

CANADA / JUDGMENT

Luminary Holding Corp. v. Fyfe

2022 BCCA 185

COURT

British Columbia Court of Appeal

DECIDED

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2022 BCCA 185 Luminary Holding Corp. v. Fyfe

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Luminary Holding Corp. v. Fyfe,

2022 BCCA 185

Date: 20220527

Docket: CA47303

Between:

Luminary Holding Corp. and Kevin Dunn

Plaintiffs

(Respondents)

And

Todd Fyfe, Todd Fyfe Personal Real Estate Corporation, and Fernie Real Estate Company Ltd.

Defendants

(Appellants)

Before:

The Honourable Mr. Justice Harris

The Honourable Mr. Justice Willcock

The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated February 3, 2021 (Luminary Holding Corp. v. Fyfe, 2021 BCSC 167, Vancouver Docket S165945).

Counsel for the Appellants:

G.A. Purdy, Q.C.

S. Twining

Counsel for the Respondents:

W. McMillan

Place and Date of Hearing:

Vancouver, British Columbia

March 14, 2022

Place and Date of Judgment:

Vancouver, British Columbia

May 27, 2022

Written Reasons by:

The Honourable Madam Justice DeWitt-Van Oosten

Concurred in by:

The Honourable Mr. Justice Harris

The Honourable Mr. Justice Willcock

Summary:

The appellant, Todd Fyfe, was the listing agent for a 160-acre property in Fernie. A portion of the property was in the Agricultural Land Reserve. The respondent, Kevin Dunn, was a prospective purchaser. Over the course of three to four months, Mr. Fyfe and Mr. Dunn communicated about the property. Ultimately, Mr. Dunn purchased it. Mr. Fyfe knew, well before the closing date, that an ongoing boundary review would result in the remainder of the property moving into the ALR unless the landowner opted out. He did not tell Mr. Dunn about this fact. After the purchase, Mr. Dunn learned that the entirety of the property was in the ALR. As a result, his plans for developing the property had to change and construction was delayed. Mr. Fyfe and the other appellants were found liable in negligence for failing to disclose the boundary review and the entitlement to opt out. Mr. Fyfe appeals the judge's finding of an implied agency and breach of duties owed to Mr. Dunn. He also alleges error in the assessment of damages.

HELD: Appeal allowed, in part. The liability findings were open to the judge on the evidence. That aspect of the appeal is dismissed. However, the appeal from the damages award for lost business profits is allowed and the amount reduced.

Reasons for Judgment of the Honourable Madam Justice DeWitt-Van Oosten:

- [1] The respondents, Luminary Holding Corp. and Kevin Dunn, purchased a 160-acre property near Fernie, British Columbia for the purpose of developing an executive retreat (the "Ferne Property"). At the time of the purchase, they knew that approximately 100 acres of the land was in the Agricultural Land Reserve ("ALR").
- [2] What they did not know is that the Ferne Property was subject to a boundary review by the Agricultural Land Commission, with a likelihood that the remaining 60 acres would also be incorporated into the ALR unless the seller or the respondents, as purchasers, opted out. No one exercised the entitlement to opt out. Instead, the respondents learned post-purchase that the entirety of the Ferne Property was in the ALR. Because of this, they had to change their development plans, resulting in considerable delay and added expense.
- [3] The appellant, Todd Fyfe, was the listing agent for the Ferne Property. Well before the closing date, he learned of the boundary review, the fact that the Ferne Property was caught by the review, and the entitlement of the owner to opt out. However, he did not disclose this information to the respondents.
- [4] The respondents sued Mr. Fyfe, his real estate corporation (Todd Fyfe Personal Real Estate Corporation) and the supervising brokerage firm (Ferne Real Estate Company Ltd.). The trial judge found all three liable for negligence and awarded the respondents a cumulative \$1,536,180 in damages.
- [5] On appeal, Mr. Fyfe says the liability findings reflect legal error and should be set aside. Mr. Fyfe also contends the judge erred in his assessment of damages.
- [6] For the reasons that follow, I would dismiss the challenge to the liability findings. However, I agree with Mr. Fyfe that the judge erred in his assessment of lost profits. I would set aside that award and, in its place, substitute an award for \$219,084.

Background

- [7] Reasons for judgment in the Court below are indexed as 2021 BCSC 167. The judge canvassed the factual background at length. I will highlight the facts I consider most salient to the appeal.

The Sale and Purchase of the Ferne Property

- [8] The Ferne Property was listed for sale in late 2012.

- [9] Mr. Dunn was interested in purchasing the land to develop an executive retreat with his spouse and some friends. Their original plan was to build a large lodge that would include two family residences, eight guest suites, a commercial kitchen and an accessory shed ("Plan A").
- [10] Mr. Dunn contacted Mr. Fyfe on July 5, 2013. In response, Mr. Fyfe sent Mr. Dunn information about the Fernie Property and they arranged for a viewing on August 4, 2013. The original listing stated that a portion of the Fernie Property was in the ALR. Mr. Dunn noted this fact; however, the judge accepted that he "did not appreciate its import" (at para. 174(c)).
- [11] At the same time as these events, the Agricultural Land Commission ("ALC") was conducting a boundary review in the Regional District of East Kootenay (the "District"). The ALC is a provincial tribunal created under the Agricultural Land Commission Act, S.B.C. 2002, c. 36. The boundary review proposed that the entire Fernie Property and other lands be brought into the ALR. Landowners could opt out by communicating their preference to the ALC.
- [12] Mr. Fyfe attended a public hearing about the boundary review on August 15, 2013. He understood that the Fernie Property was among the properties proposed for inclusion. He also understood that landowners could opt out. Mr. Fyfe expressed concern at the meeting about the fact that only a few of the affected landowners were in attendance. In response to that concern, the ALC emphasized the ability to opt out. When Mr. Fyfe left the meeting, he did not know when the ALC would make a final decision about the Fernie Property.
- [13] Between the August 4 viewing and November 13, 2013, Mr. Dunn made various inquiries of Mr. Fyfe specific to: (1) road access to the land; (2) maintenance responsibility for that road; (3) a power line on the Fernie Property; and (4) a right of way.
- [14] Mr. Fyfe responded to Mr. Dunn's inquiries. Specific to the issue of road access and maintenance, Mr. Fyfe reached out to government officials and confirmed that road maintenance would be the respondents' responsibility. However, he also told Mr. Dunn that he was "looking into some ancient legislation" that might shed additional light on the matter and would let him know the result. Mr. Fyfe testified that he also made inquiries of BC Hydro on behalf of Mr. Dunn.
- [15] On October 28, 2013, Mr. Dunn sent an email to Mr. Fyfe telling him that he would likely present an offer on the Fernie Property before the end of that week. He said he understood that Mr. Fyfe could "act for both the seller and the buyer" (emphasis added). He would "provide [Mr. Fyfe] with all the details and have [him] write up the formal offer" (emphasis added).
- [16] The next day, Mr. Fyfe responded, saying he "would be happy to put the documents together for [Mr. Dunn]." He "could draft the documents and [Mr. Dunn] could have [his] lawyer insert any comments and conditions concerning due diligence" (emphasis added).

- [17] Mr. Dunn had a lawyer in Calgary who did some work for him. However, Mr. Dunn did not ask that lawyer to conduct any research about the ALR.
- [18] On October 31, 2013, Mr. Fyfe asked Mr. Dunn if he had contacted his lawyer. Mr. Dunn said "no" because the lawyer had become ill, but he told Mr. Fyfe that he "might still be able to put in an offer [the next day] contingent on" getting certain guarantees from government about road access leading to the Fernie Property.
- [19] On November 8, 2013, Mr. Dunn emailed Mr. Fyfe and told him that he wanted to "go ahead with a conditional purchase offer" in the amount of \$700,000. He asked Mr. Fyfe to send him "any formal sale purchase agreement" for his signature.
- [20] Mr. Fyfe responded two days later by sending Mr. Dunn a link to various "purchase documents", including: (1) a property disclosure statement; (2) a standard form entitled Working with a Realtor (Designated Agency) ("WWR Form") and (3) a standard form Contract of Purchase and Sale for the Fernie Property. The documents were not accompanied by any explanation. The property disclosure statement included the following information: "An estimated 100 acres is in the ALR. 60 Acres is out of the ALR".
- [21] The WWR Form explained three "possible models" that might govern the relationship between a seller, purchaser and realtor. These included a "designated agency", a "limited dual agency" and a "customer relationship." The WWR Form contained an acknowledgement clause seeking to have Mr. Dunn confirm that he was in a (non-agency) customer relationship with Mr. Fyfe.
- [22] Mr. Dunn signed the WWR Form on November 12, 2013 and returned it to Mr. Fyfe. However, he did not initialize the boxes acknowledging the relationship with Mr. Fyfe as a customer relationship. Mr. Fyfe brought this to his attention. Mr. Dunn subsequently initialed where requested and returned the document to Mr. Fyfe.
- [23] The next day, following an exchange of counteroffers, Mr. Dunn agreed to purchase the Fernie Property for \$775,000. The Contract of Purchase and Sale was subsequently assigned to Luminary Holding Corp. ("Luminary"), a company controlled by Mr. Dunn, his spouse and the friends who would be co-developing the Fernie Property. The Contract of Purchase and Sale was executed five days before the deadline to opt out of inclusion in the ALR. Mr. Dunn was not aware of the option to opt out or the deadline. The purchase of the Fernie Property closed on November 28, 2013.
- [24] On January 22, 2014, the remaining 60 acres were moved into the ALR as part of the boundary review. The respondents did not know of this fact.

Development of the Fernie Property

- [25] After the closing date, the respondents began to develop the Fernie Property in accordance with Plan A. They retained an architect to prepare drawings.

- [26] On February 18, 2014, the seller was sent a letter by the ALC confirming that the whole of the land was now in the ALR. This notice did not make its way to the respondents. Instead, they carried on with Plan A, anticipating the development to unfold in three stages: developing the land; building an accessory building (a shop); and then laying the foundation for the retreat's main building (a lodge). Mr. Dunn testified that under Plan A, construction would likely start in spring 2015 and would take approximately 19 months to complete. The judge found that a construction start-date of 2016 was more likely (at para. 220).
- [27] By late June 2014, the respondents had prepared their plans for the lodge, which they intended to place at the north end of the Fernie Property. They applied to the District for a building permit to start construction of the shop.
- [28] On July 8, 2014, the District informed the respondents that the whole of the Fernie Property was in the ALR and the building permit could not be approved.
- [29] After additional communication with the District, the respondents applied on August 19, 2014 for a "non-farm use exemption." That application required approval from both the District and the ALC. In the interim, the respondents downed tools on Plan A.
- [30] On January 9, 2015, the District voted to support a non-farm use exemption, provided that the respondents moved the proposed location of their buildings to the south end of the Fernie Property. The respondents confirmed they were able to do so. The District then forwarded the exemption application to the ALC for a final determination. The respondents reactivated their work on Plan A.
- [31] On December 6, 2015, the ALC rejected the non-farm use application. The respondents retained a consultant to assist with next steps. The consultant recommended asking the ALC to reconsider, but cautioned the respondents that it could take considerable time. Given this advice, the respondents decided in January 2016 to stop work on Plan A until there was greater certainty. By this time, Luminary had spent \$572,240 planning and designing Plan A.
- [32] Ultimately, in addition to seeking reconsideration, the respondents decided to modify their development plans. A new plan ("Plan B") would be developed in two phases. The first phase would consist of a building that contained one family residence and four guest suites, as well as a shop. The second phase would include a second family residence, six to eight guestrooms and a commercial kitchen. The first phase did not require ALC or rezoning approval and could be built on the north end of the Fernie Property.
- [33] On April 12, 2016, the respondents submitted a reconsideration application to the ALC, indicating that their original plan (Plan A) would likely be scaled down.
- [34] On May 14, 2016, the respondents hired a general contractor to start the first phase of Plan B. It was contemplated that construction would complete by August 31, 2017.
- [35] On June 1, 2016, the respondents were advised that the ALC would reconsider an exemption.

- [36] On June 28, 2016, the respondents filed a notice of civil claim against the appellants.
- [37] On July 6, 2016, the District issued a building permit for the shop and construction began shortly thereafter.
- [38] On July 12, 2016, the respondents applied to the District for a building permit for the main building contemplated under the first phase of Plan B. The permit was issued on September 29, 2016.
- [39] On October 31, 2016, the ALC decided the non-farm use reconsideration application and granted approval for a building on the south side of the Fernie Property (confirmed by the ALC's executive committee on December 7, 2016). The approved building size would have been sufficient to accommodate the single lodge contemplated under Plan A.
- [40] For a variety of reasons, the respondents decided to ask the ALC to change the approved building location from the south side of the Fernie Property to its north side. A fresh application was required. That was submitted in October 2017. On January 22, 2018, the ALC granted the relocation request, approving construction of a building on the north side of the Fernie Property that was actually larger than the lodge contemplated under Plan A. Zoning approval for the second phase of Plan B was obtained from the District on May 10, 2018.
- [41] At the time of the trial, the respondents continued to pursue Plan B. However, construction had not yet begun on the second phase. The respondents told the judge they anticipated starting construction in spring 2022.
- [42] The first phase of Plan B opened for business as a bed and breakfast in August 2018. Luminary had spent \$5,711,936.78 for construction of the first phase. (Just under 50% of that amount is attributable to the family residence.) The bed and breakfast lost money due to, among other things, the downturn in Alberta's economy and the COVID-19 pandemic. Operations had paused by the start of the trial.
- [43] The respondents claimed a cumulative \$2,676,597.70 in damages.

Trial Judgment

- [44] There were five issues to resolve at the trial: (1) the proper characterization of the relationship between Mr. Fyfe and Mr. Dunn; (2) the standard of care governing that relationship and whether it was breached; (3) causation; (4) contributory negligence; and (5) damages.
- [45] The judge answered the liability questions as follows:
- By at least October 29, 2013, there was an implied agency relationship between Mr. Fyfe and Mr. Dunn. That relationship came to an end on November 10, 2013 (at para. 124).
 - As an implied agent, Mr. Fyfe "owed the full range of client duties to Mr. Dunn" (at para. 124).

- c) Those duties included making "full and fair disclosure of all material circumstances and of everything [Mr. Fyfe knew] regarding the subject matter" to Mr. Dunn, as well as "full disclosure of all facts within [Mr. Fyfe's] knowledge which might affect the value of the [Ferne Property] or [Mr. Dunn's] decision" (at paras. 113, 125, citing *Mulligan v. Stephenson*, 2016 BCSC 1941 at paras. 110-112).
 - d) Alternatively, if there was no implied agency, there was a customer relationship between Mr. Fyfe and Mr. Dunn (at para. 128).
 - e) In the customer relationship, Mr. Fyfe had a duty to "discuss the available agency options and the risks and benefits of each" with Mr. Dunn; to "promptly inform" Mr. Dunn of the boundary review; and to "urge Mr. Dunn to seek independent advice on the suitability of the [Ferne Property] for Mr. Dunn's proposed use" (at para. 129).
 - f) Mr. Fyfe breached the implied agency by not telling Mr. Dunn of the boundary review and the ability to opt out (at paras. 148, 150). These matters fell within the scope of Mr. Fyfe's "broadly framed" duties as an implied agent (at para. 150).
 - g) Mr. Fyfe also breached duties owed to Mr. Dunn if their relationship was properly characterized as a customer relationship (at para. 151). When Mr. Dunn indicated to Mr. Fyfe on October 28, 2013 that he understood Mr. Fyfe could "act" for both the seller and the purchaser, Mr. Fyfe was duty bound to have had a "more detailed discussion about the basis upon which he was working for Mr. Dunn" (at para. 152). He should have also recommended that Mr. Dunn "secure independent assistance" in relation to the purchase, the boundary review and the ability to opt out. His failure to do so constituted a breach (at para. 155).
 - h) In the customer relationship, Mr. Fyfe was also duty bound to tell Mr. Dunn about the boundary review and the ability to opt out (at para. 161). These were "material latent defect[s]" that could have affected Mr. Dunn's intended use of the Ferne Property and would not have been discernable even with "reasonable levels of inquiry" by Mr. Dunn (at paras. 161, 168).
 - i) Had Mr. Fyfe not breached his duties, the respondents would have been able to pursue Plan A by having the seller of the Ferne Property opt out of inclusion, or by exercising that option themselves after the purchase closed (at para. 191).
 - j) There was no basis for a finding of contributory negligence by Mr. Dunn (at para. 205).
- [46] Specific to damages, the judge held the appellants liable for:
- a) \$572,240 in thrown away expenses for the development of Plan A (at para. 208).
 - b) \$279,014 in added capital costs as a result of having to shift from Plan A to Plan B. In reaching this amount, the judge applied a 4% negative contingency to account for the difference between the respondents' evidence that construction under Plan A would have commenced in 2015 and the judge's determination that a 2016 start date was more likely (at para. 220). He also applied a 5% negative contingency for "betterment" expenses in the

construction of Plan B that would not have been incurred under Plan A (at para. 223), and a 10% negative contingency for the possibility that due to uncertainty in the future of the tourism industry, the second phase of Plan B might never be built (at para. 224(f)).

- c) \$675,277 for lost profits. This amount included business losses for 2016 and 2017 in the cumulative amount of \$200,865 (at para. 237).
- d) \$9,649 for consultant fees.

Issues on Appeal

[47] The appellants say the judge committed six errors. He:

- a) misapplied the legal test for an implied agency by failing to consider the entirety of the circumstances;
- b) erred by not allowing the content of the implied agency to be contextually informed by the circumstances;
- c) wrongly reversed the burden of proof for establishing a material latent defect;
- d) erroneously awarded expenses thrown away on Plan A and lost profits, resulting in double recovery;
- e) committed palpable and overriding error in his determination of lost profits by failing to account for negative contingencies; and,
- f) erred in awarding lost profits for 2016 and 2017 given his finding as to when construction on Plan A would reasonably have started.

[48] The appellants do not challenge the conclusions on causation or contributory negligence. Nor do they take issue with the judge's assessment of damages for Plan B's increased capital costs or consultant fees.

Analysis

The Judge Did Not Err in His Implied Agency Analysis

[49] The judge found that "an implied agency relationship was created [between Mr. Fyfe and Mr. Dunn] by at least the time of Mr. Fyfe's email on October 29, 2013, and that [the agency] came to an end [on] November 10, 2013" (at para. 124, emphasis added).

[50] The bases for this finding are thoroughly detailed at para. 121 of his reasons:

[121] In my view, the following evidence and findings are relevant in determining the nature of the relationship here:

- a) At the outset of their dealings, Mr. Dunn appreciated that Mr. Fyfe was an agent for the seller.

- b) Mr. Dunn was not aware, when he first met Mr. Fyfe, that it was possible for Mr. Fyfe to act for both the plaintiffs and the seller.
- c) Mr. Dunn suggested to Mr. Fyfe that he had others assisting him. However, at no point did he suggest that he had his own realtor. The fact that Mr. Dunn had other people with whom he was consulting does not avoid the possibility of an implied agency relationship, particularly when there was no realtor on Mr. Dunn's team. Mr. Fyfe had no information that there was a realtor on Mr. Dunn's team.
- d) Mr. Dunn called upon Mr. Fyfe to perform substantial research on the road access and power line issues. Such work was also in the seller's interest, to the extent that it may have removed qualms held by any interested purchaser. However, these research assignments from Mr. Dunn should have put Mr. Fyfe on alert about the potential creation of an implied relationship flowing from the fact that Mr. Dunn was treating him as someone who could be asked to perform tasks at Mr. Dunn's direction and for his benefit.
- e) Mr. Fyfe moved deeper into the provision of advice, rather than simply providing information, in the exchange of emails on October 1, 2013. In this exchange, he provided his interpretation of a Ministry of Transport email and went further to say that he was "looking into some ancient legislation" and that he would "let you know what I find". As Mr. Dunn himself recognized in his email of October 28, this level of research was "above and beyond" what a listing agent should be expected to provide to a mere potential purchaser.
- f) I find that there was no discussion of the various potential agency relationships between Mr. Dunn and Mr. Fyfe in the days leading up to the October 28, 2013 email exchange. Mr. Dunn only agreed that it was possible that there was such a discussion, but also suggested that the conversation he was thinking about could have occurred in 2015 in relation to a different transaction. Mr. Fyfe did not produce phone records which would presumably have given weight to his suggestion that there was such a call. When directly questioned on this subject at his discovery, when his memory should generally have been better, Mr. Fyfe claimed not to recall any such conversation. Although Mr. Fyfe suggested that his memory had improved in the 3.5 years since his discovery, it was clear to the court that this reconstructed memory of a call was in fact the result of (a) listening to Mr. Dunn's testimony, and (2) creating an ex post facto justification for some of the language in Mr. Dunn's email.
- g) While Mr. Fyfe suggest that the language used by Mr. Dunn in his email tracked what he would normally have said to someone in a conversation about a customer relationship, he acknowledges that the term "act for" is not language he would ever have used. I conclude that Mr. Fyfe was not reliable on the subject of the alleged phone call ahead of the October 28, 2013 email.
- h) Even if there was a discussion about the agency options over the phone in the days leading up to the October 28 email from Mr. Dunn, this email should have alerted Mr. Fyfe that Mr. Dunn did not understand what Mr. Fyfe alleges he explained.

- i) The fact that Mr. Dunn starts out his October 28 email by recognizing that Mr. Fyfe has done more than a realtor would normally do should have been another red flag for Mr. Fyfe, i.e., that he may have already crossed the line from what a listing agent in a mere customer relationship would normally do.
- j) Mr. Dunn's use of the term "act for both the seller and buyer" is very difficult to square with a mere customer relationship. "Act for" reasonably signifies a client relationship. Barron's Canadian Law Dictionary, 6th ed, defines "agent" as "one who acts for the benefit of another; one authorized by a party to act on that party's behalf." Black's Law Dictionary, 11th ed, defines "agent" as "someone who is authorized to act for or in place of another".
- k) Further, the use of the word "both" in his email suggests that Mr. Dunn was viewing the seller and himself as having an equivalent relationship with Mr. Fyfe, not a relationship in which the seller was at the higher "client" level and the he was down at the lower "customer" level.
- l) Finally, Mr. Dunn's suggestion that he had some control over how much commission Mr. Fyfe would receive should have been a further indication that Mr. Dunn assumed he was in a client relationship.
- m) The effect of the October 28 email is that Mr. Dunn must be taken to have been requesting Mr. Fyfe to act for him in a client relationship. That should have triggered Mr. Fyfe to clarify that he was not prepared to accept such a retainer.
- n) However, Mr. Fyfe never clarified his role after receipt of the October 28 email. Rather, he replied that he would be "happy" to prepare the documents. While it is true that the preparation of the documents itself is not inconsistent with a mere customer relationship, the positive response that he was "happy", without reservation, qualification, or correction, would reasonably have led Mr. Dunn to believe that Mr. Fyfe was accepting Mr. Dunn's proposal. Indeed, that was Mr. Dunn's evidence as to his understanding. By failing to clarify his role, we are left in a situation where there was a proposal by Mr. Dunn, and an apparent acceptance by Mr. Fyfe. This is precisely the type of fact pattern that calls out for the imposition of an implied agency.
- o) The fact that Mr. Fyfe's response referred to the potential for Mr. Dunn's lawyer putting in conditions concerning due diligence does not rebut the potential for Mr. Fyfe to be in an agency relationship with Mr. Dunn. An individual will often retain a realtor and a lawyer for the same real estate transaction.
- p) I find that the situation did change with the November 10, 2013 provision of the WWAR and the Contract. Each document contains extensive language that should have made it clear to Mr. Dunn that Mr. Fyfe was (now) declining to act in a formal agency relationship. The WWAR form was processed on two separate occasions because of Mr. Dunn's failure to initial the clarification of the limitation on the relationship on the first attempt. I conclude that there was enough information in these two documents to end any implied agency. The

problem for Mr. Fyfe is that he waited almost two weeks after the October 28 email to make his legal position clear.

[Emphasis in original.]

- [51] The appellants say the finding of an implied agency fails to account for the entirety of the circumstances surrounding the relationship between Mr. Fyfe and Mr. Dunn. This includes inferences they contend could have been drawn from Mr. Dunn's acknowledgment of a customer relationship on the WWR Form. The appellants say the fact of the acknowledgement supported their view that from the start, Mr. Dunn knew that Mr. Fyfe was not working for him and they were in a customer relationship. The appellants say the judge ignored this inference, as well as the absence of any evidence showing that Mr. Dunn relied upon assertions made by Mr. Fyfe or information provided by him, when Mr. Dunn executed the Contract of Purchase and Sale. This too, the appellants argue, was indicative of a non-agency relationship.
- [52] The appellants submit that had the judge engaged in the proper analysis, he would have reached the inescapable conclusion that the actions of Mr. Fyfe and Mr. Dunn were never consistent with an implied agency and, consequently, the respondents failed to prove it was reasonable for Mr. Dunn to infer that Mr. Fyfe had consented to that kind of a relationship.
- [53] The appellants do not dispute that an implied agency can be limited in time; however, they argue that in not taking a holistic approach to the evidence, the judge endorsed an "ephemeral" and "anomalous" 12-day implied agency that generates "considerable uncertainty" for real estate agents. If this Court upholds the finding, real estate agents will be in an untenable position. They might "owe the 'full suite' of fiduciary obligations at one moment and then be relieved of those obligations in the next": appellants' factum at paras. 69-70.
- [54] I agree with the respondents that this ground of appeal lacks substance and, in its essence, seeks to have the Court retry the evidence and reach its own conclusion as to whether Mr. Dunn reasonably inferred that Mr. Fyfe consented to act as his agent. That is not our role.
- [55] At para. 119 of his reasons, the judge correctly instructed himself on the legal test for an implied agency as set out in *Siemens v. Howard*, 2018 BCCA 197. The question to be asked in each case is "whether it is reasonable for the party asserting an agency relationship to [have inferred] from the conduct of the other party that [they] consented to an agency relationship" (at para. 12, emphasis added).
- [56] It is clear the judge answered this question with reference to the entirety of the evidence.
- [57] First, before engaging in the analysis, he reviewed the whole of the interaction between Mr. Fyfe and Mr. Dunn, including events that occurred after the agency came to an end (at paras. 11-45).

- [58] Then, specific to the question of an implied agency, the judge considered: the communication between Mr. Fyfe and Mr. Dunn; the nature of the inquiries Mr. Dunn made of Mr. Fyfe; the responses received; the absence of any clarifying discussion about the applicability or non-applicability of an agency relationship prior to November 10, 2013; Mr. Dunn's understanding, as made manifest in his October 28, 2013 email, that Mr. Fyfe would "act for both the seller and the buyer"; the absence of a response from Mr. Fyfe disabusing Mr. Dunn of any such notion or declining to act as his agent; and Mr. Fyfe's unqualified commitment to prepare the Contract of Purchase and Sale as requested before clarifying the nature of their relationship (at para. 121).
- [59] In Siemens, the Court explained that to determine whether an implied agency exists, a judge must examine the events asserted in support of an agency "in the context of all of the circumstances" (at para. 14). In my view, the judge did that. Ultimately, he interpreted the circumstances differently than the appellants. However, that does not mean he erred. The appellants do not suggest the judge misapprehended the relevant evidence. Rather, they disagree with the weight he assigned to parts of it and the inferences he drew.
- [60] The argument made under this ground of appeal is not dissimilar to one that was advanced and rejected in Siemens, namely, that the judge ignored or overlooked evidence that was central to the implied agency analysis. As noted at para. 20 of Siemens, the "standard of review on this ground of appeal is palpable and overriding error", citing *Van Mol v. Ashmore*, 1999 BCCA 6 at paras. 11-12, leave to appeal ref'd [1999] SCCA No. 117. In my view, the appellants have not established palpable and overriding error.
- [61] I am satisfied that on this record, and in these circumstances, it was open to the judge to conclude that until the differences between an agency and non-agency relationship had been brought to Mr. Dunn's attention by virtue of the WWR Form, and, importantly, Mr. Dunn was explicitly asked to acknowledge a customer relationship, it was reasonable for Mr. Dunn to infer from Mr. Fyfe's conduct that Mr. Fyfe was willing to act as his agent in purchasing the Fernie Property. Mr. Dunn testified that when he received the October 29 email from Mr. Fyfe stating that he was "happy to put the documents together", Mr. Dunn interpreted that email as Mr. Fyfe "acting on [Mr. Dunn's] behalf". He thought he had "hired Mr. Fyfe". It was his understanding that he did not need to hire anyone other than Mr. Fyfe, because Mr. Fyfe "could act for both the buyer and the seller".
- [62] In submissions before us (but not fleshed out in their factum), the appellants suggested that a finding of implied agency will be legally flawed unless there is evidence of actual reliance on the advice or information received from the alleged agent. This argument cannot succeed in light of the judge's findings of fact.
- [63] The judge found that Mr. Dunn "called upon Mr. Fyfe to perform substantial research on the road access and power line issues" (at para. 121(d), emphasis added); Mr. Fyfe provided "advice, rather than simply providing information" (at para 121(e)); Mr. Dunn was "requesting Mr. Fyfe to act for him in a client relationship" (at para. 121(m), emphasis

added); and Mr. Fyfe compiled a "formal sale purchase agreement" as requested by Mr. Dunn (at paras. 36-37). In my view, these findings show that Mr. Dunn looked to, trusted and impliedly relied upon Mr. Fyfe for information, for advice and for the production of documents in furtherance of his intention to purchase the Fernie Property.

- [64] The appellants' suggestion that the judge's implied agency finding puts real estate agents in an untenable position is without merit. First, whether an implied agency exists involves a case-by-case assessment. The judge's conclusion of an implied agency in this case is specific to the interaction between Mr. Fyfe and Mr. Dunn, as informed by the evidence. The agency persisted over a period of days and at a time when Mr. Dunn was informing himself about potential obstacles to development in preparing for a conditional offer. That was the context in which the judge found that Mr. Fyfe owed a duty to disclose the boundary review. In any event, all realtors need to do to avoid the situation that arose here is to clarify the nature of the relationship at the front end of their dealings with an unrepresented customer.
- [65] Although Mr. Fyfe testified that he discussed the limited nature of his role with Mr. Dunn prior to October 28, 2013, and encouraged him to obtain his own agent, the judge did not accept this evidence (at para. 121(f)). To the contrary, he found that Mr. Fyfe's testimony on this point was a "reconstructed memory" designed to create an "ex post facto justification for some of the language in Mr. Dunn's email" (at paras. 121(f)-(g)). This is a significant credibility and reliability finding adverse to Mr. Fyfe that was not challenged on appeal.

The "Content" of the Implied Agency was Contextually Informed

- [66] The judge held that in the absence of a formal limited dual agency agreement (which was allowed for in 2013), the content of Mr. Fyfe's duties in the implied agency were the same as the duties borne towards a "full client" (at para. 125). Consequently, Mr. Fyfe had a duty to disclose to Mr. Dunn "all known material information" in respect of the Fernie Property (at paras. 126, 148). This included the "known existence" of the boundary review and the ability to opt out (at para. 150). As Mr. Fyfe disclosed neither, he failed to meet the standard required of him (at para. 150).
- [67] The appellants say that in reaching this conclusion, the judge failed to appreciate that the nature and extent of the duties owed in an implied agency are informed by its context. Consequently, defining those duties requires an individualized assessment.
- [68] In *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2009 BCCA 224 at para. 91, the Court noted that the "reach of [the] fiduciary obligations" owed in a particular relationship will be determined by the "contractual or other circumstances that define the conduct of the fiduciary" (emphasis added). See also *Wang v. Laura W. Zhao Personal Real Estate Corporation*, 2021 BCCA 97 at para. 26, leave to appeal ref'd 39653 (29 September 2021), and *Pirani v. Pirani*, 2022 BCCA 65 at paras. 94-100. In the latter case, the legal framework for analyzing the scope of alleged fiduciary duties is discussed at some length, albeit within the specific context of a trust agreement.

[69] The appellants contend that had the judge contextually analyzed Mr. Fyfe's obligations to Mr. Dunn, rather than simply assume they would be the same as in a full client relationship, he would have realized that "this was a relationship in which the client (Mr. Dunn) was not looking to his agent (Mr. Fyfe) to protect his interests": appellants' factum at para. 81 (emphasis added). Instead, Mr. Dunn:

sought no advice from Mr. Fyfe regarding the material terms of the offer to purchase, disclosed virtually no details regarding his plans for the [Ferne] Property, and relied on his lawyer in Calgary to help him to finalize all the details. It was also an agency in which Mr. Fyfe had no discretion to unilaterally affect the position of Mr. Dunn. Mr. Dunn was merely a prospective buyer until he presented an offer, at which time there was no agency relationship.

the overall context indicates the existence of an adversarial relationship between Mr. Dunn and Mr. Fyfe. For instance, in his email of September 12, 2013, Mr. Dunn misled Mr. Fyfe into believing that he had a professional opinion that the listing price for the Property was too high. The evidence at trial was that Mr. Dunn had obtained no such professional opinion

Another factor limiting the content and scope of the agency relationship is the fact that the agency relationship came to an end before Mr. Dunn presented an offer to purchase the [Ferne] Property

it was an agency relationship limited by the circumstances of the case and by Mr. Dunn's understanding that Mr. Fyfe still represented the interests of the seller.

(Appellant's factum at paras. 84-87.)

[70] For substantially the same reasons I would not accede to the first ground of appeal, I agree with the respondents that in defining the scope of Mr. Fyfe's obligations as an implied agent, the judge did engage in a contextual analysis. His consideration of Mr. Fyfe's responsibilities, including his disclosure obligations, accounted for the contextual factors pressed by the appellants. This is readily apparent from the reasons. In particular, see paras. 114, 121(a), (c), (d), (n), (o).

[71] Moreover, at the trial, the respondents called William Phillips to provide expert opinion evidence on the "standard of care of a real estate agent in British Columbia in 2013." The appellants did not object to the admissibility of this evidence or to Mr. Phillips' qualifications as an expert witness. A report prepared by Mr. Phillips was marked as an exhibit at the trial, again without objection.

[72] Among other things, Mr. Phillips opined that:

Excepting [any] modifications as laid out in [a] Limited Dual Agency Agreement the agent, as the agent for both parties, is required to provide the following duties to the prospective purchaser as laid out in [Real Estate Council of BC] Rules, Part 3, Sec. 3-3 Duties to clients:

- f) disclose to the client all known material information respecting real estate services, and the real estate and the trade in real estate to which the services relate;

A listing agent, if the listing agent is also the agent for a prospective purchaser of the listed property and they have not entered [into] a Limited Dual Agency Agreement, has the identical duties to the prospective purchaser as if the listing agent acted solely for the prospective purchaser.

[Emphasis added.]

- [73] The judge relied on Mr. Phillips' evidence in assessing the nature and extent of the obligations owed by Mr. Fyfe (at paras. 125, 161). He was entitled to do so. Mr. Phillips' report and his testimony formed part of the overall evidentiary context for determination of the issue. The judge found that Mr. Phillips' evidence was not undermined in cross-examination (at paras. 130, 161). The appellants did not tender expert opinion evidence to the contrary.
- [74] In light of Mr. Phillips' evidence, the absence of a written dual agency agreement limiting the scope of Mr. Fyfe's duties, and the judge's finding that Mr. Dunn was "treating [Mr. Fyfe] as someone who could be asked to perform tasks at Mr. Dunn's direction and for his benefit" (at para. 121(d), emphasis added), I see neither legal nor palpable and overriding error in the conclusion that Mr. Fyfe's obligations were akin to those in a full client relationship and that they included an obligation to disclose the boundary review and the ability to opt out of incorporation into the ALR.
- [75] Objectively, these were plainly material pieces of information to Mr. Dunn as purchaser. The judge found Mr. Dunn's testimony that he told Mr. Fyfe in August 2013 of his intention to build a commercial lodge to be credible (at para. 166). At the very latest, Mr. Fyfe knew of this intention by October 2, 2013 (at para. 166(d)). And yet, he said nothing about the situation to Mr. Dunn, even when tasked with writing the conditional offer. In the particular circumstances of this case, I have no difficulty with the judge's conclusion that the duties owed by Mr. Fyfe as an implied agent included disclosure of this information. I agree with the judge that if the fact that 100 of the 160 acres was in the ALR was considered significant enough to disclose on the property disclosure statement, the potential for that number to substantially increase because of the ongoing boundary review was also material (at paras. 158-160).

There was no Reversal of Onus in the Latent Defect Inquiry

- [76] The judge's primary basis for finding liability was breach of the implied agency. However, in the alternative, he also considered whether the respondents proved a breach of a customer relationship. It was not disputed that, at the very least, Mr. Fyfe and Mr. Dunn were in a customer relationship (at para. 111). Indeed, that is the nature of the relationship Mr. Dunn was asked to acknowledge on the WWR Form.

[77] The judge found a breach of the customer relationship. He was satisfied that Mr. Fyfe had a duty to "promptly inform Mr. Dunn of the ALR Boundary Review, and to urge Mr. Dunn to seek independent advice on the suitability of the [Ferne Property] for Mr. Dunn's proposed use" (at paras. 129, 151, 155, 161, 167).

[78] In reaching that conclusion, the judge again relied on the evidence of Mr. Phillips. He accepted Mr. Phillips' "opinion on the standard of care applicable to a listing agent in a customer relationship" (at para. 130). The appellants do not say Mr. Phillips was not credible on this point or that his evidence was otherwise unreliable. His report said this:

A listing agent, who is aware of an unrepresented prospective purchaser's intended use of the listed property, and of the circumstances that may affect the intended use of that property, should consider as a material latent defect any current or reasonably foreseeable conflict between the uses. Before that purchaser begins written negotiation to purchase the property, the agent should make full written disclosure to the unrepresented prospective purchaser.

[Emphasis added.]

[79] In finding a breach of the customer relationship, the judge also considered the regulatory framework that applied to Mr. Fyfe, including the Real Estate Council of British Columbia, Professional Standards Manual, 7th ed. (2010). The Manual stipulates that a listing agent "must disclose all known material latent defects" (at para. 146). At the time of the dealings between the parties, R. 5-13 of the Rules of the Superintendent of Real Estate defined a "material latent defect" as a "material defect that cannot be discerned through a reasonable inspection of the property", including a defect "that renders the real estate unfit for the purpose for which a party is acquiring it" (at para. 145, emphasis added).

[80] The judge was satisfied that the potential incorporation of the Ferne Property into the ALR amounted to a "material latent defect" because it would interfere with Mr. Dunn's intended use of the land and would not have been discernable even had Mr. Dunn made independent inquiries about the ALR. The judge found it "speculative" that steps taken by Mr. Dunn to confirm the Ferne Property's original ALR status would have revealed the existence of the boundary review (at paras. 168(c)-(d)). The appellants say this finding is problematic because the judge placed an evidentiary onus on them to prove discoverability, rather than on Mr. Dunn to prove a material latent defect. I do not read the judge's reasons that way. Rather, in noting at para. 168(c) that the appellants did not call a District witness to confirm what would have been disclosed in response to any such inquiry, the judge was simply observing that there was no evidence to support the inference that the appellants were asking him to draw.

- [81] In reaching his conclusion about a breach of the customer relationship, the judge cited various authorities, including *McGuire v. Kernel Construction & Development Ltd.*, 2019 BCSC 58, in which it was accepted that a realtor has a duty to "disclose all material facts known to [them] which could affect a reasonable purchaser's willingness to enter into an agreement of purchase and sale" (at para. 118). The judge found that the case law was generally consistent with Mr. Phillips' evidence (at para. 130).
- [82] Given my conclusion on the first ground of appeal, it is not necessary for this Court to decide on the judge's alternative liability finding. Suffice to say, for the purpose of these reasons, the judge engaged in a careful and considered analysis of a breach within the context of a customer relationship; correctly instructed himself on the relevant legal principles; was alive to the arguments raised by the appellants (at paras. 164-171); and was satisfied that the respondents proved a material latent defect that was not disclosed to them. I see no principled basis for appellate interference with this conclusion.

The Judge Did Not Award Double Recovery

- [83] As stated, the appellants do not challenge the findings on causation or contributory negligence. Instead, it is their position that if the liability findings are upheld, there are substantial problems with the judge's assessment of damages.
- [84] For one, the appellants say the judge was wrong to award damages for expenses thrown away in developing Plan A and lost profits. They say this results in double recovery.
- [85] In my view, this argument can be dealt with summarily.
- [86] First, as correctly noted by the respondents, the appellants did not argue at the trial that if the judge awarded Plan A expenses and lost profits, it would result in double recovery. Instead, they said the claim for Plan A expenses was too high because by July 2014, the respondents would have known there were significant risks associated with pursuing that plan. Accordingly, they should have stopped work on Plan A until they received confirmation from both the District and the ALC that they could proceed. This was a mitigation argument (rejected by the judge at paras. 209-211). On appeal, the appellants have recast their challenge to this part of the assessment.
- [87] Second, and in any event, I see no basis for interference.
- [88] Damages awards attract significant deference on appeal. As explained in *Ostrikoff v. Oliveira*, 2015 BCCA 351 at para. 2, "[a]n award of damages is a fact-finding exercise that this Court will not interfere with lightly." Generally, an award will not be altered on appeal unless the appellant can show there was no evidence in support of the judge's conclusion, the judge assessed damages applying a mistaken or wrong principle, or the result reached was wholly erroneous: *Woelk v. Halvorson*, [1980] 2 S.C.R. 430 at 435.

- [89] The judge considered and rejected arguments that Plan A was pursued without a genuine intention to follow through; that Plan A would have been stymied in any event; or that it was not actually necessary to shift to Plan B. The judge found that the respondents "would have carried on with Plan A absent the ALR Problem" (at para. 177). They were "clearly on track to building Plan A when the negligence was uncovered" (at para. 177). There was evidence "Plan A should have been profitable, and hence there is no economic reason to assume that it would not have been pursued had the ALR Problem not intervened" (at para. 178). See also paras. 180-182.
- [90] Given these findings, I am satisfied there was a sufficient basis for the judge to award expenses thrown away as a distinct category of damages.
- [91] The judge's analytical approach accords with the governing legal principles. Reliance damages attempt to "put the injured party in the position it would have been in had the tort not been committed": *PreMD Inc. v. Ogilvy Renault LLP*, 2013 ONCA 412 at para. 65; *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45 at para. 108. Specific to expenses thrown away, a plaintiff is "entitled to recover only those expenses that were truly wasted": *PreMD* at paras. 67-68; *Hutchison v. Moore*, 2021 BCCA 301 at para. 112.
- [92] The respondents' claim for Plan A expenses was squarely grounded in design, engineering and planning costs incurred between January 2014 and January 2016, specific to their original plan (at para. 208). At the trial, an itemized list of Plan A expenses amounting to \$572,240 was entered as an exhibit and placed before Mr. Dunn when testifying. He confirmed that the list accurately represented "the total invoices paid for Plan A". This is the amount awarded by the judge.
- [93] The judge also found, as a fact, that had the respondents been able to proceed with Plan A, construction under that Plan would not have started until 2016 (at para. 220). There was no room for overlap between expenses thrown away and damages for lost profitability. Based on the judge's assessment of the likely start date for construction under Plan A, the anticipated facilities would not have been ready for operation in the period covered by the claimed expenses.

The Judge Appropriately Accounted for Negative Contingencies

- [94] The second of the appellants' challenges to the assessment of damages can also be summarily addressed.
- [95] The respondents claimed lost profits in the amount of \$1,134,084. To prove this loss, they tendered expert opinion reports prepared by Doug Bastin with Grant Thornton Consulting. The purpose of this evidence was to estimate profits the respondents would have achieved had they been able to pursue Plan A, rather than Plan B. Operations under the first phase of Plan B, in the form of a bed and breakfast, did not commence until August 2018.

- [96] The appellants challenged the reliability of Mr. Bastin's opinion and the judge agreed there were "difficulties" with his evidence (at para. 232). The judge's concerns included, but were not limited to, calculation errors that required correction; Mr. Bastin wrongly assumed a 2019 start date for the second phase of Plan B; he misunderstood the size of the guest accommodation available under Plan B; and, in formulating his opinion, Mr. Bastin did not assess in any concrete way the potential business impact of the collapse of the Alberta oil and gas industry or the COVID-19 pandemic (at para. 232).
- [97] The judge accepted that the appellants' negligence delayed the respondents in "getting their operations off the ground" and that, as a result of having to shift to Plan B, their "operations were initially more limited in terms of the number of rooms available" (at para. 236).
- [98] However, because of his concerns with Mr. Bastin's opinion, the judge found "it would not be appropriate to accept Mr. Bastin's report in its entirety" (at para. 235, emphasis added). Instead, he decided to approach the claim for lost profits as a "past income loss/delay claim" and, in assessing this loss, he only partially relied on Mr. Bastin's projections (at para. 236). The judge's assessment of lost profits accounted for the following factors (at para. 234):
- a) the collapse of the oil and gas industry damaged the market for the [respondents'] proposed retreat property;
 - b) Plan B Phase 1 lost money during its first two years of operation;
 - c) COVID-19 [threw] the whole tourism industry into disarray, particularly in relation to the international travellers that the [respondents] intend to target;
 - d) Plan B Phase 2 has not been built, and it is not absolutely certain that it ever will be built; and
 - e) There is no plan for the [respondents'] business to end in 2022.
- [99] The judge's comparative analysis of profits under Plans A and B yielded a difference of \$675,277, which was \$458,807 less than the amount claimed by the respondents.
- [100] In light of this analysis and the outcome, I see no merit to the appellants' argument that the judge failed to apply negative contingencies in assessing lost profits, or that he made an award under this head of damages that is "obviously unfair": appellants factum at paras. 112, 115, 116, 126.
- [101] To the contrary, the judge correctly instructed himself that a plaintiff cannot recover for loss that is "too remote or speculative" (at para. 206, citing *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63 at para. 77). He was plainly alive to the appellants' concerns about the reliability of Mr. Bastin's evidence and he gave those concerns meaningful effect. He ultimately selected an assessment methodology that he thought was better tailored to the circumstances of the case and represented a "more reasonable" approach (at para. 236).

[102] I appreciate that from the appellants' perspective, once the judge found reliability issues with Mr. Bastin's evidence, he should not have relied on any part of it, including the projections under Plan A. However, while the judge acknowledged reliability concerns, he did not find that Mr. Bastin was biased (at para. 233). Rather than disregard Mr. Bastin's evidence in its entirety, the judge decided it was appropriate to treat the matter as one of weight (at para. 233). This was a determination squarely within his purview as the trier of fact and the appellants have not persuaded me that the use of Mr. Bastin's evidence constitutes a palpable and overriding error.

The Judge Erred in Awarding Lost Profits for 2016 and 2017

[103] That brings me to the last of the alleged errors with the damages award.

[104] To assess lost profits caused by delay in construction and Plan B's reduced accommodations capacity, the judge compared Mr. Bastin's projected Plan A profits from 2016-2019 with the "actual results over the same period" (at para. 237). As noted, the comparison yielded a difference of \$675,277.

[105] The appellants say the judge made a palpable error in awarding business-related losses for 2016 and 2017. Even had Plan A proceeded as contemplated, the executive retreat would not have been operating in those years. Rather than remit the matter to the Supreme Court for a new assessment of lost profits, the appellants suggest this Court should adjust Mr. Bastin's 2018 and 2019 projections under Plan A to reflect the fact that these would be the first two years of operation (with the usual inherent vulnerabilities); apply a 10% negative contingency to account for the downturn in Alberta's economy; and then subtract the actual earnings of Plan B for those years. According to the appellants' calculation, this would result in a total loss of profits in the amount of \$200,718.

[106] The respondents say there is nothing erroneous about the judge's assessment of lost profits. His role was to assess, not calculate damages. This is necessarily an exercise in judgment, rather than one of precise calculation: *Rosvold v. Dunlop*, 2001 BCCA 1 at paras. 10-12, 18. Moreover, the judge did not make an actual finding as to when Plan A would be operable. As such, his assessment of lost profits reasonably reflects the fact that under Plan A, the respondents' business could have commenced at any time between 2016 and 2018. Finally, the reasonableness of the judge's approach is said to be readily apparent from the fact that he awarded damages only for past loss, denying the respondents' prospective claim. He found the prospective claim to be speculative and, appropriately, exercised his discretion to reject it. The respondents say the judge carefully assessed Mr. Bastin's evidence (the appellants did not adduce a conflicting opinion), and there was a sufficient evidentiary foundation for his conclusions.

[107] Given the judge's factual findings, the appellants have persuaded me that the award of lost profits for 2016 and 2017 reflects palpable error.

- [108] In his evidence, Mr. Dunn testified that construction on Plan A would likely have commenced in spring 2015 (reasons for judgment at para. 53). He said the construction would take about 19 months to complete (at para. 53).
- [109] The judge described Mr. Dunn's projection as "aggressive" and found that 2016 was "more reasonable" (at para. 220). If a 19-month timeline is applied from spring 2016, fall 2017 would be the earliest time that Plan A would reasonably have been available for occupancy. In light of this practicality, I consider it wholly erroneous to have awarded lost profits for 2016 and 2017. On the evidence, as assessed by the judge, there is a strong likelihood the respondents would have been focused on construction until at least fall 2017 and would not have been open for business.
- [110] Post-trial, the parties appeared before the judge to address the issue of interest. The appellants argued that interest on the damages should only run from January 2019 because there were no accrued business losses until then. The judge rejected this submission, saying it was "not possible to determine with certainty when Plan A would have been completed [and it] potentially could have been completed anywhere within the 2016-2018 period." In the appeal, the respondents say these comments support their position that 2016 and 2017 were appropriately included in the assessment of lost profits.
- [111] Although I consider the judge's comments to be properly before this Court as part of the record, I do not consider them determinative. First, the issue before the judge was the commencement of the appellants' interest obligation, not the entitlement to lost profits for 2016 and 2017. Second, this was not an application to re-open and reconsider the trial findings. In my view, when the reasons for judgment are read as a whole, it is clear the judge found that the respondents would not be positioned to open their Plan A business, in whole or in part, until fall 2017. That finding did not change after the hearing to settle the interest obligation.
- [112] How, then, do we rectify the error?
- [113] In my view, the appellant's suggestion of moving Mr. Bastin's analysis forward by two years makes sense. Applying that approach using calculations produced by the appellants (not challenged by the respondents on appeal), I accept that the total revenues for 2018 and 2019 under Plan A would have reasonably amounted to \$198,553 and \$417,990, respectively. Once operating expenses were deducted from those amounts, the respondents' profits under Plan A would have approximated \$28,592 for 2018 and \$155,074 for 2019.
- [114] The Plan B bed and breakfast business lost money in 2018 and 2019, in the amounts of \$29,871 and \$5,547, respectively. Accordingly, the respondents' past loss of profits for 2018 and 2019 is reasonably assessed at a cumulative \$219,084.

[115] I reject the appellants' suggestion that this amount should be reduced by a further 10% to account for the downturn in Alberta's economy. In my view, the judge already gave effect to that negative contingency in rejecting the respondents' claim for prospective business losses (at para. 234).

Disposition

[116] For the reasons provided, I would allow the appeal, but only to the extent necessary to rectify the damages award for lost profits.

[117] I would set aside the award of \$675,277 for lost profits and substitute, in its place, an award for \$219,084.

[118] I would not accede to any other grounds of appeal, leaving in place all other findings and awards made by the judge.

"The Honourable Madam Justice DeWitt-Van Oosten"

I AGREE:

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Mr. Justice Willcock"

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