

CANADA / JUDGMENT

Noel v. Tatarov

2022 BCSC 1861

COURT

Supreme Court of British Columbia

DECIDED

25 October 2022

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2022 BCSC 1861 Noel v. Tatarov

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Noel v. Tatarov,

2022 BCSC 1861

Date: 20221025

Docket: S93791

Registry: Nanaimo

Between:

Emily Noel

Plaintiff

And

Valentyna Tatarov and Alex Tatarov

Defendants

Before: The Honourable Madam Justice D. MacDonald

Reasons for Judgment

Counsel for the Plaintiff:

M.W. Buhler

Counsel for the Defendants:

N. Parhar

Place and Dates of Trial:

Nanaimo, B.C.

June 27-29, July 5, and

August 8, 2022

Place and Date of Judgment:

Nanaimo, B.C.

October 25, 2022

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Overview

- [1] This is a unique case involving a real estate transaction between the plaintiff, Ms. Emily Noel, and the defendants, Ms. Valentyna Tatarov and Mr. Alex Tatarov. Mr. Tatarov is legally known as Oleksandr Tatarov. Ms. Tatarov is also known as Ms. Tatarova.
- [2] The plaintiff seeks specific performance for the sale of a real property that she contracted to purchase in March 2021 (the "Property"). The Property is a unit in a strata development known as Echo Park Estates in Port Alberni, BC.
- [3] The plaintiff alleges the vendors breached the contract by refusing to complete the contract. The contract at issue was dated March 8, 2021 and signed on March 25, 2021. It is a contract of purchase and sale of the Property between Mr. Tatarov and Ms. Tatarov as the vendors and Ms. Noel as the purchaser. The Property was to be sold for the price of \$150,000 and the contract was to complete on May 14, 2021.
- [4] There were two similar contracts prior to the one at issue, referred to as Contract 1 and Contract 2. These contracts did not complete because Ms. Noel was unable to obtain financing. The contract in dispute is referred to as Contract 3.
- [5] The defendants argue they were justified in not completing the contract because Mr. Oleksandr Tatarov was the registered owner of the Property but the defendants' son, Oleksiy Tatarov ("Alex Jr."), was the one who signed the purchase and sale agreement. This confusion arose because both the father and son use the name "Alex". Contract 3 was signed by Ms. Tatarov and by Alex Jr. for the vendor/owner "Alex Tatarov". Ms. Noel signed Contract 3 on behalf of the purchaser. The defendants say they did not notice this "mistake" until approximately two days before closing. As a result, there was a mistake of contract and the contract was void ab initio.

- [6] The plaintiff does not dispute that Mr. Tatarov is on title and is the legal owner, along with Ms. Tatarov, of the Property. However, the plaintiff argues that based on the facts and circumstances the son, Alex Jr., had actual authority to sign on behalf of his father. The plaintiff further argues that it was an equitable fraud by the defendants to suggest the contract was invalid. The plaintiff argues this Court has equitable jurisdiction to grant remedies in equity for unconscionable conduct.
- [7] The defendants contend that actual authority and equitable fraud were not pleaded and therefore the plaintiff cannot rely on these forms of relief.

Background Facts

- [8] The plaintiff, Ms. Noel, is 38 years old. The Property at issue is a townhome-type property in Echo Park Estates in Port Alberni. The parcel identifier and legal description of the Property is: 025-414-836 and "Strata lot 23 district lot 45 Alberni District Strata Plan VIS5202 together with an interest in the common property in proportion to the unit entitlement of the strata lot as shown on Form V." Ms. Noel lives at the Property with her partner, David Hodson, and her young daughter.
- [9] Ms. Noel and her daughter moved into the Property approximately two years ago. Mr. Hodson has lived in the Property for approximately seven years. Ms. Noel and Mr. Hodson pay \$966 per month in rent.
- [10] Ms. Noel completed grade nine of high school in 2009. In 2019, Ms. Noel attended Sprott Shaw College as a mature student and received a diploma. Ms. Noel currently works two jobs in Port Alberni, both at Mountain Side Support Services, working with at-risk youth. She manages one office and obtains additional hours at another office. Her gross income is approximately \$70,000 per year.
- [11] Ms. Noel's daughter is nine years of age and goes to Wood Elementary School, a two-minute walk from the plaintiff's residence. The school yard backs onto their Property. Ms. Noel's brother comes in the mornings before school to take care of her daughter. After school her daughter is taken care of by a friend who lives in Echo Park Estates.
- [12] Both of Ms. Noel's workplaces are within an approximately five to seven- minute drive from the Property. Mr. Hodson works at Coalson Mill.
- [13] Ms. Tatarov is currently 65 years of age, as is Mr. Oleksandr Tatarov. Ms. Tatarov and Mr. Tatarov are from Ukraine. They married in 1979 and moved to Canada in 1995. They live in Calgary, Alberta, with their son, Alex Jr., who is 38 years of age. According to the defendants, Alex Jr. has Asperger's syndrome which poses challenges for him.
- [14] Ms. Tatarov had difficulty finding work when she came to Canada. She had a successful career in Ukraine but could find only minimum wage employment in Calgary. Mr. Tatarov and Ms. Tatarov testified that to provide her with meaningful work, they and their son started a family business involving the purchase, rental, and sale of homes. The business

was intended to make a profit. The parties purchased approximately 40 properties between 2001 and 2008. Unfortunately, the defendants appear to have overextended themselves. They found themselves in a difficult situation after the recession in 2008 when the value of properties decreased and they fell behind on their payments to Canada Mortgage and Housing Corporation ("CMHC"). As a result, they began to sell some of the properties.

- [15] The defendants are the owners of the Property as registered with the Land Title office. Both the certified title document and the certified state of title certificate identify the registered owners of the Property as Alex Tatarov and Valentyna Tatarov.
- [16] Ms. Noel testified that she was approached by the property manager in the summer of 2020. He advised her that Ms. Tatarov was interested in selling the Property and was wondering if she was interested in purchasing it. The property manager gave her Ms. Tatarov's telephone number. Ms. Noel contacted Ms. Tatarov and indicated that she and her partner were interested in purchasing the property. In one of those calls, Ms. Tatarov disclosed that she and "her husband" wanted to sell the Property.
- [17] Ms. Noel contacted Dorothy Clarkstone, a notary public, who drafted a purchase and sale agreement dated August 2020. This is Contract 1. It was sent to Ms. Tatarov. Ms. Tatarov forwarded by email Contract 1 to an employee at M Hawke and Associates. The email was sent to Meaghan Selzler. In that email, Ms. Tatarov wrote, "We used your office for the closing (sale) of our Prince George condo at the end of 2016 " In cross-examination, Ms. Tatarov stated that "we" referred to her and Mr. Tatarov.
- [18] Contract 1 did not complete because Ms. Noel and her partner were unable to secure financing.
- [19] A second purchase and sale agreement dated September 30, 2020 was again drafted by Ms. Clarkstone. The vendors signed first and Ms. Tatarov sent the signed agreement to Ms. Clarkstone and Ms. Noel. Contract 2 had a purchase price of \$155,000 and was signed by Alex Jr. as the owner. Alex Jr.'s signature was witnessed by Mr. Tatarov. In Ms. Tatarov's email to Ms. Clarkstone and her own notary, Marvin Hawke Notary, she did not mention any change in signature. Rather, the email states:

Hello,

Please, find attached our signed contract.

Thanks!

Kind regards,

Alex & Valentyna

- [20] Contract 2 did not complete as Ms. Noel and her partner were again unable to secure financing.

- [21] After Contract 2 failed to complete, there were a series of telephone calls between Ms. Noel and Ms. Tatarov. Ms. Tatarov offered to try to structure a private rent to own mortgage arrangement. Ms. Noel decided not to pursue this avenue.
- [22] Ms. Noel contacted a broker to try and arrange financing. Ms. Noel had difficulty securing a letter of permanent employment for her potential lender because she had only recently returned to work after seven years as a stay-at-home mother. She had two part-time jobs but was in her probationary period at both. Ms. Tatarov and Ms. Noel exchanged numerous emails prior to the signing of Contract 3. Ms. Tatarov put pressure on Ms. Noel to secure financing. Ms. Noel eventually obtained the letters of employment and gave them to her lender.
- [23] Mr. Hodson did not sign the third purchase and sale agreement dated March 8, 2021. Ms. Noel testified that he had too much debt and she was advised to pursue the purchase in her name alone. She signed Contract 3 as the purchaser.
- [24] Contract 3 was signed by Alex Jr. and Ms. Tatarov. Again, the fact Alex Jr. was signing for the vendor was not brought to Ms. Noel's or her notary's attention.
- [25] On May 12, 2021, Ms. Noel met with Ms. Clarkstone to sign the documents pertaining to Contract 3. She provided a bank draft of approximately \$24,000. On May 12, 2021, Ms. Tatarov sent an email to Ms. Clarkstone and Ms. Noel, asking for a 15-day extension to the closing date of May 14, 2022 "due to unforeseen circumstances". Ms. Tatarov did not say what the unforeseen circumstances were.
- [26] The plaintiff refused to grant an extension since she finally had everything in place and it would cause problems with her lender.
- [27] Ms. Tatarov later that day, by email, stated that Contract 3 was invalid. She said her husband would explain the reason later that night. Before she raised the contract issue, she demanded an additional \$50,000 through a second mortgage. This would bring the purchase price up to \$200,000. Ms. Noel refused.

[28] The email sent to Ms. Clarkstone and Ms. Noel stated:

"Sorry, dear ladies.

If Ms. Noel does not add the 2nd mortgage 50K from us to the contract, we are not closing, as our contract is not valid. You will see it is for sure! (and it's not my health as an issue!)

My husband will explain you the reason later tonight."

[29] In yet another email sent on May 12, 2021, Mr. Tatarov used Ms. Tatarov's email account to send an email to Ms. Noel. He began the email "Hi Dorothy", stating that Contract 3 was not valid as he had not signed it. Notably, he wrote: "I go as OLEKSANDR (Alex) Tatarov".

- [30] This statement, "I go as OLEKSANDR (Alex) Tatarov", is identical to how Ms. Tatarov described her co-owner and co-seller in her email to Ms. Clarkstone and Ms. Noel on September 6, 2020.
- [31] Similarly, Ms. Tatarov described her co-owner and co-seller in her email to Ms. Clarkstone on August 17, 2020 as "Alex (the official name is Oleksandr) TATAROV". This is also identical to how Ms. Tatarov and Mr. Tatarov described the owner, "Alex", in Contract 1 which they signed. On Contract 1, "Alex Owner" is marked with handwriting reading "SELLER: OLEKSANDR (ALEX) TATAROV".
- [32] There was no indication that the contract had been signed by the wrong person prior to receiving these emails on May 12, 2021. Ms. Noel had no communication with Ms. Tatarov's husband before this email. She was not even aware there were two people named "Alex".
- [33] Ms. Noel testified that she wanted to complete the purchase and sale agreement and close the deal. She was and is worried about where to live and how to provide stability for her daughter. However, Contract 3 never completed because the defendants refused to complete the transaction. The defendants say they refused to complete Contract 3 because the wrong Alex signed the purchase and sale agreement.
- [34] When Contract 3 did not complete, Ms. Noel and her family were not evicted from the Property. They continue to live in the unit. Ms. Noel submitted into evidence receipts for electronic transfer payments she made to Ms. Tatarov for rent for herself and Mr. Hodson between May 2021 and May 2022. Ms. Noel seeks an order that the defendants reimburse her for the rent payments made since May 14, 2021.
- [35] Ms. Noel registered a caveat against title to the Property on May 19, 2021 and registered a Certificate of Pending Litigation against the Property on June 17, 2021.

The Claim

- [36] Ms. Noel brings this action for breach of contract and seeks specific performance of Contract 3 as relief. She relies on the principles of actual authority and equitable fraud to establish a breach of contract. Ms. Noel also seeks consequential damages arising from the breach of contract in the form of rent payments made since May 14, 2021.

Credibility

Legal Principles

- [37] In *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, Justice Dillon summarized the key elements of a credibility analysis:
- [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and

opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); [*Faryna*] v. Chorny, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Faryna*]; *R. v. S.*(R.D.), [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time ([*Faryna*] at para. 356).

- [187] It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (*Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd.* (1993), 12 Alta. L.R. (3d) 298 at para. 13 (Alta. Q.B.)). I have found this approach useful.
- [38] In *Hardychuk v. Johnstone*, 2012 BCSC 1359, this Court stated:
- [10] The typical starting point in a credibility assessment is to presume truthfulness: Halteren. Truthfulness and reliability are not, however, necessarily the same. A witness may sincerely attempt to be truthful but lack the perceptive, recall or narrative capacity to provide reliable testimony. Alternatively, he or she may unconsciously indulge in the human tendency to reconstruct and distort history in a manner that favours a desired outcome. There is, of course, also the possibility that a witness may choose, consciously and deliberately, to lie out of perceived self-interest or for some other reason. Accordingly, when a witness's evidence is demonstrably inaccurate the challenge from an assessment perspective is to identify the likely reason for the inaccuracy in a cautious, balanced and contextually sensitive way.
- [39] The assessment of a witness's credibility involves a consideration of the trustworthiness of the witness's testimony based on their sincerity and the accuracy of their evidence. Ultimately, the validity of the evidence depends on whether it is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time: *Bradshaw* at para. 186.
- [40] In *Gichuru v. Smith*, 2013 BCSC 895 at para. 129, aff'd 2014 BCCA 414, Justice Adair helpfully articulated a number of factors that affect the assessment of credibility. These factors include:

- the witness's ability and opportunity to observe events;
- the firmness of the witness's memory;
- the witness's ability to resist the influence of interest to modify his or her recollection;
- whether the witness's evidence harmonizes with independent evidence that has been accepted;
- whether the witness changes his or her testimony during direct and cross-examination;
- whether the witness's testimony seems unreasonable, impossible, or unlikely;
- whether a witness has a motive to lie; and
- the demeanour of a witness generally.

[41] The validity of the evidence at trial depends on the overall consistency of the evidence with the probabilities affecting the case as a whole: *Faryna v. Chorny*, [1952] 2 D.L.R. 354, 4 W.W.R. 171 (B.C.C.A.).

Analysis

[42] Credibility is a central issue in this case. I heard conflicting testimony from the witnesses about the contracts and the parties' relationship, as well as the reasons the vendors needed to sell. In accordance with the above principles, I must approach the testimony with particular scrutiny.

[43] I found Ms. Noel to be an accurate historian. She was clear in her testimony and made appropriate admissions even when they were not in her best interest. For example, Ms. Noel testified that she had no reason to believe that Mr. Tatarov actually knew about Contract 3 prior to May 12, 2021. Ms. Noel also admitted she was aware Ms. Tatarov had some health issues.

[44] Ms. Noel was not prone to exaggeration and her testimony did not appear to be rehearsed. She answered questions without emotion and she was not evasive. No discovery evidence was put to her to contradict what she said at trial. Overall, I found that Ms. Noel was a credible witness.

[45] I had concerns about Ms. Tatarov's credibility. First, she made statements in emails to Ms. Noel that were either untrue or, if true, she was not truthful at trial. For example, in an email dated February 26, 2021, prior to Contract 3, Ms. Tatarov stated to Ms. Noel: "My husband is furious, and demands to put the unit on the market on Monday!" Ms. Tatarov testified that when she stated this she had not actually spoken to her husband about the situation and he was not furious. She simply used his name and his threats to "motivate" Ms. Noel.

- [46] In direct examination, Ms. Tatarov was asked whether she had ever forged Mr. Tatarov's signature onto a contract, and she said no. In cross-examination, Ms. Tatarov admitted that she wrote the initials "O.T." for Mr. Tatarov on Contract 1. She justified this as being merely a "technical" item. In her examination for discovery, she admitted that whenever there were "OT" initials, she could have written them. Ms. Tatarov admitted in her discovery evidence that she added the name "Mr. Tatarov" above the Seller's name "Alex" on Contract 1.
- [47] Ms. Tatarov advised Ms. Noel that she owed a lot of money to the Canada Revenue Agency ("CRA") and needed to sell the Property. At trial, Ms. Tatarov stated that her references in emails to CRA were actually references to CMHC. She stated that she owes about \$360,000 to CMHC. There was no credible explanation why she mislead Ms. Noel regarding this debt. There was also no documentary confirmation that she indeed owes this amount to CMHC. I have no idea if she simply said this to "motivate" Ms. Noel.
- [48] In cross-examination Ms. Tatarov said that she was not feeling pressured to sell the Property to Ms. Noel so that she could pay the CRA (CMHC). This statement was directly contradicted by the urgent tone of her emails. For example, in December 2020 Ms. Tatarov proposed the idea of a vendor take-back mortgage as financing for Ms. Noel's purchase of the Property. At trial Ms. Tatarov testified that she turned 65 in February 2021 and wanted to sell the Property. She stated that her and her husband believed that owning too many properties would result in Ms. Tatarov receiving a lower pension from the government. This was the time period in which she advised Ms. Noel that her husband was furious in order to "motivate" Ms. Noel to purchase the Property.
- [49] Ms. Tatarov also put pressure on the plaintiff to secure the letters of permanent employment to satisfy her potential lender. For example, in an email dated February 14, 2021, Ms. Tatarov wrote to Ms. Noel:

Ms. Noel, my patience is not limitless

I am sorry, precious!

Are you too shy? Timid? Simply do not care? I've been hundreds of times in the situation .

Go there with the box of chocolate! And VERY politely, but assertively asked for the letter. It's 3 min. for them to make it! Do not leave until they make it! The tax season will be finished in July!!!

I can NOT wait! Sorry! It's urgent! It's cost me money every day in interest from CRA! They demand to pay and to show the proof that I listed this condo!

Are you sure, that with your income, you can qualify this time?

The smart mortgage broker may do calculations and tell you up right: what is possible and what's not.

I told [you in] July, that I trust you really buy the unit, but nevertheless, I am afraid that I will lose the precious time. Now it's much more important!

BC market is hot! March is the best month for real estate!

I will have to issue the eviction notice at the end of February, if you do not qualify before.

Very sorry, dear friend!

Serious, extremely angry, frustrated with your inability to understand my situation.

Ms. Tatarov

[50] The pressure was so intense that Ms. Tatarov threatened to evict Ms. Noel. Ms. Noel presumably understood that if she did not secure financing and purchase the Property quickly, she and her family would be forced to move out.

[51] I do not know why Ms. Tatarov did not admit that she pressured Ms. Noel to purchase the Property in early 2021. By not doing so, and not admitting that she signed documents on behalf of Mr. Tatarov, Ms. Tatarov succumbed to the temptation to bend the truth to suit her case. I find that she displayed the "human tendency to reconstruct and distort history in a manner that favours a desired outcome": Hardychuk at para. 10. On more than one occasion Ms. Tatarov contradicted her previous evidence that she had given in examination for discovery. Counsel for the Tatarovs stressed that English is not Ms. Tatarov's first language. I agree. However, these contradictions in the testimony are not the result of Ms. Tatarov misinterpreting the meaning of questions put to her. Rather, at trial Ms. Tatarov had a particular narrative to which she clung despite being presented with documentary evidence to the contrary.

[52] When confronted with the inconsistencies in evidence, Ms. Tatarov testified that she had been under a lot of stress and that she had memory difficulties due to chronic fatigue and depression. However, I did not find her memory to be poor. Rather, I find Ms. Tatarov's memory to be selective. Moreover, Ms. Tatarov did not provide any medical evidence supporting her assertion that her memory was affected by a medical condition or that she suffered from chronic fatigue and depression.

[53] I also had some difficulty with Mr. Tatarov's testimony. This was particularly the case with respect to Mr. Tatarov's knowledge and involvement in Contract 3, which I discuss later in these Reasons. Any concerns with the Tatarovs' evidence will be further discussed as I address the merits of this claim.

Style of Cause

[54] The defendants argue the plaintiff has not properly identified one of the defendants in this case, Oleksandr Tatarov, because the style of cause states Alex Tatarov.

[55] As already noted, in the summer of 2020 Ms. Tatarov had the property manager contact Ms. Noel to see if she and her partner were interested in buying the Property in which they lived. Ms. Noel was given Ms. Tatarov's telephone number and contacted Ms. Tatarov. She indicated that she and her partner were interested in purchasing the unit. In one of the

telephone calls they had to discuss the potential purchase, Ms. Tatarov disclosed that she and "her husband" wanted to sell the Property. Ms. Noel testified that she understood the Property was owned by the two of them.

- [56] In her discovery evidence, Ms. Tatarov admitted she told Ms. Clarkstone and the defendants' own notary that the Alex Tatarov on title was Oleksandr Tatarov.[1]
- [57] Contract 1 was signed by Ms. Noel and Mr. Hodson for the purchasers and Ms. Tatarov and Mr. Tatarov for the vendors. Mr. Tatarov acknowledged in cross-examination that through Contract 1 he was advising the buyers and his own notaries at M. Hawke and Associates that he was the owner of the Property, along with Ms. Tatarov.
- [58] Alex Jr., rather than Mr. Tatarov, signed Contract 2 and Contract 3. Despite this change, at no time did the defendants relay to Ms. Noel, her notary, or their own notary that Mr. Tatarov was not the owner of the Property.
- [59] In my view, there was no confusion regarding who the Alex Tatarov is in the style of cause. The defendants were not caught by surprise and were fully able to respond to the notice of civil claim. To the extent the legal name Oleksandr was not used, this was caused by the defendants' own actions in carelessly using the name "Alex" on legal documents rather than proper legal names.
- [60] I also note that the defendants did not raise this issue in their pleadings. There was no prior indication that they had any confusion regarding who the plaintiff named as the defendants in this claim. They have not established they were prejudiced in any way by the style of cause.
- [61] I dismiss the defendants' claim that Ms. Noel did not properly identify one of the defendants in this case.

Sufficiency of Pleadings

Legal Principles

- [62] Parties must plead the legal basis for seeking relief. Rule 3-1 of the Supreme Court Civil Rules [Rules] addresses what is properly contained in an originating pleading:

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Contents of notice of civil claim

- (2) A notice of civil claim must do the following:
- (a) set out a concise statement of the material facts giving rise to the claim;
 - (b) set out the relief sought by the plaintiff against each named defendant;
 - (c) set out a concise summary of the legal basis for the relief sought;

- (d) set out the proposed place of trial;
- (e) if the plaintiff sues or a defendant is sued in a representative capacity, show in what capacity the plaintiff sues or the defendant is being sued;
- (f) provide the date collection information required in the appendix to the form;
- (g) otherwise comply with Rule 3-7.

[63] Rule 3-7(18) addresses particulars:

If the party pleading relies on misrepresentation, fraud, breach of trust, wilful default or undue influence, or if particulars may be necessary, full particulars, with dates and items if applicable, must be stated in the pleading.

[64] Rule 3-7(12) addresses pleadings subsequent to a notice of civil claim:

In a pleading subsequent to a notice of civil claim, a party must plead specifically any matter of fact or point of law that

- (a) the party alleges makes a claim or defence of the opposite party not maintainable;
- (b) if not specifically pleaded, might take the other party by surprise, or
- (c) raises issues of fact not arising out of the preceding pleading.

[65] Rule 6-1(8) provides that amendments to pleadings may be granted at trial. Unless otherwise ordered by the court, "if an amendment is granted during a trial or hearing, an order need not be taken out and the amended pleading need not be filed or served."

[66] There are numerous cases which discuss the purpose and importance of the Rules with respect to pleadings. In *Sahyoun v. Ho*, 2013 BCSC 1143, Justice Voith, as he then was, discussed the function of pleadings generally:

[16] The new Rules alter the structure in which pleadings are to be prepared. The core object of a notice of civil claim, however, remains the same. That object is concisely captured in Frederick M. Irvine, ed., *McLachlin and Taylor, British Columbia Practice*, 3rd ed.; vol. 1 (Markham, Ont.: LexisNexis Canada Inc., 2006 at 3-4 - 3-4.1:

If a statement of claim (or, under the current Rules, a notice of civil claim) is to serve the ultimate function of pleadings, namely, the clear definition of the issues of fact and law to be determined by the court, the material facts of each cause of action relied upon should be stated with certainty and precision, and in their naturel order, so as to disclose the three elements essential to every cause of action, namely, the plaintiff's right or title; the defendant's wrongful act violating that right or title; and the consequent damage, whether nominal or substantial. The material facts should be stated succinctly and the particulars should follow and should be identified as such

- [17] These requirements serve two foundational purposes: efficiency and fairness. These purposes align with Rule 1-3 which confirms that "the object of [the] Supreme Court rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits."
- [18] I emphasize efficiency because a proper notice of civil claim enables a defendant to identify the claim he or she must address and meet. The response filed by a defendant, together with the notice of civil claim and further particulars, if any, will confine the ambit of examinations for discovery and of the issues addressed at the trial itself. Proper pleadings limit the prospect of delay or adjournments. They allow parties to focus their resources on those matters that are of import and to ignore those that are not. They facilitate effective case management and the role of the trier of fact.
- [19] A proper notice of civil claim also advances the fairness of pre-trial processes and of the trial. Defendants should not be required to divine the claim(s) being made against them. They should not have to guess what it is they are alleged to have done.
- [Emphasis added.]
- [67] Pleadings are important. They delineate the issues between the parties and inform the opposing party of the nature of the case they have to meet. Pleadings prevent surprises at trial and limit the issues to be tried.
- [68] There are cases which specifically discuss the importance of pleading fraud and misrepresentation. Some disallow claims under those headings where they were not pleaded in accordance with Rule 3-7(18): *Karimi v. Gu*, 2016 BCSC 1060, at paras. 183-187. In *Grewal v. Sandhu*, 2012 BCCA 26, at para. 19, the Court of Appeal held that "[a]n allegation of fraud must be scrupulously pleaded and fully particularized." In *Grewal*, the Court held that the plaintiff could not seek to establish a case of fraud against the defendant that depended entirely on the defendant's husband's knowledge since there was no pleaded allegation that the husband was a participant in a fraud.
- [69] In *Terrim Properties Ltd. v. Sorprop Holdings Ltd.*, 2012 BCSC 985, the plaintiff framed its argument in negligence but had not pleaded it. Justice Melnick held that the negligence claim could not be maintained since the plaintiff had not pleaded negligence. Justice Melnick said the following:
- [17] It is trite law (as well as R. 3-1(2)(c)) that one must plead the legal basis for seeking relief. Neither counsel for the defendants came to court prepared to deal with a claim for negligence. They anticipated, properly, that they were here to meet a claim in nuisance.
- []
- [19] Given the above, it is not necessary for me to come to any conclusions respecting the capacity of Terrim to maintain all of the claims it advances

- [70] Applying a different approach in *Berthin v. Berthin*, 2018 BCCA 57, the Court of Appeal left open the principle that a pleading need not explicitly say "equitable fraud":
- [22] With great respect, I am of the view that the judge erred in dismissing the fraud claim on the basis that it disclosed no reasonable cause of action. The judge fell into error because he assessed the pleading against the requisite elements of the tort of civil fraud, rather than equitable fraud relied on by Mr. Berthin. The error occurred no doubt in part because the notice of civil claim unhelpfully failed to use the phrase "equitable fraud". However, counsel for Mr. Berthin made submissions at the hearing based on equitable fraud and in my view the facts and averments pleaded are capable of supporting that cause of action.
- [71] In *Anenda Systems Inc. v. AL13 Systems Inc.*, 2020 BCSC 2077 [Anenda], Justice Lyster considered circumstances where, contrary to Rule 3-7(18), the defendant had not provided full particulars of the fraud in which it alleged the plaintiff had engaged. Justice Lyster found that the defendant should have pleaded equitable fraud and granted leave to file a notice of civil claim rather than further amend its counterclaim.
- [72] In *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, the defendant argued that the statement of claim did not plead the factual basis for an independent actionable wrong. The statement of claim did include a claim for punitive and exemplary damages. Justice Binnie, at paras. 89 to 90, stated "if the respondent was in any doubt about the facts giving rise to the claim, it ought to have applied for particulars and, in my opinion, it would have been entitled to them." Justice Binnie noted there was no surprise except as to the quantum of punitive damages. He further noted that the plaintiff had pleaded a breach of the duty to deal fairly and in good faith in handling the plaintiff's claim.
- [73] Lastly, Justice G.P. Weatherill stated the following in *Cook v. Neufeld*, 2022 BCSC 6:
- [38] The general rule is that amendments to pleadings should be permitted as necessary to allow the real issues between the parties to be determined. Although more stringent considerations apply when amendments are sought at the end of trial, provided the proposed amendments would not cause injustice, unfairness or prejudice to the non-amending party, the amendments are generally allowed so that the real issues between the parties can be adjudicated upon: *Argo Ventures Inc. v. Choi*, 2019 BCSC 86 at paras. 6, 8 and 9; *Lam v. Chiu*, 2012 BCSC 677 at para. 10.

Analysis

- [74] The defendants argue that the issues of actual authority and equitable fraud were not included in the plaintiff's notice of civil claim, including her amended notice of civil claim. As a result, it is too late to raise these issues at the opening of the trial. The defendants did not have an authority for me on this point apart from *Anenda*, which I address below.

- [75] Ms. Noel contends the issues of actual authority and equitable fraud are responses to the defence advanced by the defendants. These responses are a shield, not a sword. They are not the basis for Ms. Noel's claim, which she maintains is in contract.
- [76] Rule 6-1 allows mid-trial amendments to pleadings. Here there was no request to amend the pleadings mid-trial.
- [77] The authorities favour the view that the court should not find a cause of action that was not included in the pleadings, contrary to Rules 3-1(2) and 3-7. Detailed pleadings are particularly important when a party is claiming in fraud: Rule 3-7(18).
- [78] I accept that claims that were not included in the party's pleadings are typically disallowed. However, these authorities do not address whether Rules 3-7(18) or 3-1(2) apply differently when an argument is made in response to the defendant's response, i.e. as a shield rather than as a sword. Although the plaintiff raised this issue, I was taken to no authority exempting a party from complying with Rule 3-7(18) on the ground that the party was responding to the defendant's defence to the plaintiff's claim.
- [79] Relying on *Harry v. British Columbia*, 1998 CanLII 6658 (BCSC), the defendants submit:
- [5] [T]he ultimate function of pleadings is to clearly define the issues of fact and law to be determined by the court. The issues must be defined for each cause of action relied upon by the plaintiff. That process is begun by the plaintiff stating, for each cause, the material facts, that is, those facts necessary for the purpose of formulating a complete cause of action: *Troup v. McPherson* (1965), 1965 CanLII 767 (BC SC), 53 W.W.R. 37 (B.C.S.C.) at paragraph 39. The defendant, upon seeing the case to be met, must then respond to the plaintiff's allegations in such a way that the court will understand from the pleadings what issues of fact and law it will be called upon to decide.
- [80] I note that this case does not suggest that the plaintiff needs to further respond to the defendants' response.
- [81] The defendants also rely on *Anenda*. In *Anenda*, the plaintiff filed a notice of civil claim against AL. AL filed a response to the notice of civil claim, a third-party notice seeking judgment against a third party (which both parties later abandoned), and a counterclaim. *Anenda's* counsel took the position that the defendant's pleadings were deficient. The defendant filed an amended response to the notice of civil claim as well as an amended counterclaim. *Anenda's* counsel still believed the pleadings were deficient and asked the Court to strike both of the amended pleadings.
- [82] Due to issues in the pleadings, the Court struck the defendant's amended response to the notice of civil claim entirely, with leave to AL to file a new response to the notice of civil claim. With respect to the counterclaim, the Court found that it should be dealt with separately from *Anenda's* action because the matters were distinct and raised different questions. Rather than striking out the counterclaim, the Court granted the defendant leave to file a notice of civil claim, about which the Court provided guidance. The new notice of

civil claim was to be clear regarding who was alleged to have committed what type of fraud and the precise legal basis upon which the defendant relied.

- [83] Counsel for Ms. Noel argues that Anenda arose in the context of a "claim" being made where there was uncertainty as to who the claim applied to and whether the amended counterclaim was pleading equitable or common law fraud. In contrast, in the case before me, the deficiency being claimed is in the reply to a defence being made by the defendants. Counsel for Ms. Noel further argues that the defendants could have applied for particulars, coupled with an application for an adjournment.
- [84] I agree with the plaintiff that Anenda arose in the context of a counterclaim, a cause of action, rather than a response to a notice of civil claim. As a result, it does not directly answer the concern that arises in this case. Further, in the case before me, there was no adjournment sought when the defendants heard in the plaintiff's opening statements that the issues of actual authority and equitable fraud were relied on in response to the defendants' case. In this context, I note that Lyster J. made the following comment in her decision:
- [9] The Court has broad discretion about the orders it may make if pleadings are found to be non-compliant with the Rules, including striking out, amending or making any other order it considers will further the object of the Rules: Rule 22-7(2).
- [85] There are authorities which provide that so long as a party had sufficient notice of the claims to be brought at trial, a court may order relief sought that is different from what was in the pleadings. For example, in *Basyal v. Mac's Convenience Stores Inc.*, 2022 BCSC 966, Justice Matthews held:
- [23] Courts often make orders other than the form of order sought in a notice of application. The court may order relief broader or different than the relief sought, so long as the parties and persons affected by the order have had the opportunity to be heard: *A.L.M. v. K.H.*, 2004 BCSC 1420 at para. 37.
- [Emphasis added.]
- [86] *A.L.M. v. K.H.*, 2004 BCSC 1420, on which Matthews J. relied, is a decision of Justice Lynn Smith where she stated in the context of an interlocutory motion:
- [37] I recognize that orders may be made that go beyond the specifics set out in a Notice of Motion. In Chambers, the interaction between counsel and the court may lead to an order beyond that sought in the Notice of Motion, but the appropriate practice is to ensure that the parties have had adequate opportunity to provide evidence and make submissions on the matter, and to adjourn if necessary to provide that opportunity.

- [87] Ms. Noel pleaded breach of contract and specific performance. She did not plead her response to the defendants' defences in her amended notice of civil claim. She did not specifically plead these additional legal principles upon which she relies to establish her cause of action, breach of contract.
- [88] Despite Ms. Noel's failure to plead these additional principles, I find the defendants had sufficient notice to respond to the allegations of actual authority and equitable fraud relied on by the plaintiff. The plaintiff raised these arguments in her opening statements. The defendants did not seek an adjournment to prepare their case, nor did they articulate how this issue surprised them when their defence was the wrong person signed the contract. Counsel did not advise me how they would have approached the trial differently had the notice of civil claim been further amended to add equitable fraud and actual authority.
- [89] The primary object of pleadings is to eliminate the prospect of surprise. The defendants should not have been surprised because actual authority, breach of contract, and the defences raised are all sufficiently related. I find that they were not surprised. The defendants had the opportunity to present evidence on the issues raised by the plaintiff and did so. The defendants attempted to answer these allegations through their testimony, cross-examination of the plaintiff, and in their final submissions.
- [90] Pleadings allow both parties to know what case they have to meet and what evidence they ought to advance in support of their position. Here, the defendants had sufficient notice of these arguments and they had the opportunity to advance their case. The issues were fully canvassed during the trial. I am not persuaded that the defendants were in any way prejudiced by these issues being raised, in response to their arguments, at the opening of the trial.
- [91] While it would have been preferable had the plaintiff raised these issues in her amended notice of civil claim, I find that I may order relief based, in part, on these additional responses to the defendants' defences. If I were to accede to the defendants' arguments, I would not be addressing the real issues in dispute. Addressing claims on their merits is the "pre-emptive objective of a trial": *Casa Milanello Developments Ltd. v. D'Angelo*, 2018 BCSC 2210.
- [92] I find that these issues are properly before this Court. I dismiss the defendants' preliminary objection to the deficiency of the pleadings.

Mistake

Legal Principles

- [93] Mistaken assumption is a mistake that goes to the basis for entering a contract. It is also referred to as "common law mistake" and "equitable mistake". In *Bell v. Lever Brothers*, [1932] A.C. 161 (H.L.), at 217-218, Lord Atkin identified three kinds of mistaken assumptions that could void a contract: (i) mistaken identity of the contracting parties; (ii) mistake as to existence of the subject matter of the contract; and (iii) mistake as to the quality of the subject matter.
- [94] As stated in *Kasian Estate v. Kasian*, 2021 BCSC 2164 at paras. 78-79, the test for ordering rectification for unilateral mistakes is more stringent than the test under common mistake. The reason for this high threshold is because it enables a party to overcome their mistake by judicially imposing on another party an agreement the other did not intend to have to perform. The test for ordering rectification for unilateral mistake requires that:
- a) the party resisting rectification knew or ought to have known about the mistake; and
 - b) permitting that party to take advantage of the mistake would amount to "fraud or the equivalent of fraud".

Analysis

- [95] The defendants contend the signature of Alex Jr. was a mistake which they did not notice until approximately two days before closing. They argue that Alex Jr. signed Contract 2 and Contract 3 under the mistaken belief that he was the owner, not as an agent of Mr. Tatarov. As a result, there was a mistake of contract and Contract 3 was void ab initio.
- [96] I do not accept there was a mistake of contract. There was no evidence before me that Alex Jr. thought he was the owner when he signed Contract 2 and Contract 3. Alex Jr. did not testify and the defendants were unable to say what he believed as to ownership of the Property. Mr. Tatarov admitted that he has never even asked Alex Jr. who Alex Jr. believes are the owners of the Property.
- [97] The plaintiff has requested that I draw an adverse inference on the basis that Alex Jr. did not testify, based on *Singh v. Reddy*, 2019 BCCA 79 at para. 10. I need not go that far because I find that by not calling Alex Jr. to provide testimony, the defendants have not met their burden in establishing that there was a mistake of fact.
- [98] The defendants further argue that although Ms. Tatarov testified that Ms. Clarkstone, the notary for Ms. Noel, never specifically advised her that Alex Jr. was the title holder, the ambiguous statement, "whoever is Alex should sign", led Ms. Tatarov to believe Ms. Clarkstone was advising her that Alex Jr. was the title holder.
- [99] I do not accept that Ms. Tatarov was confused by what Ms. Clarkstone advised her. I find that Ms. Tatarov knew the registered owner in fee simple on title may well have been Mr. Tatarov. On the certificate of title, the owner was listed as "Alex Tatarov, Businessman". Alex

Jr. was only 18 years old at the time and presumably would not have been listed as a businessman. Based on the evidence, neither Ms. Tatarov nor Mr. Tatarov took any steps to determine which Alex had actually signed the paperwork as the owner in 2002. Mr. Tatarov did not do any independent research to see whether he was the Alex on title, and he testified that at the time he signed Contract 1 Ms. Tatarov told him that he was the Alex on title and he took her word for it.

[100] When it came time to sign Contract 2, Ms. Tatarov understood that the names of the sellers on the contract for purchase and sale had to match the names on title for the Property. She understood this to mean that one of the sellers had to be described as "Alex Tatarov". Ms. Tatarov's evidence was that only Alex Jr. had identification with the name "Alex" on it and so she had him sign Contract 2. As she stated in her email dated May 13, 2021:

In August [2020], I wanted to change Oleksandr [Mr. Tatarov] for Alex in our agreement, but Dorothy [the notary] told me, that the names must be as on the Title. My Jr. at least had "Alex" on his driver's license! So, if we need Alex, we will put Alex, as any way I could not tell for sure 19 years ago [who] was with me at that investment group meeting. And there is nobody to ask! For us, it's not an issue at all. The business is mine, and only mine, anyway. And 3 of us will probably continue to live together as one family until death. (Our Jr. is on the Spectrum (Asperger's was saved intellect but inability to communicate) and [is] single.

[101] Ms. Tatarov admitted she decided to have Alex Jr. sign Contract 2 because he had a drivers licence with the name Alex on it. She did not have him sign because she mistakenly believed he was the co-owner. Rather, Ms. Tatarov admitted in the above email she did not care who was the owner. Further, Ms. Tatarov stated in her discovery evidence that it was not "crucial" or "important" which Alex was on title as the Property was in the family business.

[102] Mr. Tatarov was the person who signed as owner of the Property in 2002 when it was purchased. It was the defendants who always had the means to confirm that he was the owner. Had Ms. Tatarov and Mr. Tatarov exercised a modicum of diligence and reviewed the original documents from 2002, as well as the subsequent mortgage documents in their own house, they would easily have confirmed that Mr. Tatarov was the person who was on title.

[103] In these circumstances, I find the defendants knew about the signature issue and simply did not care. To allow them to benefit from this "mistake", would amount to an equitable fraud as I discuss below: Kasian at para. 79.

[104] There is no evidence before me that Alex Jr. believed he was on title to the Property. I do not accept the defendants' argument that Alex Jr.'s signature was a mistake resulting in Contract 3 being void ab initio.

Actual Authority

Legal Principles

[105] The requirements for a finding of actual authority were described in *0731431 B.C. Ltd. v. Panorama Parkview Homes Ltd.*, 2021 BCSC 607:

[448] The existence of actual authority is a question of fact that must be determined on a review of the evidence. The principles relating to a finding of actual authority were set out in *Grosvenor Canada Limited v. South Coast British Columbia Transportation Authority*, 2015 BCSC 177:

58 The parties agree the essential elements of an agency relationship are (a) the principal's control of the agent's action, (b) the consent of both the agent and the principal, and (c) the authority of the agent to affect the principal's legal position. Professor Fridman in *Canadian Agency Law* 2nd Ed. (Toronto: LexisNexis Canada Inc., 2012) defines agency at common law as follows (at p. 4):

Agency is a relationship that exists between two persons when one, called the agent, is considered in law to represent the other, called the principal, in such a way as to be able to the affect the principal's legal position in respect of strangers to the relationship by the making of contracts or the disposition of property.

59 The existence of an agency relationship is a question of fact and it may arise between parties who have another legal relationship. In the context of trustees acting as agents, see *Advanced Glazing v. Multimetro et al.*, 2000 BCSC 804. It is irrelevant that the parties have used the term agency in describing their relationship (Fridman, *Canadian Agency Law* at p. 6). No express agreement is necessary to establish an agency relationship, and therefore it can be implied from the circumstances: *Trident Holdings Ltd. v. Danand Investments Ltd.* (1988), 64 O.R. (2d) 65 (C.A.).

[Emphasis added.]

Analysis

[106] The defendants argue that the contract is unenforceable because the wrong Alex signed the contract. The owner is Mr. Tatarov, but Contract 3 was signed by Alex Jr. The defendants contend that Mr. Tatarov never gave signing authority to Alex Jr.

[107] Ms. Noel argues that based on the evidence before me Alex Jr. had actual authority to sign the contract on behalf of the owner, Mr. Tatarov. Even if Mr. Tatarov did not provide signing authority in words to Alex Jr., no express agreement is necessary to establish an agency relationship; it can be implied from the circumstances: *0731431 B.C. Ltd.* at para. 448.

[108] The defendants submit:

Until this dispute arose, Mr. Tatarov did not remember who was on title to the Property because, he testified, in those ~18 years since the purchase of the Property, he had experienced 2 economic recessions, 2 major employment changes, the COVID-19 pandemic, living with 3

disabled people, including his mother who suffered 5 heart attacks, his adult son with Asperger's Syndrome and his wife who suffers from chronic fatigue and ADHD, all while trying to maintain the burden of breadwinner and a portfolio of about 40 properties, for some of which he subsidized the mortgage payments in the wake of the 2008 housing collapse in Alberta.

[109] I accept that in these circumstances Mr. Tatarov would not remember whose signature was on title in 2002. However, I have already found that the parties did not care whose signature was on title as between Mr. Tatarov and Alex Jr.

[110] Mr. Tatarov and Ms. Tatarov testified that they and their son have a family business involving the purchase, rental, and sale of homes. Mr. Tatarov provided the money to buy the properties and he took on the role of maintaining the properties that were within driving distance of their home. Ms. Tatarov dealt with the paperwork and running the ongoing functions of the business. Alex Jr. handled the computer aspects of the business and acted as Ms. Tatarov's driver and bodyguard.

[111] Ms. Tatarov testified that she, Mr. Tatarov, and Alex Jr. "live like one team and function like one team". In his discovery evidence, Mr. Tatarov described the Property as a "family property"; it was part of the family business. About half of the properties were registered in the names of Alex Jr. and Ms. Tatarov; the other half were registered in the names of Mr. Tatarov and Ms. Tatarov. Mr. Tatarov stated in his discovery evidence that "it doesn't matter who owns the property, me or Alex Junior, because eventually it will be his regardless." In her discovery evidence, Ms. Tatarov stated that it was not "crucial" or "important" which Alex was on title as the Property was in the family business.

[112] Actual authority is created by a manifestation from the principal to the agent that the principal consents to the agent taking actions on the principal's behalf. Express actual authority may be conveyed orally or in writing.

[113] With respect to Contract 1, Mr. Tatarov indicated to the purchaser and to his own notary that he was the owner of the Property. With respect to Contract 2, Ms. Tatarov and Mr. Tatarov never advised Ms. Noel, her notary, or their own notary that they now believed Alex Jr. was the owner of the Property. Meagan Selzler testified that on August 21, 2020 when she was contacted by Ms. Tatarov and Mr. Oleksandr Tatarov, she understood these two people were her clients. The email was signed "Valentyna and Oleksandr Tatarov". Ms. Selzler confirmed that she was not told that the person signing for Alex Tatarov later changed. Ms. Selzler believed that Mr. Tatarov was still the seller in Contract 2.

[114] Mr. Tatarov witnessed Alex Jr.'s signature for the seller on Contract 2. By witnessing his son's signature, Mr. Tatarov approved of Alex Jr. signing the sale contract on his behalf, should he prove to be the owner. Mr. Tatarov also witnessed Alex Jr.'s signature on both addendums to Contract 2. Mr. Tatarov had signed Contract 1 as the owner despite not knowing whether his signature was on title. I find that Mr. Tatarov was unconcerned who was originally on title because it was a family business so he had no concerns when his son signed the purchase and sale agreement for Contract 2. As Mr. Tatarov said at discovery,

when he signed Contract 1 he "believed that this was a family property and we are selling family property, me and Ms. Tatarov."

- [115] Similarly, I find that Ms. Tatarov never assumed Alex Jr. signed the certificate of title when they purchased the Property in 2002. In Ms. Tatarov's discovery evidence, she said she made the decisions for her husband and son regarding buying and selling the properties. Ms. Tatarov agreed in testimony that both her husband and son "would just say, okay, I'll sign where you tell me to sign". Ms. Tatarov further admitted that because they are one family, it does not matter who owned the Property. Ms. Tatarov did not feel that it was important who the actual "Alex" was because the Property was part of the family business.
- [116] By their own evidence the parties: i) owned a family business; and ii) they owned the properties together with their son, whether it was legally structured that way or not. The parties did not review any documentation when the issue arose of who the "Alex" was on the certificate of title because they believed it was irrelevant who the owner was on paper. It was a family business and the properties were owned jointly. This situation arose because Ms. Tatarov believed that since Alex Junior used the name "Alex" on his driver's license, it was more expedient to have him sign.
- [117] Alex Jr. did not testify. Based on the other evidence, it is likely that Alex Jr. accepted Ms. Tatarov's view that he could sign as the "Alex" whether it was him or Mr. Tatarov who was actually on title. Ms. Tatarov admitted she requested Alex Jr. to sign Contract 2 and he did so.
- [118] In these circumstances, I find an agency relationship existed. The defendants treated Mr. Tatarov and Alex Jr. as owners of the Property who could sign on each other's behalf. This was certainly what they relayed to Ms. Noel through their actions.
- [119] I find that Alex Jr. had actual authority to sign the contract on behalf of Mr. Tatarov.

Equitable Fraud

Legal Principles

- [120] The Court of Appeal in *Godfrey v. Sony Corporation*, 2017 BCCA 302 at para. 102, citing *Guerin v. Canada*, [1984] 2 S.C.R. 335 at 390, explained what is required to establish equitable fraud. Equitable fraud is "conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for one to do towards the other." A purely commercial relationship may satisfy the requirement for a "special relationship" between parties: *Godfrey* at para. 103.
- [121] The Land Title Act, R.S.B.C. 1996, c. 250 and its Torrens system provisions do not oust the equitable jurisdiction of the court to grant a remedy against a person found to be subject to an equitable obligation: *Panorama* at para. 407. As stated by Chief Justice Anglin in *Tolley v. Guerin*, [1926] S.C.R. 566 at 574, 1926 CarswellAlta 109:

Nor does the Land Titles Act enable Guerin to reap the benefit of his fraud and breach of trust. That statute has not denuded the courts of their equitable jurisdiction to compel persons unconscientiously asserting legal rights to do equity.

Analysis

[122] Ms. Noel argues that, based on the defendants' conduct, it would be equitable fraud for Mr. Tatarov and Ms. Tatarov to deny that Contract 3 is a valid contract.

[123] The defendants argue that Mr. Tatarov did not sign Contract 3 and he did not approve selling the Property for \$150,000. They contend there was no "nefarious plan" from the outset to have the plaintiff pay more money at the eleventh hour.

[124] I accept there was no nefarious plan from the outset to force Ms. Noel to pay more money than she contracted to do. However, Ms. Noel did not argue there was some elaborate plan in place since August 2020.

[125] I find there was a special relationship between the parties. They had an ongoing relationship between August 2020 to May 2021, during which there were extensive communications between Ms. Tatarov and Ms. Noel. This was sufficient to meet the test: Godfrey.

[126] In my view, even if Alex Jr. did not have actual authority to sign Contract 3, it was an equitable fraud when the defendants resiled from Contract 3 based on an "error" they created. The defendants represented to Ms. Noel and Ms. Clarkstone that Mr. Tatarov was the owner of the Property when negotiating Contract 1. Mr. Tatarov signed the purchase and sale agreement for Contract 1. When Mr. Tatarov and Ms. Tatarov knew that Alex Jr. would be signing the subsequent contracts for the sale of the Property, the defendants took no steps to advise Ms. Noel or Ms. Clarkstone of this change in the "owner". While Ms. Clarkstone should have noticed the change, this does not excuse the defendants' conduct.

[127] Moreover, Ms. Tatarov confirmed that her bank, CIBC, mailed an annual mortgage statement to the defendants every year. The mortgage is in the name of Ms. Tatarov and Mr. Tatarov. Ms. Tatarov confirmed at trial that when she actually looked for these documents once the notice of civil claim was filed, she found them. She simply never looked for them before this action was filed.

[128] Ms. Tatarov tried to persuade me that she mixed up who should sign Contract 2 based on what Ms. Clarkstone advised her and due to her medical conditions. I have already found that Ms. Tatarov was not confused by what Ms. Clarkstone told her about the name on the purchase and sale agreement and the "Alex" on the certificate of title.

[129] In terms of medical conditions, Ms. Tatarov testified that she was affected by the failure of the market in 2008 and the pressure caused by being overextended in their property purchases. She testified that she became very depressed and now suffers from chronic fatigue. Nevertheless, she dedicated herself to repairing the damage and restoring her

family's faith in her. Ms. Tatarov's need to repair the post-2008 damage may explain why she put pressure on Ms. Noel to enter into Contract 3; it does not establish why the defendants were unable to complete Contract 3.

- [130] The defendants contend that Mr. Tatarov was not aware of Contract 3 until May 2021. Ms. Tatarov testified that she did not involve Mr. Tatarov in discussions about the Property in 2021 as she was trying to shield him from unnecessary worry. In January 2021, Mr. Tatarov's employer was in the process of navigating a merger which increased his workload. Mr. Tatarov was required to attend the office more frequently and was less focused on what was going on at home and in the family business. He trusted that Ms. Tatarov would continue to alert him to anything needing his attention.
- [131] Despite these explanations, I do not accept that Mr. Tatarov was unaware of Contract 3 until approximately May 12, 2021. In direct examination, Ms. Tatarov testified that Mr. Tatarov approved selling the Property for \$150,000. She said he was okay with selling the Property for \$150,000. Clearly in May 2021 he was not okay settling the Property for this price, strongly suggesting he made this statement to Ms. Tatarov at some point earlier than May 2021. The only contract that had a selling price of \$150,000 is Contract 3. Contract 1 and Contract 2 both had a selling price of \$155,000. The first time Ms. Tatarov offered the reduced price of \$150,000 was in her email to Ms. Noel dated January 26, 2021. Based on the evidence of both Ms. Tatarov and Mr. Tatarov, I conclude that Mr. Tatarov was involved in major business decisions. I also find that Mr. Tatarov likely knew that Ms. Tatarov and Ms. Noel were negotiating a new contract for the purchase and sale of the Property for the price of \$150,000 well before May 12, 2021.
- [132] I also base this finding on the evidence that Ms. Tatarov and Mr. Tatarov live together and work in the same home office. Their desks are approximately one metre apart. I accept the fact that Mr. Tatarov was going into his office more frequently in the winter and spring of 2021, and was distracted by a corporate merger. However, it is not reasonable to think that Ms. Tatarov and Mr. Tatarov did not discuss the sale of the Property as negotiations continued with Ms. Noel. This is especially so because Ms. Tatarov is a talkative person and was under pressure to sell the Property in order to pay off her CMHC debt. She was also hoping to increase her pension payments.
- [133] Ms. Tatarov testified that she did not like to discuss her failures about their properties with Mr. Tatarov but that, "If it was a success, I would tell him that evening." Ms. Tatarov clearly viewed the pending sale of the Property to Ms. Noel as a success, especially when the "subject to financing" condition was removed on March 31, 2021. After receiving the addendum removing the subject, Ms. Tatarov wrote:

Mama Mia!!!

I am SO-SO happy!

- [134] Even if Ms. Tatarov did not share the new contract price on January 26, 2021, I do not accept that Ms. Tatarov did not share this happy news with Mr. Tatarov. It is simply not plausible that she would keep this news from him.
- [135] I find that Mr. Tatarov was aware of Contract 3 by March 31, 2021. He was aware Ms. Tatarov was continuing to try to sell the Property to Ms. Noel after Contract 2 failed to complete. In addition, Mr. Tatarov knew or ought to have known that the new contract to sell the Property to Ms. Noel was signed by Alex Jr. given that Mr. Tatarov did not sign Contract 3. He accepted this agency relationship because he did not care who was originally on title.
- [136] In any event, the defendants could have allowed Contract 3 to complete. They simply chose not to do so when they saw an opportunity to obtain a better purchase price in light of a significant rise in the real estate market. However, it was too late in the process to renegotiate the purchase price so they instead refused to complete Contract 3.
- [137] Mr. Tatarov testified that Ms. Tatarov came to him in the days leading up to May 12, 2021 and told him she had made a terrible mistake regarding the identity of the person on title of the Property. He was angry that she placed the family in a precarious legal position. Mr. Tatarov told Ms. Tatarov to ask for a 15-day extension so that he could have time to assess the situation.
- [138] I do not accept this explanation. The Tatarovs were not in a precarious legal position because even if the signature was a mistake, and not a result of an agency relationship, it was easy to fix. The defendants had bought and sold approximately 40 properties; they were not new to the real estate business. If Mr. Tatarov and Ms. Tatarov wanted to correct an innocent signing error, they could have done so by simply signing the necessary transfer documents for Contract 3.
- [139] In fact, the defendants were prepared to complete the contract if Ms. Noel would pay an extra \$50,000. The defendants' evidence was that comparable properties in the area were selling for \$250,000. The defendants wanted to split the difference between the selling price of \$150,000 and the \$250,000 they believed the Property was worth.[2] As a result, they demanded that Ms. Noel pay an additional \$50,000 through a second mortgage. In an email dated May 12, 2021 from Ms. Tatarov to Ms. Clarkstone and Ms. Noel, Ms. Tatarov states: "If Ms. Noel does not add the 2nd mortgage 50K from us to the contract, we are not closing, as our contract is not valid." The inference I draw from this email is that if Ms. Noel agreed to pay the extra \$50,000 the defendants would have addressed the signature issue and completed the contract.

[140] I find the defendants acted improperly toward Ms. Noel, especially in light of the pressure Ms. Tatarov put on Ms. Noel to sign Contract 3. The defendants should not be permitted to reap the benefits of their unconscionable actions. As stated in Tolley, the Land Title Act has "not denuded the courts of their equitable jurisdiction to compel persons unconscientiously asserting legal rights to do equity." To allow the defendants to take advantage of the "wrong" signature would amount to equitable fraud.

[141] On the facts of this case, I find it was an equitable fraud when Mr. Tatarov and Ms. Tatarov asserted that Contract 3 was void because Alex Jr. signed it.

Breach of Contract

Legal Principles

[142] To establish a legally binding contract there must be an offer, acceptance, and consideration. Both parties must demonstrate an intention to contract and agree on certain terms. Agreement by both parties on the terms forms the foundation of an enforceable contract: *Anani v. Malaspina Coach Lines Ltd.*, 2003 BCSC 700 at para. 5.

[143] The vendor in a purchase and sale agreement must be able to convey the property to be sold. If not, the contract collapses for failure of consideration. To put it another way, the contract collapses because the true owner of the property has not agreed to the sale: *Badesha v. Aujla*, 2016 BCCA 294.

[144] To succeed in a claim of breach of contract it must be established that:

- a) the plaintiff had a valid and enforceable contract with the defendant;
- b) the defendant breached that contract; and
- c) the breach resulted in damages or loss.

Analysis

[145] Ms. Noel's claim is rooted in the law of contract. Specifically, her pleadings relate to a real estate transaction contract that failed to close. She is seeking relief for the alleged breach by the defendants. The issues of actual authority and equitable fraud are responses to the defendants' claim regarding mistake. They are intertwined with the contract issues in this case.

[146] I accept that the basis of Ms. Noel's claim is found in contract law; she relies on the principle of actual authority as a shield.

- [147] In determining a principal's liability to a third-party, the concept of agency power is a concept of attribution. The attribution rules differ depending on the nature of the underlying matter (tort or contract). In order for a principal to be bound by a contract entered into by an agent, there must be either actual authority or apparent authority. Here I have found that Alex Jr. had actual authority to sign the Contract. Contract 3 was valid and enforceable against the defendants.
- [148] The reason Contract 3 did not complete was not because of an issue regarding who signed for "Alex" Tatarov. Rather, the reason Contract 3 did not complete was because the defendants saw an opportunity for financial gain. I have found that Alex Jr. had actual authority, along with Ms. Tatarov, to convey the Property to Ms. Noel. Ms. Noel was ready and able to complete the Contract in accordance with her obligations. The defendants breached Contract 3 when they refused to complete the transaction.
- [149] I find the defendants breached the valid purchase and sale agreement by failing to complete the contract. As a result, Ms. Noel is entitled to relief in the form of specific performance for the reasons outlined below.

Specific Performance

Legal Principles

[150] To establish entitlement to the remedy of specific performance a plaintiff must establish:

- a) that the land is especially suitable (unique) for the purchaser;
- b) that a substitute is not readily available; and
- c) that damages are comparatively inadequate to do justice.

686966 B.C. Ltd. v. 686967 B.C. Ltd., 2007 BCSC 1137, at para. 18.

[151] A purchaser seeking a remedy of specific performance must prove that the property in dispute is unique "to the extent that a substitute would not be readily available and that there is a fair, real, and substantial justification for the decree that is sought": Ali v. 656527 B.C. Ltd., 2004 BCCA 350, at para. 23.

Analysis

- [152] Ms. Noel seeks specific performance for the breach of contract. She wants the Property, not monetary compensation.
- [153] Ms. Noel acknowledged that the real estate market has continued to climb. She acknowledged that other properties in Echo Park Estates would have sold for more than \$150,000. Ms. Noel testified that this was because the other properties were renovated. She testified that the Property at issue has not been renovated. As Ms. Noel and Mr. Hodson stated in an email dated August 19, 2020:

Your asking price was 155,000 we offered 150,000 as the townhome needs work. It has had very little to no maintenance done since days moved in here almost 5 years ago. The stove and fridge both need to be replaced, as well as the carpeting. It needs painting badly as well.

[154] Specific performance is typically ordered when a property is "unique". For example, the architecture distinguishes the property from other homes the plaintiff could purchase. Nevertheless, I do not accept that this is the only lens through which we should view uniqueness. Otherwise a remedy in specific performance would be reserved in most cases for the wealthy. In my view, proximity to family, community, and social supports may all make a property unique.

[155] In this case, Ms. Noel provided evidence that the Property is important to her and her family because it is close to her daughter's school, the pool, the library, and trails where they walk. Both friends of hers and friends of her daughter live in the building. Her daughter's biological father lives six to seven minutes away. The Property is also close to their family doctor and other amenities. Importantly, her daughter attends after-school care at another unit in Echo Park Estates. When questioned, Ms. Noel emphasized the Property is unique because it is her home. Although she had not lived in the Property for very long when the breach of contract occurred, she and her family have now lived in the Property for another year and a half.

[156] The defendants argue that the Property is not unique because there were other similar units in the same complex that had been sold since Contract 3 did not complete. They argued that Ms. Noel did not attempt to purchase any of them. In my view, this helps prove that the Property is unique because it is not renovated and it is the only property Ms. Noel could afford to purchase. There is plenty of evidence regarding how difficult it was for her to obtain financing. There is also evidence of the rising real estate values in the area. A substitute property is simply not readily available to her.

[157] I accept that this Property is unique to Ms. Noel because it is her home and close to all her support systems. It is not a commercial venture. Further, because it was not renovated, it was within Ms. Noel's purchasing power. The evidence before me is that other units of similar sizes in the same complex are more costly because the owners have made improvements to the units: Ali. In addition, there is no failure to mitigate Ms. Noel's damages because Ms. Noel could not afford another property in a rising real estate market.

[158] The defendants rely on *Thiyagarajah v. Mattamy Homes*, 2018 ONSC 5089, stating that a remedy of specific performance is unfair when it requires a party to sell an asset below market value through no fault of their own. I reject this argument because I have found that the defendants were not innocent vendors.

[159] Based on the above, there is a fair, real, and substantial justification for an order for specific performance.

Damages for Rental Payments

- [160] Ms. Noel states in her closing submissions that she has continued to pay rent of \$966 per month since the third purchase and sale agreement failed to close. She makes the payments under protest. Ms. Noel provided evidence of electronic transfer payments from her bank account to the defendants.
- [161] In written submissions, the defendants argued the relief sought in Ms. Noel's amended notice of civil claim was limited to specific performance. In oral submissions, the defendants argued that because the rental agreement for the property is in Mr. Hodson's name, the claim must fail because Ms. Noel and Mr. Hodson do not have an agency relationship.
- [162] I disagree that this issue was not pleaded. Ms. Noel states in her amended notice of civil claim under her statement of facts: "Noel has continued to make rent payments to the Tatarovs to reside in the Property. The rent payments are made under protest." Further, under relief sought the plaintiff states: "An order that the defendants reimburse the plaintiff for rent payments made by the plaintiff after May 14, 2021."
- [163] Ms. Noel seeks an order that the defendants reimburse her for the rent payments made since May 14, 2021. Ms. Noel states in her closing submissions that she has continued to pay the \$966 per month rent in protest since Contract 3 did not close. The defendants argue in oral submissions that because the rental agreement for the property is in the name of Mr. Hodson, the claim must fail because Ms. Noel and Mr. Hodson do not have an agency relationship. This issue was not fully canvassed in submissions.
- [164] Ms. Noel and Mr. Hodson live together at the Property in a common law relationship. The defendants took me to no authorities stating that Ms. Noel cannot make the payments on behalf of them in those circumstances. In any event, I have found a breach of contract as of May 12, 2021. As a result, Ms. Noel is the rightful owner of the Property from that day forward and has been making the rental payments under protest. I dismiss the agency argument put forward by the defendants.
- [165] In *Bajwa v Habib*, 2018 BCSC 1822, the Court found that an award of specific performance and an award for damages for breach of contract is suitable:
- [128] [M]oving expenses, rent paid for alternative accommodation and legal expenses thrown away would qualify as reasonably foreseeable losses at the time the Contract was made, that would arise from breach of that Contract by the defendants.
- [166] I have found the defendants breached the valid purchase and sale agreement by failing to complete Contract 3. Ms. Noel is entitled to relief in the form of specific performance. Ms. Noel is also entitled to general damages for the rent expenses she incurred from May 12, 2021 to the date of this judgment.

Disposition

[167] For the reasons given above, I order:

- a) The dismissal of the defendants' argument that they were under the mistaken belief as to the identity of the owner of the property because it would amount to equitable fraud.
- b) Alex Jr. had actual authority to bind both Mr. Tatarov and Ms. Tatarov.
- c) Specific performance of the third purchase and sale agreement dated March 8, 2021:
 - i. that the defendants sign both the requisite Form A transfer (transferring title to Ms. Noel) and all completion documents on receipt of the purchase price with the standard adjustments being made; and
 - ii. that the adjustment, completion, and possession dates are to be within 60 days of the date of this judgment.
- d) Ms. Noel is entitled to recover as damages for breach of contract the rental payments she made from May 12, 2021 to the date of this judgment, together with interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79.
- e) The defendants are to charge no further rental payments pending completion of Contract 3.
- f) As the successful party, the plaintiff is presumptively entitled to her costs. However, if there are matters relevant to costs that the parties wish to bring to my attention, they are at liberty to submit written submissions within 45 days of the date of these Reasons. Any response submission should be submitted within 15 days of the receipt of the original submissions. Any reply submission may be submitted within ten days of the receipt of the response submissions.

"D. MacDonald J."

- [1] See the email dated August 17, 2020 from Ms. Tatarov to Ms. Clarkstone and the email dated August 21, 2020 from Ms. Tatarov to reception of M. Hawke and Associates.
- [2] There was no evidence before me that the Property was actually worth \$250,000 but I accept that it had increased in value between January and May 2021.

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Prepared on 26 October 2026 · Esheria