

CANADA / JUDGMENT

Stewart v. Stewart

2021 BCSC 1212

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Supreme Court of British Columbia

DECIDED

22 June 2021

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2021 BCSC 1212 Stewart v. Stewart

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Stewart v. Stewart,

2021 BCSC 1212

Date: 20210622

Docket: S159013

Registry: Vancouver

Between:

Royston Wyndham Stewart

Plaintiff

And

Reginald Martin Stewart, James Alan Stewart, Georgeann Glover,

Jamie William Robertson, Quadra Pacific Properties Crop.,

Quadra Pacific (Aust.) Corp. Pty. Ltd., Quadra Pacific Management Pty. Ltd.,

Associated Building Credits Ltd., Westhills Land Corp.,

Lakewood Estates Ltd., Pacificgold Homes Ltd.,

SSL-Sustainable Services Ltd., Gerard Joseph Briody,

Michael John Cartwright, Ryan Emerson McKenzie,

Reginald Martin Stewart, James Alan Stewart and

Dianne Stewart Butterfield in their capacities as Trust Beneficiaries of the Stewart Trust and Martin Trusts

Defendants

Before: The Honourable Chief Justice Hinkson

Reasons for Judgment

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G. Deshon

Place and Date of Hearing:

Vancouver, B.C.

April 26 - 30, 2021

Place and Date of Judgment:

Vancouver, B.C.

June 22, 2021

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Introduction

[1] The applications before me are a part of a long-standing and acrimonious dispute between the children of Geoffrey and Edith Stewart and some of the various companies that they control, in whole or in part, and representatives of those companies.

[2] In these reasons for judgment I will adopt the collective references applied to the defendants by the parties. I refer to the defendants Quadra Pacific Properties Corp. ("QPPC"), Associated Building Credits Ltd., Westhills Land Corp., Lakewood Estates Ltd., Pacificgold Homes Ltd., SSL-Sustainable Services Ltd., Ryan Emerson McKenzie, Quadra Pacific (Aust.) Corp. Pty. Ltd. ("QPAC"), Quadra Pacific Management Pty. Ltd. ("QPM"), Gerard Joseph Briody and Michael John Cartwright as the corporate defendants. I refer to the defendants Reginald Martin Stewart ("Reg"), James Alan Stewart ("Jim"), Georgeann Glover and Jamie William Robertson as the personal defendants.

- [3] I will refer to the defendants QPAC and QPM as the Australian companies.
- [4] The parties entered into a settlement agreement in 2018 whereby, amongst other obligations, QPPC was required to purchase the plaintiff's interest in QPPC for fair market value. The settlement agreement provided that if the parties were not able to reach an agreement on the fair market value, the purchase price for the shares was to be determined by arbitration. As the parties were not able to agree on the fair market value of the plaintiff's shares, arbitration took place in November of 2020. The parties await the arbitrator's award determining the fair value for the plaintiff's shares.
- [5] The plaintiff, Royston Wyndham Stewart ("Roy"), brings his application to compel specific performance of the settlement agreement. He also seeks damages for alleged breaches of the settlement agreement and of various court orders by certain of the defendants.
- [6] The personal defendants bring an application to stay the action against all the defendants except QPPC, and to vacate certain pre-trial court orders.
- [7] The defendants also seek a sealing order with respect to certain of the documents and information relied on by the parties.

Background

- [8] Geoffrey Stewart was a successful businessman. His businesses included QPPC and its subsidiaries, which owned and operated apartment properties in Victoria, B.C. and office towers in Brisbane, Australia. QPPC also owned development lands located in Langford, B.C. Another of his businesses was Associated Buildings Credits Ltd. ("ABC") and its subsidiaries which own and operate commercial buildings and other properties on Vancouver Island.
- [9] In 2006, ABC and QPPC formed Westhills Land Corp. ("WLC") for the purpose of acquiring and developing a large tract of land on Vancouver Island.
- [10] Prior to his death in 2010, Geoffrey Stewart and his wife Edith settled or caused to be settled various trusts to hold their interests in QPPC and ABC for the benefit of their four children: the plaintiff Roy and his siblings Reg, Jim and Dianne and their issue. The holdings in QPPC and its subsidiaries were settled into the so-called Stewart Trust and the holdings in ABC and its subsidiaries were settled into the so-called Martin Trusts.
- [11] For reasons unrelated to this application, the plaintiff was removed as a director and trustee of the Stewart Trust.
- [12] The plaintiff commenced these proceedings in 2015. Prior to his appointment to the Court of Appeal, Mr. Justice Abrioux was the case management judge for this case. He gave reasons for judgment on August 26, 2016, indexed at 2016 BCSC 1576, on December 1, 2016, indexed at 2016 BCSC 2256, on August 29, 2017, indexed at 2017 BCSC 1532, on September 1, 2017 indexed at 2017 BCSC 1728, and on July 16, 2018, indexed at 2018 BCSC 1266.

The July 4, 2018 Order of Mr. Justice Abrioux

[13] The July 16, 2018 reasons were preceded by a consent order of Abrioux J., as he then was, on July 4, 2018, which included orders that:

1. Pending judgment rendered in the action or further order of the Court:
- (c) The Plaintiff is to be given no less than 4 months' notice of the decision of the Stewart Trust Trustees in relation to the tax plan that will be undertaken by the trustees in relation to the deemed disposition of the Stewart Trust, which decision shall not occur after June 18, 2019.
- (e) The Stewart Trust Trustees shall:
 - i. Provide to the Plaintiff's tax advisor, on a timely basis, all of the written communications and opinions that have been given to the Stewart Trust Trustees in relation to the Deemed Disposition Advice;
 - ii. Include the Plaintiff's tax advisor in emails and other communications with the Stewart Trust Trustees' legal and accounting advisors related to Deemed Disposition Advice.
- .
2. From November 25, 2015, the corporate Defendants are restrained from increasing any remuneration, benefits, or any other amounts paid to or for the benefit of any of the individual Defendants or members of their families (as salary, bonuses, consulting fees or otherwise), by more than CAD \$100,000.00 until further order of the Court or agreement in writing of the parties hereto.
3. Quadra Pacific (Aust.) Corp. Pty. Ltd. ("QPAC") will provide to counsel for the Plaintiff, as soon as such documents become available, copies of all notice of listings of any of QPAC's assets (specifically: 10 Russell Street, Toowoomba, Australia ("Toowoomba"); 288 Edward Street, Brisbane, Australia ("Edward Street"); and 133 Mary Street, Brisbane, Australia ("Mary Street") (hereinafter collectively referred to as the "Assets"), and any marketing materials, offers for sale or offers to purchase, and any agreements for sale related to the Assets;
4. Prior to entering into any binding agreement to sell any of the Assets, QPAC will give notice in writing to counsel for the Plaintiff and provide a copy of any such agreement simultaneously;
- [14] It also included orders that QPAC and QPPC disclose certain information to the plaintiff, including notice with respect to the use of proceeds of sale from QPAC's assets other than for defined purposes:
5. Prior to disbursing the proceeds of sale of any of the Assets, QPAC will give 30 days prior notice in writing to the Plaintiff and will at that time advise the Plaintiff what QPAC intends to do with the proceeds, if they are to be used for any purpose other than:

- (a) Completion of the sale of the Assets, payment of taxes, retirement of financing and other closing costs;
 - (b) Deployment of the sale proceeds in the ordinary course of QPAC's existing business activities for the purpose of the sale of the Assets, including capital and maintenance, repair items and landlord allowances and leasing costs;
 - (c) Payment of current management fees to QPPC or QPM; and
 - (d) Repayment of loans to QPPC and any declaration and payment of dividends to QPPC.
6. If the proceeds of sale of the Assets are paid by dividend or otherwise transferred to QPPC, prior to QPPC dealing with same in any way other than declaring an equivalent dividend or distribution payable to the Stewart Trust and to Plaintiff as a shareholder of QPPC, QPPC will give 30 days prior notice in writing to counsel for the Plaintiff and will at that time advise in the written notice what QPPC intends to do with the funds received.

[15] The order of Abrioux J. also addressed confidentiality of the documents to be produced.

The Settlement Agreement

- [16] On October 11, 2018, the parties entered into a settlement agreement. Among other things, the settlement agreement contemplated the sale of QPAC's assets located in Australia, the distribution of their sale proceeds, and the purchase of the plaintiff's shares in QPPC. Specifically, the agreement included a requirement that QPPC would purchase the plaintiff's Class B share interest in QPPC for fair market value. If the parties could not agree on the fair market value of the shares, the purchase price for the shares would be determined by arbitration.
- [17] Section 1 of the settlement agreement set out the process whereby the plaintiff's shares in QPPC would be redeemed:
- 1. The parties agree to take whatever steps are necessary to pay out the plaintiff, either directly or to a company or trust at his direction, on a time is of the essence basis, his 28% interest in QPPC, and will agree in particular as follows:
 - (a) The Defendants will sell the Australian assets and obtain sale proceeds as reasonably quickly as possible and shall:
 - (i) Only pay from the remaining net sale proceeds taxes, retirement of financing and other closing costs and current management fees to QPPC or QPM;
 - (ii) Only apply the remaining net sale proceeds to repay any loans owing to WLC and QPPC and payment of dividends to QPPC.

However, the Parties acknowledge that QPAC and QPM will incur costs and expenses including salaries and similar payments in the ordinary course of business, and to fulfill its obligations under this Agreement. If Roy believes any such expense significantly alters the value of QPAC or QPM then he may ask his CBV to include such amount in the Plaintiff's Experts' determination of value (as those terms are defined in Schedule A).

- (b) The Plaintiff's shares in QPPC and his interest in $\frac{1}{4}$ of all of the QPPC shares in the Stewart Trust shall be purchased or redeemed by QPPC based on the valuation price and paid to Roy, along with one-quarter of any other asset in the Stewart Trust:
- (i) On or before May 10, 2019 if the sale of the QPAC Assets completes in sufficient time to allow for the payment of sale proceeds by franked and, if there are insufficient franked, franked and other dividends to QPPC by May 10, 2019; and
- (ii) If (b)(i) is not possible, no later than 30 days after sale proceeds are paid by franked and, if there are insufficient franked, franked and other dividends to QPPC by QPAC in accordance with the terms of this Agreement;
- (iii) For clarity, upon payment being made to Roy for the share redemption he will surrender or deliver, as appropriate, all of his shares (including voting shares) in QPPC

(the "Share Redemption")

- (c) If the sale of the QPAC Assets does not complete in sufficient time to allow the completion of the Share Redemption by May 10, 2019, then notwithstanding (b) above, the Share Redemption shall be completed as follows:
- (i) $\frac{1}{4}$ of its Class B common and $\frac{1}{4}$ of its preferred shares of QPPC will be distributed out of the Stewart Trust to Roy on or before June 18, 2019; and
- (ii) Roy is obligated to sell or offer for redemption all of his QPPC shares and QPPC is obligated to redeem or purchase all of Roy's shares in QPPC in accordance with the Agreement and Schedule A;
- (d) The date for the valuation of QPPC will be:
- (i) December 31, 2018, if the sale of the QPAC Assets completes in sufficient time to allow the completion of the Share Redemption by May 10, 2019; or
- (ii) June 18, 2019, if the sale of the QPAC Assets does not complete in sufficient time to allow for the completion of the Share Redemption by May 10, 2019 such that paragraph 1(c) applies

(the "Valuation Date")

and the valuation will be based on the valuation principles and procedures attached hereto as Schedule A;

- (g) The payment of franked dividends by QPAC to QPPC shall be made as soon as practicable after the receipt of the sale proceeds from 10 Russell Street, Toowoomba; 288 Edward Street, Brisbane; and 133 Mary Street, Brisbane (collectively, the "QPAC Assets") or as soon as the valuation in accordance with Schedule A hereto is completed, whichever is later. The Share Redemption shall be completed on the later of the receipt of the funds in QPPC or as soon as the valuation in accordance with Schedule A hereto is completed;
- (h) Following the completion of the Share Redemption and the payment of all of the obligations under this Agreement by the Stewart Trust to Roy, the trustees of the Stewart Trust will determine if, when and how to wind-up the Stewart Trust.
- [18] Section 2 of the settlement agreement concerned a tax holdback requirement, which the parties agree is no longer required as there are no remaining tax liabilities.
- [19] Section 3 is also relevant to the plaintiff's application:
3. Roy will be entitled to his proportionate share of no less than 28% of the value of all tax attributes, not already factored into the Valuation, generated as a result of the disposal of QPPC's assets, shares, etc. and the Share Redemption shall be structured in a manner that is tax effective for Roy where it has no adverse implications on Reg, Jim and Dianne and in a manner that is tax effective for Roy in proportion to his interest where it has implication for Reg, Jim and Dianne.
- [20] Section 7 addressed payment to the plaintiff in consideration for settlement. This included, notably, \$50,000 for interest, \$200,000 for costs, and \$2 million for professional costs:
7. In consideration for the settlement, Roy is to be paid a total of \$5,050,000, to be paid as follows (all sums are in Canadian dollars);
- (a) QPPC agrees to pay to Roy the following amounts within 30 days of execution of the Agreement:
- (i) \$360,000 as general damages for pain and suffering (not to be paid from Roy's proportionate interest in QPPC);
- (ii) \$400,000 as further general damages;
- (iii) \$540,000 as general damages for Roy's general interest in QPPC;
- (iv) \$600,000 as employment compensation;
- (v) \$50,000 for interest (not to be paid from Roy's proportionate interest in QPPC);
- (vi) \$200,000 for costs (not to be paid from Roy's proportionate interest in QPPC);
- (vii) \$2,000,000 for legal, accounting and other professional costs incurred in the Action; and
- (viii) \$250,000 as general damages for Roy's interest in QPPC in general (hereinafter referred to as the "QPPC Settlement Funds"); and

- (b) The Stewart Trustees agree to distribute to each of Roy, Jim, Reg, and Dianne the sum of \$650,000 Canadian as a capital distribution from the Stewart Trust, upon the Stewart Trust receiving dividends from QPPC sufficient for the payment and, in any event, no later than the date required for the Share Redemption.

(hereinafter referred to as the "Stewart Trust Settlement Funds")

[21] The other relevant provisions of the settlement agreement are as follows:

9. The Parties will execute a mutual release which will include a covenant not to sue on any claims advanced in the Action, and an entire agreement clause (which agreement would include the mutual release, this Agreement and any documents entered into pursuant thereto) and which will also release any and all claims and defences raised or that could have been raised in the Action, up to the date of the signing of the mutual release (the "Mutual Release"). The Mutual Release will be held and will not become effective until all of the obligations by the Parties under this Agreement have been completed.
10. Upon completion of all of the obligations under this Agreement and receipt of fully executed Mutual Release by the parties, a Notice of Discontinuance of the Action without costs will be filed by the Plaintiff with the consent of the Defendants. Upon the filing of the Notice of Discontinuance, any restrictions or obligations contained in pre-trial Orders filed in the Action will cease to apply and/or will be vacated by consent if necessary.
14. For the purposes of the implementation of this Agreement, with respect to any sale of the QPAC Assets that Roy does not object to within 10 days after having been given notice pursuant to the terms of the Order of Mr. Justice Abrioux dated July 4, 2018, Roy agrees to sign or execute such consents, resolutions, or authorizations, whether as director, beneficial owner, or interested party in or with respect to the sale of the QPAC Assets that may be reasonably required by a purchaser of the QPAC Assets to close or complete the sale of the QPAC Assets, or that may be required at law to complete the wind-up of either company.
15. Upon satisfaction of any and all obligations owing to Roy pursuant to this Agreement, the Parties agree that the proceedings commenced by QPAC and QPM in Queensland will be discontinued by consent and no costs will be claimed by any party in relation to those proceedings, including without limitation any cost order that may have already been made.
16. The Parties will consent to orders as reasonably required containing the above terms and instruct their solicitors to draft the required comprehensive documentation to implement the Agreement, including a redemption agreement, any necessary QPPC shareholders agreement, releases, deeds of disclaimer, etc.

[22] Counsel explained the term "franked" as describing corporate funds upon which tax has been paid.

Post-settlement

- [23] Following the conclusion of the settlement agreement, the parties began negotiations over its implementation, including a share redemption agreement as contemplated in s. 16 of the settlement agreement.
- [24] In November 2018, one of the plaintiff's lawyers, Darrell Wickstrom, began negotiating closing documents with Arik Broadbent, one of the Stewart Trust's lawyers.
- [25] Between November 7 and 15, 2018, one of the lawyers for QPPC advised counsel for the plaintiff that he would require that a comprehensive implementation agreement be signed as a condition for payment of \$3.8 million in settlement funds.
- [26] On December 19, 2018, the plaintiff incorporated Retire Well Strategies Ltd. ("RWS") for tax reorganization purposes.
- [27] Between December, 2018 and February 2019, Mr. Wickstrom and Mr. Broadbent communicated on a tax holdback agreement, and Mr. Broadbent was asked to provide a suggested timeline and an estimate of the amount as soon as possible.
- [28] On January 16, 2019, there was an exchange between counsel regarding the form of a mutual release.
- [29] On January 30, 2019, the defendant Gerard Briody sent an email to the defendant Jamie Robertson regarding winding up the Australian companies.
- [30] On February 5, 2019, there was an email exchange between Mr. Briody and a liquidator setting out the process for appointment of a liquidator, whose total cost was estimated to be between \$20,000 and \$40,000.
- [31] On February 26, 2019, Mr. Wickstrom sent an email to Mr. Broadbent stating that it was vital for him to obtain a better understanding of the Australian procedures with respect to tax payment/clearance certificate, and asking for an update.
- [32] On March 6, 2019, Mr. Broadbent suggested a form of security/indemnity agreement to Mr. Wickstrom instead of tax holdback.
- [33] Mr. Justice Abrioux was appointed to the Court of Appeal on March 7, 2019, and I then assumed the case management of this action.
- [34] On May 8, 2019, Mr. Wickstrom emailed Mr. Broadbent, advising that the plaintiff wished to move ahead with looking at replacing the holdback process with an indemnity. He stated that the terms would need to be worked out, and suggested a call to discuss possible terms.
- [35] On May 15, 2019, Mr. Broadbent provided a draft of a share redemption agreement to Mr. Wickstrom.

- [36] David Thompson of Thorsteinssons LLP was the tax advisor to the Trustees of the Stewart Trust and to QPPC in relation to the Stewart Trust.
- [37] On May 17, 2019, there was a meeting between Mr. Thompson, Mr. Broadbent, Mr. Foreman and Mr. Wickstrom to discuss a share distribution agreement.
- [38] Six days later, Mr. Wickstrom provided revised distribution and share purchase agreements to Mr. Broadbent, to which Mr. Broadbent did not reply.
- [39] On May 23, 2019, Mr. Thompson advised Mr. Foreman that it was his understanding that the Australian companies would need to wait until December 31, 2019 to request tax clearance certificates from the Australian Tax Office ("ATO").
- [40] On May 28, 2019, the parties entered into a share distribution agreement to avoid the deemed disposition of the shares of QPPC which were distributed out of Stewart Trust to the beneficiaries.
- [41] When difficulties arose over the implementation of the settlement agreement, and the payment of the agreed upon damages to the plaintiff in s. 7 of the settlement agreement was not made, I heard submissions from the parties and released reasons for judgment on June 17, 2019. I found that the various defendants, by attempting to impose additional obligations on the plaintiff before he received the settlement funds, breached the settlement agreement. Those reasons for judgment are indexed at 2019 BCSC 985.
- [42] On June 17, 2019, Mr. Broadbent advised that his clients were busy with appraisal and valuation issues and would "look to address the matter of the Share Redemption Agreement and Holdback once they have completed that task".
- [43] On July 8, 2019, Mr. Wickstrom provided Mr. Broadbent with a revised share purchase and redemption agreement. This version reflected changes associated with tax reorganization steps proposed by the plaintiff's tax advisors. Mr. Wickstrom noted that no tax holdback agreement had been provided despite his requests for such an agreement.
- [44] The plaintiff contends that between late July 2019 and November 2019, there was no communication from any solicitors on behalf of any of the defendants regarding draft closing documents.
- [45] On November 19, 2019, Craig Young assumed the role previously performed by Mr. Broadbent (for the corporate defendants) and emailed Mr. Wickstrom, providing a draft share redemption agreement and draft tax holdback agreement. The draft did not provide a share exchange crystallization plan for the tax reorganization included in the drafts previously provided by Mr. Wickstrom.

- [46] In late 2019, counsel for the plaintiff identified a few areas of disagreement with draft implementation documents provided by QPPC, including that they required the plaintiff to give holdbacks for the 2017 to 2019 taxation years, and give holdbacks for tax liabilities in respect of the winding-up of QPAC. The plaintiff objected to being required to give an indemnity for tax issues and to providing a tax holdback.
- [47] On December 5, 2019, Mr. Giles Deshon, for the corporate defendants, wrote counsel for the plaintiff providing information about payment of dividends pursuant to para. 6 of the order of Mr. Justice Abrioux, as to when and in what amount QPPC expected to receive a dividend from QPAC in respect of the net proceeds of sale of the Australian assets, thereby transferring the redemption funds to QPPC, and advising that QPPC intended to invest the Canadian funds in short-term interest bearing investments until the plaintiff's interest in QPPC was valued and paid to him. The specific amounts were not provided.
- [48] Mr. Deshon also said that QPPC intended to retain the Canadian funds that were in excess of the amount needed to acquire the plaintiff's shares as operating funds to deploy in operations. The letter also stated that taxes were not required to be paid until 2020.
- [49] With regard to the winding-up of the Australian companies, Mr. Deshon's letter stated that QPAC would have to make tax filings in the 2020 calendar year, that the plan was "to do this as soon as possible in 2020" and that steps to wind up the companies would be taken after the 2019 tax return was filed and dividends were paid out to QPPC.
- [50] On January 7, 2020, Mr. Wickstrom sent an email to Mr. Young that referred to a lack of tax reorganization elements and tax attributes in the draft provided by Mr. Young, and the requirement that plaintiff pay all costs. In it, he objected that the draft tax holdback agreement included tax years for the Canadian entities, and an indemnity from the plaintiff, which were not agreed to or provided for in the settlement agreement.
- [51] On January 21, 2020, I granted an order, with consent of all parties, that the parties were required to use best efforts to attempt to negotiate and conclude the form and terms of the share redemption agreement and any tax holdback agreement. Among other things, the order provided that if the form and terms were not agreed to by February 17, 2020, the parties could apply to the court for directions or a declaration of breach of the settlement agreement. The relevant terms of that order are as follows:
2. The parties are required to use best efforts to attempt to negotiate and conclude the form and terms of Share Redemption Agreement required by Section 16 of the Settlement Agreement. If the form and terms of Share Redemption Agreement are not agreed upon by February 17, 2020, at any point after February 17, 2020 either party may apply to the court for directions or other relief, including the relief sought in paragraphs 1 and 4 of the plaintiff's application filed November 29, 2019, being:
 1. A declaration that the defendants are in breach of the settlement agreement entered into between the parties dated October 11, 2018;

4. An order that the Share Redemption Agreement in substantially the form drafted by counsel for the plaintiff (and which was attached as Schedule "A" to the Notice of Application filed November 29, 2019) is required to be executed by the parties thereto.
3. The parties are required to use best efforts to attempt to negotiate and conclude an agreement on the terms of any tax holdback agreement required by Sections 2 and 16 of the Settlement Agreement. If the parties are unable to reach an agreement by February 17, 2020, in relation to any tax holdback agreement, at any point after February 17, 2020 either party may apply to the court for directions or other relief (including any relief sought in paragraphs 1 and 5 of the plaintiff's application filed November 29, 2019, being:
 1. A declaration that the defendants are in breach of the settlement agreement entered into between the parties dated October 11, 2018;
 5. A declaration that no tax holdback is required in relation to the settlement.

The above relief sought will not be res judicata as a result of this Order.

4. Quadra Pacific Properties Corp. ("QPPC") and Quadra Pacific (Aust.) Corp. Pty. Ltd. ("QPAC") will advise the plaintiff of the steps that have been taken or will be taken to obtain a tax clearance certificate in Australia in relation to the sale of the assets of QPAC.
5. The proceedings commenced by QPAC and Quadra Pacific Management PTY. LTD. ("QPM") in Queensland, Australia will be discontinued by consent without costs, and, thereafter, QPAC and QPPC will take all reasonable steps in accordance with the Settlement Agreement to wind-up QPAC and QPM at the earliest possible date and to obtain any required tax clearance certificate from Australia at the earliest possible date.
6. Nothing in this Order prevents the parties from seeking document production orders in the arbitration conducted pursuant to the Settlement Agreement.
7. Except as set out in this Order, the relief sought in the plaintiffs Notice of Application filed November 29, 2019 is dismissed.
8. The Application of the Defendants Reginald Martin Stewart, James Alan Stewart, Georgeann Glover and Jamie William Robertson filed December 18, 2019 is dismissed, with liberty to seek a new stay of this action any time after February 17, 2020.

[52] After the order was entered, Mr. Wickstrom wrote to Mr. Young to request Mr. Young's comments on certain matters, including various holdbacks requested from his client. Mr. Young responded that "the Settlement Agreement does provide for various holdbacks, includ[ing] tax holdbacks," but did not give a substantive response beyond that to the issues raised by Mr. Wickstrom.

[53] On January 30, 2020, Mr. Wickstrom provided a further revised draft share redemption agreement to Mr. Young (later supplemented by attachments sent to Mr. Young on February 3 and 7, 2020), but this version was never commented upon until 2021.

- [54] On February 3, 2020, Mr. Young provided a revised share redemption agreement.
- [55] On February 6, 2020, Mr. Deshon sent an email regarding proceedings against the Australian companies in Queensland stating: "As you know ... this issue is likely already causing some delay of the wind up of the Australian companies."
- [56] Ms. Cohen, for the plaintiff, responded the same day advising that the documents were agreeable and would be signed.
- [57] Later that month, Mr. Thompson and Mr. Foreman exchanged emails regarding share exchange for tax reorganization, and Mr. Wickstrom provided comments on the revised share redemption agreement. The plaintiff provided all necessary documentation to affect discontinuance of Australian proceedings without costs. Mr. Young responded to comments on the revised draft share redemption agreement later that month.
- [58] On February 20, 2020, Mr. Wickstrom provided revised documents to Mr. Young to reflect discussions and suggested that he and Mr. Young schedule a telephone call for February 24, 2020.
- [59] On February 25, 2020, Mr. Young provided information relevant to redemption of the plaintiff's shares and proposed an indemnity from the plaintiff rather than a holdback, and stated that the available franked dividend amount was not sufficient to bring all the funds back to Canada.
- [60] On February 28, 2020, Mr. Wickstrom reiterated his position that an indemnity was not acceptable to the plaintiff and confirmed that he was waiting for a new draft share redemption agreement from Mr. Young.
- [61] On March 19, 2020, Mr. Young advised that his client was still considering the proposed revisions to the share redemption agreement but due to COVID-19 related matters, would get back to Mr. Wickstrom and Dierk Ullrich (another of the plaintiff's lawyers) in the next two weeks.
- [62] On April 14, 2020, Mr. Deshon provided the plaintiff's counsel with tax returns and financial statements for the year end of 2019 for QPAC and QPM.
- [63] One week later, Mr. Deshon provided documents related to QPAC's Class C franked dividend account and estimate of remaining liquidation costs.
- [64] Having received no response to the drafts and comments exchanged in February 2020, Mr. Wickstrom provided further revised draft documents on May 25, 2020 that made a number of concessions in an attempt to reach agreement. This included offering to pay up to \$20,000 to cover QPPC's costs of share exchange crystallization.

- [65] Three days later, Mr. Young sent a revised share redemption agreement that rejected the share exchange crystallization plan, and included terms which Mr. Wickstrom had previously advised were unacceptable, advising counsel for the plaintiff "we have come to the conclusion that the parties have reached an impasse on certain issues."
- [66] Discussions between tax advisors regarding the tax reorganization continued through the summer of 2020. In the discussions, QPPC took the position that the shareholders other than the plaintiff should not be required to contribute proportionately to any holdback, and continued to insist on an indemnity for future tax liability, beyond the amount of any holdback from the plaintiff.
- [67] From late June to August 2020, the parties also engaged in discussions about a potential partial payment to the plaintiff of what he terms the minimum undisputed amount owed to him for his shares.
- [68] In a letter dated July 17, 2020, counsel for the corporate defendants advised counsel for the plaintiff that the Australian companies' 2019 tax returns were filed, the 2019 income tax returns had been accepted as filed, and the 2019 taxes were paid. The letter also confirmed that neither QPAC nor QPM had applied for tax clearance certificates, that final tax returns had not yet been prepared, but that all of the necessary information for the final tax returns had been gathered. Counsel for the plaintiff were also advised that the liquidator would apply for clearance certificates; it would take approximately four to six months to wind up the companies; and a minor dispute with a former contractor was holding up the process, but once that dispute was resolved the information to prepare final tax returns could be submitted which would allow payment of any final franked dividend and any final tax.
- [69] Counsel for the plaintiff circulated a new draft of a share redemption agreement on September 20, 2020, including what he advised that he considered to be only the essential terms.
- [70] On October 15, 2020, Mr. Young responded with new drafts of the share redemption agreement and holdback indemnity agreement and proposed an immediate payment of a specified amount on terms that were not required by the settlement agreement. He advised that his clients were in the process of transferring funds to his trust account sufficient to pay a "preliminary purchase price".
- [71] The same day the plaintiff received notice that WLC's challenge to reassessments had been successful, resolving outstanding tax challenge related to years 2009 - 2016.
- [72] On October 20, 2020, Mr. Foreman spoke to Mr. Thompson and told him about the plaintiff's intention to incorporate Numco for his tax reorganization plan that would not involve QPPC. Mr. Thompson agreed that was an ordinary and prudent tax planning strategy to ensure tax efficiency to the plaintiff.

- [73] On October 21, 2020, Mr. Foreman, Mr. Thompson, Mr. Ullrich and Mr. Wickstrom had a telephone call to discuss a different form of share redemption agreement and a separate tax holdback agreement. Mr. Ullrich proposed resolution whereby the arbitrated award value would just be reduced by a set amount to do away with the tax holdback.
- [74] On October 23, 2020, Mr. Wickstrom responded to Mr. Young's October 15 form of share redemption agreement with a form of an initial share redemption agreement that was acceptable to the plaintiff that would have provided an immediate payment. He also requested additional information related to payment of funds into Mr. Young's trust account, including with respect to the provision of interest.
- [75] On October 28, 2020, Mr. Young responded with a proposal for a partial payment for the plaintiff's Class B shares, but the proposal gave rise to the same concerns earlier identified about adverse tax consequences for the plaintiff. It also stipulated that even if there was no final award as of April 30, 2021, the plaintiff's shares would be transferred to QPPC, and provided that the plaintiff would give up his shareholder vote.
- [76] In what the plaintiff refers to as an attempt to simplify matters and get a deal completed, Mr. Wickstrom sent a proposal for a full and final settlement on October 30, 2020. QPPC countered this proposal the same day with a counter-offer that contemplated payment after negotiation of a whole new "comprehensive agreement".
- [77] The same day, Mr. Ullrich provided a form of share purchase agreement for full and final settlement.
- [78] As no agreement on the purchase price of the shares was reached, the parties planned to proceed to arbitration to value the plaintiff's Class B shares on November 2, 2020.
- [79] QPPC responded to the new draft share redemption proposal on October 15, 2020 with its own revised draft share redemption agreement which proposed to pay the plaintiff a "preliminary purchase price" of \$54,000,045 on October 29, 2020, to then be adjusted following receipt of the arbitrator's partial award determining the value of the plaintiff's Class B shares.
- [80] This draft contained several terms which the plaintiff considered to be contrary to the settlement agreement and which he considered continued to be problematic from a tax perspective. The new draft continued to impose an indemnity on the plaintiff for tax liabilities, and holdbacks for tax years not mentioned in the settlement agreement. It made no provision for interest or to make the redemption transaction tax efficient for the plaintiff.
- [81] By letter dated November 12, 2020, Mr. Young stated that he held "funds sufficient to pay \$54,000,045" and that those funds were not in an interest-bearing account. He proposed that he transfer the funds into an interest-bearing account either at his firm or through QPPC.

- [82] This letter also made a further offer to pay the minimum undisputed amount owing to the plaintiff conditional on the inclusion of a price adjustment clause to reflect potential reassessments by the ATO of QPAC and QPM. It also contemplated further agreements on a holdback and indemnity for Canadian tax liability. The offer also contemplated a scenario in which the plaintiff's shares would be transferred to QPPC despite the potential that there would be a balance of the payment remaining outstanding.
- [83] By letter dated November 17, 2020, counsel for the plaintiff noted his client's concerns about QPPC's offer, and confirmed that the \$54,000,045 should be placed in an interest-bearing trust account held by Cook Roberts, Mr. Young's law firm. Mr. Young subsequently confirmed that this would be done.
- [84] Mr. Young later took the position that there was no agreement that he would continue to hold the funds that he held in trust, and that if QPPC instructed him to return the funds, he would do so.
- [85] In a letter dated November 25, 2020, counsel for the corporate defendants advised counsel for the plaintiff that a final audit of the Australian companies was completed in September 2020, and a final tax return had been filed in September 2020. They advised as well that the required taxes had been paid in October 2020, that the liquidator had been engaged, and declarations of solvency and directors' resolutions and forms for the members' voluntary liquidation had been signed. The letter also advised that the insurance claim and the contract dispute involving the Australian companies had been resolved, that Michael Cartwright and Gerard Briody would resign, and that the liquidation of QPM was expected to start a day or two before that of QPAC.
- [86] On November 30, 2020, the liquidation of QPM formally commenced and notification of the appointment of external administrator form and the notice of appointment of liquidator was lodged, and the ATO was advised of appointment of liquidators for QPAC and QPM.
- [87] By letter dated December 4, 2020, counsel for the corporate defendants advised counsel for the plaintiffs that the liquidator appointed was Andrew Heers. Counsel advised that Mr. Heers had not applied for a tax clearance certificate, but that the certificate was expected very early in the process.
- [88] The Australian tax clearance certificate for QPM was provided to counsel for the plaintiff by letter of February 19, 2021 and the certificate for QPAC by letter dated March 9, 2021.
- [89] In a letter dated December 21, 2020, QPPC disputed that it had agreed to pay Roy out his 28% interest on a time is of the essence basis, and took the position that only the sale of the Australian assets and obtaining the net sale proceeds was required to be done on a time is of the essence basis. QPPC also indicated that it required that the plaintiff deliver a release and notice of discontinuance of the action before it would redeem his shares.
- [90] In his affidavit affirmed March 22, 2021, Mr. Ullrich stated that:

Up until in or about January 26, 2021, we were proceeding on the assumption that the parties would effect the share transfer and provide for the tax attributes that were to be provided to Roy pursuant to the Settlement Agreement, through a share redemption agreement. Although several drafts of a Share Redemption Agreement were exchanged between the solicitors for QPPC and either Mr. Wickstrom or myself, a few issues arose consistently as the sources of disagreement between the parties.

- [91] On February 11, 2021, Mr. Young wrote to Mr. Ullrich agreeing in principle that a formal share redemption agreement might not be required. He stated that no further tax holdback agreement would be sought, and that the only remaining obligation to require QPPC to pay was receipt of award and deliver of share certificates and instruments of transfer.
- [92] Mr. Young also said in his letter that he then held approximately \$59 million in trust, but did not explain whether the funds were in an interest bearing account. The letter suggested that upon payment for the common shares the plaintiff would be obliged to provide the release and notice of discontinuance referred to in the settlement agreement.
- [93] On February 16, 2021, Mr. Ullrich provided the documents necessary to effect share transfer from the plaintiff to RWS.
- [94] The next day counsel for the parties exchanged emails regarding proper form of mutual release.
- [95] On February 19, 2021, Mr. Ullrich provided revised draft closing documents to address the revised versions provided by Mr. Young eight days earlier, and advised Mr. Young of the plaintiff's intention to transfer the shares of RWS to a numbered company for tax planning reasons. Mr. Ullrich advised that the numbered company would remain wholly-owned and controlled by the plaintiff, and also stated that the release and notice of discontinuance were not required until all obligations under the settlement agreement were complete.
- [96] The same day, Mr. Deshon provided tax clearance certificate showing no further tax owing with respect to QPM.
- [97] On February 25, 2021, Mr. Alexander (counsel for the personal defendants) wrote to counsel for the plaintiff objecting to the transfer of the shares from RWS to a newly-formed company wholly owned by the plaintiff ("Numco"). The personal defendants alleged a breach of the distribution agreement which had been entered into as a result of the Stewart Trust deemed disposition date in June 2019.
- [98] On March 2, 2021, Mr. Young provided copies of documents to approve the transfer of the plaintiff's shares to RWS but confirmed QPPC's position with respect to Numco was as set out in the letter from Mr. Alexander.
- [99] On March 4, 2021, Mr. Young confirmed that the statutory declaration provided to counsel for the plaintiff was not meant to infer that his clients agreed to the transfer to Numco, and he provided a revised statutory declaration removing any reference to Numco.

- [100] On March 8, 2021, counsel for the plaintiff wrote to counsel for QPAC inquiring about the timing of the de-registration of QPM and QPAC and the timing of the applications for tax clearance certificates for QPAC and QPM.
- [101] On March 9, 2021, counsel for QPAC confirmed that a tax clearance certificate had been issued for QPAC, indicating only 0.40 Australian dollars of taxes owing.
- [102] On March 15 and 17, 2021, Mr. Alexander again wrote regarding a transfer to Numco alleging that such a transfer would be a breach of the share distribution agreement.
- [103] On April 7, 2021, the plaintiff filed the notice of application that is the subject of these reasons.
- [104] On April 9, 2021, Mr. Deshon emailed the plaintiff's counsel, confirming consent to transfer of RWS shares from Roy to Numco.
- [105] On April 16, 2021, Mr. Young emailed certified copies of RWS' share certificates in QPPC. The plaintiff signed his irrevocable shareholder concurrence that day, so that aspect of the tax planning could be implemented immediately. It was provided to QPPC on April 17.
- [106] On April 17, 2021, Mr. Ullrich wrote to Mr. Young accepting some of proposed revisions and confirming which documents were settled.
- [107] Presently, the parties await the arbitration award determining fair market value for the plaintiff.

The Present Applications

- [108] In his notice of application, the plaintiff applied for the following orders:

1(a) Specific performance of the settlement agreement between the parties dated October 11, 2018 (the "Settlement Agreement"), on the following terms:

- (i) In specific performance of the Settlement Agreement, the closing documents in the form attached hereto as Schedule "A", with the applicable dates and dollar amounts added, are required to be executed by the parties thereto within 48 hours of issuance of any Award in the Arbitration between the plaintiff and Quadra Pacific Properties Corp. ("QPPC") determining the value of the plaintiffs Class B shares in QPPC (held directly or indirectly);
- (ii) In specific performance of the Settlement Agreement, upon receipt of any Award in the Arbitration between the plaintiff and QPPC determining the value of the plaintiffs Class B shares in QPPC (held directly or indirectly), the amount awarded is payable immediately without the requirement for any further steps or documentation being signed or provided by the plaintiff, or any person on his behalf, other than the documentation referred to in paragraph 1(a)(i) of this order, and QPPC is required to pay any amounts awarded to the bank account directed by the plaintiff by wire transfer;

- (iii) A declaration that no tax holdback agreement is required for completion and satisfaction of the Settlement Agreement;
- (iv) An order that [the plaintiff] is entitled to a reasonable rate of interest on the proceeds of sale of the Australian Assets (as referred to in the Settlement Agreement) from June 18, 2019 (the "Valuation Date") to the date of payment to him of the purchase price for his shares, or, at a minimum, the actual interest earned by QPAC or QPPC on the funds held by them from the proceeds of sale of the Australian Assets;
- (v) A declaration that [the plaintiff] is entitled to transfer ownership of Retire Well Strategies Ltd. ("RWS") to a newly-formed company wholly-owned by him following the transfer of [his] shares in QPPC to RWS and that the refusal of the defendants to agree to such transfer was a breach of the Settlement Agreement;
- (vi) A declaration that [the plaintiff] is not required to deliver a release and notice of discontinuance of the within action as a condition for receiving the payment referenced in paragraph 1(a) above and that the release and notice of discontinuance is not required to be delivered until all of the defendants' obligations under the Settlement Agreement have been fulfilled;
- (b) Damages for any tax liability arising to [the plaintiff] from the defendants' failure to transfer [the plaintiff]'s shares in QPPC to RWS in a timely fashion, and arising from their objection to the transfer of the shares for RWS to a newly-formed company wholly-owned by [the plaintiff];
- (c) A declaration that the defendants QPPC, Quadra Pacific (Aust.) Corp. Pty. Ltd. ("QPAC") and Quadra Pacific Management Pty. Ltd. ("QPM") have breached the Settlement Agreement (the relevant provisions are the agreement as a whole and paragraphs 1,1(a), (b), (g), 2, 3,16 and Schedule "A");
- (d) A declaration that the defendant QPPC has breached the Settlement Agreement by its failure or refusal to negotiate the terms of any remaining required documents to implement the Settlement Agreement honestly and in good faith;
- (e) A declaration that the defendant QPPC breached the Settlement Agreement by refusing to take whatever steps were necessary to transfer [the plaintiff]'s shares in QPPC to RWS in a timely fashion when requested;
- (f) Damages for breach of the Settlement Agreement;
- (g) A declaration that the defendants QPPC, QPAC, and QPM have breached paragraphs 2-5 of the Consent Order dated January 21, 2020 (the "Consent Order");
- (h) A declaration that the defendants QPAC and QPPC have breached paragraphs 5 and 6 of the Order of the Honourable Mr. Justice Abrioux dated July 4, 2018 (the "Abrioux Order");
- (i) Damages for breach of the Consent Order and the Abrioux Order;

(j) Special costs of this application;

...

2. Further, if it is determined in the arbitration between the parties that the arbitrator does not have jurisdiction (in whole or in part) to award costs in relation to the pre-arbitration phase of the valuation of Roy's interest in QPPC, Roy will be seeking an order for his costs of that phase of the valuation as damages for breach of contract or as costs in the Action.

[109] The plaintiff elected not to pursue the relief claimed in para. 1(b) of his notice of application, and asked to adjourn the relief sought in para. 2. In the result I will refrain from discussing those parts of the plaintiff's application.

[110] In oral submissions, the plaintiff clarified that the relief sought in para. 1(a) was not sought against QPAC, and that damages were not being sought for the relief set out in para. 1(b). Counsel for the plaintiff also confirmed that the relief sought in paras. 1(f) and (i) was only sought against QPPC. Despite the breadth of that relief sought in para. 1(j) of the application, counsel clarified that the plaintiff would be content with an order against only QPPC and its directors for the relief sought in that sub-paragraph.

[111] In its notice of application the defendant QPPC applied for that the following orders:

1. That Dierk Ullrich attend for cross-examination upon his affidavit #1 sworn 22/March/2021.
2. That Royston Wyndham Stuart attend for cross-examination upon his Affidavit #23 sworn on 24/March/2021.
3. That if necessary, the plaintiff's application filed 7/April/2021, be adjourned pending the hearing and determination of this application and the completion of the cross-examinations if ordered.
4. Costs against the plaintiff.

[112] The relief sought by QPPC in paras. 1 and 2 was not pursued before me, and I refused the relief sought in para. 3.

[113] In their notice of application, the personal defendants applied for orders that:

1. The action, as against all defendants except QPPC, be stayed.
2. Vacating the following pre-trial orders:
 - a. Paragraphs 1-5 of the order of Abrioux J. dated July 4, 2018;
 - b. Paragraphs 2, 3 and 4 of my order dated January 21, 2020.

3. Enforcing the Settlement Agreement dated October 11, 2018 (the "SA") by requiring the plaintiff, forthwith upon the shares of QPPC being purchased from the plaintiff and payment of the purchase price to the plaintiff or to his order, or at such other time as determined by this Court to:
 - a. Deliver the Release required by Section 9 of the SA.
 - b. Discontinue the action as required by Section 10 of the SA, or in the alternative discontinue against the Personal Defendants.
4. Costs against the plaintiff.

[114] In oral submissions, counsel for the personal defendants withdrew the request for the orders set out in para. 3 of the application by those defendants. I will therefore refrain from any discussion of that part of their application.

[115] The defendants also seek a sealing order with respect to certain of the documents and information relied upon by the parties.

Discussion

Sealing Order

[116] The plaintiff's claims in this proceeding were resolved by the settlement agreement. The issue of the value of his interest in QPPC has been arbitrated, although the parties await the arbitrator's award.

[117] This Court has made two orders concerning the confidentiality of information and documents disclosed in this proceeding.

[118] The first sealing order was made by Abrioux J. on June 29, 2018 with respect to the affidavit of David Thompson sworn June 4, 2018. That affidavit included information about tax planning advice provided to the directors of QPPC and the trustees of the Stewart Trust, including the calculation of QPPC's capital dividend account balance.

[119] Second, a confidentiality order was made by Abrioux J. on July 4, 2018 to protect the confidentiality of financial information and documents of QPAC and QPM. It required QPPC to provide the plaintiff with specified information and documents, and provided that those documents were subject to confidentiality provisions. In addition to the implied undertaking which attaches to documents produced in a court action, the documents had to be treated as confidential and marked 'confidential'. If confidentiality was disputed, the parties were not permitted to file affidavits attaching confidential documents prior to a hearing in court until after an opposing party had and opportunity to seek a sealing order.

- [120] When the parties settled the action, they agreed to arbitrate the sole issue of the value of the plaintiff's interest in QPPC. The valuation necessitated a consideration of the financial position of QPPC, its wholly owned subsidiaries, and the latter's subsidiaries. As such, a large volume of private, sensitive, financial information and documents were provided by the defendants during the arbitration, in addition to the information and documents previously provided.
- [121] As the action has now returned to this Court, after having been in the private confidential arbitration system, the personal defendants, supported by the corporate defendants, seek further sealing orders to those already extant in these proceedings.
- [122] The personal defendants contend that the confidentiality of information and documents at the pre- and post-arbitration stage are governed by the two interlocutory orders and the implied undertaking which applies to documents listed and produced in accordance with the Supreme Court Civil Rules, B.C. Reg. 168/2009 [Civil Rules]. They contend that all of the information and documents produced in the arbitration are protected.
- [123] Rule 27 of the Domestic Commercial Arbitration Rules of Procedure of the British Columbia International Commercial Arbitration Centre expressly protects the confidentiality of the arbitration. It reads as follows:
- (1) Unless:
 - (a) otherwise agreed by the parties,
 - (b) required by law, or
 - (c) necessary to enforce or challenge an award,
- all hearings, meetings, evidence, documents (produced or exchanged), Awards and communications shall be private and confidential as between the parties, the arbitration tribunal and the Centre.
- [124] The personal defendants seek a sealing order to protect the following financial information and records included in the affidavits that they have identified in their submissions, which they assert is sensitive, private and confidential: exhibits F, K, L, U, W, X and Y to the plaintiff's affidavit #23, sworn March 24, 2021; pages 74-75 and 105-106 of the exhibits to affidavit #2 of Dierk Ullrich, sworn April 22, 2021; and pages 21-25, 27, 31-37 and 41 from affidavit #3 of George Ikonomou, sworn April 22, 2021.
- [125] In oral submissions, counsel for the personal defendants added pages 491-492, 499-515 and 517-525 which are parts of exhibits MMM, OOO, and PPP to the plaintiff's affidavit #23.
- [126] The two-part test for determining whether a publication ban order should be granted, developed by Chief Justice Lamer for the majority in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 at 878, is as follows:

A publication ban should only be ordered when:

- (a) Such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
- (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.

[Emphasis in original.]

[127] That test was adopted by the Supreme Court of Canada to apply to confidentiality orders in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 [Sierra Club] at para. 48.

[128] I find that those parts of the affidavits for which the personal defendants seek a sealing order contain and append confidential and commercially sensitive information. If the information therein became public, it could potentially harm the financial interests of all the parties and undermine QPPC's interests in the commercial confidentiality of its operations.

[129] In the terms of the Sierra Club test, the disclosure of this information would be likely to undermine the public policy in this jurisdiction of encouraging arbitrations by defeating the parties' reasonable expectations of privacy in an on-going arbitration.

[130] In the result, the parts of the affidavits for which the personal defendants seek a sealing order should not be made public or be publicly searchable, and the sealing order sought is granted.

Jurisdiction

[131] The personal defendants challenge the court's jurisdiction to hear parts of the plaintiff's application and contend that several of the orders sought by the plaintiff do not fall within the court's limited role to enforce a settlement agreement in an otherwise settled action.

[132] In *Operation Dismantle Inc. v. Canada*, [1985] 1 S.C.R. 441, Mr. Justice Dickson, as he then was, writing for the majority, held that:

31 The reluctance of courts to provide remedies where the causal link between an action and the future harm alleged to flow from it cannot be proven is exemplified by the principles with respect to declaratory relief. According to Eager, *The Declaratory Judgment Action* (1971), at p. 5:

- 3. The remedy [of declaratory relief] is not generally available where the controversy is not presently existing but merely possible or remote; the action is not maintainable to settle disputes which are contingent upon the happening of some future event which may never take place.
- 4. Conjectural or speculative issues, or feigned disputes or one-sided contentions are not the proper subjects for declaratory relief.

Similarly, Sarna has said, "The court does not deal with unripe claims, nor does it entertain proceedings with the sole purpose of remedying only possible conflicts": (*The Law of Declaratory Judgments* (1978), at p. 179).

[133] Courts will not generally entertain applications for declaratory relief where the declaration will serve little or no practical purpose. In *Cheslatta Carrier Nation v. British Columbia*, 2000 BCCA 539, Madam Justice Newbury wrote:

13 Generally, modern courts have continued to adhere to the principle that declaratory actions should not be entertained where the declaration will serve little or no practical purpose or raises a matter of only hypothetical interest. Conversely, where the pleadings disclose a "real difficulty," present or threatened, the action will lie. The first edition of Zamir, *The Declaratory Judgment* (1962), summarized the law this way:

Generally, when a person puts himself to the trouble and expense of litigation, he does it to serve some practical purpose of considerable importance for him. It is true that the mere interest of the plaintiff is not sufficient to warrant a declaration of his rights. Declaratory proceedings, though useful enough in the opinion of the plaintiff, have often been dismissed as being hypothetical Thus, where a declaration may only satisfy the plaintiff's curiosity, or give him an extra assurance against a possible challenge or infringement of his rights in the future, it will (if there is no real ground for such a doubt or anxiety) be refused as being hypothetical. But where the court holds that it has jurisdiction and that the plaintiff has established his standing, it will be slow to find that the declaration claimed may not be useful enough to justify its intervention. Accordingly, where a real doubt is cast on the plaintiff's rights, ensuing from a dispute between the parties, the court will generally regard the mere removal of that doubt as of sufficient utility.

The requirement of utility does not mean that the plaintiff should, in consequence of the declaration, be enriched by material assets or benefited in a tangible way. Utility only means that the declaration of the court should solve a real difficulty which confronts the plaintiff in the conduct of his business affairs or his private life. [at 192-3; emphasis added by Newbury J.A.]

[134] The personal defendants say that the relief sought by the plaintiff in paragraphs 1(a)(i), (ii), (iii) and (v) for declarations relating to what must happen when the share redemption closes, are matters where there is no dispute and therefore no lis between the parties.

[135] I find that I have jurisdiction to entertain that part of the application for the relief sought in paras. 1(a)(i), (ii), (iii) and (v), as part of the court's role in the enforcement of the settlement agreement between the parties.

The Plaintiff's Application

[136] The plaintiff brings this application, he says, primarily to ensure there are no further delays in the payment to him of the value of his shares in QPPC. The plaintiff contends that the defendants have deliberately worked to delay the implementation of the settlement agreement. He says that they have manufactured hurdles and made unreasonable demands, using those as an excuse to delay agreement on closing documents and to pressure him to forgo pursuing remedies for their breaches of the settlement agreement.

[137] The plaintiff asserts that the relief he seeks in his application can be divided into five categories:

- (a) Specific performance of the settlement agreement. [The plaintiff] seeks orders to ensure that the redemption of his shares in a tax efficient manner will occur as soon as the purchase price is known. He also seeks an order ensuring that he receives interest on the millions of dollars required to be held by QPAC and QPPC for the purpose of payment to him since around June 2019;
- (b) Declarations of breach of the settlement agreement and court orders stemming from the defendants' failure or refusal to negotiate the implementation documents required in good faith and in a timely way;
- (c) Declarations of breach of the settlement agreement and court orders stemming from the defendants' failure or refusal to use best efforts to pursue wind-ups and obtain clearance certificates at the earliest possible date, and from their actions regarding the funds required to be used to purchase [the plaintiff]'s shares;
- (d) Damages for breach of the Settlement Agreement and the court orders, in the amount of the professional fees [the plaintiff] has paid necessitated by the defendants' breaches; and
- (e) Special costs of this application.

[138] I will approach the plaintiff's application using roughly these categories, to which I will add the breaches of the order of Abrioux J. of July 4, 2018 alleged by the plaintiff, which I address separately.

- (a) Specific Performance

[139] The interpretation of a settlement agreement is appropriately resolved by application to the court in the proceedings from which it arose: *Accredit Mortgage Ltd. v. Whiskey Landing Developments Ltd.*, 2018 BCSC 1243 at para. 33.

[140] The plaintiff relies on s. 10 of the Law and Equity Act, R.S.B.C. 1996, c. 253; Rule 9-7 of the Civil Rules; and the inherent jurisdiction of this Court for the relief he seeks.

- [141] As an exception to the general rule that a new cause of action cannot be advanced within an action which has been entirely resolved by way of a settlement agreement, s. 10 of the Law and Equity Act authorizes the court to enforce settlement agreements in an existing action.
- [142] The orders sought for specific performance are set out in para. 1(a) of the plaintiff's notice of application.
- [143] The personal defendants argue, and I agree, that there is no dispute over the declarations sought in paras. 1(a)(iii) and (v), so a declaration from the Court will have no practical effect and should not be made. As I will elaborate on later in these reasons, with respect to subparagraph (iii), the parties have agreed that a tax holdback agreement is no longer required. With respect to subparagraph (v), QPPC has now consented to a transfer of RWS shares to the plaintiff's newly-formed company. I therefore decline these parts of the relief sought by the plaintiff.
- [144] With respect to para. 1(vi), the plaintiff correctly points out that ss. 9 and 10 of the settlement agreement state that the release and notice of discontinuance are not required until all obligations under the settlement agreement are complete, and argues that the defendants are not entitled to the mutual release or notice of discontinuance of this action upon the redemption of his shares.
- [145] The plaintiff argues that the redemption of his shares is not the end of the defendants' obligations under the settlement agreement so long as the defendants' obligations to pay interest and costs are still outstanding. In the result, he says that the defendants should not be permitted to withhold payment for his shares on the basis that he has not provided them with the mutual release and notice of discontinuance.
- [146] The personal defendants agree that while they did seek to include specific exchange timing as part of documenting the completion of all transactions for the sake of completeness, as the plaintiff has refused those arrangements, the defendants abandoned their request therefore. They say that the share certificates for the shares of QPPC being purchased at the price to be set by the arbitrator are being held on conditions by the solicitors for QPPC, and that assuming delivery of those shares, no release or discontinuance is sought as a condition of the payment of the purchase price.
- [147] The defendants consent to the relief sought in para. 1(a)(vi), so I will make that declaration.
- [148] But I do not accept that all of the terms of the settlement agreement are inoperative until the arbitrator's valuation award is made.
- [149] I turn to the remaining terms on which the plaintiff seeks specific performance.

Completion of the Settlement Agreement -- paras. 1(a)(i) and (ii)

- [150] The plaintiff contends that as soon as the purchase price for the plaintiff's shares is known, the defendants are required to pay the purchase price to the bank account directed by him. He seeks an order or declaration that the closing documents in the form his counsel proposes, with the applicable dates and dollar amounts added, and no other documents, are required to be executed by the parties thereto within 48 hours of issuance of any arbitration award.
- [151] There appears to be a consensus amongst the parties that as soon as the fair value for the plaintiff's Class B shares is determined, QPPC must pay the amount specified in the award immediately as directed by him. A declaration from this Court of such an entitlement is thus unnecessary.
- [152] The plaintiff says the only closing documents required are those necessary to transfer the plaintiff's shares and ensure that the redemption is tax effective for him. He asserts that in order to enforce the settlement agreement and to prevent further delays and applications, this Court should order that the closing documents presented by the plaintiff on February 19, 2021 are the totality of the documents required to be executed by parties to complete the share redemption.
- [153] The personal defendants contend that the closing documents attached to the plaintiff's application contain errors that have been corrected, or terms that are already in the settlement agreement and are unnecessary. They say that QCCP, and the personal defendants as directors, have corrected and will execute the closing documents and return them to the solicitors for the plaintiff upon the handing down of the valuation award. They say that this renders this aspect of the plaintiff's application unnecessary.
- [154] The personal defendants contend that with the exception of one document, the proposed closing documents are not objectionable. The document in issue is described as directions for share redemption. These defendants contend that it is an improper attempt to extend the terms of the settlement agreement. They argue that this does not mean an order requiring them to be signed and/or delivered is appropriate.
- [155] There is no present requirement that the closing documents be executed, and I therefore decline to grant this order or declaration in the anticipation that appropriate documents will not be executed when required.
- [156] In the result, I find that the relief sought in paras. 1(a)(i) and (ii) of the plaintiff's notice of application is premature. Those paragraphs are for declarations relating to what must happen according to the settlement agreement when the share redemption closes, and they will have no practical effect.

Interest -- para. 1(a)(iv)

- [157] The plaintiff submits it was an implied term of the settlement agreement that he would be entitled to a reasonable rate of interest earned on the funds that QPPC was required to set aside for the purchase of his shares, or, at minimum, the amount actually earned by QPAC or QPPC.
- [158] The personal defendants agree that the issue of the plaintiff's entitlement to interest, if any, is a matter that is properly before me. They argue that the plaintiff's claim for interest is not provided for in the settlement agreement and should not be implied. The corporate defendants also oppose the plaintiff's claim for interest.
- [159] As explained above, the purchase of the plaintiff's shares was to be funded by the sale of Australian real estate, once obtained by the defendants. The net proceeds from the sale of that real estate (the "Redemption Funds") were to be paid via dividends to QPPC in Canada. Those dividends were to be franked to the extent possible and paid to the plaintiff once the value of his shares was either agreed to, or determined by arbitration.
- [160] After the sale of QPAC's assets in Australia, over 100,000 AUD was paid in dividends by QPAC to QPPC from January to April, 2020. Almost 40,000 AUD was paid in tax on April 29, 2020.
- [161] A portion of the funds were set aside in an account at a Canadian financial institution, pending the conclusion of the arbitration, to purchase and redeem the plaintiff's shares of QPPC. The funds were eventually placed in an interest-bearing trust account.
- [162] The plaintiff contends that it is implied in the settlement agreement that QPPC would hold the Redemption Funds for the purpose of redeeming his shares, and that he would have an entitlement to those funds (in exchange for his shares) from the valuation date for his shares. He says the settlement agreement repeatedly ties the timing of the sale of the Australian assets and receipt of the Redemption Funds by QPPC to QPPC's obligation to redeem the plaintiff's shares. For example, he contends that s. 1(d) of the settlement agreement ties the valuation date for the plaintiff's interest in QPPC to the timing of the sale of the Australian assets, because that timing dictates when his shares will be redeemed.
- [163] The plaintiff contends that given the delay in implementing the settlement agreement, he is entitled to interest on the value of his shares (once that is known), despite the absence of a reference to interest in the settlement agreement.
- [164] As described by Mr. Justice Iacobucci in *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619 [M.J.B.] at para. 27, a term may be implied in a contract in three circumstances:
- (a) Based on custom or usage;
 - (b) As the legal incidents of a particular class or kind of contract; or

- (c) Based on the presumed intention of the parties where the implied term must be necessary "to give business efficacy to a contract or as otherwise meeting the 'officious bystander' test as a term which the parties would say, if questioned, that they had obviously assumed".
- [165] In considering the "business efficacy" of the contract, or the "officious bystander" test, it is important to focus on the intentions of the actual parties and not the intentions of reasonable parties. The key element is that the implied term is more than just reasonable; it is necessary to make the contract as the parties intended. That is, without the term, the contract, as intended by the parties, would not be effective: *Moulton Contracting Ltd. v. British Columbia*, 2015 BCCA 89 at paras. 54-58.
- [166] The plaintiff submits the parties intended he would be entitled to the benefit of the Redemption Funds from the valuation date of his shares. He argues that if the intention of the parties as to who would be entitled to interest on the Redemption Funds is ambiguous from the language used in the settlement agreement and evidence of the surrounding circumstances, the court can have recourse to the conduct of the parties in making their agreement and in fulfilling their obligations.
- [167] Indeed this assertion is supported by the reasons for judgment of Madam Justice Smith in *Athwal v. Black Top Cabs Ltd.*, 2012 BCCA 107 at paras. 44 and 47, but only if there is true ambiguity in the agreement.
- [168] The plaintiff submits that the way the parties have conducted themselves since entering into the settlement agreement shows that both parties see the portion of the Redemption Funds held for the purpose of purchasing the plaintiff's interest in QPPC as monies held for his benefit.
- [169] For example, the plaintiff points to QPPC's acknowledgement of an undisputed minimum amount he ought to be paid for his shares, and the fact that QPPC has sought the plaintiff's direction as to how the funds should be held. In addition, the plaintiff points to QPPC's own reference to the funds as "dead money" to the company.
- [170] The plaintiff contends that QPPC has agreed he is entitled to, at minimum, \$49.5 million in respect of his shares. He says QPPC has had the benefit of the Redemption Funds, and the interest earned on them, so it would not be commercially reasonable to interpret the settlement agreement in a way that incentivizes QPPC's delay in paying for the plaintiff's shares.
- [171] But as the defendants point out, the settlement agreement does not require payment for the shares until their valuation by agreement or as a result of arbitration, neither of which has yet occurred.

- [172] Although the plaintiff asserts that QPPC has ceased to treat him as a shareholder, counsel for the personal defendants says that he has not been barred from voting his shares, and could defeat a special resolution if he were to do so. He is also still entitled to his share of any shareholders' dividends, if they are declared.
- [173] The personal defendants say that the process for the purchase of the plaintiff's shares is fully set out in the settlement agreement, which requires the plaintiff to give up his QPPC shares in exchange for the payment of the fair market value for them. They point out that there is no provision in the settlement agreement for any interim payment on any minimum amount nor any provision for the payment of interest on the fair market value of the shares.
- [174] There is, of course, mention of interest in s. 7(a)(v) of the settlement agreement on the sum of \$50,000 for interest that was agreed to be payable to the plaintiff. This \$50,000 was one portion of the amount he was to receive in consideration for the settlement.
- [175] The corporate defendants say that the deal memorialized in the settlement agreement did not include that the plaintiff would be entitled to any interest on the value of his shares. They argue that no other shareholders are receiving interest on their share values. They say there is no evidence that any shareholder other than the plaintiff is seeking to sell their shares, and unless and until they do, they will benefit from any increase in their share values after the plaintiff's valuation date. On the other hand, if the value of the shares decreases, such other shareholders will suffer from any loss in their share value following the plaintiff's valuation date, whereas the plaintiff will not.
- [176] The corporate defendants correctly assert that the settlement agreement is a commercial contract requiring the purchase of shares on a specified closing date, and say that no words are necessary to be implied to give the agreement commercial efficacy.
- [177] Counsel for the personal defendants point out, and I accept, that if interest on the value of the plaintiff's shares was an implied term of the settlement agreement, there is no basis upon which the court could determine the rate of interest, the amount of interest payable, or the date from which interest would be owed.
- [178] The personal defendants contend that there has been no delay in payment that would attract interest, because the time for payment has not yet come. They also contend that there is nothing akin to any money judgment upon which interest could be ordered.
- [179] They say that the plaintiff rejected offers to pay the majority of the expected award amount, or to accept the amount in trust for his use. They argue this was a failure to mitigate on his part. Given my view on the plaintiff's entitlement to interest on the value of his shares, it is unnecessary for me to resolve the matter of mitigation.

- [180] The personal defendants say that the settlement agreement required that a sale of the Australian assets be pursued immediately, which was complied with. The completion of the sale of the last Australian asset was June 28, 2019. The disposal of the Australian assets triggered a requirement for accounting and tax reporting to be completed for the 2019 tax year in Australia, which the personal defendants assert was done on a time is of the essence basis at the earliest opportunity in early 2000.
- [181] The terms of the settlement agreement, to the extent possible, the proceeds of the sale of the Australian assets were to be transferred as "franked dividends" to QPPC was accomplished well before the required time, which was the later of the 'as soon as possible' or 'the completion of the valuation'.
- [182] The defendant Jamie William Robertson has sworn that s. 1(b) of the settlement agreement required the dividends to be franked to the extent possible. He asserted that the sales in 2019 did not create an income tax liability in 2019, from the perspective of the ATO (and as a result, did not generate franking credits). The related franking credits were generated in the 2020 calendar year, when the income tax liability was deemed to exist. In addition, a 15% withholding tax would need to be paid on unfranked dividends that were paid up to QPPC in 2019.
- [183] The personal defendants assert that QPPC gave notice as required by the settlement agreement and the July 4, 2018 order, and thereafter held and/or utilized the net sale proceeds as set out in the notice. They argue that at no time did the plaintiff respond to that notice or seek any orders requiring that the funds be treated in some other fashion even though the order permitted him to bring such an application.
- [184] In my view, as the settlement agreement made specific provision for interest on one component of its terms, the absence of such a reference for another of its terms suggests that the value of the plaintiff's shares, once determined, was not intended to bear interest.
- [185] As I have already said, the plaintiff was entitled to enjoy any dividends payable to shareholders, and to vote his shares.
- [186] I accept that the parties did not anticipate that it would take as long as it has to determine the value of the plaintiff's shares. However, as I have also observed, if the share value lessened between the valuation date, and the payment date, the other shareholders, and not the plaintiff, would share in that loss.
- [187] I move now from the parties' intentions to custom.
- [188] The plaintiff contends that his entitlement to interest is consistent with custom that oppressed shareholders are entitled to interest for their shares.

- [189] He relies on *Diligenti v. RWMD Operations Kelowna Ltd.* (1977), 4 B.C.L.R. 134 (S.C.), wherein Mr. Justice Fulton awarded interest on the sale price of shares where the conduct of the purchaser was found to be oppressive of or unfairly prejudicial to the applicant, thus bringing it within the ambit of s. 1 of the *Prejudgment Interest Act*, 1974 (B.C.), c. 65.
- [190] Mr. Justice Fulton reasoned that prejudgment interest was warranted because the respondent corporation "had the use of moneys which have been due to but denied to the applicant, who on his part, cannot be said in any real sense to have had any use or benefit of his shares in the meantime."
- [191] The plaintiff also relies on *689531 B.C. Ltd. v. Anthem Works Ltd.* 2009 BCSC 657, wherein I awarded interest to the plaintiffs for "the period of time that they had no shareholders' rights, but were unpaid for their shares" (para. 27).
- [192] On this point, the corporate defendants assert that s. 9 of the settlement agreement, and the subsequent release negotiated under it, specifically release any claims that can be made by either party in this action. Oppression was one of the claims in this action and was vigorously defended. They contend that awarding interest as if those released claims had been proven is directly contrary to the agreement.
- [193] The personal defendants argue that the plaintiff's application for interest prior to the closing of the share redemption is not provided for in the settlement agreement nor should it be implied. They argue that such a requirement is inconsistent with any custom. The opposite, the custom is that interest is not paid on a commercial purchase transaction prior to closing where there has been no oppression and that the plaintiff's application is to enforce the very agreement that released and compromised oppression claims.
- [194] In *Cusac Industries Ltd. v. Erikson Gold Mining Corp.*, [1988] B.C.J. No. 1791 (C.A), Mr. Justice Macdonald referred to the test for the acceptance of evidence of custom and usage stated by Mr. Justice Duff, as he then was, in *Georgia Pacific Construction v. Pacific Great Eastern Railway* (1929) S.C.R. 630, where at p. 633 Duff J.A. said: "... the custom and usage must be reasonably certain and so notorious and so generally acquiesced in that it may be presumed to form an ingredient of the contract."
- [195] In this case, plaintiff adduced no such evidence before me, and no oppression claim was advanced before me.
- [196] I find that of the elements discussed in *M.J.B.*, the plaintiff has failed to establish that a term requiring the payment of interest could be based on custom or usage, or the legal incidents of a contract for the sale of shares. I also find that an inference warranting the payment of interest on the value of the plaintiff's shares is unnecessary based upon the intention of the parties to the settlement agreement nor necessary to give business efficacy to the agreement.
- [197] The relief sought in para. 1(a)(iv) of the plaintiff's notice of application is denied.

(b) Alleged Breaches of the Settlement Agreement

[198] In para. 1(c) of the plaintiff's notice of application, he alleges breaches of ss. 1, 1(a), 1(g), 2, 3, and 16, and Schedule A of the settlement agreement.

[199] The plaintiff alleges that the defendants have breached the settlement agreement because QPAC and QPPC failed to "take whatever steps are necessary" to pay him out "on a time is of the essence basis".

[200] The plaintiff refers to the preamble in s. 1 of the settlement agreement, which provides that:

The Parties agree to take whatever steps are necessary to pay out the plaintiff, either directly or to a company or trust at his direction, on a time is of the essence basis, his 28% interest in QPPC.

[201] The personal defendants contend that as the arbitrator has not yet determined the value of the plaintiff's shares, none of the terms of the settlement agreement that are due to be performed have not been performed.

[202] The corporate defendants contend that any alleged breach of the settlement agreement was inadvertent, and was only in relation to timing. They contend that given the nature and purpose of the settlement agreement, and its structure and mechanics, there was no breach, and that any potential breach did not cause any damage to the plaintiff.

[203] The plaintiff's contention that the defendants have failed to pay him out "on a time is of the essence basis" ignores the provision in the settlement agreement for the arbitration of the value of the shares before the plaintiff is entitled to any payment for his shares. That is, s. 1(g) of the settlement agreement provides that the share redemption shall be completed on the later of the receipt of funds in QPPC or as soon as the valuation contemplated by the agreement is completed.

[204] I find that the defendants have not breached s. 1 of the settlement agreement.

[205] The personal defendants also argue, more generally, that the plaintiff's application is predicated on the fallacy that s. 1(g) of the settlement agreement does not exist.

[206] It is unnecessary for me to comment on this submission, other than to say that I find the relief sought with respect to s. 1(g) of the settlement agreement to be, at a minimum, premature. That section states that the redemption of the plaintiff's shares cannot be completed before the receipt of the redemption funds in QPPC. I decline to grant this part of the relief sought by the plaintiff at this time.

[207] I note also that the personal defendants contend that they are not yet required to declare franked dividends under the settlement agreement. I am unable to read s. 1(g) of the settlement agreement that way. That clause refers to the payment, not the declaration of such dividends.

- [208] The plaintiff also asserts that QPAC failed to pay the Redemption Funds to QPPC "as soon as practicable" after receipt of the sale proceeds from the sale of the Australian assets. He contends that QPAC and QPPC have failed or refused to provide an accounting of the Redemption Funds or to otherwise advise what it has done or intends to do with the Redemption Funds that he contends s. 1(a) of the settlement agreement requires.
- [209] The personal defendants accept that the settlement agreement required the sale of the Australian assets and the movement of sufficient funds to pay the net sale proceeds into Canada. They assert that these steps occurred long ago and that the necessary Australian tax clearance certificates have since been obtained.
- [210] The Australian assets were sold by June 2019, but the Redemption Funds were not paid to QPPC until January 2020.
- [211] The defendants contend that if there was any "delay" in movement of the proceeds up to Canada, it was due to the fact that it was not possible to pay franked dividends on income realized in 2019 until the 2019 tax year ended, and much of those dividends were paid within 20 days of that year end.
- [212] While I am not persuaded that any damage could have occurred to the plaintiff if the payment of the Redemption Funds was not made to QPPC as soon as practicable, I find that the plaintiff is entitled to know when these funds were in fact recovered by QPAC and when they were paid to QPPC, and I order that both the corporate and personal defendants provide that information to the plaintiff forthwith.
- [213] In my view, for the plaintiff to enjoy the benefit of s. 1(a) of the settlement agreement, he must be given the information he seeks with respect to the proceeds from the sale of the Australian assets. In the result, I adjourn paras. 1(c) and (e) of the plaintiff's application generally to allow him to review the documents and information I have order disclosed. He has liberty to reset that part of his application if he wishes to do so after reviewing the documents and information.
- [214] Similarly, I find the relief sought with respect to s. 1(b) of the settlement agreement premature.
- [215] The plaintiff alleges that the defendants failed to apply for tax clearance certificates within 30 days after their final tax returns were filed, as required by s. 2 of the settlement agreement. I am not persuaded that the plaintiff requires further information to advance this assertion, and will make no order with respect thereto. Even if this assertion is true, I am unable to conclude that such a failure has had any effect on the plaintiff's interests and will therefore make no order with respect to this complaint.
- [216] I also address s. 2 of the settlement agreement below where I consider the relief claimed in para. 1(d) of the plaintiff's notice of application.

- [217] With respect to s. 3 of the settlement agreement, the plaintiff contends that QPPC refused to structure the share redemption in a manner that is tax effective for him where it has no adverse implications on his siblings. I am not persuaded that the plaintiff has made out this complaint.
- [218] There is also agreement amongst the parties that pursuant to s. 3 of the settlement agreement, the plaintiff is entitled to his proportionate share of no less than 28% of the value of all tax attributes, not already factored in the valuation, generated as a result of the disposal of QPPC's assets or that the plaintiff is entitled to the redemption of his shares to be structured in a manner that is tax effective for him, where it has no adverse implications on his siblings. A declaration from this Court of such an entitlement is thus similarly unnecessary.
- [219] The plaintiff also alleges the defendants delayed and failed to negotiate the closing documents in bad faith, in breach of s. 16 of the settlement agreement. I do not agree, for the reasons I explain below with respect to para. 1(d) of the plaintiff's notice of application.
- [220] Although the plaintiff alleged that Schedule A of the agreement has been breached, I heard no submissions with respect to that allegation. The Schedule addresses "Valuation Principles and Procedures" and it is, at minimum, premature to deal with this Schedule.
- [221] In the result, para. 1(c) of the plaintiff's notice of application, along with para. 1(e), is adjourned.
- (c) Failure or Refusal to Negotiate the Implementation Documents in a Good Faith and Timely Way
- [222] The plaintiff raised this matter in para. 1(d) of his application before me.
- [223] In essence, the plaintiff argues that the defendants have not used their best efforts to press forward the timetable to implement the settlement agreement. He contends that the defendants have failed or refused to instruct their solicitors to draft the required comprehensive documentation to implement the settlement agreement, and failed or refused to negotiate the terms of any remaining required documents to implement the settlement agreement honestly and in good faith. The defendants deny these allegations.
- [224] The plaintiff contends that reading the settlement agreement as a whole, it is clear that the parties intended that he would be paid out his 28% interest in QPPC as quickly as reasonably possible. He contends that the parties agreed broadly to "take whatever steps are necessary to payout the plaintiff... on a time is of the essence basis, his 28% interest in QPPC, and will agree in particular as follows..." The plaintiff asserts that the obligation to take steps on a time is of the essence basis is not limited to those steps set out in the subsections of s. 1. He says the obligation applies to "whatever steps are necessary."

- [225] The plaintiff asserts that QPPC's unreasonable behaviour breached the requirements of the settlement agreement to take whatever steps are necessary to pay him out on a time is of the essence basis.
- [226] Specifically, the plaintiff submits that the defendants have failed to use their best efforts to attempt to negotiate and conclude the form and terms of a share redemption agreement referred to in s. 16 of the settlement agreement and para. 2 of the January 21, 2020 order. The plaintiff also submits that the defendants have failed to use their best efforts to negotiate and conclude a tax holdback agreement as required by ss. 2 and 16 of the settlement agreement and para. 3 of the January 21, 2020 order.
- [227] He contends that, contrary to the language of the settlement agreement, the defendants have sought to impose terms that were clearly not required by the settlement agreement and which are not appropriate. He says this prevented the parties from being able to finalize the closing documents and is a failure on the part of the defendants to use best efforts to negotiate the closing documents. He contends QPPC has insisted that he indemnify QPPC for potential tax liabilities; that he alone, as opposed to other shareholders, provide a holdback amount for tax liabilities not contemplated by the settlement agreement; that he provide a holdback for tax liabilities for which there was no evidence of any potential taxes owing; and that he abandon the claims in this application in order to proceed with a reorganization to make the redemption tax efficient for him.
- [228] The personal defendants concede that they attempted to negotiate some valuation principles and a holdback in making s. 2 of the settlement agreement. They say that the holdback was for taxes (income taxes payable as a result of a Canadian audit by the Customs and Revenue Agency, any tax implications relating to the deemed disposition process, any tax implications relating to proposed transactions in the settlement agreement, and any Australian tax issues). They say that the parties acknowledged that s. 2 required clarification.
- [229] The plaintiff argues that there is no requirement in the settlement agreement for him to give an indemnity. He says that the settlement agreement refers to "an allowance", and a "holdback", but does not contemplate an indemnity.
- [230] The attempted purpose of s. 2 does appear to have been to institute a holdback to cover any potential tax liabilities. While the parties attempted to negotiate a holdback agreement, then an indemnity in its place, they were unable to do so. All of the potential tax liabilities in October 2018 are no longer potential. Therefore there is no need for any holdback from the purchase price. I find that the claim for a breach of s. 2 is academic, because the clause never took effect and therefore was not breached.
- [231] In his affidavit #11, sworn April 24, 2009, Reg Stewart stated:

For the reasons set out in this affidavit, the defendants have made a good faith effort to implement the SA but Roy has not. The settlement in the SA is to be accomplished in three stages: (1) an end to the litigation and the legal costs of defending it (2) a monetary payment to Roy for his monetary claims in return for his signed release of those claims, and (3) buying Roy out of QPPC and the Stewart Trust by distributing shares to him (or to his new holding company) and having him sell them back to QPPC in return for money (with Roy receiving his fair share of tax attributes but also paying his fair share of any CRA reassessment of QPPC or the Stewart Trust).

[232] The plaintiff contends that QPPC did not "leave no stone unturned" or attempt to press forward the timetable to conclude the share redemption agreement. From late February 2020 to late May 2020, QPPC did not respond to the plaintiff's comments on the most recent draft, or circulate a revised draft.

[233] The plaintiff contends that when QPPC did respond, its position was that the parties were "at an impasse". It provided a wholly new draft, incorporating terms that were inappropriate and not required, which had already been rejected for that reason, rather than negotiating based on the comments provided by Roy to work towards a compromise.

[234] The plaintiff also complains that he was not provided with comments on draft agreements that his advisors provided to the advisors of some of the corporate and personal defendants.

[235] In his affidavit sworn April 16, 2021, Craig Young stated:

8. I have been negotiating the redemption and/or purchase/re-purchase (all of which I refer to interchangeably) of the QPPC Shares held by Mr. Stewart with Mr. Wickstrom and Mr. Ullrich since October, 2019. Although several drafts of agreements intended to effect the redemption of the QPPC Shares were exchanged between myself, Mr. Wickstrom and Mr. Ullrich, we were not able to agree on certain issues. From my perspective, the main points of disagreement were as follows:
 - a) the amount and duration of the various tax holdbacks required for existing and potential Canadian income tax liabilities and potential Australian income tax liabilities on the wind-up of Quadra Pacific (Aust.) Corp Pty. Ltd. and Quadra Pacific Management Pty. Ltd.;
 - b) whether all the shareholders of QPPC were required to contribute to the various tax holdbacks or only shareholders whose shares were being redeemed by QPPC prior to the resolution of the existing and potential Canadian and Australian income tax liabilities;
 - c) whether Mr. Stewart should indemnify the Defendants for unascertained tax liabilities from before June 18, 2019 but that are not determined until after QPPC has redeemed Mr. Stewart's shares;

- d) whether the share rights and restrictions to be attached to the new class of common shares (the "Class C Shares") that were to be created in the capital of QPPC as part of a pre-closing tax reorganization proposed by Mr. Stewart (referred to as the "Alternative Transaction") would require QPPC to declare a dividend on the Class C Shares held by Mr. Stewart or RWS if QPPC declared a dividend on the issued Class B shares;
 - e) the amount of costs that QPPC could charge Mr. Stewart in respect of time spent by the directors of QPPC and costs incurred by QPPC to implement the Alternative Transaction;
 - f) whether the Share Redemption Agreement should include a provision for any potential interest payable to Mr. Stewart on the price paid for his QPPC Shares prior to closing; and
 - g) whether there should be a Statement of Adjustments included in the Share Redemption Agreement for ancillary matters such as an award of costs by the Court or the arbitrator.
9. With respect to the issue set out in subparagraph 8(b) above, QPPC consistently took the position that every shareholder of QPPC whose shares were being redeemed prior to the resolution of those tax liabilities would be required to contribute to the holdback. Mr. Stewart took the position that all shareholders of QPPC were required to contribute to the holdbacks whether their shares were being redeemed or not. Since no funds were being paid to any shareholder, other than Mr. Stewart, I was never able to identify from what the funds would be held back.
38. The delay that appears in the chart above between May 28, 2020, when I sent Mr. Wickstrom a new draft, and September 20, 2020, was Mr. Wickstrom's delay. I was not concerned about the delay, however, because I was aware that between June and September 2020, the form of agreements, and the Alternate Transaction proposed by Mr. Stewart to assist in his tax planning, and solutions to the tax holdback issues, were being discussed between David Thompson and Mr. Stewart's tax advisor, Mr. Foreman. In my view, the process to resolve the form of agreements have continued between the parties, with the involvement of all four of the solicitors/advisors, in a timely fashion.
- [236] The corporate defendants take the position that under the order of January 21, 2020, both parties had the obligation to use best efforts to reach agreement on closing documents. The corporate defendants contend that they did so. The remedy specified if either party did not use best efforts to reach an agreement, they could bring an application for directions. The corporate defendants say no such application was made, the form and terms for closing are now agreed upon, and no court orders are required.
- [237] The plaintiff contends that QPPC insisted on adding or modifying parts of the settlement agreement at various times since it was signed. This is true, but so too did the plaintiff. Much of the time spent by their various lawyers and advisors since the agreement was signed has been occupied by the plaintiff and QPPC trying to adapt the agreement to changing circumstances and their own interests. That these parties and their advisors no doubt spent precious time, both figuratively and literally, in these attempts cannot be laid at

the feet of either of these parties, as either could have insisted upon strict compliance with the terms of the agreement, and refused to attempt to seek mutually acceptable modifications or workarounds.

[238] Alternatively, they could have sought directions from the court as the plaintiff did, on two prior occasions.

[239] The plaintiff also argues that QPPC unreasonably objected to his intention to transfer ownership of RWS to Numco (a newly created company wholly owned by him) for tax purposes. He says this in itself is a breach of the settlement agreement, and he says the defendants used this objection as an excuse to further delay completion of the closing documents.

[240] The personal defendants assert that a share distribution agreement dated May 28, 2019 had been successfully negotiated, and specifically contemplated the plaintiff's requested tax planning activities by including a single "intervening corporation" wholly owned by the plaintiff, RWS, providing options for the plaintiff to utilize RWS in his tax planning. They submit that when the solicitors for the plaintiff disclosed an intention to utilize a second intervening corporation to transfer the shares of RWS to a numbered company, Numco, it became clear that if that intention was to be realized, the shares would not be wholly owned by the plaintiff. Objection was made that unless assurances were provided, Numco would be bound by the share distribution agreement.

[241] It is clear that on April 7, 2021, the plaintiff and Numco, through their counsel, agreed that Numco would be bound by the provisions of the share distribution agreement, and QPPC subsequently consented to a transfer of RWS shares to Numco.

[242] In my view, the actions of QPPC with respect to the transfer of RWS shares to Numco was not an unreasonable delay. As I have indicated above in para. 104, counsel for the plaintiff was advised on April 9, 2021 that the defendants consented to the transfer of RWS shares to Numco, and there is no evidence that the plaintiff faced any detrimental consequences from this relatively late concession.

[243] The personal defendants contend that the negotiations between the solicitors had contemplated an orderly exchange of all required implementation documents and as a result addressed proposals and additional agreements with respect to exchange of share certificates, signed releases, discontinuances, and payment, in a comprehensive fashion.

[244] Clearly, the parties agreed to instruct their solicitors to draft the required comprehensive documentation to implement the agreement.

[245] The parties appear to be on common ground that due to the effluxion of time, the tax holdback contemplated by s. 2 of the settlement agreement is no longer necessary, as no tax liability materialized in the categories for which the holdback was contemplated, nor could they at this stage.

- [246] The plaintiff nonetheless complains that QPAC and QPPC could have confirmed the fact that no further taxes were owing much earlier by pursuing the wind-ups, applying for and obtaining tax clearance certificates as soon as possible. He asserts that the failure to take such steps as soon as possible was a breach of the terms of the settlement agreement by QPAC and QPM that they relied upon as justifying their continued insistence upon a tax holdback, when one ought no longer to have been necessary. He contends that the delay caused him to incur unnecessary time and expense.
- [247] In my view, the delay in the resolution of the holdback issue was just one part of the ongoing disagreements between the parties, and I am unable to attribute any specific loss of time or any specific expense incurred by the plaintiff with respect to this discreet issue.
- [248] The corporate defendants contend that they have used their best efforts to attempt to negotiate and conclude the share redemption and tax holdback agreements as required by paras. 2 and 3 of my order of January 21, 2020, and have complied with para. 4 of that order and paras. 3, 4, 5 and 6 of the order of July 4, 2018.
- [249] The corporate defendants point out that unlike the facts in *K.W. Wall & Associates Ltd. v. Labourer's Pension Plan of British Columbia*, [1990] B.C.J. No. 1892 (S.C.) [K.W. Wall], relied on by the plaintiff, the personal defendants at bar do not rely on 'inevitable failure'. Instead, the defendants submit that all parties have used best efforts to negotiate the closing documents that are required by the settlement agreement.
- [250] Quite apart from solicitor client privilege, I am not persuaded that the plaintiff has proven that the defendants breached the settlement agreement by failing to instruct their lawyers to negotiate in good faith, and I dismiss the relief sought by the plaintiff in para. 1(d) of his notice of application.
- (d) Failure or Refusal to Use Best Efforts to Pursue Wind-ups and Obtain Clearance Certificates
- [251] The plaintiff seeks declarations of breach of the settlement agreement and court orders stemming from the defendants' failure or refusal to use best efforts to pursue wind-ups and obtain clearance certificates at the earliest possible date, and from their actions regarding the funds required to be used to purchase the plaintiff's shares.
- [252] The term best efforts was considered by Madam Justice Dorgan in *Atmospheric Diving Systems Inc. v. International Hard Suits Inc.* (1994), 89 B.C.L.R. (2d) 356 (S.C.) [Atmospheric Diving Systems]. After reviewing a number of authorities, Dorgan J. concluded that:
- 71 In summary, the principles extracted from the cases on the issue of "best efforts" are:
1. "Best efforts" imposes a higher obligation than a "reasonable effort".
 2. "Best efforts" means taking, in good faith, all reasonable steps to achieve the objective, carrying the process to its logical conclusion and leaving no stone unturned.

3. "Best efforts" includes doing everything known to be usual, necessary and proper for ensuring the success of the endeavour.
4. The meaning of "best efforts" is, however, not boundless. It must be approached in the light of the particular contract, the parties to it and the contract's overall purpose as reflected in its language.
5. While "best efforts" of the defendant must be subject to such overriding obligations as honesty and fair dealing, it is not necessary for the plaintiff to prove that the defendant acted in bad faith.
6. Evidence of "inevitable failure" is relevant to the issue of causation of damage but not to the issue of liability. The onus to show that failure was inevitable regardless of whether the defendant made "best efforts" rests on the defendant.
7. Evidence that the defendant, had it acted diligently, could have satisfied the "best efforts" test, is relevant evidence that the defendant did not use its best efforts.

[253] The plaintiff referred me to the decision of Mr. Justice Cowan in *K.W. Wall*, where he held that a party who had waited four months to deal with a misunderstanding in relation to the negotiation of a lease had not used "best efforts" or acted "as quickly as possible".

[254] Similarly, in *CSRS Ltd. v. Embley*, 2007 BCSC 363 at para. 78, rev'd in part 2008 BCCA 533, Madam Justice Ross found that parties did not make best efforts to conclude a written contract where they did not take steps "such as sending along a draft agreement or attempting to press forward the timetable."

[255] As Dorgan J. explained in *Atmospheric Diving Systems*, a best efforts provision carries with it a "significant onus". The obligation imposed by a "best efforts" standard is to take, in good faith, "all reasonable steps to achieve the objective, carrying the process to its logical conclusion and leaving no stone unturned." The obligation is to use best efforts, not second-best efforts. The element of reasonableness is judged objectively. The fact that the failure was inevitable does not excuse a party from the obligation to use best efforts. The onus to show that failure was inevitable rests on the respondent.

[256] The plaintiff contends that QPPC and QPAC failed to advise him of the steps they took or will take to obtain Australian tax clearance certificates on a timely basis as contemplated by para. 4 of the January 21, 2020 order or take all reasonable steps to wind-up QPAC and QPM at the earliest possible date as contemplated by para. 5 of the January 21, 2020 order.

[257] The plaintiff also argues that, in breach of the settlement agreement, QPAC and QPM failed to appoint a liquidator in a timely fashion, and have never explained why the appointment of the liquidator was postponed until November 2020, when the sale of the buildings was completed around June 2019. This alleged breach relates to s. 1(a) of the settlement agreement.

[258] The personal defendants contend that the Australian companies took all the required steps on a time of the essence basis.

[259] In his affidavit #3, sworn January 17, 2020, Jamie Robertson stated:

The Assets were sold in 2019 as soon as was possible, on a "time of the essence basis", and to my knowledge the plaintiff was informed of each sale contract, each acceptance, and the requirement to give notice was met in each sale.

[260] The corporate defendants say the commencement of the liquidation and winding up of QPAC and QPM was delayed by a lawsuit and a contractor dispute. In October 2019, a year after the settlement agreement was signed, QPM was sued over an alleged slip and fall. The advice received from a lawyer and the liquidator was it would be best to wait until the lawsuit was resolved before commencing the windings up. A contract dispute lasting six weeks was resolved in August 2020. The personal defendants say after those two matters were resolved, the windings-up could have proceeded unimpeded, but for this application, which is now delaying the windings-up.

[261] In his affidavit, sworn April 19, 2021, Mr. Briody stated:

9. The winding up of the operations of QPAC and QPM was delayed primarily by three events:
 - (a) The service on QPM of a personal injury lawsuit on 18 October 2019 from an alleged slip and fall in the forecourt of 288 Edward Street in September 2017. This personal injury suit was passed to the company's insurer to be dealt with. We were advised on 10 June 2020 that the lawsuit was completely resolved;
 - (b) A contract dispute with Cox Gomyi in relation to work done on 288 Edward Street, which commenced on 22 June 2020 and was resolved on 5 August 2020; and
 - (c) COVID-19.
10. The personal injury lawsuit delayed the commencement of the winding up. In early March 2020 I exchanged emails with Erin Martin of HWL Ebsworth lawyers. She advised me that the personal injury suit had been resolved at a compulsory conference but that it would take a further two months to complete the resolution of the matter because releases were required from Centrelink and Medicare. I asked her if we had to wait two months before the winding ups could begin and she advised "yes" and that it would be prudent to wait. She further advised that the existence of an unresolved legal claim may impact the ability of the companies to be wound up and increase costs. Now produced and shown to me and marked Exhibit "A" is a true copy of an email exchange I had with HWL Ebsworth in this regard.
15. Once the personal injury suit and contract dispute referred to above were resolved, being as of 5 August 2020, QPM and QPAC were able to prepare tax returns for the period 1 January 2020 to 31 August 2020. Those tax returns were completed on 15 September 2020 and lodged on 20 September 2020.

- [262] The personal defendants also contend that once these disputes were resolved, other steps had to be taken. They say that final tax returns were prepared and lodged on September 20, 2020 and audit reports then signed.
- [263] The personal defendants argue that the final known tax liability was paid on October 14, 2020. At that time, in October 2020, the companies were ready to be handed over to the liquidator. They say that in November and December 2020 the liquidator filed the necessary forms with the Australian Securities and Investments Commission including inviting formal proofs of debt.
- [264] The personal defendants say that the liquidator prepared documents relating to superannuation guarantees, business activity statements and PAYG withholding reports. They say that the liquidator was informed on December 17, 2020 that the documents had been lodged with the Australian Tax Office, and that there was no point in applying for tax clearances until those documents were lodged. The liquidator did apply for tax clearance certificates on December 23, 2020, and they were received on February 19 and March 8, 2021.
- [265] As the difficulties relating to the liquidation of the Australian companies have been addressed, I see no practical benefit in issuing any declaration with respect thereto, and find that the plaintiff has proven no damages from the failure to achieve an earlier winding up of the companies.
- [266] Moreover, the personal defendants contend, and I accept that it was the operations of the Australian companies, but not the corporate entities themselves, that were required to be wound up as soon as practicable, and that they were by the sale of the three assets in sufficient time to allow a cash valuation of QPAC.
- [267] The personal defendants contend that in any case, the plaintiff has admitted that the winding up of the companies themselves, if required, is not required until after the valuation of QPPC and the redemption of the plaintiff's shares, which has not yet occurred.
- [268] In the result, I find that the plaintiff has not made out his allegation that the defendants did not use best efforts to wind up the operations of the Australian companies, or the companies themselves, on a time is of the essence basis.
- (e) Alleged Breaches of the July 4, 2018 Order
- [269] These allegations arise in para. 1(h) of the plaintiff's application.
- [270] The plaintiff contends that the July 4, 2018 order of Abrioux J. forms part of the factual matrix at the time the settlement was entered into, as that order reflected his interest in the proceeds of sale of the Australian assets. Under the order, he contends that QPAC and QPPC were required to advise him as to how the proceeds were used, and that he was entitled to bring an application for interim relief if they were used in a way he considered improper.

- [271] The plaintiff contends that his special interest in these funds was continued by the provisions of the settlement agreement which imposed obligations on the defendants on the use of the Redemption Funds, and by continuation of the effectiveness of the July 4, 2018 order.
- [272] The plaintiff alleges that QPAC and QPPC failed or refused to provide an accounting of the Redemption Funds or to otherwise advise what it had done or intended to do with the Redemption Funds as required by paras. 5 and 6 of the July 4, 2018 order.
- [273] Pursuant to para. 5 of that order, QPAC agreed that prior to disbursing the proceeds of sale of any of the Australian assets, it would give the plaintiff 30 days prior notice in writing and would advise him of what QPAC intended to do with the proceeds, if they were to be used for any purpose other than closing costs, in the ordinary course for the purpose of the sale, payment of management fees to QPPC or QPM, or for repayment of loans or payment of dividends to QPPC.
- [274] Pursuant to para. 6 of the same order, QPPC agreed that after it received the proceeds of sale of the Australian assets, prior to doing anything with the funds other than declaring a dividend or distribution payable to the Stewart trust and the plaintiff, it would give the plaintiff 30 days prior notice in writing and would advise what it intended to do with the funds received.
- [275] On December 5, 2019, Mr. Deshon gave notice that QPPC expected to receive dividends from QPAC between January 6 and 10, 2020, stating that QPPC expected that the total dividends would range between \$98-104 million Australian dollars. He stated that foreign exchange contracts to convert the dividends to Canadian dollars would be settled on January 15, 2020.
- [276] In that letter, Mr. Deshon also said "QPPC intends to invest the CAD funds in short-term interest bearing investments until Roy Stewart's interest in QPPC is valued and paid to him. QPPC intends to retain those CAD funds that are excess to the amount needed to acquire Roy's shares as operating funds to deploy in its operations without further notice to him."
- [277] The plaintiff complains that Mr. Deshon did not advise how much QPPC intended to invest in short-term interest earning investments or how much it intended to deploy in its operations without further notice to him.
- [278] Since then, counsel for the plaintiff has sought information from the defendants, including about the specific amount held in short term interest-bearing investments, without success.
- [279] The plaintiff says the defendants have refused to confirm: the precise amount of the proceeds of sale from the Australian assets; the amount of Canadian dollars received by QPPC on account of the proceeds of sale from the Australian assets; the interest earned by the Redemption Funds; and the amount that QPPC holds segregated for the purpose of paying to the plaintiff for his interest in QPPC.

- [280] The plaintiff contends that to the extent that the amount now held by Mr. Young's office in trust is insufficient to pay for the plaintiff's interest in QPPC plus any interest and costs awarded, this is a breach of the July 4, 2018 order, as it is inconsistent with their statement that they would hold sufficient funds in a short-term interest bearing investments. He also contends that the amount of interest on the funds required to redeem in excess of those funds held by Mr. Young are also relevant to the claim of interest.
- [281] The corporate defendants point out that the word "accounting" does not appear in paras. 5 or 6, and deny that the July 4, 2018 order required QPAC or QPPC to provide an accounting of the proceeds of sale. These defendants contend that the notices required were given. They also say that the plaintiff's application alleges refusals to confirm information that is not required to be given by the July 4, 2018 order.
- [282] The personal defendants contend that the order of July 4, 2018 does not require any "accounting" or reporting to plaintiffs counsel. They also argue that under that order the remedy specified if either party did not use best efforts was an application for directions, but that no such application was made.
- [283] In any event, the personal defendants maintain that the form and terms for closing are now agreed upon, prior to the earliest date for implementation or execution, and as such neither the directions sought nor a declaration of breach is necessary.
- [284] As I have stated above in paras. 212-213, I find that the plaintiff is entitled to more information than the defendants have been prepared to give him, and order the disclosure of some documents and information.
- [285] As I have explained, I am not satisfied that the failure to produce that information has resulted in any damage to the plaintiff, but I will adjourn this aspect of the plaintiff's application until he has had the opportunity to review the documents and information.

(f) Alleged Breaches of the January 21, 2020 Order

- [286] These allegations arise in para. 1(g) of the plaintiff's application.
- [287] The specific breaches of the January 21, 2020 order alleged by the plaintiff are:
- a) The defendants' failure to use their best efforts to negotiate and conclude the form and terms of the share redemption agreement;
 - b) The defendants' failure to use their best efforts to negotiate and conclude an agreement on the terms of a tax holdback agreement;
 - c) The failure of QPPC and QPAC to advise the plaintiff of the steps taken to obtain tax clearance certificates in Australia; and
 - d) The failure of QPPC and QPAC to "take all reasonable steps" to wind up QPAC and QPM.

- [288] These allegations have all been addressed above, and require no further comment.

(g) Damages

[289] The personal and corporate defendants say that the claims advanced in paragraphs 1(b), (f), and (i) for damages arising from alleged breaches of the settlement agreement are new claims, not suitable for disposition by summary trial.

[290] In *Son v. Kim*, 2009 BCSC 776, Madam Justice MacKenzie found it was not appropriate to enforce the settlement agreement at issue by summary judgment. At para. 44, MacKenzie J. determined:

In deciding whether to exercise that jurisdiction, the Court would refer to the body of authority which had grown in common law jurisdictions. The Court held that the main criterion would be whether the requirements of justice to the parties were best served by (1) a determination on affidavit evidence in the summary procedure (with possible cross-examination on the affidavits), or (2) an order directing a trial of an issue in the same action, or (3) an entirely different action, or otherwise. In making this determination, the Court must consider (1) the substance of the questions to be determined, (2) whether credibility was involved, (3) whether pleadings and discovery were desirable or necessary, and (4) any other factors which indicated proceeding in a particular way.

[291] The personal defendants also say that damages are not an available remedy for breach of a court order. They assert that if any court orders were breached, damages are not an available remedy for same. They say the appropriate remedy for a breach of a court order is not a declaration, it is an order to ensure compliance, perhaps followed by a contempt order, an enforcement order, or an order to punish a party who will not comply, such as a fine under Rule 22-8 of the Civil Rules, none of which are sought by the plaintiff.

[292] The corporate defendants support this submission and add that the plaintiff does not allege the deliberate disobedience of a court order. They say that even if the corporate defendants breached a court order, the breach was not deliberate and was certainly not intended to exhibit contempt for this Court or its orders.

[293] The personal defendants argue that the declarations of breaches of the settlement agreement sought by the plaintiff, even if proven, do not lead to any resulting damages, nor are they necessary to enforce the settlement agreement. They say that the plaintiff has suffered no damage arising out of the alleged breaches and no remedy or order other than an order dismissing the claims is appropriate.

[294] As I explain in the reasons below, I am not persuaded that the plaintiff is, at this time, entitled to any damages for the breaches he alleges.

- [295] The plaintiff contends that he is entitled to damages for the defendants' breaches of the settlement agreement and the order of January 21, 2020 in the amount of the extra professional fees necessitated by the defendants' breaches in the negotiation of the implementation documents. He also seeks damages for mental distress for breach of contract.
- [296] The plaintiffs have not made out any of the alleged breaches of the settlement agreement or court orders. However, in the event that I am wrong, I address their claim for damages.
- [297] As I have adjourned the disposition of the relief sought in para. 1(h), I will not address the damages aspect of that claim that arises in para. 1(i).
- [298] The plaintiff raised an entitlement to damages for breach of the settlement agreement in para. 1(f) of his application. As noted above, the plaintiff only seeks damages against QPPC.
- [299] The plaintiff seeks damages for what he asserts are unnecessary accounting fees incurred to date as a result of the breaches of the defendant QPPC. The damages so described consist of \$8,400 plus GST on account of additional fees charged by D&H Group LLP arising from the position taken by QPPC in relation to the alternative share exchange agreement and the transfer to RWS and the transfer of the RWS shares to Numco, \$12,738 plus GST on account of additional fees charged by D&H Group LLP arising from QPPC's position on the structure of the proposed partial payment to the plaintiff and \$20,650 plus GST on account of draft closing documents exchanged during the period when Mr. Broadbent was acting as counsel to QPPC, for a total of \$41,788 plus GST.
- [300] The share transfer requested by the plaintiff of February 12, 2021 was effected. The personal defendants argue that in the result, the plaintiff has sustained no damages due to any failure on behalf of any personal defendant to approve the transfer of QPPC shares from the plaintiff to RWS.
- [301] The personal defendants also say, and I accept, that the evidence presently discloses no loss or damage relating to any tax liability arising to the plaintiff as a result of the transfer of QPPC shares to RWS on February 12, 2021, or any loss or damage arising from the subsequent transfer of the RWS shares to Numco.
- [302] The corporate defendants argue that the parties signed an agreement that contemplated and required them all to undertake more work and incur costs. They say that while the settlement agreement does not contain an express term that the parties are responsible for their own expenses, the agreed compensation for the plaintiff in s. 7 of the settlement agreement included \$2 million payable to the plaintiff to cover his expenses. The corporate defendants say that there is no evidence that the added costs he is claiming exceed the allowance made for completion of the settlement steps in the action.

- [303] The personal defendants contend that the implementation of the settlement agreement is a complex and document intensive exercise. They say it was expected that parties would continue to bear expenses until the arbitration concluded, the valuation made, all aspects of the settlement agreement implemented, and the action discontinued.
- [304] Indeed, the plaintiff was paid \$2 million for legal, accounting and other professional costs as well as \$200,000 for "costs" incurred in the action under the settlement agreement. There is no evidence before me that the agreed amount was insufficient to cover the expenses that he has continued to incur since the settlement agreement was reached.
- [305] The corporate defendants argue, and I accept, that the \$8,400 claimed for the "alternate transaction" was work that had its genesis in Mr. Foreman's idea. The corporate defendants alleged that his work was deficient, requiring the defendants' advisors to do more work to address the deficiencies. While I am not prepared to make a finding of any deficiency of the work on the record before me, it is fair to say that the advisors for both the plaintiff and the defendants had to perform work to examine the alternate transaction, and I am not prepared to find that the plaintiff is entitled to be paid for this work done by his advisors.
- [306] The corporate defendants contend that the \$12,738 claimed for the costs thrown away on the partial payment or advance payment negotiations arose due to the demands of the plaintiff for an additional \$9 million payment, and the \$20,650 for the costs incurred while Mr. Broadbent was involved resulted in the timely completion of the share distribution agreement, to the benefit of the plaintiff, saving him substantial taxes.
- [307] As with the claim for the costs relating to the alternate transaction, I am not prepared to find that the plaintiff is entitled to be paid for this work done by his advisors.
- [308] The plaintiff also argues that he is also entitled to damages representing the reasonable rate of return that he would have been able to generate but for the defendants' breaches.
- [309] The corporate defendants agree with the personal defendants that s. 1(g) of the settlement agreement does not require the share redemption until the later of the receipt of funds in QPPC or as soon as the valuation is completed, and say that this was brought to the attention of the plaintiff's counsel on December 10, 2019. As the valuation has not been completed, the corporate defendants say that the plaintiff's application is premature.
- [310] As I have determined that the plaintiff's claims for the payment of his shares is premature, I dismiss his claim for damages representing the reasonable rate of return that he would have been able to generate, if he were to have been paid before his shares were valued.
- [311] As I have mentioned above, a part of the settlement agreement was that the plaintiff would be paid a total of \$5,050,000 by QPPC within 30 days of the agreement. Of this, \$760,000 was for general damages.

- [312] The corporate defendants argue that all parties incurred fees in negotiating the necessary documents, and experienced time that they feel was wasted during that process. Each view elements of the opposing party's positions as unreasonable.
- [313] The corporate defendants contend, and I agree, that no damages flowed from any failure on behalf of any of the corporate defendants to approve the transfer of QPPC shares from the plaintiff to RWS, and in any event, such approval has been given.
- [314] The corporate defendants contend, and I find that the plaintiff has not proven any tax losses as a result of the transfer of QPPC shares to RWS nor any losses arising from the transfer of the RWS shares to Numco.
- [315] As I have already found above, the parties to the settlement agreement each sought terms in addition to or arguably inconsistent with that agreement, trying to adapt the agreement to changing circumstances and their own interests.
- [316] I find that this was accepted by all sides, and has not caused any more expense to the plaintiff than it has to the defendants.
- [317] The plaintiff also seeks damages for mental distress for breach of contract.
- [318] The plaintiff stated in his affidavit #23 that:
72. In addition to the cost, it has caused me a great deal of stress and anxiety. I have been extremely frustrated by this process and have expended considerable time and energy in dealing - with the road-blocks, delays and prevarications on the part of the defendants. What was intended to have been a settlement conducted on a time is of the essence basis has now dragged out over 2 years, and I have yet to receive any payment for my common shares in QPPC. It took a lot of soul searching to make the agreement to liquidate my QPPC shares in October 2018. I made my decision based primarily on the basis that I would be paid out on a time is of the essence basis, and not 2 1/2 years later. I also felt at that time, that I still had the health and energy to use the share redemption proceeds to consider new ventures. As one gets older, these options start to become more limited. I would not seek investments reflecting my entitlement to at a minimum around \$50 million in capital value without having those funds in hand, as I am not prepared to accept that kind of risk. As a result of the delays and approach taken by the defendants, I have been unable to move on with my life outside of QPPC, and do the things for my family that I really wish to do and enjoy doing.
- [319] In *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30 [Fidler], the Supreme Court of Canada held:

44 We conclude that damages for mental distress for breach of contract may, in appropriate cases, be awarded as an application of the principle in *Hadley v. Baxendale*: see *Vorvis*. The court should ask "what did the contract promise?" and provide compensation for those promises. The aim of compensatory damages is to restore the wronged party to the position he or she would have been in had the contract not been broken. As the Privy Council stated in *Wertheim v.*

Chicoutimi Pulp Co., [1911] A.C. 301, at p. 307: "the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed". The measure of these damages is, of course, subject to remoteness principles. There is no reason why this should not include damages for mental distress, where such damages were in the reasonable contemplation of the parties at the time the contract was made. This conclusion follows from the basic principle of compensatory contractual damages: that the parties are to be restored to the position they contracted for, whether tangible or intangible. The law's task is simply to provide the benefits contracted for, whatever their nature, if they were in the reasonable contemplation of the parties.

45 It does not follow, however, that all mental distress associated with a breach of contract is compensable. In normal commercial contracts, the likelihood of a breach of contract causing mental distress is not ordinarily within the reasonable contemplation of the parties. It is not unusual that a breach of contract will leave the wronged party feeling frustrated or angry. The law does not award damages for such incidental frustration. The matter is otherwise, however, when the parties enter into a contract, an object of which is to secure a particular psychological benefit. In such a case, damages arising from such mental distress should in principle be recoverable where they are established on the evidence and shown to have been within the reasonable contemplation of the parties at the time the contract was made. The basic principles of contract damages do not cease to operate merely because what is promised is an intangible, like mental security.

[320] Given the limited circumstance in which an award for mental distress from a breach of contract can be given, as discussed in *Fidler*, I am not persuaded that the plaintiff's claim for such damages is warranted. In my view, the parties, assisted by teams of lawyers, entered into a commercial contract, the breach of which, if it occurs, will leave the wronged party feeling frustrated or angry, but as I am not prepared to view any frustration on the plaintiff's part as other than incidental.

[321] In the absence of any evidence that the plaintiff has sought or required any treatment or assistance for his alleged mental distress for the defendants' alleged breach of contract, I find that his claim for such damages fails.

[322] In the result, I dismiss the plaintiff's claim for damages.

(h) Special Costs

[323] As I indicated above, counsel for the plaintiff indicated that the plaintiff would be content with an order for special costs against only QPPC and its directors.

[324] The plaintiff contends that QPPC's conduct throughout the negotiation is in breach of the settlement agreement and two court orders and has caused the plaintiff to incur increased and unnecessary costs and expense. He contends that the conduct of the defendants is reprehensible and deserving of reproof or rebuke.

[325] The personal defendants argue that both parties have incurred expenses, as contemplated by s. 16 of the settlement agreement, and therefore the costs of doing so were addressed in s. 7(a)(vii) of that agreement, and there is no provision in the agreement for one party to pay further costs to the other.

[326] In his affidavit #12, sworn April 16, 2021, Reg Stewart stated:

30. Under section 7(a)(vi) and (vii) of the [settlement agreement] Roy was to be paid \$2,200,000.00 for his costs in the action. The \$2,000,000.00 in section 7(a)(vii) was agreed between the parties based on Roy's concern that his actual expenses, not only in having pursued his claims (that he was abandoning) but his expenses to get through all of the steps required to implement the settlement, including tax planning, valuation, etc. Roy thought it unfair that the other shareholders were not incurring the same costs, as the companies, primarily QPPC was covering their costs. QPPC thereby reasonably contributed to each party's costs.

30. Roy has refused to disclose either his actual expenses or his alleged additional expenses incurred with the solicitors at Faskens and with Mr. Foreman. What ever they have been, Roy agreed to accept \$2million to cover those expenses. I do not believe they are as high as \$2million. Between the accounts from Arik Broadbent, Craig Young, and David Thompson, QPPC has incurred approximately \$200,000.00 to \$220,000.00 in expenses in the time period Jan. 1 2019 to March 31, 2021.

[327] In my reasons indexed at 2019 BCSC 985, I dealt with the plaintiff's application for special costs on his application for the enforcement of certain terms of the settlement agreement. After reviewing *Shewchuk v. IBM Canada Limited*, 2017 BCSC 2211 at para. 66; *Nazmdeh v. Spraggs*, 2010 BCCA 131; *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177; *Garcia v. Crestbrook Forest Industries Ltd. No. 2* (1994), 9 B.C.L.R. (3d) 242 (C.A.) at para. 17; and *J.P. v. British Columbia (Children and Family Development)*, 2018 BCCA 325 at para. 29, I determined at paras. 138-139, that the plaintiff's siblings "failed to act in good faith, and unreasonably refused to comply with their contractual obligations under the settlement agreement, in turn preventing the other defendants from making the required payment to the plaintiff." I ordered them to pay the plaintiff special costs at double the normal Scale C costs set out at Appendix B to the Civil Rules.

[328] Here, the plaintiff has enjoyed limited success on his application, although I am satisfied that was in part because the defendants were forced to address some matters of long standing, once the application was filed.

[329] I am not satisfied that the defendants' conduct complained of in this application rises to the level that warrants an order for special costs, and will dismiss that part of the relief sought, but award the plaintiff his costs at Scale B of Appendix B of the Civil Rules.

The Personal Defendants' Application

- [330] The personal defendants seek orders directing a stay of proceedings against them and vacating certain of the pre-trial orders. They rely on Part 8 of the Civil Rules and ss. 8(2) and (1) of the Law and Equity Act.
- [331] The personal defendants contend that they have complied with all outstanding requirements in the settlement agreement, and that all pre-trial orders requiring them to act or refrain from acting have been compromised and settled or are new causes of action. In the result, the personal defendants argue that as there are no further aspects of the settlement agreement relating to them that require oversight, and that they are entitled to a stay of the proceedings against them.
- [332] The personal defendants also say that once it has been conceded, as it has been conceded in this case, that a settlement agreement was made with the knowledge and consent of the parties to the litigation, and where no ground is advanced for setting aside the agreement under general contract principles, such as fraud, duress, lack of capacity or mutual mistake, then the court has no alternative but to enforce the agreement. Relying on *Robertson v. Walwyn* (1988), 24 B.C.L.R. (2d) 385 (C.A.), they say the proper course is normally to grant the stay of proceedings when it is applied for, rather than to defer the inevitable result by refusing the stay and leaving the defence of settlement to be upheld at trial or in collateral proceedings.
- [333] In my reasons indexed at 2019 BCSC 985, I determined that there could be further disagreements that would require the oversight of the Court. The personal defendants say there will be no further disagreements, save the argument on pre-closing interest, which, once resolved, should be an end to the action and any further claims under it or under the settlement agreement.
- [334] I see no reasons to change the view I expressed in those reasons, and decline to grant the stay of proceedings sought by the personal defendants.
- [335] Similarly, even if they are no longer the subject of disagreement between the parties, I am not persuaded that paras. 1-5 of the order of Abrioux J., dated July 4, 2018, or paras. 2-4 in my order of January 21, 2020 should be vacated, and I decline to do so.

Conclusion

- [336] I grant the declaration sought in para. 1(a)(vi) of the plaintiff's notice of application.
- [337] I adjourn paras. 1(c), (e), (h), (i), and 1(b) of the plaintiff's notice of application, and at the plaintiff's request, also adjourn the relief he sought in para. 2 of his application.
- [338] I deny the relief sought in paras. 1(a)(i), (ii), (iii), (iv), and (v), 1(d), 1(f), 1(g), and 1(j) of the plaintiff's notice of application.

[339] The personal defendant's application is dismissed.

"The Honourable Chief Justice Hinkson"

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