

CANADA / JUDGMENT

Rai v. Sechelt (District)

2021 BCCA 349

COURT

British Columbia Court of Appeal

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2021 BCCA 349 Rai v. Sechelt (District) APPEAL FOR BRITISH COLUMBIA Citation: Rai v. Sechelt (District), 2021 BCCA 349 Date: 20210928 Dockets: CA47087; CA47088; CA47089; CA47090; CA47091; CA47092; CA47093; CA47094 Docket: CA47087 Between: Harjit Singh Rai Respondent (Plaintiff) And District of Sechelt and Ray Parfitt Appellants (Defendants) And Her Majesty the Queen in right of the Province of British Columbia Respondent (Defendant)

- and - Docket: CA47088 Between: Elliot Held and Karen Cassie Held Respondents (Plaintiffs) And District of Sechelt and Ray Parfitt Appellants (Defendants) And Her Majesty the Queen in right of the Province of British Columbia Respondent (Defendant)
- and - Docket: CA47089 Between: Edward Arthur Pednaud and Rae-Dene Sunny Pednaud Respondents (Plaintiffs) And District of Sechelt and Ray Parfitt Appellants (Defendants) And Her Majesty the Queen in right of the Province of British Columbia Respondent (Defendant)
- and - Docket: CA47090 Between: Kevin Patrick Pickell and Lilian Irene Pickell Respondents (Plaintiffs) And District of Sechelt and Ray Parfitt Appellants (Defendants) And Her Majesty the Queen in right of the Province of British Columbia Respondent (Defendant)
- and - Docket: CA47091 Between: Sichao Wang Respondent (Plaintiff) And District of Sechelt and Ray Parfitt Appellants (Defendants) And Her Majesty the Queen in right of the Province of British Columbia Respondent (Defendant)
- and - Docket: CA47092 Between: Rodney Burwell Goy and Donna Lynn Goy Respondents (Plaintiffs) And District of Sechelt and Ray Parfitt Appellants (Defendants) And Her Majesty the Queen in right of the Province of British Columbia Respondent (Defendant)
- and - Docket: CA47093 Between: Joanna Moradian Respondent (Plaintiff) And District of Sechelt and Ray Parfitt Appellants (Defendants) And Her Majesty the Queen in right of the Province of British Columbia Respondent (Defendant)
- and - Docket: CA47094 Between: Jin Shun Pan Respondent (Plaintiff) And District of Sechelt and Ray Parfitt Appellants (Defendants) And Her Majesty the Queen in right of the Province of British Columbia Respondent (Defendant) Before: The Honourable Mr. Justice Harris The Honourable Mr. Justice Fitch The Honourable Madam Justice DeWitt-Van Oosten On appeal

from: An order of the Supreme Court of British Columbia, dated August 24, 2020 (Goy v. District of Sechelt, 2020 BCSC 1242, Vancouver Dockets S198921; S198922; S198923; S198924; S198925; S198926; S198927; S198928). Counsel for the Appellants (via videoconference): G. Allen D.S. Ball Counsel for the Respondents (Plaintiffs in the Supreme Court of British Columbia) (via videoconference): J.P. Scouten Counsel for the Respondent, Her Majesty the Queen in right of the Province of British Columbia (via videoconference): M.N. Weintraub D. Brownell Place and Date of Hearing: Vancouver, British Columbia May 19, 2021 Written Submissions Received: August 9, August 20, and September 3, 2021 Place and Date of Judgment: Vancouver, British Columbia September 28, 2021 Written Reasons by: The Honourable Mr. Justice Harris Concurring in by: The Honourable Mr. Justice Fitch The Honourable Madam Justice DeWitt-Van Oosten Summary: The issues on these appeals involved whether a covenant on title was effective to release claims advanced against the District of Sechelt. The judge concluded that the covenants registered pursuant to s. 219 of the Land Title Act, R.S.B.C. 1996, c. 250 [LTA], did not release the respondents' claims because that section did not authorize the inclusion of release language in a covenant. He went on to interpret the specific release language in issue, concluding that, in any event, the release did not apply to the respondents' claims. Held: Appeals allowed. The judge erred in concluding that the statute did not authorize the inclusion of a release in the covenant. He also erred in failing to analyse the factual matrix in interpreting the language of the release. Once the factual matrix is appreciated, the release is effective to release the respondents' claims. Reasons for Judgment of the Honourable Mr. Justice Harris:

Introduction

- [1] The issue on these appeals is whether a covenant on title to each of the individual respondents' properties is effective to release claims advanced by them against the District of Sechelt (the "District"). In essence, the respondents claim against the District for the negligent approval of a subdivision in which their properties are located. Those properties were developed on land the respondents say the District knew or ought to have known was subject to the risk of subsidence and other problems. Those risks have materialized and the respondents have been ordered to evacuate their properties.
- [2] The judge concluded that the covenants registered pursuant to s. 219 of the Land Title Act, R.S.B.C. 1996, c. 250 [LTA], did not release the respondents' claims because that section did not authorize the inclusion of release language in a covenant. He went on to interpret the specific release language in issue, concluding that, in any event, the release did not apply to the respondents' claims.
- [3] The District contends that the judge erred both in respect of his statutory interpretation of the scope of s. 219 as well as in his interpretation of the specific language of the release.

Background

- [4] The District is a municipal corporation under the Local Government Act, R.S.B.C. 2015, c. 1.
- [5] The respondents are registered owners in fee simple of properties located in a subdivision within the District (the "Development").
- [6] In 2004, a developer ("Concordia") applied to the District for a development permit and subdivision approval of the Development. In March 2005, the District issued a development permit in respect of lands, part of which would subsequently be subdivided. At or about the same time, the approving officer issued a "preliminary layout approval" ("PLA") for the proposed subdivision.
- [7] By at least late 2005, consultants had identified seepage and slope stability as "issues of potential concern". Both the District and Concordia knew that, during preparation of the property and initial construction, several soil instability events had occurred which included 'land slip', sinkholes, and the emergence of springs.
- [8] In February and March 2006, another consultant engaged by the District recommended that the District require the developer to obtain a comprehensive report outlining the current conditions, steps taken to stabilize the lands, and recommendations for proposed work on the Development.
- [9] On March 22, 2006, the approving officer amended the PLA (the "Amended PLA") to require the following from Concordia:
 - a. provide the approving officer with a new geotechnical report prepared by a professional engineer with expertise in both geotechnical and hydrological issues and confirming that the Development land "is not subject to land slip, sinkholes or erosion and is suitable for the developer's intended use and development of the lands";
 - b. execute covenants pursuant to s. 219 of the LTA or such further documents as may be required by the approving officer as a result of the new geotechnical report; and
 - c. append the new geotechnical report to the s. 219 covenant to be registered on title to "all of the lots being created to serve as a notice to all prospective buyers".
- [10] The Amended PLA also notified Concordia that "[a]t the building permit stage, the Building Inspector may require from the owner/developer further Geotechnical Reports to ensure each lot may be safely built upon to support the intended use."
- [11] In or around May 2006, the District received the geotechnical report that Concordia had been required to obtain under the Amended PLA. This report was prepared by GeoTacTics and dated April 28, 2006, with an addendum dated May 9, 2006 (collectively, the "GeoTacTics 2006 Report").

- [12] The GeoTacTics 2006 Report provided recommendations for site drainage and site preparation, and noted that in September and October 2005, two sinkholes had developed as the result of a major spring on the Development. Unrelated to the two sinkholes above the spring, two other sinkholes were also observed on the Development. Although the GeoTacTics 2006 Report indicated the occurrence of sinkholes in the general area was found to be more common than previously believed, GeoTacTics concluded the property could be safely used for the intended purpose. Specifically, GeoTacTics stated that: Provided the site preparation, earthworks and foundation construction follow the general guidelines outlined above, the property can be safely used for the intended purposes. Conventional single-family permanent or recreational residences constructed in this subdivision are expected to be safe against reasonably conceivable geotechnical hazards, including slope instability, erosion and flooding. The probability of occurrence of geotechnical hazards is estimated to be less than 10 percent in 50 years.
- [13] The addendum dated May 9, 2006 dealt primarily with the "surface expression of soil collapses", commonly known as sinkholes, which the addendum noted had been observed in the Sechelt area generally and on the Development specifically. The addendum noted that "[u]ntil a soil collapse occurs, the presence of a (potential) sink hole is generally undetectable. The occurrence is random." The addendum went on to outline certain remedial measures that had been used at the Development and that GeoTacTics opined were effective in making building sites safe for development.
- [14] Following receipt of the GeoTacTics 2006 Report, the approving officer wrote to Concordia on May 19, 2006 advising that the district engineer recommended site work not be recommenced until the District finished reviewing the GeoTacTics 2006 Report. The approving officer also advised Concordia that, before final subdivision approval, the District would "require a covenant that confirms the geotechnical stability of the subject lots; saving the District harmless (etc.)", with wording to be worked out later.
- [15] On June 6, 2006, the approving officer further amended the PLA to require that: A geotechnical covenant referenced in the [Amended PLA] shall certify that the subdivision may be developed safely for its intended use with respect to servicing work, retaining walls and proposed building sites with respect to landslip, erosion and subsidence.
- [16] On September 13, 2006, the approving officer approved the subdivision comprising the Development pursuant to the authority contained in Part 7 of the LTA.
- [17] On October 2, 2006, pursuant to s. 219 of the LTA and the agreement of Concordia, a covenant bearing Land Title Registration Number BA554998 was registered against title to each of the 28 subdivided lots of the Development, including each lot owned by the respondents (collectively, the "Section 219 Covenant" or the "Covenant").
- [18] It is, I think, important to set out the specific language of the Covenant in some detail: WHEREAS: A. The Covenantor [Concordia] is the registered owner of ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the District of

Sechelt, in the Province of British Columbia, and more particularly described as: Parcel Identifier: Not Available Lots 1 - 28 inclusive DL 1473 Gp 1 NWD Plan BCP 26297 (hereinafter called the "Lands"); B. By the provisions of Section 219 of the Land Title Act, RSBC 1996, c. 250 as amended (the "Land Title Act"), a covenant, whether of a negative or positive nature, in respect of the use of land, or that land is not to be built upon, in favour of the Municipality, may be registered as a charge against the title to that land and is enforceable against the Covenantor and his successors in title, even if the covenant is not annexed to land owned by the Municipality; C. Section 56 of the Community Charter, SBC 2003, Chap. 26, provides inter alia that a building inspector may issue a building permit in accordance with subsection (5) if a qualified professional certifies the land may be used safely for the use intended if the land is used in accordance with the conditions specified in the professional's report. D. The Covenantor has agreed to restrictions on the use of the Lands to which the Covenant applies:

- [19] The Section 219 Covenant also sets out the following terms regarding mutual covenants and agreement:
1. Pursuant to Section 219 of the Land Title Act the Covenantor [Concordia] covenants and agrees with the District that the Lands [Lots 1-28] shall only be built on or used in accordance with the terms of this Agreement and that the Covenantor:
 - (a) will not construct, erect, install or place any building, structure, improvement, utility, or work on the Lands other than those permitted by the Municipality's bylaws in effect from time to time, and only in accordance with the recommendations contained in the Geotechnical Assessments dated April 28, 2006 and May 9, 2006, provided by M.M. Eivemark of Geotactics Engineering Ltd., which are appended to this covenant as Schedule "A", those permitted comprising of conventional single family permanent residences constructed on the upland portion of the land; and
 - (b) will immediately, and at the Covenantor's sole cost, remove any buildings, structures, improvements or utilities that are in contravention of either the Municipality's bylaws or permitted uses as outlined in the geotechnical report noted above, if requested to do so by the Municipality
 2. Subject to the provisions of Section 219 of the Land Title Act the Covenantors' covenants contained in this Agreement shall burden and run with the Lands and shall enure to the benefit and be binding upon the Covenantor, his heirs, executors, administrators, successors and assigns and the District and its assigns. Every reference to the parties is deemed to include the successors and assigns of the parties. It is further expressly agreed that this Agreement may only be modified or discharged by agreement of the Municipality pursuant to the provision of Section 219(9) of the Land Title Act.

6. The Covenantor acknowledges and agrees the Municipality has no specific knowledge and makes no representations or warranties regarding the geotechnical adequacy of the Lands for the proposed uses. The Covenantor agrees that the Covenantor is relying solely on the geotechnical assessments referred to herein for the subsequent safety of the buildings to be constructed on the Lands.
 7. The Covenantor, for himself and his successors and assigns, hereby releases, saves harmless and indemnifies the Municipality for any damage, loss claim, demand, cost (including legal cost), whether as a result of injury or death to any person, or damage to property of any kind, including any claims by third parties, arising from or in connection with the construction of any structures on the Lands or use of the Lands, whether or not construction is in accordance with the geotechnical assessments referred to herein, including without limitation any subsidence, settling of any structure including any utility or road infrastructure, loss of slope stability, or any similar matter.
 8. The Covenantor agrees to immediately repair, remove, restore, replace, or stabilize, to the satisfaction of the Municipality and at the Covenantor's sole cost, any structure, landscaping, utility or road infrastructure, slope or similar feature of the Lands or features in proximity to the Lands damaged, adversely affected or rendered hazardous by the construction of any structures on the Lands, or by any use of the Lands, whether or not the structures or use comply with the Municipality's bylaws or the geotechnical assessments referred to herein.
 11. The Covenantor shall give notice of this Agreement to any person, firm or corporation to whom the Owner proposes to sell, assign, convey or otherwise dispose of the Lands and shall cause any person to whom title to same is to be vested, to enter into an assumption of this Agreement on the same terms and conditions as are herein set forth and to deliver the same to the Municipality as a condition precedent to such vesting.
- [20] As is apparent, the original covenantor was the developer, Concordia. The Section 219 Covenant had been registered against title to all of the lots when, subsequently, they were acquired by the respondents in this case. Once registered on title, the Section 219 Covenant is a charge on title to each of the lots in the subdivision, pursuant to s. 27 of the LTA. The registration on title provided notice to each of the respondents of the charge and its content. The Covenant, as a charge, burdens and runs with the land on each lot. As a result of clause 2 of the Covenant and s. 219(1) of the LTA, the terms of the Section 219 Covenant are binding on each respondent as a successor in title to Concordia.
- [21] In February 2019, the District declared a state of local emergency as a result of immediate danger arising from land subsidence and geotechnical instability at or in the area of the subdivision. Accordingly, the residents were evacuated, and the subdivision was closed and fenced off. This has continued to be the situation ever since.

- [22] The respondents started actions against a variety of defendants, arising out of their involvement in the development of the subdivision. The claim against the District and the approving officer sounds in negligence, for approving the Development and the subdivision, as well as issuing building and occupancy permits.
- [23] The District and the approving officer raised the Covenant as a defence in each case, contending that each respondent had released the District from any claims and, further, is obliged to indemnify the District for any loss arising from subsidence or settlement of dwellings or lots within the subdivision.
- [24] The parties then brought competing applications. The respondents brought an application by way of a summary trial for a declaration that the Covenant did not release the District from their claims. This application did not deal explicitly with whether the approving officer can take the benefit of the Covenant or release. Accordingly, I do not propose to address that question in these reasons. The approving officer, however, brought an application to strike portions of the pleadings naming him as a party, and for the dismissal of the claim against him. This second application forms the subject matter of the companion appeals. Reasons for Judgment
- [25] After determining that the issue before him was suitable for summary trial, the judge turned to the interpretation of the Section 219 Covenant. He addressed the two principal arguments advanced by the respondents in support of their argument that the Section 219 Covenant does not apply to release the District.
- [26] The first argument is that s. 219 of the LTA does not authorize a release. The judge began by examining the statutory language. He noted that authority for the entering into a s. 219 covenant is found in s. 86(1)(d) of the LTA: 86 (1) Without limiting section 85(3), in considering an application for subdivision approval, the approving officer may
- (d) if the approving officer considers that the land is, or could reasonably be expected to be, subject to flooding, erosion, land slip or avalanche, the approving officer may require, as a condition of consent to an application for subdivision approval, that the subdivider do either or both of the following:
 - (i) provide the approving officer with a report certified by a professional engineer or geoscientist experienced in geotechnical engineering that the land may be used safely for the use intended; (ii) enter into one or more covenants under section 219 in respect of any of the parcels that are being created by the subdivision.
- [27] The judge then set out the pertinent parts of s. 219 of the LTA. They read:

- (1) A covenant described in subsection (2) in favour of the Crown, a Crown corporation or agency, a municipality, a regional district, the South Coast British Columbia Transportation Authority, or a local trust committee under the Islands Trust Act, as covenantee, may be registered against the title to the land subject to the covenant and is enforceable against the covenantor and the successors in title of the covenantor even if the covenant is not annexed to land owned by the covenantee.
- (2) A covenant registrable under subsection (1) may be of a negative or positive nature and may include one or more of the following provisions:
 - (a) provisions in respect of
 - (i) the use of land, or (ii) the use of a building on or to be erected on land;
 - (b) that land
 - (i) is to be built on in accordance with the covenant, (ii) is not to be built on except in accordance with the covenant, or (iii) is not to be built on;
 - (c) that land
 - (i) is not to be subdivided except in accordance with the covenant, or (ii) is not to be subdivided;
 - (d) that parcels of land designated in the covenant and registered under one or more indefeasible titles are not to be sold or otherwise transferred separately.
- (6) A covenant registrable under this section may include, as an integral part,
 - (a) an indemnity of the covenantee against any matter agreed to by the covenantor and covenantee and provision for the just and equitable apportionment of the obligations under the covenant as between the owners of the land affected, and
 - (b) a rent charge charging the land affected and payable by the covenantor and the covenantor's successors in title.
- (7) If an instrument contains a covenant registrable under this section, the covenant is binding on the covenantor and the covenantor's successors in title, even though the instrument or other disposition has not been signed by the covenantee.
- (10) The registration of a covenant under this section is not a determination by the registrar of its enforceability.

[28] The judge reasoned as follows:

[37] Subsection 219(2) above provides that a covenant "may include one or more of the following provisions" and then sets out those provisions in paras. (a)-(d). It can be seen that all of those provisions, not surprisingly, are to do with land use and land development. In my view, inserting a release in a covenant under s. 219 is not contemplated or authorized by sub-s. (2).

- [38] Subsection (6) in s. 219 illustrates the Legislature's intention when a government entity, the District in this case, is permitted to receive a form of statutory protection in a subdivision approval covenant. Paragraph (a) in sub-s. (6) expressly authorizes an indemnity for the District in the circumstances set out there. The Plaintiffs, as a result, do not seek on this application a declaration that the indemnity provision in the Covenant is unenforceable.
- [29] The judge recognized that he needed to interpret the meaning of the word "may" in the section. He sought guidance as to the appropriate interpretive approach from a decision of this Court in *Evans v. Jensen*, 2011 BCCA 279. That case had to do with interpreting the word in the context of rules of court dealing with the scope of authority of a trial judge to make a costs award. In that context, this Court concluded that the use of the word "may" did not import a permissive approach which allowed the trial judge to depart from the options set out in the Rule.
- [30] The judge concluded:
- [43] In my view, that reasoning has application here, leading to the conclusion that including a release in a covenant is not authorized by s. 219(2) of the Land Title Act. The four provisions, in paras. (a)-(d) in 219(2), simply do not contemplate a release as something that can be inserted. The point was expressed as follows by Ruth Sullivan in *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ont.: LexisNexis Canada, 2014) at para. 8.90: An implied exclusion argument lies whenever there is reason to believe that if the legislature had meant to include a particular thing within its legislation, it would have referred to that thing expressly. Because of this expectation, the legislature's failure to mention the thing becomes grounds for inferring that it was deliberately excluded. Although there is no express exclusion, exclusion is implied. As Laskin J.A. succinctly put it, "legislative exclusion can be implied when an express reference is expected but absent" The force of the implication depends on the strength and legitimacy of the expectation of express reference. The better the reason for anticipating express reference to a thing, the more telling the silence of the legislature.
- [31] Having concluded that the statutory section did not authorize the inclusion of a release in a s. 219 covenant, the judge then turned to the second principal argument: namely, whether the release in fact applied to the claims. That argument turned on the proper interpretation of clause 7 of the Covenant, which reads: The Covenantor, for himself and his successors and assigns, hereby releases, saves harmless and indemnifies the Municipality for any damage, loss claim, demand, cost (including legal cost), whether as a result of injury or death to any person, or damage to property of any kind, including any claims by third parties, arising from or in connection with the construction of any structures on the Lands or use of the Lands, whether or not construction is in accordance with the geotechnical assessments referred to herein, including without limitation any subsidence, settling of any structure including any utility or road infrastructure, loss of slope stability, or any similar matter. [Emphasis of the trial judge.]

- [32] The judge emphasized the underlined passages above as the keywords engaged in the interpretation of the scope of the release. He concluded that the words which he had not underlined were merely modifiers of the keywords. Accordingly, he found that the release is only for damage, etc., "arising from or in connection with the construction of any structures on the Lands or use of the Lands." As a result, to the extent the respondents' claims are for things other than damage, etc., from construction or use of the land, the Covenant did not serve to release the District against the claims in the respondents' pleadings. In short, he concluded that the release is "confined in its application to release for damage, etc., from construction on or use of the lands." On Appeal
- [33] The District submits that the judge erred:
- a. in interpreting s. 219(2) of the LTA to preclude the inclusion of a release in a covenant under that section;
 - b. in granting the declaratory relief sought by the respondents solely based on his interpretation of s. 219(2) of the LTA;
 - c. in failing to interpret the phrase "arising from or in connection with the construction of any structures on the Lands or use of the Lands" in the Section 219 Covenants; and
 - d. in granting the declaratory relief sought without engaging in a review of the respondents' pleadings to determine whether the pleaded claims fell within the scope of the release language in the Section 219 Covenants. The questions which must be answered on appeal in order to evaluate these alleged errors are twofold. First, whether s. 219 of the LTA authorizes the inclusion of a release in a covenant under that section. Second, if so, whether the release included in the Section 219 Covenant in this case applies to the claims advanced by the respondents. Does s. 219 Authorize Releases?
- [34] The District, supported by the Province, contends, among other things, that the judge did not apply the correct framework for statutory interpretation, and consequently erred in reading s. 219 as restrictive and not as enabling. The root of the error, they contend, lies in the judge's failure to consider the legislative objective, as well as the statutory and factual context of the Covenants. The District contends, further, that the judge erred in relying on this Court's decision in *Evans*. It says that that case dealt with an entirely different statutory regime, and that the Court went to great lengths to explain its interpretation of the use of the word "may" in light of the legislative history of the provision in question. In any event, the appellants submit the release is authorized by the plain meaning of s. 219.
- [35] For their part, the respondents say that the judge got it right. They say that a s. 219 covenant is not intended to protect municipalities from liability, but is intended to be an exhaustive list identifying the type of conditions that may be attached to a development to control risks. It is not, however, a "get out of jail free card". Moreover, a release does not align with the statutory purpose of s. 219 of the LTA, which is to impose conditions on development.

- [36] With respect for the range of arguments advanced by the parties and the reasons of the judge, I do not think it necessary to canvass all of those arguments to address the issue before us.
- [37] First, it is apparent that the statute contemplates that an approving officer may allocate risk in approving a subdivision, and provide for notice to purchasers through the use of a covenant running with title. Section 86(1)(d) provides:
- (d) if the approving officer considers that the land is, or could reasonably be expected to be, subject to flooding, erosion, land slip or avalanche, the approving officer may require, as a condition of consent to an application for subdivision approval, that the subdivider do either or both of the following:
 - (i) provide the approving officer with a report certified by a professional engineer or geoscientist experienced in geotechnical engineering that the land may be used safely for the use intended; (ii) enter into one or more covenants under section 219 in respect of any of the parcels that are being created by the subdivision.
- [38] Section 219 provides:
- (1) A covenant described in subsection (2) in favour of the Crown, a Crown corporation or agency, a municipality, a regional district, the South Coast British Columbia Transportation Authority, or a local trust committee under the Islands Trust Act, as covenantee, may be registered against the title to the land subject to the covenant and is enforceable against the covenantor and the successors in title of the covenantor even if the covenant is not annexed to land owned by the covenantee.
 - (2) A covenant registrable under subsection (1) may be of a negative or positive nature and may include one or more of the following provisions:
 - (a) provisions in respect of
 - (i) the use of land, or (ii) the use of a building on or to be erected on land;
 - b) that land
 - (i) is to be built on in accordance with the covenant, (ii) is not to be built on except in accordance with the covenant, or (iii) is not to be built on;
 - (c) that land
 - (i) is not to be subdivided except in accordance with the covenant, or (ii) is not to be subdivided;
 - (d) that parcels of land designated in the covenant and registered under one or more indefeasible titles are not to be sold or otherwise transferred separately
 - (6) A covenant registrable under this section may include, as an integral part,

- (a) an indemnity of the covenantee against any matter agreed to by the covenantor and covenantee and provision for the just and equitable apportionment of the obligations under the covenant as between the owners of the land affected, and
 - (b) a rent charge charging the land affected and payable by the covenantor and the covenantor's successors in title. [Emphasis added]
- [39] In my opinion, the critical wording in the section is that a covenant may include "provisions in respect of the use of land." I agree with the Province that the legislature chose words of the widest scope in using the language of "in respect of." Mr. Justice Dickson, writing for the Court in *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29 at 39, explained: The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters.
- [40] In *R. v. Barton*, 2019 SCC 33, the Court considered s. 276 of the Criminal Code, which governs the evidence an accused can call about the prior sexual activity of a complainant "in respect of" listed offences. While the accused had not been charged with one of the listed offences, the Court nevertheless held that the regime applied to prosecutions that had some connection with those offences. As explained by Justice Moldaver at para. 73: Parliament would not have chosen this exceptionally broad language if it intended to limit the application of the s. 276 regime to proceedings in which a listed offence was expressly charged. Narrower language such as "in a prosecution for" a listed offence or "where a person is charged with" a listed offence was equally available. Yet Parliament declined to adopt those narrower formulations and instead chose a much broader one. That choice must be given effect.
- [41] As I apprehend the matter, the same reasoning is applicable here. In broad terms, the statutory scheme contemplates management and allocation of risk, notice to the public, and the protection of the public purse. The legislature has chosen the widest possible language to capture what may be included in a covenant. The covenant is a creature of statute. To the extent necessary to achieve the statutory purpose, the statute modifies or supplements common law principles. By choosing such broad language, it appears to me that the legislature contemplated the inclusion of a release in a covenant as a provision "in respect of the use of land". I do not think that the language of the section, when read in light of the statutory purposes and objectives, admits of any other possibility.
- [42] Indeed, the possibility that a covenant may include an indemnity is expressly contemplated by s. 219(6). I do not think that one can infer from the express authorization of the inclusion of an indemnity in a covenant that the legislature by implication should be taken to have excluded a release. To the contrary, I take it that the express reference to an indemnity, while probably not strictly necessary, removes any doubt that might otherwise exist. It is understandable that the legislature made express reference to an indemnity in s. 219(6)

because it, like the other provisions in that subsection, imposes positive obligations on the landowner to expend money. As the Province points out, a release is not a positive obligation and does not require the expenditure of money. I agree with the District and the Province that authorizing an indemnity but not a release would result in an absurdity, effectively requiring a plaintiff to indemnify the covenantee for the financial consequences of its negligence.

- [43] It follows that it is not necessary to consider whether the use of the word "may" in the section should be interpreted restrictively, as the judge reasoned. This is so because a release is authorized by s. 219(2)(a)(i). Is the Release Applicable to the Respondents' Claims?
- [44] I turn now to the question of whether the release bars the respondents' claims.
- [45] The judge's error, contends the District, was to endorse an interpretive approach, based solely on the ordinary meaning of the words "in a restrictive covenant". This, it says, is an extricable legal error because he ignored other necessary elements of contractual interpretation: namely, the objective circumstances known to both parties that formed the factual matrix in which the contract was made.
- [46] As the Supreme Court of Canada has recently confirmed, releases are contracts subject to the ordinary approach to contractual interpretation set out in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 [Sattva]: see *Corner Brook (City) v. Bailey*, 2021 SCC 29 at paras. 3, 20-21 [Corner Brook]. The relevant principles are summarized in *Corner Brook* at para. 20, which I reproduce here: This Court set out the current approach to contractual interpretation in *Sattva*. *Sattva* directs courts to "read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract": para. 47. This Court explained that "[t]he meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement", but that the surrounding circumstances "must never be allowed to overwhelm the words of that agreement": paras. 48 and 57. "While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement": para. 57. This Court also clarified that the relevant surrounding circumstances "consist only of objective evidence of the background facts at the time of the execution of the contract. . . , that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting": para. 58.
- [47] As the Court noted at para. 23: "In *Sattva*, this Court directed judges to look to the surrounding circumstances known to the parties at the time of contract in interpreting the meaning of the words of a contract: para. 47." This imperative has long been part of our law. I observe here the comments of Justice Lambert in *Jacobsen v. Bergman*, 2002 BCCA 102:

- [3] The applicable principles may be stated in this way. It is not sufficient in interpreting a clause in an agreement to look only at the wording of the clause in order to decide on its meaning and application; instead the clause must be examined in its place in the agreement as a whole. Further, the agreement as a whole, and the clause in particular, must be examined in the context of the factual matrix which gave rise to the agreement and against which the agreement and the clause were intended to operate.
- [4] Just as in statutory interpretation, so also in contract interpretation. The fact that the section or clause seems to have a plain enough meaning when viewed in isolation does not preclude, but indeed requires, an examination of the whole text of the statute or agreement, and a consideration of the section or clause in their place in the whole text and in the factual matrix in which they were intended to operate. That process is required in every case of interpretation of either a statute or an agreement.
- [48] To similar effect is this statement from *Canada Deposit Insurance Corp. v. Commonwealth Trust Co. (in Liquidation)* (1998), 39 B.C.L.R. (3d) 1 at para. 10 (C.A.):
- [10] That being so, in my opinion, the words of the order must be interpreted in terms of the principles governing the interpretation of contracts. The law is clear that surrounding circumstances must be taken into account and one of those circumstances is the object and purpose the parties were seeking to attain by their agreement. See: *Prenn v. Simmonds*, [1971] 1 W.L.R. 1381 at 1384-5. ...
- [49] As the interpretation of a release is a matter of contractual interpretation, the standard of review to be applied on appeal is one of mixed fact and law, unless an extricable legal error is present. Again, to quote from *Corner Brook*, at para. 44: In *Sattva*, this Court also explained that contractual interpretation is a fact specific exercise, and should be treated as a mixed question of fact and law for the purpose of appellate review, unless there is an "extricable question of law". The exception is standard form contracts, which is not relevant here: see *Ledcor Construction*. Extricable questions of law in the context of contractual interpretation include "the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor": *Sattva*, at para. 53, quoting *King v. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80, 270 Man. R. (2d) 63, at para. 21. The circumstances in which a question of law can be extracted will be uncommon. Whether something was or should have been within the common knowledge of the parties at the time the contract was entered into is a question of fact: *Sattva*, at paras. 49-55 and 58.
- [50] Here, the District alleges that the judge erred in failing to apply proper legal principles of contractual interpretation. It says he erred by ignoring relevant evidence about the factual matrix that informs the proper interpretation of the release. These legal errors, if shown, are reviewable on a standard of correctness.

- [51] As I noted above, the judge focused his analysis exclusively on the following words from clause 7 of the Section 219 Covenant: "The Covenantor, hereby releases, the Municipality for any damage, loss claim, demand, cost arising from or in connection with the construction of any structures on the Lands or use of the Lands." He concluded that, to the extent the respondents' claims are for things other than damage, etc. from construction or use of the land, the release does not shield the District against the claims in the respondents' pleadings.
- [52] I agree that the judge fell into extricable legal error. The judge failed to consider properly the factual matrix and the objective circumstances known to the contracting parties at the time the contract was executed. As a result he ignored a substantial volume of admissible extrinsic evidence adduced by the District demonstrating that the common purpose of clause 7 of the Section 219 Covenant was to mitigate the risk of, or to absolve the District from, any liability arising from Concordia and its successors in title using the property for the construction of the Development as a whole, and not simply in relation to construction on the resulting subdivided lots.
- [53] Central to the scope of application of clause 7 is the interpretation of the phrase "use of land" in the passage, "arising from or in connection with the construction of any structures on the Lands or use of the Lands." In *Corner Brook*, the Supreme Court clarified that a release may cover unknown claims, and does not need to particularize with exact precision the claims that fall within its scope. The question of a release's scope ultimately depends upon its wording, and what the surrounding circumstances indicate the parties objectively intended: *Corner Brook* at paras. 27-30.
- [54] The District contends that the judge failed to have regard to a factual matrix leading up to the requirement of the Covenant, which involved awareness by all parties of geotechnical risks associated with the subdivision and the imposition of additional conditions in such documents as the Amended PLA. It says that the Amended PLA demonstrates that all contracting parties knew or reasonably ought to have known that the District intended to rely on a professional opinion about the suitability of the land for development and subdivision, as well as assuring that the report would be available publicly to alert potential purchasers of the geotechnical risks. The District argues that this critical factual matrix evidence establishes that the risks posed by geotechnical stability issues pertaining to the whole of the lands to be subdivided were known to the contracting parties when the Section 219 Covenant was entered into. In fact, the approving officer had specifically advised Concordia that the Section 219 Covenant would contain language "saving the District harmless" from issues created by geotechnical stability problems. These concerns were not, as suggested by the respondents, limited to problems that may arise from the construction of structures on individual lots. They were concerns that extended to the Development as a whole. The language "arising from or in connection with the construction of any structures on the Lands or use of the Lands" must therefore be interpreted to properly capture objective common intent of the parties at the time the Section 219 Covenant was entered

into.

- [55] Once the factual matrix evidence adduced by the District is considered, it is clear that the parties objectively intended clause 7 to have a broad scope, namely one that would apply to (1) claims, damages and losses arising from or in connection to construction of the single family dwellings located on the individual lots of the Development, and (2) in relation to claims arising from the "use of the Lands" comprising the Development, including damages arising from subsidence, settlement of buildings or roads, or loss of slope stability upon the lots or the Development as a whole. In my view, this interpretation is compelled by the factual matrix, and is entirely in accord with the principles enunciated by the Supreme Court in *Corner Brook*.
- [56] The evidence demonstrated that the District had imposed the requirement for the Section 219 Covenant in or around 2005/2006, as part of the subdivision process, and before any building permits were applied for within the Development. The evidence also demonstrated that the requirement for the imposition of the Section 219 Covenant was aimed, in part, at addressing potential liability risk to the District that could arise from the Development generally. At the time the terms of the Section 219 Covenant were prepared, the property comprised all 28 lots, and was, as yet, unsubdivided. As such, the phrase "use of the Lands" must have contemplated the development work which was ongoing across the entire unsubdivided property at that time. This must have been objectively apparent to each contracting party.
- [57] The chambers judge did not address the fact that clause 7 is drafted to release the District from damage or claims arising "from or in connection with the construction of any structures on the Lands or use of the Lands." The phrase "or use of lands" in clause 7 suggests a different scope of release for damages arising from the construction of single-family dwellings on individual lots. The language broadens the scope of what is released. In particular, the judge did not address the reference in clause 7 to "any subsidence, settling of any structure including any utility or road infrastructure, loss of slope stability, or any similar matter." The evidence before the chambers judge was that the development of "utility or road infrastructure" was part of the site-wide works being undertaken to ready the subdivision for residential use. That work was not confined to individual lots or to construction upon them. A proper application of the canons of contractual interpretation would have led the chambers judge to apply a broader scope to the language of clause 7 than the extremely narrow scope sought by the respondents.
- [58] There exists no special dictate requiring releases to be interpreted more narrowly than other forms of contractual agreements, so long as the plain words of the agreement are in basic harmony with the parties' intentions, as shown by the circumstances surrounding the contract's execution: *Corner Brook* at paras. 3, 36-38. Broad wording in a release can conflict with the circumstances if the claims were not in contemplation at the time the release was executed: *Corner Brook* at para. 38. But that is not the case here. The requirement of the Section 219 Covenant arose out of the District's approval of the subdivision of the property

and was aimed, in part, at addressing the District's potential liability arising from the Development generally. The evidence establishes that geotechnical risks associated with the Development, in particular, were known to the contracting parties at the time the release was drafted and, indeed, are expressly referred to in clause 7.

[59] For the purpose of this application, the respondents advance the following claims against the District, all arising out of the subdivision and development process:

- a. the District was negligent in approving the development permit;
- b. the District was negligent in approving the subdivision;
- c. the District was negligent in relation to the issuance of building permits and occupancy permits for the Development;
- d. the District was negligent in respect of a settlement it reached with Concordia in 2013 relating to certain remedial action requirements it had previously ordered Concordia to complete;
- e. the District was negligent in certifying acceptance of the construction of servicing works by Concordia at the Development;
- f. the District breached an alleged positive duty to the respondents to repair roads and implement groundwater control measures at the Development;
- g. the District breached an alleged duty to warn the respondents of geotechnical issues; and
- h. the District committed the tort of nuisance and abuse of power with respect to the declaration of state of local emergency and related emergency orders.

[60] These claims all arise from or are in connection with the construction of structures in the Development or the use of development lands generally. The aforementioned evidence demonstrates that these were issues in the contemplation of the parties at the time the Section 219 Covenant was drafted and entered into, and, therefore, these are the precise types of damage, loss, claims and demands contemplated by clause 7 of the Section 219 Covenant.

[61] In sum, a release of the kind included in the Section 219 Covenant is authorized by statute, and clause 7 of the Covenant applies to release the District against the claims advanced by the respondents.

Disposition

[62] I would allow the appeal, set aside the order of the chambers judge, and issue a declaration that the respondents have released the District from all claims alleged or damages sought in *Rai v. District of Sechelt et al.*, SCBC Vancouver Registry No. S198921; *Held et al. v. District of Sechelt et al.*, SCBC Vancouver Registry No. S198922; *Pednaud et al. v. District of Sechelt et al.*, SCBC Vancouver Registry No. S198923; *Pickell et al. v. District of Sechelt et al.*, SCBC

Vancouver Registry No. S198924; Wang v. District of Sechelt et al., SCBC Vancouver Registry No. S198925; Goy et al. v. District of Sechelt et al., SCBC Vancouver Registry No. S198926; Moradian v. District of Sechelt et al., SCBC Vancouver Registry No. S198927; and, Pan v. District of Sechelt et al., SCBC Vancouver Registry No. S198928. "The Honourable Mr. Justice Harris" I agree: "The Honourable Mr. Justice Fitch" I agree: "The Honourable Madam Justice DeWitt-Van Oosten"

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