
CANADA / JUDGMENT

Nielsen v. Sartor

2012 BCSC 1954

COURT

Supreme Court of British Columbia

DECIDED

21 December 2012

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2012 BCSC 1954 Nielsen v. Sartor

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Nielsen v. Sartor,

2012 BCSC 1954

Date: 20121221

Docket: S64105

Registry: Nanaimo

Between:

George Nielsen

Plaintiff

And

Franco Sartor

Defendant

Before: The Honourable Justice Fisher

Reasons for Judgment

Counsel for the plaintiff:

J.P. Millbank

Counsel for the defendant:

W.R. Mullen

Place and Date of Trial:

Nanaimo, B.C.

November 26 - 30, 2012

Place and Date of Judgment:

Nanaimo, B.C.

December 21, 2012

- [1] The plaintiff, George Nielsen, brings this action against the defendant, Franco Sartor, seeking a mandatory injunction requiring Mr. Sartor to transfer to him the remainder of a share in a taxi company, or alternatively, a declaration of constructive trust, and damages in either event. The primary issue involves the interpretation of an agreement the parties entered into on April 30, 1997, and whether it was an agreement for a lease of shares or a lease to purchase shares.
- [2] Mr. Sartor brings a counterclaim seeking a declaration that the agreement between the parties has been repudiated and he is free to dispose of his share in the company, or alternatively, damages for breach of contract. He also seeks a mandatory injunction requiring Mr. Nielsen to implement a buy/sell provision in the agreement.

Background facts

- [3] Mr. Nielsen has been a taxi driver for about 30 years. He has a limited education (he did not complete grade 10) and he has difficulties with reading. For his entire career he has worked for AC Taxi Ltd. (AC Taxi). Mr. Sartor has also been in the taxi business for many years. He started driving for AC Taxi in 1973 and since then has been a major shareholder in the company and has served at various times as an officer and a director.
- [4] Taxi licences are issued by the provincial government through the Passenger Transportation Board (formerly the Motor Carrier Commission). AC Taxi currently has 44 taxi licences and 36 outstanding shares. Each share entitles the owner the right to a taxi licence, known as a "right of dispatch". All 44 licences are held in the name of AC Taxi, which owns eight in its own right and holds the remaining 36 as nominee of the owner of each share. Before 2001, 10 shares were required for the owner to hold a right of dispatch. In January 2001, the shares were consolidated on a 10:1 basis, so now one share entitles an owner to this right.
- [5] Each owner of a taxi licence is entitled to operate a taxi, subject to provincial government regulations and the Articles of AC Taxi. Some owners drive taxis themselves and others lease their "right of dispatch" - that is, the rights granted by the licence - to others. Owner-operators or lessee-operators are required to supply a vehicle, maintain it according to safety regulations and have it available 365 days per year. If a shareholder wishes to sell his or her shares, the long standing custom of AC Taxi (now reflected in its Articles) requires the shareholder to first offer the shares for sale to other shareholders.

- [6] AC Taxi is managed by its board of directors, known in the company as the executive. It is operated on a break even basis. If the company sells a licence, the proceeds are divided among the shareholders through dividends. Over the years, few dividends have been paid. The primary value in each share of AC Taxi is the taxi licence, or right of dispatch. The value of a share in AC Taxi has increased over the years. In 1997, Mr. Sartor valued the 10 shares associated with the right of dispatch at \$58,000. The most recent sale of one share, in 2012, was for \$205,000.
- [7] In 1997, Mr. Sartor was a member of the board of directors of AC Taxi and a major shareholder. He and his wife owned over 80 shares, which at that time gave them the right to run eight taxis. There were two other major shareholders: Michael Reeves (Mr. Sartor's brother-in-law) and Garry Smith (the current president of AC Taxi). These three together held about 70% of the shareholdings in the company.
- [8] In early 1997, Mr. Sartor decided that he did not want to be involved in the day to day operations of AC Taxi anymore and offered his shares for sale. He made it known among the drivers at AC Taxi and posted a notice in the office. Mr. Nielsen was interested but he did not have enough money to purchase all 10 shares required for a right of dispatch. He approached Mr. Sartor to learn about the proposal.
- [9] On April 3, 1997, the parties signed an "interim agreement", and on April 30, 1997, signed a final agreement on essentially the same terms, effective May 1, 1997. Both agreements were witnessed by Mr. Reeves. The final agreement was called "Proposals to Lease and Purchase". I will refer to it as the May 1997 Agreement. The salient terms are as follows:

Between:

Seller/Lessor: Franco Sartor ...

And

Purchaser/leasee [sic]: George Nielsen ...

This agreement signed by both parties will be a partnership agreement.

Sale of one share \$5800.

Down payment \$500.00 and \$2500 on or before May 1, 1997.

The outstanding balance will be paid with interest at 8.5%

Payments will be no less than \$50 per month. The seller/lessor warrants that the shares are all free and clear.

The partnership will be such that the other nine shares required to operate a taxi in the AC Taxi Company will be leased by the new owner for the sum of \$540 per month plus GST, payable in advance before the first of each month. If the leasee fails to make his payment before the due date, the payment will be considered in default, and a \$50 fee will be assessed. This partnership is for the sole purpose of the selling/purchasing of the right of dispatch and the shares of AC Taxi Ltd. No other debts will be accepted by either party for the other party.

...

The purchaser/leasee will supply and operate the vehicle and all proceeds and expenses from that car will be his alone.

Both partners will sign an agreement with AC Taxi Ltd. and will abide by all the rules and regulations of AC Taxi Ltd.

The majority shareholder will have the right to vote the block of ten shares. Notwithstanding [sic] that he may give his right to vote to the minority shareholder.

In the event that either party wishes to sell their share(s) they must offer the first right of refusal to the other partner. Should that partner refuses [sic] to purchase, then the seller warrants to purchase the remaining shares at the same value per share as was originally offered. This clause will be void if the leasee is in default.

This buy/sell clause will not be enforceable for one year from the date of the signing of this agreement.

Once all the shares are owned by one person they then have the right to sell any and all shares as they see fit, provided that the sale is according to the agreement signed with AC Taxi Ltd.

...

This agreement is signed by both parties with the understanding that any omissions or errors do not negate this contract, or its spirit.

[emphasis added]

[10] Mr. Nielsen also entered into a lease agreement and a shareholders' agreement with AC Taxi. These agreements addressed the terms and conditions on which Mr. Nielsen would operate the right of dispatch. Mr. Sartor drafted the May 1997 Agreement and was also involved in drafting these other agreements.

[11] Finally, Mr. Nielsen purchased a used taxi from Top-Lite Car Service Ltd. (Top-Lite), a company owned by Mr. Sartor, Mr. Reeves and their spouses. Top-Lite owns the building in which AC Taxi operates, and at the time also operated a repair service. The purchase price for the taxi was \$4,750 plus taxes, paid with \$665 and \$250 per month thereafter. Mr. Nielsen had his taxi repaired at Top-Lite.

- [12] Mr. Nielsen then began operating his own taxi. He hired a bookkeeper and proceeded to make the required payments under the May 1997 Agreement. His name was added to the share certificate with Mr. Sartor. Mr. Sartor continued to control all 10 shares but would sometimes let Mr. Nielsen exercise the vote allocated to the shares. After AC Taxi consolidated its shares in January 2001, the company issued separate share certificates to Mr. Nielsen (for a 1/10 share) and to Mr. Sartor (for a 9/10 share). Mr. Sartor continued to control the entire share but the company would only grant him 9/10 of a vote.
- [13] Garry Smith testified that the decision to consolidate was taken because the shareholders did not want split ownership of shares and were not happy with the arrangement Mr. Sartor had made with Mr. Nielsen. Mr. Sartor was opposed to the company's decision. In November 2000, around the time the shareholders voted to change the share structure, he decided that he no longer wanted to be in a partnership. He wrote to Mr. Nielsen, offering to sell to him the remaining nine shares at a price of \$6,000 per share, or alternatively offering to purchase Mr. Nielsen's one share at the same price. He was also prepared to offer Mr. Nielsen a lease of the right of dispatch at \$600 per month.
- [14] Mr. Nielsen said he was confused by this and did not have \$54,000. He declined to either purchase Mr. Sartor's interest or sell his own, and took the position, through counsel, that he was entitled to continue to do business as he had been doing "as a shareholder in AC Taxi". Mr. Sartor brought an action against Mr. Nielsen in Small Claims Court but eventually abandoned it, and things carried on as before.
- [15] By June 2001, Mr. Nielsen had fully paid for the one share. Mr. Sartor wrote to him about this in October 2001, and at the same time suggested that they "visit" the issue of "lease fees" as there was no provision in the May 1997 Agreement for changes to the amount. Mr. Nielsen said that he did not understand what that meant but he did not want to change the \$540 per month, which he continued to pay. Mr. Sartor said that he tried to talk to Mr. Nielsen about this but Mr. Nielsen said that he was "going to own it anyway" so it did not matter. Mr. Sartor said that this was something Mr. Nielsen said from time to time over the years but he (Mr. Sartor) did not understand what it meant.
- [16] Mr. Nielsen had difficulty making a living. His taxi was old and he had to replace the engine within the first year. It continued to be expensive to maintain. In February 2002, he made an assignment into bankruptcy. Mr. Sartor assisted him by providing information to the trustee about their contract, but he also made inquiries about purchasing Mr. Nielsen's 1/10 share if it became available through the bankruptcy. Mr. Nielsen was, however, able to retain his ownership in the 1/10 share as it was considered a tool of his trade.
- [17] Mr. Sartor testified that he wanted out of his arrangement with Mr. Nielsen. On September 10, 2002, he wrote to AC Taxi, copying Mr. Nielsen, stating that he had obtained legal advice that the May 1997 Agreement was invalid and he had decided to terminate it. He sought a return of the Motor Carrier plate to the company on the basis that Mr. Nielsen was in contravention of the lease agreement. (He considered a contravention of the buy-sell clause

in the May 1997 Agreement to be also a contravention of the lease agreement.) However, AC Taxi refused to get involved and Mr. Sartor did not do anything further about this.

- [18] Mr. Nielsen generally earned below average income. From 2002 forward, his annual gross business income was between \$73,000 and \$83,000 (with one year just over \$90,000). Mr. Smith testified that typical AC Taxi operators earn monthly gross revenues of \$10,000 - \$11,000 and typical monthly repair costs for older taxis were 10 to 15% of that.
- [19] Mr. Nielsen did not keep track of his monthly payments over the years. However, in January 2008, he asked his accountant to prepare a schedule of payments, which showed that he would pay for all of the remaining 9/10 share (with 8.5% interest) by December 31, 2010. He said that he planned to give this schedule to Mr. Sartor when it was paid off, but he put the document away and forgot about it. He thought Mr. Sartor would remind him when the 9/10 share was paid off.
- [20] In August 2011, Mr. Nielson heard that Mr. Sartor was planning to sell his 9/10 share to a third party. He was upset, as he did not think Mr. Sartor could do this. He then retained counsel, who wrote to Mr. Sartor on August 26, 2011, asserting the right of ownership on the basis that Mr. Nielsen had paid for the remaining 9/10 share.
- [21] Mr. Nielsen made one more monthly payment of \$540 on September 1, 2011. On September 20, 2011, his counsel wrote to Mr. Sartor's counsel advising that these payments would no longer be made. Mr. Sartor took the position that the letter of September 20, 2011 was a repudiation of the May 1997 Agreement and by a letter dated September 26, 2011, his counsel accepted the repudiation.
- [22] On October 18, 2011, this Court ordered that Mr. Sartor be restrained from taking any steps to transfer, encumber or otherwise deal with his 9/10 share until the final disposition of this matter, and that Mr. Nielsen pay \$540 per month pending a further Court Order or agreement of the parties, such payment to be made to Mr. Sartor's counsel in trust.
- [23] Mr. Nielsen says that the May 1997 Agreement was an agreement to purchase one share for \$5,800 with specified terms of payment, and a lease to purchase the remaining nine shares at \$540 per month. He says that the agreement was not repudiated but rather came to an end once he had paid all of the monies required under its terms.
- [24] Mr. Sartor says that the agreement was for the purchase of one share only, and a lease of the remaining nine shares in order for Mr. Nielsen to have the right of dispatch, but Mr. Nielsen could have approached him to buy further shares as he paid off the first one, at a price to be negotiated. He says that Mr. Nielsen repudiated the agreement, he has accepted the repudiation and therefore he is free to deal with his 9/10 share as he sees fit.

The issues

- [25] Mr. Nielsen seeks a mandatory injunction requiring Mr. Sartor to transfer the remaining 9/10 share to him on one of two alternate bases: (1) under the terms of the May 1997 Agreement properly interpreted; or (2) under the doctrine of unjust enrichment and the remedy of constructive trust. He also seeks damages for dividends he should have received and for excess money he paid to Mr. Sartor for the 9/10 share.
- [26] Mr. Sartor seeks a dismissal of Mr. Nielsen's claim and in a counterclaim seeks a declaration that he owns 9/10 and Mr. Nielsen owns 1/10 share, damages for Mr. Nielsen's failure to continue making the monthly lease payments after September 1, 2011, and a mandatory injunction requiring Mr. Nielsen to implement the buy/sell provision in the May 1997 Agreement or, alternatively, a declaration that the agreement has been repudiated and he is free to deal with his 9/10 share.
- [27] The primary issue in this case involves the interpretation of the May 1997 Agreement, from which a number of questions arise:
1. Is the agreement ambiguous?
 2. If so, what extrinsic evidence is admissible?
 3. What is the proper interpretation of the agreement?
 4. If the agreement is not enforceable, was Mr. Sartor unjustly enriched?
- [28] I will begin with a discussion of the general principles of contract interpretation.

General principles of contract interpretation

- [29] In interpreting a contract, the objective is to determine the intention of the parties at the time the contract was made. This intention is to be determined by the words used in the contract itself, and in light of the whole of the contract. Where a literal meaning would bring about an unrealistic result, the court should consider the words in the context, or factual matrix, in which the contract was made. These general principles of contract interpretation are well known, described in many decisions: see, for example *Prenn v Simmonds*, [1971] 3 All ER 237 (HL); *Consolidated-Bathurst Export Ltd. v Mutual Boiler and Machinery Insurance Co.*, [1980] 1 SCR 888; *Acli Ltd. v Cominco Ltd.* (1985), 61 BCLR 177 (CA); *BG Checo International Ltd. v British Columbia Hydro and Power Authority*, [1993] 1 SCR 12.
- [30] In interpreting a commercial contract, the Court is entitled to consider the factual matrix, or surrounding circumstances, at or before the date of the contract, including the commercial purpose of the contract: *Prenn*; *Ahluwalia v Richmond Cabs Ltd.* (1995), 13 BCLR (3d) 93 (CA).
- [31] In *Consolidated-Bathurst*, Estey J. for the majority made these oft-quoted comments (at 901):

.. literal meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted. Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result.

[emphasis added]

- [32] Where there is a conflict between different terms in a contract, the court is to look for an interpretation that could reasonably give meaning to each of them, possibly by construing a specific term as qualifying a general one: BG Checo at 24.
- [33] Where the language of the contract is clear and unambiguous, no extrinsic evidence is admissible to alter, vary or interpret its terms. Nor is evidence of a party's subjective intention admissible. However, where the language is ambiguous, the parol evidence rule permits extrinsic evidence to be admitted to assist a court to ascertain the intentions of the parties: Fridman, *The Law of Contract in Canada*, 6th ed (Toronto: Thomson Reuters, 2011) at pp. 440-441.
- [34] As a last resort, the rule of contra proferentum may be applied against the party who created the document. This rule is usually discussed in relation to insurance or standard form contracts, where the party who did not create the document had no meaningful opportunity to participate in the negotiation of its terms and where there is inequality of bargaining power: Fridman, p. 456. It was described by Abella J.A. (as she then was) in a dissenting judgment in *Arthur Andersen Inc. v Toronto-Dominion Bank* (1994), 17 OR (3d) 363 (CA) as

... a rule meant to relieve the non-authorial party to a contract from an interpretation that party could not clearly discern from a plain reading of the document. This prevents the party who did draft and understand the contract from springing a hidden contractual burden on an unsuspecting signator

[citations omitted].

- [35] This description has been referred to by Fridman at p. 455-456.

1. Ambiguity

- [36] The May 1997 Agreement is poorly drafted. It uses confusing and inconsistent language. It is entitled "Proposals to Lease and to Purchase" and states that it is a partnership agreement. The parties are identified as "seller/lessor" and "purchaser/leasee" [sic]. It stipulates for the sale of one share at a price of \$5,800 and sets out the terms of payment, including interest payable at 8.5%. It then purports to lease "the other nine shares required to operate a taxi" at \$540 per month plus GST. This is followed by a statement that "this partnership is for the

sole purpose of the selling/purchasing of the right of dispatch and the shares of AC Taxi".

- [37] There is a "right of first refusal" that is triggered only if either party wishes to sell his shares. If the other party refuses, the seller must purchase the other party's shares at the price offered. The agreement seems to contemplate one of the parties eventually owning all ten shares, contained in this term: "Once all the shares are owned by one person they then have the right to sell any and all shares as they see fit, provided that the sale is according to the agreement signed with AC Taxi".
- [38] In my opinion, these provisions are ambiguous. If the agreement is a pure lease, it is unclear what is being leased, there is no term specified, and a lease is inconsistent with the stated purpose of selling and purchasing the right of dispatch and shares. If it is a lease to purchase the remaining nine shares, there is no provision specifying how title to these shares is to be transferred to the purchaser, i.e. whether one share at a time or all nine at once, after full payment.

2. Extrinsic evidence

- [39] Given this ambiguity, extrinsic evidence is admissible to assist in determining the intentions of the parties. This may include evidence of the conduct of the parties, including statements made, before, during or after the contract was written: Fridman, pp. 448-449. Such evidence may be admitted even where its effect may be to vary or contradict the contract in order to dispel ambiguities, establish a term implied by custom, or demonstrate the factual matrix of the agreement: *Gallen v Allstate Grain Co.* (1984), 53 BCLR 38 (CA).
- [40] Mr. Nielsen testified that he was worried about his job security because of the way he was treated by the executive of AC Taxi, then Mr. Sartor, Mr. Reeves and Mr. Smith. He described instances of bullying behaviour, particularly by Mr. Reeves. He said that Mr. Reeves would yell at him at shareholders meetings and would say he was going to have Mr. Nielsen fired from the company. Mr. Nielsen was interested in purchasing shares in the company because he thought it would be harder for the executive to "get rid of" him. His friend, Gary Burec, testified that Mr. Nielsen was "somewhat picked on" at AC Taxi. Wanda Cooke, his bookkeeper from 1997 to 2002, was in a position to hear conversations among the executive. She testified that Mr. Nielsen and Mr. Reeves "probably had issues between them". Mr. Smith said that Mr. Reeves and Mr. Nielsen treated each other with respect at shareholder meetings but acknowledged that there could have been some confrontations between the two of them on issues related to safety code infractions.
- [41] Mr. Nielson testified that Mr. Sartor told him that the proposed agreement required him to pay \$2,500 down and \$50 per month for the purchase of one share, and when it was paid off, the \$540 per month went towards buying the remaining nine shares. He also said that Mr. Sartor told him sometime later that it was easier for tax purposes to sell his shares one at a time rather than in a block.

- [42] Two other taxi drivers testified about attending meetings where Mr. Sartor explained how his offer would work. Larry Bates said that Mr. Sartor told them that this was a good way for them to become owners; they would start with a share each and then work to the full ten shares. Ken Kurtz said that because no one had enough money, Mr. Sartor offered a "one share wonder", where after one share was paid for, the next share would be purchased.
- [43] Mr. Sartor did not specifically recall his meeting with Mr. Nielsen but he testified that he had looked at a lot of paperwork and refreshed his memory. He said that he would have discussed the terms of the interim agreement with Mr. Nielsen and what he could afford to pay. He said that he told him he could buy one share over time provided he gave a down payment and could lease the nine shares to have the right of dispatch. When asked about the tax implications of a sale of all 10 shares at once, Mr. Sartor agreed that he had received "tax planning" advice that selling all shares together meant that he would be responsible for the entire disposition, but selling one share at a time meant that he would be responsible for only the disposition of that share.
- [44] Mr. Sartor said that he was aware, in 1997, that Mr. Nielsen did not have a lot of money, and more particularly, did not have enough to buy the taxi licence outright. He agreed that at that time, he, along with Mr. Reeves and Mr. Smith, held a controlling interest in AC Taxi (about 70% of the shareholdings).
- [45] After the May 1997 Agreement was signed, Mr. Nielsen hired Wanda Cooke as his bookkeeper. She worked for Top-Lite and another company owned by Mr. Sartor and Mr. Reeves, and knew the taxi business. Mr. Nielsen said that he told Ms. Cooke that he was purchasing shares and to set up the books that way, but she disagreed. He was upset that Ms. Cooke did not do the books the way he wanted and said that they fought about this a few times. He did not take steps to find another bookkeeper until 2002, however. He said he did not want to push things because he did not think there was another bookkeeper who could do the job and he did not understand the documents.
- [46] Ms. Cooke testified that Mr. Nielsen told her that he was buying one share and leasing the balance. She set up the books to reflect her interpretation of the May 1997 Agreement as stipulating a lease. She did not recall Mr. Nielsen expressing displeasure with the way she did this work and denied having any fights with him. Each month she prepared a balance sheet and monthly and year-to-date income statements. The income statements reflected \$50 as a loan payment with interest and \$540 as a lease payment. Some of the general ledgers in 1997 described the \$540 payment as a "lease & share" payment or "lease and shares".
- [47] In 2002, Ms. Cooke stopped working for Mr. Nielsen, after which he retained an accountant to do his bookkeeping and taxes. Mr. Nielsen said that Ms. Cooke stopped working for him because of the dispute with AC Taxi and Mr. Sartor, but Ms. Cooke said that she stopped for health reasons only. From 2002 to 2006 the \$540 per month was shown in his tax returns as a business expense for "licence lease". He testified that he had troubles with this accountant

and retained another one in 2007. His 2007 and 2008 tax returns did not show the \$540 as a separate business expense. He testified that he had no understanding of bookkeeping or income taxes.

- [48] Mr. Sartor's tax returns consistently reported the \$50 as a loan payment with interest and the \$540 as business income. He stopped collecting and remitting GST on the \$540 after October 2001, apparently because his revenues were below the threshold requiring this.
- [49] Mr. Nielsen testified that he and Mr. Sartor fought with each other over the years about the shares and the licence, but Mr. Sartor would say if he kept this up he would get him fired from AC Taxi. Mr. Nielsen treated this seriously because Mr. Sartor was closely connected to Mr. Reeves and Mr. Smith, who, between them, held the majority of the shares in the company. He said that at times he ignored Mr. Sartor, and he kept making the \$540 payments because he did not want to get into a fight. He expected that the shares would be transferred to him when he finished paying. He said that once he asked why Mr. Sartor picked on him and Mr. Sartor replied, "Because I can."
- [50] Mr. Sartor denied saying these things. He did not remember any yelling and screaming and said that he had no right to vote Mr. Nielsen out of the company. He said that Mr. Nielsen was not always easy to talk to and did not often communicate verbally. Communication was usually done through leaving papers in Mr. Nielsen's box in the office. He did, however, agree that over the years he would talk to Mr. Nielsen about the May 1997 Agreement, where he would say that it was a lease and Mr. Nielsen would say that "he (Mr. Nielsen) was going to own it anyway."

3. Interpretation of the agreement

- [51] On behalf of Mr. Nielsen, Ms. Millbank submits that the May 1997 Agreement is a conditional sales agreement in which payments are made over time, with title transferred at the end. She says that Mr. Sartor's interpretation of the agreement is not supported by the words of the document (a lease requires a term), is not possible at law (one cannot lease shares), and defeats the objectives of the parties in entering into the agreement in the first place (to acquire the right of dispatch). She says that if Mr. Sartor is correct, then he sold something to Mr. Nielsen (1/10 share) that has no value, since the primary value in the share is the taxi licence, or right of dispatch. She submits that the manner in which the transaction was recorded by others for accounting or tax purposes cannot support Mr. Sartor's interpretation given Mr. Nielsen's evidence that he did not understand any of these documents, and in any event, is not indicative of the true nature of the transaction in these particular circumstances. Finally, she submits that the ambiguity in the agreement should be resolved in favour of Mr. Nielsen according to the principle of *contra proferentem*, as Mr. Sartor prepared the document and there was unequal bargaining power between the parties and no real negotiation of its terms.

- [52] For Mr. Sartor, Mr. Mullen submits that the May 1997 Agreement is not ambiguous, and in any event, cannot be interpreted as a conditional sales agreement when the course of conduct of both parties after it was entered into is considered. He relies primarily on the accounting and tax documents, which reflected Mr. Sartor's version of the agreement. He also relies on evidence that Mr. Nielsen did not make his understanding of the agreement known to Mr. Sartor over the years, particularly in response to Mr. Sartor's attempts to discuss "lease fees" or to enforce the right of refusal, and did not complain that he was not receiving the dividends to which he was entitled. Mr. Mullen submits that *contra proferentem* does not apply here because Mr. Nielsen participated in the discussions with Mr. Sartor, had the opportunity to seek advice (legal or otherwise) before entering into the agreement, and could have purchased shares from someone else.
- [53] To interpret the May 1997 Agreement, I will consider the nature of a lease and a lease to purchase (or conditional sale agreement), the extrinsic evidence of the parties' conduct before, during and after the agreement, and the words of the agreement itself.
- (a) The nature of a lease and a conditional sale agreement
- [54] Generally, a lease is an agreement under which a lessee pays monthly rent to a lessor for a specified term. At common law, a conditional sale agreement is one under which a purchaser agrees to purchase goods, pay the purchase price by instalments, and the seller agrees to transfer title to the purchaser upon receipt of full payment. A lease may include an option to purchase, but this does not normally convert the arrangement into a conditional sale: see *Yeung (Guardian ad litem of) v Au*, 2006 BCCA 217 at para. 50. However, if the parties intend that the lease payments are in reality going to paying for the goods and the goods will be transferred to the lessee at the end of the term, a lease with an option may constitute a "disguised" conditional sale agreement: see *Mitsui & Co. (Canada) Ltd. v Royal Bank of Canada*, [1995] 2 SCR 187 at para.17 (in the context of a conditional sale as defined in legislation).
- [55] In a conditional sale agreement, it is apparent that title is to be transferred when the purchase price is fully paid and it is not necessary for the parties to specify a date on which the transfer is to take place: see *Hanif v TJM Management Consultants Ltd.*, 2012 BCCA 485 at paras. 36-38 (a recent decision involving the enforceability of an agreement for the sale of land).
- (b) The period leading up to the signing of the agreement
- [56] I will start with the factual matrix, or surrounding circumstances, as well as the conduct of the parties, in the period leading up to the signing of the agreement on April 30, 1997.
- [57] At that time, Mr. Sartor was a major shareholder in AC Taxi and a member of the executive, along with Mr. Reeves. Mr. Nielsen was a driver who worked for other owners. His evidence that he felt vulnerable in his position due to the way he had been treated by the executive, particularly Mr. Reeves, was not seriously challenged. Neither Mr. Sartor nor Mr. Smith

addressed this evidence in any substantive way and Mr. Reeves was not called as a witness. The evidence of Mr. Burec and Ms. Cooke was consistent with Mr. Nielsen's evidence about this.

- [58] Mr. Nielsen was trying to find a way to be more secure in his employment. He did not have very much money and was not able to purchase 10 shares outright. Mr. Sartor was aware of both of these things.
- [59] Importantly, in this period leading up to the signing of the May 1997 Agreement, Mr. Sartor made representations to Mr. Nielsen and to other taxi drivers about purchasing shares one at a time.
- [60] Mr. Nielsen candidly admitted that he does not generally have a good memory. However, he did remember meeting with Mr. Sartor to go over the written agreement, which Mr. Sartor had prepared, and he specifically remembered Mr. Sartor telling him that he would put down \$2,500 for the first share and pay \$50 per month until it was paid off, and that the \$540 would then go towards purchasing the remaining nine shares. As a result of this discussion, he thought the "remainder money" would go towards the other shares. He also remembered discussing the buy/sell clause, as he wanted Mr. Sartor to buy the shares back if he decided to sell.
- [61] Mr. Sartor testified that he told Mr. Nielsen he could buy one share over time provided he gave a down payment and he could lease the nine shares to have the right of dispatch. He said that he would have gone over the agreement line by line. However, Mr. Sartor did not remember Mr. Nielsen specifically, nor did he remember where they met or what they discussed. He made these admissions in his examination for discovery on March 12, 2012:

166 Q ... do you recall your first conversations with Mr. Nielsen about entering into this business relationship with you?

A No, I do not recall.

167 Q How did it come about with Mr. Nielsen?

A I have no recall of how it came about.

168 Q You remember absolutely nothing about how you got the business relationship with Mr. Nielsen?

A It would have been common knowledge that I was interested or that my wife and I were interested in selling. Those that were interested would have approached me. Some sat down at the table. Some met me for coffee. Some found me in the shop. Some stopped at my house. People - it was not - it was a casual affair where we discussed opportunities and possibilities. Do I remember George specifically? No.

- [62] At trial, he sought to distance himself from these admissions, saying that he had refreshed his memory by looking at the paperwork. While he may have been sincere in his belief, my distinct impression was that Mr. Sartor had reconstructed the evidence in his own mind. His entire testimony about this issue was couched in language about what he "would have" said or what he "would have" done. I do not accept his evidence that his memory was refreshed between his discovery and his testimony at trial.
- [63] Mr. Sartor also testified that he entered into a similar agreement with another driver at the same time. I do not see how this is particularly relevant to the issue here. However, that "similar agreement" differs from the May 1997 Agreement in a significant way. It does not contain a clause stating that the partnership was "for the sole purpose of the selling/purchasing of the right of dispatch and the shares of AC Taxi Ltd." In my view, a reasonable inference to draw from this inclusion in the agreement with Mr. Nielsen, particularly since Mr. Sartor drafted these agreements, is that Mr. Sartor and Mr. Nielsen had specific discussions about this purpose, which is more consistent with Mr. Nielsen's evidence about what Mr. Sartor told him and what their intentions were.
- [64] Accordingly, I do not accept Mr. Sartor's evidence about what he told Mr. Nielsen about the agreement. I accept Mr. Nielsen's evidence about these representations. This was something that was obviously important to him and it is not surprising that he would remember the essential details. His evidence is also consistent with the evidence of Mr. Bates and Mr. Kurtz, the other drivers who attended meetings where Mr. Sartor discussed his proposal. Mr. Bates was left with the impression that the purchaser was required to buy one share and was then obligated to buy the other shares.
- [65] I find that Mr. Sartor told Mr. Nielsen that the nature of the proposal was for the purchase of one share on the terms set out in the agreement, with the lease payments that followed to go towards the purchase of the remaining nine shares.
- (c) The subsequent conduct of the parties
- [66] The documentary evidence about how each party treated the \$540 payments for accounting and tax purposes is more consistent with a lease than a purchase. Mr. Sartor included the lease payments as income in his tax returns and collected GST until 2001, when it appears that he was no longer required to collect it. From 2002 forward, Mr. Nielsen's accountant included these payments as expenses. Before 2002, Ms. Cooke generally recorded the \$540 per month as lease payments.
- [67] In addition, over the years Mr. Nielsen did not clearly communicate his understanding of the agreement to Mr. Sartor despite having several opportunities to do so, nor did he act as if he owned more than one share, or later 1/10 share.
- [68] I accept that Mr. Sartor's treatment of the payments in his tax returns was consistent with his interpretation of the agreement. However, the manner in which an individual reports his or her income for tax purposes does not necessarily reflect the true nature of a transaction.

Mr. Johansen, the expert accountant who testified for Mr. Sartor, acknowledged that people do not always accurately report income or expenses in their tax returns. There was no evidence adduced as to how lease payments should be reported for a lease to purchase transaction.

- [69] Mr. Sartor acknowledged that Mr. Nielsen's interest was to own the entire share. He testified that he hoped that he had given Mr. Nielsen an opportunity to buy one share, pay it off, buy another share, and so on, and "if he worked hard he would have the opportunity to one day own the entire share." The only difference between his interpretation and Mr. Nielsen's is that he expected Mr. Nielsen to come back to him each time he was ready to purchase another share and negotiate a new price. There is no extrinsic evidence that supports such an expectation, nor is it supported by the words of the May 1997 Agreement (as I discuss below).
- [70] Mr. Nielsen explained why he took no steps to correct the accounting records or tax returns to properly reflect his understanding of the transaction and why he did not make his position clear when Mr. Sartor raised the issue at various times over the years. Essentially, he disagreed with the way Ms. Cooke set up his books, did not understand the documents, relied on others to do them, and was afraid to talk to Mr. Sartor because he felt vulnerable and did not want to fight with him.
- [71] Mr. Nielsen's limited ability to read and understand these kinds of documents was apparent during his testimony. He needed time to read documents that were put before him and found it difficult to concentrate. I accept his evidence that he did not understand the accounting and tax documents he was given to review over the years and that he relied on others to prepare these documents.
- [72] His evidence that he and Ms. Cooke had fights about how she set up his books was contradicted by Ms. Cooke, who did not recall Mr. Nielsen expressing displeasure with the way she did his books. While I found Ms. Cooke to be a sincere witness, she was not specific in her evidence regarding the discussions she had with Mr. Nielsen when she first set up his books in 1997. Mr. Nielsen may very well have told her he was buying one share and leasing the rest but this says nothing about the nature and purpose of the lease payments. I accept Mr. Nielsen's evidence that he was not happy when Ms. Cooke told him that the books had to be set up as a lease and I find that he had a discussion with her about this when she was initially retained. Some of Ms. Cooke's entries in the general ledgers in 1997 show the \$540 as "lease & share pay't" or "lease & shares", which I interpret as consistent with Mr. Nielsen's evidence about the instructions he gave to her.
- [73] Beyond this, I find that Mr. Nielsen and Ms. Cooke got along well during the time she worked for him. In light of his evidence that he did not look at the documents he was given but filed them away, it is unlikely that Mr. Nielsen would have had continuing "back and forth" fights with Ms. Cooke about how she did the books, and his memory about this was not very clear. More importantly, however, is the fact that the manner in which Ms. Cooke set up Mr.

Nielsen's books reflected only her understanding of the May 1997 Agreement. It did not reflect Mr. Nielsen's understanding.

- [74] The only tax returns for Mr. Nielsen in evidence begin in 2002, when he hired an accountant. His evidence was that he had troubles with this accountant, which led him to eventually terminate his services in about 2007. These troubles were apparently related to the accountant failing to file timely returns. In any event, none of his tax returns reflect the lease payments as a lease to purchase, although those filed by a different accountant after 2007 do not show the \$540 payments as a separate item. Given Mr. Nielsen's lack of understanding about these documents, and his reliance on others, I cannot conclude that this evidence supports an interpretation of the May 1997 Agreement as a lease transaction.
- [75] Finally I come to Mr. Nielsen's failure to clearly communicate his understanding of the agreement to Mr. Sartor despite having had several opportunities to do so, and his failure to take timely steps to assert his right to own more than one share, or later, 1/10 share.
- [76] His first clear opportunity to communicate was when Mr. Sartor wrote to him in November 2000, at the time the company was consolidating the shares, offering to sell the remaining 9/10 share, or alternatively, offering to purchase Mr. Nielsen's 1/10 share, at a price of \$6,000 per share. Mr. Nielsen said that he was confused by this letter and thought it was a trick to get the licence back. He said that he told Mr. Sartor he did not want to sell and wanted to carry on the way it was. He also consulted a lawyer, who wrote to Mr. Sartor, stating that Mr. Nielsen was under no obligation to either purchase or sell "his shareholding" in AC Taxi, the buy/sell clause was vague and unenforceable, and Mr. Nielsen was entitled to continue to do business as he had been doing "as a shareholder in AC Taxi." Unfortunately, the lawyer's response was rather unclear, but Mr. Nielsen cannot be faulted for a letter written by his lawyer. And while it would have been better if the parties had been able to discuss the issue more clearly, Mr. Nielsen's response to "carry on the way it was" was not unreasonable given that he was still paying for the first share at that time.
- [77] The second opportunity was in October 2001, just after Mr. Nielsen was told that he had paid off the first share. Mr. Sartor wrote to him about this and suggested that they "visit" the issue of "lease fees". Mr. Nielsen could not remember if he talked to Mr. Sartor about this, but he did not do anything about the letter and was not interested in changing the lease fees. Mr. Sartor said that he tried to talk to Mr. Nielsen about this but Mr. Nielsen said that he was "going to own it anyway" so it (the fees) did not matter.
- [78] I accept Mr. Sartor's evidence about this discussion. Both parties testified that they did discuss their disagreement from time to time over the years. Mr. Nielson described these discussions as fights. Mr. Sartor described them as him saying the agreement "was a lease" and Mr. Nielsen saying "he was going to own it." In this way, Mr. Nielsen did communicate his understanding of the agreement to Mr. Sartor.

- [79] I found Mr. Sartor's evidence that he did not understand what Mr. Nielsen meant to be disingenuous. Although Mr. Nielsen's communication was imprecise, in the context of their "partnership" I find it highly unlikely that Mr. Sartor did not understand his comments to mean that the lease fees were paying for the shares. Moreover, Mr. Sartor was, at that time, trying to extract a further agreement from Mr. Nielsen to make increased monthly payments while representing that it was also in Mr. Nielsen's interest to "visit" the fees as the price could decrease. I found this rationale also disingenuous. There is no evidence that the value of the right of dispatch had ever decreased and Mr. Sartor would have known that such a risk was small.
- [80] Clearly, Mr. Nielsen ought to have taken some steps to assert his position once he had paid off the first share. He conceded that perhaps he should have dealt with this issue at the beginning but explained that he had argued with Mr. Sartor about this over the years and was afraid to talk to him. He thought Mr. Sartor, with his connections to the executive, would try to have him removed from the company. He also presumed that the payments for the second share "would automatically happen." He was misguided about all of this, but I cannot find that his inaction was inconsistent with his understanding of the May 1997 Agreement. The same can be said for his silence when dividends were paid in 2002, 2005 and 2008 and he only received 1/10 of the dividend for his interest. In any event, it was not clear whether title to the shares (or increments) was to be transferred one at a time or only after all nine had been fully paid for.
- [81] When he went through bankruptcy in early 2002, Mr. Nielsen declared only his interest in 1/10 share. I find nothing inconsistent with this. He said that he did not realize he had paid off the first share by then (despite receiving Mr. Sartor's October 2001 letter) but in any event thought that he would have been paying down the second share at that time. I accept that Mr. Nielsen did not think that he owned more than one share at the time of his bankruptcy.
- [82] Mr. Nielsen blamed AC Taxi for his bankruptcy. He said that Mr. Reeves unreasonably required bi-weekly inspections of his taxi, necessitating expensive repairs, and this is what pushed him into bankruptcy. Whether or not this was so, during the bankruptcy, he was worried that the executive of AC Taxi were going to take his share away. This fear was not unfounded. Ms. Cooke had warned him to "cover his ass" or "watch his back". (She testified that Mr. Nielsen's bankruptcy caused some tension at AC Taxi and she had heard Mr. Sartor, Mr. Reeves and Mr. Smith talking about getting a lawyer or going to court to see if they could get the share back.) Mr. Sartor admitted that he would have made inquiries of the trustee about purchasing Mr. Nielsen's share. I can understand that Mr. Sartor and the executive had legitimate concerns about the status of the right of dispatch during the bankruptcy, but these events served only to push the parties further apart. Later that same year, in September 2002, Mr. Sartor purported to terminate the May 1997 Agreement and sought a return of the Motor Carrier plate from Mr. Nielsen's taxi. However, nothing came of this, as AC Taxi refused to get involved. This was the last of Mr. Sartor's attempts to change his arrangement with Mr. Nielsen.

- [83] It was not until January 2008 that Mr. Nielsen took any steps to calculate his monthly payments in an effort to determine when the remaining 9/10 share would be paid in full. The schedule prepared by his accountant showed that this would occur on December 31, 2010. Although he planned to give this schedule to Mr. Sartor when the share was paid off, he forgot about it and he thought Mr. Sartor would remind him when this occurred. In the end, he finally asserted his right of ownership in August 2011 after he heard about Mr. Sartor's impending sale to a third party.
- [84] Mr. Nielsen's inaction about this very important issue is difficult to understand. However, the entire dealings between these two parties are difficult to understand, and considering Mr. Nielsen's fears and his obvious inability to look after his own business affairs, it cannot be said that any of his conduct in this regard is inconsistent with his understanding of the May 1997 Agreement as a lease to purchase the 9/10 share.
- [85] Mr. Nielsen's inaction must also be considered along with Mr. Sartor's conduct. Despite the purpose of the agreement and his awareness of Mr. Nielsen's objective to own the shares, Mr. Sartor never approached his partner to discuss how this was going to be effected. Instead, he tried to end the partnership, change the agreement or terminate it. When none of those things happened, he sat back in silence and for many years continued to receive the monthly payments that Mr. Nielsen worked so hard to make.
- (d) The agreement itself
- [86] The May 1997 Agreement must be considered in the context of its commercial purpose, expressed in the agreement itself as a partnership "for the sole purpose of the selling/ purchasing of the right of dispatch and the shares of AC Taxi Ltd." Mr. Sartor wanted to sell his shares because he no longer wanted to be involved in the day to day operations of the taxi business. I interpret his evidence about this to mean that he was really offering to sell the taxi licences, or rights of dispatch. It is difficult to discern the commercial sense of selling 1/10 of what is required to acquire the right of dispatch and leasing the rest, with no obligation on either party to sell or buy the rest. It is also difficult to discern what real value could be placed on one share, or 1/10 share, other than the right to receive a small portion of any dividends that may be issued. It gave Mr. Nielsen no voting rights. It is not an ownership interest that could realistically be sold to anyone other than Mr. Sartor and it was not of any value to Mr. Nielsen to give him "insider" rights as an existing shareholder, as he was not in a position to purchase shares from anyone else. Nor was such an arrangement at all compatible with Mr. Nielsen's clear objective, known to Mr. Sartor, to acquire the right of dispatch and achieve job security.
- [87] In this context, I interpret the reference in the May 1997 Agreement to the "sale of one share \$5800" to set out the initial purchase and to establish the price for each of the 10 shares.
- [88] Additionally, it is difficult to discern what is really being leased in the May 1997 Agreement, which states that "the other nine shares required to operate a taxi ... will be leased". Both parties adduced opinion evidence from experienced accountants, both of whom had never

heard of a lease of shares. Mr. Sartor acknowledged the same. He said, "You can't lease a share," but explained that the terms "shares" and "right of dispatch" are often used interchangeably. That may be, but such a customary use of terms cannot legitimize a purported lease of something that does not lend itself to such treatment. Moreover, it is questionable whether Mr. Sartor was able to lease part of the right of dispatch at all.

- [89] These terms can be compared to the terms in other agreements Mr. Sartor entered into to lease the right of dispatch. He testified that he had entered into a lot of leases over the years. There is in evidence four lease agreements, the first in March 1997 and the others in 2000, 2006 and 2010. Each of these agreements expressly states that the lessee is to pay a specified sum per month "for the Right of Dispatch" and each specifies a term of the lease. In my view, it is telling that the May 1997 Agreement contains no such language. I consider the absence of a term significant, particularly where the monthly payment is a fixed amount, as this is more consistent with an agreement where the lease payments are really going towards paying for the shares.
- [90] Mr. Sartor testified that the "buy/sell" clause governed what Mr. Nielsen was to do if he wanted to purchase more shares. He said that Mr. Nielsen was to come to him and make an offer to purchase the next share and they would then negotiate the price. Mr. Nielsen did not recall Mr. Sartor saying anything like this but he did recall him saying that he (Mr. Nielsen) would have to go to Mr. Sartor first if he wanted to sell the licence "down the road".
- [91] I cannot accept Mr. Sartor's evidence about this. First of all, if this was his subjective intention in drafting the buy/sell clause, such evidence is inadmissible for this purpose. In any event, the buy/sell clause is not in itself ambiguous; it is a clause that simply requires one partner to first offer his share or shares for sale to the other partner should he wish to sell, and only if the other partner refuses to purchase will the first partner be obligated to purchase the other's shares. It says nothing about one partner offering to purchase shares from the other without first having to offer his share or shares for sale. In other words, Mr. Nielsen would have to first risk losing his own share if he wanted to purchase more shares from Mr. Sartor. Again, Mr. Nielsen's evidence about this is entirely consistent with the actual words in the buy/sell clause.

(e) Conclusion

- [92] In my view, to interpret the May 1997 Agreement as a pure lease would defeat the intention of the parties and their expressed objective in entering into the transaction in the first place: to sell and purchase the right of dispatch and the shares of AC Taxi. The extrinsic evidence shows that the true nature of the transaction between these parties was a purchase of the right of dispatch through the purchase of one share, followed by a lease to purchase the remaining nine shares required to acquire the right. The more reasonable interpretation is that the agreement was a conditional sale agreement. This interpretation promotes the intention of the parties and produces a fair and sensible commercial result.

- [93] If I am in error about this, I would as a last resort apply the rule of contra proferentum and construe the ambiguity in the written document against Mr. Sartor, who drafted it. While this rule is normally applied to standard form contracts, particularly insurance contracts, it can be applied to resolve ambiguity in other situations where the party who created the document is in a stronger bargaining position relative to the other party, and where there is no meaningful opportunity for real negotiation of the written terms.
- [94] In this case, Mr. Sartor was a major shareholder and director of AC Taxi, while Mr. Nielsen was a driver in what he reasonably perceived was a vulnerable position at AC Taxi. He also had a limited education, reading difficulties, and little money. He was not able to purchase 10 shares outright and there is no evidence that anyone else was offering to sell shares to persons who were not already shareholders. I acknowledge that Mr. Nielsen had an opportunity to, and did, seek the advice of his friend, Mr. Burec, about the agreement before it was signed. However, there is no evidence that there were any real negotiations between the parties. Mr. Sartor made his proposal, presented his document and left it to Mr. Nielsen to decide if he was prepared to agree to the terms. Mr. Nielsen was in a weak bargaining position throughout and did not have the ability to meaningfully negotiate, and this must have been obvious to Mr. Sartor.
- [95] Accordingly, it is my view that the rule of contra proferentum, which (as described by Abella J.A. in *Arthur Andersen Inc.*) is "meant to relieve the non-authorial party to a contract from an interpretation that party could not clearly discern from a plain reading of the document", would apply in these circumstances, and would support my conclusion as to the interpretation of the May 1997 Agreement.
- [96] Finally, there are some uncertainties relating to the terms of payment. Mr. Nielsen's evidence about how the monthly payments of \$540 would be credited towards the purchase price for the remaining nine shares was inconsistent. He testified that he thought the payments would be applied to the purchase once the first share was fully paid. However, the payment schedule he obtained from his accountant in 2008 (according to his instructions) credits all payments starting in 1997. In addition, the May 1997 Agreement specifies only that interest at 8.5% was payable on the monthly payments of \$50. Mr. Nielsen's payment schedule for the 9/10 share assumes that 8.5% interest was payable on the monthly payments of \$540.
- [97] Ms. Millbank submits that in these circumstances, the Court may imply payment terms to give effect to the intention of the parties. She points to the final clause in the agreement itself, which seems to contemplate that omissions or errors are not intended to render the contract unenforceable:

This agreement is signed by both parties with the understanding that any omissions or errors do not negate this contract, or its spirit.

- [98] It is not appropriate for the Court to rewrite an agreement for the parties. However, in some circumstances it is appropriate for the Court to find an implied term in an agreement, provided the implied term does not conflict with an express one. In *Zeitler v Zeitler Estate*, 2010 BCCA 216, the court noted the adoption of a business efficacy or business necessity test for determining whether a particular term is implied by a contract. It referred to this summary of the law in *Luxor (Eastbourne) Ltd. v Cooper*, [1941] 1 All ER 33 (HL) at pp. 52-53:

There have been several general statements by high authorities on the power of the court to imply particular terms in contracts. It is agreed on all sides that the presumption is against the adding to contracts of terms which the parties have not expressed. The general presumption is that the parties have expressed every material term which they intended should govern their agreement, whether oral or in writing. It is well-recognised, however, that there may be cases where obviously some term must be implied if the intention of the parties is not to be defeated, some term of which it can be predicated that "it goes without saying," some term not expressed, but necessary to give to the transaction such business efficacy as the parties must have intended. This does not mean that the court can embark on a reconstruction of the agreement on equitable principles, or on a view of what the parties should, in the opinion of the court, reasonably have contemplated. The implication must arise inevitably to give effect to the intention of the parties. These general observations do little more than warn judges that they have no right to make contracts for the parties. Their province is to interpret contracts.

[emphasis added]

- [99] These principles have been expressed in numerous cases. For example, in *Canadian Pacific Hotels Ltd. v Bank of Montreal*, [1987] 1 SCR 711, it was held that a term may be implied in a contract based on the presumed intention of the parties where the implied term is necessary "to give business efficacy to a contract or as otherwise meeting the 'officious bystander' test as a term which the parties would say, if questioned, that they had obviously assumed".

- [100] In this case, I find it appropriate to imply a term that interest at 8.5% was payable on the monthly lease payments. Such a term does not conflict with any express terms of the May 1997 Agreement and, in my view, meets the business efficacy and business necessity tests described above. The parties obviously intended that Mr. Sartor would be paid interest where fixed payments were to be made over many years.

- [101] I do not find it necessary to imply any other terms relating to how the payments were to be credited. Since I have found that the true nature of the transaction was a lease to purchase or conditional sale agreement, it follows that all of the lease payments were made for that purpose. Mr. Nielsen's initial understanding that these payments were to be credited only after the first share had been paid in full is inconsistent with this. The payment schedule that he later caused to be produced is entirely consistent with the true nature of the transaction, including the implied term to include interest.

[102] Accordingly, I find that the May 1997 Agreement was a contract for the purchase and sale of one right of dispatch whereby Mr. Nielsen purchased one share (later 1/10 share) at a value of \$5,800 on specified terms, and the remaining nine shares (later 9/10 share) at the same price per share by way of a lease to purchase or conditional sale, all payments to include 8.5% interest. I also find that, in accordance with this agreement, Mr. Nielsen fully paid for the 9/10 share on December 31, 2010, and Mr. Sartor was in breach of the agreement by failing to transfer the remaining 9/10 share to Mr. Nielsen when demanded to do so.

4. Alternative claim in unjust enrichment

[103] It is not necessary to address Mr. Nielsen's alternative claim in unjust enrichment, as it is predicated on the assumption that the May 1997 Agreement is unenforceable.

The counterclaim

[104] In his counterclaim, Mr. Sartor seeks a declaration that the May 1997 Agreement has been repudiated, such repudiation has been accepted, and he is free to deal with his 9/10 share. He says that Mr. Nielsen repudiated the agreement on September 20, 2011, when his counsel advised that the monthly payments would no longer be made. Mr. Nielson says that he did not repudiate the May 1997 Agreement because it had already come to an end on December 31, 2010, when he had fully paid for the remaining 9/10 share.

[105] Repudiation occurs when a party evinces an intention not to be bound by the agreement. This intention may be evinced by a refusal to perform even where the party doing so is mistaken about his contractual rights: see *Guarantee Co. of North America v Gordon Capital Corp.*, [1999] 3 SCR 423 at para. 40.

[106] Given my conclusions about the nature of the May 1997 Agreement, Mr. Nielsen's refusal to make further payments cannot be said to constitute a repudiation. His counsel's letter of September 20, 2011, must be considered along with her prior letter of August 26, 2011, where Mr. Sartor was notified that Mr. Nielsen asserted the right of ownership to the 9/10 share. Mr. Nielsen was not evincing an intention not to be bound by the agreement, nor was he refusing to perform. He was simply asserting his contractual rights.

[107] Mr. Sartor is not entitled to damages, nor is he entitled to the declaration or the mandatory injunction he seeks.

[108] The counterclaim must be dismissed.

Remedy

[109] Mr. Nielsen is entitled to the mandatory injunction he seeks, requiring Mr. Sartor to take the necessary steps to transfer the 9/10 share in AC Taxi to him.

- [110] Mr. Nielsen also seeks damages for the dividends which would have been payable had the shares been transferred to him on a share by share basis, and for the amount he overpaid for the shares.
- [111] I am satisfied that he is entitled to damages for the amount he overpaid, which comprises all monthly payments made from January 1 to September 1, 2011, a total of \$4,320. However, I have some difficulty with his claim to past dividends.
- [112] Despite the nature of the transaction, it is not clear that Mr. Nielsen would have been entitled to have each share transferred to him on a share by share basis. The shares were consolidated in 2001, before Mr. Nielsen had fully paid for the first share. While the company initially issued Mr. Nielsen a separate share certificate for his 1/10 share, it is not clear if Mr. Sartor could have caused the company to continue to issue fractional share certificates to Mr. Nielsen as each increment was paid off over the years. In any event, no one was keeping track of the payments. It seems unfair to me to unwind the transaction in this way at this late stage.
- [113] As discussed above, it is not necessary for the parties to a conditional sales agreement to specify a date on which the transfer of title is to take place because it is apparent that title is to be transferred when the purchase price is fully paid. In the unusual circumstances of this case, it is my view that the only clear date on which title to the remaining 9/10 share was to be transferred was when it had been fully paid for, which occurred on December 31, 2010.
- [114] Accordingly, I am not satisfied that Mr. Nielsen is entitled to damages based on additional dividend payments prior to December 31, 2010.
- [115] Finally, the order of October 18, 2011, which restrained Mr. Sartor from taking any steps to transfer, encumber or otherwise deal with his 9/10 share and required Mr. Nielsen to continue to make the monthly payments, is no longer effective. All monies paid by Mr. Nielsen to Mr. Mullen in trust pursuant to that order are to be repaid to him.

Order

- [116] In summary, there will be an order as follows:
1. a mandatory injunction that Mr. Sartor take the steps required by AC Taxi to transfer the remainder of his 9/10 share, as evidenced by Share Certificate 168, to Mr. Nielsen;
 2. Mr. Sartor is to reimburse Mr. Nielsen for all payments received after December 31, 2010, in the amount of \$4,320;
 3. all monies held in trust pursuant to the order of October 18, 2011 are to be paid to Mr. Nielsen;
 4. the counterclaim is dismissed.

[117] Costs normally follow the event. Mr. Nielsen is entitled to costs at the usual scale for his claim and the counterclaim.

"Fisher J."

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