

CANADA / JUDGMENT

Goy v. District of Sechelt

2020 BCSC 1242

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1242 Goy v. District of Sechelt

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Goy v. District of Sechelt,

2020 BCSC 1242

Date: 20200824

Docket: S198926

Registry: Vancouver

Between:

Rodney Burwell Goy and Donna Lynn Goy

Plaintiffs

And

District of Sechelt, Ray Parfitt, Her Majesty the Queen in right of the Province of British Columbia, Concordia Seawatch Ltd., Ronald Davis, Ronald Antalek, 514165 B.C. Ltd., doing business as Holywell Properties, Barbie Whitworth, Shay Moudahi, Suncoast Geotechnical Ltd., Geotactics Media Engineering (2007) Ltd., John Enevoldson Engineering Ltd., John Enevoldson, Thurber Engineering Ltd., Golder Associates Ltd., Web Engineering Ltd. and GES Geotech Inc.

Defendants

And

District of Sechelt, Concordia Seawatch Ltd., Ronald Davis, Ronald Antalek, 514165 B.C. Ltd., doing business as Holywell Properties, Barbie Whitworth, Shay Moudahi, Suncoast Geotechnical Limited, Geotactics Media Engineering (2007) Ltd., GES Geotech Inc., John Enevoldson Engineering Ltd., John Enevoldson, Web Engineering Ltd., Urban Systems Ltd., Golder Associates Ltd., Thurber Engineering Ltd., N.B. Contracting Ltd., Concordia Homes (1997) Ltd., Concordia Homes Ltd. and Keady Holdings Ltd.

Third Parties

- and -

Docket: S198921

Registry: Vancouver

Between:

Harjit Singh Rai

Plaintiff

And

District of Sechelt, Ray Parfitt, Her Majesty the Queen in right of the Province of British Columbia, Concordia Seawatch Ltd., Suncoast Geotechnical Ltd., Geotactics Media Engineering (2007) Ltd., John Enevoldson Engineering Ltd., John Enevoldson, Thurber Engineering Ltd., Golder Associates Ltd., Web Engineering Ltd. and GES Geotech Inc.

Defendants**And**

District of Sechelt, Concordia Seawatch Ltd., Ronald Davis, Ronald Antalek, Suncoast Geotechnical Limited, Geotactics Media Engineering (2007) Ltd., GES Geotech Inc., John Enevoldson Engineering Ltd., John Enevoldson, Web Engineering Ltd., Urban Systems Ltd., Golder Associates Ltd., Thurber Engineering Ltd., N.B. Contracting Ltd., Concordia Homes (1997) Ltd., Concordia Homes Ltd. and Keady Holdings Ltd.

Third Parties

- and -

Docket: S198922

Registry: Vancouver

Between:

Elliott Held and Karen Cassie Held

Plaintiffs

And

District of Sechelt, Ray Parfitt, Her Majesty the Queen in right of the Province of British Columbia, Concordia Seawatch Ltd., Denise Brynelsen, Denise Brynelsen Personal Real Estate Corporation, Joel O'Reilly, Joel O'Reilly Personal Real Estate Corporation, Suncoast Geotechnical Ltd., Geotactics Media Engineering (2007) Ltd., John Enevoldson Engineering Ltd., John Enevoldson, Thurber Engineering Ltd., Golder Associates Ltd., Web Engineering Ltd. and GES Geotech Inc.

Defendants

And

District of Sechelt, Ray Parfitt, Her Majesty the Queen in right of the Province of British Columbia, Concordia Seawatch Ltd., Concordia Homes Ltd., Concordia Homes (1997) Ltd., N.B. Contracting Ltd., Geotactics Media Engineering (2007) Ltd., Suncoast Geotechnical Limited, John Enevoldson Engineering Ltd., John Enevoldson, Web Engineering Ltd., GES Geotech Inc., Urban Systems Ltd., Golder Associates Ltd., Thurber Engineering Ltd., 0532836 B.C. Ltd., formerly known as Canadian Construction Materials & Testing Ltd., Ronald Davis, Ronald Antalek, Denise Brynelsen, Denise Brynelsen Personal Real Estate Corporation, Joel O'Reilly and Joel O'Reilly Personal Real Estate Corporation

Third Parties

- and -

Docket: S198923

Registry: Vancouver

Between:

Edward Arthur Pednaud and Rae-Dene Sunny Pednaud

Plaintiffs

And

District of Sechelt, Ray Parfitt, Her Majesty the Queen in right of the Province of British Columbia, Concordia Seawatch Ltd., Ronald Davis, Ronald Antalek, 514165 B.C. Ltd., doing business as Holywell Properties, Barbie Whitworth, Shay Moudahi, Suncoast Geotechnical Ltd., Geotactics Media Engineering (2007) Ltd., John Enevoldson Engineering Ltd., John Enevoldson, Thurber Engineering Ltd., Golder Associates Ltd., Web Engineering Ltd. and GES Geotech Inc.

Defendants

And

District of Sechelt, Concordia Seawatch Ltd., Ronald Davis, Ronald Antalek, 514165 B.C. Ltd., doing business as Holywell Properties, Barbie Whitworth, Shay Moudahi, Suncoast Geotechnical Limited, Geotactics Media Engineering (2007) Ltd., GES Geotech Inc., John Enevoldson Engineering Ltd., John Enevoldson, Web Engineering Ltd., Urban Systems Ltd., Golder Associates Ltd., Thurber Engineering Ltd., N.B. Contracting Ltd., Concordia Homes (1997) Ltd., Concordia Homes Ltd. and Keady Holdings Ltd.

Third Parties

- and -

Docket: S198924

Registry: Vancouver

Between:

Kevin Patrick Pickell and Lilian Irene Pickell

Plaintiffs

And

District of Sechelt, Ray Parfitt, Her Majesty the Queen in right of the Province of British Columbia, Concordia Seawatch Ltd., Ronald Davis, Ronald Antalek, Oceanview Realty Ltd., doing business as RE/MAX Oceanview Realty, Archie MacLean, Suncoast Geotechnical Ltd., Geotactics Media Engineering (2007) Ltd., John Enevoldson Engineering Ltd., John Enevoldson, Thurber Engineering Ltd., Golder Associates Ltd., Web Engineering Ltd. and GES Geotech Inc.

Defendants

And

District of Sechelt, Ray Parfitt, Her Majesty the Queen in right of the Province of British Columbia, Concordia Seawatch Ltd., Ronald Davis, Ronald Antalek, Concordia Homes Ltd., Concordia Homes (1997) Ltd., N.B. Contracting Ltd., Geotactics Media Engineering (2007) Ltd., Suncoast Geotechnical Limited, John Enevoldson Engineering Ltd., John Enevoldson, Web Engineering Ltd., GES Geotech Inc., Urban Systems Ltd., Golder Associates Ltd., Thurber Engineering Ltd., 0532836 B.C. Ltd., formerly known as Canadian Construction Materials & Testing Ltd., Oceanview Realty Ltd., doing business as RE/MAX Oceanview Realty, Archie MacLean, 514165 B.C. Ltd., doing business as Holywell Properties, Barbie Whitworth and Shay Moudahi

Third Parties

- and -

Docket: S198925

Registry: Vancouver

Between:

Sichao Wang

Plaintiff

And

District of Sechelt, Ray Parfitt, Her Majesty the Queen in Right of the Province of British Columbia, Concordia Seawatch Ltd., Kenan McKenzie, Suncoast Geotechnical Ltd., Geotactics Media Engineering (2007) Ltd., John Enevoldson Engineering Ltd., John Enevoldson, Thurber Engineering Ltd., Golder Associates Ltd., Web Engineering Ltd. and GES Geotech Inc.

Defendants

And

District of Sechelt, Ray Parfitt, Her Majesty the Queen in right of the Province of British Columbia, Concordia Seawatch Ltd., Concordia Homes Ltd., Concordia Homes (1997) Ltd., N.B. Contracting Ltd., Geotactics Media Engineering (2007) Ltd., Suncoast Geotechnical Limited, John Enevoldson Engineering Ltd., John Enevoldson, Web Engineering Ltd., GES Geotech Inc., Urban Systems Ltd., Golder Associates Ltd., Thurber Engineering Ltd., 0532836 B.C. Ltd., Keady Holdings Ltd., formerly known as Canadian Construction Materials & Testing Ltd., Ronald Davis, Ronald Antalek and Kenan McKenzie

Third Parties

- and -

Docket: S198927

Registry: Vancouver

Between:

Joanna Moradian

Plaintiff

And

District of Sechelt, Ray Parfitt, Her Majesty the Queen in right of the Province of British Columbia, Concordia Seawatch Ltd., Ronald Davis, Ronald Antalek, 514165 B.C. Ltd., doing business as Holywell Properties, Barbie Whitworth, Shay Moudahi, Suncoast Geotechnical Ltd., Geotactics Media Engineering (2007) Ltd., John Enevoldson Engineering Ltd., John Enevoldson, Thurber Engineering Ltd., Golder Associates Ltd., Web Engineering Ltd. and GES Geotech Inc.

Defendants

And

District of Sechelt, Concordia Seawatch Ltd., Ronald Davis, Ronald Antalek, 514165 B.C. Ltd., doing business as Holywell Properties, Barbie Whitworth, Shay Moudahi, Suncoast Geotechnical Limited, Geotactics Media Engineering (2007) Ltd., GES Geotech Inc., John Enevoldson Engineering Ltd., John Enevoldson, Web Engineering Ltd., Urban Systems Ltd., Golder Associates Ltd., Thurber Engineering Ltd., N.B. Contracting Ltd., Concordia Homes (1997) Ltd., Concordia Homes Ltd. and Keady Holdings Ltd.

Third Parties

- and -

Docket: S198928

Registry: Vancouver

Between:

Jin Shun Pan

Plaintiff

And

District of Sechelt, Ray Parfitt, Her Majesty the Queen in right of the Province of British Columbia, Concordia Seawatch Ltd., Ronald Davis, Ronald Antalek, Oceanview Realty Ltd., doing business as RE/MAX Oceanview Realty, Randal Udahl, Suncoast Geotechnical Ltd., Thurber Engineering Ltd., Golder Associates Ltd., Web Engineering Ltd and GES Geotech Inc.

Defendants

And

District of Sechelt, Concordia Seawatch Ltd., Ronald Davis, Ronald Antalek, 514165 B.C. Ltd., doing business as Holywell Properties, Barbie Whitworth, Shay Moudahi, Suncoast Geotechnical Limited, Geotactics Media Engineering (2007) Ltd., GES Geotech Inc., John Enevoldson Engineering Ltd., John Enevoldson, Web Engineering Ltd., Urban Systems Ltd., Golder Associates Ltd., Thurber Engineering Ltd., N.B. Contracting Ltd., Concordia Homes (1997) Ltd., Concordia Homes Ltd. and Keady Holdings Ltd.

Third Parties

Before: The Honourable Mr. Justice Macintosh

Ruling on Two Applications**Counsel for the Plaintiffs:**

J.P. Scouten

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J.W. Locke

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Place and Dates of Hearing:

Vancouver, B.C.

July 20-24, 2020

Place and Date of Judgment:

Vancouver, B.C.

August 24, 2020

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Introduction

[1] The Plaintiffs in these eight actions purchased lots in a 28-lot residential subdivision in the District of Sechelt ("District"). The subdivision borders Sechelt Inlet at the north of the District. On February 15, 2019, the District mayor issued an order, entitled a Declaration of State of Local Emergency ("Declaration"). The mayor issued the Declaration due to an immediate danger resulting from land subsidence and geotechnical instability. As a result of the Declaration, the subdivision was closed, and fenced off, and all those living there were ordered out. The Provincial Government, through the Minister of Public Safety and Solicitor General, has issued weekly extensions of the closure, and continues to do so. The subdivision remains fenced off and is a ghost town, or at least a ghost subdivision. As noted above, the mayor issued the Declaration because the land is unstable. It appears at this stage to be a geotechnical disaster.

[2] Quoting para. 6 from the Plaintiffs' notices of application, filed June 25, 2020:

It is the contention of the Plaintiffs that the lands comprising the Development were, or ought to have been, known by the District and Concordia [the developer] to have been geotechnically unstable and prone to sinkholes and other forms of land subsidence dating back to before 2005, and that the Development ought never to have been approved.

- [3] The Plaintiffs have received no assistance from the District or the Province. They commenced these eight actions on August 20, 2019. The second amended notices of civil claim were filed on February 8, 2020, and they are the pleadings before the Court on the present application.
- [4] The Plaintiffs have sued the District; Mr. Parfitt, the approving officer who approved the subdivision; the Province; Concordia Seawatch Ltd., the developer; and a number of geotechnical engineers and engineering companies.
- [5] Several Defendants have joined one another and other entities as third parties.
- [6] The Plaintiffs sue the District and Mr. Parfitt, as the approving officer, in negligence for approving the development and the subdivision, and for issuing the building permits and occupancy permits, and allege further negligent conduct, and also injurious affection and other complaints. The Plaintiffs seek general and special damages against all the Defendants, and punitive damages against the District and the Province.
- [7] No discoveries have been conducted. No trial date is set.

The Two Applications

- [8] The Plaintiffs apply by summary trial for declaratory relief that they have not, by reason of the existence of covenants registered against their lots, pursuant to s. 219 of the Land Title Act, R.S.B.C. 1996, c. 250 (the "Section 219 Covenants"), released the District from the entirety, or from any, of the claims alleged and the damages sought in the actions. The Section 219 Covenants were on the titles to the lots in the subdivision at the times the Plaintiffs each acquired their interests.
- [9] In the second application addressed in these reasons, the District and Mr. Parfitt apply to strike those portions of the Plaintiffs' February 8, 2020 pleadings naming Mr. Parfitt as a Defendant, and setting out the claims against him, and for a resulting order that the claim against him be dismissed.

The First Application: The Plaintiffs' application for a declaration that they have not released the District from the claims they advance against the District

- [10] The question of whether the Section 219 Covenants released the District from the Plaintiffs' claims arises from Part 1, Division 2, para. 23A, and Part 3, Legal Basis, para. 1, of the amended response to civil claim, filed by the District on December 24, 2019:

23A. Upon the transfer of title to the Lot to the Plaintiff, the Plaintiff, as a successor in title to the Lot to Concordia, became bound by and subject to the Section 219 Covenant (Geotechnical) covenant to release, save harmless and indemnify the District for, inter alia, all claims, damages and losses arising from or in connection with the construction of the single family dwelling on the Lot (the "House") or the use of the lands comprising the Development, and including any damages and losses arising from any subsidence or settlement upon the Lot or the Development,

and the Plaintiff has released the District from the entirety of the scope of the claims alleged and the damages sought in the action herein.

Part 3 - Legal Basis

1. Upon the transfer of title to the Lot to the Plaintiff, the Plaintiff, as a successor in title to the Lot to Concordia, became bound by and subject to the Section 219 Covenant (Geotechnical) to release, save harmless and indemnify the District for, inter alia, all claims, damages and losses arising from or in connection with the construction of the House or the use of the lands comprising the Development, and including any damages and losses arising from any subsidence or settlement upon the Lot or the Development, and the Plaintiff has released the District from the entirety of the scope of the claims alleged and the damages sought in the action herein.

[Emphasis added.]

Suitability for Summary Trial

- [11] Rule 9-7(2) of the Supreme Court Civil Rules permits a summary trial application to proceed "either on an issue or generally." The case law addressing the question of when it is acceptable to give judgment on an issue, without deciding the whole of a claim or defence, is now extensive. The District fights vigorously against the Court deciding the release question at this stage. It says that question should be left for determination at trial.
- [12] The threshold decision in the discussion of summary trial relief is *Inspiration Mgmt. Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.). Chief Justice McEachern said this, at p. 214:

It was suggested in *Stuart v. Russell*, *supra*, but without deciding the question, that the course of wisdom might be not to separate issues by deciding some of them under R. 18A if other issues will have to be decided at a trial in any event. This is a question which should always be considered by a chambers judge who has a discretion in such matters under R. 18A(3). But I wish to add that a chambers judge should also consider, if a critical issue in the case can be decided, whether that may assist the parties to reach an accommodation on other questions. It may be the case that there will still have to be a trial of other issues notwithstanding a judgment on one or more issues, but chambers judges should not feel constrained to avoid deciding some issues even if others cannot be decided at the same time by this procedure.

[Emphasis added.]

- [13] Counsel before me cited dozens of authorities addressing the use of the summary trial process when only one of several issues is the subject of the application. I will refer to three of those authorities, which the District relied on in particular.

- [14] The first is *Coast Foundation v. Currie*, 2003 BCSC 1781. The others are *Greater Vancouver Water District v. Bilfinger Berger AG*, 2015 BCSC 485; and *Ferrer v. 589557 B.C. Ltd.*, 2020 BCCA 83. *Coast Foundation* is considered in the latter two decisions, and I will turn to them directly.
- [15] In *Greater Vancouver Water District*, Griffin J., as a member of this Court, presented a thorough analysis for the use of summary trial for only part of a case, at paras. 79-100 of her reasons. Her summary of the relevant factors to consider is found at para. 110.
- [16] In *Ferrer*, Justice Groberman, for himself, and Justices MacKenzie and Stromberg-Stein, found no error by the chambers judge in concluding that the applicability and enforceability of a limitation clause was appropriately determined on a summary trial. At para. 27 of his reasons, Justice Groberman quoted para. 110 from *Greater Vancouver Water District*, Griffin J.'s summary of the relevant factors to consider for summary trial of only part of a case.
- [17] Justice Groberman's review of the authorities, including *Greater Vancouver Water District*, is found as follows at paras. 23-38 of his reasons:
- [23] On its face, the Rule appears to allow parties considerable freedom to bring particular issues on for summary determination apart from the balance of the litigation. Courts have, however, shown considerable reluctance to opine on particular issues independently of other issues in the litigation.
- [24] In *Bacchus Agents (1981) Ltd. v. Philippe Dandurand Wines Limited*, 2002 BCCA 138, Southin J.A., for the Court, said this about the summary trial rule (then Rule 18A):
- [6] This is a useful rule intended to shorten litigation, thereby lessening its cost to the parties and to the public treasury and reducing delays in the process, it being an axiom, at least since Bacon's time, that justice delayed is justice denied.
- [7] When, however, as in this case, the rule is invoked to try "an issue" rather than the whole case - what I have often characterized as "litigating in slices" - it may become a hindrance to the "just, speedy and inexpensive determination" of the dispute "on its merits".
- [25] In *Coast Foundation v. Currie*, 2003 BCSC 1781, at paras. 13-18, the court considered the circumstances in which summary determination of a discrete issue will be appropriate; this Court cited the decision with approval in *Kaler v. Kaler*, 2013 BCCA 57 at para. 24.
- [26] In *Hryniak v. Mauldin*, 2014 SCC 7, the Supreme Court of Canada added its voice to the observation that the summary trial procedure should be accepted as a means of improving access to justice where it provides a fair and just process that is proportionate to the matters being litigated:
- [27] There is growing support for alternative adjudication of disputes and a developing consensus that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern reality and needs to be re-adjusted. A proper balance requires simplified and proportionate procedures for adjudication, and

impacts the role of counsel and judges. This balance must recognize that a process can be fair and just, without the expense and delay of a trial, and that alternative models of adjudication are no less legitimate than the conventional trial.

- [28] This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible -- proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure
- [27] In *Greater Vancouver Water District v. Bilfinger Berger AG*, 2015 BCSC 485, the court considered a large number of authorities (most of which emanated from the British Columbia Supreme Court) on when it is appropriate to hive off an issue in litigation for summary trial. It distilled from the cases a list of factors to be considered:
- [110] In summary, the authorities in BC, including *Hryniak*, make clear that the factors the court must consider on applications to determine by summary trial only part of the issues in the lawsuit are:
- a) whether the court can find the facts necessary to decide the issues of fact or law;
 - b) whether it would be unjust to decide the issues by way of summary trial, considering amongst other things:
 - i. the implications of determining only some of the issues in the litigation, which requires consideration of such things as:
 - (1) the potential for duplication or inconsistent findings, which relates to whether the issues are intertwined with issues remaining for trial;
 - (2) the potential for multiple appeals; and
 - (3) the novelty of the issues to be determined;
 - ii. the amount involved;
 - iii. the complexity of the matter;
 - iv. its urgency;
 - v. any prejudice likely to arise by reason of delay; and
 - vi. the cost of a conventional trial in relation to the amount involved.
- [28] This list is a good indication of the factors that are typically of concern when a court is asked to deal with a single issue on a summary trial. I would not, however, suggest that all of these factors will be relevant in every case, and I would discourage a checklist approach to the question.

- [29] There is a different line of cases, commencing with *Chun v. Smit*, 2011 BCSC 412, that adopts the test for severance of trial proceedings under Rule 12-5 as the test for the suitability of individual issues for summary determination under Rule 9-7. The test for severance of issues for trial under Rule 12-5 had, in a number of earlier cases, been described as being whether there are "extraordinary, exceptional, or compelling reasons for severance".
- [30] It is not clear to me that the considerations used to determine whether individual issues are suitable for summary determination under Rule 9-7 need to be identical to those that are used, under Rule 12-5, to determine whether a conventional trial should be bifurcated. Often, the two situations will present quite different contexts, in terms of the efficiency of trial management and the allocation of judicial and litigant resources.
- [31] We are concerned, on this appeal, only with the considerations to be applied under Rule 9-7, and nothing that I say should be taken as reflecting on the proper tests or practices under Rule 12-5.
- [32] In my view, the "extraordinary, exceptional or compelling reasons" test, at least when applied under Rule 9-7, is a curious one. It is not clear why we should describe the concept using three near-synonyms in a disjunctive test. Nor does the test give us a clear picture of what it is about the reasons for severance that makes them "extraordinary", "exceptional," or "compelling".
- [33] The case law under Rule 9-7 and its predecessor, Rule 18A, makes it clear that, absent good reason, courts should not isolate individual issues in a proceeding and decide them separately from the rest of the litigation. If that is all that is meant by the use of the phrase "extraordinary, exceptional or compelling reasons", then it is not objectionable, though I am not convinced that the phrase itself provides much in the way of guidance.
- [34] In terms of what constitutes a good reason to decide an individual issue separately in a summary trial, it seems to me that the analytical approach represented by *Currie* and by *Greater Vancouver Water District* is more helpful in setting out the considerations that apply. Using that approach, I am not convinced the trial judge erred in ruling that the Limitation Clause issue was suitable for summary disposition.
- [35] The Limitation Clause issue is a relatively straightforward one. It does not involve novel issues, and no unfairness results from determining it in advance of the other issues at trial. Further, disposition of the Limitation Clause issue will greatly assist the parties in determining what resources should reasonably be devoted to the trial.
- [36] While the judge did not specifically mention it, I would observe that one of the most important considerations in determining whether a single issue should be separated out and determined in a summary trial is the question of whether it is intertwined with other issues. In this case, there is very little connection between the Limitation Clause and other issues in the litigation.

- [37] The judge stated that she did "not view the summary trial application as litigating in slices". The appellants say that she was wrong in that regard. As I see it, the expression "litigating in slices" is simply a way of describing the disposition of litigation in a sequence of hearings. In that sense, the current proceedings could be described as "litigating in slices", but the description is of no moment. Courts are wary of attempts to split up litigation into independent hearings, but in appropriate cases, they will permit that to occur.
- [38] The chambers judge gave brief but cogent reasons for dealing with the Limitation Clause issue separately from other issues. She made no error in proceeding as she did.
- [18] I will address, later in the analysis, the factors from para. 110 in Greater Vancouver Water District, quoted in Ferrer above at para. 27, mindful of Justice Groberman's observations, at para. 28 in Ferrer, that the factors listed in Greater Vancouver Water District will not all be applicable in every case, and that they are not merely a checklist.
- [19] In my view, the enforceability of the release which the District relies upon ought to be addressed at this stage, somewhat as a threshold issue. The District is the principal Defendant in the eight actions. The Plaintiffs allege negligence against it, under several heads, as well as other torts. The Plaintiffs allege that the District's negligence permeated the development and permitting process on the project.
- [20] I was told that estimates for the length of trial are in the range of 100 days. If the release is binding, the Plaintiffs' eight actions against the District, as the principal Defendant, would be for nothing. In light of that reality, it is sensible to decide now, instead of at the end of trial, whether the release pleaded from the Section 219 Covenants renders those actions academic.
- [21] An appeal from a decision here on the enforceability of the release would not jeopardize the scheduling of the trial. No trial date is set. In the result, an appeal can be brought and decided before the beginning of trial.
- [22] Furthermore, the release question is a discrete question of law, of statutory interpretation for one of the arguments, and interpretation of the Section 219 Covenants for the other argument. Determining the enforceability of the release is not intertwined, factually or legally, with the rest of the case. The determination does not depend on any facts in dispute. It is an issue that stands alone.
- [23] One can see, thinking tactically, that the District might prefer to have the question of whether the release is enforceable left hanging, perhaps to the end of trial, to serve as a discount factor on any settlement that could otherwise be reached. I do not view that as an argument in favour of leaving the release unconsidered at this stage. To turn the matter around, this case presents good reasons for isolating this individual issue for early resolution. The administration of justice is, in my view, better served by coming to grips early with the release question, given that resolution one way, in the District's favour, will effectively bar the major claims in the case, and resolution the other way, in the Plaintiffs'

favour, will lead to a settlement or trial disposition focused more squarely on the factual dispute as governed by the law of negligence.

- [24] The District argues that even if it wins on the merits of the Plaintiffs' application at this stage, so that the release is sustained, the case will continue nonetheless for the District as a third party. But the reality is that the core of the present litigation would be ripped away, and the litigation would acquire a diminished character.
- [25] The District on this application filed the affidavit of a lawyer experienced in land use and s. 219 covenants. He stated that the inclusion of a release in s. 219 covenants by local governments and the provincial government is a widespread practice in the Province. The District then cited Coast Foundation, cited earlier, for the point that where a summary trial requires determination of a difficult legal issue that might not need to be resolved in order to resolve the claim at trial, the court on the application "may conclude" that the appropriate development of the common law demands restraint. In the case at bar, however, that consideration should not in my view result in deflecting the release issue to the end of trial. The factors cited above weight the decision the other way, such that the better course is to determine the release question at the outset. It is not one that that depends for its determination on a consideration of the factual matrix underlying the merits of the Plaintiffs' claims against the District overall.
- [26] I return here briefly to the factors in para. 110 of Greater Vancouver Water District, quoted above at para. 27 in Ferrer, at para. 17 of these reasons. The facts necessary for adjudicating the release question can be found without difficulty. There is no potential for the risk of duplicated or inconsistent findings, in part because the relevant issues are not intertwined factually with other issues. Any appeal from this decision can be heard before the trial, as noted earlier, given that no trial date has been set. To the extent the issues may be said to be novel in some respect, a trial will not serve to expand the relevant factual matrix for properly and fully addressing the issue. Adjudication of this threshold question now is timely, before the parties have spent time and money on discoveries and trial.
- [27] I conclude that the Plaintiffs' application is suitable for disposition by summary trial. Having regard to Rule 9-7(15), the Court is able to find the necessary facts for deciding the issue, and is of the opinion that it would not be unjust to decide the issue at this stage.

Assessing the Merits of the Plaintiffs' Argument that the Section 219 Covenants did not Release the District from the Claims Alleged and the Damages Sought

- [28] Paragraph 7 in the Section 219 Covenant, registered against each of the 28 lots, reads as follows:
7. The Covenantor, for himself and his successors and assigns, hereby releases, saves harmless and indemnifies the Municipality for any damage, loss claim, demand, cost (including legal cost), whether as a result of injury or death to any person, or damage to property of any kind, including any claims by third parties, arising from or in connection with the

construction of any structures on the Lands or use of the Lands, whether or not construction is in accordance with the geotechnical assessments referred to herein, including without limitation any subsidence, settling of any structure including any utility or road infrastructure, loss of slope stability, or any similar matter.

[Emphasis added.]

The whole of the Section 219 Covenant is attached to these reasons as Schedule A.

[29] Paragraph 7 above in the Section 219 Covenant is the key provision for determining whether the Covenant contains an enforceable release. I will return to it below.

[30] The Covenant was filed against each of the 28 lots on or about October 2, 2006, in the course of the land being subdivided. The covenantor was the Defendant developer, Concordia Seawatch Ltd.

[31] Each of the Plaintiffs in these eight actions acquired their interests in their respective lots in the subdivision at different times after the Covenant was registered against the titles. Five of them purchased from Concordia directly. Three purchased from people who had previously purchased from Concordia.

[32] As noted above at para. 10 of these reasons, the District has now amended its responses to civil claim to plead in each of the actions the release found in para. 7 of the Covenant.

[33] The Plaintiffs advance two main arguments in support of their submission that the Section 219 Covenant does not apply to release the District.

[34] The first is that s. 219 of the Land Title Act does not authorize a release.

[35] Authority for the subdivision approving officer to require a land subdivider to enter into a s. 219 covenant is found in s. 86(1)(d) of the Land Title Act:

86 (1) Without limiting section 85 (3), in considering an application for subdivision approval, the approving officer may

- (d) if the approving officer considers that the land is, or could reasonably be expected to be, subject to flooding, erosion, land slip or avalanche, the approving officer may require, as a condition of consent to an application for subdivision approval, that the subdivider do either or both of the following:
 - (i) provide the approving officer with a report certified by a professional engineer or geoscientist experienced in geotechnical engineering that the land may be used safely for the use intended;
 - (ii) enter into one or more covenants under section 219 in respect of any of the parcels that are being created by the subdivision.

[36] The relevant provisions in s. 219 of the Land Title Act are as follows:

- (1) A covenant described in subsection (2) in favour of the Crown, a Crown corporation or agency, a municipality, a regional district, the South Coast British Columbia Transportation Authority, or a local trust committee under the Islands Trust Act, as covenantee, may be registered against the title to the land subject to the covenant and is enforceable against the covenantor and the successors in title of the covenantor even if the covenant is not annexed to land owned by the covenantee.
- (2) A covenant registrable under subsection (1) may be of a negative or positive nature and may include one or more of the following provisions:
 - (a) provisions in respect of
 - (i) the use of land, or
 - (ii) the use of a building on or to be erected on land;
 - (b) that land
 - (i) is to be built on in accordance with the covenant,
 - (ii) is not to be built on except in accordance with the covenant, or
 - (iii) is not to be built on;
 - (c) that land
 - (i) is not to be subdivided except in accordance with the covenant, or
 - (ii) is not to be subdivided;
 - (d) that parcels of land designated in the covenant and registered under one or more indefeasible titles are not to be sold or otherwise transferred separately.
- (6) A covenant registrable under this section may include, as an integral part,
 - (a) an indemnity of the covenantee against any matter agreed to by the covenantor and covenantee and provision for the just and equitable apportionment of the obligations under the covenant as between the owners of the land affected, and
 - (b) a rent charge charging the land affected and payable by the covenantor and the covenantor's successors in title.
- (7) If an instrument contains a covenant registrable under this section, the covenant is binding on the covenantor and the covenantor's successors in title, even though the instrument or other disposition has not been signed by the covenantee.
- (10) The registration of a covenant under this section is not a determination by the registrar of its enforceability.

[Emphasis added in sub-s. (2).]

- [37] Subsection 219(2) above provides that a covenant "may include one or more of the following provisions" and then sets out those provisions in paras. (a)-(d). It can be seen that all of those provisions, not surprisingly, are to do with land use and land development. In my view, inserting a release in a covenant under s. 219 is not contemplated or authorized by sub-s. (2).
- [38] Subsection (6) in s. 219 illustrates the Legislature's intention when a government entity, the District in this case, is permitted to receive a form of statutory protection in a subdivision approval covenant. Paragraph (a) in sub-s. (6) expressly authorizes an indemnity for the District in the circumstances set out there. The Plaintiffs, as a result, do not seek on this application a declaration that the indemnity provision in the Covenant is unenforceable.
- [39] Returning to s. 219(2), the District argues that the words "may include one or more of the following provisions" is not intended to be exhaustive. In the result, the District submits, a release can be included in the covenant even though sub-s. (2) makes no mention of it.
- [40] The decision of our Court of Appeal in *Evans v. Jensen*, 2011 BCCA 279, provides guidance for interpreting "may" as that word is employed in s. 219(2) of the Land Title Act. The Court in *Evans* was interpreting Rule 37B(5) of the Rules of Court in force from July 1, 2008 to June 30, 2009. In particular, the question was whether it was open to a trial judge under Rule 37B(5) to award single (not double) costs to a defendant who had made a pretrial offer to settle in an amount which exceeded the amount ultimately awarded to the plaintiff.

[41] Rule 37B provided, in part:

Offer may be considered in relation to costs

- (4) The court may consider an offer to settle when exercising the court's discretion in relation to costs.

Cost options

- (5) In a proceeding in which an offer to settle has been made, the court may do one or both of the following:
- (a) deprive a party, in whole or in part, of costs to which the party would otherwise be entitled in respect of the steps taken in the proceeding after the date of delivery of the offer to settle;
 - (b) award double costs of all or some of the steps taken in the proceeding after the date of delivery of the offer to settle.

Considerations of court

- (6) In making an order under subrule (5), the court may consider the following:
- (a) whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or on any later date;

- (b) the relationship between the terms of the settlement offered and the final judgment of the court;
- (c) the relative financial circumstances of the parties;
- (d) any other factor the court considers appropriate.

[Emphasis added.]

[42] The Court in *Evans* had to decide whether it was open to a court to award single costs for steps taken after the offer to settle. Counsel for the defendant argued that use of the permissive word "may" in Rule 37B(5) indicated that a court is not restricted to the options set out in the Rule. Although the express reference to double costs was necessary because double costs are a creature of statute, a court may award single costs without a statutory authorization. This, in counsel's view, explained why that option was not referred to in the Rule. That argument did not succeed. Justice Prowse, with whom Justices Newbury and Hinkson agreed, wrote as follows at para. 36 and para. 39:

[36] Nor am I persuaded that the word "may" in Rule 37B(5) imports the permissive approach to the interpretation of the Rule advocated by the defendant. Again, such an interpretation would be the equivalent of the open-ended approach to the award of costs in the context of an offer to settle which is inconsistent with the obvious intent of this Rule and its predecessors. While s. 29 of the Interpretation Act, R.S.B.C. 1996, c. 238 provides that the word "may" in an enactment is to be construed as "permissive and empowering", this is an instance in which the words cannot reasonably be read, in context, to permit three or more options for an award of costs where the precise words used are "one or both".

[39] I also agree with the amicus that there is no room in Rule 37B(5) for the exercise of inherent jurisdiction to read in an option which is not expressly provided for in that Rule. I am not persuaded that the absence of a provision for single costs represents a gap in the Rule 37B(5), rather than a considered decision to provide only the options expressly set out therein. Nor am I prepared to find the power to award single costs in the more general costs provisions set out in the Rules, given the specific options provided for in Rule 37B(5) in the context of an offer to settle.

[43] In my view, that reasoning has application here, leading to the conclusion that including a release in a covenant is not authorized by s. 219(2) of the Land Title Act. The four provisions, in paras. (a)-(d) in 219(2), simply do not contemplate a release as something that can be inserted. The point was expressed as follows by Ruth Sullivan in *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ont.: LexisNexis Canada, 2014) at para. 8.90:

An implied exclusion argument lies whenever there is reason to believe that if the legislature had meant to include a particular thing within its legislation, it would have referred to that thing expressly. Because of this expectation, the legislature's failure to mention the thing becomes grounds for inferring that it was deliberately excluded. Although there is no express exclusion, exclusion is implied. As Laskin J.A. succinctly put it, "legislative exclusion can be implied when

an express reference is expected but absent" The force of the implication depends on the strength and legitimacy of the expectation of express reference. The better the reason for anticipating express reference to a thing, the more telling the silence of the legislature.

- [44] The District sought to argue from legislative debates recorded in Hansard that s. 219(2) ought to be interpreted so as to allow for the reading in of the right to include a release as part of a s. 219 covenant. That submission cannot be supported on the facts of this case. First, in my view, s. 219(2) is clear, such that there is no ambiguity which could make Hansard relevant. Second, the debate extracts I was shown are themselves ambiguous as to legislative intention. Third, the legislation being considered in the debate was not s. 219 of the Land Title Act, it was s. 86 of the Land Title Act, which contemplated s. 219 covenants but did not discuss their permissible contents. The extensive case law cited by the Plaintiffs on this point clearly relegates Hansard to a secondary role, at best, in ascertaining the meaning of the statute, and does not support the use of Hansard on the facts here in any event. See, for example, *R. v. Moriarity*, 2015 SCC 55, at para. 32; *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 at para. 97; *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20, at paras. 39-40; and *Amateur Youth Soccer Association v. Canada Revenue Agency*, 2007 SCC 42, at para 12.
- [45] Applying the above reasoning, I conclude that s. 219(2) does not authorize a release to be made part of a covenant registered pursuant to that section. Paragraph 12 of the Covenant, quoted above at para. 28 of these reasons, contemplates severance of any part of the Covenant held to be invalid by the decision of a court of competent jurisdiction. I have made no severance order. The parties can appear before me if they require the Court's adjudication of the severance question.
- [46] The Plaintiffs' other main argument against the release turns on the interpretation of para. 7 in the Covenant itself:

The Covenantor, for himself and his successors and assigns, hereby releases, saves harmless and indemnifies the Municipality for any damage, loss claim, demand, cost (including legal cost), whether as a result of injury or death to any person, or damage to property of any kind, including any claims by third parties, arising from or in connection with the construction of any structures on the Lands or use of the Lands, whether or not construction is in accordance with the geotechnical assessments referred to herein, including without limitation any subsidence, settling of any structure including any utility or road infrastructure, loss of slope stability, or any similar matter.

[Emphasis added.]

[47] The Plaintiffs accepted in their oral submissions that the modern approach to construing restrictive covenants is that they are to be interpreted based on the ordinary meaning of the words they contain, like most other documents are to be interpreted, as contrasted with an interpretation giving the words a narrow meaning and strict construction so as to confine the scope of the covenant's restrictions. See, *Zhang v. Davies*, 2017 BCSC 1180, para 55; 2018 BCCA 99, para 33.

[48] In my view, the keywords for interpreting para. 7, for purposes of determining the scope of the release, are the words underlined below:

The Covenantor, for himself and his successors and assigns, hereby releases, saves harmless and indemnifies the Municipality for any damage, loss claim, demand, cost (including legal cost), whether as a result of injury or death to any person, or damage to property of any kind, including any claims by third parties, arising from or in connection with the construction of any structures on the Lands or use of the Lands, whether or not construction is in accordance with the geotechnical assessments referred to herein, including without limitation any subsidence, settling of any structure including any utility or road infrastructure, loss of slope stability, or any similar matter.

[Emphasis added.]

[49] The words that are not underlined above are modifiers for the keywords. It follows that the release contemplated in para. 7 is only for damage, etc., "arising from or in connection with the construction of any structures on the Lands or use of the Lands." Therefore, to the extent the Plaintiffs' claims are for things other than damage, etc., from construction or use, the release in the Covenant cannot serve to release the District against the claims in the Plaintiffs' pleadings.

[50] In summary, in addressing the merits of the Plaintiffs' application, I find that s. 219(2) of the Land Title Act does not authorize releases, and also that the release as contained in the Covenant in this case is confined in its application to release for damage, etc., from construction on or use of the lands.

The Second Application: By the District and Mr. Parfitt to have the Plaintiffs' pleadings against Mr. Parfitt struck

Striking a Pleading Pursuant to Rule 9-5(1)(a)

[51] The District and Mr. Parfitt apply to strike the Plaintiffs' pleadings against Mr. Parfitt as disclosing no reasonable claim, pursuant to the Supreme Court Rule 9-5(1)(a).

[52] In their second amended notices of civil claim, the Plaintiffs, at para. 128, plead that Mr. Parfitt owed them a duty of care in his role as approving officer. The duty is characterized as follows:

a duty of care to potential purchasers of lots in the Development . . . to exercise reasonable care in determining whether or not to approve the Subdivision, and in setting terms, conditions and requirements for approval of the Subdivision, to ensure that properties purchased in the Development would be reasonably safe and free of occurrence of landslip, soil subsidence, sinkholes and other potentially dangerous or disruptive geotechnical events.

[53] The Plaintiffs claim that Mr. Parfitt did not exercise the required standard of care by, among other things, failing to require various terms and conditions prior to approving the subdivision, approving the subdivision after learning Concordia engaged in initial construction activities such as clearing vegetation which materially increased the risk of geotechnical problems later in the construction, and failing to act on various recommendations of the District's engineers. The Plaintiffs allege that Mr. Parfitt's negligence caused the loss of the full value of their properties, forced them to incur costs for alternative accommodation, and caused mental distress.

[54] Mr. Parfitt submits in this application that he owed no duty of care to the Plaintiffs, and in the alternative, as a local public officer, that he is protected from individual liability by s. 738(2) of the Local Government Act, R.S.B.C. 2015, c. 1. He submits either argument should cause this Court to conclude that the pleadings disclose no reasonable claim against him under Rule 9-5(1). In addition to asserting that Mr. Parfitt owes a duty of care, the Plaintiffs respond that Mr. Parfitt is not a local public officer as defined by s. 738(1) of the Local Government Act, and therefore does not have statutory immunity.

[55] Rule 9-5(1) provides in part:

At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that

(a) it discloses no reasonable claim or defence, as the case may be,

and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[56] The parties agree that a claim will be struck under Rule 9-5(1)(a) only if it is plain and obvious that it has no reasonable prospect of success (*R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 17; *Nevsun v. Resources Ltd. v. Araya*, 2020 SCC 5 at para. 64; *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at para. 14). Since Rule 9-5(2) precludes evidence being considered on an application to strike, the Court must confine itself to examining the pleadings, and assume the facts alleged in the second amended notices of civil claim to be true, while reading the pleadings of the application respondents generously (*Berthin v. Berthin*, 2016 BCSC 2235 at para. 14).

[57] The two questions Mr. Parfitt's application raises are:

1) Is it plain and obvious that he owes no private, common law duty of care to the Plaintiffs?

- 2) Is it plain and obvious that he is a "local public officer", as defined under s. 738(1)(m), and an action against him is therefore barred pursuant to s. 738(2) of the Local Government Act?
- [58] If the answer to either question is yes, Mr. Parfitt's application to strike should be granted since the claim against him will not have a reasonable prospect of success.
- [59] The Plaintiffs submit that their claim against Mr. Parfitt raises novel legal questions, and as such, it should be considered only in the light of the full factual matrix, by a judge at trial.
- [60] However, the Supreme Court of Canada has said, in cases such as *Hryniak v. Maudlin*, 2014 SCC 7, at paras. 24 and 25, and most recently, in *Atlantic Lottery Corp.*, at paras. 18 and 19, that, where possible, courts should resolve even novel questions promptly rather than defer them to a full trial. Paragraphs 18 and 19 in *Atlantic Lottery Corp.* read as follows:
- [18] Secondly, and since *Microsoft* was decided, this Court has recognized in *Hryniak v. Maudlin*, 2014 SCC 7, [2014] 1 S.C.R. 87 the need for a culture shift to promote "timely and affordable access to the civil justice system" (para. 2). Where possible, therefore, courts should resolve legal disputes promptly, rather than referring them to a full trial (paras. 24-25 and 32). This includes resolving questions of law by striking claims that have no reasonable chance of success (S. G. A. Pitel and M. B. Lerner, "Resolving Questions of Law: A Modern Approach to Rule 21" (2014), 43 Adv. Q. 344, at pp. 351-52). Indeed, the power to strike hopeless claims is "a valuable housekeeping measure essential to effective and fair litigation" (*Imperial Tobacco*, at para. 19).
- [19] Of course, it is not determinative on a motion to strike that the law has not yet recognized the particular claim. The law is not static, and novel claims that might represent an incremental development in the law should be allowed to proceed to trial (*Imperial Tobacco*, at para. 21; *Das v. George Weston Ltd.*, 2018 ONCA 1053, 43 E.T.R. (4th) 173, at para. 73; see also *R. v. Salituro*, [1991] 3 S.C.R. 654, at p. 670). That said, a claim will not survive an application to strike simply because it is novel. It is beneficial, and indeed critical to the viability of civil justice and public access thereto that claims, including novel claims, which are doomed to fail be disposed of at an early stage in the proceedings. This is because such claims present "no legal justification for a protracted and expensive trial" (*Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83, at para. 19). If a court would not recognize a novel claim when the facts as pleaded are taken to be true, the claim is plainly doomed to fail and should be struck. In making this determination, it is not uncommon for courts to resolve complex questions of law and policy (see e.g. *Imperial Tobacco*; *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537; *Syl Apps*; *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261).
- [61] I will return later in these reasons to considering whether the answers to the two questions, posed above at para. 57 of these reasons, are "plain and obvious", after examining the components of the duty of care and the statutory immunity argument.

Duty of Care

[62] The parties are in agreement that Carhoun & Sons Enterprises Ltd. v. Canada, 2015 BCCA 163, at paras. 50 and 51, accurately restates the "Anns/Cooper" test from Cooper v. Hobart, 2001 SCC 79, at para. 30:

- 1) Does a sufficiently analogous precedent exist that definitively found the existence or non-existence of a duty of care in these circumstances;

If not;

- 2) Was the harm suffered by the plaintiff reasonably foreseeable;

If yes;

- 3) Was there a relationship of sufficient proximity between the plaintiff and the defendant such that it would be just to impose a duty of care in these circumstances;

If yes, a prima facie duty arises;

- 4) Are there any residual policy reasons for negating the prima facie duty of care [otherwise established?

If not, then a novel duty of care is found to exist.

[Emphasis added.]

[63] I will address each of those questions under the next four heading in these reasons.

- i. Is Grande v. Nelson a Sufficiently Analogous Precedent?

[64] Mr. Parfitt relies on Grande v. Nelson, [1989] B.C.J. No. 476 (S.C.), as a precedent in which this Court refused to find a duty of care on the part of an approving officer as a result of his negligent approval of a subdivision. The alleged negligence consisted of approving a subdivision on an improperly compacted lot, setting standards to ensure the fill and drainage of the land were suitable for construction before approving subdivisions, failing to seek professional assistance from engineers, and failing to take reasonable steps to inspect the subdivision. Robinson L.J.S.C. summarily dismissed the negligence claim against the approving officer because the alleged duty fell "more readily within a judgmental, legislative or policy category, and not operational", so as to protect a public official from liability in negligence.

[65] The Plaintiffs do not accept that the decision in Grande can serve to defeat their claim against Mr. Parfitt. They submit that the law of public authority liability has evolved since Grande was decided.

[66] The Supreme Court of Canada has cautioned against drawing a conclusion with respect to proximity, one element in the duty of care analysis, based on precedent (*Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63 at para. 28). Therefore, it is necessary to examine *Grande*, and the law on policy immunity, more closely before applying *Grande* here in Mr. Parfitt's favour.

[67] The Supreme Court's caution in *Deloitte* is particularly apt here. I say that because at the time *Grande* was decided, the question of proximity appears to have formed a smaller part in the duty of care analysis than it does today. Proximity was briefly mentioned in an academic writing quoted in *Grande*, but it was not the subject of a separate analysis. Proximity is now rigorously analysed in the duty of care analysis (*Wu v. Vancouver (City)*, 2019 BCCA 23, leave to appeal refused [2019] S.C.C.A. No. 90; *Cobble Hill Holdings Ltd. v. British Columbia*, 2020 BCCA 91). In the result, in my view, it would be unsafe to treat *Grande*, a decision of this Court, as binding authority so as to defeat the Plaintiffs' claim against Mr. Parfitt at this stage, even though the facts in *Grande* are comparable in many respects to those at bar.

ii. Reasonable Foreseeability

[68] Reasonable foreseeability asks whether the harm alleged by a plaintiff could have been a reasonably foreseeable consequence of a defendant's acts or omissions (*Cooper* at para. 30; *Deloitte* at para. 32). In other words, the inquiry considers the probability of injury arising from the defendant's negligence (*Deloitte* at para. 33).

[69] It is evident that the negligent approval of a subdivision by Mr. Parfitt on land unfit for the construction of houses due to geotechnical issues would cause property damage and physical harm to the Plaintiffs. The official community plan for the land on which the Plaintiffs' homes are located clearly provides that the land has "potential for both rock and soil slope instability and the impact of the proposed development should be addressed by a registered professional with specific experience in geotechnical engineering or engineering geology", and lists requirements for a report to be prepared by such a professional.

[70] In addition, s. 86(1)(d)(i) of the Land Title Act provides:

- (d) if the approving officer considers that the land is, or could reasonably be expected to be, subject to flooding, erosion, land slip or avalanche, the approving officer may require, as a condition of consent to an application for subdivision approval, that the subdivider do either or both of the following:
 - (i) provide the approving officer with a report certified by a professional engineer or geoscientist experienced in geotechnical engineering that the land may be used safely for the use intended

[71] Mention of geotechnical issues in a provision outlining an approving officer's duty suggests the harm alleged by the Plaintiffs, that of "dangerous or disruptive geotechnical events", should be within the contemplation of an approving officer at the time of subdivision.

Moreover, the official community plan specifies the possibility of geotechnical problems on those lands, which means the negligent approval of a subdivision on the lands would be reasonably likely to cause physical harm to the Plaintiffs or their property. This risk, inherent in the subdivided lands, means it was reasonably foreseeable at the time of approval that an approving officer who was negligent with respect to geotechnical concerns would cause physical harm to the Plaintiffs or their property.

[72] In the result, in my view, the Plaintiffs can succeed in demonstrating on the pleadings the reasonable foreseeability that the harm they allege by Mr. Parfitt could be a reasonably foreseeable consequence of his acts or omissions.

iii. Proximity

[73] Proximity examines the relationship between a plaintiff and a defendant, including broad policy considerations pertaining to that relationship (Cooper at para. 30). A court must answer whether "the parties are in such a 'close and direct' relationship that it would be 'just and fair having regard to that relationship to impose a duty of care in law'" (Cooper at paras. 32 and 34; Deloitte at para. 25). A court must begin the proximity analysis by characterizing the purpose of any applicable statutory scheme (Wu at para. 61; Cobble Hill at para. 67).

[74] Mr. Parfitt argues that, as the approving officer, he was engaged in what the case law describes as a legislative or a quasi-judicial role. He relies on a decision of this Court for the proposition that the goal of the statutory scheme applicable to approving officers is to have the approving officer determine whether a subdivision is in the public interest (0742848 B.C. Ltd. v Squamish (District), 2017 BCSC 2177 at para. 32).

[75] The Plaintiffs respond, at paras. 32 and 34 of their application response, that the statutory scheme governing the approving officer's role "is not a broad or general one of 'protection of the public' or some sector of it, but rather the determination, on a case-by-case and factually specific basis" of whether subdivision should occur. The Plaintiffs argue, based on the statutory scheme, that the approving officer's ultimate decision is "tightly constrained by specific requirements and conditions set out in legislation".

[76] The respective positions of the parties, summarized immediately above, captures the issue for resolving the proximity question.

[77] In my view, the legislative scheme is highly informative for resolving the question of proximity in Mr. Parfitt's favour. Under the Land Title Act, every municipality must appoint an approving officer, see s. 77(1). An approving officer's decision to subdivide is one of numerous regulatory requirements for the construction of new homes. Numerous municipal employees, in addition to approving officers, participate in the extended regulatory tasks associated with home construction. Sometimes an approving officer, or the other municipal employees employed in the regulation of house construction, have direct dealings with the public in the course of their work. However, our Court of Appeal has found that, subject to rare exceptions, interactions inherent in the discharging of public law duties

do not give rise to a private law duty of care for the public authorities (Wu at para. 58; Cobble Hill at para. 66).

[78] Subsection 85(3) of the Land Title Act provides:

In considering an application for subdivision approval in respect of land, the approving officer may refuse to approve the subdivision plan if the approving officer considers that the deposit of the plan is against the public interest.

[79] Thus, an approving officer is to determine whether a subdivision is against the public interest. Paragraph 86(1)(c) the Land Title Act takes into consideration for subdivision approval the impact on neighbouring properties, the sufficiency of highway allowances, public utility costs and the impact on agricultural land. In other words, the Legislature has been clear in showing that an approving officer's focus, in deciding whether to approve subdivision, is to be a broad one, looking beyond the immediate interests of potential occupants in the potential subdivision.

[80] In *Kamloops v. Nielsen*, [1984] 2 S.C.R. 2, the Supreme Court of Canada found that a building inspector owed a private law duty of care, but that finding was based on bylaws stating that Kamloops had undertaken a policy to regulate construction for the health, safety, and protection of persons and property, coupled with a provision obligating the building inspector to enforce the provisions of the bylaw and administer the bylaw. There are no comparable duties imposed upon Mr. Parfitt as the approving officer.

[81] In, 0742848 B.C. Ltd., referred to above at para. 74, an approving officer's overarching duty was found to be owed to the public, acting in the public interest. Practically speaking, it is likely that this public duty will conflict with the interests of lot owners within an individual subdivision, when, for example, questions of access, the location of utilities, and the location and density of the subdivision itself, are taken into account. The potential conflict between an overarching public duty and an alleged private law duty of care can be a reason for refusing a finding of proximity within the private law duty of care analysis (Cobble Hill at para 51.).

[82] While the Plaintiffs are correct that there is no requirement of direct interaction between a plaintiff and an approving officer for there to be a finding of proximity, in Wu the Court of Appeal stated, "[t]ypically, if a private law duty of care is recognized, it will arise from specific interactions either between the public authority and the claimant sufficient to create necessary proximity or in the context of a statutory scheme"; Wu at para. 59. There is nothing in the second amended notice of civil claim about the relationship between Mr. Parfitt and the Plaintiffs in this action to give rise to a private law duty of care. There is no allegation, for example, that Mr. Parfitt made specific representations or developed a special relationship either with the Plaintiffs or with the property developer, Concordia, in carrying out his statutory duties.

- [83] Such interactions were important to the finding that the City owed a duty to the homeowners in Kamloops. In the absence of such interactions, the registrar of mortgage brokers who had an overarching duty to the public, owed no duty of care to a specific group of investors in Cooper. Even in Carhoun, where it was found on an application to strike that proximity could exist between the government, which had an overarching duty to the public, and individual developers, the pleadings alleged direct dealings between the government and the developer, Carhoun, over a 10-year period (See Cobble Hill at para. 86).
- [84] The sorts of facts in the second amended notice of civil claim which perhaps could support a finding of proximity are pleaded with respect to the District, at para. 65:

the District, through its representatives, was actively and directly involved in monitoring and assessing the geotechnical conditions on the Seawatch Lands and both in itself and performing work, and in directing Concordia as to specific work to be done, to repair sinkholes and remedy conditions that rendered the lands potential unstable.

- [85] No comparable interactions are pleaded by the Plaintiffs with respect to Mr. Parfitt.
- [86] In summary, from an examination of the legal responsibilities imposed by statute on an approving officer, a consideration of the applicable case law, and a consideration of the further amended notice of civil claim, I conclude, as a matter of law, there is not the proximity between the Plaintiffs and Mr. Parfitt that would be required to found a private law duty of care. In addition, in the next section, I examine the fourth step in the duty of care analysis, and conclude there that residual policy considerations further dictate against a finding that Mr. Parfitt owed the Plaintiffs a duty of care. It will be seen that the proximity analysis and considerations of residual policy overlap to some extent.

iv. Residual Policy Considerations

- [87] Residual policy considerations examine the effects of recognizing a private law duty of care on other legal obligations, the legal system, and society more generally. In other words, they may cause a court to conclude that there will not be a private law duty of care because of the adverse societal impacts of finding such a duty (Deloitte at para. 38; Cooper at para. 37). When residual policy considerations are taken into account, the assessment becomes, "despite the proximate relationship between the parties, and despite the reasonably foreseeable quality of the plaintiff's injury, the defendant should nonetheless be insulated from liability" (Deloitte at para. 41).
- [88] The District and Mr. Parfitt submit that even if Mr. Parfitt could otherwise be found to owe a private law duty of care, such a duty cannot arise because it would impair an approving officer's public interest functions and raise the risk of indeterminate liability.

(a) Core Policy

[89] In *Imperial Tobacco*, cited above at para. 56, tobacco manufacturers, being sued by the BC government to recover healthcare costs of tobacco-related illnesses, wanted to third-party the federal government, claiming contribution and indemnity, claiming the federal government was liable for negligent misrepresentation in representing the health attributes of low tar cigarettes. The Supreme Court of Canada found that the third-party claims should be struck, finding that it was plain and obvious that the third-party claim disclosed no reasonable cause of action. The Court found sufficient proximity, under the duty of care analysis, but residual policy considerations caused it to conclude that a duty of care did not exist from the federal government to the tobacco companies. The judgment of the Court was delivered by McLachlin C.J. She said this at paragraph 90:

I conclude that "core policy" government decisions protected from suit are decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith. This approach is consistent with the basic thrust of Canadian cases on the issue, although it emphasizes positive features of policy decisions, instead of relying exclusively on the quality of being "non-operational". It is also supported by the insights of emerging jurisprudence here and elsewhere. This said, it does not purport to be a litmus test. Difficult cases may be expected to arise from time to time where it is not easy to decide whether the degree of "policy" involved suffices for protection from negligence liability. A black and white test that will provide a ready and irrefutable answer for every decision in the infinite variety of decisions that government actors may produce is likely chimerical. Nevertheless, most government decisions that represent a course or principle of action based on a balancing of economic, social and political considerations will be readily identifiable.

[90] Applying that approach to the motion to strike, the Chief Justice concluded that it was plain and obvious that the impugned government decision was a policy decision, and so could properly be struck on the ground that it could not ground an action in tort.

[91] In *Cooper*, the Court found that the question of "core policy" is addressed as part of examining residual policy considerations. *Cooper*, at para 38, observed that the policy immunity, found in *Just v. British Columbia*, [1989] 2 S.C.R. 1228, remains relevant at the residual policy considerations stage, and can form the basis for excluding liability for public authorities. In *Cooper*, investors alleged that losses would have been avoided or reduced if the registrar of mortgage brokers had acted sooner to suspend a broker's license. The Supreme Court of Canada found that the registrar did not owe a private law duty of care to members of the investing public giving rise to liability in negligence for economic losses the investors sustained. The Court upheld the finding of our Court of Appeal that the pleadings did not disclose a cause of action against the registrar.

- [92] In my view, both Imperial Tobacco and Cooper, as well as Grande, addressed above beginning at para. 64 of these reasons, support the conclusion that an approving officer is engaged in a decision of core policy in approving subdivisions, and is thus protected against owing a private law duty of care.
- (b) Indeterminate Liability
- [93] The other residual policy consideration in this case is that of indeterminate liability. I accept Mr. Parfitt's submission that imposing a private law duty of care on approving officers introduces the problem of indeterminate liability.
- [94] As a matter of law, indeterminate liability is liability of a specific character rather than just significant liability. See Deloitte at para. 43.
- [95] The Plaintiffs argued that the class of potential claimants against an approving officer is limited, consisting of prospective purchasers of the lots created, as well as adjoining or adjacent landowners. That in itself, however, is a broad description, encompassing innumerable potential plaintiffs. Furthermore, in addition to considering successive lot owners within a particular subdivision, entire communities can be affected by a single subdivision. In my view, the problem of indeterminate liability is a second residual policy consideration working against the Plaintiffs in this case.
- [96] In summary, under the duty of care analysis, I find both an absence of proximity, as that term is defined in the case law, and residual policy considerations against imposing a private law duty of care.

Immunity under subsection 738(2) of the Local Government Act

- [97] As an alternative basis for their application to strike, Mr. Parfitt and the District submit that whether or not Mr. Parfitt owed a duty of care to the Plaintiffs, he is immune from suit through the application of s. 738(2) of the Local Government Act, which provides:
- (2) No action for damages lies or may be instituted against a local public officer or former local public officer
- (a) for anything said or done or omitted to be said or done by that person in the performance or intended performance of the person's duty or the exercise of the person's power, or
- (b) for any alleged neglect or default in the performance or intended performance of that person's duty or the exercise of that person's power.
- [98] Since there is no allegation that Mr. Parfitt acted outside his duties, and because the claims against him are in negligence, they are covered by s. 738(2)(b) as long as an approving officer is a local public officer.
- [99] "Local public officer" is defined in s. 738(1)(m) of the Local Government Act:

In this section, "local public officer" means any of the following:

- (m) an officer or employee of a municipality, regional District, improvement District, library board under the Library Act, a greater board referred to in paragraph (g), the trust council under the Islands Trust Act or the Okanagan Basin Water Board;

[100] The Plaintiffs simply argue that approving officers are not municipal officers under s. 738(1) (m), and therefore Mr. Parfitt is not protected by s. 738(2).

[101] It can be seen that s. 738(1) of the Local Government Act defines "local public officer" broadly. It includes both employees and officers working for various local government bodies, and, under s. 738(1)(p), even includes individuals volunteering for those bodies. Given the breadth of the definition, I find that it embraces approving officers such as Mr. Parfitt, with the result that he is protected by s. 738(2). That interpretation is consistent with the finding that two trustees and the regional planning manager of an island local trust committee were protected as local public officers in *Ellis v. Denman Island Local Trust Committee*, 2020 BCSC 935 at paras. 103-107.

[102] It is further supported by the reasoning in *Reglin v. Creston (Town) et al.*, 2004 BCSC 790. Mr. Reglin was the Town's director of financial planning, and if he was found to be an officer, a common law duty of fairness applied to any decision to end his employment. In finding Mr. Reglin to be an officer, Melnick J. wrote as follows at paras. 34 and 38 of his reasons:

[34] From my review of those cases, I have no doubt that Mr. Reglin was an "officer" such that Creston's council owed him a duty of fairness. Mr. Justice McRae in *Broderick v. Kanata (City)* (1995), 130 D.L.R. (4th) 188 (Ont. Div. Ct.), adopted at 191 the following definition of "municipal officer" in I.M. Rogers, *The Law of Canadian Municipal Corporations*, 2d ed. (Toronto: Carswell, 1982) at 281-82:

A municipal officer, generally speaking, is one who holds a permanent position of responsibility with definite rights and duties usually prescribed by statute and sometimes by by-law. As distinguished from a servant employed by a municipality, an officer appointed by it has, in the performance of his duties, some discretionary authority and has a responsibility to perform vital duties of the corporation; a mere servant has only a duty to obey orders. This class includes such persons who occupy offices of an executive or administrative nature established by the legislature who exercise powers and who are appointed by and subject to the control of the council of such municipality.

[38] I am supported in this conclusion by Mr. Justice McRae's comments in *Broderick* at 191, again citing Rogers at 282:

It is submitted that the term "officer" also includes such persons who are appointed by a council to discharge the duties attendant upon an office established by it and that it is not limited in its application to those officials such as the clerk who occupy positions created by the statute itself. Provisions empowering the council to create additional offices support this view. There is no

reason for confining the term only to the highest officers of the corporation the only distinction between an office created by statute and one established by by-law being that, in the case of the former, the appointment may be mandatory and some of the duties attached to the office may be governed by statute.

[103] Reglin thus found that a municipal officer was someone whose duties predominantly derived from statute, and who had some discretionary authority. That description applies to the role of an approving officer, including Mr. Parfitt. I conclude that he is protected by s. 738(2) of the Local Government Act.

Conclusion on the Application to Strike

[104] Mr. Parfitt's application to strike the claim against him is allowed. The application satisfies the "plain and obvious" requirement. He does not owe a duty of care, because of the absence of proximity, and because of residual policy considerations. He is also protected by s. 738(2) of the Local Government Act. As a result, the claim against him is dismissed.

Summary

[105] The Plaintiffs' application for a declaration that they have not released the District from the claims they advance against the District is allowed.

[106] The application by the District and Mr. Parfitt to strike the pleading against Mr. Parfitt as the approving officer is allowed, and as a result the claim against him is dismissed.

[107] Costs were not spoken to. If they are in issue, the parties can apply.

[108] I thank counsel for their helpful submissions.

"Macintosh J."

Schedule "A": Section 219 Covenant (Geotechnical)

WHEREAS:

A. The Covenantor [Concordia] is the registered owner of ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the District of Sechelt, in the Province of British Columbia, and more particularly described as:

Parcel Identifier: Not Available

Lots 1 - 28 inclusive DL 1473 Gp 1 NWD Plan BCP 26297

(hereinafter called the "Lands")

B. By the provisions of Section 219 of the Land Title Act, RSBC 1996, c. 250 as amended (the "Land Title Act"), a covenant, whether of a negative or positive nature, in respect of the use of land, or that land is not to be built upon, in favour of the Municipality, may be registered as a charge against the title to that land and is enforceable against the Covenantor and his successors in title, even if the covenant is not annexed to land owned by the Municipality;

C. Section 56 of the Community Charter, SBC 2003, Chap. 26, provides inter alia that a building inspector may issue a building permit in accordance with subsection (5) if a qualified professional certifies the land may be used safely for the use intended if the land is used in accordance with the conditions specified in the professional's report.

D. The Covenantor has agreed to restrictions on the use of the Lands to which the Covenant applies:

NOW THEREFORE THIS COVENANT WITNESSES that in consideration of the mutual covenants and agreements contained herein and the sum of ONE (\$1.00) DOLLAR now paid to the District by the Covenantor (the receipt and sufficiency whereof is hereby acknowledged, the parties hereto covenant and agree with each other as follows:

1. Pursuant to Section 219 of the Land Title Act the Covenantor [Concordia] covenants and agrees with the District that the Lands [including but not limited to Lot 27] shall only be built on or used in accordance with the terms of this Agreement and that the Covenantor:
 - (a) will not construct, erect, install or place any building, structure, improvement, utility, or work on the Lands other than those permitted by the Municipality's bylaws in effect from time to time, and only in accordance with the recommendations contained in the Geotechnical Assessments dated April 28, 2006 and May 9, 2006, provided by M.M. Eivemark of Geotactics Engineering Ltd., which are appended to this covenant as Schedule "A", those permitted comprising of conventional single family permanent residences constructed on the upland portion of the land; and
 - (b) will immediately, and at the Covenantor's sole cost, remove any buildings, structures, improvements or utilities that are in contravention of either the Municipality's bylaws or permitted uses as outlined in the geotechnical report noted above, if requested to do so by the Municipality.
2. Subject to the provisions of Section 219 of the Land Title Act the Covenantors' covenants contained in this Agreement shall burden and run with the Lands and shall enure to the benefit and be binding upon the Covenantor, his heirs, executors, administrators, successors and assigns and the District and its assigns. Every reference to the parties is deemed to include the successors and assigns of the parties. It is further expressly agreed that this Agreement may only be modified or discharged by agreement of the Municipality pursuant to the provision of Section 219(9) of the Land Title Act.

3. The Covenantor shall, at the expense of the Covenantor, do or cause to be done all acts reasonably necessary to give this agreement priority over all charges and encumbrances which may have been registered against the title to the Lands at the time of submitting his [sic] Agreement for registration in the applicable Land Title Office, save and except those specifically approved in writing by the Municipality or in favour of the Municipality.
4. Nothing contained or implied herein shall prejudice or affect the rights and powers of the Municipality in the exercise of its functions under any public or private statutes, bylaws, orders and regulations, all of which may be fully and effectively exercised in relation to the Lands as if this agreement had not been executed and delivered to the Covenantor.
5. Notwithstanding anything contained herein, the Covenantor shall not be liable under any of the covenants and agreements contained herein where such liability arises by reason of any act or omission occurring after the Covenantor ceases to have any future interest in the Lands.
6. The Covenantor acknowledges and agrees the Municipality has no specific knowledge and makes no representations or warranties regarding the geotechnical adequacy of the Lands for the proposed uses. The Covenantor agrees that the Covenantor is relying solely on the geotechnical assessments referred to herein for the subsequent safety of the buildings to be constructed on the Lands.
7. The Covenantor, for himself and his successors and assigns, hereby releases, saves harmless and indemnifies the Municipality for any damage, loss claim, demand, cost (including legal cost), whether as a result of injury or death to any person, or damage to property of any kind, including any claims by third parties, arising from or in connection with the construction of any structures on the Lands or use of the Lands, whether or not construction is in accordance with the geotechnical assessments referred to herein, including without limitation any subsidence, settling of any structure including any utility or road infrastructure, loss of slope stability, or any similar matter.
8. The Covenantor agrees to immediately repair, remove, restore, replace, or stabilize, to the satisfaction of the Municipality and at the Covenantor's sole cost, any structure, landscaping, utility or road infrastructure, slope or similar feature of the Lands or features in proximity to the Lands damaged, adversely affected or rendered hazardous by the construction of any structures on the Lands, or by any use of the Lands, whether or not the structures or use comply with the Municipality's bylaws or the geotechnical assessments referred to herein.
9. Wherever the singular or masculine is used herein, the same shall be construed as meaning the plural, feminine or body corporate or politic, where the contents or parties so require.
10. The Covenantor acknowledges that the Municipality is not required or is under no obligation in law or equity to prosecute or enforce this agreement in any way whatsoever.

11. The Covenantor shall give notice of this Agreement to any person, firm or corporation to whom the Owner proposes to sell, assign, convey or otherwise dispose of the Lands and shall cause any person to whom title to same is to be vested, to enter into an assumption of this Agreement on the same terms and conditions as are herein set forth and to deliver the same to the Municipality as a condition precedent to such vesting.
 12. If any section, subsection, sentence, clause or phrase in this Agreement is for any reason held to be invalid by the decision of a Court of competent jurisdiction, the invalid portion shall be severed and the decision that it is invalid shall not affect the validity of this Agreement.
 13. The parties hereto shall do and cause to be done all things and execute and cause to be executed all documents which may be necessary to give proper effect to the intention of this Agreement.
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