

CANADA / JUDGMENT

LeRoy v. TimberWest Forest Corp.

2021 BCCA 326

COURT

British Columbia Court of Appeal

DECIDED

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2021 BCCA 326 LeRoy v. TimberWest Forest Corp.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

LeRoy v. TimberWest Forest Corp.,

2021 BCCA 326

Date: 20210903

Docket: CA46944

Between:

Rebecca LeRoy and Ted LeRoy

Appellants

(Plaintiffs)

And

TimberWest Forest Corp., TimberWest Holdings Ltd.,

TimberWest Forest Company, David Whiteley,

Paul McElligott, and Beverlee Park

Respondents

(Defendants)

Before:

The Honourable Madam Justice Griffin

The Honourable Mr. Justice Abrioux

The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated July 2, 2020 (LeRoy v. TimberWest Forest Corp., 2020 BCSC 978, Duncan Docket S14836).

Counsel for the Appellants

(via videoconference):

A. Crabtree

Counsel for the Respondents

(via videoconference):

J.S. Yates

A.B. Gray

Place and Date of Hearing:

Vancouver, British Columbia

April 22, 2021

Place and Date of Judgment:

Vancouver, British Columbia

September 3, 2021

Written Reasons by:

The Honourable Madam Justice Griffin

Concurred in by:

The Honourable Mr. Justice Abrioux

The Honourable Madam Justice DeWitt-Van Oosten

Summary:

The appellants appeal the dismissal of their claim in civil conspiracy and related causes of action on the basis that the judge erred in failing to find that the respondents had an agreement to cause their logging company's business to fail as part of the respondents' larger union negotiating strategy.

Held: Appeal dismissed. The essence of the appeal is a challenge to findings of fact that were made after a careful and thorough assessment of the evidence and the credibility of the witnesses. The appellants have not shown that the judge made a palpable and overriding error.

Reasons for Judgment of the Honourable Madam Justice Griffin:

Introduction

- [1] The period 2006 through 2008 was a challenging time in the forestry industry of British Columbia. The industry was battered by a decline of US housing starts, the rise in value of the Canadian dollar, strikes by unionized employees, and a global economic crisis. Many key players in the industry were struggling.
- [2] Ted LeRoy Trucking ("TLT") was a logging company founded by Ted and Rebecca LeRoy in 1968. It became one of the largest private logging contractors on Vancouver Island. Its work spanned from "stump-to-dump": from road building, to cutting, and through to transporting the trees to a log sort. Unfortunately, in 2008, it went bankrupt.
- [3] By 2008, TLT had several contracts with the respondent TimberWest Forest Company ("TimberWest"). TimberWest was dealing with its own financial stresses during the same period.
- [4] Following TLT's bankruptcy, Ted and Rebecca LeRoy filed a notice of civil claim against TimberWest. Because TLT went bankrupt, it could not pursue the underlying claim or this appeal. PricewaterhouseCoopers ("PwC"), the trustee in bankruptcy, assigned the claims to Ms. LeRoy, who subsequently assigned them to Mr. LeRoy. Although the respondents challenged the assignments' validity, the judge decided this issue against them, and they do not cross-appeal.
- [5] The central factual allegation, upon which all the claims depended, was that TimberWest and certain of its executive employees, the individual respondents, formed and carried out a plan to cause TLT's business to fail, eventually causing TLT's bankruptcy. The appellants alleged this conduct was a civil conspiracy. This allegation also founded claims in fraud, deceit and fraudulent misrepresentation. The appellants sought disgorgement of profits or, alternatively, damages.
- [6] The appellants' theory at trial was that TimberWest planned to cause TLT's business to fail so that TimberWest would have leverage in union negotiations, which would allow for "subdivision" of certain large union seniority lists and result in larger logging contracts being divided into smaller contracts.
- [7] The respondents admitted that they had a strategy to achieve union subdivision. However, they were public about that labour strategy in 2007. They denied the allegation that they had intended TLT's business to fail as part of their subdivision strategy. Their position was that they tried to help support TLT.

- [8] Following a nearly eight-week trial, the trial judge dismissed the appellants' claims: 2020 BCSC 978. She found the respondents had not engaged in a conspiracy and had not engaged in fraudulent or deceitful behaviour. The judge found that the respondents' actions were motivated by TimberWest's own financial obligations and challenging market conditions. In summary, the judge found that TimberWest did not plan to destroy TLT's business as part of its goal to achieve subdivision.
- [9] The appellants' case depended on the judge drawing inferences from certain documents that were open to interpretation and rejecting the credibility of the respondents' key witnesses. In the end, the judge did not accept the appellants' interpretation of the evidence and found the respondents' witnesses credible.
- [10] The insurmountable hurdle faced by the appellants on this appeal is the standard of appellate review. In my view, all of the issues they raise are challenges to the judge's findings of fact and assessments of credibility. As such, in order to succeed on appeal, the appellants would need to show that the judge made a palpable and overriding error. However, the judge's 628-paragraph reasons were thorough and canvassed all key material evidence and factual issues in dispute. There is also considerable support in the record for all of the findings of fact made by the judge.
- [11] The judge's findings are entitled to deference on appeal. For the reasons that follow, I would dismiss the appeal.

Background

The Parties

- [12] TimberWest Forest Company is a partnership registered in British Columbia, consisting of the two other TimberWest appellants. When I refer to TimberWest, I am referring to these entities collectively.
- [13] TimberWest is involved in timber and land management and has logging licences on both private and Crown lands.
- [14] The personal respondents were all part of the TimberWest management team. Mr. McElligott joined TimberWest as a director in 1997 and served as the president and CEO from 2001 to 2011. Mr. Whiteley worked for TimberWest's predecessor in 1984 and joined TimberWest in 1997. He was the operations superintendent until 2003, when he was promoted to general manager of TimberWest's northern operations. In 2005, he became general manager of all TimberWest operations, and in 2007 he was promoted to vice-president of timberland operations, serving in that position until his retirement in December 2015. Ms. Park is a chartered accountant who joined TimberWest in 1996 and served as TimberWest's Chief Financial Officer from 2000 to 2010.

- [15] The appellants started working in the logging industry in 1968 with a single logging truck. By 1972, TLT was incorporated and entered into a harvesting contract with Western Forest Industries ("Western Forest"). By 2006, TLT had significantly expanded, with extensive assets, including logging trucks, planes, and real estate, and over 530 employees and contractors.

The Logging Industry Generally

- [16] To understand the context of the issues under appeal, it is useful to have a general understanding of the harvesting process within the British Columbia forestry industry.
- [17] To harvest timber on Crown lands, companies must acquire licences to harvest a pre-determined amount on an annual basis during a five-year period. There are various types of licences, including forest licences, which are volume-based, and tree farm licences ("TFL"), which are area-based. In this case, TimberWest was the relevant licence holder.
- [18] In general, timber harvesting includes four steps:
- a) developing a harvest plan;
 - b) constructing roads to access the site;
 - c) harvesting the trees; and
 - d) transporting the timber to log sorts.
- [19] Licence holders generate harvesting plans, which set out the areas of land and type of timber to be harvested. The harvesting plans must be approved by the government on a five-year cycle. Licence holders use their own crews for timber harvesting operations or subcontract other companies to perform the work.

Logging Contracts

- [20] TimberWest often contracted out logging operations to various independent operators, such as TLT. TimberWest also employed its own unionized workers to perform operations.
- [21] TLT was a unionized company and all of its crews were unionized.
- [22] As the licence holder, TimberWest would develop the harvesting plans for government approval. The approved harvesting plans were the basis for TimberWest to negotiate the annual harvesting rates with its contractors. If they could not agree, harvesting would begin using the previous year's rates. Once the dispute was resolved, payment would be adjusted retroactively. Additionally, if there was a material change in circumstances, the parties could negotiate rate adjustments.
- [23] In 2004, following a labour dispute, TimberWest began to outsource approximately half of its operations to outside contractors, including TLT. During the time period at issue, most of TLT's work came from TimberWest, and the two entities had a good relationship.

[24] In addition to its contracts with TimberWest, TLT had two additional large contracts:

- a) a stump-to-dump Bill 13 contract with Western Forest, renewable in 2009 (the "Western Forest Contract"); and
- b) a five-year stump-to-dump logging and road-building contract with Island Timberlands GP Ltd. (the "Island Timberlands Contract"), which expired in 2011.

TLT also worked with several smaller licence holders.

[25] Additionally, TLT held several "Bill 13" contracts it had acquired over the years. Bill 13 contracts are creatures of statute under the Timber Harvesting Contract and Subcontract Regulation, B.C. Reg. 22/96 [Bill 13 Regulation]. Bill 13 contracts differ from other harvesting contracts in that they are "replaceable," i.e., renewable, in perpetuity. If the contractor satisfactorily performs the agreed-upon services, the licence holder must offer a replacement contract for successive five-year terms. The replacement contract must have substantially the same terms and conditions, and the legislation imposes a duty to negotiate rates in good faith. Bill 13 contracts may be assigned.

[26] In 1997, TLT had a Bill 13 contract in the Johnstone Straits that granted it harvest rights in an area known as "TFL 47." TimberWest held the licence to TFL 47. In 2001, TimberWest approached TLT to consider purchasing another Bill 13 contract in TFL 47, then held by Bendickson Logging. In 2002, TLT purchased the contract for \$4 million, with TLT providing \$2 million and TimberWest loaning TLT the remaining \$2 million.

[27] TLT had two contracts with TimberWest in the Johnstone Straits:

- a) the Bill 13 contract in Johnstone Straits (the "Bill 13 Contract"); and
- b) a road construction service agreement for the Johnstone Straits operation.

[28] TLT also had a number of other contracts with TimberWest, including:

- a) a log-sorting contract for TimberWest's operations at the North Island Log Sort, which expired in 2007;
- b) a timber harvesting contract in TFL 47 near Beaver Cove and Bonanza Lake;
- c) a non-replaceable timber harvesting and road construction services agreement in Nanaimo Lakes (the "Nanaimo Lakes Contract");
- d) a non-replaceable log-sorting and booming services agreement with the Ladysmith Log Sort (the "Ladysmith Contract"); and
- e) a non-replaceable log-sorting and booming services agreement with the Shoal Island Log Sort (the "Shoal Contract").

Collectively, the Nanaimo Lakes, Ladysmith, and Shoal contracts were referred to as the "Woodlands" contracts or operations.

TimberWest's Labour Dispute and Contracting Out

- [29] The impetus for the Woodlands contracts was TimberWest's 2003 labour dispute. The 2003 labour dispute between TimberWest and its unionized employees began with a strike but ended when the provincial government enacted back-to-work legislation. As part of that legislation, the provincial government appointed Don Munroe to be a mediator/arbitrator.
- [30] In May 2004, Mr. Munroe issued his award (the "Munroe Award"). The Munroe Award allowed TimberWest to contract out its Woodlands operations to unionized stump-to-dump contractors. TimberWest would transfer its employees to the relevant contractor using the Woodlands operation seniority list. Each operation had a seniority list of former TimberWest employees that was transferred to the contractors. This structure meant that TimberWest could not subdivide the operations into smaller contracts without the union's consent.
- [31] In August 2004, TimberWest began outsourcing its Woodlands operations to TLT and two other large contractors, Munns Lumber (1956) Ltd. ("Munns") and Roga Contracting Ltd. Roga's contract was subsequently acquired by Oyster River Logging ("Oyster River").
- [32] As mentioned, the Woodlands contracts were entered into because of this outsourcing. TLT entered into these contracts after winning a competitive bidding process. The relevant clauses of the Woodlands contracts provided that:
- a) the term was for five years and was non-renewable;
 - b) TimberWest made no representations about the area at issue, the quality or quantity of the timber, or the difficulty of the work;
 - c) the volume of work could be adjusted or suspended by TimberWest for various reasons, including reasons related to the market or pricing of logs;
 - d) TimberWest had no obligation to provide substitute work if operations were suspended;
 - e) each contract was for a fixed cost per volume, which was to be negotiated in good faith annually (as opposed to being "cost-plus");
 - f) either party could terminate the contract on 90 days' notice if there was no agreement on rates; and
 - g) TimberWest would transfer all unionized employees to the contractor at each site. The employees would revert back to TimberWest if the contract was terminated or the contractor went bankrupt.
- [33] None of TimberWest's contracts with TLT guaranteed a minimum volume of timber nor provided that TimberWest would be liable if it did not provide the estimated or planned volume. Mr. LeRoy admitted to having known the volumes were variable and that the logging contracts were susceptible to any decrease in market demand.

TLT's Financial Condition

- [34] TLT's financial condition was an issue at trial, as it related to the cause of TLT's bankruptcy and the decisions made by the Royal Bank of Canada ("RBC"), including to call TLT's loans. RBC was TLT's banker for many years leading up to the period in issue. Nearly all of TLT's debt was with RBC.
- [35] In either 2001 or 2002, RBC prepared a risk assessment framework for TLT. This framework reported positively on many aspects of TLT's operations and noted TLT had achieved a profit target of approximately 10%.
- [36] In 2001, Mr. LeRoy started a company called Fiberica SA, located in Costa Rica. The Fiberica operations became a source of financial stress and difficulties in TLT's relationship with RBC, and, ultimately, Fiberica defaulted on a payment due in Costa Rica in 2007.
- [37] RBC noted that TLT experienced financial difficulties in 2003 and 2004. The difficulties were caused by several factors, including a particularly bad fire season in 2003 and distributions to Fiberica for the establishment of a sawmill and plantation. The sawmill business eventually failed and became salvage for a scrap metal company.
- [38] In 2004, RBC reported a downturn in TLT's overall financial position, pointing to the same factors. Correspondence around this time showed RBC wanted TLT to have less involvement in Fiberica and another company, Profab, which was run by one of Mr. LeRoy's children.
- [39] By the end of 2004, TLT had breached its fixed charge covenant to RBC due to ongoing distributions to Fiberica and Profab. RBC placed a covenant on TLT not to make any further distributions to Costa Rica.
- [40] TLT significantly increased the size of its operations by 2005 as a result of its new contracts. Following the expansion of operations and the purchase of some TimberWest equipment in 2005 (made to facilitate the increased workload under the Woodlands contracts), TLT's debt load was approximately \$28.6 million. In June 2005, a member of the RBC credit approval group formed the view that TLT needed to reduce its debt. That summer, RBC required Mr. LeRoy to provide a \$1 million guarantee, and, in 2006, it required TLT to hire a certified accountant.
- [41] By September 2006, TLT had paid down \$6 million in debt to RBC. RBC remained concerned about payments made to Fiberica, including \$250,000 that had been made in the previous three months. In October 2006, TLT used RBC to finance the acquisition of the Island Timberlands Contract for \$3 million. In the same month, an updated RBC risk assessment framework reported that TLT had an "unsustainably high debt level," was "seriously under-capitalized," and was underperforming relative to expectation on the Woodlands contracts.

- [442] RBC representatives met with Mr. LeRoy in December 2006 to discuss the bank's concerns. In 2007, RBC was considering referring the file to their special loans group. Around the same time, RBC's representatives expressed concerns regarding TLT's cash flow. By August 2007, RBC was becoming increasingly concerned about TLT's financial condition, noting that TLT had breached financial covenants in February 2007. On August 21, 2007, RBC advised Mr. LeRoy that special loans may become involved in TLT's file by September 1.
- [443] On August 28, 2007, RBC advised Mr. LeRoy that TLT's line of credit had been capped at \$2.5 million and recommended TLT retain an outside consultant. The next day, the individuals in charge of the loan recommended the file be transferred to the special loans group immediately. Once assigned to special loans, the credit management and day-to-day supervision of the account were handled by the special loans group in Toronto.
- [444] Ms. Watson was assigned as the senior manager from special loans. She was responsible for the TLT file from the end of August 2007 until the loan was eventually sold to Century Services Inc. ("Century") in March 2008. On September 6, 2007, Ms. Watson met with Mr. LeRoy and TLT's representatives. Ms. Watson asked TLT's lawyer to prepare a legal opinion on the value, marketability, and risks associated with TLT's Bill 13 contracts. She also asked RBC's legal counsel to review the opinion and provide his own opinion on the rights under the Bill 13 contracts. Ms. Watson reviewed the opinions prepared by both lawyers and assessed the Bill 13 contracts as having no market value.
- [445] On September 27, 2007, another meeting was held between RBC and TLT's representatives, at which Ms. Watson advised Mr. LeRoy that the Bill 13 contracts, as well as the Western Forest Contract, had been ascribed no value. At the same meeting, RBC insisted TLT hire an accountant to develop a business plan and restructure by October 31, 2007, for which TLT retained PwC.
- [446] On November 29, 2007, internal bank communications showed RBC intended to call TLT's loans prior to the completion and assessment of a draft business plan.
- [447] PwC prepared the draft business plan and provided it to Ms. Watson ahead of a December 10, 2007, meeting with TLT. Ms. Watson's view was that the cash flow projections were unrealistic. At the meeting, RBC gave written notice that it would be calling its loans, which amounted to \$18 million.
- [448] As a result of RBC calling the loans, TLT applied for and obtained a protection order under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 [CCAA], on December 14, 2007. RBC protested the protection order, but was unsuccessful. RBC also attempted to petition TLT into bankruptcy in January 2008 but was unsuccessful.
- [449] In March 2008, TLT found a new lender, Century, to which RBC sold TLT's debt. By May 2008, TLT had defaulted under the loan agreement with Century by failing to make its first interest payment.

- [50] In June 2008, PwC was recommending TLT downsize to only its most profitable operations. In its monitor's update to Century on June 6, 2008, PwC advised that TLT did not expect to make any payments until mid-July, but it would be current with its interest payments by mid-August. On July 1, 2008, TLT set out a proposed liquidation plan that aimed to repay Century's debt on or before October 31, 2008.
- [51] In August 2008, TLT and TimberWest entered into a compromise agreement that provided for exits from the various contracts between the parties and a mutual release and abandonment of existing claims between the parties.
- [52] On September 3, 2008, TLT was assigned into bankruptcy and the compromise agreement was approved.

TimberWest's Financial Condition

- [53] TimberWest was structured as a trust, with its trust units publicly traded. TimberWest had a fixed requirement to make quarterly distributions to its unitholders. This requirement could only be varied with unitholder approval. As such, TimberWest was required to actively monitor its "distributable cash."
- [54] The demand for wood products began to soften in 2006, and by 2007 TimberWest was losing money for the first time in its history. Poor market conditions led TimberWest to significantly reduce harvest volumes in 2007 and 2008 compared to preceding years.
- [55] TimberWest issued a quarterly "President's Report" to provide information to the board of directors relating to TimberWest's business. The President's Reports issued in 2007 showed TimberWest to be in significant financial difficulty.
- [56] In January 2008, Mr. McElligott, then TimberWest's president, advised the unitholders that TimberWest did not expect to generate sufficient distributable cash to meet its obligations. The TimberWest board directed the company to reduce the 2008 harvest by 40%.
- [57] In July 2008, TimberWest sought a private placement with the British Columbia Investment Management Corporation ("BCIMC"), but this was rejected by the board.
- [58] In October 2008, TimberWest's lender, the Bank of Montreal, referred the account to special loans. At the time, TimberWest had nine months of projected liquidity.
- [59] TimberWest ultimately entered into an agreement with BCIMC for financing in the form of convertible debentures, with the documents finalized on December 12, 2008.
- [60] In April 2011, BCIMC and the Public Sector Pension Investment Board purchased all the issued and outstanding units of TimberWest and took the company private.

The Subdivision Plan

- [61] The root of the appellants' conspiracy and fraud claims is what the appellants describe as the "subdivision plan."
- [62] It is common ground that by at least 2007, TimberWest wanted to find a way to reduce the costs of its Woodlands operations. After contracting out much of these operations to three large contractors, including TLT, TimberWest management formed the view that the large sizes of the contractor operations were contributing to high costs. It wanted to subdivide the unionized employees into smaller groups, thereby splitting up the union seniority lists. This would allow TimberWest to contract out the Woodlands harvest into smaller contract volumes and to multiple crews.
- [63] However, TimberWest could not implement its subdivision plan without the union's consent due to the terms of the Munroe Award. It would also need the consent of any individual contractors on existing contracts or would need to wait until the existing Woodlands contracts expired.
- [64] TimberWest and the union were in labour negotiations in early 2007. That summer, the union members went on strike. TimberWest made it publicly known that it was pursuing a subdivision strategy as part of the collective bargaining. Mr. LeRoy was aware of this strategy.
- [65] TimberWest put forward a final offer to the union that, if accepted, would give TimberWest the necessary union approval to subdivide the seniority lists attached to the Woodlands operations. The Labour Relations Board dismissed the final offer vote as contrary to the Labour Relations Code, R.S.B.C. 1996, c. 244 on August 15, 2007. A second offer vote was dismissed on October 12, 2007. Reconsideration of the dismissals was denied on December 19, 2007.
- [66] The parties' theories as to TimberWest's intentions regarding the subdivision plan diverge after the union vote failed to go ahead.

The Appellants' Theory

- [67] The appellants' theory on appeal (somewhat fine-tuned from its position at trial) was that when TimberWest's attempt to gain subdivision through a union vote failed, TimberWest pursued a strategy to achieve its subdivision plan by intentionally causing TLT and other contractors' businesses to fail. This was designed to pressure the union to agree to subdivision.
- [68] Central to the appellants' theory is an internal document drafted by Mr. Whitely and Mr. McElligott for the TimberWest board, namely, the September 30, 2007, quarterly President's Report (the "2007 President's Report"). A passage in the 2007 President's Report reads:

If a negotiated solution is not possible, then the company will attempt to achieve its subdivision plan, operation by operation, as commercial agreements with stump-to-dump contractors are terminated (as a result of rate dispute with contractors or contractor business failures).

- [69] The appellants argue that its theory is supported not only by TimberWest's conduct with TLT but also TimberWest's conduct with another contractor, Munns. TLT's theory is that TimberWest sought to implement the subdivision plan by rate disputes with Munns so as to allow TimberWest to terminate that contract.
- [70] In support of their theory, the appellants rely heavily on a judgment another party obtained against TimberWest, 0856464 B.C. Ltd. v. TimberWest Forest Corp., 2014 BCSC 2433 [Munns Decision]. In that action, the plaintiff was an assignee of Munns, which by then had gone bankrupt (the "Munns Action").
- [71] The plaintiff in the Munns Action proved that TimberWest had breached its timber-harvesting contract with Munns in relation to the Woodlands operation. Justice Sigurdson found that by late 2007, when TimberWest embarked on the annual rate negotiations, it had a subdivision strategy to terminate logging contracts over rate disputes so as to pressure union members. In reaching this conclusion, Justice Sigurdson relied in part on the 2007 President's Report but also on a detailed review of TimberWest's actual conduct in negotiating rates with Munns. Justice Sigurdson concluded that TimberWest had breached its contractual obligation to negotiate timber-harvesting rates with Munns in good faith and then had unlawfully terminated the contracts: Munns Decision at para. 310.

The Respondents' Theory

- [72] TimberWest argued that the subdivision plan did not arise until after the contracting out following the Munroe Award, when it became obvious that the large contractors were struggling with the new larger contracts for the Woodlands operations. These struggles led to an increase in harvesting costs for TimberWest, when it had hoped contracting out the services would lead to cost reductions.
- [73] TimberWest described the subdivision plan as relating only to the plan to subdivide the union seniority list to allow it to contract out smaller volumes of work. Since the smaller contractors handling other parts of TimberWest's operations were doing so more efficiently, TimberWest expected this would result in reduced costs. Thus, Mr. McElligott developed a detailed plan to acquire the right to subdivide the seniority lists. TimberWest's board decided to pursue this plan during the 2007 labour negotiations, but, as noted, it was unsuccessful.
- [74] The subdivision strategy was only for the Woodlands harvesting contracts and not the log-sorting contracts or other contracts unrelated to the Woodlands operations. The only contract between TimberWest and TLT that could be affected by subdivision was the Nanaimo Lakes Contract.

[75] TimberWest informed Mr. LeRoy of its subdivision plan and advised him that his contract would be honoured until the end of its term in 2009.

[76] Mr. Whitely and Mr. McElligott each gave evidence in the present proceeding about the subdivision plan and the 2007 President's Report. They disputed that they or TimberWest ever had a strategy of causing TLT's business to fail. TimberWest's position was that it would have honoured the existing Woodlands contracts through 2009 if the contractor had desired or it would have negotiated "managed exits" to allow for mutually agreed-upon termination of the contracts.

[77] In 2008, TimberWest finally obtained the union's permission to subdivide the lists. By that time, both Munns and TLT were in bankruptcy. The remaining contractor, Oyster River, provided terms on which it would agree to a managed exit. TimberWest did not agree to those terms, and the contract with Oyster River continued until it expired in 2009.

The Decision Below

[78] After extensively setting out the background facts, the trial judge outlined the substantive issues before her as follows:

[357] The pleadings, evidence and submissions raise the following issues:

- a. Have the assignments been properly proven at trial?
- b. Does the release include the claims for fraud, conspiracy, and deceit alleged in this action?
- c. Did the defendants, or any of them, conspire to cause TLT to go bankrupt?
- d. Did the defendants, or any of them, engage in fraudulent or deceitful conduct to cause TLT to go bankrupt?
- e. Are the individually named defendants liable to the plaintiffs?
- f. Was TLT's loss or damage caused by the defendants?
- g. What is the appropriate remedy if liability is found?

[79] The appellants do not challenge the judge's treatment of the assignments and the release. The relevant issues on appeal all relate to the appellants' claim in conspiracy.

[80] Turning to the remaining issues, the judge first outlined the two actionable types of conspiracy as laid out in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57: predominant purpose conspiracy and unlawful act conspiracy. The judge described the elements of each tort as follows:

[423] The elements of the tort of predominant purpose conspiracy are:

- a. an agreement or concerted action between two or more persons;
- b. with the predominant purpose of causing injury to the plaintiffs; and

- c. overt acts committed that cause damage to the plaintiffs.

Watson v. Bank of America Corporation, 2015 BCCA 362 at para. 125.

[424] The elements of the tort of unlawful act conspiracy are:

- a. the defendants acted in combination by agreement or common design;
- b. the defendants committed an unlawful act;
- c. the defendants' conduct was directed towards the plaintiffs;
- d. the defendants knew or ought to have known that injury to the plaintiffs was likely to result from their unlawful act; and
- e. the defendants' unlawful conduct in furtherance of their conspiracy caused injury to the plaintiffs.

LaFarge at 471-72; Watson at para. 56.

[425] In either type of conspiracy claim, the defendants must act in combination--that is, in concert--by agreement with a common design. At least two parties must have agreed to conspire together: Pro-Sys at para. 72, Golden Capital Securities Ltd. v. Rempel et al, 2004 BCCA 565 at paras. 47, 56 [Golden Capital].

[426] The agreement does not have to be "an agreement in the contractual sense" and there does not have to be direct evidence of the agreement, so long as there is evidence from which an agreement can be inferred: Golden Capital at para. 47, Bernstein et al v. Stoytcheva-Todorova et al, 2007 BCSC 14 at para. 38. An agreement by inference can be established from the totality of the evidence, which may include a consideration of several isolated incidents: Youyi at para. 120.

[81] The judge also outlined the elements of the tort of deceit as follows:

[429] The tort of deceit, also known as civil fraud or fraudulent misrepresentation, has four elements:

- a. the defendant made a false representation;
- b. the defendant had some level of knowledge of the falsehood of the statement, either through knowledge or recklessness;
- c. the false representation caused the plaintiff to act; and
- d. the plaintiff's actions resulted in a loss.

Bruno Appliance and Furniture Inc. v. Hryniak, 2014 SCC 8 at para. 21 [Hryniak].

[430] Under the first element, mere silence is generally not enough to constitute a misrepresentation, but active concealment can be: Sidhu Estate v. Bains, [1996] B.C.J. No. 1246 at paras. 30-31 (C.A.); Manning v. Dhalla, 2018 BCSC 2148 at para. 34.

- [431] The second element is concerned with the representor's state of mind and their knowledge that the representation was false or recklessly made. A claim in deceit cannot be made out where the representor had an honest belief in the statement: *Freeman v. Perlman*, 1999 BCCA 40 at paras. 15-18. As the Court of Appeal confirmed in *Catalyst Pulp and Paper Sales Inc. v. Universal Paper Export Co. Ltd.*, 2009 BCCA 307 at para. 57, the representor must have intended to deceive the person to whom it is made--in other words, to cause that person to believe in the truth of the statement and act accordingly.
- [432] The third element, reliance, requires that the representation caused the plaintiff to act to his or her detriment: *Catalyst* at para. 59. Once the plaintiff has established that the defendant made a misrepresentation calculated to induce the plaintiff to act to his detriment and loss consistent with the plaintiff's having acted on the misrepresentation, the onus then shifts to the defendant to prove that the plaintiff did not in fact rely on the misrepresentation: *Catalyst* at para. 58.
- [82] After reviewing the parties' positions, the judge turned to the first element of both types of conspiracy: the requirement that the defendants had acted in concert by agreement with a common design. In her analysis, the judge accepted that all the witnesses who testified at trial were credible, although she noted some concerns about the reliability of their evidence. The judge accepted that the subdivision plan had existed and that its ultimate goal had been to divide the Woodlands operations into smaller parcels. The judge also accepted that the plan had involved pressuring the union to agree to the subdivision concession. The issue, in her mind, was whether the respondents had planned to do so by causing TLT to fail.
- [83] After reviewing the testimony of witnesses and the documents relied upon by the appellants, including the 2007 President's Report, the judge found the appellants had not proved that the respondents had an agreement to cause TLT's business to fail, and thus the conspiracy torts could not be made out.
- [84] Although it was not necessary, the judge went on to analyze the other elements of the tort of conspiracy. Regarding the allegation of a predominant purpose conspiracy, the judge found the evidence did not support that the primary purpose of TimberWest's actions had been to harm TLT. She found TimberWest's harvest reduction had been primarily due to prevailing market conditions. In relation to the unlawful conduct conspiracy, the appellants alleged that TimberWest had engaged in six "unlawful acts." The judge reviewed each in detail and was not persuaded that the allegations were supported by the evidence.
- [85] In the result, the judge dismissed the claims.

Issues on Appeal

- [86] The appellants concede that all of the grounds of appeal require the appellants to establish that the trial judge erred in failing to find that the respondents had an agreement to cause TLT's business to fail.

[87] The appellants say the judge's key error was in accepting the respondents' testimony that there was a mistake in the 2007 President's Report. As I will explain, I conclude that the appellants cannot succeed on this issue. As such, they cannot succeed on this appeal.

Positions of the Parties

The Appellants' Position

[88] The appellants consider the 2007 President's Report to be the central document evidencing TimberWest's plan to cause contractor business failure as a way to implement its subdivision strategy. They assert the judge erred in fact and law in accepting the respondents' testimony that certain statements in the 2007 President's Report were a mistake.

[89] The legal error, they say, is in not recognizing that this testimony amounted to an abuse of process because it was inconsistent with the evidence and testimony given by the same witnesses in the Munns Action. In the alternative, they say it was a palpable and overriding error. The appellants submit that since the evidence of mistake is inconsistent with the evidence and positions taking in the Munns Action--and that the positions are irreconcilable--the judge erred in accepting the evidence.

[90] Additionally, the appellants submit the finding of mistake is founded on the assertion that subdivision could only be achieved with union consent. They say this assertion is inaccurate because it ignores that contractor consent or contract expiration was a condition precedent to subdivision and that there was no evidence TimberWest sought TLT's consent or was prepared to wait until the contracts expired. Respectfully, I do not understand this aspect of the argument because the respondents never claimed otherwise. They understood that union consent was necessary, but they never asserted that they would not also need to negotiate with their contractors or wait until the Woodlands contracts expired.

The Respondents' Position

[91] The respondents argue that the abuse of process argument is a new issue that was not raised before the trial judge, and thus leave of this Court is required to consider it. They say that the interests of justice weigh against granting leave. They say that the appellants are trying to recast what was a losing credibility argument at trial into a legal argument on appeal so as to attract a less deferential standard of review.

[92] In any event, the respondents submit that the examination of witnesses in this action revealed no inconsistency with their evidence in the Munns Action.

[93] Further, the respondents say the judge's conclusion that there was no conspiratorial agreement was based on many findings of fact--more than simply accepting that the 2007 President's Report contained a mistake--and that the judge would have dismissed the claim even absent her acceptance of this evidence.

Analysis

[94] The critical ground of appeal challenges the judge's acceptance of the evidence of Mr. McElligott and Mr. Whiteley in respect of the 2007 President's Report. The judge held:

[449] I will first address what the plaintiffs have described as one of the key pieces of evidence in support of the conspiracy: the Subdivision Plan Provision in the President's Report.

[450] In considering the meaning to be given to the words of this provision, the two sentences that the plaintiffs rely on have to be put into the context of the entire document. The two sentences appear under the heading, "Labour Negotiations with USW (Update)". This section reads:

The company's second application for a final offer vote was dismissed by the BC Labour Relations Board on October 12, 2007. In that same ruling, the Board advised that the hourly timber harvesting employees who were previously employed by TimberWest and who are now working for stump-to-dump contractors under the Munroe Woodlands Letter of Understanding are entitled to a vote on a new TimberWest collective agreement when their interests may be adversely impacted. These rulings were unexpected and they effectively defeated the company's principal bargaining strategy in this round of negotiations. While we believe the rulings will be overturned as a result of a judicial review, the results of same will take some 4 to 8 months to obtain. TimberWest must therefore modify its approach to achieving subdivision.

The company's first preference is for a negotiated solution and we will attempt to negotiate subdivision with the union with the assistance of mediator Vince Ready. While there is a possibility that subdivision can be successfully negotiated, the chances in today's environment are slim. A previous attempt was made during the strike, before the Board ruled on TWF's application for a final offer vote and when no other industry negotiating tables were open. At the time, TimberWest had the leverage of its Board application and it also offered the union movement on alternate shifting and partial severance, two of their key strike issues, so as to break the impasse that existed. This could have set the pattern for an industry wide settlement. While the union acknowledged the current contractor model is broken and that too much volume is in the hands of too few contractors, the exploratory talks failed because the local USW Presidents were unwilling to divide the former TimberWest crews. The union management relationship has since deteriorated with labour's public relations campaign to discredit TimberWest in the marketplace.

If a negotiated solution is not possible, then the company will attempt to achieve its subdivision goal, operation by operation, as commercial agreements with stump-to-dump contractors are terminated (as a result of rate disputes with contractors or contractor business failures). This process would take one to two years to complete and it would see TimberWest continuing the strike of its foresters and engineers and proceed with stumpage sales (i.e. selling trees on the stump, where the buyer arranges for his own harvesting).

There will no doubt be a series of legal challenges by labour and some potential business disruptions in pursuing this strategy, making it a challenging one to implement. After former TimberWest employees have been without work long enough, especially after a lengthy strike in the summer/fall of 2007, and they see work traditionally performed by them going to stumpage sales, the hope is that they will exert sufficient pressure on their union executive to sit down with TimberWest and settle on a new contractor model.

[Emphasis in trial reasons.]

[451] The reference to achieving the "subdivision goal" in the context of this document is clearly referencing the goal of subdividing the seniority lists, as the previous paragraph referenced that the union was "unwilling to divide the former TimberWest crews". As both Mr. McElligott and Mr. Whiteley testified, the subdivision goal could not be achieved by the failure of the contractors. Even if a contractor failed, TimberWest would still not be able to subdivide the operations since the union's consent was always required.

[452] I accept Mr. McElligott and Mr. Whiteley's evidence that the words "achieve [the company's] subdivision goal, operation by operation" was a mistake, since the reality was that the subdivision goal could not be achieved without the union concession.

[Emphasis added.]

[95] In a lengthy section following the above excerpt, the judge went on to consider the extensive record of other evidence, including documents and testimony, and concluded that she was not convinced the appellants had proven that the respondents had an agreement to cause TLT's business to fail: at para. 474.

[96] The appellants devote much of their argument on this first ground of appeal to findings made against TimberWest in the Munns Decision. I appreciate that the Munns Decision must have added to the appellants' belief in the merits of their own causes of action. However, the Munns Action was decided in Munns' favour based on a claim in contract. The judge in the Munns Decision made findings adverse to TimberWest in respect of its contractual rate negotiations with Munns.

[97] Not only were TLT's negotiations with TimberWest separate from and involving different circumstances than Munns' negotiations with TimberWest, TLT expressly released TimberWest from any contractual claims when it entered into the compromise agreement. For these reasons, the present claim is not a duplicate of the Munns Action. The present claim alleges that TimberWest's conduct in its relationship with TLT was part of a civil conspiracy to cause TLT's business to fail.

[98] The appellants appear to accept that neither issue estoppel nor cause of action estoppel would apply and thus do not argue that the findings in the Munns Decision bound the trial judge in the present case.

- [99] The trial judge was aware of the Munns Decision and summarized its key findings. However, she noted that she was required to assess the conduct of TimberWest as it relates to TLT based on the evidence before her:
- [130] It is of note that this Court has previously decided a case involving TimberWest and another logging company, Munns, indexed as 0856464 BC Ltd. v. TimberWest Forest Corp., 2014 BCSC 2433 [Munns]. This action, which came before Justice Sigurdson, involved a claim for damages arising from the allegedly unlawful termination of timber harvesting contracts between Munns and TimberWest due to TimberWest's failure to negotiate the annual logging rates in good faith, as the contracts between them required. Munns claimed that this was part of TimberWest's strategy to terminate their existing contracts so that they could subdivide their logging contracts into smaller, less expensive contracts. Munns also claimed that TimberWest fraudulently misrepresented its position by concealing its intention to implement its subdivision strategy.
- [131] Munns was ultimately successful in proving its breach of contract claim and was awarded damages on the basis that TimberWest breached its obligation to negotiate 2008 rates in good faith with a view to continuing the contracts. Justice Sigurdson found that TimberWest's strategy was to use rate disputes to terminate its contracts. This, in turn, would cause out-of-work union members to put pressure on the union to agree to TimberWest's subdivision strategy, which would provide significant cost savings to TimberWest: Munns at paras. 258, 262, 308. Absent the subdivision strategy, the parties would have been able to reach an agreement on rates as contemplated by the contracts: at para. 296.
- [132] Justice Sigurdson dismissed Munns' fraudulent misrepresentation claim, finding that it was not established on the evidence: at para. 316.
- [133] Although there are similarities between the Munns case and the case before me--in particular, the fact that they both involve disputes brought by larger contractors for TimberWest's Woodlands Operations and impugn actions that took place at similar times--I must assess the conduct of TimberWest as it relates to TLT, not Munns, based on the evidence that is before me in this trial, not that which was before Justice Sigurdson.

[Emphasis added.]

The appellants do not claim the judge made any errors in the above analysis.

- [100] The appellants rely on the concept of abuse of process, as expressed in *Este v. Esteghamat-Ardakani*, 2018 BCCA 290 at para. 83:
- [83] Abuse of process is a flexible doctrine, one which focuses on the proper administration of justice and the court's power to prevent misuse of its process. Recently, in *Pan Afric Holdings*, Justice Fisher summarized the doctrine as follows:

[36] The doctrine of abuse of process engages a court's inherent power to prevent the misuse of its procedures in a way that would bring the administration of justice into disrepute, and it arises in a variety of legal contexts. While many of the cases that deal with abuse of process do so in the context of relitigation, the doctrine itself does not have specific requirements such as those applicable to *res judicata* and issue estoppel .

[37] Abuse of process may be invoked where a party takes inconsistent factual and legal positions in different proceedings, but such assertions must be considered in the context and circumstances of the case .

[Emphasis in 2018 BCCA 290.]

[101] As explained in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 [CUPE], while abuse of process is a somewhat more flexible doctrine, it is still related to issue estoppel and cause of action estoppel. The policy grounds supporting these doctrines are the same, as stated in CUPE:

[38] It is true that the doctrine of abuse of process has been extended beyond the strict parameters of *res judicata* while borrowing much of its rationales and some of its constraints. It is said to be more of an adjunct doctrine, defined in reaction to the settled rules of issue estoppel and cause of action estoppel, than an independent one (*Lange*, *supra*, at p. 344). The policy grounds supporting abuse of process by relitigation are the same as the essential policy grounds supporting issue estoppel (*Lange*, *supra*, at pp. 347-48):

The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.

[102] Succinctly, "the primary focus of the doctrine of abuse of process is the integrity of the adjudicative functions of courts": CUPE at para. 43.

[103] The respondents point out that only excerpts of the evidence from the Munns Action, and not the entire transcripts, were entered as an exhibit at trial in this proceeding. They say there is an insufficient evidentiary record to determine that the evidence given in this proceeding amounts to an abuse of process.

[104] Regardless, I do not see how the integrity of the adjudicative function can be questioned by the appellants on appeal when they did not advance the abuse of process argument at trial. Instead, it appears the appellants' counsel's approach was to focus on purported inconsistencies in the witnesses' testimony, as between the Munns Action and the present proceeding, as a basis to challenge credibility. The appellants' counsel put to the key witnesses some of their testimony in the Munns Action, but the judge was not persuaded that there were any material inconsistencies affecting credibility.

- [105] Furthermore, this is not a case where a party took one position in one courtroom as to a set of facts and then asserted an opposite position as to the facts in another courtroom. The respondents asserted that they had not acted improperly in their dealings with Munns in the Munns Action. The respondents maintained a similar position in the present case: that they had not acted improperly in their dealings with TLT.
- [106] Based on the circumstances, it cannot be said that the integrity of the adjudicative functions of the courts was undermined by the respondent witnesses' testimony as to their intentions and strategy regarding TLT.
- [107] In my view, the judge cannot be criticized for failing to consider abuse of process as that doctrine was not argued by the appellants and, in my view, based on the record before this Court, it did not apply.
- [108] I agree with the respondents that the first ground of appeal is really a complaint that the judge did not accept the appellants' challenge to the credibility of the respondent witnesses.
- [109] It is true that Mr. McElligott and Mr. Whiteley were cross-examined several times on the meaning of the 2007 President's Report, both in the Munns Action and in the present proceeding, and their evidence had variations in it. However, that is not unusual. Indeed, where a witness uses the same language to describe matters every time they give evidence, it can be argued their evidence is unnatural and not credible.
- [110] Importantly, the framing of the questions by the lawyers conducting the examinations of witnesses in the present case was very different than in the Munns Action. This is understandable, as the claims were also framed differently in the two actions.
- [111] It was the appellants' counsel who, in cross-examination of Mr. McElligott and Mr. Whiteley, characterized the 2007 President's Report as containing a "mistake." These witnesses agreed with that description. However, it is clear from reading their entire testimony that what they meant was that the language in the sentence beginning "[i]f a negotiated solution is not possible"--containing the implicit suggestion that the company would try to achieve subdivision without negotiating an agreement with the union--was wrong. This is also how the judge understood their evidence. Union consent was necessary to achieve subdivision, and so it was always going to be necessary to negotiate a solution with the union. This fact is not controversial: TimberWest ultimately needed to negotiate an agreement with the union.
- [112] The issue in the Munns Action was whether TimberWest had engaged in bad faith rate negotiations with Munns so as to lead to the termination of its contract with Munns as part of its strategy to pressure the union. This issue was still premised on TimberWest needing to conclude successful negotiations with the union.
- [113] Despite the able attempts by appellants' counsel in the cross-examination of Mr. McElligott and Mr. Whiteley, I do not see anything materially inconsistent in their evidence given in the two actions.

- [114] The respondents were forthright in agreeing that if the existing subcontractors' businesses failed, this could put economic pressure on the union to come to agreement with TimberWest. The 2007 President's Report was not "wrong" in identifying this, nor did the respondents purport that it was wrong in this regard.
- [115] The 2007 President's Report followed the failure of TimberWest's primary strategy for dealing with the union, that is, its plan to have a final vote on a collective agreement that would permit subdivision. Although it was a quarterly report for the quarter ending September 30, it appears to have been prepared for the Board meeting of October 30, 2007. The question for TimberWest was what to do next. The 2007 President's Report is open to interpretation as to whether TimberWest intended to leverage existing, known pressures on subcontractors--namely, rate disputes and financial instability--to pressure the union, or if it intended to do more and put additional pressure on subcontractors by causing rate disputes and business failures, thereby leading to more pressure on the union. The judge rejected the latter interpretation.
- [116] It was known by the time of the 2007 President's Report that TimberWest was having rate disputes with its contractors, and so the possibility that contracts might terminate for that reason was real. It was also known that TimberWest's Woodlands contractors were having significant financial difficulties (at least Munns and TLT), and so the possibility one or more of them might fail was also real.
- [117] For example, TimberWest had long known that TLT's business was in trouble--well before TimberWest's primary union strategy failed and the 2007 President's Report was written. Since at least January 2006, TLT had informed TimberWest that it had a "cash flow crisis" and needed some kind of support: at para. 179. TimberWest agreed to provide some assistance because, according to its witnesses, it wanted to help TLT stabilize: at paras. 181, 188-191. TimberWest made a retroactive adjustment and paid TLT \$2 million at the end of March 2006.
- [118] TLT also asked for financial assistance from TimberWest in February 2007, advising that it was in a "difficult financial situation" and needed TimberWest's help "to continue with any viability": at para. 205. From Mr. Whiteley's perspective, TimberWest agreed to pay higher rates to TLT on a retroactive basis to January 1, 2007, to provide it with some financial relief. This was subject to TLT providing unaudited and audited financial statements. However, these financial statements were never provided by TLT: at para. 217.
- [119] TLT informed TimberWest in June 2007 that it needed \$2.4 to \$2.5 million to meet its bank obligations. TimberWest provided \$2.3 million, which TimberWest viewed as a bailout to help stabilize TLT's fragile financial condition: at paras. 230-234. TLT claims this was for retroactive rate adjustments: at para. 233. Regardless, it shows conduct inconsistent with TimberWest trying to cause TLT to fail.

- [120] In August, TLT asked TimberWest for another \$2.5 million in financial assistance, but it was not provided. By August, 2007, TLT's banker had transferred TLT's account to the special loans department, and the banker in charge of the account described TLT as in very bad shape. By October 4, 2007, at the bank's insistence, TLT retained PwC to conduct an independent business review and restructuring plan.
- [121] As a reminder, the Woodlands contracts had annual rate negotiations but only for five-year terms. Around the time of the 2007 President's Report, the contracts' terms had approximately two years remaining. The 2007 President's Report refers to the process of contract termination taking one to two years, which is consistent with the respondents' evidence that they planned to try to negotiate termination of contractor agreements, which they referred to as "managed exits," and if they were not successful, they would simply let any remaining contracts expire.
- [122] The fact that the 2007 President's Report contemplated a contract possibly terminating due to business failure before then, and recognized that a contractor's business failure might help give TimberWest leverage with the union, does not answer the question of whether TimberWest had a deliberate strategy to cause a contractor's business failure.
- [123] Likewise, the fact that the 2007 President's Report contemplated the possibility that rate disputes might lead to contract termination does not answer the question of whether TimberWest had a deliberate strategy to negotiate in bad faith with TLT over the rates in the Nanaimo Lakes Contract.
- [124] The respondent witnesses gave evidence that it was not part of their strategy to exert pressure on the union by causing contractor business failures. There was other evidence consistent with this evidence, including efforts made by TimberWest to assist TLT, TimberWest's recognition that failure of contractors could negatively affect its own interests, and TimberWest honouring the contract with Oyster River until it expired in 2009, when they could not reach agreement on a managed exit.
- [125] The respondent witnesses also gave evidence as to the reasons for the positions they took with TLT regarding renewal of contract rates at the Nanaimo Lakes operation. There was evidence that TLT was not interested in renewing the Nanaimo Lakes Contract, having lost money on it the previous year and also due to its own need to restructure, and that TLT did not try to participate in rate negotiations for that contract: at para. 277. In TLT's restructuring plan, it did not intend to continue the Nanaimo Lakes operations. The judge accepted Mr. Whiteley's evidence that if it could not negotiate a "managed exit" from that contract, TimberWest intended to honour the Nanaimo Lakes Contract to the end of its term: at para. 463.
- [126] The judge carefully considered the appellants' arguments and view of the evidence but, in the end, did not find the 2007 President's Report to be the "smoking gun" proving the conspiratorial intent to harm TLT that the appellants see it to be.

- [127] The weighing of prior statements and drawing of inferences, in the context of the entire record, is the role of trial judges, who have the experience and expertise in assessing credibility. The appellants have not shown that the judge made any palpable and overriding errors in her assessment of the respondents' evidence about the 2007 President's Report, including in her consideration of evidence the witnesses gave in the Munns Action.
- [128] This conclusion means that the appellants cannot succeed on any of the grounds of appeal, all of which are premised on the respondents having an agreement and intention to cause TLT's business to fail.

Conclusion

- [129] The central premise of this appeal is that the trial judge made an error in failing to find that the respondents had an agreement and intention to cause TLT's business to fail. The appellants have not established this error; accordingly, I would dismiss the appeal.

"The Honourable Madam Justice Griffin"

I AGREE:

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Madam Justice DeWitt-Van Oosten"

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