

CANADA / JUDGMENT

Konicek v. Vantown Infrastructure Invesco Inc.

2022 BCSC 1590

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 1590 Konicek v. Vantown Infrastructure Invesco Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Konicek v. Vantown Infrastructure Invesco Inc.,

2022 BCSC 1590

Date: 20220909

Docket: S189109

Registry: Vancouver

Between:

Ralph Konicek and Jennic #60 Holdings Ltd.

Plaintiffs

And

Vantown Infrastructure Invesco Inc.,

R.S.K. Excavating & Contracting Ltd.,

Paul Leung, Amy Hung Ying Leung,

The Crown in Right of Canada

Defendants

And

Ralph Konicek and Jennic #60 Holdings Ltd.

Defendants by Counterclaim

Before: The Honourable Madam Justice W.A. Baker

Reasons for Judgment

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Paul Leung

The Defendant, Amy Hung Ying Leung, Appearing in Person:

Amy Leung

Place and Date of Trial:

Vancouver, B.C.

October 12-14, 18-22, 25, 27-29, 2021

November 1-5, 29-30, 2021

December 1-2, 2021

January 17-21, 2022

Place and Date of Judgment:

Vancouver, B.C.

September 9, 2022

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I. Introduction

- [1] This action arises out of the sale of a business in Kitimat, British Columbia. The plaintiffs, Ralph Konicek and Jennic #60 Holdings Ltd. ("Jennic"), sold their shares in R.S.K. Excavating & Contracting Ltd. ("RSK") to Vantown Infrastructure Invesco Inc. ("Vantown") pursuant to a share purchase agreement, dated April 27, 2016 (the "SPA"). The purchase price was partially paid on completion, and partially paid by promissory notes secured with a deferred

payment loan agreement (the "DPLA"). The DPLA was guaranteed by RSK and was personally guaranteed by Paul Leung. Mr. Leung and his wife, Amy Leung, granted a mortgage over their family home in Vancouver as further security for the DPLA.

- [2] Vantown defaulted on the payments required under the DPLA. The plaintiffs brought foreclosure proceedings to recover the outstanding amount, pursuant to the security granted under the DPLA, including the Leung mortgage. The defendants have defended this foreclosure proceeding on the basis that the plaintiffs defaulted on various obligations and covenants they owed pursuant to the SPA, or made false representations in the SPA, and that Vantown suffered resulting losses which must be set off against any amounts owing under the DPLA, with the result being that no amounts are due and owing to the plaintiffs under the SPA or the DPLA.
- [3] Vantown and RSK also counterclaim against Mr. Konicek and Jennic, seeking damages sounding in fraudulent misrepresentation, breach of contract, breach of duty of good faith and honest performance, and equitable fraud.

II. Background

- [4] Ralph Konicek lived in Kitimat virtually his entire life. He left high school to start working in a paper mill in Kitimat, BC, where he worked until 1984. Mr. Konicek started a small landscaping company shortly thereafter.
- [5] Mr. Konicek was successful, and gradually his residential landscaping business grew to a commercial and industrial landscaping business. He acquired heavy equipment as his business grew. By 1990 Mr. Konicek had 6-10 employees during his busy seasons. In the summer he did landscaping, and installed and maintained irrigation systems and flower beds. In the winter he did snow removal, site maintenance, and sanding/salting.
- [6] In 1991 Mr. Konicek incorporated his business as R.S.K. Excavating & Contracting Ltd., and RSK purchased its first commercial property. On that property, RSK built an office and a shop. RSK was able to store up to six pieces of heavy equipment on the property.
- [7] While RSK had grown from a small proprietorship, Mr. Konicek continued to do the accounting work for the company, with the assistance of his wife. It was an unsophisticated system, entirely paper based. At the end of the year, he would send all the documents for the business to his accountant, Mr. Brian Perry, who would then prepare the annual financial statements and tax returns.
- [8] In the late 1990s and early 2000s, RSK developed what would become a significant relationship with Alcan in the town of Kemano. The town of Kemano existed to support the dam and power plant associated with Alcan's operations. In approximately 2000, the power generating plant was modernized and could be operated remotely from the Alcan smelter in Kitimat. This resulted in the Kemano town site being decommissioned. RSK obtained a contract to assist in decommissioning the town site, including demolition of buildings,

shortening sewer lines, removing fire hydrants, cleaning up hazardous materials, and general clean up work.

- [9] The Kemano town site decommissioning project was a significant one for RSK, both in terms of scale and revenue. RSK received approximately \$1,000,000 a year, for two years, from this project.
- [10] In 2001 RSK purchased a new commercial property at 266 Third Street, Kitimat. This property was larger and could accommodate RSK's 8-10 pieces of heavy equipment, as well as smaller equipment.
- [11] RSK generally operated in the Kitimat/Terrace/Prince Rupert area. Before 2008, RSK performed a variety of work, including excavating, simple road construction, material handling, heavy equipment services, and snow removal. The work was low complexity, and fluctuated significantly year to year. Revenue fluctuated from a high of approximately \$1,000,000 in 2003, to a low of approximately \$350,000 in 2004. From 2006 to 2008, RSK's revenues were approximately \$570,000 each year.
- [12] In 2008 a very significant new project began in Kitimat--the Kitimat Modernization Project ("KMP"). The Kitimat smelter was owned and operated by Rio Tinto Alcan ("RTA"), and the decision was taken by RTA to upgrade the old aluminum smelter. This was a unique mega project with a budget of \$4.8 billion USD. The project began with site preparation from 2008 to 2011. From 2012 to 2014, the project was in full swing and, by the fall of 2015, it was starting to wind up. Bechtel was retained by RTA as the engineering, procurement and construction manager from the inception of the KMP until the project started to wind down in 2015.
- [13] RSK, and Mr. Konicek, had an excellent relationship with Bechtel and with RTA. All of RSK's contracts relating to the KMP were managed by Bechtel. Any work with RTA unrelated to the KMP, was handled by RTA directly.
- [14] RSK performed site preparation work for the KMP between 2008 and 2011, and continued with four separate master agreements once the KMP got underway in 2012. Those agreements were the General Services Agreement, the As and When Agreement, the Bussing Agreement, and the KMP Construction Site Snow Removal Agreement. All were time and material contracts, and RSK was able to charge premium rates under them. In addition, RSK continued to perform a lesser amount of work for RTA unrelated to the KMP.
- [15] As a result of the unique opportunity provided by the KMP, RSK's revenues soared. Annual revenue rose from \$21 million in 2012 to \$55 million in 2015.

- [16] By 2014, Mr. Konicek decided it was time to sell the company and retire. He hired Sequoia Mergers & Acquisitions Corp., a company which assists vendors in selling their businesses. Sequoia assisted in marketing RSK and represented Mr. Konicek in any sale negotiations. The primary person at Sequoia dealing with the RSK sale was Mr. Chris Larmer, although Mr. Andrew Blazenko and Mr. Brent Cunningham were also involved.
- [17] In September 2014, Sequoia prepared a confidential information memorandum ("CIM") which was intended to interest potential buyers in the purchase of RSK. The CIM expressly stated on its face that it was intended to convey preliminary information to potential buyers, and that all prospective buyers were responsible for doing their own due diligence before any acquisition. Further, the CIM confirmed that Sequoia took no responsibility for the accuracy of the information in the CIM, and all representations and warranties "shall be made solely by the Company [RSK] in a signed purchase and sale agreement".
- [18] Mr. John Gordon was introduced to the RSK opportunity in the fall of 2014 through Mr. Larmer, who is his cousin. Mr. Gordon's father was a businessman with experience in the oil and gas industry. In the fall of 2014, Mr. Gordon met with Mr. Konicek, together with Mr. Gordon's father, to discuss RSK. At that meeting, Mr. Konicek showed the Gordons around Kitimat and the RTA sites, as well as the RSK shop. By the end of November 2014, Mr. Gordon proposed to Mr. Konicek that they work towards negotiating a sale of RSK for between \$25,000,000 and \$28,000,000 to a buyer group called the Sibbick Group, comprised of Mr. Gordon's father and Glen Sibbick.
- [19] In January 2015, a letter of intent was executed between NBC Servco, a company owned by Mr. Gordon's father, and RSK for a sale price of \$25,000,000. Mr. Gordon was actively involved in the due diligence conducted for NBC Servco.
- [20] Following a request from Mr. Gordon, in February 2015 Mr. Konicek provided Mr. Gordon with a letter setting out "current obligations on RTA site (possible opportunities) (snow removal, as & when, general services, bussing)". In this letter, Mr. Konicek stated the following potential opportunities with RTA:
- a) There is a great deal of uncertainty about the exact end date for RSK on the KMP site. RTA would perhaps issue a contract directly to RSK to continue on, i.e. after Bechtel's contract ended.
 - b) Ongoing maintenance to plant and equipment and grounds.
 - c) Possibility to secure plant-side snow removal through disgruntlement with current snow removal provider (HEL).
 - d) Release of ongoing internal projects/tenders from RTA.
 - e) Decommissioning and remediation of the current operation portion of the RTA smelter.

- [21] In that same February 2015 letter, Mr. Konicek outlined possible opportunities with Chevron/ Apache's anticipated LNG project in the area, and possible opportunities with Prince Rupert LNG-Lelu Island-Petronas.
- [22] Mr. Konicek stated that the "opportunities are endless and are only limited by management's position on which projects to pursue and what services to provide." Mr. Konicek also included the following critical qualifier:

Obviously, there are no guarantees past September 30 this year.

I [personally] am confident that there will be some sort of extension requested past September 30 by RTA; the extent of which I cannot comment on. It is my opinion that completion dates for all does not look realistic at this point in time, and I am unaware of the contract limitations between RTA and Bechtel so as to understand what factors or influences are at play.

The gearing down of this project will give RSK the opportunity to reassess its equipment fleet, personnel (identify key personnel and circumvent others) and begin to actively pursue other clients (up to and including now. We have been unable to do this because we simply cannot take the chance of disappointing future clients, by not being able to respond. We are still adding manpower to satisfy RTA/Bechtel's requirements. My own will to expand is also not there).

- [23] Mr. Konicek testified that his intention in writing the February 2015 letter was to outline the possibilities that existed for future owners, should they wish to pursue them. He was not representing that he was intending, on behalf of RSK, to take RSK in any particular direction.
- [24] By March 2015 the NBC Servco deal had fallen apart. Through Mr. Larmer, Mr. Gordon met with Brian Gessner. Mr. Gessner introduced Mr. Gordon to potential investors who might be interested in RSK. Through this relationship, an investor known as the Hillcore Group ("Hillcore") became interested in RSK. Mr. Gordon was engaged by Hillcore to provide operational due diligence in relation to RSK.
- [25] Mr. Gordon met with Mr. Konicek in Salmon Arm in May 2015, on behalf of Hillcore. Mr. Konicek candidly admitted that he has no recollection of this meeting, but did not deny it took place. Mr. Gordon prepared a memo to file following the meeting. This memo set out a number of key points.
- [26] The memo discussed Mr. Konicek's vision for a hand over the company, which included showing Mr. Gordon the "ropes" and introducing him to staff and clients, and guiding him through general processes and procedures currently employed by RSK, followed by Mr. Konicek stepping back and shadowing Mr. Gordon. Mr. Konicek and Mr. Gordon would work hand in hand doing business development. The memo then summarized discussions about possible new business, possible ISO accreditation, and the desire to retain Nathan Medeiros as a key employee. In his evidence at trial, Mr. Gordon noted that the discussions were in the vein of what Mr. Konicek would do if he was purchasing the company. The plaintiffs submit, and I agree, that the nature of these conversations was not what Mr. Konicek was planning

to do himself with RSK in the future, but rather what a purchaser itself could do with RSK.

- [27] Sequoia prepared a virtual data room for potential purchasers, which contained documents requested during the due diligence process. Mr. Gordon first had access to such a data room when he was investigating RSK for NBC Servco/Sibbick. He gained access to a new data room when he began conducting due diligence for Hillcore. Mr. Blazenko testified that with each new potential buyer, a new data room was created, but his practice was to copy to the new data room the documents which had been requested by previous potential buyers.
- [28] Mr. Larmer testified that Sequoia does not suggest offer prices to prospective buyers, or suggest what buyers should investigate as part of their due diligence. Sequoia's role is to facilitate a buyer's due diligence by receiving requests for information from the buyer, and passing those requests on the client/vendor or the client's consultants, such as lawyers or accountants, as directed by the client. The information received by Sequoia is placed in the data room. It is up to the buyer to its own assessment or verification of the data placed in the data room, and Sequoia takes no responsibility for such data. Mr. Larmer was clear that due diligence is buyer-driven process.
- [29] For Hillcore, Mr. Gordon requested documents, including work requests and purchase orders, for both Bechtel (i.e. KMP) work, and non-Bechtel work. The plaintiffs submit, and I agree, that through such requests Mr. Gordon was aware of the difference between such contracts.
- [30] Mr. Gordon visited Kitimat in June 2015 to meet with Mr. Konicek. Mr. Gordon documented the meetings he participated in. He was introduced to Mr. Medeiros to discuss his future with RSK. He attended the Premier's LNG working committee meeting, and Mr. Konicek introduced Mr. Gordon to various union representatives. Mr. Gordon observed signs around the RTA project indicating the KMP was 95% complete, but noted that he felt the 95% figure was overstated. Mr. Gordon met with the workforce services supervisor at Bechtel. Following that meeting, Mr. Gordon made the following assessment: "My assessment is that there is a very minimum of 6-9 months work required to complete the KMP. As the catch all contractor RSK will, in my opinion, be the last to leave. There is also the possibility that RSK will assume further responsibility on site as and when Bechtel and Bantrel complete the project and leave site."
- [31] Mr. Gordon noted that Mr. Konicek arranged a meeting with RTA to discuss direct contracts after KMP. Mr. Sylvain Lemay, the procurement manager, was supposed to attend this meeting, but had a family emergency and was unable to attend. Mr. Konicek was able, instead, to arrange a meeting with Mr. Dwight Magee, from RTA corporate relations. At that meeting, and as confirmed in his testimony at trial, Mr. Magee stated that RSK performed well during the KMP. Mr. Magee testified that in his role with RTA, he was kept apprised of any difficulties or problems with major contractors. He testified that he was never notified of any difficulties with respect to RSK. He further confirmed that RTA continued to retain RSK for work after the KMP was complete. Mr. Konicek testified that RSK received three

unsolicited work orders from RTA during the meeting with Mr. Magee. At the meeting, Mr. Magee was told that Hillcore would become an equity partner in RSK.

- [32] Mr. Gordon met with Mr. Ritchie, a representative of Bechtel, who discussed both the KMP and an upcoming project with Petronas in Prince Rupert.
- [33] Mr. Gordon met with a representative from Shell Canada regarding a planned LNG facility. Mr. Gordon was of the view that RSK was well positioned for work with Shell.
- [34] Following his meetings in Kitimat in June 2015, Hillcore withdrew its interest due in part to its "inability to confirm the outlook for revenues for RSK beyond the imminent contract".
- [35] By September 2015, Mr. Gordon was again conducting due diligence on RSK, this time for a group called Orestone. In October 2015, Orestone expressed interest in purchasing RSK for \$8,500,000. The opportunity with Orestone did not proceed.
- [36] In October 2015, Mr. Gordon was also in communication with a representative of Adaptable Investments regarding the potential purchase of RSK. On behalf of Adaptable, Mr. Gordon sought information from Mr. Larmer regarding the value of opportunities for RSK, and the competitors with RSK. Mr. Larmer replied to Mr. Gordon, "If they are focussing on RTA as the upside for the future of RSK, they're barking up the wrong tree. I would say that Shell would be a better place to focus energy." On October 30, 2015, Mr. Kai Chen of Adaptable wrote to Mr. Gordon indicating that it was not likely that either Shell or PetroChina would have interest in mega projects in the LNG sector, and that there was a 14-year oversupply of LNG around the globe which would create financial stress on LNG players. As a result, Adaptable declined to make an offer for RSK.
- [37] In December 2015, Mr. Gordon was introduced to Mr. Leung through contacts of Mr. Gessner. Mr. Leung described Mr. Gessner as a senior vice president of private banking at the Bank of Montreal, and a person for whom he had a great deal of respect and admiration. Mr. Gessner had passed away by the time of trial. Mr. Leung had a background in accounting and computer science. He was looking to RSK as an investment which would create a revenue stream for him and his family. He was not knowledgeable about the kind of business RSK was engaged in.
- [38] On December 17, 2015, Mr. Gessner emailed a letter of intent to Mr. Larmer, copied to Mr. Leung and Mr. Gordon. Mr. Gessner, Mr. Leung, and Mr. Gordon would ultimately form Vantown for the purpose of purchasing the shares in RSK. The highlights of the proposed letter of intent were summarized by Mr. Gessner in his email as follows:

Here is the final LOI for presentation to Ralph. Ralph should know:

1. We will have \$600,000 working capital.
2. We hope to close earlier than February 28 if possible.
3. Our due diligence in principle is complete.

4. We will cover Ralph's closing costs.
5. The \$3 million VTB is well secured with Residential Home consisting of \$5M equity plus tail end equity on Equipment and Land & Building value about \$1.8 M. VTB \$3M vs asset valuation \$7.8M : LTV 39%
6. VTB could be repaid as early as 6 months from completion date.

Hope everyone is onside let me know. Chris would like to present to Ralph on Friday before he goes out of town.

[39] Negotiations on the letter of intent carried on through January and February 2016. Key information was exchanged, as follows:

- a) On January 11, 2016, Mr. Larmer advised Mr. Leung that "RSK has never recorded financial data (in an accounting program) on a monthly basis, to produce monthly income statements and balance sheets".
- b) On January 11, 2016, Mr. Leung asked for RSK's monthly operating expense summary for October to December 2015. Mr. Larmer advised Mr. Leung that RSK "historically had to send the physical data (i.e. bill statements, invoices, etc.) to their accountant in Terrace for review and reporting."
- c) On January 18, 2016, Mr. Leung asked Mr. Larmer how RSK's performance was warranted, and whether Mr. Konicek would warrant the RSK would have at least \$1,800,000 in monthly revenue. Mr. Larmer responded:

Per our conversation just now, Ralph makes no warranties about future revenue for the company. Given that you are getting the business for just over its orderly liquidat-able value, financial performance wouldn't be a determinant in a valuation for the company. If it were and we were basing it on revenue of \$1.8MM per month (at 20% EBITDA margins), the value of the company would far exceed what is being paid.

There are many opportunities to drive revenue up in the area and RSK has a good reputation, so I expect that you should do very well.

- d) On January 20, 2016, Mr. Leung wrote to Mr. Larmer confirming, "we have done only limited due diligence on RSK and like you said there is no warrants on performance from revenue to EBITDA."
- e) On January 28, 2016, Mr. Leung wrote to his business partners, Mr. Gessner and Mr. Gordon, copy to his wife, setting out his concerns including:

Here are the concerns from my wife and myself as well:

1. There is no warrant on the revenue and EBITDA from the vendor.

2. The accounting system cannot provide monthly financials for us to analyse their monthly revenue vs expense, business cycles and trends.
 3. There are no contracts with any customers to guarantee some amount of revenue over a period of time.
 4. We rely on the due diligence from the other buyers that failed to close the deal.
- [40] On January 29, 2016, Mr. Leung wrote to Mr. Larmer regarding issues with the letter of intent. In this email he acknowledged, "I hope Ralph can also see it from our perspective, there is no protection on our end that his business will maintain certain minimum revenue and EBITDA."
- [41] On February 18, 2016, the plaintiffs signed a letter of intent wherein Vantown would purchase all the shares in RSK for \$7,900,000. \$5,000,000 would be paid on closing, and the remaining \$2,900,000 would be secured by a vendor take back loan, to be paid in six equal quarterly installments, bearing interest at 4.5% (the DPLA). The DPLA would be further secured by a personal guarantee from Mr. Leung and a mortgage on Mr. and Mrs. Leung's home.
- [42] The letter of intent contained a condition precedent that RSK would retain Mr. Gordon to provide business development services until the closing date or the termination of the letter of intent.
- [43] The letter of intent proposed that a definitive agreement would be entered into by March 31, 2016, and the closing date would be April 15, 2016. If the definitive agreement was not executed by March 31, 2016, the letter of intent would terminate. Vantown also had the right to terminate the letter of intent if on or before March 31, 2016, it advised the plaintiffs that "the results obtained from its due diligence review, including the review of RSK's financial statements, 2015 tax returns and Notice of Assessment from CRA, demonstrate that the actual business, operations, assets or financial condition of RSK are different from its understanding".
- [44] On March 2, 2016 Vantown was incorporated. Mr. Gordon, Mr. Leung and Mrs. Leung were directors on incorporation.
- [45] On March 8, 2016, Vantown and Mr. Leung executed the letter of intent to purchase the shares of RSK.
- [46] Vantown had access to the data room maintained by Sequoia throughout 2016 prior to the SPA being executed. The data room was updated with new information requested by Vantown, including a 2016 list of receivables. The 2016 receivables list and invoice log were provided to the lawyers for Vantown, and Mr. Leung confirmed under cross-examination that he received these documents.

- [47] On April 2, 2016, Mr. Gordon wrote to Mr. Konicek seeking to restructure the deal to allow for adequate working capital during "this downturn period". Essentially, he sought to reduce the payment on closing, and to defer a further \$1,900,000 for approximately six months. Mr. Gordon acknowledged under cross-examination that he made this proposal in light of the fact that RSK's revenue had dropped below the operating expenses of \$250,000 per month. In an email dated April 3, 2016, Mr. Gordon acknowledged that revenue had diminished so much that they were concerned they were undercapitalized.
- [48] Mr. Konicek testified that he had numerous discussions with Mr. Gordon in which he confirmed that the revenues in RSK were dropping off and there was not much work on the horizon, and in which Mr. Gordon confirmed that he was buying RSK for its future potential, not its present work.
- [49] Mr. Larmer had a conversation with Mr. Leung on April 4, 2016, where Mr. Leung expressed concern with the financial status of RSK in January, February, and March 2016, and stated his view that RSK was not a going concern. Mr. Larmer told Mr. Leung that he had been told all along that the buyers could not rely on any revenue from any of the existing projects of RSK. Mr. Leung testified that he had no recollection of this conversation. However, I accept the evidence of Mr. Larmer and find that this conversation did take place.
- [50] On April 4, 2016, Mr. Leung wrote to Mr. Larmer acknowledging that revenue in RSK dropped to \$60,000 in March 2016, and that the buyers would need a nine-month runway to rebuild the business of RSK. Mr. Larmer replied to Mr. Leung the same day, with the following:
- As discussed and agreed on the phone this morning, we were transparent with you all the way along that the business revenue was on a steady decline and that at some point soon, the RTA project would come to a conclusion. You accepted this from the beginning and nothing has changed on our end.
- [51] In the same email to Mr. Leung dated April 4, 2016, Mr. Larmer told the buyers that the SPA was not signed by March 31, 2016 and, therefore, the letter of intent had expired. Nevertheless, he expressed Mr. Konicek's willingness to close the transaction on the terms set out in the letter of intent, by April 15, 2016, and asked Mr. Leung to respond if the buyers wished to proceed.
- [52] On April 10, 2016, Mr. Gordon wrote to Mr. Larmer proposing the first DPLA payment under the DPLA should be deferred until December 31, 2016. Mr. Larmer responded that Mr. Konicek would agree to defer the first payment until December 31, 2016, provided the SPA was signed that week (of April 10, 2016).
- [53] On Monday, April 12, 2016, Mr. Larmer wrote to Mr. Leung, Mr. Gessner, and Mr. Gordon advising them of RSK's position at that time with respect to future work. In particular, Mr. Larmer advised:

Ralph said that RSK is not on the list for the RTA plant decommissioning project, since he didn't think the deal was going to happen with you guys. If he had put in for the tender, he would have been obligated for future work and since he is retiring, this wasn't in line with his personal objectives.

Ralph mentioned to me again this morning to make clear to you guys that he has plans put in place that will not be reversible after Friday and that this deal will not be possible after this Friday if we do not have a signed SPA. This is not a posturing, it is a fact and he wants to make sure that you know this is the case.

[54] The SPA was not finalized and signed by the parties by Friday, April 15, 2016.

[55] On April 22, 2016, Mr. Gessner wrote to Mr. Larmer regarding financing issues, and confirmed that he understood that they were buying a business with no customers, "just forecasts and future considerations", and that there would be no revenue for the first six months after closing.

[56] On Monday, April 25, 2016, Mr. Gordon wrote to Mr. Larmer confirming that he had spoken to Mr. Konicek the previous Saturday. Mr. Konicek was frustrated and described his options to Mr. Gordon as including a sale to Vantown, liquidating the company and winding it up, or allowing the key employees of RSK to operate the company to see if they could manage it. Mr. Gordon stated to Mr. Larmer:

The reality is that RSK is a difficult sale due to the economic downturn in Kitimat. The entire north-west BC region is in a state of flux and waiting on LNG or another major project to kick off. The local commercial and residential real estate market are very soft for this same reason. Every lender but one has turned down the mortgage opportunity due to the location being Kitimat.

[57] Mr. Gordon also told Mr. Larmer that he had no doubt that Mr. Konicek would realize more value on the disposal of the equipment but it would take considerable time and energy to do so. Mr. Larmer stated in his email that he believed \$600,000 was enough capital to run the company with zero revenue for approximately six months.

[58] On April 27, 2016, Mr. Konicek and his holding company, Jennic, entered into the SPA with Vantown and Mr. Leung, pursuant to which they sold all their RSK shares. The closing date was May 13, 2016. The first payment under the DPLA was required on January 1, 2017.

[59] Following the execution of the SPA, the plaintiffs continued to provide information to buyers regarding the business and operations of RSK.

[60] On June 10, 2016, the parties entered into an extension agreement, extending the closing date to June 22, 2016.

[61] Over the fall of 2016 and the first half of 2017, the parties exchanged email regarding the accounting with respect to working capital and amounts payable post closing, which were required to confirm the final amount owing under the SPA.

- [62] No payment was made under the DPLA in January 2017, or at all. On February 2, 2017, counsel for the plaintiffs gave notice of default to counsel for Vantown, in accordance with the DPLA.
- [63] On February 14, 2017, Mr. Konicek wrote to Mr. Leung confirming that \$2,900,000 pursuant to the DPLA was due and payable, and that he expected a payment proposal from Vantown's lawyer within the next two days. Also on February 14, 2017, Mr. Gordon replied to Mr. Konicek's email confirming that their lawyers were preparing a formal proposal, which Mr. Konicek could expect by February 17, 2017.
- [64] On February 17, 2017, counsel for Vantown wrote to counsel for the plaintiffs setting their client's proposal, namely:
1. The VTB of \$2.9m would be paid out in full and Ralph would release all existing security.
 2. The receivable note would be amended or replaced to be payable in full (to the extent collected as at such date) on what would have been the final payment date of the VTB and would be secured against the Kitimat Land & Buildings.
- [65] This proposal was not accepted.
- [66] On June 19, 2017, almost a year after the deal closed, Vantown took the position with the plaintiffs that they had breached the representations, warranties and conditions which required RSK to remain a going concern in continuous operation at times material to the sale and, as a result, the defendants owed nothing under the DPLA.

III. Issues

- [67] In this litigation, the plaintiffs seek declarations that the DPLA is in default and as to the amount owing pursuant to the loan, together with various remedies in relation to the alleged breach of loan. The defendants seek judgment on various losses which they say arise from the plaintiffs' breach of covenants and misrepresentations in relation to the SPA, and seek to set off such losses against any amounts owing to the plaintiffs.
- [68] I will address the issues raised by the defendants first, before determining the loan amounts, if any, owing to the plaintiffs. As such, this litigation raised for determination the following issues:
- a) Did the plaintiffs breach the SPA and its associated agreements?
 - b) Did the plaintiffs make any fraudulent misrepresentations in relation to the SPA and its associated agreements?
 - c) Are the plaintiffs liable in equitable fraud?
 - d) Did the plaintiffs breach a duty of good faith owed to the defendants?

- e) Are the defendants entitled to any damages which must be set off against amounts owing to the plaintiffs under the SPA and its associated agreements?
- f) What amounts, if any, remain payable by Vantown to the plaintiffs under the SPA and its associated agreements?
- g) Are the guarantees granted by RSK and Paul Leung, and the mortgage granted by Paul and Amy Leung, valid?
- h) Are any costs payable to any of the parties?

A. Credibility

- [69] Credibility issues were raised by all parties in this litigation. For the reasons discussed below, and as referenced throughout my reasons, I found the witnesses for the plaintiffs to be credible witnesses. I found the evidence of Mr. Gordon, Mr. Leung, and Mr. Medeiros to raise significant adverse credibility issues.
- [70] The law as it relates to the assessment of the credibility and reliability of the evidence of a witness is not controversial. In *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 186-187, Madam Justice Dillon provides a very useful summary of the principles engaged in a credibility analysis. Some of these factors include the witness' ". . . ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally".
- [71] I have governed my assessment of the credibility of the witnesses in accordance with the principles summarized in *Bradshaw*.
- [72] In addition, it is important to consider the reliability of a witness' evidence. For example, there may be instances where a witness is an honest credible witness, but specific pieces of evidence are not reliable due to the passage of time, or other factors affecting the witness' memory.
- [73] Mr. Konicek candidly admitted that his memory of certain events was not entirely accurate or reliable. He explained that he was getting older and was taking some medication which, he suggested, may have affected his memory of specific dates and some events. As an example of his memory difficulties, Mr. Konicek admitted that he did not have a memory of a meeting held between him and Mr. Gordon at his home in Salmon Arm in May 2015. He did not deny the meeting took place, and he agreed that Mr. Gordon prepared a memo of that meeting that likely reflected what was discussed. I am satisfied that Mr. Konicek was an honest forthright witness, who readily admitted when his memory of specific events was unreliable. However, I also accept that when his memory of an event was clear, his evidence was credible and reliable.

- [74] Mr. Gordon, on the other hand, gave evidence which was exaggerated and at times at odds with the documentary evidence and evidence of other reliable witnesses. Examples of credibility concerns with Mr. Gordon are detailed throughout my reasons. However, specific examples are set out below.
- [75] At trial, Mr. Gordon testified he was shocked that prior to the closing Mr. Konicek sold two trucks that were part of the inventory of assets of RSK. In his direct evidence, Mr. Gordon stated that he was only told days before the closing that Mr. Konicek had sold the trucks, and Mr. Konicek only let him know in a throw away line.
- [76] In fact, the documents show that Mr. Gordon and Mr. Konicek had discussed the sale of this retired equipment as far back as April 2016 and, in fact, Mr. Gordon supported the idea as the proceeds from the sale of the trucks would reduce the financing needed by the purchasers. On May 17, 2016, Mr. Larmer wrote to Mr. Gordon and Mr. Leung confirming the following:

Thank you for your confirmation that Ralph (on behalf of RSK) is authorized to sell the two pieces of equipment (specifically, D250E Articulated End Dump Truck with serial #4P500740 and D250E Articulated End Dump Truck with serial #5TN01623) prior to the Closing Date for not less than \$120,000 plus any applicable taxes.

Pertaining to this potential sale of the two D250 Articulating Rock Trucks, you agree that should this sale of equipment take place, the Share Purchase Agreement (SPA) is amended by deleting these Vehicles from the Equipment set out in Schedule 3.35 of the SPA.

Both you (as Purchaser) and Ralph (as Vendor) agree that the proceeds of the sale of the Vehicles will be held by RSK and, upon Closing, will be paid by RSK to Travelers Finance Ltd. in partial repayment of the loan from Travelers Finance Ltd. to RSK.

- [77] The plaintiffs submit that Mr. Gordon's evidence of being shocked about the sale of the trucks, and only learning about the sale days before the closing at the end of June 2016 demonstrated "a willingness to misreport events in an effort to cast a bad light on Mr. Konicek." I agree.
- [78] Mr. Gordon testified that the plaintiffs received a general security agreement over the property of the corporate defendants. This statement was not supported by any documents at trial, and the SPA does not refer to any such agreement as a form of security. I find Mr. Gordon was careless in testifying, rendering his evidence less reliable.
- [79] Mr. Gordon testified at trial that he made only two or three trips to Kitimat prior to the closing date. On discovery he agreed that he made at least six trips to Kitimat, and possibly more. The email and other documents entered at trial support a finding that he made more than three trips to Kitimat. The plaintiffs argue that Mr. Gordon was attempting to minimize knowledge of and familiarity with RSK. I agree and find that he was either careless or untruthful in his evidence, both of which impact his credibility.

- [80] In addition, throughout his testimony Mr. Gordon asserted his understanding of commercial issues, such as costing formulae, pre-qualification processes, accounting practices, and equipment maintenance records, as examples of what was expected and agreed to between the parties. However, he did so in the absence of any evidence that such matters were raised with Mr. Konicek before the sale (or after the sale), or were even the subject of the due diligence by Vantown. I find this evidence of Mr. Gordon to be a gross exaggeration of the mutual understanding of the parties to the SPA, which severely undermined his credibility.
- [81] Mr. Medeiros overstated his evidence in chief. Under cross-examination he admitted the limited personal knowledge he had of certain broad statements he had made. In addition, Mr. Medeiros swore an earlier affidavit in these proceedings, which was the subject of cross-examination. In the affidavit, Mr. Medeiros similarly overstated his personal knowledge and made a number of exaggerations and mis-statements. While many of the mis-statements were not material, such as the incorrect date set out for the commencement of the KMP, others were significant and material. Mr. Medeiros made material mis-statements with respect to the profitability of RSK, Mr. Konicek's efforts to obtain work, the competitiveness of bids made by RSK, the alleged termination of the working relationship between RTA and RSK, the state of the equipment in the yard, the number of hours worked by Mr. Johnstone, and Mr. Konicek's alleged free and open conversations with clients about liquidating the company.
- [82] Under cross-examination, it became clear that Mr. Medeiros simply had no direct knowledge of most of these material mis-statements, or his actual knowledge contradicted the statements made in his affidavit. In the result, I have serious credibility and reliability concerns with the evidence of Mr. Medeiros in chief. To the extent his evidence was tested under cross-examination, I do accept some of his evidence as is referred to in these reasons.
- [83] Mr. Coleman's testimony must also be approached with caution. Like Mr. Medeiros, he swore an affidavit previously in this litigation, large portions of which he resiled from at trial. Like Mr. Medeiros' affidavit, the affidavit of Mr. Coleman contained inaccuracies, exaggerations, mis-statements, and generalizations for which Mr. Coleman had no personal knowledge. Mr. Coleman testified that he continued working for RSK after the sale, and felt pressured by the management of RSK to swear the affidavit and so he did, even though it was not accurate. I accept this evidence of Mr. Coleman.
- [84] The defendants subpoenaed Mr. Coleman, and sought leave to cross examine him as an adverse witness. While being cross-examined by counsel for the defendants, Mr. Coleman would often agree to things he did not recall. He would give answers like "I am not sure, so I will say yes". I place no weight on such answers which appeared to me to be brought about by the stress he felt under cross-examination, and not because the answers were in fact true.

- [85] I am satisfied that under cross-examination by counsel for the plaintiffs, where he was given an opportunity to answer questions without pressure, using his own words and to the best of his recollection, Mr. Coleman gave credible and reliable answers, which evidence I generally accept as referred to in these reasons.
- [86] Mr. Leung's evidence was often not credible and entirely self serving. His evidence must also be approached with caution. For the most part, unless his evidence was corroborated by documentary evidence, or the evidence of a credible witness, I have placed little weight on it.
- [87] Examples of Mr. Leung's unreliable evidence include his testimony that the buyers did not know until late in the process that Mr. Konicek had insufficient insurance on the equipment, which was contradicted by an email from Mr. Gordon in June 2016 stating that they knew all along Mr. Konicek was self insured and carried no insurance. Another example was Mr. Leung's evidence that Mr. Konicek was rushing them to complete the transaction, which was contradicted by the documentary evidence which established that the letter of intent was signed two months later than Mr. Leung originally intended, the SPA was executed almost one month after the date specified in the letter of intent, and the closing happened more than two months after the date specified in the letter of intent.
- [88] The more significant areas where I find Mr. Leung lacked credibility relate to the execution of the agreements associated with the SPA, including the promissory notes, the guarantees and the DLPA, and the information he shared with his wife regarding their obligations under the agreements.
- [89] At trial, Mr. Leung gave specific evidence of what happened during the meeting with the lawyers when the agreements were executed, testifying that the documents were not explained to him and his wife and they were not given an opportunity to seek legal advice. However, when he was discovered, Mr. Leung stated that he could not remember anything about the meeting. The documentary evidence at trial, including email sent before and after the meeting, supports a finding that the documents were explained to Mr. and Mrs. Leung, and they were given an opportunity to seek independent legal advice. Frans Lotz, one of the lawyers who witnessed the execution of the documents, had an independent memory of the meeting and confirmed the documents were explained to the Leungs, and they were given an opportunity to seek legal advice. I find the evidence of Mr. Leung at trial with respect to this meeting is not credible or reliable.
- [90] With respect to whether he had discussions with his wife prior to the execution of the documents, Mr. Leung at trial denied he had any discussions about the guarantees and mortgage granted over their home. The documentary evidence produced from that time frame, including many email, contradicts Mr. Leung's testimony at trial. I do not accept Mr. Leung's testimony in this respect as credible.

B. Did the plaintiffs breach the SPA and its associated agreements?

[91] The SPA contains the following clauses, which are relevant to the issues raised in this litigation:

1.6 Entire Agreement

This Agreement and the agreements entered into between the Parties and delivered in connection with Closing constitute the entire agreement between the Parties with respect to the subject matter hereof and supersedes all prior agreements, understandings, negotiations and discussions, whether written or oral. There are no conditions, covenants, agreements, representations, warranties or other provisions, express or implied, collateral, statutory or otherwise, relating to the subject matter hereof except as herein provided.

3.32 No Changes

Except as set out in Schedule 3.32 and Schedule 3.37 (and, as contemplated herein, RSK is proposing to enter into the RSK Guarantee and RSK Mortgage, and, as contemplated in Section 2.4(e), RSK may declare and pay dividends, or repay loans owed to the Vendors), since the Interim Statement Date, the Business, as conducted by RSK, has been carried on only in the ordinary and normal course consistent with past practice and there has not been:

- (a) any material adverse change in the condition (financial or otherwise), assets, liabilities, operations, earnings or Business of RSK;

...

3.37 Customers and Suppliers

- (a) Schedule 3.37 sets out all customers of RSK since March 31, 2014 which have purchased \$25,000 goods or services from RSK and, except as disclosed in Schedule [3.37], since March 31, 2014:
 - (i) there has not been any material change in the business relationship between any such customer and RSK and to the knowledge of the Vendors no such customer intends to materially change its business relationship with RSK;
 - (ii) there have been no material disputes between RSK and any such customer; nor is RSK involved in any material disputes with other customers which would reasonably be expected to be material; to the knowledge of the Vendors there are no disputes between RSK any such customers or any other customers which would reasonably be expected to be material; and
 - (iii) no such customer has terminated, cancelled, materially modified or altered, or notified RSK or, to the knowledge of the Vendors, otherwise intends to terminate, cancel, materially modify or alter its relationship with RSK or to effect a change in its operations and/or facilities which would reasonably result in the termination or material alteration of the such customer's relationship with RSK.

- (b) Schedule 3.37 sets out all suppliers of RSK since March 31, 2004 which have provided supplies to RSK in excess of \$5,000 and, except as disclosed in Schedule [3.37], since March 31, 2014:
- (i) there has not been any material change in the business relationship between any such supplier and RSK and to the knowledge of the Vendors no such supplier intends to materially change its business relationship with RSK;
- (ii) there have been no material disputes between RSK and any such supplier; nor is RSK involved in any disputes with other suppliers which would reasonably be expected to be material; to the knowledge of the Vendors there are no disputes between RSK any such suppliers or any other suppliers which would reasonably be expected to be material; and
- (iii) no such supplier has terminated or materially altered, or notified RSK or, to the knowledge of the Vendors, otherwise intends to terminate or materially alter its relationship with RSK or to effect a change in its operations and/or facilities which would reasonably result in the termination or material alteration of the such supplier's relationship with RSK.

[92] Schedule 3.37 sets out the following information regarding customers:

Customers

Subsequent to March 31, 2014, RSK provided goods and services to the following customers. RSK currently has no ongoing commitments to provide goods or services to the following customers or any other person.

1. ABB Inc.
2. Bechtel Canada Co.
3. Lander Gen. Power
4. Rio Tinto Alcan

[93] With respect to suppliers, Schedule 3.37 states:

Suppliers

Subsequent to March 31, 2014, RSK acquired supplies from the following suppliers. RSK currently has no commitments to purchase supplies from the following suppliers or any other person.

[94] Following the above prefatory statements, Schedule 3.37 then lists 53 different suppliers to RSK.

[95] The defendants submit that the plaintiffs breached the following representations:

- a) RSK had been operated only in the ordinary and normal course consistent with past practice (clause 3.32);

- b) There had been no material adverse change in the condition (financial or otherwise), assets, liabilities, operations, earnings or business of RSK (clause 3.32(a)); and
- c) There has not been any material change in the business relationship between any customer listed in Schedule 3.37 of the SPA and RSK (clause 3.37).

[96] The defendants argue that RSK ceased operating in the ordinary and normal course consistent with past practice. In particular, they submit that RSK essentially "downed tools" and stop taking on new work. The defendants argue that rather than obtaining a "turn key" operation, they obtained a mothballed shop with few employees and no work. The defendants make the following specific allegations of breaches on the part of Mr. Konicek:

- a) Failed to satisfactorily maintain ongoing good faith relationships with customers and clients;
- b) Failed to qualify or register RSK for work projects;
- c) Failed to bid competitively;
- d) Failed to pursue and secure projects;
- e) Failed to pursue and secure as and when work;
- f) Failed to satisfactorily maintain key equipment;
- g) Published his intention to retire and his belief Vantown would not complete the transaction;
- h) Failed to properly maintain and hand-over financial and business records; and
- i) Failed to deliver RSK as a "turn-key" operation.

[97] Many of these allegations relate to opinions held by Mr. Gordon or Mr. Leung as to what they felt ought to have been the state of RSK at the time of transfer. However, the difficulty with many of these propositions is that they are either unsupported by any evidence, or are directly contradicted by the evidence and the contract documents themselves.

1. Failed to satisfactorily maintain ongoing good faith relationships with customers and clients

[98] Mr. Gordon testified that Mr. Konicek had soured relations with many of RSK's customers and clients at some point before the transfer. However, he produced no actual evidence of this. He referred to various hearsay comments about how RSK had not maintained relationships in the community, but gave no specifics as to who made the comments and no witnesses were called to corroborate such statements.

[99] The only specific example Mr. Gordon gave of Mr. Konicek's alleged destruction of a relationship was with respect to RTA. Mr. Gordon referred to a big disagreement Mr. Konicek had with RTA regarding a snow removal contract, which resulted in RTA not wanting to do business with RSK any longer. The difficulty with this evidence is that it is hearsay. No representative of RTA testified to the breakdown of the relationship between

RSK and RTA. To the contrary, Mr. Magee, who was employed by RTA before and after the sale of RSK, testified that there were no ongoing problems with RSK from the perspective of RTA, and RSK continued to get work from RTA in 2016 and following. This is echoed in a memo to file Mr. Gordon prepared following his meeting with Mr. Magee in 2015, where he wrote:

It was explained to me that RSK have performed well during the KMP and had provided a solid backbone to the project as a whole. Dwight [Magee] mentioned that RSK had been one of the most reliable and professional contractors on site. While we were in the meeting Dwight gave Ralph three work orders that had been unsolicited. It was clear that RSK are leaned on by RTA to 'get it done'.

[100] Mr. Gordon had no personal knowledge of the alleged meeting regarding the snow removal contract, and relied on what he was told by an RSK employee, Mr. Medeiros, who also was not present in the meeting. Mr. Gordon suggested that the meeting happened after March 31, 2014, and therefore Mr. Konicek was in breach of Article 3.37(a) of the SPA.

[101] Mr. Konicek agreed that he had a disagreement with RTA regarding a snow removal contract, where he felt RTA underpaid him for work completed prior to a purchase order being issued. However, he also testified that the disagreement happened in 2013, and did not result in any disruption in the normal pattern of work RSK continued to do for RTA. Mr. Konicek testified that he and a member of his staff, Mr. Coleman, went to a meeting at RTA to discuss Mr. Konicek's concerns. The value of the disputed work was \$200,000, and was significant to RSK. Both Mr. Konicek and Mr. Coleman testified about the meeting. Mr. Coleman agreed that Mr. Konicek was assertive and upset, but testified that Mr. Konicek was not disrespectful. He agreed that Mr. Konicek did not demand payment "on the spot". Mr. Coleman said he would not describe the meeting as an explosive argument. Mr. Coleman also confirmed that the meeting happened in 2013 and stated that his affidavit evidence in which he placed the meeting in 2015 was incorrect.

[102] Following the meeting, RTA invited RSK to bid on the operating plant snow removal contract for the three-year period of 2013-2016. In that invitation, RTA stated to Mr. Konicek that "RTA would like to reiterate that your excellent performance of the services during the contract term had been highly commended by RTA management and employees", and that RTA looked forward to a continued working relationship. RSK did bid on that contract, but the contract was awarded to Hoban Construction.

[103] In June 2015 RTA approached RSK regarding back-up support for Hoban's snow removal work. Mr. Konicek expressed his concern that, because his staff was not involved in marking hazards on the site, his staff would not have the required familiarity with the hazard locations to safely provide services. In addition, his equipment would have to be insured and ready to be mobilized on an emergency basis, which was not financially viable for RSK. Mr. Konicek testified that he had an amicable conversation with RTA regarding his concerns and that he advised Mr. Gordon of the outcome of his meeting with RTA.

[104] Mr. Medeiros and Mr. Gordon testified that after the sale they met with Mr. Lemay from RTA. Mr. Gordon testified that Mr. Lemay referred to contentious moments with Mr. Konicek, made it clear that he would not work with Mr. Konicek, and wanted to know that Mr. Konicek was no longer with RSK. This evidence was contradicted by Mr. Medeiros. Under cross-examination, Mr. Medeiros confirmed that Mr. Lemay asked them if Mr. Konicek was still with RSK, but made no statements beyond that. Mr. Lemay was not called to confirm the content of any conversation with Mr. Gordon, or to confirm the suggestion that he was dissatisfied with Mr. Konicek. I reject the evidence of Mr. Gordon with respect to the hearsay evidence of Mr. Lemay regarding RTA's dissatisfaction with Mr. Konicek.

[105] I accept the evidence of Mr. Konicek, and find that the dispute with RTA about the snow removal occurred in 2013, and also did not interrupt the ongoing business relationship between RTA and RSK.

[106] I find that the defendants have not proven that Mr. Konicek failed to maintain good faith relationships with customers and clients.

2. Failed to qualify or register RSK for work projects

[107] Similar to the allegation regarding failed business relationships, the defendants produced no evidence to support the allegation that Mr. Konicek failed to qualify or register RSK for projects.

[108] Mr. Gordon testified that RSK was not preregistered with Chevron, LNG Canada/Shell, or Coastal Gas Link, but that after the sale Mr. Gordon took steps to complete preregistrations with these companies.

[109] Mr. Konicek testified that for many potential projects, the opportunity to pre-qualify had not arisen before the closing date under the SPA. With respect to Shell, RSK did produce an early introductory letter to LNG Canada (Shell) sent on April 7, 2015. Mr. Konicek testified that after he provided preliminary documentation to RSK, employees began performing work on the LNG Canada (Shell) site in January, February and May 2016.

[110] Mr. Konicek testified that not every big client required pre-qualification before bids could be submitted, and this was confirmed by Mr. Medeiros.

[111] Ms. Crewe was the office administrator for RSK both before and after the sale. Her responsibilities included general administration, payroll, maintaining contracts, and dealing with receivables and payables. Ms. Crewe testified that in 2015 and 2016 RSK received approaches from Fluor and Petronas, seeking confidential information exchange in relation to proposed projects. RSK responded with the requested information, but the opportunities fizzled out, which I understood to mean the companies did not proceed with the anticipated projects. Ms. Crewe testified that the companies did not express dissatisfaction with the paperwork submitted by RSK. Copies of the paperwork submitted remained in the office of RSK after the sale. Ms. Crewe also testified that the financial investment announcement for the Fluor project did not occur until 2019, well after the sale.

- [112] Mr. Gordon testified that he met with Graham Cambray at RTA who told him he had only met Mr. Konicek once. Mr. Gordon said he had to re-introduce RSK to RTA and let it be known RSK was still operating, not liquidated, and Mr. Gordon was intent on growing the company. Mr. Gordon testified that after the meeting, work began to snowball with RTA. Mr. Gordon agreed under cross-examination that after the sale of RSK, because there had been a change in ownership, RTA required RSK to requalify again.
- [113] It was not clear when the conversation with Mr. Cambray was alleged to have taken place, and Mr. Cambray was not called to testify. Therefore, I cannot attribute much weight to the statements attributed to Mr. Cambray. What I do take from this evidence is that because RSK had new ownership, it was required to requalify with RTA, and that once that requalification with RTA was complete, RSK began receiving ample work from RTA.
- [114] With respect to the suggestion that RTA did not know much about RSK and thought it was not operating, I do not accept that to be a truthful statement in accordance with the evidence of Mr. Magee of RTA, who did testify, and the evidence that RSK continued to receive tenders from RTA and work from RTA in 2015 and 2016.
- [115] The defendants produced no evidence that, before the closing date, bid opportunities were available to RSK, to which RSK failed to respond. The defendants produced no evidence that RSK failed to get work because RSK did not pre-qualify with any company prior to the closing date.
- [116] During the due diligence period Mr. Gordon did not ask to review any of the pre-qualification documents RSK prepared for any potential projects, and did not ask to review any pre-qualification documents RSK had prepared on previous projects.
- [117] Mr. Gordon testified that pre-qualification documents were complicated and when he took over it was a lengthy process to assemble the required documents to support a pre-qualification package. However, at trial Mr. Konicek was not questioned about whether the pre-qualification package prepared by Mr. Gordon was anything like the package he would have prepared for RSK.
- [118] Further, pursuant to the letter of intent, Mr. Gordon had the right to provide RSK with business development services during the due diligence period. Mr. Gordon agreed that this right allowed him to go out and speak to people in the community, and allowed him to pre-qualify RSK for projects. Mr. Gordon did not take any steps pursuant to this right given to him under the letter of intent.
- [119] I find that the defendants have not proven that Mr. Konicek failed to qualify or register RSK for work projects.
3. Failed to bid competitively/ Failed to pursue and secure projects

- [120] There is no evidence that RSK failed to bid competitively from March 2014 to the closing date. RSK did get work in 2015 and 2016. Mr. Konicek testified that historically RSK did not bid on every project that came along. In the data room kept by Sequoia for the benefit of Vantown's due diligence process, Vantown was advised that RSK's marketing approach was to pursue opportunities that were within RSK's capabilities and desired profit margins. Mr. Konicek testified that his preferred contracts were time and material based, rather than fixed price. RSK continued to work for RTA on such contracts up until the closing date.
- [121] Mr. Medeiros testified that RTA and the District of Kitimat put out many tenders, and RSK made no efforts to bid for them in late 2015 and 2016. However, he gave no specifics of what opportunities were available that RSK did not bid on. His evidence is contradicted by the documentary evidence from RTA. Mr. Medeiros obtained a list of four tenders released by RTA to RSK in 2015 and 2016. In January 2016, RSK responded with a bid for the crucible cleaning project. Mr. Konicek could not confirm whether the last two tenders were issued prior to the closing date. The defendants produced no evidence to establish when the last two tenders were released.
- [122] Ms. Crewe testified that she did not recall Mr. Konicek refusing to tender on projects that were suitable for RSK. She did not recall any opportunities coming from the District of Kitimat in 2016 prior to the closing date. Ms. Crewe also testified that RSK continued to look for bid opportunities on the "Ariba" bidding system used by RTA as the work on KMP reduced.
- [123] While Mr. Medeiros initially testified that Mr. Konicek was reluctant to bid competitively, under cross-examination he agreed that he had no knowledge of the rate structure used by RSK or what rates would be competitive.
- [124] The allegation that RSK did not bid competitively was not borne out in the evidence at trial. For the RTA crucible cleaning project, which RSK bid on at the end of the KMP, RSK proposed rates which were approximately 82% of the rates RSK received on the KMP. Similarly, on an excavator contract in the fall of 2015, RSK received rates well below the rates it was able to charge on the KMP. I find the evidence does not support the allegation that RSK failed to bid competitively on jobs once KMP started to wind down.
- [125] Mr. Gordon discussed a project to decommission the RTA site as something RSK could have done. However, the defendants produced no evidence as to whether that project had been made available to bidders prior to the closing, or whether the scope of work would have been suitable for RSK, or whether the project in fact proceeded.
- [126] The letter of intent expired because the SPA was not completed by March 31, 2016. On Monday April 12, 2016, Mr. Larmer wrote to Mr. Leung, Mr. Gessner and Mr. Gordon advising them that RSK was not on the list for the RTA decommissioning plant because he did not think the SPA with Vantown would be completed. The deadline for completing the SPA pursuant to the letter of intent had been almost two weeks prior. Mr. Larmer advised that taking on the responsibility of the decommissioning project did not align with Mr.

Konicek's personal objectives. In other words, Mr. Konicek made it clear that he was not prepared to take on work he was not able to perform and, because the parties still had not reached terms on a SPA, he was not prepared to put RSK on the list as he could not be sure that a sale to Vantown would actually be completed.

- [127] In the face of the information provided by Mr. Larmer as to the RTA decommissioning project, namely that because the SPA was not completed by the deadline set out in the letter of intent, RSK did not ask to be put on the list for the project, Vantown continued to work with Mr. Konicek to complete the SPA. It is simply not open to Vantown to complain now that RSK's failure to put itself on the list for the RTA decommissioning project is a breach of the SPA.
- [128] In any event, the defendants have not established that the RTA decommissioning project was ever tendered or awarded. Ms. Crewe provided photographic evidence that in the summer of 2021, some five years after the RSK deal closed, the buildings on the old RTA site remain standing.
- [129] The defendants rely heavily on the CIM in arguing that the CIM set out all kinds of opportunities that RSK failed to pursue. However, the CIM was not a contractual document in this deal. It was intended to introduce potential buyers to the opportunities that might be available to them in operating RSK. It cannot be read as a commitment by RSK to pursue all such opportunities for the benefit of potential buyers. It expressly states that all representations and warranties shall be solely made by RSK in a signed purchase and sale agreement.
- [130] The CIM sets out major projects that, in 2014, were planned for the Kitimat area. There is no guarantee that any or all of them would proceed, or that any of the projects would make work available to RSK at all, or on any specific timeline. Rather, it is intended to provide some background to potential buyers to assist them in their own due diligence.
- [131] Mr. Gordon was very argumentative under cross-examination in respect of potential work opportunities in the Kitimat area. However, he did agree that the Petronas project ultimately did not happen. When presented with the negative comments regarding the future of LNG in the Kitimat area made by Adaptable, a potential buyer Mr. Gordon was assisting, Mr. Gordon made it clear that the opportunities he saw in the area were based on his own experience and assessment, not on anything being told to him by others.
- [132] Mr. Coleman confirmed the evidence of Ms. Crewe and Mr. Konicek, namely that as KMP shut down there was a dearth of work in the Kitimat area. While some new projects may go forward at some point in the future, such projects had not developed to the point of creating opportunities which could keep RSK working at anywhere close to the levels it had been working in 2014 or 2015.

- [133] Mr. Gordon was critical of Mr. Konicek's failure to register with the chamber of commerce. He testified that when he went to a meeting at the chamber of commerce after the sale and met with (unnamed) representatives of various (unnamed) companies, the representatives told him that RSK had not pre-qualified with them or expressed any interest in their work, and they did not know who RSK was. This evidence of Mr. Gordon is entirely unreliable hearsay. No specifics of who made the alleged statements was provided, and no representatives of any companies testified that they had projects available to RSK in 2016 which RSK failed to express interest in. There is no evidence that Mr. Konicek ever registered RSK with the chamber of commerce during the history of the company, and there was no obligation under the SPA for Mr. Konicek to change his historical business practices to comply with what Mr. Gordon felt was appropriate.
- [134] The defendants have not proven that there was work available to RSK, which RSK failed to bid on, or on which RSK failed to bid competitively. The argument of the defendants seems to be nothing more than: we thought RSK would have more work, and because it doesn't have the work we thought it should have, it must follow that RSK failed to pursue such work properly. I do not agree. If there is no work to be had, RSK cannot be faulted for not having more contracts than it did, particularly in light of the express representations in the SPA that RSK had no ongoing contracts.
- [135] I find the defendants have not proven that Mr. Konicek failed to cause RSK to bid competitively on projects available to it prior to the closing date, or failed to pursue and secure projects in the ordinary course.
4. Failed to pursue and secure "as and when" work
- [136] The defendants argue that RSK historically received significant revenues from "as and when" relationships with clients, which they argue is work done without a pre-existing contract in place. They argue that Mr. Konicek failed to pursue such work and, due to his "misconduct", was no longer approached for such work. The allegations with respect to the "as and when" work appear to be directed primarily towards work with RTA.
- [137] For the reasons already expressed, I do not accept that RSK failed to obtain work that was available to it, or that Mr. Konicek had acted in a way that disinclined RTA to hire RSK.
- [138] Mr. Konicek agreed that RSK would be approached to do work prior to a purchase order being issued. Once RSK agreed to do the work, a purchase order would be issued and that purchase order would govern the work. For example, the work done by RSK for RTA in 2016 was generally work done under purchase orders. This was explained by Ms. Crewe who reviewed the multiple invoices issued in 2015 and 2016 and confirmed that they were not one-off invoices, but were in fact issued pursuant to specific overarching purchase orders for barge ramps, janitorial work, support services for the mobile cool room and L16 complex, and janitorial services at the support office.

[139] The defendants argue that RSK took on work historically without a formal contract in place. I do not agree. A purchase order is a form of contract which controls the work undertaken.

[140] I find the defendants have not proven that RK failed to pursue and secure "as and when" work on behalf of RSK.

5. Failed to satisfactorily maintain key equipment

[141] Mr. Gordon testified that when he went to the RSK site following the sale, he was surprised to see all of the heavy equipment "stacked" in the yard, and difficult to access due to the large volume of equipment. He testified that the equipment was not in working order, had not been maintained, and no service or maintenance records were kept.

[142] Mr. Gordon gave extensive evidence about what maintenance he assumed would be done on the equipment, based on his experience in other companies. However, he confirmed that he had no discussions with anyone at RSK about the kinds of records they kept. He simply assumed they kept maintenance records in line with his prior personal experience.

[143] Mr. Leung testified that when he saw the equipment shortly after the sale closed, he saw rust on the tracks of some equipment and felt that only cosmetic work had been done on the machinery.

[144] The evidence of the defendants was vague and generalized regarding the state of the equipment. The defendants produced no evidence of repairs they were required to do on the equipment after the sale. They produced no photographs of the equipment at the time of sale demonstrating that it was not in a proper or expected state. Neither Mr. Gordon nor Mr. Leung are mechanics and they cannot speak to the mechanical state of the equipment. Mr. Gordon testified that they had to go through each piece of equipment to assess the operability and state of repair. No records of this assessment were produced in evidence. Therefore, I cannot conclude that the assessment performed by the defendants, if it happened at all, established that the equipment was not in an expected state at the time of sale. Mr. Konicek and Ms. Crewe testified that they were not notified by the purchasers of any concerns relating to the equipment after the sale completed, which I find is consistent with a finding that the equipment was in an acceptable state at the time of transfer.

[145] Mr. Medeiros testified that during Mr. Konicek's ownership, RSK did not keep any real records for repairs or maintenance, other than a checklist which was kept in most pieces of equipment and was filled out by the operators. He agreed under cross-examination that nothing changed at RSK with respect to paper work for the equipment from the time before the sale until the sale completed in June 2016.

[146] Mr. Medeiros testified that Mr. Konicek had no desire to spend money on the equipment doing routine maintenance. He testified that Mr. Johnstone, a mechanic hired by RSK, did low level work on the equipment, such as oil changes, light bulb changes, and cosmetic work. He testified that Mr. Johnstone worked part-time, only three days a week, and there was no urgency to the work he was doing. I do not accept this evidence of Mr. Medeiros

which was contradicted by himself under cross-examination, by financial, employee, and other records, and by the evidence of Mr. Coleman and Mr. Konicek, whose evidence I do accept.

- [147] Mr. Medeiros confirmed under cross-examination that he did not personally monitor the work that was done on the equipment, did not know any details about what work was done, had no documents that demonstrated the required work was not done, and did not know how much money was spent on equipment maintenance before the closing date of the sale in June 2016.
- [148] Mr. Medeiros testified that the equipment returned to the RSK site after the KMP wound down was "stacked" in the yard. Some were operational on short notice, but some were not. Under cross-examination, Mr. Medeiros agreed that RSK equipment was in active use on jobs in 2016, including in June 2016. He also agreed that loaders, trucks and excavators were ready to be mobilized at the time of the sale. He stated that 25% of the equipment were ready to be used on jobs, and the rest were "stacked" in the yard and would take some effort to bring them out.
- [149] Ms. Crewe and Mr. Coleman agreed that the yard was very crowded, due to the wind up of the KMP and equipment being returned to the RSK site.
- [150] Mr. Coleman testified that he did not remember maintenance logs being kept for the equipment, but said he did do repair work on the equipment. Mr. Coleman agreed that by June 2016, some of the equipment had been in the yard since it came off the KMP. He stated that some equipment needed work, and some did not. RSK had equipment ready to be used, including loaders, excavators, and rock trucks. Mr. Coleman agreed that some equipment showed signs of rust, but explained that due to the amount of sulphur in the air from the smelter, exposed metal rusts within days of exposure. He confirmed that signs of rust are not indicative of a lack of maintenance.
- [151] Under cross-examination, Mr. Coleman testified that he observed Mr. Johnson doing maintenance on heavy equipment. He understood Mr. Johnson was qualified to clean out the cabs, grease the machines, perform oil changes, replace fan belts, lights, and broken mirrors, and do anything else that did not require a heavy-duty mechanic ticket. Mr. Coleman disagreed that Mr. Johnson was performing only cosmetic work on the equipment.
- [152] Mr. Konicek testified that as KMP wound down, equipment was returned to the RSK site and RSK continued its normal practice of performing maintenance and repairs. He testified that Mr. Johnstone was a mechanic hired by RSK to do servicing and minor repairs on the equipment, and that such work was also done by Mr. Konicek himself and others such as Mr. Coleman and other operators. Mr. Johnstone worked approximately 30 hours per week from March 24, 2016 to the closing date performing maintenance and repair work on the equipment.

- [153] Mr. Konicek testified that any major repairs were set out to external shops for servicing, including Kitimat Iron, Zanron, John Deere, and Finning. Mr. Konicek testified that RSK's highway trucks were inspected biannually by an independent certified inspector.
- [154] In the fiscal year ending May 31, 2016 RSK spent \$203,036 on repairs and maintenance, and in the period June 1, 2016 to June 24, 2016, RSK spent \$38,882 on repairs and maintenance. Mr. Konicek testified that these amounts excluded labour provided by employees of RSK.
- [155] Mr. Konicek confirmed that the practices of RSK with respect to maintenance and repairs did not change following the SPA. Mr. Konicek testified that a handwritten notebook was kept to document service done on the equipment. In addition, a daily inspection clipboard was kept in each machine where the operators recorded their daily inspections. This was confirmed by Mr. Coleman and Mr. Medeiros, although Mr. Medeiros stated the operators were not always diligent in filling out the reports.
- [156] Mr. Gordon admitted he did not review equipment maintenance records prior to the sale. He testified as to what he thinks good practice is for record keeping in the industry. However, the SPA does not warrant that the maintenance records for the equipment will be kept in accordance with the standards suggested by Mr. Gordon.
- [157] Mr. Gordon was on site in the week leading up to the closing date. Mr. Konicek testified that Mr. Gordon was on site and that they walked through the "stacked" equipment. Mr. Gordon did not express any concern with how the equipment was stored. Ms. Crewe also testified that she did not recall Mr. Gordon expressing any concern with the equipment in the week before the sale closed.
- [158] I find the defendants have not proven that RSK failed to maintain key equipment prior to the closing of the transaction, and have failed to prove that RSK's approach to maintenance and record keeping changed at any time during Mr. Konicek's ownership right up to the closing date.
6. Published his intention to retire and his belief Vantown would not complete the transaction;
- [159] The defendants argue that Mr. Konicek published within the local construction industry and the local Kitimat community that he was intending to retire, that Vantown was unlikely to complete the purchase, and that he was contemplating liquidating RSK's assets and closing down the business. There was simply no admissible evidence called by the defendants to support such a proposition.
- [160] There is no question that Mr. Konicek was intending to retire and was trying to sell RSK. Mr. Konicek took Mr. Gordon, on behalf of Hillcore, to meet with RTA in 2015 and advised RTA that Hillcore was intending to be brought into the business. Mr. Konicek introduced Mr. Gordon to various contacts in the months leading up to the SPA. There is also no question that Mr. Konicek considered that he had three options when deciding how he could retire. He described these options as selling the business to a new purchaser, turning the operations over to existing employees, or liquidating the business entirely. However, it is

also clear from all of the evidence that Mr. Konicek's first choice was to sell the business to a new purchaser, and from January 2016 onwards that purchaser was Vantown.

- [161] Mr. Gordon testified that evidence of Mr. Konicek's intention to liquidate the company was Mr. Konicek's decision to sell two trucks prior to the closing. I have already expressed my finding that Mr. Gordon's evidence in relation to the sale of the trucks is not credible and I do not accept it.
- [162] On April 22, 2016, Mr. Konicek expressed his frustration to Mr. Gordon that the parties had still not finalized the SPA. The letter of intent expired on March 31, 2016, but the parties were still trying to agree on wording for a sale of RSK. At that point, Mr. Konicek told Mr. Gordon that he had the three options of selling to Vantown, turning the business over to the employees, or liquidating the assets. However, I do not agree that the fact Mr. Konicek acknowledged these options at a time where he must have wondered if he would be able to reach agreement with Vantown on the terms of the sale is the same as Mr. Konicek telling people all over town that he was planning to liquidate the company.
- [163] The defendants rely on the vague, generalized evidence of Mr. Medeiros, to the effect that he spoke to (unnamed) colleagues, friends and competitors, that many people knew Mr. Konicek was selling RSK, and that he had overheard Mr. Konicek say he was getting out of the business. Mr. Medeiros also points to the fact that he and Mr. Konicek had discussed how Mr. Konicek would be selling everything and moving to Salmon Arm. I find that the hearsay evidence proffered by Mr. Medeiros is not reliable, and I decline to accept it.
- [164] With respect to Mr. Medeiros' evidence that he overheard Mr. Konicek speaking about his plans, under cross-examination it became clear that this conversation was much more limited than suggested in his direct evidence. Mr. Medeiros agreed that he heard Mr. Konicek and a close friend, Barry Nedland, have a discussion once where Mr. Konicek told his friend he was tired, wanted to retire and was looking at his options. This was the only conversation Mr. Medeiros actually overheard. Mr. Nedland owned Lander General Power, a company which did business with RSK. Mr. Medeiros agreed he did not hear Mr. Nedland say Lander would not do business with RSK in the future. In fact, the 2017 financial statements of RSK show that by May 31, 2017 Lander General Power was under common control with RSK, along with a number of other companies. Mr. Medeiros could not point to any other conversation Mr. Konicek had with any other person regarding his plans for RSK.
- [165] Mr. Konicek was clear in his testimony that he did not broadcast around the community that he was intending to liquidate the company. His testimony was clear that if someone asked him directly, he would have told them that he had a buyer lined up to purchase RSK, but if that sale did not complete for some reason, he would consider liquidating the company. He said he did not volunteer that information, but would not be untruthful if asked directly. He also could not identify any person he made such a statement to. He did not agree that he knew of any customers switching to the competition because of any statements he made.

- [166] Mr. Konicek agreed that if he told customers he was planning to liquidate, it would have had a chilling effect on them. However, he did not agree that he actually told customers that he was planning to liquidate.
- [167] I find the defendants have not proven that Mr. Konicek published within the local construction industry and the local Kitimat community that he was intending to retire, that Vantown was unlikely to complete the purchase, and that he was contemplating liquidating RSK's assets and closing down the business.
7. Failed to properly maintain and hand-over financial and business records
- [168] The defendants argue that Mr. Konicek improperly removed from the RSK offices financial and business records, including equipment service records, business performance records, and costing records.
- [169] The plaintiffs agree Mr. Konicek took certain records on or around the closing date, but say they did so with the consent of Mr. Gordon.
- [170] Pursuant to Article 8.1 of the SPA, the vendors are responsible for pre-closing liabilities. Therefore, Mr. Konicek understood that he was liable for all payables, including tax liabilities, arising before the closing date. CRA could audit RSK for tax filings in the previous six years, for which Mr. Konicek would be responsible. As a result, Mr. Konicek testified that he preferred to keep the financial records with him and make them available to Mr. Gordon if he needed them. Mr. Konicek testified that Mr. Gordon agreed to this.
- [171] Mr. Konicek testified that he took with him accounting records, such as receipts, invoices, and other documents related to CRA filings. He testified that he left all other documents at the RSK office, including daily maintenance logs, insurance documents, safety records, hard copies of contracts from the KMP, and paper files relating to Petronas business opportunities. Mr. Konicek testified that no request for any documents was made to him by the purchasers after closing.
- [172] Mr. Gordon agreed that he consented to Mr. Konicek taking the financial records with him. Mr. Gordon expressed surprise that Mr. Konicek took close to 40 boxes of documents with him.
- [173] Mr. Konicek explained that the invoices for the KMP were often extremely lengthy. Ms. Crewe confirmed that the invoices on the KMP could be up to six inches thick as they included all backup documents, including sub contractor and supplier invoices.
- [174] In this litigation, the defendants had access to all 35 boxes of documents retained by Mr. Konicek. No evidence was led by the defendants to contradict the evidence of Mr. Konicek that he only took accounting records.
- [175] Ms. Crewe testified that due to occasional power surges that could damage computers, she occasionally made backups of data from her computer onto CDs. She confirmed that she did not delete the data from the computer when she took the snapshot backups. Ms. Crewe

would make two backups and would leave one in her desk and would take one home for safekeeping. Ms. Crewe testified that the data on the computer, which were also found on the CDs, covered the period from 2009 up to the closing date. Ms. Crewe continued working for RSK until 2018. The data on the computers and CDs was available to RSK following the closing date. Ms. Crewe testified that she gave the office copies of the CDs to Mr. Medeiros in 2018 when she stopped working for RSK. This was denied by Mr. Medeiros; however, where the evidence of Mr. Medeiros and Ms. Crewe is in conflict, I prefer the evidence of Ms. Crewe.

- [176] Mr. Gordon testified extensively about the costing documents he expected to find in the RSK files. He testified that costing is made up of costs which are common to all bidders, such as union rates and government burdens like EI and CPP, but the "secret sauce" developed by companies when developing bids is what is important. A company will have its own calculation as to what goes into the rates which form part of the bid and these will include the costs of consumables, indirect costs, fixed operational costs, and the profit margin. Through that formulation, the company is able to establish a profitable bid. Mr. Gordon testified that in his practice he creates a detailed spreadsheet to develop rates. Mr. Gordon testified that he could not find any documents related to how RSK developed its rates when he looked through the documents left behind by Mr. Konicek. The defendants allege that Mr. Konicek deliberately destroyed or took with him the documents which would have assisted RSK in creating the rates it set in its contracts.
- [177] The difficulty with the argument advanced by the defendants is that there is no evidence that Mr. Konicek ever used the sophisticated kind of system in developing rates which Mr. Gordon described. Mr. Konicek was not cross-examined on his method to develop rates. Neither Mr. Medeiros or Mr. Coleman were involved in developing rates for RSK contracts. Ms. Crewe testified that paper copies of the four KMP agreements RSK had were moved to the RSK main office from the KMP site office in the fall of 2015, and they were still there after the closing. Ms. Crewe recalls the binders being placed in boxes when the RSK office moved to trailers behind the shop at some point after the closing date.
- [178] There is no actual evidence that Mr. Konicek withheld anything from Vantown as it relates to costing. There is simply an assumption on the part of Mr. Gordon that Mr. Konicek must have done his costing in the same way Mr. Gordon did. In the absence of any evidence that Mr. Konicek did an elaborate costing analysis, I am not prepared to make a finding that Mr. Konicek withheld such costing documents from the defendants. In my view, it is just as likely and, having seen Mr. Konicek testify for a number of days, perhaps more likely, that Mr. Konicek had been developing costing in his mind for 30 years, had a good idea about what he needed to charge to make a profit, and simply translated his instinct and experience into a rate on a job proposal, without undertaking any kind of elaborate costing exercise.

- [179] I find the defendants have not proven that Mr. Konicek took any RSK documents without the consent and knowledge of Mr. Gordon, and have not proven that Mr. Konicek failed to disclose any financial or other business records.
- [180] The defendants also argue that Mr. Konicek wrongfully continued to operate an RSK bank account after the closing date, and wilfully retained a significant CRA refund that ought to have been received by RSK after the sale completed.
- [181] Mr. Konicek continued to operate Envision account 189001 after the closing. Mr. Konicek testified that Mr. Gordon agreed that Mr. Konicek could operate the old account to allow him to pay pre-closing supplier invoices. Mr. Konicek opened a new bank account for the new operators to use for the ongoing business of RSK, and made sure that they had cheques ready for use on that account when they took over.
- [182] Mr. Gordon testified that he did not agree Mr. Konicek could continue to operate an RSK bank account. He said that it was not appropriate for Mr. Konicek to have access to an RSK account after the closing, when he was no longer a director or shareholder of the company. Mr. Gordon testified that he contacted the account manager at Envision numerous times in an attempt to get the account shut down and ultimately, he had to threaten Mr. Konicek with legal action in order to get it shut down. The account manager was not called as a witness to corroborate this evidence, and no documents were produced which corroborated this evidence.
- [183] Mr. Leung testified he also spoke to the Envision account manager, but again his evidence was not corroborated by the account manager or any documentary evidence.
- [184] The version of events recounted by Mr. Konicek, however, is corroborated by documentary evidence. In July 2016, Mr. Leung wrote to Mr. Larmer expressing concern that if RK continued to use the RSK account, Mr. Leung would have difficulty accounting for activities in the account and making adjustments. In an email dated July 7, 2016, Mr. Larmer replied to Mr. Gordon and Mr. Leung as follows:

If you remember, Ralph had left the original RSK bank account in operation and opened a separate new checking account for you, so as to simplify the accounting for old vs new AR and AP, taxes payable/ receivable, etc.

Is this something that the bank has an issue with? If we can discuss, in order that I can properly explain the issue to Ralph, I will be happy to help.

- [185] The email from Mr. Larmer supports Mr. Konicek's evidence that his use of the account was discussed with Mr. Gordon, and Mr. Gordon agreed with it. Further, there were no more email or other documents produced indicating that either Mr. Gordon or Mr. Leung had an issue with Mr. Konicek using the account, following Mr. Larmer's explanation in July 2016. The only other email in evidence which mentions the Envision account is from Mr. Konicek to Mr. Gordon on October 19, 2016, where Mr. Konicek advises he has closed the old Envision account, which had a zero balance and no further transactions as of the latest

bank statement.

- [186] With respect to the CRA refund, on September 21, 2016 a CRA refund in the amount of \$549,697.23 was deposited to the Envision account 189001. At trial the defendants raised an issue with respect to Mr. Konicek's receipt of this tax refund. No issue was raised in the pleadings regarding the tax refund, and Mr. Gordon under cross-examination could not identify any documents where a concern about the tax refund had been raised at any point.
- [187] Mr. Konicek testified that he understood the tax refund related to pre-closing tax and he was entitled to receive it. On June 24, 2016 the parties entered into a further agreement with respect to issues arising on the closing of the transaction. In that agreement, the parties acknowledged that RSK would declare a dividend payable to the plaintiffs in the amount of \$427,029, which would be payable either 90 days after closing or on the date RSK received its tax refund for the year ended May 31, 2016.
- [188] In the final days before closing, the parties exchanged email discussing various matters, including tax liabilities and pre-closing liabilities. Mr. Larmer indicated to Mr. Leung and Mr. Gordon that the 90-day true-up period was intended to give time for all pre-closing liabilities and receivables to be addressed, and any final adjustments to the purchase price to be made.
- [189] On June 22, 2016 Mr. Gordon wrote to Mr. Larmer, copying Mr. Leung and the accountants Wolrige Mahon, stating:
- Should the 90 day post closing figures (or any bills presented prior to the 90 days) reveal there is a liability for pre-closing activities then Ralph will be responsible for their immediate payment. If there is a surplus then in the same manner Ralph will receive the refund.
- [190] The email from Mr. Gordon is consistent with an understanding that the tax refund would be available to Mr. Konicek as part of the reconciliation process.
- [191] It is clear that the defendants knew the tax refund had been deposited, at least by November 21, 2016. On that date, Wolrige Mahon, the accountants engaged to assist in the true-up calculations required under the SPA, sent draft calculations to Mr. Leung which reflected the deposit of the tax refund to the vendors' bank account. On December 22, 2016 Mr. Gessner wrote to Mr. Konicek attaching draft true-up calculations which included the same information about the tax refund. Mr. Gessner did not take issue with Mr. Konicek's receipt of the tax refund. Rather, it was simply added to the calculations whereby the parties agreed to make any adjustments to the purchase price as set out in the SPA.
- [192] On February 3, 2017 Mr. Konicek wrote to Mr. Leung and Mr. Gordon regarding the net amount owing and stated:
- (d) I received the tax refund that was paid to RSK post closing, in the amount of \$549,697.23, which exceeded the dividend payable (\$427,029) and shareholder loan (\$6,359) (total \$433,388) which was payable to me or Jennic #60.

- (e) I understand that a total of \$374,852 of closing date accounts receivable have been collected by RSK since Closing, and should have been paid to me. I have not received any of those amounts receivable. However, as the tax refund amount I received exceeded the dividend payable and shareholder loans payable to me (including my additional post-closing loan of \$19,376), the excess amount of the tax refund can be set off against some of these accounts receivable, reducing the total amount of accounts receivable still payable to me.

As a result, Vantown Invesco currently owes me \$247,509. Also, once the additional \$37,738 accounts receivable is collected by RSK, Vantown Invesco and RSK will owe me a net amount of \$285,247, as set out in the "Schedule 1" spreadsheet attached.

[193] This email makes it clear that the receipt of the tax refund by Mr. Konicek was accepted by the parties and was added to the mix in determining the exact amounts owing to the plaintiffs under the SPA.

[194] There is nothing in the evidence to support the assertion of Mr. Gordon and Mr. Leung that RSK was entitled to take the tax refund and add it to the working capital of RSK after the closing.

[195] I find the position of the defendants in relation to the tax refund to be unsupported by the evidence, and simply a red herring introduced at trial.

8. Failed to deliver RSK as a "turn-key" operation

[196] The defendants argue that Mr. Konicek failed to deliver to Vantown a turn-key operation, and that RSK was not in a position to respond to even "as and when" enquiries for work, due to unsatisfactory maintenance of key equipment, lack of records, and the way the equipment was stored in the yard.

[197] For the reasons already expressed, I do not agree that the defendants have proven the equipment was not in a reasonable state at the time of closing. I am also not satisfied the defendants have proven Mr. Konicek failed to ensure appropriate records were available for the new owners. I am not satisfied the defendants have proven the equipment was stored in an unreasonable manner, given the large volume of equipment returned to the site following the wind down of the KMP.

[198] Work was being done by RSK, albeit at a much lesser volume than in years previously. However, that fact was known to the defendants at the time of purchase. RSK had a business office, a yard, a large volume of equipment, a strong relationship with RTA and other companies in the area, a small core of full-time employees, and access to a large number of staff which could be engaged if needed.

- [199] Mr. Leung testified that in the CIM, RSK was described as a turn-key platform, which he understood to mean the buyers would just walk in the door and "turn up the heat". I do not accept that representations in the CIM are binding on the plaintiffs. The CIM expressly states that all representations will be made by RSK solely in a signed SPA. There is no reference to the term "turn-key" in the SPA or any of the associated contractual documents.
- [200] Further, Mr. Leung appears to have had no understanding of the business he was investing in. He appears to have assumed he was buying an operation not unlike a sandwich chain, with a ready market and customers lining up. What he was buying was a company that had the ability to bid on contracts in the future, in industries and regions where no business was guaranteed. RSK provided a platform for new business, but the new owners had to go out and get that new business. At no time did Mr. Konicek represent that any work was guaranteed for RSK.
- [201] I find that there was no enforceable representation made to the defendants that Mr. Konicek would deliver RSK as a "turn-key" operation. I am satisfied that RSK was a functioning business at the time of transfer.

9. Conclusion on breaches of SPA

- [202] As discussed above, the defendants have not proven the facts necessary to support a finding that the plaintiffs breached the SPA.
- [203] Pursuant to Article 3.32 of the SPA, the plaintiffs warranted that, since the interim statement date (defined in the SPA as February 29, 2016) they carried out the business in the ordinary and normal course consistent with past practices, and there has not been a material adverse change in the business of RSK. This provision, however, is subject to the representations set out in Schedules 3.32 and 3.37.
- [204] Article 3.37 of the SPA states that Schedule 3.37 sets out customers of RSK which purchased \$25,000 of good or services, and suppliers which have provided supplies to RSK in excess of \$5,000, all since March 31, 2014, and except as disclosed in Schedule 3.37 there has not been any material change in the business relationships with RSK.
- [205] Schedule 3.37 is the critical schedule with respect to the issues in this lawsuit. It sets out the customers and suppliers of RSK since March 31, 2014. This schedule clearly and unequivocally states:

Customers

Subsequent to March 31, 2014, RSK provided goods and services to the following customers. RSK currently has no ongoing commitments to provide goods or services to the following customers or any other person.

1. ABB Inc.

2. Bechtel Canada Co.
3. Lander Gen. Power
4. Rio Tinto Alcan

Suppliers

Subsequent to March 31, 2014, RSK acquired supplies from the following suppliers. RSK currently has no commitments to purchase supplies from the following suppliers or any other person.

[List of 53 suppliers]

- [206] In addition to Schedule 3.37, Article 3.31 of the SPA expressly stated that RSK had no contract or arrangement for the provision or purchase of materials, supplies, equipment or services involving more than \$5,000.
- [207] I find that the SPA was explicit on its face that RSK had no ongoing work with any person or customer at the time of sale.
- [208] The defendants seek to argue that the SPA can be read to represent to the buyers that there had been no material adverse change to the relationships RSK had with ABB Inc., Bechtel Canada Co., Lander General Power, and RTA since March 31, 2014. This is simply a construction of the SPA which cannot be borne out on the plain language of the agreement. Schedule 3.37 identifies those four companies as companies RSK worked with since March 31, 2014, but it also explicitly states that RSK has no current ongoing commitments to provide goods or services to any of them.
- [209] The defendants rely on *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 [Sattva] for the proposition that the modern approach to contractual interpretation allows the court to look to the surrounding circumstances, or factual matrix, in which the contract was entered into. In particular, the defendants argue that the court ought to take into consideration the following in interpreting the SPA
- a) The SPA was for the purchase of the shares in RSK, not for the purchase of the assets of RSK;
 - b) The Purchase Price significantly exceeded the value of the RSK assets;
 - c) Mr. Konicek was expressly made aware that the Transaction was a highly leveraged acquisition;
 - d) The underlying rationale behind the structure of the payment of the Purchase Price and the Deferred Payment Loan Agreement was that after the Closing Date, RSK would be generating enough revenue to enable Vantown to pay the Balance;
 - e) RSK was promoted and represented as being a going concern and a turn-key operation, ideally positioned to take advantage of upcoming work projects;

- f) In the Vantown Letter of Intent, the purchase was subject to the condition precedent that there would be no material adverse change in the affairs of RSK after February 17, 2016;
- g) It was known to both parties that while Vantown did not expect KMP level revenues, they expected and would rely on revenues in the amount of at least pre-KMP levels;
- h) It was known to both parties that RSK had historically generated significant revenue from "as and when" work and that Vantown intended to rely on the same after the Closing Date.

[210] While the court may look to the surrounding circumstances and considerations in the creation of an agreement, this does not mean that the court can elevate the subjective understandings and expectations of one party to the point that they override the plain language of the agreement. The court must strive to determine the mutual and objective understandings of the parties as expressed in the words of the agreement.

[211] There is no dispute that the parties agreed to a share purchase, and not an asset purchase. However, there is no evidence that the purchase price far exceeded the asset value of RSK. While RSK was actively working on the KMP, it entered into preliminary discussions with a number of potential buyers, all of which engaged Mr. Gordon in one way or another. Mr. Gordon would have known that the purchase price offered by Sibbick Group in November 2014 of \$25,000,000 to \$28,000,000, followed by an offer from NBC Servco in January 2015 of \$25,000,000, which then dropped to \$18,000,000 with Hillcore in May 2015, and then dropped to \$11,500,000 in August 2015 with Orestone, and dropped further with Orestone in October 2015 to \$8,500,000.

[212] When Vantown made the offer of \$7,900,000 it was a fraction of the value of the offers from Sibbick and NBC Servco in 2014 and early 2015 when RSK was earning significant revenue from the KMP.

[213] Mr. Konicek testified that in his opinion the value of the RSK assets was approximately \$7,900,000. He referred to an asset list he prepared on March 1, 2016 which valued the assets at \$7,890,000, and a December 1, 2015 asset list which valued the assets at \$7,880,000. The defendants produced no evidence to contradict the values asserted by Mr. Konicek. The reasonableness of the equipment values Mr. Konicek set out on the asset list was demonstrated by the sale of two large trucks in 2016 for amounts slightly higher than the values attributed by Mr. Konicek on his asset list.

[214] The defendants have not proven that the purchase price under the SPA significantly exceeded the value of RSK assets.

[215] The circumstances which the defendants outline relating to the highly leveraged nature of the transaction, and the rationale under the DPLA that RSK would earn sufficient revenue to pay the remainder of the purchase price when it became due are, in my view, considerations internal to the buyers. It is not incumbent on the vendor to protect the buyers from the financial decisions they made when buying the business. The vendor is entitled to assume that the buyer has done its due diligence and assessed it has the ability to

make good on its obligations. I do not agree the evidence supports a finding that the plaintiffs agreed they had an obligation to ensure that RSK had sufficient future revenue to allow the defendants to meet the financial obligations they agreed to in the SPA.

[216] I have earlier dismissed the defendants' allegation that RSK was represented as a "turn-key" operation in the SPA.

[217] The defendants rely on language in the letter of intent to argue that there was a representation that there was no material adverse change in the operations of RSK since February 17, 2016. However, the letter of intent expired March 31, 2016 and is not a relevant agreement for that reason alone. In addition, the letter of intent is expressly superseded by the SPA pursuant to Article 1.6 of the SPA, and the clear language of the SPA states that there is no work with any of the four large companies RSK previously contracted with, and no arrangements for any provision of goods and services over the value of \$5,000. I find the defendants are not entitled to rely on the letter of intent to override the clear language of the SPA.

[218] With respect to the circumstances outlined by the defendants in relation to their reliance on revenue at pre-KMP levels, and significant "as and when" work, such assertions are contradicted by the plain language of the SPA, and I decline to give any weight to them.

[219] I conclude that the plain language of the SPA governs the obligations between the parties. In coming to this conclusion, I reject the circumstances relied on by the defendants which are either purely the subjective understandings and intentions of the defendants, or are contradictory to the plain language of the SPA. I also take into consideration the relevant circumstances which are consistent with the plain language of the SPA and the clear objective understandings and intentions of all parties to the agreement. These circumstances are referred to throughout these reasons, and include the following:

a) On January 18, 2016 Mr. Larmer wrote to Mr. Leung, Mr. Gessner and Mr. Gordon advising: Ralph makes no warranties about future revenue for the company. Given that you are getting the business for just over its orderly liquidat-able value, financial performance wouldn't be a determinant in a valuation for the company. If it were and we were basing it on revenue of \$1.8MM per month (at 20% EBITDA margins), the value of the company would far exceed what is being paid.

b) On January 20, 2016 Mr. Leung wrote to Mr. Larmer, copying Mr. Gessner and Mr. Gordon, stating:

we have done only limited due diligence on RSK and like you said there is no warrants on performance from revenue to EBITDA.

c) On January 26, 2016 Mr. Leung wrote to Mr. Gessner and Mr. Gordon, copying his wife, stating:

1. There is no warrant on the revenue and EBITDA from the vendor.
2. The accounting system cannot provide monthly financials for us to analyse their monthly revenue vs expense, business cycles and trends.
3. There are no contracts with any customers to guarantee some amount of revenue over a period of time.
4. We rely on the due diligence from the other buyers that failed to close the deal.
- d) On April 2, 2016 Mr. Gordon wrote to Mr. Larmer seeking to restructure the deal to "allow adequate working capital to grow the company in this downturn period."
- e) On April 3, 2016 (three weeks before the SPA was made) Mr. Gordon wrote to Mr. Konicek and Mr. Cunningham of Sequoia, copying Mr. Gessner and Mr. Leung, stating,

Due to recently learning that the revenue has diminished so much we now feel that we are undercapitalized. We could not have anticipated this before seeing the figures when the SPA schedules were presented.

We need to keep our immediate repayments to a minimum to close the gap over the next six months, hence the need for us to present the new structure to you.

- f) On April 12, 2016 (two weeks before the SPA was made), Mr. Leung wrote to Mr. Larmer, copying Mr. Gordon and Mr. Gessner expressing his view that Mr. Konicek violated the letter of intent (which had expired on March 31, 2016) because revenues had fallen so dramatically, stating that the "RSK lawyer disclosed the operation basically is shut", and stating,

It was through the disclosure requirements from our lawyer to know RSK revenue dropped to a meagre \$60,000 revenue figure from \$400K+ in Feb.

- g) On April 21, 2016 (six days before the SPA was made), in discussing the anticipated revenue from the sale of the two trucks and the freeing up of \$300,000 in capital, Mr. Gordon stated to Mr. Larmer,

The extra \$300k gives us an essential addition to our working capital pool and thus more stability for the company in these slower months.

- h) On April 22, 2016 (five days before the SPA was made), Mr. Gessner wrote to Mr. Larmer addressing some last-minute negotiations regarding where the proceeds of the sale of the trucks would be directed, and whether the whole deal was no longer on the table. Mr. Gessner ended the email chain stating,

If the equipment was off the table before I can't see why it can't be off again. I guess you are dealing with principles but I'm dealing with business [survival]. It's scary business no customers just forecasts [and] future considerations. I [am] trying to get us through for the first 6 months with an assumption of no income - hence it means we all [inject] personal cash resources.

[220] I also take into account the undisputed evidence that at no time before June 19, 2017, almost one year after the defendants took over RSK, did any of the defendants raise any concerns with the operations of RSK, the records of RSK, the process of the true-up accounting, or the obligation of the defendants to pay the outstanding purchase price.

[221] I find that the defendants knew before they entered into the SPA that the volume of work with RSK had dramatically dropped off since prior years, that there were no ongoing agreements or arrangements to provide services to any person, including the major prior customers of RSK, that there were no arrangements in place to provide services over \$5,000 to any person, and the defendants executed the SPA knowing that there was a possibility of no revenue from the business at all for at least six months.

[222] I find that the plaintiffs did not breach the SPA as alleged by the defendants, or at all.

C. Did Mr. Konicek make any fraudulent misrepresentations?

[223] The defendants allege numerous false representations of fact in their closing submissions. The plaintiffs argue that the defendants are foreclosed from raising many of the allegations as they were not pleaded by Vantown. The plaintiffs refer to an agreement reached between counsel wherein they agreed that, following delivery of demands for particulars, the scope of the defence and counterclaim would be narrowed as set out in the responses to those demands. I was provided with an exchange between counsel which I agree confirms the agreement reached.

[224] I find that the defendants cannot raise in argument any allegations of false representations which were not articulated before trial in accordance with the agreement of counsel. While counsel for the defendants made a valiant attempt to bring the alleged false misrepresentations within the pleadings, I cannot agree with most of his submissions. As a result, the defendants may only raise the following allegations of false representations of fact:

- a) RSK had been operated only in the ordinary and normal course consistent with past practice (SPA Article 3.32),
- b) There had been no material adverse change in the condition (financial or otherwise), assets, liabilities, operations, earnings or Business of RSK (SPA Article 3.37),
- c) There has not been any material adverse change in the business relationship between any customer listed in Schedule 3.37 of the SPA and RSK (SPA Article 3.37), and
- d) RSK's equipment was ready to roll on short notice.

[225] As I have already determined that the plaintiffs did not breach the above noted provisions of the SPA, it follows that I also find that the plaintiffs did not make the alleged false representations of fact.

- [226] With respect to the allegation that RSK's equipment was not "ready to roll on short notice", I have already found that the defendants have not proven the equipment was not in a proper state of at the time of sale. The evidence was that the equipment was being maintained in the ordinary course, and equipment was operational and being used on jobs at the time of closing. I find that the plaintiffs made no false representations of fact in relation to the equipment.
- [227] The defendants also argue that the plaintiffs were required to disclose a number of specific facts to correct a false impression. These submissions relate to the allegation that the plaintiffs made fraudulent misrepresentations through omission. Again, the defendants are restricted in raising new issues that were not raised in their pleadings. In argument the defendants allege the following facts which could arguably fall within their pleadings:
- a) Mr. Konicek had not taken, and did not intend to take, any steps to have RSK pre-qualified or pre-registered for projects advertised as potentially available in the CIM and the Current Obligations/Opportunities Letter,
 - b) In 2016, not only did RSK only have 3 "employees", RSK also did not have any craft labourers or any personnel qualified to operate machinery, and
 - c) Generally, that RSK would not be a turn-key operation at the Closing Date.
- [228] I have already addressed the allegation that Mr. Konicek did not take steps to pre-register for projects and I determined that Mr. Konicek did in fact pre-register for opportunities that were available to RSK.
- [229] The SPA clearly stated that there were only three employees in RSK at the time of the sale. Two weeks before the SPA was made, Mr. Gordon was sent the employee list for RSK which identified 3 daily workers, 14 "sporadic" workers, and up to 40 workers that were available to be brought back to operate equipment and provide labour as required. Mr. Konicek testified that his normal practice was to hire for jobs as they came up from his list of past workers, and RSK did not maintain a large full-time staff. I find that Mr. Konicek properly disclosed the employees of RSK to the defendants.
- [230] There is no allegation in the pleadings that RSK would be a "turn-key" operation. However, the pleadings allege that the plaintiffs represented RSK was a "going concern" operation.
- [231] The defendants rely on several answers given by Mr. Konicek in his examinations for discovery where he agreed with a question put to him to the effect that as of the closing date RSK was not a going concern. Mr. Konicek explained at trial that he understood the phrase "going concern" to mean a "profitable" company. Mr. Konicek agreed at trial that "the business of the company was not going in the direction of being profitable at the time of the sale" to Vantown. This admission by Mr. Konicek does not negate the fact that the financial situation of RSK in 2016 was made clear to Vantown repeatedly, as documented in the many email which discuss the downturn in revenue and the fact that the SPA was explicit that there were no contracts for ongoing work.

- [232] While the exact intended meaning of "going concern" in the pleadings is not clear, I have determined that RSK was a functioning business at the time of the transfer. It was a company which had just completed a substantial project and was available for new work. I am satisfied that RSK provided the buyers with a strong platform to grow their business, but that the responsibility of obtaining work consistent with their vision fell to the buyers, and not the vendors. RSK and Mr. Konicek had no control over which third-party projects would proceed, or how quickly such projects would proceed. There was no evidence that work that was available to RSK was not pursued by Mr. Konicek.
- [233] While I have not addressed many of the failures to disclose alleged by the defendants, I agree with the submission of the plaintiffs to the effect that the due diligence process managed by Sequoia was driven by the buyers. It was up to the buyers to ask Sequoia to obtain all the information they deemed necessary to assess the history and performance of RSK. There was no evidence that the plaintiffs withheld any information when such requests were made during the due diligence process.
- [234] I find that the defendants have not established that any fraudulent representations were made by the plaintiffs, either by commission or by omission. A finding that a party made a representation which is false in fact is a prerequisite to any finding of fraudulent misrepresentation. Having found that no such false representations were made by the plaintiffs, it is not necessary to engage in an analysis of the remaining elements of the claim.

D. Are the plaintiffs liable in equitable fraud?

- [235] The defendants alleged no additional facts to support a claim in equitable fraud beyond those facts alleged in relation to fraudulent misrepresentation. I find no basis upon which the defendants have established a claim in equitable fraud.

E. Did the plaintiffs breach a duty of good faith owed to the defendants?

- [236] The defendants argue that the plaintiffs breached the duty of good faith owed to them as a contracting party by failing to disclose material facts and by deceiving or misleading Vantown with respect to the status of the ongoing operations of RSK. The particulars of the alleged dishonesty are the same as have already been referred to in relation to the other claims discussed above. For the reasons I have already given, I find the defendants have not proven any of the allegations which are foundational to the claim of breach of duty of good faith. As such, I find no basis upon which the defendants have established a claim in a breach of duty of good faith.

F. Are the defendants entitled to any damages which must be set off against amounts owing to the plaintiffs under the SPA and its associated agreements?

- [237] Having found no breaches of the SPA, no fraudulent misrepresentations, no equitable fraud, and no breach of a duty of good faith, there is no basis upon which the defendants would be entitled to damages.
- [238] In addition, the defendants have failed to provide any evidence which would support a claim in damages. The defendants have not established the revenue earned from RSK operations in the year following the transfer. Mr. Medeiros confirmed that RSK continued to get work after the transfer, and Mr. Gordon testified that the work from RTA "snow balled". No documents relating to such work were provided in evidence. Without knowing what RSK earned, the court is not in a position to determine if RSK suffered any loss.
- [239] The defendants did provide financial statements prepared by Mr. El-Bakri of Ernst & Young, but these financial statements were produced on a review-engagement basis, attaching management-prepared financial statements. I was not satisfied with the answers provided by Mr. El-Bakri as to the work he did. He was not responsive to questions asked regarding the steps he took to review the management-prepared information. He was unable to comment on the accuracy of the figures set out in the financial statements.
- [240] The business of RSK was described on the financial statements as "excavation rentals, providing the other companies within the Servco Canada Group access to a large, modern and well-maintained fleet of equipment", which Mr. El-Bakri understood to describe the business of RSK from June 24, 2016 to May 31, 2018.
- [241] Further, the financial statements describe Lander General Power & Equipment Ltd., along with the Servco entities, as related parties such that the value of transactions between them are not necessarily at fair market value.
- [242] Given that the business of RSK is described as providing services to related parties, and there is no requirement that related party transactions reflect fair market value, the usefulness of the RSK financial statements post the transfer is limited.
- [243] No witnesses for the management of RSK testified as to the actual revenue or contracts entered into by RSK, or the truth of the management-prepared financial statements. As such, if damages were to be assessed, I would place little to no weight on the financial statements prepared by Ernst & Young.
- [244] The defendants produced a schedule of monthly revenue and gross profit for the 12 months after closing. No back up documents were provided and, therefore, an assessment of the sources of revenue, including the underlying contracts or projects, cannot be assessed. Further, the revenue and profit figures are subject to the same frailties discussed above in relation to the financial statements. However, even if these figures were accepted on their face, they show monthly revenues exceeded \$200,000 by December 2016, and by April 2017 monthly revenues were close to \$600,000. These figures do not support the assertions of the defendants that there was no work at all for RSK following the transfer to the new owners.

[245] The defendants also failed to prove that there were market opportunities which RSK ought to have bid for, but did not, due to a failure on the part of Mr. Konicek, or as a result of not having the manpower, equipment, or any other feature of the business which the defendants say they bargained for.

G. What amounts, if any, remain payable by Vantown to the plaintiffs under the SPA and its associated agreements?

[246] Pursuant to the SPA, the consideration payable by the purchaser was:

- a) \$7,900,000, and
- b) An amount equal to the Accounts Receivable at the Closing Time.

[247] The consideration was subject to a further adjustment on account of working capital and indebtedness of RSK on the closing date, and on account of accounts receivable assigned to the vendors.

[248] \$5,000,000 was paid on the closing date. The remaining \$2,900,000, plus any working capital adjustment, would be the "deferred payment amount" which would be payable under a deferred payment promissory note ("Note") and DPLA. The Note confirmed the obligation of Vantown to pay \$2,900,000 plus interest of 4.5% per annum, compounded monthly, and it was subject to the DPLA. A second promissory note secured the accounts receivable owing to the plaintiffs.

[249] The DPLA was executed by both plaintiffs, and Vantown, RSK and Mr. Leung. It required six quarterly payments of principal in the amount of \$483,333.33, beginning on January 1, 2017. Accrued unpaid interest was payable with each quarterly payment of principal.

[250] Vantown made no payments of principal or interest under the DPLA at any time.

[251] At trial, the parties agreed that the working capital adjustment under the SPA resulted in an additional payment to the plaintiffs of \$69,021.75. They also agreed that RSK owed the plaintiffs \$427,029 in relation to a dividend declared prior to the closing, and \$6,359 in relation to a shareholder loan amount owing to the plaintiffs.

[252] The plaintiffs claim \$1,575 is owing to them in relation to costs incurred in preparing the June 24, 2016 financial statements. The purchaser had the obligation under the SPA to deliver a final statement pursuant to Article 2.4(f). The final statement referred to in the SPA was to set out a detailed calculation of all adjustments to the purchase price. I am satisfied that the creation of financial statements as at the date of closing were necessary to complete the final statement referred to in Article 2.4(f). I agree with the plaintiffs that this cost is to be borne by Vantown.

[253] On May 17, 2016 Vantown and the plaintiffs agreed that Mr. Konicek/RSK was authorized to sell two trucks which had been listed as assets of RSK. The parties agreed that the two trucks would be removed from the list of equipment in Schedule 3.35 of the SPA. The

parties agreed that the plaintiffs would pay to Vantown the values for the trucks as listed in the SPA, namely \$120,000, plus 5% representing GST, for a total of \$128,325. The plaintiffs would assume the risk on the sale of the trucks and receive the full value received on the sale. I agree with the plaintiffs that \$6,675 on the sale of the trucks, as received by RSK on the completion of the sales, was owed to the plaintiffs.

[254] The closing accounts receivable balance under the SPA, owing to the plaintiffs as of April 12, 2021 was \$311,362.32, as agreed between the parties.

[255] Following the closing, Mr. Konicek maintained the RSK account 189001 at Envision until November 2016. Over that period of time, RK received a net amount of \$557,717.91 on account of post-closing transactions. The plaintiffs agree that these funds must be taken into account in determining the final amounts owing.

[256] The plaintiffs argue the following amounts totalling \$510,659.75, owing to the plaintiffs by the defendants, ought to be credited against the \$557,717.91 received in account 189001. I agree. From the \$557,717.91 the following will be credited:

- a) Working capital: \$69,021.75
- b) Dividend declared in favour of Jennic prior to closing: \$427,029
- c) Shareholder loan payment: \$6,359
- d) Cost of preparing the June 24, 2016 financial statements: \$1,575
- e) Outstanding payment in relation to the two trucks: \$6,675

[257] Once these deductions have been made, \$47,058.16 remains owing to Vantown from the \$557,717.91 received by the plaintiffs into the Envision account.

[258] The accounts receivable balance owing by Vantown to the plaintiffs is agreed to be \$311,362.32. The plaintiffs submit that the \$47,058.16 owing to Vantown ought to be credited against the accounts receivable balance. I agree. This leaves \$264,304.16 in accounts receivable owing by Vantown to the plaintiffs.

[259] In the result, Vantown is liable to pay the following to the plaintiffs:

- a) \$2,900,000 plus interest at 4.5% per annum, compounded monthly, from June 24, 2016 to the date of judgment; and
- b) \$264,304.16 of accounts receivable, plus interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79, from January 1, 2017 to the date of judgment (the "Redemption Amount").

H. Are the guarantees granted by RSK and Paul Leung, and the mortgage granted by Paul and Amy Leung, valid?

1. RSK/Paul Leung Guarantees

[260] Both RSK and Mr. Leung executed separate, but identical guarantees containing the following language:

1.01 Guarantee

The Guarantor hereby unconditionally and irrevocably guarantees payment of all the debts and liabilities, present or future, direct or indirect, absolute or contingent, matured or not, at any time owing by the Obligor [Vantown] to the Lenders [the plaintiffs] or remaining unpaid by the Obligor to the Lenders pursuant to the deferred payment loan agreement made as of June 24, 2016, as amended from time to time (the "Deferred Payment Loan Agreement"), between, inter alia, the Obligor and the Lenders and pursuant to each of the security documents and other documents from time to time delivered to the Lenders in connection with the Deferred Payment Loan Agreement (together with the Deferred Payment Loan Agreement, the "Finance Documents"), including the amount of any judgment or award made against the Obligor for the benefit of the Lenders in connection with the Finance Documents (collectively, the "Obligations").

[261] It is clear that the SPA is a document delivered in connection with the DPLA. The DPLA secures an obligation set out in the SPA itself, the DPLA is a schedule to the SPA, the recitals in the DPLA refer to the SPA, and the DPLA adopts terms from the SPA. Any other interpretation would be nonsensical. I find the SPA is a "Finance Document", as defined in s. 1.01 of the RSK and Leung guarantees.

[262] RSK did not argue that the RSK guarantee was invalid, or secured some obligation unrelated to the SPA. I find RSK is liable to pay the Redemption Amount.

[263] Mr. Leung argues that the solicitors for the plaintiffs prepared the guarantee, and had an obligation to obtain a certificate of independent legal advice ensuring that Mr. Leung understood the nature of the obligations contained in the guarantee. In the absence of such a certificate, Mr. Leung argues the guarantee is not valid. In addition, Mr. Leung argues that he was induced to enter into the transaction by the fraudulent misrepresentations made by Mr. Konicek, and therefore the entire transaction including the guarantee should be invalidated and cancelled by the court. Mr. Leung made a number of submissions in relation to unconscionability and undue influence. Other than the allegation that Mr. Konicek made false representations, none of these submissions are founded on Mr. Leung's pleadings. Parties are not entitled to raise entirely new defences at trial. Nevertheless, the evidence at trial would not support these submissions, even if they could be advanced.

[264] In June 2016 Mr. Leung was directly involved in reviewing the guarantee with the solicitors for Vantown. He reviewed drafts of both the RSK guarantee and the Leung guarantee. At no point did he appear to misunderstand what was being presented to him. He raised concerns and received black lined documents reflecting various changes.

[265] On June 21, 2016, Mr. and Mrs. Leung attended at the offices of the solicitors for Vantown to execute all documents required by the transaction, including the guarantee signed by Mr. Leung. The senior lawyer was Mr. Gangji, and the junior lawyer was Mr. Lotz. Mr. Lotz

testified that at that meeting, the need for independent legal advice was raised with the Leungs by Mr. Gangji. Both lawyers confirmed they acted for Vantown, and not the Leungs personally. Mr. Lotz recalled Mr. Gangji advising the Leungs that they should get independent legal advice, but if they did not a waiver would be required.

[266] Mr. Leung testified that he did not recall any discussion at the meeting about independent legal advice. He initially testified about various memories about the meeting, but then when presented with his discovery transcript where he stated he had no memory of the meeting, Mr. Leung conceded that he remembered no details about the meeting.

[267] On June 22, 2016, Mr. Ganji wrote an email to Mr. Leung stating:

Paul and Amy,

As we have discussed, while we have been involved in the negotiation of the Deferred Payment Loan Agreement, the Leung Guarantee and the Leung Mortgage and other matters related to the Deferred Payment Loan Agreement we have only represented Vantown Infrastructure Invesco Inc. (the "Company") and the interests of the Company. We have not represented either of you in this transaction personally. As a result, and as has been previously discussed (including yesterday) and included on the Agenda, Vendors' counsel would like for both of you to obtain certificates of independent legal advice. This would involve having both of you sit down with another lawyer, whom we can connect you with, and having them walk you through what you are agreeing to as a part of the transaction involving the purchase of RSK by the Company. We understand that you would like to push back on this front and not obtain a Certificate of Independent Legal Advice and would instead like to sign a waiver. Please confirm this is your position and that you would like us to convey this to Vendors' counsel.

As we have discussed before, you should obtain independent legal advice before entering into the Deferred Payment Loan Agreement, the Leung Mortgage and the Leung Guarantee in order to make sure their terms are reasonable, and to among other things, ensure that you are familiar with the rights and liabilities thereunder. We can prepare waivers indicating that you have been advised as such and that you have had the opportunity to seek independent legal advice and have either done so or decided to proceed without doing so.

Happy to discuss should you have any questions.

[268] In a second email the same day, Mr. Ganji wrote to Mr. Leung sending forms of waivers of independent legal advice, and advising that it was still open to the Leungs to seek independent legal advice before signing the waivers.

[269] On June 23, 2016, Mr. Leung wrote to the plaintiffs' representative, Mr. Chris Larmer, the following:

There is no need for independent advice. Amy and I both are on the board of director of Vantown, the acquisition vehicle. Also she is the director and CFO and I am the Chairman and CEO of Empower Technologies Corporation, a TSXV listed company. Thanks.

[270] I am satisfied that Mr. Leung was well aware of the opportunity to obtain independent legal advice, having been advised of that right in various email and by the Vantown lawyers before the documents were signed on June 21, 2016. Mr. Leung chose to waive that opportunity. While he did not sign the form of waiver prepared by counsel, I am satisfied that in his email of June 23, 2016 Mr. Leung clearly expressed his waiver of independent legal advice on his part and on the part of Mrs. Leung.

[271] For the reasons already expressed, I do not find that Mr. Konicek obtained Mr. Leung's consent to the transaction through fraudulent misrepresentations or equitable fraud. I find the Leung guarantee is enforceable against Mr. Leung for the Redemption Amount.

2. The Leung Mortgage

[272] The Leung guarantee is secured by a mortgage over the family home owned in joint tenancy by Mr. and Mrs. Leung.

[273] Mrs. Leung did not provide a personal guarantee for any obligations contained in the SPA or its related financial documents. Her only obligation in this litigation arises from the mortgage she executed on June 21, 2016 before Mr. Lotz. The only recourse the plaintiffs have against Mrs. Leung is with respect to her interest in the family home.

[274] Mrs. Leung argues that she was not provided with all relevant documents at the time she executed the mortgage, that she was under undue influence when she signed the mortgage, and that she did not have the opportunity to seek independent legal advice. Mrs. Leung did not plead that she was unduly influenced to sign the mortgage, or that she did not have the opportunity to seek independent legal advice, and she cannot raise these issues for the first time at trial. Nevertheless, the evidence would not support such defences.

[275] Mrs. Leung has a bachelor's degree in accounting, and speaks and understands English. After she obtained her degree, she worked in accounting for a number of years at different companies, although she does not have an accounting designation. In 2003 she was appointed a director of a company known as Empower Technologies Corporation. On March 2, 2016 she became a director of Vantown, along with Mr. Leung and Mr. Gordon.

[276] Mrs. Leung admitted she understood what a mortgage was, and had executed a Scotiabank mortgage in 2011 which was registered on the title to the family home.

[277] Mrs. Leung testified that she understood that if she signed legal documents, people may rely on those documents, and if she signed documents as a director of a company, people would understand she was a director, knowledgeable about the business of the company, and would rely on that information in making decisions. She also agreed that signing documents without reading them could have consequences.

- [278] While at trial both Mr. Leung and Mrs. Leung attempted to downplay their knowledge and understanding of the financial documents they executed in relation to the SPA, the email communication entered in evidence and the answers given by Mr. Leung on discovery support a finding that they both read and understood the implications of the mortgage and the guarantee.
- [279] In January 2016, Mr. Leung wrote to Mr. Gordon, copying Mrs. Leung, a lengthy email setting out the conditions under which he would provide his personal guarantee along with security against his property. He set out his wife's detailed concerns. In January 2016, the plaintiffs' representative wrote to Mr. Leung regarding the importance of the family home as security. On February 1, 2016, Mr. Leung was sent a draft agreement which specified that security against the family home would be provided, and Mr. Leung responded to the plaintiffs' representative that he "will have a talk with my wife and then hopefully I get pass her and have the signed copy to you late tonight". On the same night he sent another email raising the issue of additional security being provided in place of the mortgage specifically because of his wife's concerns in granting the mortgage. On February 2, 2016 Mr. Leung again raised with the plaintiffs' representative his wife's concern with granting the mortgage.
- [280] Mr. Lotz testified that at the meeting with the Vantown lawyers on June 21, 2016 both Mr. and Mrs. Leung were advised by Mr. Ganji that they could and should seek independent legal advice with respect to the documents. They were also advised that if they did not wish to seek independent legal advice, they could sign a waiver. Both Mr. and Mrs. Leung stated they would like to waive the right to obtain independent legal advice.
- [281] Mr. Lotz testified that the documents had been sent to Mr. and Mrs. Leung prior to the meeting, and the documents were reviewed with them both in the meeting. Email communication between Mr. Lotz and Mr. Leung in the evening of June 21, 2016 confirms that Mr. Lotz discussed the mortgage, and the limited guarantee contained in the mortgage, with Mrs. Leung on June 21, 2016. He testified that in the meeting on June 21, 2016, both Mr. and Mrs. Leung appeared to understand the nature of the obligations created by the documents. Mr. Lotz testified that Mrs. Leung was not upset or agitated during the meeting, she did not appear to be in disagreement with her husband, and did not appear to have any concerns about what she was signing. Both Mr. and Mrs. Leung signed an acknowledgement of receipt of mortgage terms at the meeting with Mr. Lotz.
- [282] Mrs. Leung testified that she did not remember any lawyer saying anything to her at the meeting, and that she just signed what her husband put in front of her. I find the evidence of Mrs. Leung to be unreliable. Under cross-examination, she was presented with an affidavit she swore on October 18, 2018 in which she stated that she was asked by Mr. Leung in June 2016 to sign the Leung mortgage. In response, Mrs. Leung denied the truth of her affidavit, saying the affidavit was not prepared by her. I do not accept this testimony. Rather, I find she was less than truthful in her evidence at trial. Under cross-examination, Mrs. Leung admitted that she had no recollection of what happened at the meeting on June

21, 2016.

- [283] I am satisfied that Mr. Lotz's memory of the June 21, 2016 is reliable and I accept his evidence as to what was discussed in the meeting, including the mortgage terms, the limited guarantee provided by Mrs. Leung in relation to the mortgage, his advice that she should obtain independent legal advice, and her waiver of that right.
- [284] Under cross-examination, Mrs. Leung agreed that she knew what the word "borrower" meant, and she could see that she was listed as a borrower on the mortgage document she signed. She agreed she knew what a mortgage is. She agreed that if she had taken the time to read the document before she signed it, she would have understood what it meant. While she stated she was used to signing documents without reading them, she did not have any doubt about what she was signing and so did not need any details about what she was signing.
- [285] Following the June 21, 2016 meeting, the lawyers for Vantown sent the email discussed above to both Mr. and Mrs. Leung, again advising they had the opportunity to seek independent legal advice. Mrs. Leung agreed in evidence that the email was sent to one of her email addresses; however, she argued that she did not access that email address and only Mr. Leung saw it. When examined for discovery, Mrs. Leung agreed that she had access to the relevant email address. Further, I note that on at least one of the relevant email written by Mr. Leung in relation to the mortgage, he copied his wife's email address. It is difficult to understand why he would do that if she had no access to that email address.
- [286] I am satisfied that Mrs. Leung was provided with all relevant documents at the time she executed the mortgage, and prior to the mortgage being signed. Further, she received a full explanation of the effect of the mortgage documents from the lawyers for Vantown, both in writing and orally. Mrs. Leung was advised orally and by email that she had the opportunity to seek independent legal advice in relation to the security she was granting, and she waived her right to seek such advice orally in the meeting June 21, 2016. The fact that the waiver was not in writing is not material, given the extensive information and repeated advice she was given. Further, Mr. Leung represented to the plaintiffs' representative, in writing, that both he and Mrs. Leung did not require independent legal advice. On balance, I am satisfied that Mrs. Leung waived her right to seek independent legal advice in relation to the mortgage.
- [287] Mrs. Leung suggested that she was simply doing what her husband told her to do. I do not agree that suggestion is borne out on the evidence. There was nothing in her behaviour in the meeting on June 21, 2016 that would have suggested to the lawyers for Vantown that she was being forced to execute the required documents against her will.
- [288] The email leading up to the execution of the mortgage suggest Mrs. Leung was actively engaged in the decision to grant the mortgage. While these email do suggest she was initially unwilling, there is nothing in the evidence which allows me to conclude that the plaintiffs, or the lawyers for Vantown, would have any reason to believe that Mrs. Leung

was an unwilling mortgagor at the time she signed the mortgage documents. Mrs. Leung was a director of Vantown, which was a party to the SPA. It was reasonable for the plaintiffs to understand that Mrs. Leung, as a director of one of the contracting parties, would have an understanding of the security required to complete the transaction. Further, that security was explained to Mrs. Leung and she expressed no concerns. As a director of the principal party to the SPA, it cannot be said that it was obvious that executing the mortgage was a disadvantage to Mrs. Leung. Nothing in the evidence suggests the plaintiffs ought to have been alerted to any undue influence exerted by Mr. Leung. As such, I find the plaintiffs had no notice, constructive or otherwise, of any undue influence exercised by Mr. Leung over her which would allow me to set aside the mortgage.

[289] Mrs. Leung relied on a number of cases, none of which have application to the case before me:

- a) *Bertolo v. Bank of Montreal*, (1986), 57 O.R. (2d) 577: this case does not stand for the proposition that legal advice must always be provided, or that a waiver of legal advice must always be signed. The court held that it was open to the trier of fact in each case to determine whether the party understood the nature of the transaction, notwithstanding no legal advice being given.
- b) *MacKay v. Bank of Nova Scotia* (1994), 20 O.R. (3d) 698 (S.C.): in this case the court found the bank knew the underlying agreement was unconscionable, the plaintiff was being pressured to execute it, and there was unequal bargaining power between the parties. The presumption of undue influence can be rebutted by independent legal advice.
- c) *May v. Dunster*, 1996 CanLII 3453 (B.C.S.C.): the court found that the parent who provided security for a loan to the benefit of her son had no ability to understand the nature of the transaction, the transaction itself was unconscionable, and she had no legal advice.

[290] In all of these cases, the issue arose between the lender and the person obliged under the security instrument: did the lender act unconscionably towards the party who offered security? In the case before the Court, no pleading of unconscionability of any kind was made by Mrs. Leung. Further, to the extent her submissions can be understood, they are that her husband placed pressure on her or that her husband acted unconscionably towards her. I do not agree that claims between Mr. and Mrs. Leung as co-mortgagors can defeat the valid claim of the plaintiffs under the security instruments provided.

[291] In any event, I am satisfied that Mrs. Leung, with a university education and over 13 years as a corporate director, who acknowledged understanding what a mortgage was and had signed one in the past, who had had the documents reviewed with her by the lawyers for Vantown, and was repeatedly offered the opportunity to seek independent legal advice, fully understood what she was signing and freely waived her right to independent legal advice.

IV. Conclusion

- [292] I made the declarations of rectification sought at paras. 1 and 2 under Part 2 of the second amended notice of civil claim, both of which were consented to at trial.
- [293] With respect to the claims for relief in relation to the Leung Mortgage, I make the declarations set out at paras. 3, 4, and 5 under Part 2 of the second amended notice of civil claim.
- [294] I order the "Amount Required to Redeem" as reflected in these reasons and as set out in para. 6 under Part 2 of the second amended notice of civil claim may be amended to include any order for costs made following submissions of the parties and, if no such application for costs is filed within 45 days of this decision, I make the declaration set out in para. 6 under Part 2 of the second amended notice of civil claim.
- [295] I make the orders set out at paras. 7, 10, and 11 under Part 2 of the second amended notice of civil claim.
- [296] I order that, on the Leung Defendants or any of them paying into Court, or to the lawyers for the plaintiffs, prior to the pronouncement of an order absolute or an order approving a sale of the Lands, the Amount Required to Redeem, then the plaintiffs shall re-convey the Lands free and clear of encumbrances in favour of it or by any person claiming by, through, or under it, and shall deliver up all documents in the plaintiffs' custody relating to the Lands to the Leung Defendants or the Leung Defendant who made the payment.
- [297] I order judgment, jointly and severally, against Vantown, RSK, Mr. Leung, and Mrs. Leung pursuant to the Mortgage and Associated Agreements, for the Amount Required to Redeem, with all recovery against Mrs. Leung being strictly limited to her interest in the Lands pursuant to the Mortgage.

V. Costs

- [298] My decision on costs is deferred pending a further application being brought to determine that issue in accordance with the orders made above.

"W.A. Baker J."

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