
CANADA / JUDGMENT

Mariash v. 0715422 B.C. Ltd.

2012 BCSC 788

COURT

Supreme Court of British Columbia

DECIDED

30 March 2012

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2012 BCSC 788 Mariash v. 0715422 B.C. Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Mariash v. 0715422 B.C. Ltd.,

2012 BCSC 788

Date: 20120330

Docket: S118922

Registry: Vancouver

Between:

Kenneth W. Mariash

1444467 Alberta Inc.

Bayview Properties Ltd. and

Bayview Properties Limited Partnership

Plaintiffs

And:

0715422 B.C. Ltd.

Defendant

Before: The Honourable Mr. Justice Blok

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiffs:

S.M. Hirji

S.S. Galeski

Counsel for the Defendant

appearing via teleconference:

S. Wells

Place and Date of Hearing:

Vancouver, B.C.

March 29, 2012

Place and Date of Judgment:

Vancouver, B.C.

March 30, 2012

- [1] THE COURT: The defendant applies for an order cancelling the registration of certain certificates of pending litigation (CPLs) filed by the plaintiffs in this proceeding. The CPLs were filed against lands located near Sooke, British Columbia.
- [2] Specifically, the application is to strike the plaintiffs' claims for an interest in the subject lands, together with an alternative application for an order discharging the CPLs upon the posting of security.

A. Facts

- [3] For convenience, I set out the facts by referring to excerpts from the defendant's written submissions, which counsel for the plaintiffs agreed were accurate or substantially accurate, as well as other sources as detailed below:

Written Argument of the Defendant

8. The Defendant's principal, Michael Ryan, is a California businessman. He is in the real estate business, but he is not a developer and has no experience in real estate development in Canada.
9. The Defendant purchased the Lands in February, 2005 as an investment with the intent to redevelop them. The Lands presently comprise a resort known as the "Grouse Nest" situated on approximately 86 acres abutting Sooke Harbour.
10. The Defendant holds the legal title to the Lands in trust 75% for itself and 25% for a joint venturer.

11. The Defendant's sole business in the development of the Lands. Substantial holding and development costs have been incurred by the Defendant since taking title to the Lands in 2005. The Plaintiffs suggest that these facts make the recovery of damages against the Defendant questionable, however there is no actual evidence and nothing pleaded that suggests that the Defendant's financial position is precarious or that it would not abide by a court order of damages. The evidence also discloses that the Defendant will retain a 25% interest in the Lands after the prospective sale and that the Lands are assessed at \$6,000,000.
12. The Plaintiff Mr. Mariash is an experienced real estate developer.
13. The other Plaintiffs are companies of which Mr. Mariash is a principal.
16. In 2005, following the purchase of the Lands by the Defendant, Mr. Ryan was introduced to Mr. Mariash.
17. On behalf of the Defendant, Mr. Ryan discussed an arrangement with Mr. Mariash by which Mr. Mariash would, through a company, provide consulting services for the development of the Lands for a \$50,000 monthly fee for a period of 6 months with the possibility of ultimately becoming an equity joint venture partner if mutually agreeable terms were reached.
18. As a result of these discussions, the Defendant entered into a written agreement (the "Management Agreement") concerning the Lands with an entity named "Focus Equities BC Ltd.", of which Mr. Mariash was the purported principal.
19. The Management Agreement contained the following material terms:
 - (a) it was for a fixed term from July 1 to December 31, 2005;
 - (b) it could only be extended by agreement in writing;
 - (c) it provided for payment to Focus Equities BC Ltd. of the sum of \$50,000 per month during the term in management fees ("Management Fees") with a pro rated payment for July 2005;
 - (d) it provided that the parties would attempt to negotiate a mutually acceptable joint venture agreement, but were not bound to conclude one;
 - (e) it provided that Focus Equities BC Ltd. had the option to accrue the Management Fees rather than taking payment and then convert them into equivalent equity in the Lands in the event a joint venture agreement was concluded; and
 - (f) it provided that, if the negotiations for a joint venture agreement failed, Focus Equities BC Ltd. would be entitled to a \$50,000 termination fee provided it delivered up certain enumerated documents (the "Termination Fee").
- [4] I pause here to add a reference to two further terms of the Management Agreement, as follows:

- a) payment of the Management Fee was to terminate on December 31, 2005 unless extended pursuant to another clause in the agreement; and
- b) if the parties came to terms on a joint venture agreement then Focus Equities B.C. Ltd. would waive the Termination Fee.

[5] I return to the outline of the facts, derived from the defendant's submissions:

20. Between July and December 2005, Mr. Mariash and others working with him did provide management services related to the proposed development of the Lands pursuant to the Management Agreement.

21 Mr. Mariash claimed payment of the \$50,000 monthly Management Fees and did not seek to accrue them as potential equity. There is an issue concerning the \$50,000 fees for December 2005, which is addressed below, but there is no dispute that all the other Management Fees due from July to November, 2005, totalling \$217,741 have been paid or that the Plaintiffs are claiming payment of the \$50,000.

22. On December 31, 2005, the Management Agreement terminated. There was no agreement to extend the Management Agreement, and no joint venture agreement had been concluded.

23. The Plaintiffs acknowledge the Management Agreement (they are claiming there is money still payable under it). However, in the pleading they are also claiming compensation on the basis of quantum meruit for "initial management services" rendered during the term of the Management Agreement.

24. Mr. Mariash deposes that he entered into the Management Agreement in 2005 with the "goal" and "intention" of forming a joint venture and also attributes the latter intention to Mr. Ryan. This is not inconsistent with the Management Agreement which provides a non-binding mechanism by which the parties would attempt to negotiate a joint venture.

25. However, Mr. Mariash further deposes that it was always his "understanding" that he would be able to share in the increase in value to the Lands that his work and development services provided, although he does not assert that there was an actual common understanding or agreement to this effect with Mr. Ryan.

28. On or about December 30, 2005, the Defendant offered to extend the Management Agreement for a period of one month by sending a copy of the proposed written Extension Agreement to counsel for Mr. Mariash (the "Extension Agreement").

29. An executed copy of the Extension Agreement by Mr. Ryan for the Defendant was provided to Mr. Mariash, however Mr. Mariash never executed or returned the Extension Agreement and did not provide a counter-proposal.

30. The proposed Extension Agreement signed by the Defendant expressly provided that no further Management Fee would be payable for the extended term (e.g. after December 31, 2005).

31. Mr. Ryan says that the purpose of the proposed Extension Agreement was to extend the time period provided in the Management Agreement for the negotiation of a mutually acceptable joint venture agreement between the parties, and that he deliberately omitted any further Management Fees because he was not prepared to pay them any more. He also says that there was no work to do and Mr. Mariash told him he was not working on the project although this is disputed.
32. Although the Extension Agreement was not signed, the Defendant did continue negotiations with Mr. Mariash, but ultimately did not form a joint venture agreement. By letters to Mr. Mariash's counsel dated August 2 and 25, 2006, counsel for the Defendant notified Mr. Mariash that it was terminating the negotiations.
33. Mr. Ryan says the Defendant did not agree to pay Mr. Mariash for any services provided in 2006. Moreover, he says the Defendant would not have agreed to compensate Mr. Mariash or any of his companies for any services during this period, much less at the rate of \$50,000 per month as Mr. Mariash claimed.
34. Mr. Mariash disputes this. He also claims he did further work because he reached a "deal" with Mr. Ryan in January 2006 by which he was granted a 50% equity interest in the Lands (the "50% Deal"). He does not specify the consideration or other terms of the 50% Deal, but says he would not have expended further efforts if he had not had such a deal.

Affidavit #1 of Kenneth W. Mariash

40. From January 2006 to August 2006, Mr. Ryan and I, through our solicitors, continued to negotiate the terms of the joint venture agreement. During this same period of time, I continued to work on the redevelopment of the Property, and 071 continued to accept and request my services and the services of my team members.
41. I did this because Mr. Ryan and I had a deal. The deal was that I had a 50% equity position in this development. This deal was reached in early 2006 and I took Mr. Ryan at his word that he would honour it. Further, and to put it bluntly, I would not have continued with my efforts on Mr. Ryan's behalf without such a deal because there would not nearly have been enough money involved to warrant my participation in this project. Whether or to what extent a joint venture agreement was concluded was a different issue, although my expectation at the time was that a joint venture agreement would be concluded as we had agreed on all the fundamental terms by early 2006.

Written Argument of the Defendant

36. (a)

(iii) from the time the Defendant terminated the negotiations in August, 2006 until this action was commenced over 5 years later, the Plaintiffs never once objected to that termination or mentioned any claim to an interest in the Lands, much less a claim to 50% of the Lands.

(iv) Notwithstanding this "50% Deal", Mr. Mariash also sent invoices in early 2006 claiming \$50,000 in monthly management fees in 2006. Mr. Ryan says these were disputed, but Mr. Mariash claims they were not. Either way, they are inconsistent with such disputed work being the consideration for the 50% Deal.

(v) The February 6, 2007 demand letter also did not object to the August 2006 termination of negotiations, did not assert the 50% Deal or any other claim to an interest in Lands. Instead, it claimed compensation for Mr. Mariash's services in 2006 at \$50,000 per month.

[6] Mr. Ryan responded as follows to Mr. Mariash's demand letter of February 6, 2007:

0715422 B.C. Ltd.

[address]

February 28, 2007

Focus Equities B.C. Ltd.

[address]

Attention: Kenneth Mariash

Dear Ken:

Re: Sooke Project

I was extremely surprised to receive your letter of February 6, 2007. Almost 6 months have passed since the termination of our negotiations with little if any contact from you. Further, with the possible exception of your claim for the termination fee, the financial demands which you have made in your letter are without substance or merit.

In light of your letter, I feel it is important to clarify the factual circumstances:

1. We entered into a Management Agreement with effect on July 1, 2005 by which you were to provide planning and land development services in respect of the Project. The Management Agreement was for a term of 6 months expiring on December 31, 2005.
2. The Management Agreement contemplated the parties negotiating in good faith and in a timely manner a joint venture agreement prior to December 31, 2005, failing which the Management Agreement would terminate. We were unable to finalize a mutually satisfactory joint venture agreement prior to the end of 2005.
3. In order to permit further time for the parties to negotiate the joint venture agreement, I proposed a simple extension of the term of the Management Agreement by email on December 30, 2005. The extension agreement which I proposed would have extended the term of the Management Agreement to January 31, 2006 without any management fee. You never signed and returned the document to us. Accordingly, the Management Agreement terminated on December 31, 2005.

4. Despite the termination of the Management Agreement, we continued to negotiate with you in good faith in an effort to reach mutually satisfactory terms of a Joint Venture Agreement.
5. On January 26th, 2006, we met in John Third's office. At that time you advised that you were unwilling to enter into a joint venture agreement on the basic terms which we had previously agreed to and which were outlined in Part 4 of the Management Agreement. The fact that the terms you were demanding deviated from the previously agreed terms was brought to your attention at the meeting and you indicated at that time that you were not interested in entering into a joint venture agreement unless the terms changed.
6. Despite your position, we continued with our good faith negotiations. Numerous drafts of the agreement were exchanged between our respective legal counsel through the Spring of 2006. In almost every instance, you demanded a change to a fundamental business term which had previously been agreed to by both of us.
7. By May 2006, we had been negotiating for over 6 months without reaching a mutually acceptable agreement. Accordingly, on May 30th, 2006, we again met in Mr. Third's with a view to attempting resolve any remaining issues of disagreement. Following the meeting, it was my expectation that we would shortly receive a revised draft of the agreement from your legal counsel which would reflect the terms discussed in our May 30 meeting. This is not what transpired.
8. Almost 2 months passed before we received a revised draft of the agreement from Mr. Third. On July 26, 2006, your legal counsel presented me with a revised draft of the document which was a total revision to the previous document. Further, the revised draft contained business terms which you were aware were less acceptable to us than the previous draft.
9. I was out of the country in late July and early August and was unable to immediately review the July 26th draft. Mr. Schmidt advised me of the extensive changes to the draft. Accordingly, on August 2, 2006 I had my legal counsel notify Mr. Third that I was concerned that the parties were getting no closer to finalizing a mutually satisfactory agreement but that I would respond to you once I returned in mid August.
10. After returning to California in mid-August I had an opportunity to review the revised draft in detail. It was apparent that the revised draft was a complete rewrite of the previous document. More significantly, the document contained substantial changes in the fundamental business terms evidencing that the parties were not any closer to reaching mutually agreeable terms. On the contrary, the parties positions were moving further apart and it was clear that it was impossible to reach a mutually acceptable agreement. Accordingly, I instructed our solicitors to deliver to you the letter of August 25, 2006 which terminated further negotiations.

11. Consistent with the expiration of the Management Agreement, little work was expended by you in connection with the Project after November, 2005. The Project was effectively on hold during this time and the failure of the parties to reach a mutually agreeable joint venture agreement was impacting on the progress of the Project. This weighed heavily on my decision to terminate any further negotiations.

The accounting which you have provided contains numerous charges for which you have demanded payment. The following is my view on these claims:

- (a) Management Fees - The management agreement terminated on December 31, 2005. There is no entitlement to management fees in 2006.
- (b) Fraser Milner Casgrain LLP - The account for services of Fraser Milner Casgrain is with respect to services rendered to you in attempting to negotiate the joint venture agreement. These services were for you (and not the Project) and are to your account.
- (c) Termination Payment - Upon return of originals of all books, records, reports, studies, permits, plans, contracts, correspondence, and other documents relating to the Project as contemplated by section 3.3 of the Management Agreement, and the delivery of an executed Release of all obligations in relation to the Management Agreement and the Project, I will arrange for payment to you of the termination fee in the amount of \$50,000. I would be will agreeable to executing a Mutual Release if you wish.
- (d) Other Charges - These costs were incurred by you during the calendar year 2006 without my authorization and not reimbursable.

As I indicated to you in my telephone message of last Fall, we are proceeding with our efforts to complete the Project and will be doing so without the participation of yourself or Focus Equities. We appreciate the efforts which you expended in 2005 with respect to the Project for which you have been compensated in accordance with the terms of the Management Agreement.

- [7] Returning to the outline of facts as derived from excerpts from the submissions and other sources:

Written Argument of the Defendant

39. Mr. Ryan deposes that Mr. Mariash stopped working on the development of the Lands following the termination of the Management Agreement on December 31, 2005. To the extent Mr. Mariash maintained a public association with the development project, the Defendant understood that he was doing so to encourage goodwill in hopes of concluding a joint venture with the Defendant and to promote his reputation as a developer of substantial projects.
40. Mr. Mariash disputes this and claims that valuable services were provided in 2006 but the specifics he gives disclose very little activity to support this:

- (a) He claims to have monitored Royal Assent being given on February 22, 2006 to the annexation of the Lands to Sooke that was approved by referendum in November 2005. to this end he claims he maintained contact with a government official and minister in January and February.
 - (b) He admits that he did not pursue any rezoning work until after the Royal Assent, but he does not depose to pursuing rezoning afterwards either. To the contrary, he deposes only to "considering options" on rezoning.
 - (c) He claims to have focused on public relations stating that he 'set up a booth at a Rotary Fair" and was "liaising with local media", presumably in Sooke.
 - (d) As noted, he claims to have "considered options" for redevelopment, but cites no useful documents, plans or studies that were provided to the Defendant as a result.
 - (e) He claims he monitored other rezoning applications of other developers and reviewed minutes of public meetings.
41. Mr. Mariash also deposes to performing management work on the site and assisting it in dealing with neighbours, but he gives no meaningful particulars and the documents he cites to do not support this evidence.

Affidavit #1 of Kenneth Mariash

60. Up to that point, I had committed a significant amount of time and effort in 2005 and 2006 towards the success of the development. The work done up to that point had significantly increased the value of the Property, because the annexation by the District of Sooke was a necessary element of any successful future rezoning application. A rezoning application that permitted the construction of 800 to 1000 new housing units would result in a development with a value of approximately \$40 to \$50 million, based on revenue of \$50,000 per unit constructed.

Written Argument of the Defendant

44. Put in the most favourable light for Mr. Mariash, the annexation, which was approved in November 2005, had "occurred" by February 22, 2006 when Royal Assent was given, such that any efforts he made towards it happening for which he was not paid a monthly fee under the Management Agreement, occurred in under two months in early 2006.
52. The claim for the Termination Fee is a monetary damages claim and the amount claimed does not support a claim for an interest in Lands. However, the fact the Plaintiffs are claiming it requires that the Plaintiffs accept the termination of the obligations of the Defendant under the Management Agreement to negotiate to try to enter into any agreement that would grant them an interest in the Lands. It is thus inconsistent with any claim to an interest in Lands arising from services provided under the Management Agreement.

53. The Defendant acknowledges that the \$50,000 Termination Fee remains unpaid. However it will not become due and owing until Focus Equities BC Ltd. returns to the Defendant "the originals of all books, records, reports, studies, permits, plans, contracts, correspondence and other documents in its possession or control relating to the Lands and the Development Approvals" as set out under clause 3.3 of the Management Agreement.
54. The Defendant has said that it will pay the Termination Fee upon receipt of the materials required to be returned by Focus Equities BC Ltd. under the Management Agreement. The Defendant set out its position on the Termination Fee to Mr. Mariash in a letter dated February 28, 2007.
67. On or about January 25, 2012, the Plaintiffs notified the Defendant of this action by serving the Notice of Civil Claim and the Certificates on its counsel.
68. The Certificates are blocking the pending sale of a 75% beneficial interest in the Lands, and are thereby causing hardship and inconvenience to the Defendant.
69. For some time prior to receiving notice of this action and the registration of the Certificates, the Defendant had been engaged in negotiations to sell a portion of both the Defendant's and its joint venturer's beneficial interest in the Lands to a purchaser, whose identity is confidential.
70. The pending sale is intended to cause:
 - (a) the purchaser to acquire a 75% beneficial interest in the Lands;
 - (b) the Defendant to retain a 25% beneficial interest in the Lands;
 - (c) the Defendant's current joint venturer to sell its beneficial interest in the Lands and retain only a passive and contingent interest in the new development; and
 - (d) the Defendant and the purchaser to form a limited liability partnership for the purpose of moving forward with a multi-unit residential redevelopment of the Lands.
71. Prior to the filing of the Certificates, the Defendant and its advisors believed the sale was very close to completion. The Defendant believes that substantial agreement had been reached on all the major issues and material terms of the transaction, and as of January 4, 2012, the parties were working toward a target closing date of January 15, 2012.
72. However, as a result of the filing of the Certificates, the purchaser has subsequently refused to close the sale until the Certificates are removed.
73. The documentation of the pending sale was not finalized prior to receiving notice of the Certificates and no signed executory agreement is in place.

- [8] To this I would add the following: the general context is that the lands in question were located within the Capital Regional District and, as I understood it, were subject to a regime or governance that was not in favour of development of the lands in the manner hoped for by the defendant.
- [9] Mr. Mariash was retained to assist the defendant in a bid to have the District of Sooke -- that is the municipality itself -- annex the properties, following which it was expected that rezoning of a type favourable to the defendant could be achieved. In fact, in November 2005 an annexation referendum was conducted and the voters of Sooke voted in favour of annexing the subject lands. That annexation required Royal Assent to complete and the required Royal Assent was given in February 2006.

B. Submissions

(a) The Defendant

- [10] The defendant says, firstly, that there is no basis on the face of the pleadings or in the evidence on which the plaintiffs can make out a proprietary interest in the lands. Secondly, and in the alternative, the defendant seeks cancellation of the CPLs pursuant to the provisions of the Land Title Act on the posting of security. As to the amount of the security, the defendant suggests it should be in a nominal amount, given the weakness of the plaintiffs' proprietary claims.
- [11] The defendant advanced its application for cancellation of the CPLs for failure to make out a proprietary interest in the lands on two main bases: (1) on the basis of inherent jurisdiction of the court and (2) by way of summary judgment.
- [12] As to the existence of a proper proprietary claim, the defendant submits that it is important to bear in mind the two relevant time periods in this case. Up to December 31, 2005, the relationship of the parties was governed by the management agreement. It conferred no property rights, though it spoke of negotiating a joint venture agreement that would presumably have granted an interest in property had the parties come to terms on it. So the services provided give rise to, at most, a claim in debt.
- [13] After December 31, 2005, the claim is one for unjust enrichment. On this claim, the plaintiff submits that the claim for unjust enrichment, even if successful, will only rarely result in a proprietary remedy. The first remedy to consider is always a monetary award, because in most cases this will be sufficient to remedy the unjust enrichment.
- [14] The defendant submitted further that a constructive trust will not be the appropriate remedy in the vast majority of cases. It will not be awarded where there is no reason to grant the plaintiff the additional rights that flow from the recognition of a right of property. In commercial cases, those additional rights are typically needed only where recovery is doubtful, where it is appropriate that the plaintiff receive priority in an insolvency, or where the defendant obtained the benefit in question through deliberate wrongdoing: *Kerr v. Baranow*, 2011 SCC 10, at paras. 46-47; *Lac Minerals Ltd. v. Intl. Corona Resources Ltd.*,

[1989] 2 S.C.R. 574 at 678; *Atlas Cabinets & Furniture Ltd. v. National Trust Co.* (1990), 45 B.C.L.R. (2d) 99 at 113 (C.A.).

- [15] The defendant submits that a constructive trust is therefore not necessary to permit an unjustly deprived plaintiff to capture his share of any increase in the value of the property in question; rather, this can be achieved by a monetary award in any event.
- [16] Counsel said further that a monetary award will clearly be sufficient to compensate the plaintiffs for any loss they may ultimately be able to establish. Indeed, the plaintiffs' original demand in 2007, and its primary claim in this case, is for a money amount. Even the constructive trust they seek is in respect of amounts they say are owing. Here there is no risk that the defendant might not be able to satisfy a monetary judgment. There is here no threat of insolvency, nor any need for a proprietary priority, and there is no allegation of deliberate wrongdoing.
- [17] The defendant submits further as follows:
89. The second factor militating against a constructive trust in the present case is that a constructive trust is an appropriate remedy only if the plaintiffs can demonstrate an link or causal connection between their contribution and the acquisition, preservation, maintenance or improvement of the disputed property. The Supreme Court of Canada has consistently held that the link must be "sufficiently substantial and direct" and that a minor or indirect contribution will not suffice: *Kerr v. Baranow*, *supra* at paras. 50-51.
90. Here, the Plaintiffs have asserted that their alleged contributions enhanced the value of the Lands. However, as set out in detail above, the evidence adduced by Mr. Mariash to support this assertion falls short of explaining any link between the value of the Lands and the services provided and shows only a minor amount of work in 2006. The one exception is the work done toward the annexation of the Lands, however any benefit conferred to the Defendant in this respect was provided by November 2005 pursuant to the Management Agreement, which means, as addressed below, that it cannot be the subject of a claim for unjust enrichment. As such, there is here no sufficient causal nexus between the Plaintiffs' non-contractual contributions, if any, and the Lands.
- [18] On the matter of services provided, the defendant characterized them as follows in paragraph 40:
- 40 (a) He claims to have monitored Royal Assent being given on February 22, 2006 to the annexation of the Lands to Sooke that was approved by referendum in November 2005. to this end he claims he maintained contact with a government official and minister in January and February.
- (b) He admits that he did not pursue any rezoning work until after the Royal Assent, but he does not depose to pursuing rezoning afterwards either. To the contrary, he deposes only to "considering options" on rezoning.

- (c) He claims to have focused on public relations stating that he 'set up a booth at a Rotary Fair' and was "liaising with local media", presumably in Sooke.
 - (d) As noted, he claims to have "considered options" for redevelopment, but cites no useful documents, plans or studies that were provided to the Defendant as a result.
 - (e) He claims he monitored other rezoning applications of other developers and reviewed minutes of public meetings.
- [19] The defendant's third submission on this issue is that unjust enrichment is an equitable remedy and as such is subject to the equitable defence of laches. The defendant said the following about laches:
93. Here, the Plaintiffs' long unexplained delay in asserting their claim to an interest in the Lands, combined with the Defendant's reasonable assumption that it was free to develop the Lands and sell them without interference by the Plaintiffs, meant that the defendant continued its substantial investment in the development of the Lands after 2006, and that it spent time and money negotiating the pending sale now put in jeopardy by the Plaintiffs' assertion of a proprietary interest. Had the Defendant known that the Plaintiffs were lying in the weeds with their claim, it would not have invested its time, efforts and money as it did. All of this would make it profoundly unjust to grant the Plaintiffs a constructive trust. Accordingly, the doctrine of laches bars the Plaintiffs' claim for a proprietary remedy.
- [20] The defendant's fourth submission is based on the frailty of the unjust enrichment claim, as set out in the following paragraphs of its submissions:
96. The legal framework for an unjust enrichment claim is clear. The Plaintiffs must establish three elements: (1) an enrichment of or benefit to the Defendant; (2) a corresponding deprivation of the Plaintiffs; and (3) the absence of a juristic reason for the enrichment. While the legal principles underlying the law of unjust enrichment are the same for all cases, the courts must apply those common principles in ways that respond to the particular context in which they are to operate.
97. The courts have emphasized that the elements of unjust enrichment are not simple to apply "in the context of a commercial relationship, where the essence of the relationship is the enrichment of the participants, perhaps at the expense of each other, all in the name of fair and honest business dealing."
98. In *Atlas Cabinets & Furniture*, the British Columbia Court of Appeal clarified the proper approach to the principles of unjust enrichment in a commercial setting:

But it is important to understand what is meant by "enrichment", by "deprivation" and by "juristic reason" in the context of a commercial relationship where ordinary and extraordinary flows of funds are part of the reality and purpose of the relationship. To my mind the key to the correct interpretation and application of the decisions of the Supreme Court of Canada on this subject to a commercial relationship is to focus on the "unjust" element of "unjust enrichment". [. , .] In my

opinion the element of injustice or want of commercial good conscience which should guide the application of the three-part test in *Pettkus v. Becker* in a commercial context is established in this case.

99. Here, there are numerous reasons why the Plaintiffs cannot make out an unjust enrichment. Fundamentally, nothing the Defendant did was against "sound commercial conscience".
100. The Plaintiffs seek restitution in respect of the management services provided in 2005 when the Management Agreement was in effect (the "initial management services"), the continued services allegedly provided following the termination of the Management Agreement (the "further management services"), and the Third Party Payments.
101. The Plaintiffs have claimed that the Defendant has benefitted from the provision of all of these services because they have increased the value of the Lands. Even if it is assumed to be true for the purpose of this application, it is clear that there was no corresponding deprivation and/or absence of juristic reason if any enrichment occurred.
102. Dealing first with the "initial management services", as set out above, it is not disputed that these services were provided pursuant to Mr. Mariash's contractual obligations under the Management Agreement. It is trite law that a contractual obligation to provide a benefit is a juristic reason for the enrichment of the receiving party. As such, no unjust enrichment could have occurred as a result of any benefits gained by the Defendant as a result of the "initial management services".
103. With respect to the Further Management Services and Third Party Payments, the Plaintiffs have admitted that these services were continued despite the termination of the Management Agreement, and despite the offer to extend it only if no fee was paid, because Mr. Mariash anticipated that he would reach a joint venture agreement as a result of his negotiations with the Defendant.
104. This Court has held that where parties are negotiating towards an agreement that will replace their existing agreement, benefits voluntarily provided by one party to the other in anticipation of that new agreement do not constitute unjust enrichment.
107. Although it is questionable whether the Plaintiffs have adduced any actual evidence in support of its claim that the Defendant requested services in 2006, even if it is assumed that the Plaintiffs believed this to be the case, as in *Minardi*, the Plaintiffs are sophisticated and experienced developers who were aware that they were acting without a binding contract in place. They were not bound to provide any service to the Defendant and there is no reason why the Defendant should be held responsible for their decision to do so without securing an agreement for payment.

108. The Plaintiffs' claim for unjust enrichment is bound to fail. Nothing has been alleged that could give rise to a finding that there was anything unjust about the enrichment and deprivation alleged by the Plaintiffs. Without a claim in equity, there can be no claim to constructive trust as a remedy.
- [21] As a comment on that latter point, concerning a case called *Minardi v. Clearly Canadian*, 2001 BCSC 108, I say I agree that this case has similarities to *Minardi*.
- [22] The second prong of the defendant's application is for a dismissal of the plaintiff's claim for an interest in the lands under Rule 9-6, the summary judgment rule. The test on this is that there must be no genuine issue to be tried. Here the defendant submits that the plaintiffs have failed to plead or adduce any material facts that would support the elements of absence of juristic reason and unsound commercial conscience, elements that are required to give rise to the plaintiff's claims of unjust enrichment.
- [23] Defence counsel said that there was merely a bare pleading without material facts. Accordingly, counsel submitted that since there are insufficient facts to ground the plaintiffs' claim in equity, there are also insufficient facts to support the claim for constructive trust over the lands. Moreover, even if a claim of unjust enrichment is made out, the defendant says that the plaintiffs have failed to allege or adduce any material facts capable of establishing that a monetary judgment would not be an adequate remedy in the circumstances.
- [24] The alternative submission of the defendant is that the CPLs should be cancelled, pursuant to the provisions of the Land Title Act. The provisions in question are ss. 256 and 257:
- 256 (1) A person who is the registered owner of or claims to be entitled to an estate or interest in land against which a certificate of pending litigation has been registered may, on setting out in an affidavit
- (a) particulars of the registration of the certificate of pending litigation,
 - (b) that hardship and inconvenience are experienced or are likely to be experienced by the registration, and
 - (c) the grounds for those statements,
- apply for an order that the registration of the certificate be cancelled.
- (2) An owner whose indefeasible title or charge is registered subject to a certificate of pending litigation under section 217 (2) (a) or (c) (ii) may, on setting out in an affidavit
- (a) that the pleading or petition by which the proceeding was commenced or notice of application attached to the certificate contains no allegation that the owner is not a purchaser in good faith and for valuable consideration,

- (b) that the owner applied to register the owner's indefeasible title or charge before the certificate was received by the registrar, and
- (c) particulars of dates and times of receipt, application and registration of the owner's application and the certificate,

apply for an order that the registration of the certificate be cancelled.

- (3) An application under this section must be made to the court in which the proceeding was commenced and must be brought

- (a) as an application in that proceeding, if the applicant is a party to the proceeding, or
- (b) by petition, if the applicant is not a party.

257 (1) On the hearing of the application referred to in section 256 (1), the court

- (a) may order the cancellation of the registration of the certificate of pending litigation either in whole or in part, on
 - (i) being satisfied that an order requiring security to be given is proper in the circumstances and that damages will provide adequate relief to the party in whose name the certificate of pending litigation has been registered, and
 - (ii) the applicant giving to the party the security so ordered in an amount satisfactory to the court, or
- (b) may refuse to order the cancellation of the registration, and in that case may order the party
 - (i) to enter into an undertaking to abide by any order that the court may make as to damages properly payable to the owner as a result of the registration of the certificate of pending litigation, and
 - (ii) to give security in an amount satisfactory to the court and conditioned on the fulfilment of the undertaking and compliance with further terms and conditions, if any, the court may consider proper.

- (2) The form of the undertaking must be settled by the registrar of the court.

- (3) In setting the amount of the security to be given, the court may take into consideration the probability of the party's success in the action in respect of which the certificate of pending litigation was registered.

- (4) On hearing the application referred to in section 256 (2) and on being satisfied that

- (a) the facts set out in the affidavit are consistent with the records of the land title office, and
- (b) there is nothing in the pleading or petition by which the proceeding was commenced or notice of application attached to the certificate that expressly or by necessary implication alleges that the owner is not a purchaser in good faith and for valuable consideration,

the court may make an order declaring that the owner's indefeasible title or charge is not affected by the certificate of pending litigation or the outcome of the proceeding.

- (5) On receipt of an order made under subsection (4), the registrar must file it and cancel the registration of the certificate of pending litigation.
- [25] A prerequisite for such an order is that "hardship and convenience are experienced or are likely to be experienced by the registration". The defendant submits that it has established hardship and inconvenience.
- [26] It submits as well that it has established the further requirement under s. 257 that damages would be adequate, saying the following in its submissions:
135. When determining whether damages will provide adequate relief in lieu of a plaintiff's claim to an interest in land, a preliminary assessment of the merits of the plaintiff's claim is appropriate [citing *Park and Tilford Canada Inc. v. Festival Markets Inc.* (1986), 30 D.L.R. (4th) 220, 6 B.C.L.R. (2d) 160 (S.C.) and *EVO Properties Ltd. v. 637934 B.C. Ltd.*, 2004 BCSC 1203].
- [27] Finally, as to the amount of the security, the defendant submitted that it would be sufficient that there merely be an undertaking or nominal security.
- [28] In supplementary submissions, the defendant addressed the very recent amended notice of claim filed by the plaintiffs. This amended notice of civil claim was filed on March 28, 2012, just the day before the hearing of the defendant's application. In their amended pleading, the plaintiffs now assert that there was an agreement, partly oral and partly based on conduct, that Mr. Mariash would get a 50 percent interest in the property, and on that basis the plaintiff now seeks an order of specific performance.
- [29] The defendant poured scorn on this assertion and on the alleged deal generally, describing the amendment as a strategic fabrication. The defendant submits that under the terms of the management agreement, Mr. Mariash or his unincorporated entity, Focus Equities, was paid \$50,000 per month for his services, could have accrued those fees and converted them into equity for a prospective joint venture, but never did, yet says that these same services plus some minor additional services rendered in 2006 were the foundation for the granting of a 50 percent interest in property valued at eight million dollars, for at least some purposes at least, in January 2006.
- [30] Leaving that aside, the defendant says that the evidence fails to disclose a valid and enforceable contract, that the terms of the supposed contract are wholly inconsistent with the evidence of the parties' negotiations at the time, conducted through solicitors, that laches would be a complete bar to the plaintiffs' new claim, and that, in any event, damages would be an adequate remedy, given that the property would merely constitute a commercial investment and be entirely compensable in damages, citing *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415, 136 D.L.R. (4th) 1.

(b) The Plaintiffs

- [31] Firstly, as to the dismissal of the unjust enrichment claims or the constructive trust claims, the plaintiffs submit that while there is an evidentiary dispute, there is nonetheless a genuine issue to be tried. Under Rule 9-6, the court is not to weigh evidence, and here there is evidence on which a claim for unjust enrichment could succeed and, further, on which a constructive trust might be ordered.
- [32] On the matter of the application pursuant to the court's inherent jurisdiction to cancel the CPLs, plaintiffs' counsel submitted as follows:
45. While the Court may cancel a CPL based on its determination that a claim for an interest in land lacks merit, this power should only be exercised in rare circumstances and with great caution: 309355 B.C. Ltd. v. Cambie Pacific Enterprises Ltd., [1988] B.C.J. No. 1529 (S.C.).
46. In order to cancel a CPL based upon the Court's inherent jurisdiction, the Court may consider the merits of the Plaintiff's claim but only: ".so far as doing so enables the Court to determine that the Plaintiff's claim may be frivolous, a nuisance, an abuse of process, or, there is no chance for success.": Avia West Resorts v. Memory Lane Developments Inc., (2004), 22 R.P.R. (4th) 255 (B.C.S.C.) at paras. 8 and 12.
- [33] The plaintiffs submit that the evidence of Mr. Mariash is that the services he provided in 2005 and 2006 enhanced the value of the property, and in particular, the services he provided in 2006 were done at the defendant's request and generally worked to increase the value of the property.
- [34] As for the application made pursuant to the Land Title Act for cancellation upon security being posted, the plaintiffs argue that hardship and inconvenience had not been shown, which I will go into in greater depth shortly.
- [35] Finally, if security were to be ordered, the plaintiff submits that the following ought to be taken into account: (1) that \$50,000 remains due under the agreement; (2) there is a \$50,000 termination fee that is also being claimed; and (3) that eight more months of work was done in 2006 which would, using an equivalent level of remuneration to that paid in 2005 (that is \$50,000 a month), bring about a remuneration claim of \$400,000, with all sums together totalling \$500,000, which the plaintiffs submit would be an appropriate sum to order as security for the cancellation of the CPLs.

C. Discussion

- [36] The parties agree on the test to be applied. Under the inherent jurisdiction power, the defendant set out the test at paragraph 81 of its written submissions and the plaintiffs at paragraph 46 of their submissions:

Written Argument of the Defendant

81. In determining whether this test can be met, the Court has cautioned that the test is not one for summary disposition of the plaintiff's claim, however the merits of the claim should be considered to the extent that "doing so enables the court to determine that the plaintiffs' claim may be frivolous, a nuisance, and abuse of process, or... has no chance of success".

Written Argument of the Respondents

46. In order to cancel a CPL based upon the Court's inherent jurisdiction, the Court may consider the merits of the Plaintiff's claim by only: "... so far as doing so enables the Court to determine that the Plaintiff's claim may be frivolous, a nuisance, an abuse of process, or... there is no chance for success."
- [37] As to the Rule 9-6 summary trial, both counsel agreed that the test was whether there was a genuine issue to be tried.
- [38] I agree that the plaintiffs' claim for a constructive trust is weak, and perhaps exceedingly weak, for the reasons argued by the defendant. The plaintiffs largely failed to distinguish between the work done in 2005 and that done in 2006, and it is an important distinction. On the evidence, it seems apparent that the 2005 work was done pursuant to the management agreement that was in place between the parties and, should any amount still be owing under that agreement, these would be debt claims and would not give rise to a proprietary interest in the lands.
- [39] Given the wording of the management agreement, insofar as it expressly deals with a possible future joint venture agreement between the parties, it seems unlikely in the extreme that, on the evidence currently before me, a court would find that there was a concurrent collateral agreement of some sort granting to Mr. Mariash an interest in the property.
- [40] 2006 stands on a somewhat different footing. Here, it is asserted that services were requested and provided, and that these enhanced the value of the property. Here, though again I consider that the claims are weak largely for the reasons argued by the defendant, I cannot say that they have no chance of success as per the Avia West test or that they do not disclose a genuine issue to be tried. Although the defendants argued that the unjust enrichment claim was pleaded as a bare pleading without material facts and it was deficient because of that, insofar as material facts were not pleaded to support absence of juristic reason and unsound commercial conscience, these are more in the nature of pleadings of law and I do not consider that the plaintiffs' claims fail because of that.
- [41] That disposes of the defendant's application to cancel the CPLs under the inherent jurisdiction of the court and under Rule 9-6.

- [42] This brings me to the application made under ss. 256 and 257 of the Land Title Act. The plaintiffs' principal argument against cancellation under these provisions was that the defendant had failed to meet the hardship and inconvenience requirement of s. 256. In particular, they argue that the evidence shows merely that discussions are underway or were underway, and that there is no signed contract for the sale or development of the land. They also argue that no causal connection has been shown between the presence of the CPLs and the stalling of the prospective transaction. They submit that full particulars must be known before the court can be certain of that causal connection. For example, the transaction might instead have stalled because of a lack of financing.
- [43] I have no difficulty in finding that hardship and inconvenience have been made out in this case. The hardship and inconvenience are firmly established, in my view, by the evidence contained in Mr. Ryan's affidavits, which I excerpt as follows:

Affidavit of Michael Ryan sworn February 28, 2012

14. The effect of the CPLs has been to block the pending sale. I attach as Exhibit "E" a true copy of correspondence from Mr. Doug Regelous stating that position. Mr. Regelous has significant experience in real estate development and is the lead representative of the purchaser. The purchaser has advised that the lender to the purchaser will not fund the transaction so long as the CPLs remain in place.

Affidavit of Michael Ryan sworn March 26, 2012

12. At this time, the Defendant is under no contractual obligation to sell the Lands to the purchasers, and the purchasing group is under no contractual obligation to proceed with the purchase. We have the framework of an agreement, but our efforts to finalize it stalled when the CPL was discovered, as the purchaser is not willing to close until the CPL is removed.

Exhibit "E" to Ryan Affidavit sworn February 28, 2012

[Letter from Mr. Regelous to Mr. Ryan's solicitors dated February 16, 2012]

I am writing formally to confirm our discussion of earlier this week. After consideration, we regret that we are not able to proceed with the purchase of an interest in the Grouse Nest property while a Certificate of Pending Litigation remains registered against the lands. If your client expects us to proceed with the purchase as contemplated he will have to take steps to remove this charge against the land at his earliest opportunity. To reiterate, we will not proceed while this charge encumbers the asset which is the sole subject of the purchase agreement.

- [44] While not yet finalized, the proposed transaction has proceeded to the point where solicitors for the respective parties had exchanged a draft closing agenda. While it may yet fail to come into being, these negotiations have obvious substance, are relatively far along, and the evidence establishes that the CPLs have impeded further progress. The hardship and inconvenience that has to be shown need not be significant: *Enigma Investments Corp. v.*

Henderson Land Holdings (Canada) Ltd., 2007 BCSC 1379 at para. 24; Daum v. Meek Hotels Ltd., 2009 BCSC 373 at para. 48.

[45] Accordingly, I find that the defendant has met the requirement of showing hardship and inconvenience. I am also satisfied that damages will provide an adequate remedy to the plaintiffs, should they succeed in their claim.

[46] I turn now to the question of security and the amount. Here, by virtue of s. 257(3), I am permitted to take into account the probability of success on the plaintiffs' part. I bear in mind, however, that it is the probability of success of the proprietary claims that is to be considered here, not the debt claims that would arise due to any unpaid amounts under the management agreement. This answers the plaintiffs' assertions that the discussion of the security amount should start at the \$100,000 sum that is claimed under this agreement.

[47] As to the prospects for success on the proprietary claims, I make the following observations:

1. Mr. Mariash in his affidavit says, at para. 41:

... Mr. Ryan and I had a deal. The deal was that I would have a 50% equity position in this development. The deal was reached in early 2006.

He does not recount a specific agreement reached on a specific day in a certain context, in a particular conversation, at a particular place, or anything else that would give flesh to what is really quite a bald statement. This seems remarkable, in that the plaintiff was faced with an application for summary dismissal of this part of his claim and might have been expected to put his best foot forward in asserting the available evidence on the point.

2. There is nothing in writing about the deal and, as the defendant points out, the alleged deal is inconsistent with the written joint venture discussions that were going on at the time, discussions that were being conducted through the solicitors for the respective parties.

3. There is the seeming unlikelihood that in 2006 the defendant would have granted to Mr. Mariash a 50 percent interest in lands worth millions, and on one valuation in early 2006, eight million dollars, when the plaintiff had been already compensated for services rendered through 2005 pursuant to the management agreement, and Mr. Mariash had chosen not to accrue his fees for later investment in the prospective joint venture.

4. I agree with the submission of the defendant that the work described as having been done in 2006 by Mr. Mariash or his associates is very vague and seems to be of relatively limited substance, and that it is equally consistent with some work being done in the expectation that a joint venture agreement might be agreed to at some point. Most, maybe all, of the work of any substance seems to have been provided in 2005, when Mr. Mariash or his unincorporated entity was being compensated pursuant to the terms of the management agreement. The limited services provided in 2006, particularly given that they took place in a commercial context, also make it unlikely that the plaintiff would succeed in obtaining a proprietary remedy.

5. The demand letter sent on behalf of the plaintiffs in February 2007 made no mention of any proprietary claim or any claim that there was a deal for an ownership interest. This claim was not asserted until nearly five years later, and the claim for specific performance was not made until the day before the present application.
- [48] Even if laches might not bar the equitable remedies of a constructive trust or specific performance, the failure to assert any proprietary claim when demand was made in February 2007, and for five years afterward, cannot help but give rise to some questions about the veracity of the claim.
- [49] From these and the other facts referred to, I conclude that the plaintiff's prospects for a successful claim for a proprietary interest in the lands are very weak.
- [50] For these reasons, and having considered the circumstances generally, I consider that the appropriate remedy is to order the CPLs cancelled upon the posting of security, but that the amount of the security to be ordered should not be substantial. I fix it at \$25,000.
- [51] Those conclude my reasons.
- "Blok J."

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