased a 7-acre parcel of land adjacent to their 35-acre parcel, and registered the 7-acre parcel in the names of Mr. Dhami, his wife, and his mother.
- [14] In 2013, Mr. Dhami and his two original partners purchased another 20-acre parcel of property on the opposite side of the 35-acre parcel from the 7-acre parcel.
- [15] Prior to 2015, Mr. Redekop permitted Jason La Ronde (who, although unrelated to Mr. Redekop, refers to himself as Mr. Redekop's son) to build a home on the northeastern part of the Maclure Lands, which Mr. La Ronde occupied at the time that the challenged document was signed.
- [16] Prior to and in 2015 another part of the Maclure Lands were rented to Pacifica Nurseries Inc. ("Pacifica") and yet another part to Frasersview Nurseries ("Frasersview").
- [17] On February 6, 2015, the challenged document purporting to lease the Maclure Lands was signed by Mr. Dhami and Mr. Redekop.
- [18] On April 18, 2015, Mr. Dhami offered to lease the properties at 28080 and 28110 Fraser Highway from Mr. Redekop, or to buy them for \$2.5 million. Mr. Redekop did not accept the purchase offer.
- [19] On May 28, 2015, Mr. Dhami agreed to purchase all of the remaining plant inventory and equipment on the Maclure Lands for \$61,950. Aldergrove did not issue an invoice to Greenland for that amount until July 21, 2015.
- [20] In or around June 2015, with the permission of Mr. Redekop, the plaintiffs began occupying the Maclure Lands on a rent-free basis until the term set out in the challenged document began.
- [21] On June 1, 2015, Mr. Dhami executed a lease agreement between himself and Greenland, whereby he sublet the Maclure Lands to Greenland for 12 years, expiring December 31, 2028. He explained in his evidence that he did so to gain a tax advantage through the company.
- [22] In January 2016, Mr. Dhami executed an undated rental agreement for three greenhouses on about one acre on the Maclure Lands to Frasersview for a term from January 1, 2016 until December 31, 2016.
- [23] On January 15, 2016, Mr. Dhami signed a sublease agreement with Pacifica for what he estimated was five acres of the Maclure Lands (although Mr. La Ronde estimated the size as roughly two acres) for 11 years ending January 15, 2027. He gave evidence that he did so to accommodate Mr. La Ronde's need to travel back and forth to the United States to attend to his nursery interests both there and in Abbotsford.

The Positions of the Parties

[24] In their amended notice of civil claim, the plaintiffs seek remedies that include:

1. An order that the [challenged document] include Aldergrove as a party
2. A declaration that the [challenged document] is valid and enforceable.
3. An Injunction prohibiting the Defendants from terminating the [challenged document].
4. Judgment against Aldergrove based upon contractual damages.
5. Judgment as against the Defendant, Lorne Redekop, based upon his negligent misrepresentation that he owned the Maclure lands.
6. Judgment as against the Defendants based upon the tort of conspiracy.
7. [A]n award of aggravated, punitive, and/or exemplary damages.
8. Special and general damages including, loss of business reputation and good will.
9. Interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, Chapter 79 and amendments thereto.
10. Special costs, or alternatively, costs of this proceeding at Scale B.

[25] There is no dispute that Aldergrove is the true owner of the Maclure Lands, nor is there any dispute that Mr. Dhami and Mr. Redekop signed the challenged document. The main issue is whether Aldergrove is bound by the terms of the challenged document.

[26] The plaintiffs submit that the challenged document constitutes a valid and enforceable lease. The plaintiffs contend that Aldergrove is bound to the terms of the lease on the bases that Mr. Redekop acted as the agent of Aldergrove when executing the challenged document, the agreement in the challenged document was ratified by Aldergrove, or that Aldergrove led the plaintiffs to believe that they would have tenancy rights to the Maclure Lands, and as such, are estopped from removing them from the Maclure Lands. They submit the challenged document can be rectified to include Aldergrove as the lessor. They further seek judgment against Mr. Redekop for negligent misrepresentation.

[27] The defendants argue that the onus rests on the plaintiffs to prove the validity and enforceability of the challenged document, both on the facts and on the law, and that they bear no onus to prove the contrary.

[28] The defendants dispute that the challenged document creates an enforceable lease. In their counterclaim the defendants seek:

1. An Order for Immediate Possession of the [Maclure] Lands.
2. A Declaration that the Plaintiffs vacate the Lands within seven (7) days.
3. Judgment for general and special damages against the Plaintiffs, including occupation rent since January 1, 2016 and costs to remediate and restore the Lands.

The Plaintiffs' Claims

Negotiations Leading to the Challenged Document

- [29] Mr. Dhami and Mr. Redekop differ as to the events that preceded the signing of the challenged document.
- [30] Mr. Dhami gave evidence that he and Mr. Redekop began discussions about leasing the Maclure Lands and two parcels on the south side of the Fraser Highway to Mr. Dhami in 2014 over the course of four or five meetings. The two other parcels of land were located at 28080 and 28110 Fraser Highway ("the Fraser Highway properties").
- [31] According to Mr. Dhami, Mr. Redekop advised him that he wished to lease or sell his nursery, and asked if Mr. Dhami was interested in it. Mr. Dhami gave evidence that Mr. Redekop referred to all three properties as "my land".
- [32] Mrs. Redekop gave evidence that her husband had said that he wanted to retire in 2015.
- [33] Mr. Dhami said that on January 12, 2015, when he and Mr. Redekop met at Greenland's office, Mr. Redekop expressed his intention to leave the nursery business and the discussions came to be about renting the Fraser Highway properties and the Maclure Lands, with an option to purchase the Maclure Lands only.
- [34] Mrs. Redekop denied participating in the negotiations leading up to the execution of the challenged document as alleged by the plaintiffs.
- [35] Mr. and Mrs. Redekop gave evidence that Mr. Redekop told his wife that he was discussing a lease of the Maclure Lands with Mr. Dhami and others in January and February of 2015, despite Mr. Redekop's evidence at his examination for discovery, which he confirmed at trial, that he could not recall advising his wife of discussions with Mr. Dhami about so doing.
- [36] Mr. Dhami gave evidence that he met with Mr. Redekop, in the presence of Mrs. Redekop, at Aldergrove's office on January 13, 2015, and said that their discussion returned to the option to rent and buy all three lots previously discussed. Mr. Dhami said that at that time, Mr. Redekop was agreeable to a lease of the Maclure Lands. Mr. Dhami gave evidence that, after two further meetings, three separate leases with options to purchase were drafted for the three properties.
- [37] Mr. Dhami said that under his supervision, his nephew Sukhdeep Dhami, prepared three leases; one for the Maclure Lands, and two more for the other two properties that had been discussed. Meaning no disrespect to him, but in order to avoid confusion, I will refer to Mr. Dhami's nephew by his first name, Sukhdeep.

- [38] Mr. Dhami gave evidence that before the challenged document was signed, Sukhdeep prepared some seven drafts of a lease for the Maclure Lands but not all were presented to Mr. Redekop. In the earlier drafts, including one that Mr. Dhami said was presented to Mr. Redekop, Mr. Redekop was listed as the "lessor/seller" and owner of the lands but in the later versions, including the challenged document, Mr. Redekop is referred to only as the "lessor" and owner of the lands.
- [39] Sukhdeep gave evidence that he obtained a property information report on the Maclure Lands from the City of Abbotsford website that described the legal address of the property as Lot A, Section 21, Township 13, Plan NWP - 036787, but did not name the owner. His evidence was that this information was used in the preparation of the challenged document, but it did not indicate the ownership of the property.
- [40] Mr. Dhami gave evidence that he presented the challenged document to Mr. Redekop on January 29, 2015 along with draft leases for the other two properties. Mr. Dhami said that Mr. Redekop advised him that he had received a better offer for the sale of the Fraser Highway properties, so the discussions between the two men settled on the Maclure Lands.
- [41] Mr. Dhami said that he understood at that time that Mr. Redekop owned the Maclure Lands and Mr. Redekop never said that he was not authorized to sign the challenged document. Mr. Dhami also gave evidence that at no time did Mr. Redekop indicate that he was not the owner of the Maclure Lands or that the lease should list Aldergrove as the owner of those lands.
- [42] Mr. Dhami gave evidence that on February 6, 2015, he believed that he was negotiating a deal between himself and Mr. Redekop and not their respective companies. He said that he brought the challenged document with him to a meeting with Mr. Redekop on that date.
- [43] Mr. Redekop denied telling Mr. Dhami that he owned the Maclure Lands, but conceded that he never told him he did not own those lands. He said the topic never came up. He also said that he was unaware that the arrangement he had made with Mr. Dhami was personal until that fact was brought to his attention by Mrs. Redekop in November 2015.
- [44] Mr. Dhami gave evidence that Mrs. Redekop "was always there in the office", and that he and Mr. Redekop signed the challenged document on February 6, 2015, in the presence of Mrs. Redekop. Sukhdeep confirmed that he was present and witnessed the challenged document when it was signed, and that both Mr. and Mrs. Redekop were present at that time.
- [45] Both Mr. and Mrs. Redekop denied that Mrs. Redekop was present when the challenged document was signed.
- [46] Mr. Dhami gave evidence that Mr. Redekop initialled the first page of two copies of the challenged document and that he and Mr. Dhami signed the second page of two copies of that document, and their signatures were witnessed by Sukhdeep.

- [47] Mr. Dhami said that he took one copy of the signed challenged document with him and left the other with Mr. Redekop.
- [48] Mrs. Redekop gave evidence that her husband told her he had signed a lease for the Maclure Lands with Greenland on February 6, 2015. It was Mrs. Redekop's evidence that before she saw the challenged document, her husband told her that he had signed a lease and that when he did so she asked "how much?" and "how long?", and when Mr. Redekop answered those questions, her reply was "not enough".
- [49] Mr. Redekop conceded that in 2015, he did not discuss all business matters with his wife, as although they were equal partners in Aldergrove, he would not necessarily review a lease of lands with her, and in fact had not done so on more than one occasion prior to 2015. He said that he would review a proposed sale of Aldergrove property with her, as he did when he, Mrs. Redekop, Mr. Dhami and Sukhdeep met in May of that year to discuss the sale of the Fraser Highway properties. I accept that Mr. Redekop involved his wife in this discussion, as a sale would have meant that the Redekops would have had to move houses.

Events Following Execution of the Challenged Document

- [50] The challenged document provided that Mr. Dhami would begin to occupy the Maclure Lands in January 2016.
- [51] The challenged document recognized that there were residences located at the northeast and southeast corners of the Maclure Lands that were not available for sublet or rent by Mr. Dhami. A portion of the lands were occupied by Mr. La Ronde and his company Pacifica, and a portion by Fraserview. Neither of these occupancies were the subject of any formal lease prior to the execution of the challenged document.
- [52] The lands were also the repository of a variety of used vehicles, including fire trucks, and other possessions of a Mr. Stan Mckay since 2010, and two cranes owned by Ryan Buchanan, who Mr. Redekop had allowed to use the lands for storage. The lands also housed the remnants of buildings.
- [53] Another part of the Maclure Lands was described by Sukhdeep as a dumping ground for the 20 years or so prior to the execution of the challenged document. Thus, significant parts of the lands were unsuitable for use by Mr. Dhami for nursery purposes.
- [54] The challenged document provided that the term of the lease would be for 12 years, commencing January 1, 2016. Mr. Redekop could not recall how the figure for rent was arrived at.
- [55] The challenged document included a term that:

Lesser can terminate the Lease Agreement if Lesser is able to exclude the parcel from the Agriculture Land Reserve OR if Lesser is able to Re-Zone the parcel for another use. The Lesser shall give the Lessee at least 12 months notice and will be subject to a \$50,000 moving fee payable to the Lessee [sic].

- [56] Mr. Redekop said that he and Mr. Dhami agreed that each would pay one-half of the city taxes for the Maclure Lands, given that his son's home was on those lands.
- [57] On May 28, 2015, Mr. Dhami agreed to purchase all of Aldergrove's inventory on the Maclure Lands and he and Mr. Redekop agreed to an informal and unwritten arrangement allowing Mr. Dhami and Greenland to use the Maclure Lands from June 2015 to the end of August 2015 while only paying taxes and utilities. Mr. Redekop gave evidence that when Mr. Dhami took over the Maclure Lands, they were clean and weed free.
- [58] Mr. Dhami agreed that he effectively took possession of the Maclure Lands in June 2015. In return, Mrs. Redekop said that her husband permitted Mr. Dhami to use the Maclure Lands free for seven months, while Mr. Dhami gave evidence that he was to take care of the inventory that he had purchased from Aldergrove on the property.
- [59] The two men later had further discussions, and an agreement was reached for the lease of the Fraser Highway properties on a long-term basis, but Mr. Redekop and Aldergrove insisted that they retain the right to sell the properties without conditions before August 31, 2015. In exchange for that, they agreed that Mr. Dhami and Greenland had the right to match any offer to purchase the properties. The documents relating to these properties were signed by both Mr. and Mrs. Redekop and by Mr. Dhami.
- [60] The defendants then received an offer to purchase the Fraser Highway properties dated August 5, 2015, which they countered, and the purchaser accepted that counteroffer. The purchaser removed all conditions on August 10, 2015, which triggered Mr. Dhami's right to match the offer. Mr. Dhami decided to match the accepted offer and Mr. Redekop and his company accepted Mr. Dhami's offer.
- [61] Mr. Dhami failed to complete the purchase of the Fraser Highway properties by September 30, 2015, the time required, but he and Greenland have continued to be in possession of the Maclure Lands since that date, claiming the lease remained valid.
- [62] In roughly November 2015, events on the Maclure Lands resulted in the involvement of the RCMP, and relations between the Redekops and Mr. Dhami were particularly strained. Mrs. Redekop gave evidence that this caused her to review the challenged document for the first time, and when she did so, she noted that Aldergrove was not named in the document.
- [63] Both Mr. and Ms. Redekop said that before they looked at the challenged document in November 2015, they understood that it would be Greenland that would operate on the property. That is consistent with their sale of Aldergrove's inventory to Greenland.

- [64] Mr. Redekop gave evidence that by June 2016, he had told Mr. Dhami that the Maclure Lands were owned by Aldergrove. Mr. Dhami gave evidence that it was not until July 2016 that he learned that Aldergrove, not Mr. Redekop, owned the Maclure Lands.
- [65] In July 2016, Mr. Dhami began issuing cheques from his personal account made out to Mr. Redekop, personally, for Greenland's use of the Maclure Lands and has continued to do so. Mr. Redekop has consistently rejected and returned these cheques to Mr. Dhami on the basis that the challenged document is not a valid lease agreement, and on the basis that Mr. Redekop is not the owner of the Maclure Lands. The plaintiffs have not sent any cheques payable to Aldergrove for their use of the Maclure Lands and continue to occupy the lands despite multiple notices from Aldergrove to vacate the lands.
- [66] Mr. Redekop and his company petitioned this Court for a declaration that Mr. Dhami and Greenland were late or failed to pay rent and utilities for the Fraser Highway properties on some occasions, amounting to a breach of the leases with respect to those properties, justifying their termination, for orders to remove Mr. Dhami and Greenland from those properties, and to confirm their ability to sell it without giving Mr. Dhami and Greenland the opportunity to match any offer.
- [67] The petition was heard by Madam Justice Sharma. At paras. 38 and 39 of her reasons for judgment indexed at 2017 BCSC 1059, Sharma J. found that:

38 the respondents do not identify the misrepresentation upon which they relied that justifies non-completion of the sale. They simply say the two offers did not match. Second, the respondents first alleged misrepresentation after the petitioners started this proceeding. Importantly, the respondents did not raise any issue about misrepresentation when they made the Second Offer. However, the respondents do not seek specific performance, or continuation of their leases in the misrepresentation action. These factors combined persuade me that the misrepresentation claim is weak at best. Therefore, I do not agree that the facts and issues are so intermingled to preclude summary determination of the issues in this petition. I am satisfied the petitioners have proven a prima facie case for an order of possession pursuant to the First Notice.

39 Even if that conclusion is wrong, I also find that the petitioners have established a prima facie right to vacant possession effective February 28, 2018.

[68] At paras. 71 - 72, Sharma J. concluded:

71 Based on the respondent's failure to close on Mr. Dhami's binding purchase agreement for the Property, I find the petitioners were entitled to and did terminate the leases, and the First Notice is valid. Because the leases terminated, the petitioners are entitled to an order for immediate conduct of sale of the Property and are not obliged to offer the respondents an opportunity to match any offer.

72 I also order that the respondents must deliver vacant possession of the Property to the petitioner within 45 days of the date of this judgment.

The Nature of the Challenged Document

- [69] The plaintiffs claim relies on a finding that the challenged document constitutes a valid and enforceable agreement, specifically, a valid and enforceable lease.
- [70] The defendants argue that the challenged document is not a valid and enforceable agreement nor does it create a valid leasehold interest. The defendants contend that if the challenged document does create a valid and enforceable leasehold interest, its terms lack certainty and should be interpreted in accordance with the accepted principles of contractual interpretation.

Validity of the Agreement

- [71] The test for a valid agreement is whether the parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract.
- [72] In *Langley Lo-Cost Builders Ltd. v. 474835 B.C. Ltd.*, 2000 BCCA 365 at paras. 20-21, Chief Justice McEachern commented that:
- [20] There is very little authority about the basis upon which intention to contract should be found. In *Tilden Rent-A-Car Co. v. Clendenning* (1978), 83 D.L.R. (3d) 400 (Ont. C.A.), it was suggested at 405, that a person "who attaches his signature to the contract intends by doing so to acknowledge his acquiescence to its terms, and that the other party entered into the contract upon that belief." In A.G. Guest, ed., *Chitty on Contracts*, 27th ed. (London: Sweet and Maxwell, 1994), it is noted at 152 that in normal commercial transactions, where the intention to be contractually bound is at issue, the onus of proving that such an intention did not exist "is on the party who asserts that no legal effect is intended, and the onus is a heavy one": *Edwards v. Skyways Ltd.*, [1964] 1 W.L.R. 349.
- [21] Most authorities suggest that the Court is not confined to the four corners of the alleged agreement, but may look at all the circumstances. In *Osorio v. Cardona* (supra) McLachlin J. considered evidence of past agreements involving other parties, the circumstances in which the alleged agreement was made, and future actions and representations by both parties. The investigation is to determine whether a reasonable observer would think that Terry Johnson on behalf of Langley, in signing the faxed document in these circumstances, intended to be contractually bound when he signed and delivered the faxed documents.
- [73] In *Wallace v. Allen*, 2009 ONCA 36, the Ontario Court of Appeal overturned the decision of the trial judge on the basis that he had failed to apply the presumption that intention to be bound is present in agreements in a commercial context. The Court also confirmed that the conduct of the parties, after a written instrument is prepared, may be considered in determining whether they considered themselves bound.

[74] In *Grewal v. Grewal*, 2017 BCSC 573, Madam Justice Fleming summarized these principles at paras. 34 - 36:

34 The test for determining whether an enforceable agreement has been reached is an objective one and was discussed in *Salminen v. Garvie*, 2011 BCSC 339, as follows:

[27] ... [I]t is "whether the parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract"; it is "whether a reasonable ... [person] in the situation of that party would have believed and understood that the other party was consenting to the identical term": *Fridman*, supra, p. 15; ...

35 The court may consider the parties' conduct prior to and after the formation of an alleged agreement to determine if they actually entered into a binding contract (*Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, 2009 BCSC 1303 at para. 334; *Canlan Investment Corp v. Gettling* (1997), 37 B.C.L.R. (3d) 140 (C.A.)). Certainly subsequent conduct may be considered in assessing the credibility of the parties' evidence regarding the circumstances at the time of contracting.

36 When interpreting an existing contract, however, evidence of the parties' conduct is approached somewhat differently. Pre-agreement conduct is admissible and considered as part of the factual matrix which includes facts known or reasonably known to both parties before or at the time of contracting. Post-agreement conduct, which does not form part of the factual matrix, is only admissible and considered when the meaning of the contract is ambiguous based on its language and the factual matrix (*Shewchuk v. Blackmont Capital Inc.*, 2016 ONCA 912 at para. 41). In *Shewchuk* the Ontario Court of Appeal discussed at para. 52 the concerns underlying the distinction between pre- and post-agreement conduct, describing evidence of post-agreement conduct as potentially unreliable to establish the parties' objective intentions at the time they entered into the agreement. The court noted that even when evidence of such conduct is admitted, it should be used cautiously.

[75] In cross-examination, Mr. Redekop retreated from his evidence at his examination for discovery, which he agreed he had given, that he did not recall seeing earlier drafts of what became the challenged document. At trial, he gave evidence that he did not understand what the initial draft of what became the challenged document was saying.

[76] I do not accept that Mr. Redekop was that careless or that naïve. It is clear that a number of changes were made to that draft, and I find that they were made at the insistence of Mr. Redekop. I conclude from that finding that he was aware of the contents and the meaning of that draft, and I reject his evidence to the contrary as untrue.

[77] Mr. Redekop also gave evidence that he reviewed another draft of what became the challenged document, but did not review the part that set out his designation as the owner of the lands. I reject this evidence as untrue.

- [78] In my view, the fact that the final document was only two pages and resulted from multiple drafts belies Mr. Redekop's assertion that he simply did not review the part of the document that sets out his designation as the owner of the lands.
- [79] The defendants contend that based on Mr. Dhami's own evidence, it cannot be said that the written instrument is an agreement between Mr. Dhami and Mr. Redekop in their personal capacities as that does not reflect the true agreement Mr. Dhami believed he had entered into.
- [80] I am unable to accept this argument. It ignores the fact that both men intended that Mr. Dhami and his company would enjoy the use of the Maclure Lands, which could only occur if the owner of those lands agreed to the lease of the lands.
- [81] In the challenged document, there is a representation as to the ownership of the Maclure Lands, which I find Mr. Redekop accepted when he signed the document.
- [82] Mr. Redekop agreed that the challenged document dealt with the Maclure Lands, but would not agree that it was a lease. It was his evidence that he thought he was signing the challenged document as an officer or director of Aldergrove.
- [83] I find that the parties intended the challenged document to bind the owner of the lands as it states in the documents recitals.
- [84] The defendants also contend that because Mr. Dhami assigned his interest as lessee in the Maclure Lands to Greenland, by way of a sublease agreement dated in June 2015, without notice of the sublease to Mr. Redekop or Aldergrove, it cannot be argued that the arrangement was intended to be personal as between Mr. Dhami and Mr. Redekop, and the arrangement was in fact, one between Aldergrove and Greenland, thus calling the intent of the sublease of the Maclure Lands into question.
- [85] However, I find that Aldergrove was a part of the Maclure Lands arrangements at every step. Mr. Redekop originally entered into negotiations and signed the agreement with the intention of binding Aldergrove, and Aldergrove subsequently sold the inventory on the land to the plaintiffs.

Validity of the Leasehold Interest

- [86] The defendants contend that where the substance of an agreement between parties is that the grantee is not to have a right to exclusive possession of the premises but only to use them, the agreement operates as a licence, not a lease. Where a party has granted to another party a right to use a portion of the owner's premises without a grant of exclusive possession - simply a personal privilege with the possession and control of land remaining in the hands of the owner - the agreement between the parties is a licence, not a lease.
- [87] In *Cohen et al v. Moulton et al*, [1997] B.C.J. No. 2283, Mr. Justice McEwan explained:

One of the fundamental characteristics of a lease is that it confers exclusive possession of the demised lands (See, e.g. *A.G. (Canada) v. Lees (No. 2)*, [1977] 5 W.W.R. 581). With every deference to the right of parties to contract, it is the substance of the relationship itself rather than the labels the parties put on it that determines what it is.

[88] The defendants contend that the challenged document does not convey a leasehold interest in the Maclure Lands to the plaintiffs as they have not held exclusive possession of the lands at any material time during the term of the challenged document.

[89] For the reasons that follow, I reject this argument by the defendants.

[90] Mr. Redekop conceded that he understood that the nature of the transaction that led to the challenged document was a lease of the Maclure Lands, and said that he thought the arrangement was a lease, but would not agree that the document was itself a lease. He gave evidence that the reference in the document to him as the lessor was an oversight, but conceded that he thought he was signing as an officer or director of Aldergrove.

[91] I find that the substance of the relationship that the parties intended to capture in the challenged document was the lease of the Maclure Lands to Mr. Dhimi for the use of Greenland.

[92] The lands referred to in the challenged document are described as the entire plot of the Maclure Lands without exception, but as discussed below, the interests of Mr. La Ronde and Pacifica are set out in the challenged document.

[93] During Mr. Dhimi's cross-examination, he stated that he was aware at all times that the entire Maclure Lands would not be for his own use, and that he would have to share the lands with other users on site.

[94] The Maclure Lands have been occupied by Pacifica, which occupies and operates out of acreage in the southeast corner of the Maclure Lands and Fraserview, which occupies three greenhouses located at the east side of the Maclure Lands. The challenged document specifically provides that the plaintiffs were prevented from subletting the northeast and southeast corners of the parcel.

[95] Since the plaintiffs took possession of the Maclure Lands, the Redekops have entered the lands for various purposes, including to visit their son. Around February 2017, the Redekops entered the Maclure Lands on several consecutive days to fix a leak reported to the Redekops by the City of Abbotsford. The Redekops have continued to periodically attend the Maclure Lands to attend to maintenance matters and inspect the condition of the lands.

[96] There is also a common use roadway that runs through the middle of the site used generally for access by all occupants.

[97] Unlike a lease, a licence creates no estate or property interest in the property to which it relates. It merely conveys a privilege in the use of the property. A licence to occupy, as distinguished from a lease, is always revocable upon reasonable notice by the grantor.

[98] In *HighStreet Accommodations Ltd. v. The Owners, Strata Plan BCS2478*, 2017 BCSC 1039 at para. 49, Madam Justice Sharma pointed out that:

The law has recognized for centuries that a license does not grant an interest in land. Nothing in the legislation alters that basic principle. Therefore, HighStreet is partially correct. Bylaw 46.5 cannot purport to invalidate HighStreet's tenancy with Mr. Christman; but that relationship is not at issue in this case.

[99] I find that the parts of the Maclure Lands that were not for the exclusive use of the lessee were sufficiently identified in the challenged document, and that the remainder were intended to be and were in fact leased by the defendants to Mr. Dhami for use by Greenland.

[100] The defendants assert that notwithstanding the personal nature of the challenged document, its substance never gave rise to a landlord-tenant relationship, so they are within their authority as licensors of the Maclure Lands to revoke Greenland and/or Mr. Dhami's licence to operate the Greenland Growers Nursery on the lands.

[101] In the alternative, the defendants argue that if the challenged document is a valid lease of the entirety of the Maclure Lands, the plaintiffs hold the lease, at best, pursuant to a tenancy at sufferance.

[102] As I have already determined, other than the parts of the Maclure Lands that were not for the exclusive use of the lessee, the remainder were intended to be and were in fact leased by the defendants to Mr. Dhami for use by Greenland for the term specified in the challenged document, unless the termination clause could be invoked.

Whether Aldergrove is a Party to the Agreement

Agency

[103] The plaintiffs submit that Aldergrove is properly a party to the challenged document because Mr. Redekop was acting as agent for Aldergrove when he entered into the agreement.

[104] The agency argument may be summarized as follows:

- (a) Mr. Redekop was agent for Aldergrove;
- (b) Aldergrove gave Mr. Redekop authority as an agent to enter into agreements that would bind them;
- (c) in his capacity as agent, he did enter into a lease agreement with the defendants; therefore,
- (d) Aldergrove is bound to the terms of the lease.

[105] To conclude a contract, a corporation needs to act through a natural person; the legal authority for a natural person to do so, called "actual authority", may be granted on that person expressly, or may be implied.

[106] An agent, acting on behalf of their principal, can bind his or her principal to the terms of an agreement, even if the principal is not noted as a party. Per *John Ziner Lumber Ltd. v. Kotov*, 137 OAC 177, 2000 CanLII 16894 (Ont. C.A.):

When an agent acts on behalf of an undisclosed principal, the third party thinks that it is dealing with a person acting on his or her own behalf. In such a situation, if the third party learns of the existence of the undisclosed principal, the third party may sue the principal so long as the agent has acted within the scope of his or her actual authority.

[107] The plaintiffs rely on the following passage from *Friedmann Equity Developments Inc. v. Final Note Ltd.*, 2000 SCC 34, at para. 17:

Although the undisclosed principal may not be named in the contract, he or she does exist in fact and directs the agent. The agent is simply the instrument through which the principal acts. Since the principal controls the agent and receives the benefit of the contract with the third party, there does not appear to be any injustice in making the principal directly answerable to the third party or in allowing the principal to enforce the contract against the third party.

[108] The plaintiffs contend that the defendants are barred from pleading that Mr. Redekop was not authorized to bind Aldergrove, pursuant to s. 146 of the Business Corporations Act, S.B.C. 2002, c. 57, which provides:

146(1) Subject to subsection (2), a company, a guarantor of an obligation of a company or a person claiming through a company may not assert against a person dealing with the company, or dealing with any person who has acquired rights from the company, that

- (a) the company's memorandum or notice of articles, as the case may be, or articles have not been complied with,
- (b) the individuals who are shown as directors in the corporate register are not the directors of the company,
- (c) a person held out by the company as a director, officer or agent
 - (i) is not, in fact, a director, officer or agent of the company, as the case may be, or
 - (ii) has no authority to exercise the powers and perform the duties that are customary in the business of the company or usual for such director, officer or agent,
- (d) a record issued by any director, officer or agent of the company with actual or usual authority to issue the record is not valid or genuine, or
- (e) a record kept by or for the company under section 42 is not accurate or complete.

- (2) Subsection (1) of this section does not apply in respect of a person who has knowledge, or, by virtue of the person's relationship to the company, ought to have knowledge, of a situation described in paragraphs (a) to (e) of that subsection.
- [109] Mr. Redekop conceded that he had authority to sign documents on behalf of Aldergrove, but contended that the challenged document was of no force and effect, and advanced a counterclaim for compensation for the plaintiffs' occupation of the Maclure Lands and for the cost of restoration of those lands to the condition that they were in before the plaintiffs took occupancy of them.
- [110] Mr. and Mrs. Redekop both testified that Mr. Redekop had the authority to bind Aldergrove. The plaintiffs contend that Aldergrove can thus be bound to the lease of the Maclure Lands as the principal of Mr. Redekop, as he was or believed he was acting on behalf of Aldergrove and had the general authority to bind Aldergrove. They argue that as Mr. Redekop was an instrument for Aldergrove, and would have received the benefit from the lease; there is no injustice in allowing Aldergrove to enforce the lease, or to have the lease enforced against it.
- [111] Mr. Redekop gave evidence that from the outset of his discussions with Mr. Dhami about the Maclure Lands, it was his intention to put the lands under a lease. It is reasonable to assume that he thought that would be to the benefit of Aldergrove, the landowner, for whom he acted as its agent at the time of signing the challenged document.
- [112] The plaintiffs contend that actual authority may also be implied through conduct, relying on *Taylor Ventures Ltd. (Re)*, [1999] B.C.J. No. 2899 at para. 20. In that case, Mr. Justice Burnyeat found that an elected secretary entering into contracts involving mortgages, transfers, agreements of purchase and sales, and purchases of trade items on behalf of a corporation gave that secretary implied actual authority to conduct on behalf of that corporation.
- [113] Mr. Redekop gave evidence that all of his business dealings with Mr. Dhami since 2003 and prior to 2015 had been corporate, and not personal. He confirmed his evidence from his examination for discovery in August 2018 that he understood he never had signing authority for Aldergrove, but could sign contracts and leases on its behalf.
- [114] However, neither the Redekops nor Aldergrove protested that Mr. Redekop was wrongly noted as the owner of the Maclure Lands until Greenland had relied on the lease, even though the ownership of the lands was known to them.
- [115] When he was pressed about this evidence, I concluded that Mr. Redekop had confused his signing authority with his ability to sign cheques on the Aldergrove's corporate bank account, but even this was shown to be incorrect as of at least February 2015.
- [116] In September of 2006, Mr. Redekop signed mortgage registrations as "the authorized signatory" for Aldergrove.

- [117] I find that this evidence confirms Mr. Redekop's actual authority to act as Aldergrove's agent.
- [118] I find that Mr. Redekop acted in both his personal capacity and as agent for Aldergrove in negotiating the terms of the challenged document and in its execution.
- [119] Since Mr. Redekop had actual authority to bind Aldergrove and was acting as its agent in negotiating and executing the challenged document, I conclude that the challenged document is binding on Aldergrove despite Aldergrove not being noted as a party to the contract.

Ratification

- [120] I have already found that Mr. Redekop in his capacity as agent had the authority to bind Aldergrove to the challenged document. However, in case I am wrong in that finding, I will consider the plaintiffs' claim that Aldergrove ratified the agreement.
- [121] Agency by ratification provides an alternative legal basis to find a principal is bound by an agreement entered into by their agent. It can be applied where an agent was not acting with the authority of his principal. Even where an agent was not acting with his principal's authority, a principal may nevertheless be bound by the terms of the agreement because, by their conduct, they are found to have ratified the agreement. In ratification, the principal confirms what the agent did and the agreement is now binding on the principal.
- [122] To constitute a valid ratification, three conditions must be satisfied:
- (a) The agent whose act is sought to be ratified must have purported to act for the principal;
 - (b) At the time the act was done, the agent must have had a competent principal; and,
 - (c) At the time of the ratification, the principal must be legally capable of doing the act himself.
- (See: *Community Savings v. United Assoc. of Journeymen et al.*, 2002 BCCA 214 at para. 31, citing *Firth v. Staines*, [1897] 2 Q.B. 70 at 75)
- [123] The plaintiffs assert that the same argument they rely upon with respect to agency applies to ratification as well, in that Mr. Redekop was acting as an agent of Aldergrove all along. They submit that the defendants acted to ratify this agreement by allowing Greenland to operate on the Maclure Lands, and generally understood that the plaintiffs and Aldergrove were in a lease agreement.
- [124] The plaintiffs contend that but for a breakdown in the relationship in November 2015, and the defendants seeking a way out of the lease, they likely would have continued to leave Greenland to operate. In the result, the plaintiffs say that Aldergrove acted with acquiescence, effectively ratifying the agreement that was binding on them. They assert that in equity, the agreement is enforceable.

- [125] As discussed above, Mr. Redekop acted as the agent for Aldergrove with respect to the Maclure Lands. Had I not reached that conclusion, I would have found that Aldergrove must be taken to have ratified the lease of those lands by permitting Greenland and its principal, Mr. Dhami, to operate on the lands, until there was a falling out between the parties in November 2015.
- [126] Had I not reached the conclusion that Mr. Redekop acted as the agent for Aldergrove with respect to the Maclure Lands, I would also have found the parties intended that the challenged document would bind the owner of the Maclure Lands to a lease of those lands, as that is what the challenged document says. It is a document that went through several drafts, but none changed the reference to the lessor.
- [127] Thus, I find that if Mr. Redekop acted only as the agent for Aldergrove with respect to the Maclure Lands, he bound Aldergrove to a lease of the Maclure Lands when he signed the challenged document in that capacity, and the challenged document was ratified on Aldergrove's behalf by him.
- [128] Having found that Mr. Redekop was acting as agent for Aldergrove, I will therefore consider whether the document needs to be rectified to accomplish the intentions of the parties.

Rectification

- [129] Rectification is an equitable remedy that allows a court to correct mistakes of transcription of a contract. The conditions required to support an order for rectification are set out in *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19 at para. 31:
- a) The plaintiff must show the existence and content of an oral agreement that is inconsistent with a document recording its terms;
 - b) The defendant knew or should have known about the lack of correspondence between the written document and the oral agreement, in circumstances amounting to fraud or the equivalent of fraud; and
 - c) The plaintiff must show the precise form in which the written document can be made to express the prior intention.
- [130] If the challenged document is, on its face, incapable of construction such that it is an enforceable contract against Aldergrove, the plaintiffs submit that the court may amend it to note Aldergrove as the lessor through the doctrine of rectification.
- [131] The scope of the rectification remedy was discussed by Mr. Justice Brown, for the majority of the Supreme Court of Canada in *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56 ("Fairmont Hotels"). At paras. 12 - 15:

12 If by mistake a legal instrument does not accord with the true agreement it was intended to record - because a term has been omitted, an unwanted term included, or a term incorrectly expresses the parties' agreement - a court may exercise its equitable jurisdiction to rectify the

instrument so as to make it accord with the parties' true agreement. Alternatively put, rectification allows a court to achieve correspondence between the parties' agreement and the substance of a legal instrument intended to record that agreement, when there is a discrepancy between the two. Its purpose is to give effect to the parties' true intentions, rather than to an erroneous transcription of those true intentions (Swan and Adamski, at §8.229).

13 Because rectification allows courts to rewrite what the parties had originally intended to be the final expression of their agreement, it is "a potent remedy" (Snell's Equity (33rd ed. 2015), by J. McGhee, at pp. 417-18). It must, as this Court has repeatedly stated (Shafron v. KRG Insurance Brokers (Western) Inc., 2009 SCC 6, [2009] 1 S.C.R. 157, at para. 56, citing Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd., 2002 SCC 19, [2002] 1 S.C.R. 678, at para. 31), be used "with great caution", since a "relaxed approach to rectification as a substitute for due diligence at the time a document is signed would undermine the confidence of the commercial world in written contracts": Performance Industries, at para. 31. It bears reiterating that rectification is limited solely to cases where a written instrument has incorrectly recorded the parties' antecedent agreement (Swan and Adamski, at §8.229). It is not concerned with mistakes merely in the making of that antecedent agreement: E. Peel, The Law of Contract (14th ed. 2015), at para. 8-059; Mackenzie v. Coulson (1869), L.R. 8 Eq. 368, at p. 375 ("Courts of Equity do not rectify contracts; they may and do rectify instruments"). In short, rectification is unavailable where the basis for seeking it is that one or both of the parties wish to amend not the instrument recording their agreement, but the agreement itself. More to the point of this appeal, and as this Court said in Performance Industries (at para. 31), "[t]he court's task in a rectification case is ... to restore the parties to their original bargain, not to rectify a belatedly recognized error of judgment by one party or the other".

14 Beyond these general guides, the nature of the mistake must be accounted for: Swan and Adamski, at §8.233. Two types of error may support a grant of rectification. The first arises when both parties subscribe to an instrument under a common mistake that it accurately records the terms of their antecedent agreement. In such a case, an order for rectification is predicated upon the applicant showing that the parties had reached a prior agreement whose terms are definite and ascertainable; that the agreement was still effective when the instrument was executed; that the instrument fails to record accurately that prior agreement; and that, if rectified as proposed, the instrument would carry out the agreement: Ship M. F. Whalen v. Pointe Anne Quarries Ltd. (1921), 63 S.C.R. 109, at p. 126; McInnes, at p. 820; Snell's Equity, at p. 424; Hanbury and Martin Modern Equity (20th ed. 2015), by J. Glister and J. Lee, at pp. 848-49; Hart v. Boutilier (1916), 56 D.L.R. 620 (S.C.C.), at p. 622.

15 In Performance Industries (at para. 31) and again in Shafron (at para. 53), this Court affirmed that rectification is also available where the claimed mistake is unilateral - either because the instrument formalizes a unilateral act (such as the creation of a trust), or where (as in Performance Industries and Shafron) the instrument was intended to record an agreement between parties, but one party says that the instrument does not accurately do so, while the other party says it does. In Performance Industries (at para. 31), "certain demanding preconditions"

were added to rectify a putative unilateral mistake: specifically, that the party resisting rectification knew or ought to have known about the mistake; and that permitting that party to take advantage of the mistake would amount to "fraud or the equivalent of fraud" (para. 38).

[132] In *Intergulf Investment Corporation v. 0954704 B.C. Ltd.*, 2018 BCCA 337 at para. 42, our Court of Appeal stated as follows:

The critical feature of rectification is that it corrects, with precision, the agreement's mistaken expression of the parties' agreement. In *Bank of Montreal v. Vancouver Professional Soccer Ltd.* (1987), 1987 CanLII 2588 (BC CA), 15 B.C.L.R. (2d) 34 (C.A.) this court, in words fully in accordance with *Fairview Hotels*, held that a party seeking rectification must establish:

1. that the written instrument does not reflect the true agreement of the parties; and
2. that the parties shared a common continuing intention up to the time of signature that the provision in question stand as agreed rather than as reflected in the instrument.

[133] A court can only rectify an agreement with definite and ascertainable terms. A party seeking rectification must demonstrate that the parties had reached a prior agreement with definite and ascertainable terms that simply had not been recorded. The evidence must be "clear, convincing and cogent": *Fairmont Hotels* at para. 36. This is a remedy that must be exercised with great caution, and cannot be used as a substitute for due diligence at the time a document is signed, see: *5551928 Manitoba Ltd v. Canada (Attorney General)*, 2019 BCCA 376 at paras. 17 and 19.

[134] First, I must determine whether there was an agreement inconsistent with the recording in the challenged document.

[135] The plaintiffs contend that the parties' intention was for the challenged document to bind the owner of the Maclure Lands, relying in part on the recitals to the challenged document.

[136] Mr. Redekop stated in cross-examination that the challenged document was neither complete nor accurate. When asked, he clarified that the inaccuracy was that he signed from a personal perspective when he was not the owner of the Maclure Lands. He explained that he did not clearly read page one where he was described as the lessor, although he fully and carefully read the second page of the document, and thought he was signing as an officer of Aldergrove. He asserted that to be a proper lease, the signatory line should have stated "Lorne Redekop/Aldergrove Nursery". I reject this evidence, namely: I do not accept that Mr. Redekop was so careless and naïve in his review of the challenged document; there were several drafts of the challenged document, and at least some of the changes came at the request or direction of Mr. Redekop, and Mr. Redekop signed a document which included a recital that the lessor was the owner of the Maclure Lands.

- [137] Mr. Dhimi provided evidence during his cross-examination that he considered that the agreement was a personal deal between himself and Mr. Redekop and he intended it as such. Both men agreed that the blank lines on the first page of the challenged document were left that way because they were never discussed between them.
- [138] The defendants argue that the plaintiffs' position that the challenged document was intended to be between Aldergrove and Greenland is inconsistent with the position they took that all cheques would be issued to Lorne Redekop personally, despite knowing from November 2015 onwards that Aldergrove owned the Maclure Lands, and despite multiple notices from the defendants that their cheques would not be accepted by Mr. Redekop as he was not the owner of the Maclure Lands.
- [139] I accept that where parties have not directed their minds to a particular point of the agreement that is incorrect, rectification can be employed, so long as it was clear the parties had a continuing intention to be in agreement on the point to be rectified if they had directed their mind to it. The continuing intentions of Mr. Dhimi and Mr. Redekop were to bind the owner of the Maclure Lands, and both would have agreed to the ownership reference rectified at the time the agreement was made.
- [140] Second, I will consider whether the defendants knew or ought to have known about the lack of correspondence between the challenged document and the oral agreement between the parties.
- [141] The agreement between Mr. Dhimi and Mr. Redekop was, as I have already stated, to effect a lease of the Maclure Lands to Mr. Dhimi. Both men shared that intention.
- [142] Mr. Redekop categorized his name on the challenged document as the lessor as an "oversight".
- [143] Unless he conducted a Land Registry search of the title to the Maclure Lands, the ownership of those lands was outside the knowledge of Mr. Dhimi. While it would have been prudent for Mr. Dhimi to have conducted such a search, the casual and friendly relationship between he and Mr. Redekop mitigated against such a search, and the fact that Mr. Redekop signed the challenged document made such a search unnecessary. In the result neither man appreciated that there was a mistake at the time of transcription. Such a mistake lies at the heart of why rectification is granted. In *Burns v. Ferri* (1994), 16 O.R. (3d) 569 (Ont. C.A.), Mr. Justice Grange quoted Professor Waddams from *The Law of Contracts*, 3rd edition, s. 334, p. 221 in regards to rectification:

Certainly there must be a common intention to agree to terms different from those stated in the document, and the party seeking relief must be ignorant of the discrepancy but it could hardly be supposed that the party benefiting by the mistake would have a defence to rectification if that party actually knew of the discrepancy and consciously sought to take advantage of it. Such conduct would be close to fraudulent, and it is clear that the courts will relieve against it.

- [144] As I have mentioned above, neither the Redekops nor Aldergrove protested that Mr. Redekop was wrongly noted as the owner of the Maclure Lands until Greenland had relied on the lease, even though the ownership of the lands was known to them.
- [145] I have already found that Mr. Redekop intended to bind Aldergrove to the arrangement set out in the challenged document. In the result, it would be unfair and unjust for Aldergrove and Mr. Redekop to be allowed to avoid that agreement set out in the challenged document.
- [146] According to the test articulated in *Fairmont Hotels*, rectification is available only where permitting the other party to take advantage of the error would amount to "fraud or the equivalent of fraud".
- [147] I take this reference not to be a reference to the tort of deceit or strict fraud, but rather the contemplation of fraud in the "wider sense... where the Court is of the opinion that it is unconscientious for a person to avail himself of the advantage obtained": see, e.g., *Coast Mountain Aviation Inc. v. M. Brooks Enterprises Ltd.*, 2014 BCCA 133 at para. 23.
- [148] I will therefore address the "precise form" in which the challenged document can be made to express the prior intentions of the parties.
- [149] The precise form of amendment sought by the plaintiffs is the removal of any notation of Lorne Redekop within the lease, and its replacement with Aldergrove Nursery Ltd. I find that such a change would effect the intention of the two men.
- [150] Finally, the defendants assert that at all material times, both parties were aware that Mr. Dhami and/or Greenland would not have exclusive possession of the Maclure Lands. They assert that even if a rectification remedy were available in respect of the names of the parties to the challenged document, the document continues to lack clarity because it contains no site plan and sets no boundaries in terms of the areas of the Maclure Lands that would be available for Mr. Dhami's or Greenland's use.
- [151] As I have explained above, the parts of the Maclure Lands that were not for the exclusive use of the lessee were sufficiently identified in the challenged document, and the remainder were intended to be and were in fact leased by the defendants to Mr. Dhami for use by Greenland.
- [152] In the result, I find that there is sufficient certainty in the lease to permit the rectification sought by the plaintiffs.
- [153] In conclusion, I find that Mr. Redekop intended Aldergrove to be bound to a lease of the Maclure Lands when he signed the challenged document, and that the challenged document should be rectified to read as Mr. Redekop said it should have originally been, had it been a proper lease, with the lessor listed as "Aldergrove Nursery", and the signatory line reading as Mr. Redekop suggested it should originally have been, to read "Lorne Redekop/Aldergrove Nursery".

Negligent Misrepresentation

[154] As set out in the seminal case of *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87, there are five elements to negligent misrepresentation:

- a) A duty of care based on a special relationship between the representor and the representee;
- b) the representation in question must be untrue, inaccurate, or misleading;
- c) the representor must have acted negligently in making the misrepresentation;
- d) the representee must have relied in a reasonable manner on the negligent misrepresentation; and
- e) reliance must have been detrimental to the representee in the sense that damage resulted.

[155] Mr. Redekop was in a position where misleading the plaintiffs on the ownership of the land would reasonably cause harm to the plaintiffs, thus creating a duty of care to the plaintiffs.

[156] Mr. Redekop's representation in the challenged document that he was the owner of the Maclure Lands is untrue, and I find he was negligent in permitting that representation to be included in the document.

[157] I also find that Mr. Dhami, in his personal capacity and as the representative of Greenland, reasonably relied upon Mr. Redekop's representation.

[158] However, as I have found above that Mr. Redekop acted in both his personal capacity and as agent for Aldergrove in negotiating the terms of the challenged document and in its execution, it follows that the plaintiffs' reliance on his representations to them cannot have been detrimental to them in the sense that any damage resulted from any misrepresentations, and the fifth element of negligent misrepresentation has not been made out.

[159] If I am wrong in concluding that Mr. Redekop acted as an agent for Aldergrove when he entered into the challenged document, I would have found that the plaintiffs suffered no damage from the negligent misrepresentation of Mr. Redekop.

Proprietary Estoppel

[160] Proprietary estoppel is in and of itself a cause of action. It allows the plaintiffs to pursue damages against Aldergrove in the same manner as it could, had Aldergrove been a contracting party of the challenged document.

[161] As I have found that Aldergrove was in fact a party to the contract, the lease is binding upon it. The proprietary estoppel analysis is necessary only if I have erred in making that finding. I will therefore consider this cause of action as an alternative basis for relief by the plaintiffs.

[162] The doctrine of proprietary estoppel - being an equitable remedy - is intended to be flexible and contextual. While the basic elements of the doctrine are not to be technically defined, our Court of Appeal set out these elements in *Idle-O Apartments Inc. v. Charlyn Investments Ltd.*, 2014 BCCA 451 at para. 49:

- (a) Is there an equity established?
- (b) If so, what is the extent of the equity?
- (c) What is the relief appropriate to satisfy the equity?

[163] In *Cowper-Smith v. Morgan*, 2017 SCC 61 at para. 15, Chief Justice McLachlin, for the majority, held an equity is established when:

- (1) a representation or assurance is made to the claimant, on the basis of which the claimant expects that he will enjoy some right or benefit over property; (2) the claimant relies on that expectation by doing or refraining from doing something, and his reliance is reasonable in all the circumstances; and (3) the claimant suffers a detriment as a result of his reasonable reliance, such that it would be unfair or unjust for the party responsible for the representation or assurance to go back on her word.

[164] The plaintiffs argue that they believed that they had a tenancy right in the Maclure Lands based on the lease with Mr. Redekop, on purchasing the remaining Aldergrove inventory left on the lands, and by being allowed to commence operations on the Maclure Lands for several months without any dispute by Aldergrove until their operations were under way.

[165] Aldergrove must be taken to have been aware of the lease of the Maclure Lands, through Mr. Redekop. It did nothing to challenge the lease until Greenland took steps in reliance on the document as a lease.

[166] Mr. Redekop represented to the plaintiffs that they would have a tenancy and the plaintiffs relied on this tenancy and commenced operations on the Maclure Lands, including irrigation repairs, purchasing and selling stock left over from Aldergrove.

[167] I find that it would be unjust for Mr. Redekop to go back on his representation on his own behalf, and on behalf of Aldergrove because he did not protest Mr. Redekop being wrongly noted as the owner of the Maclure Lands on the lease despite knowing about the error until Greenland tried to rely on the lease.

[168] The primary factor in fashioning a remedy for proprietary estoppel is the reasonable expectations of the plaintiff. The courts have given relief by ordering a lease to be enforced through proprietary estoppel before, with some modification to the lease's terms.

[169] The relief that can be granted under this cause of action is contextual with the extent of the equity established as the upper limit. Here, the challenged document was a 12-year lease of the Maclure Lands. That would constitute the upper limit of the relief available under this cause of action.

- [170] At paras. 72-73 in *Idle-O Apartments*, Madam Justice Newbury held that the granting of a remedy for proprietary estoppel is a discretionary matter for which the appropriate remedy is the "minimum equity necessary to do justice".
- [171] At paras. 74-75, Newbury J.A. cautioned that the "minimum equity" in every case will not necessarily be to grant the claimant what it was promised or its monetary equivalent, but stated that the claimant's reasonable expectations will usually be a very important factor, and perhaps the primary factor, in the fashioning of a remedy for proprietary estoppel.
- [172] Bearing this direction in mind, I find that the plaintiffs' reasonable expectation was the use of the Maclure Lands for 12 years, unless they were removed from the Agricultural Land Reserve ("ALR") or rezoned for another use.

Breach of Contract

- [173] In addition to their claim for a finding that the challenged document is a valid lease, the plaintiffs seek damages for a breach of the implied term of quiet enjoyment in that lease. Having now found that the challenged document is a valid lease, I will refer to it as the "Lease" when describing the legal obligations and remedies that flow from it.
- [174] The plaintiffs contend that the conduct of the defendants relating to the ownership of the Maclure Lands is a breach of the Lease, in that the defendants maintained that the Lease was one that was only "at will", and refused to cash the cheques tendered by the plaintiffs, made out to Mr. Redekop. In addition, the defendants refused to disclose the amount of the property taxes on the lands, one half of which the plaintiffs were obligated to pay.
- [175] The right to quiet enjoyment is implied into any lease. The implied covenant of quiet enjoyment protects against a landlord's derogating from his or her own grant.
- [176] In *Stearman v. Powers*, 2014 BCCA 206, at para. 18, Madam Justice Newbury explained the term provides "assurance against the consequences of a defective title and against any substantial interference, by the covenantor or those claiming under him, with the enjoyment of the premises for all usual purposes". Citing *Firth v. B.D. Management Ltd.* (1990), 73 D.L.R. (4th) 375 (B.C.C.A.), Newbury J.A. held that, to establish a breach of the covenant of quiet enjoyment, the tenant must show that the ordinary and lawful enjoyment of the demised premises is "substantially interfered" with by the acts of the lessor.
- [177] The plaintiffs argue that the defendants' conduct respecting the ownership of the property amounts to a breach of the Lease.
- [178] Contrary to what the plaintiffs contend was an implied term of quiet enjoyment, the defendants did not protect the plaintiffs from the consequences of defective title; instead seeking to take advantage of it, taking the position there was an "at will" tenancy. The plaintiffs say that this substantially interfered with their long term plans to grow cedar trees on the property, as the plan required the certainty of a long-term tenancy. The plaintiffs contend that they reasonably believed their ability to continue operating on the Maclure

Lands could be hindered with short or no notice, and thus ceased their operations on the Maclure Lands.

[179] In *Dourada Investment Inc. v. V. Melfi Holding Ltd.*, 2017 ONSC 4901 at para. 41, Mr. Justice C. de Sa stated:

At common law, if a tenant remains in possession following the expiry of the term of the lease, there are four possible legal relationships that can then be created between the tenant and the landlord: (1) a tenancy at sufferance; (2) a tenancy at will; (3) a deemed new periodic tenancy, referred to as a holdover tenancy; and (4) a trespass. See *AIM Health Group Inc. v. 40 Finchgate Limited Partnership*, 2012 ONCA 795, 113 O.R. (3d) 187, at para 92. Epstein J.A. goes on to explain these legal relationships succinctly in the following way:

- [93] A tenancy at sufferance arises when a person remains without consent after the person's right to be in possession has ended but where no demand for possession has been made. Once the former landlord demands possession, the former tenant is no longer there at sufferance and becomes a trespasser.
- [94] In a tenancy at will, the tenant remains in possession with the consent of the landlord after the lease has expired, most often when they are negotiating a new lease. The tenancy at will lasts "until some other interest is created, either by express grant or by implication by the payment and acceptance of rent". A tenancy at will is determinable by either party indicating that it wishes the tenancy at will to end.
- [95] Where a tenant remains in possession following the termination of a lease, or holds over, and where the landlord accepts rent from the tenant or otherwise consents, a new periodic tenancy arises at common law by implication on the same terms as the expired lease, subject to any evidence that the parties reached a different arrangement or understanding. If the original lease term was less than one year, the new tenancy is deemed to be month to month, whereas if the original lease term was for more than one year, the new tenancy is deemed to be year to year. The payment and acceptance of rent is considered evidence of the parties' intent to enter into a new tenancy arrangement. Without agreeing on other terms, it would be on the same terms as the old lease.
- [96] In order to avoid the deemed creation of a yearly tenancy when the tenant holds over and the landlord accepts rent, the overholding clause is frequently inserted into commercial leases, providing that the tenancy that is created is a month-to-month tenancy. Such clauses often provide for higher rent than was paid during the original term of the lease.
- [97] But if the tenant remains without paying rent, then at common law, the tenant is there at the sufferance of the landlord and is subject to ejectment: see *Burritt v. Dunham*, [1847] O.J. No. 18, 4 U.C.R. 99 (U.C.Q.B.).

- [180] In their submissions, the defendants argue that the Lease created a tenancy at sufferance, not a tenancy at will. As I have determined that the Lease was valid, it is unnecessary for me to resolve this issue.
- [181] The purpose of the Lease was not simply possession of the land but the operation of a viable nursery business thereon.
- [182] The defendants' insistence that all the plaintiffs had acquired was an at will/at sufferance tenancy interfered with the plaintiffs' enjoyment of the land, which required the certainty of a long-term tenancy.
- [183] I find that the implied term of quiet enjoyment was breached by the conduct of the defendants.

Conspiracy

- [184] The plaintiffs did not make submissions in support of this claim, and I am not satisfied that such a claim could be supported on the evidence that I heard. In the result their claim based upon the tort of conspiracy is unproven and is dismissed.

Loss of Business Reputation and Goodwill

- [185] The plaintiffs adduced no evidence to support this claim. In fact, the evidence from their customers who were called as witnesses did not suggest any basis for a claim for damages for loss of business reputation and goodwill, and indeed I infer from their evidence that the plaintiffs' reputation and goodwill remain unsullied. This claim is therefore dismissed.

The Damages alleged by the Plaintiffs

Ability of Greenland to Claim Damages

- [186] The plaintiffs submit that the assignee of a contract can sue under that contract if the assignment is made known to the other contracting party. On this basis, they argue that Greenland can claim contractual damages.
- [187] Greenland's claim is a claim for damages for breach of contract. A claim for damages for breach of contract is a legal chose in action, which is assignable either as a legal assignment or as an equitable assignment: *Argo Ventures Inc. v. Choi*, 2019 BCSC 86 at para. 24.
- [188] Legal assignments are governed by s. 36 of the Law and Equity Act. For a legal assignment to be enforceable, s. 36 requires that an assignment be in writing and that express notice of the assignment be given to the person from whom the assignee may make a claim. The latter requirement has clearly not been met in this case, so the assignment to Greenland cannot be a legal assignment.

[189] Where an assignment does not meet the statutory requirements of s. 36, it is possible to find that it is operative as an equitable assignment: see *Guraya v. Kaila*, 2019 BCCA 367. At para. 20, the Court quoted with approval from the decision of Mr. Justice Pearlman in *University of British Columbia v. Kapelus*, 2012 BCSC 486 as follows:

20 The principles concerning the creation of equitable assignments were reviewed by Justice Pearlman in *University of British Columbia v. Kapelus*, 2012 BCSC 486, in these terms:

[68] In *Bank of NS v. Nfld Rebar Co.* (1987), 65 Nfld. & P.E.I.R. 165, (Nfld. T.D.), Steele J. reviewed the law on equitable assignments and at para. 12 cited the following passage from Snell's *Principles of Equity*, 27th Ed. where the learned author stated at p. 74:

An assignment which does not comply with the statutory requirements is not necessarily ineffectual, for it may operate as an equitable assignment. "The statute does not forbid or destroy equitable assignments or impair their efficacy in the slightest degree." In many cases an assignment which fails to satisfy the statute (e.g., because only part of the chose is assigned) is nevertheless fully effective in equity. As assignment, too, may at first be merely equitable, and then, when, e.g., the necessary notice is given, become statutory.

[69] Steele J. then summarized the essential requirements for an equitable assignment at para. 13:

Generally speaking, it can be said that an equitable assignment is deemed to exist where a sufficient expression of an intention to assign can be found. An intention to assign must be proved. Equity is more concerned with intent than actual form. The assignment must adequately identify the chose. In certain circumstances consideration may be necessary. Notice to the debtor is not necessary to perfect an equitable assignment but notice is indeed desirable in order to prevent the debtor from paying the assignor and, secondly, it also gives to the assignee priority over other assignees.

[70] An equitable assignment will be deemed to exist where there is a sufficient expression of an intention to assign, which must be demonstrated by evidence before the court: *Bramalea Ltd. (Receiver manager of) v. Citibank Canada*, [1996] O.J. No. 3895 at para. 14 (Ct. J. Gen. Div.), reversed on other grounds, [1997] O.J. No. 4283 (C.A.).

[71] In *Chudy v. Merchant Law Group*, 2008 BCCA 484 at para. 39, Low J.A. stated that "[e]quity looks to any evidence of an intent to assign, rather than to the form of the assignment".

[190] In order to find an equitable assignment, I must therefore determine if there was any assignment, and if so, whether there was a sufficient expression of an intent to assign, which has been demonstrated on the evidence.

[191] Mr. Dhami gave evidence that it was his plan to lease the Maclure Lands to Greenland in order to expand the company's operations. He said his intended use for the Maclure Lands was to use them to grow cedar hedging.

- [192] As Madam Justice Southin summarized in *Lawson Graphics Pacific Ltd. v. Simpson* (1987), 12 B.C.L.R. (2d) 126 (S.C.), cited with approval in *Chudy v. Merchant Law Group*, 2008 BCCA 484 at para. 44, "[n]o particular form of words is necessary; all that is required is that the words clearly show an intention that the assignee is to have the benefit of the chose in action".
- [193] The evidence before me satisfies me that there was an assignment, as the sublease functions to effect this end.
- [194] In this case, there is a term in the Lease that stated: "Lessee can sublet or rent any portion of land/shop/greenhouse as he wishes, EXCLUDING the current residences at the North East and South East corners of the parcel."
- [195] The parties had an informal relationship, and a protracted negotiation leading up to the Lease, but did not get legal advice in preparing the Lease. Their business operations were well known to each other. On this basis, I conclude that there was an expression of an intent to assign at the time of the agreement.
- [196] Notice to the defendants was not necessary to perfect an equitable assignment and was not necessitated to prevent the defendants from dealing with Mr. Dhami, as opposed to Greenland and gave Greenland priority over any other assignees, had any asserted the right to an assignment.
- [197] In any event, I find that the defendants were well aware of Greenland's use of the Maclure Lands, and by the application to add Greenland as a party to these proceedings on March 22, 2019, the defendants had clear notice of the assignment.
- [198] I find that the defendants fully expected that Greenland would be using the Maclure Lands, and should be taken to have accepted that reality. In effect, they had sufficient notice that Greenland would use the lands, and must have anticipated that it would have been by way of sublease or assignment, and acquiesced thereto. In the result, they cannot now complain of the lack of formal notice of the assignment.

Plaintiffs' Claim for Damages

- [199] The plaintiffs' claim for damages is based on the defendants' breach of contract. The essence of the claim is the profit that the plaintiffs would have made from selling 5-gallon pots of cedar trees but for the defendants' breach.
- [200] The plaintiffs claim \$677,648.40 for damages, consisting of:
- (a) \$744,100 for sales they say they would have made from selling 57,000 units between 2017 and 2019, offset by \$152,310 for the cost of potting and loading to obtain these sales - amounting to lost profits equalling \$591,791 between 2017 and 2019.
 - (b) \$12,220 for the cost of removing plants from the Maclure Lands in 2018; and,

- (c) \$73,637 for costs thrown away in planting and maintaining the plants on the Maclure Lands.
- [201] The figure of \$677,648.40, is based upon the production of 60,000 5-gallon cedars on the Maclure Lands, broken down as follows:
- (a) 2015 potting expenses and maintenance: \$49,996.75
 - (b) 2016 expenses: \$9,786.95
 - (c) 2017 expenses and loss of sale: \$81,309.78
 - (d) 2018 expenses and loss of sale: \$220,994.92
 - (e) 2019 expenses and loss of sale: \$315,560.00
- [202] On July 21, 2015, Aldergrove entered into a sale of all remaining inventory and certain equipment located on the Maclure Lands to Greenland.
- [203] Sukhdeep confirmed that Greenland moved onto the Maclure Lands in the summer of 2015. Mr. Redekop provided permission for the plaintiffs to do so on a rent-free basis until the term of the Lease had officially begun early the following year.
- [204] The plaintiffs estimate that they would have sold 57,000 units of 5-gallon hedges over three years. Mr. Dhami testified Greenland would have been able to sell all its 5-gallon pots grown on the Maclure Lands. They ceased growing on the Maclure Lands due to threats of invalidity of the Lease and termination.
- [205] The plaintiffs contend that they had some \$6,000 worth of inventory on the Maclure Lands and worked on the irrigation system on those lands during the summer of 2015, investing some \$4,000 for this work and for bark mulch used on the lands. They assert that the business plan was to mix soil at Greenland's nursery site, and then move it to the Maclure Lands to facilitate the replanting of cedar trees, also known as emerald greens from the 4-inch pots into 1-gallon pots. He gave evidence that he did so in the summer of 2015, and planned to move the plants into 5-gallon pots in 2016. He said that by July 2015 he had 60,000 trees in 1-gallon pots on the Maclure Lands, which he planned to sell in 5-gallon pots in 2017, 2018 and 2019. I will refer to these plants as "cedars" for the balance of these reasons for judgment.
- [206] Mr. Redekop gave evidence that Mr. Dhami began moving his inventory off the Maclure Lands in 2016, and that by 2017 had moved most of the inventory he purchased from Aldergrove from the Maclure Lands, leaving the potted cedar trees and blueberries. Mr. Redekop also gave evidence that the lands had not been weeded and had deteriorated.
- [207] The process of growing cedars begins with taking clippings of mature cedar hedging and placing them into plug trays. After a period of roughly six months, the clippings are moved into 4-inch square pots. After another year, the clippings are moved into 1-gallon pots, and after a further year, they are moved into 5-gallon pots.

- [208] Mr. Dhami agreed that in the wintertime, cuttings of approximately three to four inches would be taken from existing cedar trees. The cuttings would then be planted in cell plug trays in the nursery propagation area. After four to six months, the cedars were moved from the cell plug trays into 4-inch pots. After approximately a further year, the cedars would be moved into 1-gallon pots, where they would develop for approximately a year until they were then moved into 5-gallon pots, where they would further develop for one to three years, at which time they would be ready for sale.
- [209] The plaintiffs assert that Greenland had initiated the operations for growing, which included fixing up irrigation, cleaning up the plant beds, mixing soil, and transferring 60,000 cedar hedge saplings into 1-gallon pots in the summer of 2015. The plan was ultimately to grow the cedars in 1-gallon pots until the summer of 2016, in which they would be transferred into larger 5-gallon pots for further growing, and be ready for sale between 2017 and 2019.
- [210] Mr. Dhami gave evidence that in preparation for the execution of the business plan, he spent some \$20,000 preparing the Maclure Lands in 2015, in labour costs weeding, taking care of, watering and cleaning the hedges.
- [211] The plaintiffs' loss calculation described the growth cycle of four years to reach 3½ to 4-foot size. In order to reach such size, Mr. Dhami agreed that water is the main necessity. He agreed that the water supply on the Maclure Lands was shared with Pacifica, but pointed out that their operation was smaller than his, and that the water utilized by his operation could have been and was recycled, reducing the actual amount of water required.
- [212] Mr. La Ronde explained in his evidence that his company and Greenland shared the water supply on the Maclure Lands which presented challenges for both nurseries. He expressed the view that Greenland's operation on the Maclure Lands deteriorated after 2015.
- [213] I accept that there were practical challenges to Greenland's plan for the Maclure Lands. Firstly, they shared their irrigation system with Pacifica, and the supply was more limited than the combined needs of the two operations. While there was the potential for other water supplies or the recycling of water, I have concluded that this did not fully address the limited irrigation system problems for Greenland.
- [214] Mr. La Ronde said that Mr. Dhami had both cedars and planted blueberries on the Maclure Lands in 2016, and that all started to grow, but by 2017 anything desirable in terms of the plants were moved from the property. One-gallon pots of cedars and the blueberries remained on the property into 2018, but fewer and fewer in number in 2017 and 2018.
- [215] Mr. Dhami gave evidence that once he was in possession of the Maclure Lands, he potted some 60,000 cedar trees from 4-inch pots into 1-gallon pots on that property.

- [216] Mr. Redekop gave evidence that there were only about 35,000 cedar trees in 1-gallon pots on the Maclure Lands in 2015, although he conceded that he had not "walked the beds" to determine the number of cedar tree pots. He did agree that if one started with potting of 4-inch plants into 1-gallon pots in 2015, they could be re-potted into 5-gallon pots in 2016, and grown to 3 ½ feet and sold at that size by 2017, but added that they would be better for sale in 2018.
- [217] Mrs. Redekop said that she saw some of the cedar trees in 1-gallon pots on the Maclure Lands in the summer of 2015 and agreed with her husband's estimate of the number, but did not explain how she arrived at the number herself.
- [218] Mr. La Ronde gave evidence that he regarded the Redekops as his parents, and that he regarded Mr. Dhami as his brother. I found him to be a fair and objective witness. He said that he "eyeballed" the number of cedars at 30,000 to 40,000 in the summer of 2015. In cross-examination he agreed that he had not "walked" the area or counted the number of cedars, and would be unable to contest Mr. Dhami's estimate of 60,000 cedars.
- [219] I have reservations about the number of cedars that were actually on the Maclure Lands. I find that the estimate of 60,000 by Mr. Dhami and Sukhdeep is overly generous, and would reduce that number to 50,000.
- [220] In addition, I find that not all of the cedars in 1-gallon pots on the Maclure Lands would have made it to saleable size or condition. The irrigation challenges were not entirely manageable from the available irrigation supply, and I accept that a loss of perhaps 10% of the number of planted cedars would have been lost due to irrigation challenges.
- [221] In the result, I find that had Greenland been able to make full use of the Maclure Lands they would have produced only 45,000 saleable cedars.

The Plaintiffs' Ability to Sell Cedars

- [222] Sukhdeep gave evidence that Greenland sold to wholesalers and retailers of plants and had over a hundred customers to whom it sold plants. He said that in 2017, there was a shortage of cedars on the nursery market and some wholesalers who wanted bigger quantities in 5-gallon pots were turned away; one of whom wanted to purchase some 6,000 to 10,000 cedars in 5-gallon pots.
- [223] The plaintiffs contend that the corporate plaintiff had gross revenues of approximately \$2.1 million in 2018. They contend that it cost \$30,000 to get their inventory to the 1-gallon stage, but that a 1-gallon cedar could be sold for \$3 a unit.

- [224] The defendants argue that the plaintiffs' claim is unsupported by any expert valuation of business loss and rests entirely on the evidence of Mr. Dhimi tied to what he says might have been received had he been able to pot what he alleges were 60,000 1-gallon cedars into 5-gallon pots and then sell them from the Maclure Lands. I am not persuaded that the evidence before me is insufficient for me to determine this aspect of the plaintiffs' claim.
- [225] The plaintiffs gave evidence that Greenland's sales of 5-gallon cedars were:
- 2011 - 7,000 to 10,000;
 - 2012 - 7,000 to 10,000;
 - 2013 - 7,000 to 10,000;
 - 2014 - 7,000 to 10,000;
 - 2015 - 10,000 to 12,000;
 - 2016 - 15,000 to 16,000
 - 2017 - 10,000; and
 - 2018 - 10,000.
- [226] Sukhdeep gave evidence that Greenland had over 100 regular purchasers. He said that he was always able to sell Greenland's inventory, but conceded that to do so, he sometimes needed to offer discounts.
- [227] William Michael Petersen is the national marketing manager of Brookdale Treeland Nurseries ("BTN"), an enterprise that he described as the largest, if not one of the largest distributors of nursery products in Canada. His company supplies many of the "big box" stores in the country. BTN grows hedging cedars in 5-gallon pots and also purchases those trees in 5-gallon pots from third party sources, including Greenland.
- [228] Mr. Petersen gave evidence that by the time of trial, his company had had a business relationship with Greenland for eight or more years. Mr. Petersen gave evidence that BTN purchased probably 35,000 to 40,000 or 50,000 various plants from Greenland each year.
- [229] Mr. Petersen explained that container-grown trees are certainly more in demand than field-grown trees.
- [230] Mr. Petersen gave evidence that in 2016 BTN purchased 9,000 5-gallon pot units from Greenland. He stated that in 2017, BTN had a shortage of 5-gallon pot cedar trees and was trying to purchase 7,000 to 10,000 such trees from third party suppliers. He said that BTN purchased over 34,000 units from Greenland, including 3,000 cedar trees in 5-gallon pots, and would likely have purchased more if Greenland had them available. He said that the height of the trees was 3½ to 4 feet, but that the industry usually hoped for trees a little larger; 4 to 4½ feet. Mr. Petersen estimated that it would probably take four years for a tree to reach 3½ to 4 feet.

- [231] Mr. Petersen gave evidence that BTN did not purchase any 5-gallon potted cedar trees from Greenland in 2018 or 2019, but that if Greenland had had available 5-gallon potted trees in 2018 and 2019 the likelihood that BTN would have purchased from them was good, as BTN was seeking about 3,000 such units in 2018 and 8,000 to 10,000 in 2019.
- [232] Mr. Petersen gave evidence that BTN would have paid \$10.50 per unit in 2017, and \$12 to \$12.50 in 2019. He was uncertain what price would have been paid in 2018, but surmised that it would have been between the 2017 and 2019 prices.
- [233] Mr. Aman Sivia is the Operations Manager for his family's development and construction business. He gave evidence that he had purchased 3,000 to 5,000 cedar hedge trees in 5-gallon pots from Greenland per year for a period of 11 or 12 years until 2017 when Greenland's inventory became low and his landscaper outsourced their purchases except for about 150 - 200 that were purchased from Greenland. The sale prices ranged from \$13 - \$14 per tree, but generally was \$12. Mr. Sivia said that he would have continued to buy from Greenland if they had sufficient inventory from 2017 onward.
- [234] Mr. Brent Moody is the Managing Director of Golden Spruce Nurseries. Prior to 2017 he purchased 2,500 - 3,000 cedar trees in 5-gallon pots from Greenland, for \$12 - \$13 less an 8% discount, but since their inventory fell in 2017, he has only purchased about 700 such trees from Greenland, and some 1800 - 2300 from other suppliers, albeit with some difficulty. He presently pays \$14.50 per tree. He said he would have continued to purchase exclusively from Greenland if they could supply his needs.
- [235] Mr. Leonard Smit is a manager with Kato Nurseries in Abbotsford and has spent some 38 years in the nursery business. He is familiar with the type of cedar trees grown by Greenland, and said that cuttings are taken in the fall to propagate these trees, and once rooted into plugs, they are transferred into 1-gallon pots for approximately one year, then transferred into 5-gallon pots. He gave evidence that the trees are grown to whatever size one wants, but take three to three and a half years from cuttings to reach 3 to 3½ feet and four years to reach 4 to 4½ feet.
- [236] Mr. Smit explained that his nursery grows trees similar to those grown by Greenland, but that his nursery grows for the retail market whereas Greenland grows for the landscaping market, which is less demanding of quality.
- [237] Mr. Redekop gave evidence that he had experience growing the type of cedars that Mr. Dhami was growing in the 5-gallon pots, and that they needed to be grown for two years in 1-gallon pots and then a further two years in 5-gallon pots to reach a height of four feet.
- [238] Mr. Dhami estimated that the sale prices would have been \$10.50 in 2017, less \$2.14 for potting, handling and loading per unit, and the cost of soil mix, which he estimated at \$34.76 a yard. He estimated sale prices in 2018 of \$12.95 per unit, and sale prices in 2019 of \$13.95, less \$2.68 for potting, handling and loading per unit.

- [239] Mr. Dhami gave evidence that 15% of the cedars on the Maclure Lands would have been saleable in 5-gallon pots by 2017, 33% by 2018 and a little over 45% by 2019.
- [240] I accept that if the plaintiffs' loss was occasioned by the defendants' refusal to treat the lease as valid, that their claim is calculable, but as I will now explain, I am not persuaded that the plaintiffs could not have mitigated their loss by reasonable action.

Mitigation

- [241] The plaintiffs submit that they made a reasonable business decision to cease operation, based on the threats by the defendants, and thus met their duty to mitigate.
- [242] Mr. Dhami was told the Lease was invalid in several letters sent by and on behalf of the defendants and gave evidence that as a result, he made a decision on behalf of Greenland to arrest his planned use of the Maclure Lands. The first of these letters was sent by counsel for the defendants on July 11, 2016. The defendants maintained this position in further correspondence sent on June 19, 2017, July 11, 2017, and July 19, 2018.
- [243] The plaintiffs contend that because the defendants took the position that there was no long-term lease, they were left uncertain whether they would continue to have the ability to grow on the Maclure Lands. This, they argue, led to them making the decision to not transfer their cedars to 5-gallon pots.
- [244] The plaintiffs conceded that their inventory on the Maclure Lands was never transferred from 1-gallon pots to 5-gallon pots and that when they decided to ship the inventory in 1-gallon pots from the Maclure Lands back to their own nursery, the cedars in those pots were thrown out as most were already dead, having been kept too close together to keep them from falling over.
- [245] This does not explain why the cedars were not sold in the 1-gallon pots for a price of \$3 per unit as the plaintiffs contended they could have been. The failure to do so, is, in my view, a failure to mitigate on the part of the plaintiffs.
- [246] More importantly, the defendants point out that this action has been outstanding since October 2016, and that since then, the plaintiffs have not pursued the injunctive relief claimed in their pleadings. They say as well that despite their threats, no steps were taken to evict the plaintiffs from the Maclure Lands until February of 2018, by which time the repotting to 5-gallon pots could clearly have been completed.
- [247] Mr. Dhami gave evidence that by 2018 he gave up the prospect of producing the cedars he had initiated on the Maclure Lands, as it was uneconomic and he concluded that those trees were all probably damaged.
- [248] One-gallon pots are obviously lighter than 5-gallon pots, and they were clustered together by Greenland, making them easier to maintain. Transplanting the hedges from 1-gallon pots to 5-gallon pots required the man-hours, and material, to transfer and spread out

60,000 5-gallon pots, which Mr. Dhami estimated would cost around \$100,000. If the plaintiffs were then forced to move from the Maclure Lands, it would have been a much larger undertaking to move 5-gallon pots off as opposed to 1-gallon pots. If they were prevented from entering the Maclure Lands, they would have lost out on the man-hours to transfer and move the 5-gallon pots.

[249] Mr. Dhami said that the cedars at the Maclure Lands were not replanted into 5-gallon pots as 1-gallon pots are cheaper to care for, and they were afraid of being forced to leave the Maclure Lands.

[250] The defendants rely on the categorization of Mr. Dhami by Mr. La Ronde as an aggressive businessman; not easily deterred by fear. On this basis, the defendants argue that it is implausible that Mr. Dhami would have been deterred from carrying out his intended business activities on the Maclure Lands as a result of the Notices to Vacate the lands issued by Aldergrove.

[251] In *Gill v. Lai*, 2019 BCCA 103 at para. 22, the Court adopted the following test on whether the plaintiff mitigated:

His test is relatively lax: whether a reasonable but conservative person in his shoes, knowing only the facts then known, might have made the same choice.

[252] Mr. Dhami gave evidence that he did not seek injunctive relief respecting the possession of the Maclure Lands, based upon the legal advice he received.

[253] Mr. Redekop said that due to the dispute with the defendants over the lease of the Maclure Lands, by 2018 almost all the inventory, including the potted cedars, had been moved from the Maclure Lands, and that no maintenance was being met on the lands.

[254] Mr. Dhami gave evidence that ultimately, the cedars in the 1-gallon pots burned and most died in those pots and all were discarded in 2018.

[255] I am not satisfied that the plaintiffs made sufficient efforts to mitigate their loss. Given the expenses and potential loss of sales, it was simply not reasonable for the plaintiffs to resist the suggestions that they did not have a valid lease, but at the same time, take no steps to have the validity of their lease determined.

[256] The validity of the Lease had been in issue since November 2015. Accepting that some time might have been expended in preparing an application to determine the validity of the Lease, I would accept that inactivity on the Maclure Lands could be justified for some period of time. I note that the petition that led to the hearing by Sharma J. that I have mentioned above was filed on June 16, 2016, thus bringing the parties before the Court, albeit on another matter, on January 12, 2017.

- [257] This action was not commenced until October 21, 2016. Had the plaintiffs moved to protect their interests with respect to the Maclure Lands in a reasonable time, I find that they would have initiated the process by June 2016. Had they done so, they would have been spared the decision that they made in 2018, and avoided the loss of the cedars in the 1-gallon pots.
- [258] I therefore dismiss the plaintiffs' claim for the loss of sales of even 45,000 cedars, but find that they are entitled to damages for the loss of quiet enjoyment of the Maclure Lands over the term of the Lease to date.
- [259] Mr. Dhami gave evidence that the defendants never offered to amend the Lease to name Aldergrove rather than Mr. Redekop and that had they done so; he would have been agreeable to making the Lease cheques payable to Aldergrove.
- [260] As I have already set out above, I find the defendants' position with respect to the Lease to be untenable. I would go further and say that it is unreasonable. I regard the position taken by the defendants beginning in November 2015 to be disingenuous, opportunistic, and bullying. I award the plaintiffs the sum of \$100,000 for the breach of the term of quiet enjoyment that accompanied the Lease.

The Defendants' Counterclaim

- [261] The defendants, by way of response and counterclaim, dispute that the Lease creates a valid and enforceable lease such that the plaintiffs can continue to occupy the Maclure Lands. In their counterclaim, they seek an order in favour of Aldergrove for immediate possession, a declaration that the plaintiffs vacate the lands within seven days of the order, and judgment for occupation rent and costs to remediate and restore the lands.

The Termination Clause

- [262] On January 8, 2018, Mr. and Mrs. Redekop couriered a document to Greenland entitled "Notice of Termination & Notice to Vacate" and then posted it on the Maclure Lands. This document disputed the validity of "the Lease dated February 6, 2015" but stated in part that:

in reliance on the right of the Lessor to terminate on twelve (12) months' notice, notice is hereby given that we require vacant possession of the property as of January 10, 2019.

If you deliver up vacant possession on or before that date, leaving the lands "in good repair", the moving fee of \$50,000.00 referred to in the lease document will be paid to you.

We do require payment to be made by January 30, 2018 of the sum of \$36,499.80 being the total of two years' rent (\$30,000) and 50% of property taxes for 2016 & 2017 (\$6499.80). Payment should be made jointly to Lorne Redekop and Aldergrove Nursery Ltd.

- [263] Mr. Dhami replied asserting that the Lease was "in full affect" [sic] and could only be terminated if the land was excluded from the ALR or the lands were rezoned, triggering a moving fee, and neither had occurred. In the same response, Mr. Dhami proposed a means by which the disagreement might be resolved. That proposal was rejected.
- [264] Mr. Redekop asserted an entitlement to terminate the Lease on 12 months' notice, even if it were valid, on the basis that he was entitled to do so pursuant to the terms of the Lease.
- [265] The defendants contend that at best, the termination clause is ambiguous, so that pursuant to the rule of contra proferentem, that ambiguity should be resolved in their favour as Mr. Dhami's evidence is that Sukhdeep drafted the Lease on his instructions and Mr. Redekop had no hand in drafting it.
- [266] Mr. Redekop provided evidence that he understood the termination clause in the Lease to allow an opt-out provision under which he could provide 12-months' notice to terminate the Lease, in exchange for payment of a \$50,000 "moving fee" to Mr. Dhami. Mrs. Redekop's evidence is that Mr. Redekop conveyed to her shortly after he signed the Lease that an opt-out clause existed.

[267] I dismiss that claim for the following reasons.

[268] In *Jackson v. The Standard Life Assurance Company*, 2011 BCSC 1487, at para. 19, Mr. Justice Halfyard identified the commonly accepted principles of contractual interpretation:

From my reading of these authorities, I would describe the method for interpreting the meaning of a disputed term in any contract, including a contract of insurance, as follows:

- a) Decide what is the plain and ordinary meaning of the words used in the disputed term of the contract. This will most often be the dictionary definition of the words unless the contract sets out its own definitions.
- b) The intended meaning of the disputed term is to be determined by reading the disputed word or words in their immediate context and in the context of the contract as a whole.
- c) If necessary, the court may also consider evidence of the circumstances known to the parties which existed when the contract was made (the "factual matrix").
- d) In construing the meaning of the disputed term, the court should strive to give meaning to all of the words contained in the term.
- e) The law presumes that the parties intended the legal consequences of their words. But an examination of the immediate context in which the disputed words appear or the overall context of the whole contract may lead the court to conclude that reasonable persons who were making the contract would not have intended that the disputed term be given its grammatical and ordinary meaning. For example, the adoption of the ordinary meaning of the disputed term might conflict with the intent clearly expressed or implied in one or more related terms of the contract, or might defeat the fundamental objective of the contract. If

that is the conclusion reached by the court, then the ordinary meaning of the disputed words should be rejected, and the meaning which would have been intended by reasonable persons in the position of the parties, should be adopted.

- f) If there is nothing in the other parts of the contract or in the factual matrix that persuades the court that the parties did not (objectively) intend that the disputed term of the contract should be given its ordinary meaning, then the court must adopt and apply the plain and ordinary meaning of the disputed term.
- g) However, if in the course of the above inquiry the court determines that the disputed term of the contract is reasonably capable of bearing two or more interpretations, then an ambiguity exists. In such a case, the court will have to determine which of the alternate meanings was intended by the parties. In deciding that issue, the court may admit and consider extrinsic evidence of the conduct of the parties leading up to the contract and their conduct in performing their contractual obligations. Additional rules for interpreting contracts can also be applied. In the case of ambiguous insurance contracts, the court will apply the *contra proferentem* rule. Ultimately, the court must decide which of the two or more possible meanings was (objectively) intended by the parties.

[269] In *Consolidated-Bathurst v. Mutual Boiler*, [1980] 1 S.C.R. 888 at 901, the doctrine of *contra proferentem* was discussed by Mr. Justice Estey, for the majority, in the following terms:

Even apart from the doctrine of *contra proferentem* as it may be applied in the construction of contracts, the normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract. Consequently, literal meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted.

[270] In my view, a plain reading of the termination clause is that if the Maclure Lands were removed from the ALR or re-zoned, then the lessor could terminate the Lease by giving 12 months' notice and a \$50,000 moving fee to the lessee. However, the second sentence of the clause cannot be reasonably constructed as a standalone right to terminate.

[271] The second sentence does not include the term "terminate", and it does not specify the basis upon which the lessor is providing notice. In my view the sentence is intended to be linked to the termination allowed under the first sentence, and not to be read as a standalone clause.

[272] I am fortified in this reading, by the fact that an interpretation that the second sentence is a standalone right to terminate renders the first sentence absurd. With the two sentences taken as separate clauses, the defendants could terminate the lease the moment the Maclure Lands were taken out of the ALR or re-zoned, leaving no notice requirement, and no time for the plaintiffs to wrap up their operations and get off the land.

- [273] I reject as untrue and illogical, Mr. Redekop's evidence that he understood the termination clause to mean that he would be permitted to terminate the Lease upon 12 months' notice, and by paying a \$50,000 moving fee. Mr. Redekop's evidence that there was a similar clause in a lease agreement dated May 2, 2015, which was not introduced into evidence in respect of the lands located on Fraser Highway, permitting the lessor to terminate the lease with 24 months' notice, is unpersuasive in terms of Mr. Redekop's asserted understanding.
- [274] Mr. Redekop agreed that the Maclure Lands were neither excluded from the ALR nor that he applied to or obtained re-zoning of the lands for another use. As a result, the Notice of Termination & Notice to Vacate was invalid pursuant to the terms of the Lease.

The Damages alleged by the Defendants

- [275] In addition to their claim for immediate possession of the Maclure Lands, the defendants' counterclaim included unpaid utility fees and one half of the property tax bills amounting to \$11,643.18.
- [276] Mr. Dhami gave evidence that, to the extent that he could determine what payments were owing under the Lease, he made all required payments in a timely way by tendering cheques for the amounts he believed to be owing, payable to Mr. Redekop, with whom he believed he had contracted. He agreed that at no time did he tender payments to Aldergrove.
- [277] Mr. Dhami produced uncashed cheques payable to Mr. Redekop for what he calculated as owing under the Lease for 2016 and 2017, but his counsel was advised by counsel for the defendants that "the lease agreement prepared by your client is neither valid nor enforceable". Mr. Dhami was advised to vacate the Maclure Lands and the Fraser Highway properties on more than one occasion.
- [278] The cheques payable to Mr. Redekop were never negotiated, and were returned to Mr. Dhami or his lawyers. Mr. Redekop conceded that he was unable to say if the tendered cheques addressed all of the payments owing under the Lease. On July 11, 2017, Mr. Redekop's lawyers advised that Aldergrove would accept a cheque or bank draft payable to it for the taxes owing by Greenland for the Maclure Lands. Payment for these taxes had previously been included in one of the cheques tendered to Mr. Redekop.
- [279] The defendants took the position that the Lease was at will, refused to take tendered cheques made out to Mr. Redekop, and refused to tell the plaintiffs what property taxes were for the year so that the 50% they were obligated to pay could be paid. They further took the position that the Lease could be terminated on 12 month's notice - threatening removal if they did not take heed to the termination.
- [280] I have explained above why I find that the Lease was neither one at will nor one at sufferance.

- [281] The amount claimed in the notice of January 8, 2018, was not paid, either to Aldergrove or to Aldergrove and Mr. Redekop jointly. That amount was \$36,499.80. Additionally, \$15,700.00 ought to have been paid to Aldergrove in July of this year. It is inconsistent with the claim made by the plaintiffs of a valid and unenforceable leasehold interest that no payment has ever been made to Aldergrove as owner of the Maclure Lands.
- [282] I expect that some, if not all of the cheques tendered by Mr. Dhami to Mr. Redekop are stale-dated and cannot be negotiated. In order to avoid any duplication of payment, if they have not already been destroyed, I order that those cheques be returned to Mr. Dhami.
- [283] The plaintiffs' claims must be reduced by way of setoff by the amounts that ought to have been paid by the plaintiffs to the defendants over the course of the Lease. If they cannot be agreed upon by the parties, then they will have to be determined by a reference to the Registrar.
- [284] Finally, I turn to the defendants' claim for the cost of restoration.
- [285] The defendants' counterclaim is in part for the cost of restoring the property to the condition that it was in when Mr. Dhami took occupancy in 2015. Mr. Redekop estimated his costs of preparing the lands for his own use in 2010 at over \$25,000, but agreed that he was not seeking damages for the \$168,000 estimated by one of the companies from whom he obtained an estimate of the costs of restoring the lands to their 2015 condition. He accepted that this would result in new beds, rather than the used beds that were on the property in 2015.
- [286] He presented estimates of the costs to restore the property to that state, but conceded that since those estimates were given, Mr. Dhami has made some efforts to flatten areas of the Maclure Lands, and done some weeding.
- [287] Mr. Dhami said that he had restored the Maclure Lands to the condition that they were in when he first occupied them, and that the cost of doing so was about \$4,000.
- [288] Mr. Russell Bruce is the principal of a wholesale and retail nursery with some seven sites comprising approximately 170 acres. He said that he was good friends with Mr. and Mrs. Redekop and purchased plants from Mr. Redekop, over some 10 -15 years before Mr. Redekop retired; some five years before the trial in this action. He described the Maclure Lands when Mr. Redekop operated his nursery on them and in July 2019, and said that on his most recent visit, they had not really been maintained. He said that they were not in a condition in which he could farm the lands.
- [289] Mr. Bruce gave evidence that to put the lands in a workable state, they would need to be levelled and drained, an irrigation system installed and groundcover cloth put down and covered with three inches of crushed rock. He estimated that the cost of this work and supplies would be in the range of \$186,905.00.

- [290] Mr. Dhami conceded that he and Greenland did little maintenance on Maclure Lands in the year or two that preceded the trial in this case, explaining that he did not do so as there was no income generated from the operation on those lands.
- [291] Mr. Doug Brandt is a certified arborist who operates a business named Cedar Rim. He provided a cost estimate for the restoration of all nursery beds on the Maclure Lands in the amount of \$97,650 to level the existing clear crush and replace it, and to remove all ripped and damaged fabric, check and repair all irrigation and remove all debris. His evidence was ruled inadmissible as expert evidence by Brown J., when it was tendered, but permitted as non-expert evidence.
- [292] His estimate was based on photographs and his visit to the Maclure Lands some four to five years before trial. It contemplated re-doing the entire site, and assumed that there was no irrigation system in place. It also included the removal of all debris and garbage on the property despite the fact that a large part of that debris and other material was on the lands when first occupied by the plaintiffs.
- [293] He visited the Maclure Lands in early 2019 and said that 25% to 30% of the lands had weed growth and needed repair. He explained that the needed repair was weeding, excavation with new gravel and cloth.
- [294] Mr. La Ronde also gave evidence that the Maclure Lands were kept in a somewhat decent state of maintenance in 2016, but underwent a real decline in 2017 and 2018 with fewer and fewer plants on the property. He spoke to Mr. Dhami about the weeds, and the decline of the property, as the appearance detracted from his own operation, which catered to landscape architects.
- [295] Mr. La Ronde said that shortly before the final week of trial, Mr. Dhami had a chemical spray done on the property, and had a crew of eight or nine workers hand pull weeds, remove dead plants, and scrape and clean the property with tractors. He described the effort as a "pretty good job", for which he was appreciative.
- [296] Mr. Dhami agreed that he had not addressed the irrigation needed on the Maclure Lands yet, but expected that it could be addressed at a cost of \$500 to \$700.
- [297] While I do not accept that restoration of the nature and extent proposed by the defendants has been done, or is necessary, I dismiss the counterclaim for the cost of restoration of the Maclure Lands as it will not be until the Lease expires that any restoration is required.

Conclusion

- [298] I declare that the Lease is a valid and enforceable lease of the Maclure Lands.
- [299] The Lease should be rectified to list the lessor as Lorne Redekop/Aldergrove Nursery.

- [300] Having found that Mr. Redekop was acting as agent for Aldergrove when he entered into the Lease, I dismiss the plaintiffs' claims for negligent misrepresentation and proprietary estoppel.
- [301] The plaintiffs are awarded the sum of \$100,000 for breach of contract.
- [302] The plaintiffs' claim based upon the tort of conspiracy is unproven and is dismissed.
- [303] The plaintiffs' claim for damages for loss of business reputation and goodwill is dismissed.
- [304] Counsel for the plaintiffs may make written submissions if they wish to pursue a claim for aggravated, punitive, or exemplary damages, but may not adduce evidence to support such claims beyond the evidence that is already in the record. Should the plaintiffs wish to pursue this aspect of their claim, they should file and serve the defendants' counsel with their submissions within three weeks of the date of these reasons for judgment. The defendants will have two weeks from the receipt of the plaintiffs' submissions, if any, to file and serve their reply submissions and the plaintiffs will then have one week for any reply, if necessary.
- [305] The plaintiffs are entitled to interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79 and amendments thereto from January 1, 2016, when the term of the Lease was to commence. As with their claim for aggravated, punitive, or exemplary damages, the parties may address this in written submission on the same timetable as that for the aggravated, punitive, or exemplary damage claims.
- [306] The defendants' claim for an order for immediate possession of the Maclure Lands is dismissed.
- [307] The defendants' claim for a declaration that the plaintiffs vacate the Maclure Lands within seven days is dismissed.
- [308] Other than the payments I have ordered the plaintiffs to account for by way of setoff, the defendants' claim for general and special damages against the plaintiffs is dismissed.

"The Honourable Chief Justice Hinkson"

Appendix A

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