

CANADA / JUDGMENT

Stene v. White Castle Ventures Inc.

2020 BCSC 1134

COURT

Supreme Court of British Columbia

DECIDED

7 August 2020

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2020 BCSC 1134 Stene v. White Castle Ventures Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Stene v. White Castle Ventures Inc.,

2020 BCSC 1134

Date: 20200807

Docket: S141595

Registry: Vancouver

Between:

Anne Stene

Plaintiff

And:

White Castle Ventures Inc.

and Harry Louis Ari Cassel

Defendants

Before: The Honourable Mr. Justice D.M. Masuhara

Reasons for Judgment

Counsel for Plaintiff:

D.W. Donohoe

J. Wu

Counsel for Defendant:

G. Crickmore

Place and Dates of Trial:

Vancouver, B.C.

May 13-17, 2019

August 12, 2019

November 25-26, 2019

February 5, 2020

Further Written Submissions:

July 10, 2020

July 20, 2020

Place and Date of Judgment:

Vancouver, B.C.

August 7, 2020

I. Introduction

- [1] These Reasons deal with a claim by Ms. Stene for relief in respect to a property in Coquitlam on which she once lived with her late spouse, Mr. "Gunny" Fleischer. Under an agreement for sale she held the right to obtain title to the property from the defendant White Castle Ventures Ltd. ("WCV"). She was required to vacate the home because she was unable to make the required payments under the agreement. She faults the conduct of the defendant for this. Though she also alleges wrongs against Mr. Fleischer, she did not claim against him or his estate.
- [2] The subject property has the civic address of 1935 Brunette Avenue (the "Lot") and was part of a larger parcel of land (the "Land") which Mr. Fleischer and the defendant were jointly engaged in developing starting in October 2007 under a joint venture agreement dated November 17, 2007 (the "Joint Venture Agreement"). The principal of WCV is Mr. Ari Cassel.
- [3] Mr. Fleischer built a house on the Lot (which had yet to be subdivided) in which he and the plaintiff occupied. As part of the dealings between Mr. Fleischer and the defendant under the Joint Venture Agreement, an agreement was made a few years later on April 30, 2010, which included a term that the Lot (to be subdivided) held in the name of the defendant, would be sold to Ms. Stene for \$1.1 million on terms which included regular monthly payments. Full payment was due on November 30, 2012. Pursuant to that agreement, WCV and the plaintiff entered into the subject agreement for sale on May 14, 2010.

- [4] Mr. Cassel through WCV agreed to extensions of the maturity date through agreements dated October 30, 2012 and in June 2013 under which final payment was extended to June 30, 2013 and then to September 30, 2015, respectively. My finding is that the maturity date in the agreement for sale and extension agreements were selected to reflect when the parties expected the subdivision to be completed. I will refer to the agreement for sale and extensions agreements collectively as the Agreement for Sale, unless the context requires otherwise.
- [5] Arrears in monthly payments under the Agreement for Sale began to accrue from June 2013 to October 2013. They were paid off in November 2013; however, the required payments subsequent to October 2013 were not. After four months of further arrears, notice was provided by WCV that if the arrears were not brought current by April 4, 2014, the Agreement for Sale would be considered null and void in accordance with the terms of the Agreement for Sale.
- [6] The plaintiff then commenced the within action on March 4, 2014. The plaintiff claimed that the Agreement for Sale was null and void and sought return of all monies paid under the agreement. The defendant filed its response to civil claim March 13, 2014 and counterclaim on March 14, 2014.
- [7] On April 11, 2014, in a hearing before Justice Leask, the action against Mr. Cassel was dismissed but not the defendant. Justice Leask also ruled that Ms. Stene had a licence to occupy the Lot until July 31, 2014 on various conditions including monthly payments of \$2,200 from April 15, 2014 through to July 15, 2014.
- [8] The plaintiff and Mr. Fleischer did not vacate the Lot on July 15, 2014. Mr. Cassel did not seek to force Ms. Stene or Mr. Fleischer out; he was sympathetic to their financial situation and agreed to let them continue to rent until November 2014. The plaintiff and Mr. Fleischer surrendered vacant possession of the top level of the house in November 2014 and the two re-located to Gibsons, B.C.
- [9] In 2016, Mr. Donohoe took on the case for the plaintiff and obtained orders to amend the pleadings to include the relief which were the focus at trial.
- [10] Mr. Fleischer had health problems and died on April 5, 2016 in Gibsons, B.C.
- [11] The lengthy list of relief sought by the plaintiff is in summary:
- (a) A declaration that the Agreement for Sale was a "consumer transaction" under the Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2 [BPCPA] and that the defendant engaged in an unconscionable act or practice in dealing with the plaintiff thereby supporting an order directing that the Agreement for Sale be set aside as void or voidable;

- (b) Alternatively, a declaration that the Agreement for Sale was not binding on the plaintiff due to the lack of independent legal advice given to her at the date of the execution of the Agreement for Sale or it was unconscionable at common law or an improvident bargain springing from unequal bargaining power;
- (c) Alternatively, a declaration that the defendant was in breach of its obligations under the terms of the Agreement for Sale and/or the defendant repudiated the agreement by:
 - (i) By its delay in starting and/or completing the subdivision so that the Land could be created and it could offer good title to the Land; and/or
 - (ii) Its continuing to charge the plaintiff an excessive interest expense for extension caused by delays in the subdivision process, which delays the defendant would not reasonably act to remedy;
- (d) In addition or alternatively, a declaration that the plaintiff accepted the defendants' repudiation by treating the Agreement for Sale as rescinded and by her ceasing to make payments until the defendant could make good title to the Land.
- (e) In addition or alternatively, a declaration that, the plaintiff acted within her rights to accept the defendant's unreasonable delay in the subdivision process and the defendant's other actions as repudiation of the Agreement for Sale and to treat the Agreement for Sale as rescinded.
- (f) In addition or alternatively, a declaration that:
 - (i) the amount of the payments collected by the defendant from the plaintiff on account of "interest" on the purchase price under the Agreement for Sale should not be considered earnest money, but instead payments on account of the purchase price.
 - (ii) such money paid by the plaintiff on account of the purchase price should be paid by the defendant to the plaintiff, in addition to a further payment by the defendant for any amount spent by the plaintiff on improvements to the Land, or premises that has unjustly enriched the defendant.
- (g) In addition or alternatively, a declaration that a claim of a purchaser's lien or similar equitable interest be granted to the plaintiff upon title to the Land owned by the defendant, being the new parcel of land created from the sub-division of the Parent Lands, the legal description of which is P.I.D. 029-915-244, Lot 2 District Lots 62 and 63 Group I New Westminster District Plan EPP42542 in the amount invested by the plaintiff, including all payments towards the purchase price (inclusive of interest), insurance, maintenance, and property taxes and value of improvements to the Parent Lands that were made in good faith, in anticipation of the creation of the Land that was to be sold by the defendant to the plaintiff and a certificate of pending litigation in respect to this claim.

- (h) In the alternative, an order granting relief to the plaintiff from forfeiture of the payments made by the plaintiff on account of the purchase price, insurance, maintenance and improvements in a total amount of \$302, 129.05, plus interest, less reasonable occupation rent of \$2,200 per month, under the terms and conditions this Honourable Court deems just and fair in the circumstances.
- (i) In the alternative, an order that the defendant pay equitable compensation or restitution to the plaintiff in the amount deemed reasonable and appropriate by this Honourable Court in respect to the installment payments on the purchase price set by the Agreement for Sale that was not completed by a transfer of title to the plaintiff and for other amounts invested by the plaintiff in the Parent Lands or the Land that have unjustly enriched the defendant.
- (j) In the alternative, an order that the defendant pay equitable compensation or restitution of benefits conferred on it by the plaintiff, in respect to payments made to it by the plaintiff or investments made by the plaintiff in and improvements to the Parent Lands, regardless of whether this Honourable Court finds that the plaintiff repudiated the Agreement for Sale or acted in breach of such Agreement.

[12] WCV counterclaims against Ms. Stene. The relief sought includes:

- (a) A declaration that the Agreement for Sale has been determined;
- (b) Judgment against Ms. Stene of \$77,235.22 as of February 28, 2014 with interest at \$196.42 per diem;
- (c) Damages for breach of the Agreement for Sale, including the difference in value between \$1.1 million and the current value of Ms. Stene's interest in the Lot;
- (d) Occupational rent, and an accounting of money received from renting any part of the Land;
- (e) General, special, punitive, statutory, and aggravated damages.

[13] The witnesses who appeared in the plaintiff's case were:

- (a) Mr. Mitchell Rapiner. He prepared an appraisal of the 1935 Brunette property dated October 16, 2009 for Canadian Western Bank.
- (b) Mr. Kevin Axford. He is a realtor and conducts a property leasing and rental business. He prepared a report in respect to occupational rent for the 1935 Brunette Avenue property.
- (c) Mr. Miles Alperstein. He is a solicitor who acted for Mr. Fleischer and drafted many of the agreements and documents referred to in this action.
- (d) Mr. Robert Monterio. He is a solicitor. He spoke to the work he performed for Ms. Stene.
- (e) Ms. Anne Stene, the plaintiff.

[14] The witness called in the defendant's case was:

(a) Mr. Ari Cassel, the principal of the defendant.

II. Summary

- [15] For the reasons that follow, I find that the plaintiff has not established that: the Agreement for Sale was a consumer transaction; that it was unconscionable; that the defendant breached the Agreement for Sale; and that Mr. Fleischer was abusive toward Ms. Stene and used her as a pawn; and that Mr. Fleischer and Mr. Cassel conspired to prejudice Ms. Stene.
- [16] Also, I find that Ms. Stene repudiated the Agreement for Sale; and that the payments made were partial payments towards the purchase price. However, the plaintiff is not entitled to relief from forfeiture in the circumstances. I have included in my determination that the defendant suffered damages for unpaid rent of \$48,365.62 plus prejudgment interest, in addition to other damages.
- [17] I also find that the plaintiff is entitled to restitution for improvements in the amount of \$5,000.
- [18] I have found that the limitation and laches defences raised by the defendant have not been established.

III. Background

- [19] Ms. Stene met Mr. Fleischer at a dance hall around 1999. She described him as an older gentleman. She had been previously married and had two children (now adults). She owned two homes from which she derived rental income. About six months after they met a relationship developed. It appears that the two began cohabiting in about 2002.
- [20] Subsequently, she sold her two homes and RRSP funds and provided the proceeds to Mr. Fleischer for his projects. Promissory notes and a letter of understanding evidence some of the monies said to have been loaned to Mr. Fleischer which is said to have totalled \$450,000. They indicate she would receive an interest in various units in land development projects that Mr. Fleischer was developing.
- [21] Mr. Cassel is a professional engineer who ran a business involved in high-end electronics and computers. He has retired from his business. He is not a land developer.
- [22] Mr. Fleischer was a land developer and builder with many years of experience. Mr. Cassel described Mr. Fleischer as a good builder but would overbuild.
- [23] The relationship between Mr. Fleischer and Mr. Cassel goes back many years.
- [24] The two met in about 1983, when Mr. Cassel purchased from Mr. Fleischer bare land located in North Vancouver upon which Mr. Cassel would build his home (not by Mr. Fleischer).

- [25] Mr. Fleischer was unable to obtain financing for his development projects from conventional lenders. He approached Mr. Cassel for funding. While private lending was not Mr. Cassel's focus, as he had his own electronics business, he agreed and began to provide financing for various projects that Mr. Fleischer brought to him. Prior to the Joint Venture Agreement, Mr. Cassel provided financing for about six projects to Mr. Fleischer. He would take security in the property for which he was providing funding.
- [26] One such project was the Tumbler Ridge Wilderness Lodge. In about 2005, Mr. Cassel negotiated the purchase of an apartment building in Tumbler Ridge for one dollar from the District of Tumbler Ridge. A condition was that he was to invest a minimum of \$700,000 to renovate and upgrade the premises to a first class hotel to service the mining industry in the area. Mr. Cassel through a company provided the funding for this to Mr. Fleischer's company Tumbler Ridge Wilderness Lodge Corp. ("TRWL"). Ultimately, Mr. Cassel through his company provided a total of \$2.6 million for the project which funds were secured by mortgages. The project was successful and the 50-suite hotel was fully booked for several years and Mr. Fleischer kept current with his mortgage payments to Mr. Cassel's company. Mr. Fleischer received significant monthly distributions from TRWL's until around 2011 when a significant downturn in the mining industry in the area took hold.
- [27] In about 2007, Mr. Fleischer located the Land in Coquitlam. He wished to buy, develop and subdivide it. He asked Mr. Cassel if he would be interested in the project. Mr. Cassel agreed to provide the financing through WCV for Mr. Fleischer to purchase the Land which took a first mortgage against the Land. The transaction is reflected in a Joint Venture Agreement dated November 17, 2007. The agreement first contemplated Mr. Fleischer obtaining first mortgage financing in the amount of \$520,000 to repay funds advanced by WCV; and then to secure financing for the building of his home on his allotted lot. The agreement was drafted by Mr. Alperstein, a solicitor representing Mr. Fleischer. Mr. Cassel did not have legal representation in respect to this agreement nor related agreements dealing with the Joint Venture Agreement.
- [28] The agreement states that:
- The Joint Venturers wish to come together to form a joint venture and to work together to combine their complementary skills and resources and to develop, build and operate the Project .
- [29] A key aspect of the Joint Venture Agreement was that the Land was to be subdivided into three lots. Mr. Fleischer and WCV would each own one lot and jointly own the third. Mr. Fleischer selected the middle of the three. He wished to build a house on it which and Ms. Stene would occupy. This is the Lot, the subject of the within action.

- [30] The Joint Venture Agreement contemplated that if Mr. Fleischer died "[t]he lot on which the residence will be (or in process of being constructed), will be sold to Anne Steen [sic] or otherwise as directed by Fleischer for \$305,000 plus the cost of constructing the residence up to the time of sale. Verifiable receipts and proof of payment for all construction costs must be produced in order to determine the construction costs."
- [31] Mr. Cassel agreed to advance funds for its construction as part of the funds loaned and secured for the purchase and development of the Land. The house construction started in 2007 and finished around 2009. It has living quarters on the upper floor with an office and two suites on the first floor. The upper floor has 2,524 square feet. The upper floor and office were occupied by Mr. Fleischer and Ms. Stene. Two self-contained rental suites were constructed on the first floor; a two-bedroom suite and a one-bedroom suite. These were rented out by the couple during the period they resided in the house at \$1,200/month and \$900/month, respectively. The house was described as high quality. It was Mr. Cassel's understanding that around \$700,000 to \$800,000 had been spent on the house.
- [32] In mid-2009, WCV purchased Mr. Fleischer's interest in the project in exchange for the mortgages held by WCV against the property and other terms. The amounts owing under the mortgage by Mr. Fleischer was \$1,816,508.60. The purchase price was \$1.865 million. Mr. Fleischer and WCV agreed to split the subdivision costs one-third and two-thirds respectively.
- [33] In November 2009, the defendant granted a mortgage to Canadian Western Bank with a principal amount of \$800,000 at a rate of prime plus 5%. The defendant continues to make payments under the mortgage.
- [34] Issues between Mr. Fleischer and Mr. Cassel began to arise regarding Mr. Fleischer's indebtedness. In April 2010, Mr. Fleischer and Mr. Cassel agreed to settle the debts owed to the defendant, which claims included sums loaned by the defendant to Mr. Fleischer for the joint venture including the construction of the two storey house.
- [35] The settlement included a term by which the defendant agreed to sell the land and building upon which the residence was built, about one-third of the Land, to Ms. Stene for \$1.1 million by way of an agreement for sale. This figure was settled upon as the combination of the value of the lot and the cost of constructing the house. Mr. Fleischer agreed to make monthly payments to WCV of \$6,200 per month which included \$500 as the estimated maintenance, insurance and taxes associated with the Land. Payment of the full balance was due and payable on November 30, 2012 (the "Maturity Date"). As a contribution towards the \$6,200 monthly payment, Mr. Fleischer agreed to direct funds he received from TRWL each month of \$4,500 to the defendant or such lesser amount which together with the rental income from the Lands totalled \$6,200. These terms were through negotiations between Mr. Fleischer, his lawyer Mr. Alperstein and Mr. Baltadjian. The aforementioned \$4,500 was later stated in another agreement to be an amount that was due to Ms. Stene or her company, Stene Construction and Equipment Ltd., in respect to the rental of furniture and equipment

to the hotel in Tumbler Ridge. At the time of the settlement, Mr. Cassel was not aware of a furniture lease agreement between the hotel and Ms. Stene.

- [36] On May 14, 2010, Ms. Stene, Mr. Fleischer and Mr. Cassel attended the law offices of Watson Goepel, where Mr. Alperstein practised. The purpose of the meeting was to sign documents in relation to the settlement reached in April. The agreement to settle is entitled "1935 Brunette Av., Coquitlam Settlement Agreement" and is stated to be effective April 30, 2010. The Settlement Agreement and related documents were drafted by Mr. Alperstein, who again represented Mr. Fleischer in this transaction. The Settlement Agreement included WCV agreeing to sell the Lot to Ms. Stene under an agreement for sale which was a schedule to the Settlement Agreement. Neither Mr. Cassel nor his company had legal representation in the transaction. Ms. Stene had the benefit of legal representation of Mr. Monterio, who was requested by Mr. Alperstein to attend the meeting for that purpose and was present. Mr. Alperstein testified that he had on past occasions asked Mr. Monterio to attend and provide independent legal representation for a contracting party he could not represent.
- [37] The Agreement for Sale provided that the plaintiff would pay the defendant the interest amount of nine (9%) percent per annum (with a performance bonus of three percent (3%) should payments be received when due and payable) for an effective rate of 6% from the effective date of the agreement until all outstanding amounts together with interest thereon would be paid in full, such amounts being completely due and payable at the maturity date of the agreement, such maturity date being November 30, 2012. The monthly amount payable was set in the agreement at six thousand two hundred dollars (\$6,200.00) representing five thousand seven hundred dollars (\$5,700.00) applicable towards the interest on the purchase price and an additional five hundred dollars (\$500.00) due and payable to the defendant to be applied towards "property taxes, insurance premiums and miscellaneous costs applicable to the Land".
- [38] The Agreement for Sale also states that the plaintiff was permitted to occupy the property until default. In the event of default, the agreement specifies that it will be considered null and void.
- [39] In terms of default, the agreement states in clause 21:
21. if default is made in payment of the Purchase Monies, or Interest thereon or performance of any covenant, agreement or condition of the part of the Transferee to be performed and such default shall continue for a period of four (4) months ("4 Month Default") or more, then the Transferor, at his option, may, by written notice demand that the whole of the Purchase Monies be paid within sixty (60) days, together with interest accumulated to date of payment and all other monies unpaid herewith. If the full amount of the outstanding Purchase Monies and Interest thereon is not repaid within the 60 days, this Agreement shall be null and void and the Transferee shall immediately vacate the Lands and provide the Transferor with vacant possession of the Lands.

- [40] At the meeting, Ms. Stene was presented the Agreement for Sale. Ms. Stene signed the Agreement for Sale. Mr. Monterio witnessed the execution by Ms. Stene of a Form C general release in relation to the Agreement for Sale at the meeting.
- [41] The Agreement for Sale was registered as a right to purchase against title to the property on May 18, 2010.
- [42] At around the same time as the Settlement Agreement, an agreement was reached between Mr. Fleischer and Ms. Low on one side and a company owned by Mr. Cassel, Star 18 Enterprises, under which Mr. Fleischer and Ms. Low agreed to sell the interest in a property development project in Surrey held by a company which they owned called Abby Mews Development Corporation. Mr. Fleischer and Ms. Low under this other agreement reserved to themselves a claim that Abby Mews had against Straiton Development Corp regarding an unpaid portion of the purchase by Straiton Development of the project which was approximately \$600,000.
- [43] In January 2011, Stene Construction and Equipment Ltd. ("Stene Construction") was incorporated, with the plaintiff as its sole officer, director and signing authority. Mr. Monterio's office incorporated the company. This company would be used to perform the physical subdivision work on the Land as well as some work at the Tumbler Ridge Hotel. This finding is discussed later.
- [44] In about 2011 due to a significant decline in mining in the Tumbler Ridge area, revenues from the TRWL dropped dramatically. The significant monthly revenues Mr. Fleischer had received from the hotel fell and the hotel began to default under the mortgages granted to companies of Mr. Cassel and his brother.
- [45] On September 5, 2012 an agreement settling the indebtedness of TRWL to Star 18 Enterprises Inc. and Interworld Electronics & Computer Industries Inc. was completed (the "Main Settlement Agreement"). The latter company was owned by Mr. Cassel's brother and the former was owned by Mr. Cassel. The agreement sets out that TRWL's indebtedness to Star 18 Enterprises Inc. and Interworld Electronics & Computer Industries Inc. was \$3 million and \$1.6 million, respectively.
- [46] The settlement also included another agreement made at the same time between Star 18 Enterprises Inc., Interworld Electronics & Computer Industries Inc., Harry Louis Ari Cassel and Gerald Guido Cassel and TRWL, Gundhart Fleischer, Anne Stene, Stene Construction et al., in which the preamble states that Ms. Stene owns the furniture at the TRWL hotel and holds a lease agreement whereby she rents the furniture for monthly rent of \$4,500 and that Ms. Stene or Stene Construction and Equipment Ltd. (collectively "Stene") agreed that it will not enforce any claim to the Stene Indebtedness unless and until TRWL repays the TRWL indebtedness. It was further agreed that Ms. Stene would continue to receive the monthly furniture rent "for so long as the Mortgages are not in default as set out in the Main Settlement Agreement and all other terms and conditions of the Main Settlement Agreement are not in default". Ms. Stene further warranted that "they have not relied on any

statement made to them by Gundhart Fleischer, Sheila Low, TRWL, Aviator Hotel Dawson Creek Corp. or Michael Riemann or any of them. Ms. Stene further acknowledged that "they have been advised to seek independent legal advice with respect to entering into [the Settlement Agreement]." The agreement was drafted either by Mr. Baltadjian or Mr. Alperstein who would have been acting for Mr. Fleischer and Ms. Stene and related companies, and not Mr. Cassel or related parties.

- [47] As the Maturity Date under the Agreement for Sale neared, the subdivision of the Lands had not been completed. Mr. Baltadjian, acting on behalf of the plaintiff, drafted an extension agreement dated October 30, 2012 whereby the defendant agreed to extend the Maturity Date to June 30, 2013.
- [48] As June 30, 2013 neared, the subdivision work was not nearing completion and another extension was sought by the plaintiff and agreed to by the defendant, extending the Maturity Date to September 30, 2015 (the "Second Extension Agreement"). The agreement is reflected in a contract dated October 8, 2013 which was drafted again by Mr. Baltadjian, acting on behalf of Ms. Stene. This agreement also included a new Purchase Price, terms for the payment of arrears, a reduction in interest rate payable to 5.0625%/year, an offer of a second mortgage loan by the defendant with respect to the plaintiff's purchase of the home in the amount of \$350,000; and the right for Ms. Stene to terminate the Agreement for Sale upon certain terms.
- [49] The plaintiff paid the accrued arrears of \$21,039.53 but did not make the further required monthly payments from October 2013.
- [50] Mr. Cassel sent several emails to the plaintiff in December 2013 and January 2014 regarding the accruing arrears. The plaintiff did not respond to them. She stated that she did not contact Mr. Cassel because she knew payments had not been made and was embarrassed to talk to him.
- [51] The payments required under the Second Extension Agreement from November 1, 2013 to April 15, 2014 was \$48,365.62.
- [52] Ms. Stene it appears then came to the view that because of the failure of the subdivision plans to be submitted for registration, that the Agreement for Sale had been repudiated by the defendant and refused to make any further payments on account of that agreement. I note here that the subdivision completion had been extended to September 30, 2015.
- [53] In 2014, TRWL was running into difficulties making payments under the mortgage held by Star 18 Enterprises Inc. and the furniture lease agreement with Ms. Stene.

- [54] On February 2, 2014, an email from Ms. Stene's email address was sent providing the defendant with written notice demanding that the defendant return the money she had disbursed to the defendant on account of the Agreement for Sale. The message accused Mr. Cassel of extortion. Mr. Cassel stated that the email did not resemble Ms. Stene's style of writing. Ms. Stene testified that she did not write the email and further stated that she did not know who wrote it. I found her assertion here.
- [55] On February 3, 2014, Mr. Cassel, for the defendant served notice of eviction upon the plaintiff should she not pay arrears of four months (October, November, December 2013 and January 2014) on account of the Agreement for Sale and that if the arrears were not paid by April 4, 2014, the Agreement for Sale according to its terms would be null and void.
- [56] On February 25, 2014, Mr. Markus, a lawyer retained by the defendant demanded payment of the aforementioned arrears and advises that if payment was not made by April 4, 2014, the Agreement for Sale would be considered terminated and vacant possession was required forthwith on that date.
- [57] On March 4, 2014, the plaintiff acting in person filed the within action seeking rescission of the Agreement for Sale and "for an order that the parties be restituted to their respective positions as though the Agreement for Sale and all subsequent extensions had never been executed."
- [58] The defendant filed a response and counterclaim on March 13, 2014, pleading that the plaintiff had "irrevocably repudiated" the Agreement for Sale and thus no longer had any right to occupy the Lot and residence thereon.
- [59] On an application filed by the defendant heard by Justice Leask on April 11, 2014, the court made an order that granted a licence to the plaintiff to continue to occupy the Lot until July 31, 2014 on the condition that the plaintiff deliver to the defendant by April 14, 2014 post-dated payments of monthly occupational rent of \$2,200 on April 15, May 15, and June 15, 2014 and \$1,100 on July 15, 2014 for the two week period following. The Reasons of Justice Leask were not provided at trial.
- [60] As mentioned, Mr. Cassel agreed to permit Ms. Stene and Mr. Fleischer to continue to rent beyond July. His evidence was that he had sympathy for the two as they advised him they had no other accommodations. Ms. Stene testified that following the Leask Order of April 2014, she was of the opinion that this action was done and finished. In Autumn 2014, the plaintiff and Mr. Fleischer surrendered vacant possession and re-located to Gibsons, B.C. to a property Mr. Fleischer had purchased.
- [61] In April 2016, Mr. Donohoe commenced an action on behalf of Mr. Fleischer and Ms. Low to obtain monies related to the sale of a land development project held by Abby Mews.
- [62] Later in April 2016, Mr. Fleischer died in Gibsons, B.C.
- [63] In May 2016, Mr. Donohoe came on as counsel for the plaintiff in the within action.

- [64] Ms. Stene has since moved to Surrey, B.C. and resides in an apartment.
- [65] Conditions did not improve for the hotel in Tumbler Ridge and foreclosure on the hotel was initiated and it was sold for \$1 million in December 2016.
- [66] In late August 2016, the defendant completed the work needed to register a subdivision plan for the Lot with the Land Title Office. In August 2017, the defendant listed the property for sale at \$1.690 million, however it did not sell. The defendant continues to hold title to the Land and the residence is rented out.

IV. Discussion

- [67] The theme advanced in the plaintiff's case was of fairness and the protection of a weaker and vulnerable party - namely Ms. Stene.
- [68] The theme advanced by the defence was that the plaintiff was pursuing a number of disjointed claims using extensions or creations of facts all to disguise the simple truth that from October 2013 she could not make the required monthly payments on the house she had agreed to purchase from the defendant.
- [69] A troubling aspect of the plaintiff's case was the attack against the character of the plaintiff's spouse, Mr. Fleischer. The averment in the plaintiff's pleadings is that the plaintiff's husband exercised undue influence over the plaintiff by "wrongly inducing her to lend him or a company controlled by him the sum of \$330,000 in various advances of money or goods secured by 2 promissory notes and other security." The attacks continued in Mr. Donohoe's written closing submissions, excerpts from which are:
- (a) As a result of undue influence over Stene by Fleischer prior to 2010, Stene was wrongly induced to lend to him or to a company controlled by him the total sum of \$575,000 in various advances of money or of good for used by Fleischer as he saw fit in his business activities.
- (b) Having become a dependent on Fleischer, the plaintiff was now vulnerable to his abuse of her as a puppet or pawn in his business dealings, including his dealings with the defendant. G. Fleischer had many creditors and did not wish to own assets in his name. Therefore, he used the plaintiff to act as his pawn in her taking a prospective ownership interest in the property in order to avoid his name and his assets being exposed to seizure by creditors. Cassel knew about his scheme of Fleischer, but there was no evidence that the plaintiff knew about it. This joint scheme of Fleischer and Cassel was immoral and contrary to public policy in its effort to hinder or delay creditors of Fleischer.

- (c) The other important aspect of the abuse by Fleischer of the vulnerability of the plaintiff was his deliberate conduct of keeping the plaintiff completely uninformed about his business dealings with the defendant insofar as they might affect the plaintiff. The attendance of the plaintiff at the meeting at the Watson Goepel law office on May 14, 2010, as arranged by Fleischer, for her to be presented with documents to sign, without any advance notice, was a classic "ambush".
 - (d) Fleischer candidly admitted to the plaintiff after the meeting of May 14 that he did not give her advance notice as he was concerned that she would object to signing the agreement for sale. Such an ambush was unconscionable and clearly an abuse of Fleischer's power of domination over the plaintiff.
 - (e) The plaintiff did not have any knowledge about the previous dealings and negotiations between Fleischer and the defendant in which there was, in effect, a scheme or conspiracy between the two of them that the debt of Fleischer should be off-loaded to the plaintiff, apparently to simply protect Fleischer from any claim of his creditors. This scheme and the Agreement for Sale arising out [of] it was contrary to public policy in respect of schemes by a debtor to hinder or defeat creditors and thus was illegal under common law. The plaintiff was an uninformed dupe in this scheme.
- [70] In his oral submissions Mr. Donohoe referred to Mr. Fleischer as a "confidence man". This serious accusation that Mr. Fleischer was a fraudster who engaged in fraud even against his spouse was concerning as Mr. Donohoe had been acting for Mr. Fleischer in the Abby Mews litigation up to his death and continued as counsel for Mr. Fleischer's estate in that litigation. By the time the matter was about to go to trial the estate was being administered by Ms. Stene. The trial of that case was running before Justice Armstrong concurrently with this action and is yet to conclude.
- [71] I queried Mr. Donohoe about his assertions against his former client, who was no longer his client only because of his death. Mr. Donohoe advised he would seek advice from the Law Society.
- [72] He returned to advise that he would withdraw the pejorative remarks but maintained that Mr. Fleischer was a promoter and did not communicate with Ms. Stene. It was admitted by Mr. Donohoe that Mr. Fleischer had in the past successful development projects which generated real cash flow. The evidence at trial, which I accept, is that Mr. Fleischer was a good builder, had successful projects, but was not as good at managing finances.
- [73] While Mr. Fleischer encountered financial difficulties, I do not take Mr. Fleischer to be a fraudster as asserted by the plaintiff or her counsel. While he could not obtain financing from conventional sources, he is not the first. The line of business he was in was a risky one and financial failure is not uncommon. It is apparent he became over-extended in the later stages of the joint venture. It is also clear he had some successful projects, TRWL being an example, from which he earned large amounts for a good period. He also ran a cabinet business with Ms. Stene, which the evidence indicates was a real business where Mr. Cassel's

son was employed for a time. I do not accept the submissions suggesting wrongful or abusive conduct on the part of Mr. Fleischer against Ms. Stene. I do not see how Mr. Donohoe having acted for Mr. Fleischer and now his estate in the mentioned litigation can be accepted to properly make the disparaging assertions of his former client (now withdrawn) in the circumstances of this case. I will disregard these submissions.

- [74] Further, I do not find the evidence of Ms. Stene sufficient to support the negative submissions of Mr. Donohoe regarding Mr. Fleischer's abuse or withholding information in relation to the plaintiff. I discuss Ms. Stene's overall credibility and reliability later.
- [75] Mr. Alperstein was called by the plaintiff and was granted dispensation to testify about solicitor/client matters.
- [76] Mr. Alperstein, according to Mr. Cassel, was involved in negotiating the terms of the various documents arising from the April 2010 settlement yet no attempt was made to canvas the topic of conspiracy or ambush, to prejudice of Ms. Stene or the unconscionability of the agreements.
- [77] Even though abuse occurs in many ways and is often hidden, I did not hear of specific examples of such abuse over the course of the relationship between Ms. Stene and Mr. Fleischer, except for the threats in relation to the joint venture that Mr. Fleischer would throw her out of the house or would never recover the monies she had loaned him if she did not sign the documents which I question. There was nothing about their ongoing relationship where she was abused, deprived and treated as a pawn. There was no evidence of a demand for information or others who may have been aware of Ms. Stene being used by Mr. Fleischer. It is not as though Mr. Fleischer lived a separate life or better life at the expense of Ms. Stene. It appears that Ms. Stene and Mr. Fleischer lived together for many years as a couple in pretty much the same circumstances. They worked together and socialized as a couple. Obviously during the later stages of the joint venture things financially got bad there was no doubt that tensions arose. However, I note that when they could no longer reside in the Coquitlam house, they moved to Gibsons, B.C. in 2014 and lived together. When Mr. Fleischer became ill Ms. Stene cared for him until his death in April 2016. My view is that Ms. Stene understood the difficult circumstances Mr. Fleischer encountered and the need for the various transactions discussed in this proceeding. She understood in my view the risk of losing the house from the outset; I also do not accept that she was driven to sign the Agreement for Sale or extensions on Mr. Fleischer's threat that he would throw her out if she did not sign. My view, based on all of the circumstances is that she understood the Agreement for Sale was to preserve a chance to maintain an interest in the joint venture. I also do not find the evidence establishes a conspiracy as asserted by the plaintiff on the part of Mr. Fleischer and Mr. Cassel to prejudice Ms. Stene in the subject transactions. I say this, particularly given her significant experience as a long time commercial loans officer and her involvement in various transactions relating to the joint venture before and after the Agreement for Sale. Often when things do not go well history takes on a much different complexion than what actually occurred. The lack of knowledge

she testified to regarding Mr. Fleischer's business and financial affairs is not accepted. I discuss my reservations regarding Ms. Stene's overall reliability below in this regard.

A. Ms. Stene

- [78] Ms. Stene is presently 80 years old. She testified that she met Mr. Fleischer in about 1999 at a dance hall. It appears that in around 2002 they entered into a common law relationship. She would have been about 62 years old.
- [79] Ms. Stene has a Grade 12 education. She was previously married and has two adult children from the marriage. She has extensive experience in banking. She was employed with several banks Canadian Imperial Bank of Commerce, Bank of Montreal, and most lately the Royal Bank of Canada where she was employed by the Royal Bank for 25 years. For many of those years she was a commercial loans manager with a large portfolio of significant value and dealt frequently with construction matters. It is clear that she had significant responsibility and experience in business lending. She testified as being familiar with loan agreements and contracts and had general business knowledge in lending money. After retiring from the bank she took accounting courses and worked for a company in a financial. More latterly, she worked as a sale manager for a cabinet manufacturing business started by Mr. Fleischer called Shanghai Trading and was the sole officer, director and banking signatory of Stene Construction.
- [80] At the time she met Mr. Fleischer she owned two residential properties which she had bought in 1988 which generated rental income. At some point, Mr. Fleischer asked her to sell the properties and provided the proceeds from the sale of her properties to him. The total amount advanced to Mr. Fleischer was \$450,000. The amounts were given as a loan to him. This is evidenced by a promissory note dated September 27, 2002 in which \$225,000 and \$20,000 are the amounts stated as owed by Mr. Fleischer to Ms. Stene; and a letter of understanding dated November 10, 2006, where a further loan of \$225,000 is evidenced as owing to Ms. Stene by Mr. Fleischer.
- [81] Ms. Stene testified that she also advanced \$85,000 out of her Registered Retirement Savings Plan to Mr. Fleischer; as well as two amounts of \$20,000.
- [82] Unfortunately, Ms. Stene was not a strong witness.
- [83] The concern which caught my attention was her poor recall, difficulty in understanding and answering questions posed to her by her counsel as well as when under cross examination. This concern grew during the course of her testimony. She appeared often confused. During the periods between her answers and the next question she muttered and spoke to herself while shaking her head and waving her hands and at times crying. I also observed her doing the same while sitting in the gallery of the courtroom including speaking out quite audibly to no one in particular. At one point, during her examination the court had to stand down because of her significant upset at the difficulty she was having with the questioning, by defence which questioning was conducted fairly and properly.

- [84] Equally concerning were the moments in her cross examination where it was apparent that she heard and understood the question but deflected by providing an answer to a different question. She was taken to the transcript of her examination for discovery and read questions and her answers and asked if her answers were true. She initially stated "I have no idea." There were other instances when she was referred to her examination for discovery testimony and asked if she gave the answers in it. There were long pauses. She seemed to resist answering and gave an answer which was not responsive and then answered the specific question. She had an awareness of the implications of the questions asked and resisted answering them because of the prejudice they posed to her case.
- [85] There were also inconsistencies that were illuminated during her examination. She testified in direct examination that she was never told of the order of Justice Leask. Then under cross-examination she stated at one point that she did know of the order. Then again stated that she did not. It was apparent she was confused, yet it is clear that she had knowledge of the order because of the series of cheques she wrote that were required under the order and on which she wrote in her handwriting in the memo section "Court Order occupation rent." There is no doubt that Ms. Stene knew of the Leask order shortly after it was issued.
- [86] Another example was her conflicting testimony of whether Mr. Baltadjian was her lawyer or not. She indicates in her discovery evidence that he was but at trial said he was not. However, she agreed in cross examination that she wrote personal cheques on her own account to Mr. Baltadjian for legal services. She agreed that she did not produce the cheques in this litigation. The evidence, particularly the agreements drafted by Mr. Baltadjian for Ms. Stene, simply does not support her assertion that Mr. Baltadjian was not her lawyer. It is significant that Mr. Baltadjian was called as a witness by Mr. Donohoe in the Abby Mews trial (which was running in parallel with the trial before me) but not in the trial before me. Though there was mention that Mr. Baltadjian had been in an accident, alternate means to obtain his evidence appears not to have been considered.
- [87] Another example is her affidavit of April 7, 2014 in which she deposed that her house on 1935 Brunette was her "dream home", in cross examination she denied that she had ever described it as such. However, when taken to her affidavit stating this, she stated that she never had a chance to read the affidavit. She testified that she swore the affidavit without having read the document. I found this to be a disturbing admission and diminished her reliability overall.
- [88] Another example comes from the same affidavit where she deposed that she was "not a business person, nor have ever been and had very limited personal business experience". This is untrue and entirely inconsistent with the fact that she was for much of her career in the banking industry and more particularly a commercial loans officer for years; she acknowledged that she was familiar with loan agreements and contracts; she agreed she had general business knowledge in the area of lending money; she had taken accounting courses; worked in payroll; and was the sales manager of the cabinet business she ran with Mr. Fleischer. The assertion of being naive about business matters, including the financing

arrangements around the Joint Venture Agreement and particularly the terms of the Agreement for Sale and extension agreements, simply does not hold up. In fact, she admitted that she understood completely the key provisions of the Agreement for Sale upon reading it; including that because of her experience as a commercial loans officer that when she did the calculations she knew that no principal was being paid out of the \$6,200 (\$500 of which was for property taxes and insurance) monthly payments. Again, her reliability was brought into question.

- [89] Another inconsistency is where Ms. Stene deposes in the same affidavit that "[a]lthough I have a relationship with Mr. Fleischer, I do not consider him to be my common-law husband nor do I cohabit with him in a conjugal relationship." However, at trial she stated that her relationship with Mr. Fleischer was marriage-like. This was further supported by the testimony of Mr. Cassel who stated that Ms. Stene and Mr. Fleischer socialized as a couple for a period of time with he and his wife, and were taken on a cruise as guests of the Cassels. Again, her reliability was diminished.
- [90] There were also emails in her name which she disavowed having sent; yet she testified that Mr. Fleischer did not have access to her computer and she specified no one else who might have sent the email. She at one point then stated that she had seen Mr. Baltadjian sitting at her computer desk but did not know what he had been doing. I did not find her testimony regarding the lack of knowledge of emails sent under her name credible.
- [91] There are several emails sent to Ms. Stene in December 2013, in which Mr. Cassel advises of arrears and inquires about the non-payment. Ms. Stene agreed she received the first email but stated she did not receive the subsequent four. She at one point stated that she did not respond to them because she was told "not to", which is different from not having received them. She appeared confused at points in her testimony on this topic. My view here is that she received the emails and knew of their contents.
- [92] There is also the absence of documentation from Ms. Stene to support her assertions that she was the source of funds paid under the various agreements. The furniture lease with TRWL held by Ms. Stene is an example.
- [93] The furniture lease agreement only appears in the documents in 2012, many years after the lodge came in to operation. In my view, the furniture lease was an expedient devised for the purposes of the Settlement Agreement and Agreement for Sale.
- [94] I also found the general tenor of her evidence that she was kept in the dark and uninformed about the state of the joint venture unconvincing. The materials indicate that Mr. Stene was in the loop of various transactions and financial information regarding it - her handwriting on some of the documents indicate she prepared and/or reviewed such documents. She also testified to preparing documents related to the work, she also attended to paying invoices. She made mention of an accountant "Boris" who did work for Mr. Fleischer and her. She also stated that "Boris" had refused to be a witness in her case. She was the sole officer, director and signing officer of Stene Construction and was involved, based the available

documentation, at least in managing the financial aspects of the work done by Stene Construction.

- [95] I also noted her conflicting testimony regarding her claim for improvements made to the property in excess of \$25,000. It is hard to reconcile her testimony of having no savings or property at one point in her testimony which covers the period of the improvements and then later testifying to having personally paid for the improvements. She produced little convincing evidence of the sources of monies she says she personally paid. When pressed on the suggestion that it was Mr. Fleischer who in fact was the source of the funds, she conceded that she actually could not recall the source of the funds used. This provided little support for her claim here. It is also apparent that Ms. Stene has not provided full disclosure of her finances. This is another problem which diminished her claims.
- [96] I also note her evidence that the Notice of Civil Claim that initiated this action, filed March 4, 2014 that she knew that she was the person in breach of the agreements and when asked at trial, could not specify a wrong by the defendants; yet she signed the Notice of Civil Claim. She also stated that she was not aware of counterclaim against her in the trial and that she only understood this when asked about it on the stand. The circumstances simply do not support her lack of knowledge.
- [97] I also note that Ms. Stene did not start an action against Mr. Fleischer for the wrongs she asserted to at trial nor has she sought to sue the estate of Mr. Fleischer.
- [98] I also note that she never made a complaint to the Law Society nor started an action against Mr. Alperstein, Mr. Monterio or Mr. Baltadjian.
- [99] I do not find it enjoyable recounting the challenges with Ms. Stene's evidence and I have taken into account that she is elderly and that court appearances are stressful; however, noting deficiencies in her testimony is necessary given that her evidence is key to her claims. The fluidity and deficiencies in her testimony are significant and cannot be ignored in addressing the issues raised in this case. Unfortunately, I can place little weight on her evidence.

B. Mr. Cassel

- [100] Mr. Cassel is a professional engineer and a businessperson. His primary line of business was manufacturing and distributing specialized electronic components and equipment. He is now retired from his business. He was and is the directing mind of the WCV. He is in the same age range as Ms. Stene. Mr. Cassel was alert, responsive, and had a good recall of events. Though there were some points of weakness in his evidence including his lack of recall if Ms. Stene was at the May 14, 2010 meeting as indicated in his discovery evidence (though at trial he recalled she was present which is supported by other witnesses) and that he thought at one point Mr. Alperstein represented Ms. Stene, I had more confidence in his testimony than Ms. Stene.

- [101] Where the two conflict in accounts on the key points in dispute in the absence of clear objective evidence to the contrary, I prefer that of Mr. Cassel.
- [102] I also am of the view that Ms. Stene's assertions of wrongful conduct on the part of Mr. Cassel, such as accusing Mr. Cassel of extortion in an email under her name are unjustified. The evidence supports my conclusion that Mr. Cassel was reasonable in his dealings, such as agreeing to the extension agreements where he relaxed some conditions, providing assistance to Ms. Stene and Mr. Fleischer in finding funding, allowing Ms. Stene and Mr. Fleischer to continue to rent and remain in the residence beyond the move out date; and putting up with the lack of response to his various communications to Ms. Stene and Mr. Fleischer.
- [103] I accept his account of what occurred during the closing meeting for the Settlement Agreement on May 14, 2010; namely, that:
- (a) the closing was conducted in a conference room at the offices of Watson Goepel Maledy on May 14, 2010;
 - (b) that Mr. Alperstein and Mr. Monterio were present representing Mr. Fleischer and Ms. Stene, respectively;
 - (c) that Mr. Cassel was there without the benefit of legal representation;
 - (d) that Mr. Alperstein went over the terms and conditions of the agreements to be signed and that Mr. Fleischer, Ms. Stene, and Mr. Cassel were present when this occurred;
 - (e) that Mr. Cassel did not urge or press Ms. Stene to sign the documents;
 - (f) that Mr. Cassel did not leave the conference room to obtain documents and placed them in front of her; and
 - (g) that there was never a time when Mr. Cassel was alone with Ms. Stene on that occasion.
- [104] Further, I accept his evidence in respect to the division of responsibilities in the joint venture: that Mr. Fleischer and Stene Construction were responsible for the development, construction and land-related work to obtaining subdivision of the property; and that Mr. Cassel or his company was responsible for providing funding when needed. This division is consistent with the contribution of complementary skills of the parties language stated in the Joint Venture Agreement. As mentioned, Mr. Fleischer's expertise was in development and construction. This is further supported by the documents showing the activity of Mr. Fleischer and Stene Construction which includes reimbursement by the defendant of expenses incurred by Mr. Fleischer, Ms. Stene and/or Stene Construction over several years, as well as an email dated March 5, 2013, in which Mr. Baltadjian wrote to the electrical engineer on the project stating that he worked for "the general contractor [Stene Construction] that will be completing the work to be done at 1935 Brunette Avenue." I recognize that the Joint Venture Agreement states that both parties share the duties however, my finding here is in respect the actual division of duties between Mr. Fleischer

and Mr. Cassel.

[105] I also find that Mr. Cassel was not interested in owing the house. In addition to his testimony to this effect, the favourable terms he agreed to in the Second Extension support this.

[106] I also find that the source of the payments under the Agreement for Sale was not from Ms. Stene's own funds (other than the rent received from tenants in the House) but from Mr. Fleischer or TRWL. As mentioned, the furniture lease payments to Ms. Stene was in my view a device to deal with a financial settlement between Mr. Cassel's companies and Mr. Fleischer. The settlement agreement in 2010 makes no reference to the furniture lease agreement with Ms. Stene, it is only first referenced in Main Settlement Agreement dated September 5, 2012 whereas the TRWL had been in operation for years prior. There is no original purchase evidence of Ms. Stene having purchased the furniture for TRWL nor a lease agreement. The documentary record is insufficient to establish that the source of funds was reflective of monies paid by Ms. Stene. This is to be contrasted with the promissory note and letter of understanding the plaintiff obtained from Mr. Fleischer regarding monies she advanced to him. I am of the view that the Agreement for Sale was a device to protect against creditors of Mr. Fleischer.

[107] I turn now to the specific issues raised.

C. Did the defendant breach the Agreement for Sale and did the defendant repudiate the Agreement for Sale?

[108] The plaintiff asserts that the defendant breached its obligations under the terms of the Agreement for Sale or repudiated the agreement by its conduct, which the plaintiff avers was the delay in starting and/or completing the subdivision so that the Land could be created and it could offer good title to the Land; and/or, its continuing to charge the plaintiff an excessive interest expense for extension caused by delays in the subdivision process, which delays the defendant would not reasonably act to remedy.

[109] Underlying the plaintiff's argument is the reliance on good faith in contractual performance as a general organising principle of contract law and the sub-category of the duty to act honestly in the performance of contractual obligations, not capriciously and arbitrarily. This accords with the reasonable expectations of commercial parties. In this regard, the plaintiff submits that the defendant falsely mis-stated to Ms. Stene that Mr. Fleischer had not paid the municipal DCC's, when in fact he had done so in 2009. By refusing to move the subdivision application forward with best efforts in a payment of the DCC's to the City, the defendant acted in breach of its Agreement for Sale with Ms. Stene, assuming that such obligations existed and these agreements were not void from the start.

[110] It is submitted that this breach of contract came at a critical stage for Ms. Stene and Mr. Fleischer, because their only faint hope of completing on the Agreement for Sale was to finalize and register the subdivision, so that Ms. Stene could potentially obtain a first

mortgage from a lender to close on the transaction. It is argued that Mr. Cassel blocked the final step to obtain a land survey and register the subdivision plan, the defendant ensured that there was not even a faint hope that Ms. Stene and Mr. Fleischer could pay the purchase price. In 2013-2014, TRWL hotel was then in an irretrievable financial collapse with the closure of the coal mines around Tumbler Ridge.

- [111] In my view, the plaintiff has not made out these claims.
- [112] My view of the evidence is that the defendant neither breached nor repudiated the Agreement for Sale or extensions agreements; rather it was the plaintiff who did not adhere to the terms of said agreements and then commenced an action seeking rescission and return of monies paid as a defensive tactic to against the defendant. The defendant had to then respond.
- [113] I am not persuaded by the arguments of the plaintiff that there had been a breach of contract or a failure of good faith by the defendant through the delay in obtaining the subdivision approval for the Lot. He was not responsible for a delay. Mr. Cassel's conduct was reasonable and fair throughout.
- [114] I have also found the agreement not to be unconscionable which is discussed later in these Reasons.
- [115] As per my finding that the subdivision work was the responsibility of Mr. Fleischer and after incorporation Stene Construction, the delay in obtaining subdivision approval was through the actions or inaction of Mr. Fleischer and Stene Construction or others and not the defendant. The need for the extensions to the maturity date are a reflection of Mr. Fleischer's and Stene Construction's failings. Ms. Stene was the sole officer, director and bank signing authority for payments by Stene Construction. She agreed in her cross examination that she knew that Stene Construction was doing the subdivision work and stated that she "pushed Gunny to get the subdivision done." It is apparent though the documents that she "had knowledge" of the work or lack of subdivision work which gave her a clear view of what was and was not moving the project ahead. This is apparent through the various communications that are in the materials provided at trial, including the need for the extension agreements sought by the plaintiff. The maturity dates in the Joint Venture Agreement and Settlement Agreement and Agreement for Sale reflected the dates that subdivision work was expected to be completed. Extending the Maturity Date twice were at the instigation of the plaintiff. The extension agreements were drafted by Mr. Baltadjian acting on behalf of Ms. Stene. There is no support for the notion that the need for the extensions, in other words that a delay in obtaining subdivision, was caused by the defendant. The assertions of delay against the defendant are not sustainable.

[116] I also rely upon the testimony of Ms. Stene that clearly establishes that it was not the delay in the subdivision; rather it was her and Mr. Fleischer's lack of funds which caused the defendant to consider the Agreement for Sale at an end. The discovery evidence of Ms. Stene relied upon by the defendant is clear in this regard. Ms. Stene admitted this in her examination for discovery and affirmed her answers at trial. The questions and answers from her discovery were:

963 Q And that's because you knew on March 4th of 2014, that it was you who was in default of the agreement: correct?

A That's correct.

* * *

967 Q But you knew when you filed this that you were the party that was in breach for not making payments; correct?

A Yes.

968 Q And yet you also knew when you filed this that you were asserting that it was Mr. Cassel who was in breach; correct?

A I was just worried about not being on the street.

* * *

977 Q What did you think as of March 4th of 2014 that White Castle or Mr. Cassel himself was supposed to do that they had failed to do?

A I have no idea.

* * *

980 Q So at the beginning of March of 2014, no payments had been made by you under the agreement since October: correct? Of 2013?

A Correct.

981 Q And so you were six months in arrears; correct?

A Correct.

982 Q So you hadn't paid for six months?

A Correct.

983 Q And the reason why you hadn't paid for six months was because you didn't have the money; correct?

A Correct.

984 Q I'll ask that again: the reason why you hadn't paid for six months is because you didn't have the money to make the payments; correct?

A That's right.

[117] The record is clear that Mr. Cassel was ready to move forward with final payment for the subdivision approval yet Mr. Fleischer would not contribute his one-third share. It is now clear that Mr. Fleischer did not have the monies to pay. This explains the lack of response to Mr. Cassel's emails to Ms. Stene regarding outstanding monthly payments. The only response appears to be a letter which asserts extortion and other problems with the defendant that are unfounded, a concoction to deflect the issue.

[118] While there is some evidence that the DCCs may have been contributed by Mr. Fleischer, but as the defendant argues, this was never asserted by Mr. Fleischer over the period the parties disputed issues around the project; nor was it an issue raised by Mr. Baltadjian over the period he was involved in the project and working for Mr. Fleischer, Stene Construction and Ms. Stene. The evidence is simply not sufficient to elevate the issues around DCC contributions to a breach of contract by the defendant, including whether there was a breach of the duty of honest performance.

D. Was the Agreement for Sale a "consumer transaction" under the BPCPA and was it "unconscionable"?

[119] The plaintiff also seeks relief on the basis that the Agreement for Sale and extension agreements were unconscionable.

[120] The first question to address is whether the Agreement for Sale was a "consumer transaction" under the BPCPA It is defined as follows:

"consumer transaction" means

- (a) a supply of goods or services or real property by a supplier to a consumer for purposes that are primarily personal, family or household, or
- (b) a solicitation, offer, advertisement or promotion by a supplier with respect to a transaction referred to in paragraph (a),

and, except in Parts 4 and 5, includes a solicitation of a consumer by a supplier for a contribution of money or other property by the consumer.

[121] Section 8 of the BPCPA states:

Unconscionable acts or practices

8 (1) An unconscionable act or practice by a supplier may occur before, during or after the consumer transaction.

- (2) In determining whether an act or practice is unconscionable, a court must consider all of the surrounding circumstances of which the supplier knew or ought to have known.
- (3) Without limiting subsection (2), the circumstances that the court must consider include the following:
 - (a) that the supplier subjected the consumer or guarantor to undue pressure to enter into the consumer transaction;
 - (b) that the supplier took advantage of the consumer or guarantor's inability or incapacity to reasonably protect his or her own interest because of the consumer or guarantor's physical or mental infirmity, ignorance, illiteracy, age or inability to understand the character, nature or language of the consumer transaction, or any other matter related to the transaction;
 - (c) that, at the time the consumer transaction was entered into, the total price grossly exceeded the total price at which similar subjects of similar consumer transactions were readily obtainable by similar consumers;
 - (d) that, at the time the consumer transaction was entered into, there was no reasonable probability of full payment of the total price by the consumer;
 - (e) that the terms or conditions on, or subject to, which the consumer entered into the consumer transaction were so harsh or adverse to the consumer as to be inequitable;
 - (f) a prescribed circumstance.

[122] My assessment of the circumstances is that the transaction here is not "primarily" a consumer transaction. The entire context here has to do with a real estate property development project, where the sale of a portion of the land for the construction of a home was just a part of a larger commercial transaction; namely, the development of the Land. Mr. Fleischer was a developer and he sought the involvement of Mr. Cassel in the project, which resulted in the Joint Venture Agreement.

[123] In this regard, the Agreement for Sale arises out the Settlement Agreement and the specific terms and conditions are attached as a schedule to the Settlement Agreement. The interest in the Lot was originally to be held by Mr. Fleischer. Only if he were to die was Ms. Stene or his designate under the Joint Venture Agreement to be transferred the Lot. The sale of the Lot was part of the Joint Venture Agreement, which was clearly a commercial transaction and not a consumer transaction. In closing submissions, counsel for the plaintiff relied upon the belief of Mr. Cassel that Mr. Fleischer arranged for the sale of the Lot to Ms. Stene to keep it safe from claims from Mr. Fleischer's creditors which supports the view that the transaction was in essence a commercial as opposed to a consumer transaction. This in my view is an accurate assessment. The Agreement for Sale was in essence an assignment by Mr. Fleischer to Ms. Stene. Mr. Fleischer was to continue to provide the funding for the purchase of the Lot.

[124] Further, given my findings regarding the reliability of Ms. Stene, I am not persuaded that she did not know of the reason for the Agreement for Sale, the purpose of the meeting on May 4, 2010 and her role in the dealings at the meeting. I also find that she had the access to independent legal advice at the meeting through the presence of a lawyer Mr. Monterio who was present there for that purpose.

E. Was the Agreement for Sale Unconscionable?

[125] In any event, having considered the factors enumerated under s. 8 of the BPCPA as well as the entirety of the circumstances, I do not find "unconscionably" in the transaction. Following the trial, the Supreme Court of Canada issued its decision in *Uber Technologies Inc. v. Heller*, 2020 SCC 16. The case dealt with unconscionability of contract. The parties provided further written submissions.

[126] The plaintiff noted the court's comments regarding the doctrine of unconscionability as the protection of vulnerable persons in transactions with others; and that unconscionability had two elements: an inequality of bargaining power, stemming from some weakness or vulnerability affecting the claims and an improvident transaction.

[127] The plaintiff utilizing the commentary in *Uber* reinforced her original submissions based on the evidence. The defendant similarly argued that the principles supported his defence that the doctrine of unconscionability did not support the plaintiff.

[128] In my view, the principles expressed in *Uber* do not alter the approach and principles applicable to the issues before me.

[129] I do not find that there was an inequality of bargaining power; nor do I find the transaction to be improvident.

[130] Specifically, I do not find that Mr. Cassel subjected Ms. Stene to undue pressure to enter into the agreement. I accept Mr. Cassel's testimony that he did not press Ms. Stene. I accept his evidence that there was no advantage to him whether Ms. Stene had the right to purchase. I do not accept Ms. Stene's testimony that Mr. Cassel pressed her and said "quick, quick, sign". I find this most unlikely given that there were two lawyers at the meeting, one for Mr. Fleischer, namely Mr. Alperstein, who drafted the agreements and related documents; and one for Ms. Stene, namely, Mr. Monterio. I discuss Mr. Monterio's presence further below. It is not credible that Mr. Cassel in those circumstances had power over Ms. Stene and could verbally compel her to agree to and sign the agreement. Neither lawyer called by the plaintiff provided any evidence to support Ms. Stene's contention.

[131] I do not find that Mr. Cassel took advantage of Ms. Stene's inability or incapacity to reasonably protect her own interest because of physical or mental infirmity, ignorance, literacy, age or inability to understand the character, nature or language of the transaction. She did not have any of these deficiencies. In this regard, Ms. Stene was fully able and capable to protect her own interest. There is no evidence that she was physically or mentally infirm, ignorant, illiterate, at the time of the transaction. It is quite the opposite.

She was a mature adult, and admitted that she understood the nature of the transactions the specific terms and implications she had entered into. She had significant experience in banking over decades and for a good part of it as a commercial loans manager handling contracts in a large portfolio both in terms of amount and numbers, frequently on construction matters. While I do not accept that she only learned of what she signed after signing the agreement, her evidence is that she completely understood what she had signed when she returned home from the closing about one hour later. She expressly stated that she had no confusion over the credit terms. Her testimony from her examination for discovery shows she had specific understanding of the key terms of the agreement under the Agreement for Sale. My view is that she understood the nature of the transaction she would be entering into in advance of the meeting in May 2010. I also do not find that Ms. Stene was cowed by Mr. Fleischer, her evidence alone is insufficient. I also note her evidence of having been furious at Mr. Fleischer and the argument that ensued between them regarding the Agreement for Sale does not support her subservience. Further, I note that she attended to the monthly payments under the agreement and never complained to Mr. Alperstein, Mr. Monterio or Mr. Cassel. It is also notable that she did not complain to Mr. Baltadjian; rather, he drafted extension agreements for her. All of this dispels the argument that she had deficits which precluded her from understanding the character, nature or language of the transaction she had entered into or any other related matter and could be taken advantage of as a result.

[132] Further, I do not find that at the time the transaction was entered into, the total price grossly exceeded the total price at which similar subjects of similar consumer transactions were readily obtainable by similar consumers. The plaintiff relied on an appraisal conducted by Mr. Rapiner, who prepared a report for the Canadian Western Bank regarding the Lot, that concluded that the market value of the Lot to be \$950,000 as at October 16, 2009. Comparing that value with the price under the Agreement for Sale of \$1.1 million in May 2010, the 15.8% difference is not grossly excessive, when considered in the context of Mr. Rapiner's opinion that the market prices did not increase appreciably between October 2009 and May 2010. In addition to Mr. Rapiner not including the rental income in his conclusion, the actual expenditures made in constructing and finishing the house, the quality difference in this house from a "spec" house, the difference between actual living space and the drawings, and the difference in rent assumed and actual rent for the two basement suites; these tend to reduce the aforementioned difference between the market value opinion and the price in the Agreement for Sale.

[133] I also do not find that at the time the transaction was entered into, there was no reasonable probability of full payment of the total price by the consumer. Mr. Fleischer had made payments in the past, TRWL had provided substantial distributions to Mr. Fleischer in the past. It was suggested to Ms. Stene that Mr. Fleischer's income has exceeded \$30,000 per month. Ms. Stene did not disagree. She stated she knew he was doing very well. TRWL had the potential to generate revenues, and the subdivision if approved would allow for funding. I also note that Ms. Stene's claim for return of payment made under the

Agreement for Sale of \$259,439 belie her assertion.

[134] I also note here that the plaintiff led no evidence as to the interest rates in the subject agreements to be excessive; and that Mr. Alperstein's testimony supports the view that the borrowing rates were not out of line with those prevailing at the time.

[135] I do not find that the terms or conditions on, or subject to, were so harsh or adverse as to be inequitable. I do not find inequality of bargaining power; nor that the impugned transactions were improvident.

F. Was the Agreement for sale not binding based on the lack of independent legal advice or on grounds of unconscionability under the common law or being an improvident agreement based on unequal bargaining power?

[136] I am not persuaded by the argument that the Agreement is not binding on the basis of the lack of independent legal advice or advances the plaintiff's unconscionability argument.

[137] The plaintiff argues that Mr. Cassel for the defendant had an obligation to ensure the plaintiff obtained independent legal advice.

[138] I will note here that Mr. Cassel in his dealings did not have a lawyer representing his interests in the Joint Venture Agreement or extensions agreements.

[139] A critical factual matter here is resolving whether Ms. Stene had legal representation. My finding is that she had such representation present and available to her. There is some evidence that Mr. Monterio provided advice to her; which I discuss below. In any event, my view is that Ms. Stene knew Mr. Monterio was there for her benefit and to the extent she did not, receive his advice, it was done so consciously on her part.

[140] In this regard, Mr. Alperstein testified that he requested the attendance of Mr. Monterio, a lawyer who formerly had been a member of his firm, to provide Ms. Stene legal advice as required. He also advised Ms. Stene in advance that she would require independent legal advice as he could not represent her. Mr. Alperstein agreed in cross examination that Mr. Monterio was at the closing meeting on May 14, 2010, Mr. Alperstein was taken to his time record which supports the evidence that he arranged for a lawyer for Ms. Stene. Mr. Alperstein also testified that he had requested Mr. Monterio on other occasions in the past to provide independent legal advice related other clients. It is also apparent that Mr. Monterio, subsequent to this attendance provided further legal services to Ms. Stene by incorporating Stene Construction and Equipment Ltd. ("Stene Ltd.") which after its creation was the vehicle used to develop the property. The materials indicate that there were subsequent communications between Ms. Stene and Mr. Monterio.

[141] Mr. Monterio had little recall of the meeting at Watson Goepel on May 14, 2010. He could not recall attending the meeting or reviewing documents at the meeting. He could not recall any request made of him to attend or being informed about what he was expected to do. He could not recall the face of Ms. Stene. He did admit however, as a result of a Form C

release on which that he took Ms. Stene's signature and applied his notary stamp on May 14, 2010 that she was a client on that date but the stamp indicated to him that he was acting as a notary and not as a lawyer. He could not recall if he had given any legal advice to Ms. Stene. He agreed that he sent a solicitor's bill for services provided at the meeting. The account states that he reviewed documents and attended to explain documents to Ms. Stene in relation to the notarization of land documents. He agreed under cross examination that he had no reason nor facts to challenge Mr. Alperstein's testimony that he had arranged for Mr. Monterio to attend the meeting to provide legal advice to Ms. Stene. I note here that Mr. Alperstein was called as a witness by the plaintiff. Mr. Cassel also testified that Mr. Monterio attended the meeting on May 14, 2010, he did so based on notes that he made on his computer. Mr. Monterio agreed he had no basis to challenge Mr. Cassel's evidence and then stated that he believed he was at the meeting for a few minutes.

- [142] My findings are that Mr. Alperstein requested Mr. Monterio to attend the May 14, 2010 meeting to provide independent legal advice/representation for Ms. Stene, that Mr. Monterio's was present at the meeting for that purpose. I find that Mr. Monterio attended to provide independent legal advice to Ms. Stene regarding the documents at the meeting. The standard stamp indicating "No legal advice sought or given" in respect to Ms. Stene executing a Form C in relation to the Agreement for Sale is not consistent with the service described in his bill for service. In any event, it does not establish that she did not have access to legal representation. In fact, such advice was there to be accessed. I note that the relationship with Mr. Monterio continued on as there is evidence in the emails and with Ms. Stene's handwriting on a message, indicating conversations between Ms. Stene and Mr. Monterio in January 2011. He was not a stranger to her as she claimed at trial.
- [143] Having determined that Ms. Stene had legal representation in respect to the May 14, 2010 transaction, I do not need to determine the cases handed up by the plaintiff in regard to the need for legal representation.
- [144] I add however, that unlike the cases handed up by the plaintiff, Ms. Stene in my view was not vulnerable and naïve. As I have found she was knowledgeable and experienced in lending and business matters. There was no inequality of bargaining power. Even though she stated she did not read the Agreement for Sale until after she signed the document, there is no doubt that she understood the key terms and their implications upon reading them. The circumstances here are distinguishable from the cases handed up by the plaintiff on this point.

G. Should there be relief from forfeiture?

- [145] Section 24 of the Law and Equity Act, R.S.B.C., c. 253 confers broad discretion to the court to relieve a party from forfeitures. It reads as follows:

24. The court may relieve against all penalties and forfeitures, and in granting the relief may impose any terms as to costs, expenses, damages, compensations and all other matters that the court thinks fit.

[146] The provision reflects an equitable and purely discretionary remedy found at common law.

[147] In *B.C. Development Corporation v. NAB Holdings Ltd.*, (1986), 6 B.C.L.R. (2d) 145 (C.A.), Lambert J.A. summarized relief from forfeiture at p. 157 as follows:

So, in summary, relief against forfeiture may be granted under s. 21 of the Law and Equity Act, which, as I have said merely restates the equitable principles in statutory form. The circumstances under which relief should be granted are where, first, the sum forfeited is out of all proportion to the loss suffered and, second, it is unconscionable to retain the money, in the tradition equitable sense of unconscionability.

[148] Relief is provided where monies paid are not deposits but are partial payments. Further, even when an agreement has been repudiated, relief has been permitted in equity to the defaulting party. See: *Conner v. Buller*, 2010 BCCA 457 and 375186 B.C. Ltd. v. *Coquitlam Enterprises* (1997), 38 B.C.L.R. (3d) 247 (S.C.) and (1998), 61 B.C.L.R. (3d) 160 (C.A.).

[149] The cases provided establish that relief has been granted where agreements for sale are involved. The payments made here, in my view, were partial payments towards the purchase price and not a deposit. I note that the Agreement for Sale does not address the forfeiture of monies paid in the event of default.

[150] The leading authority relating to the court's discretion to grant equitable relief against forfeiture remains *Saskatchewan River Bungalows v. Maritime Life*, [1994] 2 S.C.R. 490. The decision sets out factors that should be considered when exercising discretion to grant relief from forfeiture (they are not all required in any given case):

1. the conduct of the applicant, was it reasonable;
2. the gravity of the breaches; was the forfeiture to secure payment; and
3. the disparity between the value of the property forfeited and the damage caused by the breach to the vendor.

[151] The overarching consideration is whether unconscionability is present.

[152] Under the Agreement for Sale, the monies received by the defendant amounts to \$259,439. The plaintiff seeks return of this amount as well as relief from payment of any amounts in default that were not paid to the defendant and without any deduction for occupation rent, or in the alternative subject to an adjustment for reasonable occupation rent.

[153] Relief is dependent on the circumstances of the case; here they do not justify such relief.

[154] In this regard, I have taken into consideration the following along with the other findings I have made:

- (a) the construction of the house was funded by the defendant.
- (b) the defendant took on a significant debt obligation to fund the subdivision work and the house construction reflected in a mortgage granted against the Land. The payment obligations under the mortgage are substantial and continue to be paid by the defendant.
- (c) The \$259,439 relates to the unpaid monthly payments required under the Agreement for Sale which were essentially interest on the purchase price of \$1.1 million. As far as I can discern from the evidence, there was no reduction in principal or earning of equity.
- (d) The Agreement for Sale was in essence an assignment was from Mr. Fleischer to Ms. Stene. The assignment was a means for Mr. Fleischer to insulate against his creditors. The payments under the Agreement for Sale would be funded by Mr. Fleischer along with the rental revenue from the main floor suite and monies from TRWL.
- (e) Ms. Stene and Mr. Fleischer had the benefit of living in the custom built home for many years. While payments were made under the Agreement for Sale, it did not reflect rent.
- (f) Ms. Stene's claim does not recognize occupational rent. The plaintiff's position is that the Agreement for Sale was void for illegality under the BPCPA and thus, the defendant cannot recover any damages or rent for the plaintiff's use and occupation of the Lot. Having decided that the Agreement for Sale was not unconscionable under either the BPCPA and common law, this argument against including occupational rent fails.

The occupational rent the plaintiff argues should be \$2,200/month less \$250/month for non-owner payments i.e. fire insurance and property taxes, a net of \$1,950/month. The total number of months of occupation on the top floor of the house to the date of Leask J. Order was 48 months. If no deduction is made the occupational rent for the period is \$165,839 and with deduction the occupational rent for the period is \$93,600.

Occupational rent should be deducted from any amount for relief, further the cost of insurance and property taxes should also be deducted. Having considered the description of the premises occupied and the rental evidence, my view is that the \$2,200/month (including fire and property taxes) is too low and that a more reasonable rent would be \$2500/month. This then would amount to \$120,000.

- (g) the action commenced by the plaintiff in my view was tactical to defend against the defendant exercising right take possession of the house. I would note that even if it was the defendant's obligation to complete the subdivision, which I have found was the obligation of Mr. Fleischer, the completion of the subdivision date had not yet expired - that being September 30, 2015.
- (h) Ms. Stene and Mr. Fleischer had run out of funds, had not made the required payments for many months and no resources to make good on the outstanding amounts let alone future amounts.

- (i) the plaintiff filed and maintained a CPL against the property, which has prevented the defendant from re-financing.
 - (j) that there is evidence of the value of Lot (as if subdivided) as at April 1, 2014 was \$1,035,000 which is less than the purchase price, thus, no real gain in property value existed was present. The fact that the Lands have increased in value as at the time of trial, given the considerable passage of time has little weight here.
 - (k) the conduct of the plaintiff here was questionable in terms of delay. It is apparent Ms. Stene did not personally know of a basis for the suit she started and believed that matters had ended following the Leask Order. This claim was brought long after the original order of Leask J. and even longer from the point that she says she fully understood the terms of the Agreement for Sale. There has been prejudice to the defendant because of this.
 - (l) Mr. Cassel had to attend to the subdivision work himself with the attendant costs following the disengagement of Mr. Fleischer and Ms. Stene.
 - (m) the extensions provided by the Mr. Cassel to the maturity date.
 - (n) the quantum sought in the counterclaim is for unpaid rent of \$48,365.62 from November 1, 2013 to April 15, 2014 plus prejudgment interest from April 15, 2014. The amount sought by the defendant has in my view been established. Mr. Cassel was not challenged in respect to quantum and I can find nothing in Ms. Stene's testimony that brings into question the amount sought. Moreover, there was no accounting by Ms. Stene for the rents she received, which monies under the Agreement were to be paid to the defendant.
 - (o) I also recognize the plaintiff's argument that her inability to make payments was in part because of Mr. Cassel suspending furniture lease payments from TRWL. However, the right to suspend payments is clearly set out in the Agreement for Sale.
- [155] In considering the totality of the circumstances, relief from forfeiture is not justified. I do not find that the amount forfeited and the damage to the defendant can be said to be out of all proportion. I do not find unconscionability here.

[156] The claim for relief against forfeiture is denied.

H. Reimbursement for Improvements to the Lot?

[157] The plaintiff seeks equitable compensation in the amount of \$26,099.03 for improvements to the Lot.

[158] The plaintiff says the payments are for paving of the driveway at \$3,622.50, installation of trees, shrubs, bushes, and other landscaping at approximately \$2,500, installation of new parts to the boiler for the house at \$2976.80, retaining walls at a cost of around \$7,000, value for purchase and installation of appliances and other equipment, with later depreciation adjusted, to be estimated roughly at \$10,000 for a total of \$26,099.30. The plaintiff has pleaded that from the execution of the Agreement for Sale in May 2010 to further eventual

eviction she made the payments, "with her own funds".

[159] The plaintiff also relies upon an appraisal report by Wes Tech dated April 1, 2014, the appraiser, at page 7 of his report, valued the landscaping improvements on Lot 2 to be around \$25,000 and the site improvements without any details to be another \$25,000.

[160] While the plaintiff states she personally had paid for the improvements, she did not produce documentation to establish that she had used her funds to pay for the improvements. As mentioned, she testified that she had no savings or property over the period covering the claimed expenditures. Ms. Stene has not made complete disclosure of her personal finances which is a difficulty for her claim. One cheque used to support her claim was for the payment of an invoice for grading, gravel and paving; however, it was not in the name of Ms. Stene but in the name of Stene Construction. One personal cheque in Ms. Stene's materials was referred to by Mr. Donohoe to indicate she had her own source of funds; however, she could not establish where the funds for this account came from. In this regard, she agreed she only earned a modest amount at Shanghai Trading. That business appears to have closed in 2011. I also note from the records of account kept by Mr. Cassel that he provided reimbursement of purchases which appear to have been made personally by Ms. Stene for certain items for the house and that such purchases had been made prior to the Agreement for Sale. I also note that Ms. Stene relied upon documentation to support part of her claim the source or author of which was unknown. Reliance upon this documentation is thus of limited assistance. I also note that for the period she indicated the expenditures had been made; the monthly payments were not being made by Ms. Stene, so it is hard to accept she was paying for the significant expense.

[161] When pressed on the point that it was Mr. Fleischer who provided the funds for the items, she stated that she could not actually recall what the source of the funds was for the purchaser. The essence I took from her, in the context of the entire case, was that she could not say she was the source.

[162] Given my overall assessment as to the reliability of Ms. Stene, the weakness of her testimony on this point, and the thinness of the evidence, I conclude that the plaintiff's evidence is not sufficient to ground her claim entirely. However there is some evidence. In my view a fair and reasonable account is \$5,000.

I. Is the action barred by the Limitation Act?

[163] The defendant pleads that the within action is extinguished by the Limitation Act. The defendant relies upon the testimony of Ms. Stene where she repeatedly testified that she was fully aware of the circumstances and contents of the agreement she now impugns, shortly after reviewing the agreement when she got home. Though I am not of the view that she only understood what she had signed after she signed it, it is clear from her own evidence that at the latest is when she read the entire agreement shortly after she returned home from the meeting on May 14, 2010. It is submitted that the six-year limitation period under the former Limitation Act, R.S.B.C. 1996, c. 266 expired on May 15, 2016. The

defendant submits that there is no evidence from the plaintiff to toll or to not give effect to the limitation period.

[164] The plaintiff agrees that the claims under the BPCPA were not advanced by the plaintiff until the order of Master McDiarmid of November 1, 2017 allowing the Fourth Amended Claim. However, it is submitted that the claim is not a new cause of action but only the introduction of an additional legal matrix to the original claims of common law unconscionability, contained in the plaintiff's claim and amended claim both filed respectively in March and April 2014.

[165] The plaintiff submits that the amended statement of claim filed April 7, 2014 pleaded unconscionability which read as follows:

3. The Plaintiff paid pursuant to the terms and conditions of the Agreement for Sale under mistake of fact and law and all moneys disbursed should be returned to her as she should be restituted to her position before the Agreement for Sale was executed. It would be unconscionable to allow the Defendant to keep the moneys paid by the Plaintiff or to award further damages to the Defendant considering the following:
 - a) White Castle made statements (promises) to deliver good title for purchase by the Plaintiff
 - b) the Plaintiff relied upon such statements, acted to her detriment by paying amounts which only substantially equated to occupation rent to reside in the house
 - c) the Plaintiff was not aware of any arrangements/agreements other than the Agreement for Sale that would affect her, if any
 - d) at all material times the Plaintiff believed that White Castle, being the only party to Agreement for Sale, was the only one responsible to deliver the subject property to her for purchase, and
 - e) the Plaintiff relied and acquiesced upon that belief by paying regularly up to the point where White Castle repudiated the Agreement by clearly stating and acting as though it did not feel bound to proceed with delivery of the land.
 5. The Agreement for Sale by its terms imposes upon the Defendant a fiduciary duty to complete the transaction in an expeditious manner and it has breached such fiduciary duty by collecting unconscionable amounts under threat of eviction and breach of contract while intentionally delaying performance of its obligation to tender the subject property of the agreement within a reasonable time in order that the Plaintiff may complete the purchase and acquire it.
- [166] The plaintiff argues that the cause of action for equitable relief on the legal basis of unconscionably accrued or arose either on the plaintiff's first reading of the Agreement for Sale, after her signing it on May 10, 2010 or on the defendant's breach in not delivering title to a subdivided lot on the completion date noted in the Agreement for Sale in October 2012. In either case, it is submitted the claim of unconscionability was filed by the plaintiff within

the six-year limitation period that applied prior to the change in the Limitation Act and the limitation periods in 2013. The plaintiff relies upon *Swiss Reinsurance Co. v. Camarin Ltd.*, 2018 BCCA 122.

[167] I agree with the plaintiff's submission that the claim of unconscionability can be found in the amended notice of civil claim filed April 7, 2014 though not as compelling as argued by the plaintiff. The substance of the claim in the present form of the pleadings remains. I rely on *Swiss Reinsurance Co.*

J. Does the doctrine of laches apply?

[168] The defendant has pleaded the doctrine of laches as further defence:

8. This action was in abeyance from April, 2014 to Fleischer's death, in April, 2016. During this period of time the Plaintiff was acting personally and provided no notice or indication to White Castle that she considered the claims made in this Action, nor any rights she may have pursuant to the Agreement for Sale, to remain operative. In this regard, White Castle relies on the doctrine of laches in response to all claims that White Castle failed to complete the subdivision in a timely manner after April, 2014.
9. Further, with respect to all claims advanced by the Plaintiff in the 4th Amended Notice of Civil Claim, the Defendant pleads the doctrine of laches and acquiescence against the Plaintiff as a consequence of the Plaintiff's extraordinary and unexplained delay, the Defendant's alteration of position in reasonable reliance on the Plaintiffs acceptance of the status quo and the above-noted circumstances, all of which render it inequitable to afford the Plaintiff the relief sought.

[169] I do not find that the period of inactivity or delay is sufficient to engage this defence. In the circumstances the doctrine does not apply here.

V. Conclusion

[170] The plaintiff has not established her claims except for her claim for equitable compensation in the amount of \$5,000.

"The Honourable Mr. Justice Masuhara"

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