

CANADA / JUDGMENT

Shen v. West Continent Development Inc. (BC0844848)

2020 BCSC 5

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 5 Shen v. West Continent Development Inc. (BC0844848)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Shen v. West Continent Development Inc. (BC0844848),

2020 BCSC 5

Date: 20200103

Docket: S121748

Registry: Vancouver

Between:

Hong Wen Shen and Wei Xing Guo

Plaintiffs

And

West Continent Development Inc. (BC0844848) and

Sunny Sun and Jie Song

Defendants

Before: The Honourable Madam Justice Maisonville

Reasons for Judgment

Counsel for the Plaintiffs:

S. Xue

Defendant, Sunny Sun, appearing in person on his own behalf and on behalf of West Continent Development Inc.:

S. Sun

Defendant, Jie Song, appearing in person:

J. Song

Place and Dates of Trial:

Vancouver, B.C.

January 9-13, 16-20, 23-26,

November 6-10, 20-24, 2017

January 22-26, October 22-26, 2018

March 4-8, July 3-4, 2019

Place and Date of Judgment:

Vancouver, B.C.

January 3, 2020

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introduction

- [1] The plaintiffs, Wei Xing Guo and Hong Wen Shen, are husband and wife. They sought to have a new home built on West King Edward Avenue in Vancouver, BC (the "Property").
- [2] After meeting with the defendant, Sunny Sun, the plaintiffs settled on hiring Mr. Sun's company, West Continent Development Inc. ("West Continent"), as the contractor for the development of the Property.
- [3] The project was to be the construction of a single dwelling residence with a detached garage. At all times, the plaintiffs were the Property's registered owners in fee simple.
- [4] The defendant, Mr. Sun, is the owner and sole shareholder of West Continent, a company registered in the province of British Columbia. The other defendant, Jie Song, was Mr. Sun's spouse prior to their divorce.
- [5] Towards the end of 2009, the plaintiffs went to an open house with their realtor at West 66th Avenue in Vancouver. Across the street from the open house, Mr. Sun was building a house and the plaintiffs went to meet him. The plaintiffs had purchased a house on King Edward Street and wished to rebuild.
- [6] Mr. Sun introduced himself as an "experienced builder" and handed the plaintiffs his business card with West Continent's name on it. Below the company's name the card set out: "Investors, General Contractors, Project Management, Renovations". The contact information provided a phone number for "Sunny Suen", though no issue arises at trial from the different spelling of the last name.
- [7] After that meeting, the parties drove to see houses built by Mr. Sun on Vancouver's west side. The plaintiffs did not have an opportunity to tour inside the houses but saw the exteriors.
- [8] The parties continued with discussions and ultimately entered into an initial agreement (the "First Construction Agreement"), dated January 19, 2010, for Mr. Sun to build a house on the Property. A number of further written agreements were executed, and the parties disagree which agreement governs.
- [9] The relationship between the parties soured after disagreements over price and design, and in April 2011, the plaintiffs wrote to the defendant through their counsel barring him from the Property. The plaintiffs then retained Karen Xue to complete the construction of their home.
- [10] The plaintiffs claim damages against Mr. Sun and West Continent for breach of contract; fraud, including fraud that resulted in a builder's lien being registered against their property; breach of fiduciary duty; and negligence. They additionally claim damages against all defendants for unjust enrichment. Little evidence of negligence was presented at trial, and by the end of the trial the plaintiffs appeared to have abandoned this claim.

- [11] The defendants deny all of the plaintiffs' claims. In addition, Mr. Sun and West Continent counterclaim pursuant to the Builders Lien Act, S.B.C. 1997, c. 45, saying they are owed for work performed on the Property. The defendants initially sought removal of a Certificate of Pending Litigation registered on their property, which was registered by the plaintiffs pursuant to their unjust enrichment claim. During the trial, the court was advised that the Certificate of Pending Litigation was lifted following monies being paid into the trust account of counsel for the defendant's then law firm.

THE CONSTRUCTION AGREEMENTS

The First Construction Agreement

- [12] The First Construction Agreement was concluded between West Continent and the plaintiffs. It was signed before Mr. Peter Li, notary public, on January 21, 2010. It consists of a standard form contract from the Canadian Home Builders' Association of B.C., which was provided by Mr. Sun and completed by Mr. Guo, who set out the milestones for payment.
- [13] The First Construction Agreement provided the terms of payment, whereby the plaintiffs would pay \$626,500 to West Continent with an interest at a rate of prime plus one percent per annum on any part not paid as follows:
- i. 15% of the price (\$93,975) as deposit upon signing of the First Construction Agreement;
 - ii. 10% of the price (\$62,650) two days before approval of building plans by the City of Vancouver;
 - iii. 25% of the price (\$156,625) on completion of the roofing;
 - iv. 20% of the price (\$125,300) on completion of interior finishes;
 - v. 20% of the price (\$125,300) upon issue of the occupancy permit; and
 - vi. 5% of the price (\$31,275) both: 55 days after (v) and six months after (v).
- [14] The First Construction Agreement set out that "extras"--items not contemplated by the construction agreement--were to be paid for by the purchaser in addition to the agreed upon price. The contract appears to indicate that the plaintiffs would only be charged cost for extras.
- [15] At the "Entire Agreement" clause of the standard form contract, the parties inserted: "this Agreement includes Addendum and specification attached".
- [16] On January 22, 2010, the plaintiffs gave a cheque to Mr. Sun payable to West Continent in the amount of \$93,975 pursuant to the First Construction Agreement, being 15% of the purchase price.

Addendum to the First Construction Agreement

- [17] The parties attached an addendum to the First Construction Agreement (the "Addendum"), which set out the construction price and the specifications of the house to be built. The parties to the Addendum were West Continent and the plaintiffs.
- [18] The construction price of \$626,500 was calculated pursuant to the following terms contained in the Addendum:
- i. West Continent was to construct a single dwelling residence on the subject Property;
 - ii. The proposed house area would be 4550 square feet (the "Proposed House Area"), which was subject to ultimate approval by the City of Vancouver (the "Approved House Area");
 - iii. The construction price is calculated at \$130 per square foot, plus agreed costs for additional work as enumerated in the First Construction Agreement and applicable taxes (the "Agreed Formula");
 - iv. According to the Agreed Formula, in the event that the Proposed House Area was to be approved by the City of Vancouver, the construction price would be \$591,500 in addition to applicable taxes;
 - v. The cost of additional work requested by the plaintiff is \$35,000, yielding a total construction price of \$626,500 plus applicable taxes ($\$591,500 + \$35,000 = \$626,500$). This price included design fees; all fees for applications and permits from the City of Vancouver; house appliances; kitchen cabinets; and all necessary fixtures;
 - vi. In the event the Approved House Area differed from the Proposed House Area, the parties would, in writing, adjust the construction price and confirm the terms of payment; and
 - vii. Completion was to be six months after the commencement of the project. In the event of delay, West Continent was to pay interest calculated at $\$1,070,000 \times (\text{prime} + 1\%)$. This figure was derived from the loan taken out by Ms. Shen.
- [19] The Addendum also set out in greater detail the layout and specifics of each room in the house. It provides that any items not yet specified but necessary to complete the house would be the responsibility of West Continent.

Disagreement over the Terms of the First Construction Agreement and Addendum

- [20] Mr. Guo testified that Mr. Sun wanted to increase the construction price by \$20,000 after the First Construction Agreement was signed. Mr. Sun told him the reason for the increase was that that square footage in the design plans was larger than what was estimated in the First Construction Agreement and that Ms. Shen was making changes to the design plan.

- [21] Ms. Shen testified that her understanding was that the clause in the Addendum allowing for price adjustment to account for the Approved House Area could only be exercised if the City of Vancouver did not approve the Proposed House Area.
- [22] Mr. Guo testified that he refused to pay the increased price and began to worry that Mr. Sun would ask for a raise in the future. Mr. Guo indicated his worries increased when Mr. Sun asked for a further \$25,000 to build a covered porch and increased the design fee by \$3,000. Mr. Guo again refused to pay and reiterated that the pricing details had been confirmed in the First Construction Agreement and Addendum.
- [23] As a result of their disagreements about price, Mr. Guo testified that he suggested switching to a management contract where construction expenses would be paid by the plaintiffs. He says he felt that he would be able to better impose a fixed ceiling on the price and avoid future disputes under this type of a contract. Mr. Guo says Mr. Sun agreed to switch to a management contract where he would be paid a fee of \$60,000. These discussions led to the execution of a second agreement (the "Second Construction Agreement").

The Second Construction Agreement

- [24] Like the First Construction Agreement, the Second Construction Agreement consisted of a standard form contract provided by the Canadian Home Builders' Association of BC. It was between West Continent and the plaintiffs, and was signed by Mr. Sun and the plaintiffs before a notary on July 15, 2010.
- [25] Under the "Price" heading, the contract sets out:
- management fee of \$60,000 up to completion of construction + HST and tax; subject to price and fee n include subcontractors' material costs.
- Mr. Sun testified that the "n" meant "not".
- [26] The construction completion date was set to be six months from demolition of the original house on the Property. Design plans of the house were approved by the City of Vancouver in July 2010. Demolition of the existing house was completed on December 1, 2010, making the completion date June 1, 2011.

Memorandum on Homebuilding

- [27] The parties attached a memorandum to the Second Construction Agreement (the "Memorandum"), which was signed before the notary at the same time as the Second Construction Agreement.
- [28] The Memorandum set out that the total construction price of the home would be calculated at \$130 per square foot, plus the agreed costs of extra work. Examples of how that would be calculated were set out. The first example set out:

$$4115.63 \text{ sq ft} + 127.80 \text{ sq ft} + 64.35 \text{ sq ft} = 4307.78 \text{ sq ft} * 130 =$$

(Actual area) (front and back covered porches)

$\$560,011 + 10,000 + 5,000 + 3,000 = \$578,011$

(A) (B) (C) (D)

(additional design)

[29] The parties disagreed on the purpose of (B), but it likely relates to air-conditioning and additional design. (C) was for cabinets and (D) was the additional design fee. The parties agree that the \$60,000 management fee was included in the total figure of \$578,011. This amount did not include applicable taxes.

[30] Finally, West Continent agreed in the Memorandum to guarantee construction of the house at the aforementioned price regardless of changes in the market.

The Power of Attorney

[31] After the Second Construction Agreement was signed, Ms. Shen opened a chequing account with TD Canada Trust and executed a power of attorney in favour of Mr. Sun. Ms. Shen testified that the account was opened with the sole purpose of paying for the construction of the house, and Mr. Sun asked her to open it so that he could make payments to subcontractors and suppliers on her behalf. The power of attorney thus limited Mr. Sun's powers to making or receiving payments.

[32] On September 10, 2010, Ms. Shen transferred \$50,000 into the account. Mr. Sun was issued a bank card, and on September 13, 2010, \$50,000 was transferred to Ms. Song by Mr. Sun. Ms. Shen testified that she did not know that Mr. Sun had been issued a bank card, and only became aware of it when she received the account statements. Nor did she know or approve of him making the transfer.

[33] Ms. Shen indicated that Mr. Sun made payments to subcontractors and suppliers from the plaintiffs' bank account using the power of attorney. She said that the parties had agreed that Mr. Sun would provide invoices to the plaintiffs at the completion of each milestone, which she says never occurred. She testified she got together with Mr. Sun to review payments made to third parties for the first time in January 2011.

[34] Ms. Shen testified that she had not agreed that the money deposited into the account would become the property of West Continent or Mr. Sun.

Handwritten Documents Signed Subsequent to the Second Construction Agreement

[35] The parties signed an additional document dated September 20, 2010. It is entirely handwritten in Chinese. It is untitled, but the Property's address was listed at the top. The price of \$578,011 agreed to under the Second Construction Agreement remained unchanged. While the translation provided is difficult to parse, my understanding is that the parties agreed to a new payment schedule as follows:

- a) 25% of the purchase price (\$144,502.75 + Harmonized Sales Tax ("HST")) has been paid;
 - b) 15% of the price (\$86,701.65 + HST) upon completion of the foundation;
 - c) 15% of the price (\$86,701.65 + HST) at the roofing stage of the main building;
 - d) 10% of the price (\$57,801) after all water and electrical works are completed;
 - e) 15% of the price (\$86,701.65 + HST) after the interior wall work is completed;
 - f) 15% of the price (\$86,701.65 + HST) after the garage and exterior portions of the main structure are completed; and
 - g) 5% of the price (\$28,900 + HST) upon issue of the occupancy permit
- [36] An additional document was signed on October 21, 2010. In this document, Ms. Shen agreed to \$6,500 in additional costs, bringing the total agreed cost of the project to \$584,511. With applicable taxes, the cost is approximately \$654,652.32.

breakdown of the relationship

- [37] The plaintiffs learned in April 2011 that work was not being done at the site and subcontractors were not being paid. At this point, they directed their counsel to write to West Continent and bar Mr. Sun from entering the Property.
- [38] The letter from counsel for the plaintiffs indicates that Mr. Sun and West Continent had not provided an accounting of the costs incurred for labour or materials. The plaintiffs also asserted that Mr. Sun had failed to provide documentation of the architectural plans approved by the City of Vancouver, permits, engineer approved documentation, and the new home warranty policy details. They further indicated that Mr. Sun had overcharged them for a number of items, including the new home warranty coverage. Finally, the plaintiffs stated that Mr. Sun had not followed the original building plan they approved and had changed architectural plans without their notice or approval.
- [39] The plaintiffs assert no further work was done by West Continent on the Property after April 12, 2011. After barring the defendants from entering the Property, they entered into negotiations with Karen Xue, eventually retaining her as construction manager. Ms. Xue's company, TJ Construction Ltd., continued the construction until completion.

ISSUES

- [40] The following issues arise in this litigation:
- i) What costs were incurred by West Continent in constructing the plaintiffs' home?
 - ii) In the event that West Continent is found liable, should the corporate veil be pierced such that liability for any wrongdoing attaches to Mr. Sun?

- iii) Was the construction agreement between the plaintiffs and West Continent breached? If so, what is the appropriate measure of damages?
- iv) Did Mr. Sun breach a fiduciary duty owed to the plaintiffs? If so, what is the appropriate remedy?
- v) Did Mr. Sun or West Continent commit fraud?
- vi) Was West Continent, Mr. Sun, or Ms. Song unjustly enriched?
- vii) Are the plaintiffs entitled to punitive damages?
- viii) Is Mr. Sun owed any money under the Builders Lien Act for unpaid expenses he incurred on the project?

COSTS INCURRED BY WEST CONTINENT

- [41] By the time the defendants were barred from entering the Property, the plaintiffs had paid West Continent and Mr. Sun a total of \$367,838.36. Bank statements confirm withdrawals by the defendants from the plaintiffs' chequing account for this amount. The plaintiffs say this amount corresponds to payments for milestones (1), (2), and (3), plus HST. They say that, following the schedules set out in the written agreements, this amount corresponds to 55% of the total construction costs and should have been payable at the roofing stage.
- [42] I note that a formal accounting of construction fees was never conducted. The plaintiffs say that despite withdrawing \$367,838.36 from their chequing account, West Continent had only spent \$144,401.53 on the project. Mr. Sun claims he spent considerably more. However, despite being given multiple opportunities to do so, Mr. Sun did not bring invoices proving these expenditures to court. Beyond his testimony, which I found to be overall self-serving and unreliable, there was no evidence that these expenses were actually incurred.
- [43] I accept the plaintiff's acknowledgement that Mr. Sun spent \$144,401.53. I further accept that the plaintiffs are responsible for tree removal in the amount of \$3,395, and find that Mr. Sun spent \$147,796.53 on the project.
- [44] The plaintiffs assert that they overpaid West Continent by \$223,436.83: the difference between total payment made (\$367,838.36), minus the costs actually incurred by the defendants (\$144,401.53). Given my finding that West Continent paid an additional \$3,395 for tree removal, I adjust the overpayment figure claimed by the plaintiffs to \$220,041.83.

SHOULD THE CORPORATE VEIL BE PIERCED?

- [45] The plaintiffs' Amended Notice of Civil Claim alleges that:

50. At all material times, Sun treated the Builder as his alter ego in that, among other things,

A. Sun used the Builder as a front to commit fraud against the plaintiffs, the particulars of which are set out in paragraph 41 of this Notice of Civil Claim;

B. Other acts of Sun, by which Sun treated the Builder as his alter ego, as may be proved at trial.

- [46] In their closing submissions, the plaintiffs indicated that they sought to pierce the corporate veil and find Mr. Sun personally liable for damages in breach of fiduciary duty as well.
- [47] The starting position is that a corporation is a distinct legal entity separate from its shareholders: *Salomon v. Salomon & Co.* (1896), [1897] A.C. 22 (U.K.H.L.) [*Salomon*]. On rare occasions courts have seen fit to disregard the separate legal personality of a corporation by "piercing the corporate veil". Veil piercing can operate in one of two ways: either by holding shareholders liable for the corporation's obligations, or by holding the corporation responsible for a shareholder's personal obligations.
- [48] The language used by counsel for the plaintiffs in paragraph 50(A) in the Amended Notice of Civil Claim is ambiguous. From the reference to paragraph 41, which sets out the plaintiffs' allegations of fraud, I take it that the plaintiff argues that the separate legal personality of West Continent should be disregarded in the event that I find Mr. Sun liable for fraud.
- [49] I dismiss the plaintiffs' claim that the corporate personality of West Continent should be disregarded and that Mr. Sun should be personally liable for any damages arising out of a breach of contract. A party is required to plead all material facts to the cause of action alleged against the opposite party in order to define the issue to be tried and provide notice to all parties of the case they will have to meet: *Yongfeng Holdings Inc. v. Zheng*, 2019 BCSC 1534 at paras. 190-198.
- [50] For this reason alone, I would dismiss this particular claim advanced by the plaintiffs.
- [51] I further consider that any claim that the separate legal existence of West Continent should be disregarded would fail based on the evidence before me. Counsel has failed to provide this Court with any legal authority on this point. From my review of the case law, it is clear that the separate legal personality of a corporation will not be disregarded lightly: *Edgington v. Mulek Estate*, 2008 BCCA 505 at paras. 20-21. Parties to transactions employ the use of corporate vehicles for a reason, as they are entitled to do. As Justice Seaton said in *B.G. Preeco 1 (Pacific Coast) Ltd. v. Bon Street Holdings Ltd.* (1989), 37 B.C.L.R. (2d) 258 (C.A.), "[t]he use of a company as a means of avoiding bearing business losses is neither unusual nor a basis for lifting the veil".
- [52] To justify lifting the corporate veil the court must be satisfied that a refusal to do so would be "flagrantly opposed to justice", either due to improper conduct or fraud, or because the corporation was formed for the express purpose of doing a wrongful or unlawful act: *Clarkson Co. v. Zhelka*, [1967] 2 O.R. 565 (H.C.) [*Clarkson*]. The Ontario Superior Court in *Chan v. City Commercial Realty Group Ltd.*, 2011 ONSC 2854, reaffirmed that the separate legal existence of a corporation will not be lightly disregarded, noting at para. 21:

Four governing statements can be drawn from the authorities:

- a) First, the separate legal personality of a corporation will not be disregarded lightly;

- b) Second, the analysis is largely fact specific;
- c) Third, typically the corporate veil is lifted when incorporation occurs for a purpose that is illegal, fraudulent or improper;
- d) Fourth, even if that is not the case, personal liability may be imposed on a person who controls a company and uses it as a shield for fraudulent or wrongful conduct provided that conduct is the reason for the complaining party's injury or loss.

- [53] In a circumstance where a plaintiff attempted to have the liability of a subsidiary corporation imposed on a parent, this Court indicated that complete control by the parent of the subsidiary is insufficient for the alter ego doctrine to apply: the corporation must have been used as a shield for fraudulent or improper conduct: *Emtwo Properties Inc. v. Cineplex (Western Canada) Inc.*, 2011 BCSC 1072 at para. 102.
- [54] Clarkson provides an example the high threshold that the plaintiff must meet to demonstrate that declining to pierce the corporate veil would be flagrantly opposed to justice. In Clarkson, the defendant's personal creditors sought to access property held in a corporation where the defendant was the sole shareholder. The court appears to suggest that the defendant had attempted to defraud his personal creditors, but nonetheless declined to pierce the corporate veil. While the court noted that this was a close case, the plaintiffs had failed to demonstrate that the corporation was the defendant's mere agent for the conduct of his personal business. Factors considered by the court included: that the defendant did not form his corporation while insolvent and it was thus evident that it was not formed for the sole purpose of doing a wrongful act; that there was no evidence the defendant put his personal assets into the corporation to protect them; and that there was no evidence the defendant's personal creditors had relied on the availability of assets in his corporations (at paras. 67-77).
- [55] In declining to pierce the corporate veil, the court in Clarkson demonstrates that there are strong policy reasons in favour of respecting the principle from Salomon that a corporation is a distinct legal entity. Notably, corporations have their own creditors who could be prejudiced by allowing the personal creditors of shareholders to go after a corporation's assets.
- [56] There is no evidence that West Continent was incorporated for a fraudulent, illegal, or improper purpose. Further, the plaintiffs in this case have failed to adduce evidence suggesting that West Continent was used as a shield for fraudulent or wrongful conduct. Like in Clarkson and Chan, the plaintiffs have not demonstrated that a refusal to pierce the corporate veil would be flagrantly opposed to justice.
- [57] I note, however, that Mr. Sun and West Continent may be jointly and severally liable for fraud based on the corporate identification doctrine. I will discuss this in greater detail later in these reasons.

BREACH OF CONTRACT

- [58] The plaintiffs claim damages for breach of contract under the Second Construction Agreement against Mr. Sun and West Continent. They say that the Second Construction Agreement was the governing contract, and replaced the First Construction Agreement when it was signed on July 15, 2010.
- [59] The agreed upon price under the First Construction Agreement was \$626,500. The price was reduced to \$578,011 under the Second Construction Agreement. With the extras agreed to in the handwritten document dated October 21, 2010, the final price the parties agreed upon was \$584,511, plus applicable taxes.
- [60] Mr. Sun disputes that the Second Construction Agreement is the governing contract. He testified that it was executed as a sham to avoid paying the Harmonized Sales Tax ("HST") then in effect. I do not accept Mr. Sun's evidence and find that the parties intended the Second Construction Agreement to overtake their initial agreement. I thus find that it is the governing contract. I further accept that the parties consented to the payment schedule set out in the handwritten document dated September 20, 2010.
- [61] The plaintiffs say the Second Construction Agreement was no longer a general contractor agreement but rather a cost-plus type contract whereby West Continent was paid a \$60,000 management fee to manage construction on the Property.
- [62] As the builder/construction manager, West Continent, according to the plaintiffs, was to:
- Arrange for the house to be built to code;
 - obtain all permits, approvals, licences, and insurance;
 - make payment for the construction costs on behalf of the plaintiffs after receiving the relevant amounts from the plaintiffs as set out in the handwritten document dated September 20, 2010; and
 - complete the construction of the house within six months from the date of the commencement of the project.
- [63] The plaintiffs say that West Continent breached its obligations under the construction agreement by withdrawing funds from the plaintiffs' chequing account beyond what was authorized in the payment schedule and by failing to pay tradespeople. The plaintiffs attempt to claim \$223,436.83 in damages for breach of contract, representing the difference in the amount paid to the defendants (\$367,838.36) and the amount paid by West Continent towards construction costs (\$144,401.53). I note that I found this amount to be \$147,796.53 as West Continent paid \$3,395 for tree removal.
- [64] This is not a proper characterization of damages for breach of contract. Restitution for this overpayment should have been claimed as damages for unjust enrichment or breach of fiduciary duty. The purpose of an award of damages for breach of contract is to put the

injured party, so far as money can do so, in the same position as if the contract had been performed without its terms being violated: *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, [2001] 2 S.C.R. 943 at para. 73. An assessment of the plaintiffs' damages for breach of contract is thus the difference between the agreed upon price with the original builder and the price they ultimately paid for construction contemplated in the contract with the original builder. The price with the original builder was \$584,511 or \$654,652.32 with tax. The price they paid is the cost of the work in place when Mr. Sun was barred from the Property, plus the reasonable costs paid to the subsequent builder. The findings of the professional quality surveyors are, accordingly, central to this assessment. I will address any overpayments to Mr. Sun in my discussion of breach of fiduciary duty.

Professional Quantity Surveyors

Matthew K. Weber

- [65] At the request of counsel for the plaintiff, Matthew K. Weber, a Professional Quantity Surveyor, prepared a report assessing the value of the incomplete work performed by West Continent. In addition to assigning a value to the incomplete work, Mr. Weber was asked to determine the percentage of construction completed by the original builder and to determine the costs paid by the plaintiffs to the subsequent builder to complete the residence as contemplated in the agreement with West Continent.
- [66] Mr. Weber based his estimates on a review of municipal, consultant, contractor, and supplier invoices and statements, architectural drawings, and photographs of the Property taken in May 2011. He also conducted a site visit on April 12, 2012. Since Mr. Weber was unable to assess the physical work in place at the time it was abandoned by West Continent, he based his assessment on the aforementioned documents.
- [67] Mr. Weber noted that his estimates relied on statements from the first heating, ventilation, and air conditioning ("HVAC") subcontractor. The only evidence from the first HVAC subcontractor was a letter requesting payment for an allegedly complete job. The plaintiffs say that the first HVAC subcontractor was untruthful and that the job was not completed.
- [68] Terry Phuong, the second HVAC subcontractor, was subpoenaed. He testified that a fan-coil AC unit and some ductwork had already been installed, but he had to redo this work as the parts used were not compatible with his air conditioning unit. Mr. Phuong estimated that the original HVAC subcontractor had completed 30% of the work. I accept Mr. Phuong's evidence. Mr. Weber noted that if the evidence of Mr. Phuong is believed, the value of the work performed by the first HVAC subcontractor is reduced from \$14,560 (including HST) to \$2,360. Mr. Weber did not indicate whether this second figure included HST.

- [69] Based on his review of vendor invoices, Mr. Weber concluded that the value of work performed by the original builder was \$223,096.67, including HST. With the deduction for the incomplete work performed by the original HVAC contractor, this amount is reduced to \$210,896.67. Mr. Weber further concluded that West Continent had completed 38.1% to 43.1% of the work they had contracted to perform.
- [70] In addition to his estimates of the work performed by West Continent, Mr. Weber conducted a review of the invoices and statements issued after West Continent left the project to determine the costs paid to the subsequent builder, Ms. Xue. Mr. Weber analyzed each payment made to determine whether it was contemplated by the contract between the plaintiffs and West Continent. He concluded that the plaintiffs had paid Ms. Xue between \$399,964.92 and \$421,732.75 exclusive of HST to finish the features contemplated by the Second Construction Agreement and the subsequent handwritten letter whereby Ms. Shen agreed to extras. This did not include the \$35,000 management fee to Ms. Xue. Mr. Weber was not clear on how the disputed work completed by the original HVAC subcontractor factored into these estimates.
- [71] Beyond his opinions on the three estimates he was asked to provide, Mr. Weber offered some additional comments for the court's consideration.
- [72] He first opined that Ms. Xue's construction company, TJ Construction Management, did a poor job managing the project. He noted that deadlines were not met, and the plaintiffs were billed for fees beyond their agreement with Ms. Xue. Finally, Mr. Weber opined that West Continent had agreed to a contract amount for less than the cost of the work required to complete the project. He estimated that in 2011 a fair market cost for the project would be \$252.70 per square foot, for a total of \$998,698.

Steven Wong

- [73] At the request of Mr. Sun, Steven Wong, a Certified Residential Appraiser, prepared a report that was entered into evidence and testified at trial. Mr. Wong's stated purpose was to estimate the value of the work performed by West Continent; however, he did not make any independent findings and instead drew conclusions based on Mr. Weber's report.
- [74] Mr. Wong employed three approaches to assessing the value of the work performed by West Continent, which involved manipulating the values set out in Mr. Weber's report.
- [75] The first approach taken by Mr. Wong involved relying on the mid-point of Mr. Weber's established range of completion, which is 40.6%. Mr. Wong assigned this figure a value based on the \$578,011 price the parties agreed on in the Second Construction Agreement. Using this approach, which he called the "contract costs in place" approach, the value of the incomplete work was \$262,833.15 with HST. Mr. Wong then added \$139,664 to this number, which Mr. Sun had told him were the expenses he incurred for extras requested by the plaintiffs that were not contemplated by the contract. Mr. Wong's estimate of the total value of the work performed by West Continent pursuant to this approach is thus \$402,497.15.

- [76] I note that the plaintiffs dispute the list of extras in Mr. Wong's report. As noted above, I do not accept the evidence that these costs were incurred, except where they are acknowledged by the plaintiffs. I have accepted that the defendants spent \$147,796.53 on the project. Mr. Wong was unable to produce any additional evidence documenting the expenses incurred by Mr. Sun. I thus reject his estimate of the extra expenses incurred by the defendants.
- [77] Mr. Wong then assessed the project using a technique he called the "market cost approach". Under this approach, Mr. Wong drew on Mr. Weber's estimate of the total market value of the project and assigned a value to the incomplete work based on Mr. Weber's estimate of the percentage of the project that was completed. 40.6% of \$978,809 equals \$397,396.45. With HST, the amount is \$445,084.02.
- [78] Finally, Mr. Wong assessed the value of the work performed by West Continent using a "forensic approach", which--while not stated in his report--appears to derive the value of the work done by West Continent based on the cost of the work performed by the subsequent builder. Here, Mr. Wong relied on Mr. Weber's estimate of the additional cost incurred by the owners to finish the project using TJ Construction. The middle range is \$410,848.84. With the construction management fee of \$35,000 and HST, the total value for the remaining 59.4% of the project was \$499,350.70. Mr. Wong then concludes that 40.6% of the project should be worth \$341,307.04. With the \$139,664 allegedly owed by the plaintiffs to West Continent in extras, the total value of the completed work pursuant to this approach is \$480,971.04. I note that evidence that the plaintiffs ever paid HST was inconsistent. Respecting supplies and the payments to Ms. Xue, there were documents in evidence showing HST being paid. However, numerous other invoices tendered into evidence do not indicate HST was paid, particularly, invoices involving cash payments and labour.
- [79] Mr. Wong then concluded that "given the absence of solid evidence" the best approach would be to rely on the average of the first two approaches, which is approximately \$424,000. I note that I am not sure what "absence of solid evidence" Mr. Wong was referring to in his report, and it was not clarified at trial.
- [80] Mr. Wong was vigorously cross-examined given that he had couched his report in terms of varying uncertainties and in large measure he had relied upon the assessments of Mr. Weber.

The Plaintiffs' Claim for Breach of Contract

- [81] I prefer the evidence of Mr. Weber over the evidence of Mr. Wong. Mr. Wong was vague and was unable to answer simple questions about the methodology he employed. He did not make any independent findings and, instead, manipulated the numbers in Mr. Weber's report. Mr. Wong noted that he had difficulties deciphering documents, many of which were written in Chinese and simplified Chinese. Mr. Sun further noted that he could not recall which invoices he had provided to Mr. Wong.

- [82] I find that the plaintiffs ultimately paid \$660,945.51 to have the home contemplated by the second construction agreement built. I accept Mr. Weber's estimate that the plaintiffs paid approximately \$410,848.84 to Ms. Xue to complete the construction of the house (the mid-point in the range of \$399,964.92 and \$421,732.75), plus a \$35,000 management fee. While Mr. Weber notes that this amount does not include HST, I cannot conclude that the plaintiffs consistently paid HST given the lack of acceptable evidence that it was consistently charged and therefore do not add HST to the estimate. I note, however, that Ms. Xue charged HST on the management fee. To this number, I add the \$210,896.67 worth of work completed by Mr. Sun.
- [83] As noted previously, the price for the contemplated by the contract with the initial builder was \$654,652.32. I therefore award contractual damages for \$6,293.18.
- [84] As noted above, the overpayment of \$220,041.83 claimed by the plaintiffs to West Continent was improperly characterized as damages for breach of contract. I will deal with this overpayment in my discussion of breach of fiduciary duty.

BREACH OF FIDUCIARY DUTY

- [85] The plaintiffs say the Second Construction Agreement, as I understand the submission, was a cost-plus type arrangement whereby West Continent was paid a management fee and would be reimbursed for incurred costs. The plaintiffs say the parties then entered into an oral agreement on the method of payment, whereby the defendant undertook to act as the plaintiffs' payment agent to pay sub-contractors from the plaintiffs' bank account. A power of attorney was executed, and Mr. Sun was granted full power to make payments from the plaintiffs' chequing account.
- [86] As previously noted, the plaintiffs assert they overpaid West Continent by \$220,040.83, being the difference between the amount withdrawn from their account (\$367,838.36) and the acknowledged payments made by the defendants (\$147,796.53). The plaintiffs say that Mr. Sun was not authorized to make these payments, and breached his fiduciary duty by acting contrary to the interests of the plaintiffs and by failing to provide an adequate accounting of payments made.

The Legal Framework

The Fiduciary Duty of an Attorney Acting Pursuant to a Power of Attorney

- [87] Certain categories of relationships are presumptively fiduciary in nature because they have as their essence discretion, influence over interests, and an inherent vulnerability. In these types of relationships, there is a rebuttable presumption, arising out of the inherent purpose of the relationship, that one party has a duty to act in the best interests of the other: *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at 409 [Hodgkinson]. These categories of relationships are called presumptive or per se fiduciary relationships: *Galambos v. Perez*, 2009 SCC 48 at para. 36 [Galambos]. The relationship between a principal and agent is one

such relationship; see for example: *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 at 597 [Lac Minerals]; *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23 at paras. 138-140. Where an agency relationship is established, a fiduciary duty will only be negated where it is shown that the agent did not have the powers of a true agent in the transaction at issue: *Imperial Oil v. H.H.L. Fuels Ltd.*, 2006 NBCA 1 at paras. 44-46; *Indutech Canada Ltd. v. Gibbs Pipe Distributors Ltd.*, 2013 ABCA 111 at para. 20 [Indutech].

[88] The existence of a fiduciary obligation between a principal and agent ultimately depends on a finding of trust and confidence imposed on the agent by the principal according to tests that have been referred by the Supreme Court of Canada in a number of cases: *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 at paras. 27-36 [Elder], referring inter alia to *Hodgkinson*; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; and *Galambos*; and *Frame v. Smith*, [1987] 2 S.C.R. 99. Per Elder, the defining features of a fiduciary relationship are:

- i) An undertaking (express or implied) by the fiduciary to act in the claimant's best interests; and
- ii) Vulnerability to the fiduciary's exercise of control, in that the claimant's interests can be adversely affected by the fiduciary's exercise of discretion.

[89] The case law confirms that the features of a fiduciary relationship are present when an attorney acts pursuant to a power of attorney. In *Andreasen v. Daniels-Ferrie*, 2001 BCSC 1503 [Andreasen], Justice Quijano stated at para. 27: "it is well established that the attorney acting under a power of attorney does so in a fiduciary relationship with the donor". A similar proposition was enunciated in *Lau v. Lee*, [1994] B.C.J. No. 1770 (S.C.), aff'd [1996] B.C.J. No. 1667 (C.A.), where the plaintiff appointed the defendant attorney for the purpose of selling property. The attorney was found to have breached a fiduciary duty by selling the property to herself before re-selling it at a profit. In that case, Mr. Justice Lysyk stated at paras. 34-35:

[34] I have come to the conclusion that the plaintiff is entitled to succeed on the basis of breach of fiduciary duty arising out of the power of attorney.

[35] It is clear that the power of attorney gave rise to a principal-agent relationship between the plaintiff and the defendant Lee.

Content of the Fiduciary Duty

[90] Courts have refused to articulate a fixed set of rules and principles that apply in all circumstances where a fiduciary relationship exists. The Supreme Court of Canada has stressed that "not all fiduciary relationships and not all fiduciary obligations are the same": *McInerney v. MacDonald*, [1992] 2 S.C.R. 138 at 149. Nonetheless, it is well settled that a fiduciary must act with absolute loyalty to the beneficiary in managing their affairs: *Canadian Aero Service Ltd. v. O'Malley*, [1974] S.C.R. 592, at 383-384 [Canaero].

[91] In *Andreasen*, Justice Quijano articulated the standard of care required of an attorney acting under a power of attorney at para. 27:

in addition to whatever duties may be enunciated on the face of the instrument, even where the attorney acts gratuitously he or she has a duty to account, to exercise reasonable care as would a typically prudent person managing his or her own affairs, and not act contrary to the interests of the donor.

Application

[92] It is well settled that a power of attorney creates a fiduciary relationship. I thus conclude that Mr. Sun owed the plaintiffs a fiduciary duty, and was required to act in the plaintiffs' best interests when exercising his powers pursuant to the instrument. He had a further duty to render accounts.

[93] The plaintiffs have demonstrated that Mr. Sun removed \$367,838.36 from their checking account using the power of attorney. The plaintiffs concede that the evidence documents that \$147,796.53 was spent on the project. The issue for determination is whether Mr. Sun breached his fiduciary duty as an attorney by removing the \$220,041.83 he cannot account for.

[94] Credibility is central to my determination on this issue due to the fact that Mr. Sun was largely unable to produce any kind of record of the uses to which the plaintiff's money was being put. On numerous occasions, Mr. Sun was given time during breaks in the trial of this matter to go home to look for the documentation he claimed he had. I do not find his explanation for failure to produce invoices--that he had them and would produce them but could not find them--to be believable, and draw an adverse inference from his failure to produce them. I found Mr. Sun's handwritten summaries of payments made to be self-serving. I further note that my finding that Mr. Sun altered the quote provided by APS Electrical Ltd. negatively affects my assessment of his credibility.

[95] Given Mr. Sun's failure to account to the plaintiffs for the funds removed from their account and his lack of a credible explanation for the removal, I find that Mr. Sun breached his fiduciary duty.

Remedy

[96] A finding of fiduciary liability "opens access to an array of equitable remedies": *Wewaykum Indian Band v. Canada*, 2002 SCC 79 at para. 94. In some instances, an injunction or a proprietary remedy such as a constructive trust will be the appropriate remedy for breach of fiduciary duty: see e.g. *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6 at para. 227. More commonly a monetary remedy is awarded, which can come in the form of equitable compensation for the beneficiary's loss or disgorgement of the fiduciary's gain through an accounting of profits. Equitable compensation and an accounting of profits are alternative, not cumulative, remedies: the beneficiary can claim both, but must elect

between them, at the latest, at the time of judgment: *First Majestic Silver Corp. v. Davila*, 2013 BCSC 717 at para. 187-188 [First Majestic].

- [97] Equitable compensation is a monetary award available to remedy all sorts of equitable wrongdoing, including breach of fiduciary duty. It originates in trust law: trustees who have lost trust property or otherwise dealt with it in breach of trust must either "restore" the property to the trust or pay compensation instead. Equitable compensation is designed to put the beneficiary in as good a position financially as he or she would have occupied but for the breach of the equitable obligation: *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534 at 577, 579 [Canson]; *First Majestic* at para. 219.
- [98] While there is disagreement in the law about how the assessment of equitable compensation should proceed, and whether a beneficiary is limited by factors such as causation, foreseeability, and remoteness (see: *Canson*, as contrasted with the position taken by the majority in *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377), the British Columbia Court of Appeal has accepted that "in Canada, the common law principles of causation, foreseeability and remoteness would apply, at least in a general or approximate sense" to limit equitable compensation: *Dhillon v. Jaffer*, 2016 BCCA 119 at paras. 22, 26. Regardless, equitable compensation is designed to restore the beneficiary to the position she would have occupied but for the breach of the fiduciary duty, not a better one.
- [99] The aim of the disgorgement remedy is to strip the fiduciary of any gain derived from the breach of the fiduciary duty. The gain need not correspond to the beneficiary's loss: the remedy is available even where the beneficiary lost nothing: *Lac Minerals* at 671; *Canaero* at 621-662. In *Indutech*, the Court suggested that disgorgement is "the correct remedy when the fiduciary's profit is greater than the beneficiary's loss", and that it "may be awarded in addition to the consequential damages suffered by the beneficiary" (at para. 45).
- [100] Having reviewed the principles of compensation for breach of fiduciary duty, I believe equitable compensation is the most appropriate remedy in the circumstances. This case is not similar to *Lac Minerals* or *Canaero*, where the fiduciary's gain was greater than any losses suffered by the beneficiary. Damages should thus be awarded with the goal of restoring the plaintiffs to the position they would have occupied but for Mr. Sun's breach of fiduciary duty.
- [101] The plaintiffs have demonstrated that Mr. Sun removed \$367,838.36 from their checking account. Mr. Sun could only demonstrate through invoices that \$147,796.53 was spent on the project. The plaintiffs claim that they are entitled to damages of \$220,041.83, being the difference between the amount removed from their account and the amount spent on the project.
- [102] I believe that it would not be just and equitable to award the plaintiffs compensation in this amount, as it would place them in a better position that they would have occupied had the breach not occurred. Based on a careful review of invoices, Mr. Weber concluded that the value of the work completed by Mr. Sun was \$210,896.67. While Mr. Sun may not be able to

account for this amount, the plaintiffs, nonetheless, received the benefit of expenditures in excess of \$147,796.53. I therefore find that Mr. Sun misappropriated \$156,941.69 from the plaintiffs' chequing account, and award equitable compensation in this amount.

FRAUD

[103] As a preliminary matter, I note that the terms fraud, deceit, and fraudulent misrepresentation are used interchangeably, and have been treated similarly in the jurisprudence. In *Rosenich v. Welke*, 2003 ABQB 876, the Alberta Court of Queen's Bench held at para. 37 that "allegedly being liable for fraudulent misrepresentation or the tort of deceit is one of the same". Likewise, the Ontario Superior Court of Justice in *Re Bozzo* (2005), 10 C.B.R. (5th) 1 (Ont. S. Ct. J.), citing *Parna v. G. & S. Properties Ltd.*, [1971] S.C.R. 306, stated at para. 23 that "often the tort of deceit and the tort of fraudulent misrepresentation are used by the courts as interchangeable terms" and that "courts have tended to treat the two causes of action similarly, if not the same".

[104] At paragraph 41 of the Amended Notice of Civil Claim, the plaintiffs allege that Mr. Sun and West Continent committed fraud by:

- advising the plaintiffs that he made prepayments to subcontractors and suppliers, which he apparently did not make and which resulted in a builder's lien being registered against the Property;
- making a payment from the plaintiff's account to a subcontractor for services rendered on an unrelated property;
- altering a quote provided by a subcontractor to reflect an inflated price; and
- indicating to subcontractors that they should seek payment directly from the plaintiffs, when the parties had agreed that Mr. Sun would make these payments.

[105] As discussed above, the plaintiffs attempted to argue that the court ought to disregard the separate legal existence of West Continent and find the corporation to be the alter ego of Mr. Sun. Following the criteria from *Clarkson and Chan*, I dismissed this argument on the basis that the plaintiffs had failed to adduce any evidence demonstrating that West Continent was incorporated for an improper purpose or was used as a shield for fraudulent or wrongful conduct.

[106] I take the above argument to be distinct from the plaintiffs' assertion at paragraph 41 of the Amended Notice of Civil Claim that both Mr. Sun and West Continent committed fraud. While difficult to parse given the plaintiffs' failure to provide me with any case law on the point, my understanding is that the plaintiffs seek joint and several liability in fraud for West Continent in the event that I find Mr. Sun liable for fraud.

Liability of West Continent for Fraud

- [107] Fraud has a knowledge component: a defendant can only be liable if he or she has knowledge of certain facts. While a corporation can commit fraud, liability will be based on the fraudulent intent of a person who is a directing mind of the corporation. Per the Alberta Court of Appeal in *Motkoski Holdings Ltd v. Yellowhead (County)*, 2010 ABCA 72, citing *BG Checo International Ltd. v. British Columbia Hydro and Power Authority* (1990), 44 B.C.L.R. (2d) 145 (C.A.) at 161 aff'd on this point [1993] 1 S.C.R. 12:
- [89] Absent fraudulent intention or conduct by one of the individual corporate representatives, fraud cannot be attributed to the corporation. For example, if the person with the key knowledge intentionally withheld it from the representative who is making the critical decision, knowing or intending that others would proceed on false assumptions, that might result in corporate fraud.
- [108] Corporate liability for torts with a knowledge component is imposed by virtue of the corporate identification doctrine, which is used to impute the knowledge of the individuals who control the corporation to the corporation. Per *Canadian Dredge & Dock Co. v. The Queen*, [1985] 1 S.C.R. 662 at 351 [Canadian Dredge], the corporate identification doctrine operates where the action taken by the directing mind (a) was within the field of operation assigned to him or her; (b) was not totally in fraud of the corporation; and (c) was by design or result partly for the benefit of the corporation.
- [109] Without question, Mr. Sun, as the owner and sole shareholder, is the directing mind of West Continent. If the plaintiffs' allegations of fraud are made out, they were done by Mr. Sun when carrying out his assigned function in the corporation. In *Hart Building Supplies Ltd. v. Deloitte & Touche*, 2004 BCSC 55 [Hart], Justice Baker noted at para. 32 that the mere fact that the officer's actions are criminal or fraudulent does not mean they were done outside of the scope of his authority.
- [110] In *Canadian Dredge*, it was held that a criminal act cannot be attributed to the corporation where it "is totally in fraud of the corporate employer and where the act is intended to and does result in benefit exclusively to the employee-manager" (at 713). If the instances of fraud as alleged by the plaintiff are made out, I find that Mr. Sun was not acting against West Continent for his sole benefit. Per Hart, the mere fact that an employee or manager benefitted from the improper act does not absolve the corporation of liability (at para. 36). I thus conclude that, should Mr. Sun be found liable for one or more of the above instances of fraud, West Continent is also liable.

The Legal Framework

[111] The requirements to establish a fraudulent misrepresentation are:

- 1) the defendant made a representation of fact to the plaintiff;
- 2) the representation was, in fact, false;

- 3) the defendant knew the representation was false when it was made, or made the false representation recklessly, not knowing if it was true or false;
- 4) the defendant intended the plaintiff to act on the representation; and
- 5) the plaintiff relied upon the false representation and thereby suffered a detriment.

See *Wang v. Shao*, 2018 BCSC 377 at para. 196; *Hamilton v. Callaway*, 2016 BCCA 189 at para. 25.

[112] While the tort of civil fraud traditionally operated in the context of fraudulent inducement to enter into a contract, Mr. Justice Bauman, as he then was, writing for the court in *Catalyst Pulp & Paper Sales Inc. v. Universal Paper Export Co.*, 2009 BCCA 307 [Catalyst Paper], was clear that the tort extends beyond that context. Catalyst Paper involved a plaintiff who made payments on the strength of the defendant's false statements. In that case, the parties were already involved in an ongoing contract that called for regular reports and invoices. The defendant had been engaged by the plaintiff (Catalyst) to facilitate the delivery and distribution of paper to a customer. Pursuant to their contract, the defendant regularly invoiced Catalyst for certain costs, but the parties had not agreed that the defendant was permitted to mark up those costs. Catalyst had assumed the defendant was passing on only its actual costs, and sued for fraud when it discovered this was not the case.

[113] Catalyst was successful both at trial and on appeal. The Court of Appeal endorsed the trial judge's finding that the defendant had intended the plaintiff to "act on the representation by not focusing on, inquiring into, or assessing the appropriateness of the amount paid to [the defendant]" (at para. 45), concluding that the case for fraudulent misrepresentation against the defendant was "overwhelming" (para. 63).

[114] *XY Inc. v. International Newtech Development Inc.*, 2013 BCCA 352, leave to appeal ref'd [2013] S.C.C.A. No. 376 [XY Inc.], further extended the reliance element to provide relief to a plaintiff who was not actually induced to make payments but whose financial position was affected by the defendant's fraudulent conduct. In XY Inc., the plaintiff company owned the intellectual property to some technology and entered into a licencing agreement with the defendants whereby the defendants would pay the plaintiffs royalties based upon sales. The defendants then falsified records and underreported royalties. The defendants argued that they were not liable in civil fraud because the plaintiffs were not induced to change their position. The Court of Appeal rejected this argument, and concluded that the plaintiff's continuation under the contract until it discovered the fraud constituted an act of reliance sufficient to make out the tort of civil fraud (at paras. 39-41).

[115] The issue of reliance was also in question in *Roy v. 1216393 Ontario Inc.*, 2014 BCCA 429 [Roy], where a real estate developer entered into a contract for sale with the plaintiffs without disclosing a Certificate Pending Litigation registered on the property. He then lied and told the plaintiffs that completion of the sale was delayed pending subdivision plan approval, when the real cause of the delay was the pending litigation. Justice Chiasson applied XY Inc. to conclude that the tort of civil fraud was made out as the plaintiffs had

accepted the continuing representations of the defendant that there were problems with subdivision approval, and thus did not seek to purchase comparable lot (at para. 61).

Application

The Failure to Pay Invoices

[116] The plaintiffs say that Mr. Sun lied when he told them that he had made prepayments to subcontractors or suppliers. It is unclear from the parties' submissions whether the defendants actually withdrew the prepayment amounts from the plaintiffs' chequing account. My understanding is that the plaintiffs seek compensation for \$21,825.60, the amount of the lien registered against their property, as they had to pay to have it discharged.

[117] Mr. Sun's response to this allegation of fraud is that he made the prepayments to subcontractors. He was unable to say where the money for these payments came from, and could not provide invoices. Given the registration of the lien and Mr. Sun's inability to provide invoices documenting payments, it seems likely that Mr. Sun did not make the payments in question. However, the plaintiffs have not adduced any evidence of loss. While they had to pay the subcontractors and suppliers to have the lien discharged, they received the benefit of the work and materials.

[118] The circumstances of this case are analogous to XY Inc. and Roy to the extent that the plaintiffs continued under the contract with Mr. Sun until they discovered his fraudulent statement. However, the plaintiffs did not suffer any quantifiable loss. I am therefore unable to find Mr. Sun liable for civil fraud when he informed the plaintiffs that he made payments to suppliers when he had in fact not. The plaintiffs have not adduced evidence that they were unable to restore themselves to the same position they would have occupied but for Mr. Sun's misrepresentation, or that they suffered any quantifiable loss beyond the inconvenience of having to discharge the lien.

[119] I repeat that it was unclear whether the plaintiffs were alleging that Mr. Sun actually withdrew funds in the amount of the lien from their chequing account. In the event they are, I note that I have dealt with all allegations of misappropriation of funds from the plaintiffs' chequing account in my discussion of breach of fiduciary duty.

The Misappropriation of Funds from the Plaintiffs' Bank Account

[120] The plaintiffs say that Mr. Sun paid Sirwal Construction Ltd. ("Sirwal") \$25,000 from their chequing account, but that Sirwal only performed \$20,000 worth of services on their property. The remaining \$5,000 was used to pay Sirwal for services on an unrelated property.

- [121] The president of Sirwal, Mr. Avtar Sangha, was called as a witness and testified that he completed the framing at the Property. He indicated that Mr. Sun was managing the construction when he started working at the Property, but that Ms. Xue had taken over by the time he completed his work. He testified that he billed \$31,500 for the entire project.
- [122] Mr. Sangha testified that he was paid in relation to two projects for Mr. Sun, and received a cheque for \$10,000 on March 20, 2011. Mr. Sangha was not able to provide an exact breakdown of how much was for the work performed on the plaintiffs' property and how much was for the unrelated project.
- [123] While I am inclined to believe the plaintiffs when they say that Mr. Sun misappropriated the funds from their bank account to pay for services performed by Sirwal on an unrelated property, they were unable to point to concrete evidence of the amount. Rather than speculate, I find that it is more appropriate to deal with all claims related to Mr. Sun's misappropriation of funds from the plaintiffs chequing account in my discussion of breach of fiduciary duty.

Presenting a False Quote

- [124] The plaintiffs say Mr. Sun committed a further instance of fraud by presenting Ms. Shen with an apparently altered estimate from APS Electrical Ltd. for \$18,200. In document production, Mr. Sun produced an almost identical document reflecting a quote for \$8,200.
- [125] I find that Mr. Sun submitted a doctored quote for electrical services to the plaintiffs. While this impacts my assessment of Mr. Sun's credibility generally, I cannot conclude that this amounts to fraud, as the amount quoted was never paid. The tort of fraud requires detrimental reliance. Even on the lenient standard set out in Roy, where the plaintiff was not required to demonstrate monetary loss and could instead rely on the loss of opportunity to exercise a legal right, I cannot conclude that the plaintiffs relied on Mr. Sun's purported forgery or suffered a related loss.

Incorrect Instructions to Subcontractors

- [126] Finally, the plaintiffs say that the defendants' instructions to subcontractors that they should seek payment directly from the plaintiffs amounts to fraud. A representation of fact from the defendant to the plaintiff is the first requirement to establish fraud. Since this allegedly false statement was not made to the plaintiffs, this claim is not made out.

UNJUST ENRICHMENT

- [127] The plaintiffs claim unjust enrichment against Mr. Sun, West Continent, and Ms. Song. As a remedy, they seek the imposition of a constructive trust over the defendants' land in New Westminster, arguing that the funds wrongfully obtained from the plaintiffs were used to purchase and maintain these lands.

[128] At the outset, I note that the plaintiffs will not be successful in obtaining their desired remedy should their claim for unjust enrichment succeed. Ms. Song produced bank records showing that she transferred \$310,949.10 to Mr. Sun from her line of credit to pay for the purchase of a property, proving that the property was not purchased or maintained using funds misappropriated from the plaintiffs' account. The only remedy available to the plaintiffs for unjust enrichment is monetary restitution.

The Legal Framework

[129] A claim for unjust enrichment requires a plaintiff to establish:

- 1) an enrichment or benefit to the defendant;
- 2) a corresponding deprivation to the plaintiff; and
- 3) the absence of a juristic reason for the enrichment.

See *Kerr v. Barranow*, 2011 SCC 10 at para. 32 [Kerr].

[130] Courts have taken a straightforward and economic approach to the first two elements. Other considerations, such as moral and policy questions, are dealt with at the juristic reason stage of the analysis: *Kerr* at para. 37.

[131] For the first requirement--enrichment--the plaintiff must show that he or she conferred a tangible benefit to the defendant which enriched the defendant and which can be restored to the plaintiff. The second element--a corresponding deprivation--requires that the benefit identified at the first stage of the analysis correspond to a deprivation the plaintiff suffered: *Kerr* at paras. 38-39. The third element of an unjust enrichment claim requires the plaintiff to demonstrate that the benefit and corresponding deprivation occurred without a juristic reason. This means that there is no reason in law for the defendant's retention of the benefit conferred by the plaintiff.

Unjust Enrichment by Mr. Sun and West Continent

[132] The plaintiffs argue that Mr. Sun was unjustly enriched by receiving excess funds from their chequing account. This claim is for substantially the same damage as was caused by the alleged breach of fiduciary duty. As I have found that Mr. Sun breached his fiduciary and awarded damages, I decline to rule on plaintiffs' claim against Mr. Sun for unjust enrichment.

[133] The plaintiffs further assert that West Continent was enriched by receiving funds from them beyond the agreed upon management fee. However, the plaintiffs have not adduced evidence to demonstrate that any funds misappropriated by Mr. Sun in breach of his fiduciary duty were diverted to West Continent. I thus conclude that the plaintiffs have failed to meet their evidentiary burden to show that West Continent was enriched.

Unjust Enrichment by Ms. Song

- [134] The plaintiffs' banking records reveal that between September 13, 2010 and March 15, 2011, a total of \$60,400 was transferred to Ms. Song from their chequing account. The plaintiffs say this amounts was unjust enrichment.
- [135] Ms. Song denies all allegations against her. She acknowledges that she received funds from the plaintiffs' chequing account, but asserts that she was owed that money by Mr. Sun.
- [136] Ms. Song's banking documents reveal that between March 15, 2010 and August 18 2010, she transferred a total of \$87,682 from her personal bank account to that of West Continent. Ms. Song also provided the court with credit card receipts for two building permits from the City of Vancouver for the plaintiffs' property in the amount of \$5,912. Additionally, Ms. Song produced an irrevocable letter of credit for \$25,000 to the National Home Warranty Program, which she says she paid for at the request of Mr. Sun. Ms. Song says that Mr. Sun was short on money to run his business and needed a loan to pay accounts. She says he promised to repay her as soon as he was paid.
- [137] Ms. Song testified at trial, and I found her to be a credible and reliable witness. While she was unable to say that the loans she made to Mr. Sun were used to pay accounts in connection with the construction on the plaintiffs' home, the timeline of the payments made to West Continent would suggest that they were. I accept Ms. Song's evidence and thus find that the plaintiffs' claim in unjust enrichment against Ms. Song must fail. Ms. Song was not enriched, and the plaintiffs did not suffer a corresponding deprivation. The funds transferred to Ms. Song from the plaintiffs' chequing account were repayment for money she paid to Mr. Sun for the construction of the plaintiffs' home.
- [138] Further, the plaintiffs' claim in unjust enrichment against Ms. Song must fail because permitting recovery would allow the plaintiffs to recover twice--once from Mr. Sun for breach of fiduciary duty, and again from Ms. Song for receiving the funds.

PUNITIVE DAMAGES

- [139] The plaintiffs assert that Mr. Sun's fraudulent misrepresentations and misuse of the power of attorney warrant the imposition of punitive damages. They say his conduct lacked honesty and reasonableness, and that he took advantage of the plaintiffs' lack of knowledge over the construction process. The plaintiffs have provided little support for their position, citing *Kerr v. Arpac Storage Systems Corporation*, 2018 BCSC 704, which is an employment case where the court declined to award punitive damages.

The Legal Framework

[140] Punitive damages are a type of non-compensatory damages which are imposed solely to punish the defendant. The Supreme Court in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 29 [Hill], articulated the following purposes of an award of punitive damages:

Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency. Punitive damages bear no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. It is a means by which the jury or judge expresses its outrage at the egregious conduct of the defendant. They are in the nature of a fine, which is meant to act as a deterrent to the defendant and to others from acting in this manner.

[141] The Court in *Hill* went on to emphasize at para. 199 that punitive damages should be awarded only where the combined award of general and aggravated damages would be insufficient to achieve punishment and deterrence.

[142] Punitive damages are reserved for exceptional cases, where conduct is "harsh, vindictive, reprehensible and malicious": *Norberg v. Wynrib*, [1992] 2 S.C.R. 226 at 264. Mr. Sun's conduct was largely the product of poor judgment and opportunism, and I do not find it was of such a nature as to warrant an award of punitive damages.

MR. SUN'S COUNTERCLAIM

[143] Mr. Sun claims that he spent over \$450,000 on the project. Pursuant to the Builders Lien Act, he counterclaims for a lien in the amount of \$115,641.23, saying that the plaintiffs have not paid him for construction expenses he incurred.

[144] Mr. Sun says he incurred significant expense paying for excessive extras requested by the plaintiffs.

[145] As noted above, the plaintiffs acknowledge that the defendants made payments in the amount of \$147,796.53 in relation to construction on the Property. The plaintiffs deny that the defendants paid for any of the remaining amounts claimed.

[146] Mr. Sun says the plaintiffs requested extra design work beyond what was contemplated in the construction agreements, and claims he is owed \$39,200 in extra design fees. He says Ms. Shen agreed to pay \$22,500 to use the architectural design drafted by Peter Rose for a different property, plus \$12,500 for designing a high living room ceiling. I find that Mr. Sun did not have consent to use Mr. Rose's designs, and that the design was paid for by Mr. Sun's other clients directly to Mr. Rose. I thus conclude that there is no cogent evidence of Mr. Sun incurring expense for the redesign fee.

- [147] Mr. Sun says he spent \$35,000 + HST on Low-E windows. The plaintiffs agreed to pay \$2,000 extra for these windows. At trial, Mr. Sun said that the \$35,000 amount included the cost of hiring Stephen LaPlante as a foreman/manager. His evidence was that he paid Mr. LaPlante \$28,350. There is no admissible evidence and handwritten notes purportedly signed by Mr. LaPlante. There is no admissible evidence, beyond Mr. Sun's testimony, that Mr. LaPlante ever worked on the Property. I accept the plaintiffs' contention that they should not be paying Mr. LaPlante's remuneration, as they were already paying Mr. Sun a management fee to oversee construction on the Property.
- [148] Mr. Sun prepared a document indicating he paid a further \$156,362.97 for extras requested by the plaintiff. The only evidence of these expenses being incurred is Mr. Sun's testimony and handwritten summaries of payments, which he made himself. I find Mr. Sun's evidence with respect to expenses to be self-serving: he wrote out invoices himself, and failed to bring the original invoices to court despite being given numerous opportunities to do so. I thus reject Mr. Sun's claim that the plaintiffs owe him for these alleged extras.
- [149] In addition to the extras, Mr. Sun claims that he made payments to suppliers and subcontractors in excess of what he was paid by the plaintiffs. Again, apart from Mr. Sun's testimony, there is no evidence that these amounts were paid. While there are some invoices from suppliers, builder's liens registered by these suppliers suggest that the invoices were not paid.
- [150] Finally, Mr. Sun says he had to pay \$25,000 under the National Home Warranty Program in order to apply for a building permit. I find that a builder is required to be registered with this program, and it was improper to bill the entirety of the enrolment fee to the plaintiffs.
- [151] In conclusion, I do not accept Mr. Sun's evidence with respect to the amounts he says he is owed by the plaintiffs. I prefer the evidence of Ms. Shen, who acknowledges that the defendants incurred \$147,796.53 in construction expenses. I thus dismiss Mr. Sun's counterclaim under the Builders Lien Act.

SUMMARY OF AWARDS

- [152] In summary, I make the following awards against Mr. Sun:

Compensation for breach of fiduciary duty:

\$156,941.69

Damages for breach of contract

\$6,293.18

TOTAL

\$163,234.88

COSTS

[153] Ms. Song is entitled to her costs at Scale B.

[154] The plaintiffs were substantially successful in this action against Mr. Sun and West Continent, and I would award them costs at Scale B.

[155] The plaintiffs are also entitled to interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79 from April 28, 2011 to the date of this judgment.

"Maisonville J."

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