

CANADA / JUDGMENT

Ziprick v. Simpson Estate

2020 BCSC 401

COURT

Supreme Court of British Columbia

DECIDED

18 March 2020

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2020 BCSC 401 Ziprick v. Simpson Estate

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ziprick v. Simpson Estate,

2020 BCSC 401

Date: 20200318

Docket: S115223

Registry: Kelowna

Between:

Maureen Patricia Ziprick and Leona Anastasia Simpson

Plaintiffs

And

James Gilchrist, Administrator of the Estate of Herbert Simpson, KPMG Inc., 662777 B.C. Ltd.,
Braunfel Construction Ltd., Roberta Simpson-Alec,

Okanagan Indian Band, Brenda Baylis, Administrator of the Estate of Karen Simpson, Alicia
Michelle Simpson, Dillon George Simpson,

Glen Shay Terry Simpson

Defendants

Corrected Judgment: The text of the judgment was

corrected on the front page on April 17, 2020.

Before: The Honourable Mr. Justice G.P. Weatherill

Reasons for Judgment

Counsel for the Plaintiffs:

J.J. Kidston

C. Stewart

Counsel for the Defendant

Okanagan Indian Band:

C. Truesdale

B. Feltmate, Articled Student

Appearing as agent on behalf of the Defendants, 662777 B.C. Ltd. and Braunfel Construction Ltd.:

G. DeFehr

R. DeFehr

No other appearances

Place and Date of Trial/Hearing:

Kelowna, B.C.

January 27 - 31;

February 3 - 7, 2020

Place and Date of Judgment:

Kelowna, B.C.

March 18, 2020

I. Introduction

- [1] This case is an example of the importance of complying with the processes, procedures, protections, and rules set out in the Indian Act, R.S.C. 1985, c. I-5 ("Indian Act") when non-band members seek to engage in business activities on indigenous lands.
- [2] This trial was the culmination of numerous legal and other battles spanning over 30 years involving a 40-acre parcel of land ("Lands") and a mobile home park known as Creek Run Park ("Creek Run Park") located on a portion of the Lands. The Lands are situated to the east of Highway 97N in the Duck Lake Indian Reserve No. 7, part of the Okanagan Indian Band ("OKIB"), on the northern outskirts of the City of Kelowna and just south of the town of Winfield, B.C.

- [3] Creek Run Park's construction started in 1993 and over the years has grown in size to its current 81 mobile home pads (79 of which have occupied mobile homes on them). It was originally developed and managed by the defendant Braunfel Engineering and Construction Ltd. (an Alberta company), who transferred the operation in 2003 to 662777 B.C. Ltd. ("777"), a related company. Braunfel Engineering and Construction Ltd. changed its name to Braunfel Construction Ltd. ("BCL") in 2011 when its shares were sold to Mr. Gordon DeFehr and his family. For ease of reference, and because, at all material times, 777 and BCL were consecutively running Creek Run Park with the same operating mind, 777 and BCL will be referred to together where necessary as the "Companies".
- [4] Despite discussions, arrangements and interim agreements over the past 26 years, the Companies have never obtained a registered head lease from the Minister of Indigenous Services (as it is now called) on behalf of the federal Crown ("Crown") authorizing the Creek Run Park to operate on the Lands. The Indian Act requires such a head lease for Creek Run Park to be constructed and operated. The Companies proceeded with development, construction and significant expansion of Creek Run Park on the expectation that a head lease would eventually be granted to them by the Crown. It never was.
- [5] Under the Indian Act, band members who hold the right to possession of reserve lands under certificates of possession issued by the Crown under s. 20(1) of the Indian Act are often referred to as "locatees" or "CP holders". The plaintiffs, the current Locatees of the Lands, supported by the OKIB, seek to oust 777 from the Lands and Creek Run Park on the basis that they have no legal right or other authority to be on the Lands and are therefore trespassing. They also seek various forms of damages for losses they say they have suffered over the past number of years as a result of the trespass.
- [6] While acknowledging that they have no legal right of possession of the Lands and Creek Run Park, the Companies assert that they relied on repeated assurances and agreements that a head lease would be formally agreed to and registered. They say that by virtue of them developing and operating Creek Run Park on the Lands since 1993 on the strength and in reliance on those assurances, including proposed lease agreements and other arrangements between them and the Locatees, they are legally entitled to operate Creek Run Park. Alternatively, they counterclaim against the plaintiffs seeking damages and other forms of relief on the basis of the equitable principles of promissory estoppel, unjust enrichment and quantum meruit.
- [7] The key issue from which all other claims and counterclaims flow is whether or not the Companies are trespassing on the Lands.

II. Summary of Decision

- [8] The combination of the relevant legislation, well-established common law and agreed facts leads to the inescapable conclusion that the Companies are trespassing on the Lands.

- [9] For the reasons that follow, the plaintiffs' action is allowed and the Companies' counterclaim is dismissed.

III. The Players

- [10] The plaintiffs Maureen Patricia Ziprick ("Maureen") and Leona Anastasia Simpson ("Leona") are two of Herbert Simpson's ("Herbert") four daughters. His other two daughters are Roberta Simpson-Alec ("Roberta") and Karen Beverly Simpson ("Karen"). I will refer to the four sisters collectively as the "Simpson Sisters". Herbert and the Simpson Sisters are, or were, members of the OKIB.
- [11] At all material times, Herbert was the original locatee of the Lands. Herbert died on February 26, 2011. Karen died in July 2018, leaving three children, the defendants, Alicia Michelle Simpson ("Alicia"), Glen Shay Terry Simpson ("Glen"), and Dillon George Simpson ("Dillon"). As matters currently stand, Maureen, Leona, Roberta, and Karen's three children are the Locatees of the Lands.
- [12] The OKIB is a "band" within the meaning of the Indian Act and one of eight bands that make up the Okanagan Nation or Syilx people, an "Aboriginal people" within the meaning of the Constitution Act, 1982, s. 35, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.
- [13] Mr. Ron Swetz and Ms. Vicki O'Brien were a married couple who owned the Companies' shares and operated Creek Run Park until June 2011. Neither Mr. Swetz nor Ms. O'Brien were members of the OKIB.
- [14] Mr. Gordon DeFehr purchased the Companies' shares from Mr. Swetz and Ms. O'Brien in June 2011, paying them \$2,500 as a down payment with a promise to pay them the balance of the \$1.2M purchase price from Creek Run Park's receipts. The agreement provided that Mr. Swetz and Ms. O'Brien would re-purchase the shares from Mr. DeFehr if a head lease could not be secured. Mr. DeFehr has been in the construction and property management business for most of his adult life including the development and management of some thirty mobile home parks, some on reserve lands. He has also been involved in numerous lawsuits over the years and is familiar with the court process. Mr. DeFehr is not a member of the OKIB. Mr. DeFehr represented the Companies' interests at trial.
- [15] 0810353 B.C. Ltd. ("353") was incorporated by Mr. DeFehr in 2007 for an unrelated purpose. Its shareholders are Mr. DeFehr, his son Richard DeFehr ("Richard"), and the DeFehr Family Trust. After he bought the Companies' shares in 2011, he caused them to be transferred to 353.
- [16] Mr. Jim Gilchrist was, prior to his retirement, a partner with KPMG's Kelowna office. Pursuant to an order made by Mr. Justice Hunter on March 20, 1998, KPMG was appointed the trustee of a trust known as the "Simpson Trust". The Simpson Trust was the then locatee of half of the Lands held in joint tenancy with Herbert. KPMG remained the trustee of the Simpson Trust until being discharged on July 13, 2017, by the order of Mr. Justice Davies

("Davies Order"). Mr. Gilchrist was also appointed the Administrator of Herbert's estate by a grant of probate issued March 2, 2015. He was discharged as Administrator on July 13, 2017, by the Davies Order. Mr. Gilchrist was never a member of the OKIB.

- [17] Mr. Craig McIntyre is the principal of CML Properties and was appointed the receiver/manager of Creek Run Park by an order made by Mr. Justice Wilson effective November 1, 2019. Mr. McIntyre continues to operate and manage Creek Run Park pending the determination of this case.
- [18] 1135067 B.C. Ltd. ("067") is related to the Companies with Mr. DeFehr as its operating mind. It was incorporated in September 2017 (shortly following the Davies Order) to manage Creek Run Park's affairs in place of 777. It continued to do so until November 1, 2019, when Mr. McIntyre was appointed receiver/manager. For unknown reasons, 067 was not added as a party to these proceedings but should have been for the sake of completeness.

IV. The Lands

- [19] The Lands are legally described as:

Lots 125, 126, 128, 129 and 140, Plan 75843 CLSR, formerly known as Lot 7-1 and 8-2, Plan 1457 CLSR, Duck Lake IR No. 7

- [20] Creek Run Park is located on Lot 129.

- [21] The Lands are currently held by the Simpson Sisters under certificates of possession issued under s. 20 of the Indian Act. Each sister holds an equal one-quarter interest as tenants in common in the Lands.

V. Chronology and Background

- [22] The background and history of this dispute is complex and lengthy. Much of it is not in dispute. There are hundreds of documents that were admitted into evidence by agreement that helpfully explain the chronology of events. The parties also filed a detailed agreed statement of facts ("ASF"). I do not propose to review the details but will simply highlight the significant facts I have gleaned from the ASF, the documents that have been filed, and the evidence I have accepted from the witnesses who testified.
- [23] The saga began in late 1989. Herbert, the then sole locatee, transferred the Lands to himself and Maureen as joint tenants. Herbert later sued Maureen to have the transfer set aside. After losing the trial and appeals, the result was that the transfer was held to be valid but that Maureen held her one-half share in the Lands in trust for herself and her three sisters. This trust later became known as the Simpson Trust.
- [24] In early 1993, Herbert and Maureen entered into negotiations with BCL for the development of a mobile home park on the Lands. In February 1993, Maureen and Herbert signed a letter of intent ("Letter of Intent") with BCL to develop what became known as Creek Run Park on the Lot 129 portion of the Lands. BCL's principals at the time were two brothers, Larry

Hrabchuck and Mr. Swetz. All parties knew that, even though Maureen and Herbert were the locatees, the Lands were owned by the federal Crown. They also knew that for there to be a valid lease over the Lands, the Indian Act required various steps to be taken including that the parties receive the input from the OKIB and the ultimate approval from the Crown in the form of a head-lease.

- [25] The Letter of Intent provided that BCL would develop Creek Run Park at its cost and that Herbert and Maureen would receive 25% of the gross income from pad rentals. The head lease, if and when approved by the Crown, was intended to last for 45 years. An "up-front" payment from BCL to Herbert and Maureen of \$30,000 was also contemplated.
- [26] In April 1993, Herbert and Maureen executed application to lease documents in favour of BCL and authorized BCL to commence construction of the Creek Run Park. Pursuant to this arrangement, BCL commenced development and construction of Creek Run Park without approval from the Crown. The development included the construction of an access off Highway 97, a bridge, roads, mobile home pads and water, sewer and electrical infrastructure.
- [27] As part of its consideration of whether or not to grant BCL a head lease and the application as a whole, the Crown arranged for a fair market value appraisal of the proposed mobile home park and, based on that appraisal, concluded that the up-front and yearly payments to the locatees should be in the \$65,000 range, not the \$30,000 agreed to by BCL. While Herbert nevertheless seemed content with the \$30,000 payment proposed by BCL, Maureen refused to agree to a head lease unless BCL agreed to pay the Crown's appraised value. She was concerned that BCL was attempting to take advantage of Herbert and the Simpson Sisters.
- [28] In November 1993, Maureen resiled from the agreement and commenced action against BCL and Herbert seeking an injunction restraining BCL from proceeding with the project.
- [29] In January 1994, the Crown made it clear to BCL that unanimous consent was required from Herbert and Maureen before it would agree to the proposed head lease. It also made it clear that proceeding with the development without a lease would be perilous.
- [30] In February 1994, Maureen's injunction application was heard by Mr. Justice Spencer who dismissed it on the basis that, because BCL had already expended significant money on the project, the balance of convenience favoured BCL. By that point, seventeen mobile home pads had been constructed and some tenants had already moved in. Justice Spencer concluded that an injunction would negatively affect future sales and Creek Run Park's fair market value. He also concluded that the Letter of Intent was no more than an agreement to agree and the Crown was correct in declining to process the lease application until the disagreement between Herbert and Maureen was resolved.
- [31] In December 1994, the matter was back in court. This time before Mr. Justice Wilkinson who issued injunctions against both Maureen and BCL ("the Wilkinson Order"). Respecting Maureen, Wilkinson, J. ordered that she be restrained:

From directly or indirectly molesting, annoying, harassing, interfering, communicating with or attempting to molest, annoy, harass, interfere or communicate with any tenants or persons involved in the development or tenancy of the subject property. . .

[32] Respecting BCL, he ordered that it:

Be restrained and enjoined from any further development upon the lands. . . And . . . shall effect no further sales of homes to be placed on the aforesaid lands, shall make no efforts at sales of homes to be placed on the aforesaid lands, shall not affect removal of any sand or gravel. . . and shall make no further improvements to the. . . lands.

[33] Justice Wilkinson further directed that BCL:

Shall during the currency of this injunction, maintain the improvements and services already existing upon the property to a proper standard and shall use its best efforts to maintain such services in accordance with prevailing health and other lawful requirements of authorities having jurisdiction.

[34] In September 1997, Herbert took steps to sever the joint tenancy of the Lands with Maureen and in December 1997, forwarded an application to lease the lands to BCL to the Crown. Maureen never approved or provided her consent to this new application.

[35] In March 1998, Leona, Roberta and Karen filed a petition seeking to remove Maureen as the trustee of the Simpson Trust. The petition came on before Mr. Justice Hunter who appointed KPMG as trustee in place of Maureen. Mr. Gilchrist, then a partner with KPMG, ultimately acted as the trustee of the Simpson Trust through KPMG.

[36] In June 2000, the parties attended a mediation in an attempt to negotiate a settlement of their differences. A tentative agreement was reached whereby, of the 40-acre parcel comprising the Lands, Maureen would receive a properly surveyed and sub-divided 10-acre portion. Upon completion of that subdivision, Maureen agreed to have no further interest in Creek Run Park. Negotiations respecting a lease from the Crown would then involve BCL, Herbert and the remaining Simpson Sisters and Herbert would transfer the remaining 30 acres to those sisters by way of a will. He would then enter into a lease agreement/application with BCL that would be forwarded to the Crown for approval.

[37] In accordance with this tentative agreement and proposed subdivision, a survey of the Lands was commissioned. This survey, however resulted in Maureen receiving seven acres instead of the ten acres agreed upon. Although by then, settlement documentation, including transfers of Maureen's interest in the Lands, were executed and forwarded to the Crown for processing; they were later withdrawn because of a concern that Maureen lacked authority to bind the Simpson Sisters to the deal. As a result, the Lands were never subdivided.

[38] In January 2003, Mr. Swetz and Ms. O'Brien incorporated 777. 777 purchased all of BCL's assets and took over the operation of Creek Run Park.

- [39] In March 2003, Herbert executed another application to the Crown to lease the portion of the lands comprising Creek Run Park, this time to 777 ("2003 Lease Agreement"). Although this application was signed by Maureen, the 2003 Lease Agreement was never approved by the Crown.
- [40] In July 2007, Herbert executed a will leaving his interest in the Lands to two of Karen's children, Glen and Dillon.
- [41] In November 2010, Herbert purported again to lease the Lands to 777 despite being the locatee of only a one-half interest. This time the "lease" was by way of a document called an 'Irrevocable Commercial Lease' ("ICL"). The ICL was noted to be an interim lease agreement. Although the ICL referred to and attached the 2003 Lease Agreement, it was not agreed to by either Maureen or KPMG. The only signatories to it were Herbert and 777. It contemplated the parties acquiring a head lease approved by the Crown and provided that 25% of Creek Run Park's gross revenues were to be paid to Herbert until the head lease was approved. The ICL has never been approved by either the Crown or OKIB.
- [42] On February 26, 2011, Herbert died.
- [43] In June 2011, Mr. DeFehr purchased BCL and 777's shares from Mr. Swetz and Ms. O'Brien and took over the operation of Creek Run Park. He relied, in part on the ICL giving 777 the right to occupy the Lands. At that point, Creek Run Park comprised 34 mobile home lots. Mr. DeFehr met with Mr. Gilchrist who agreed to cooperate in the process of securing a head lease from the Crown. Mr. Gilchrist apparently believed that, as trustee of the Simpson Trust, he had the authority to approve and execute the necessary documents on behalf of the Simpson Sisters. However, no one had initiated steps to probate Herbert's will and therefore no one had the authority to agree to a head lease on behalf of Herbert's estate.
- [44] Mr. DeFehr took no further steps to obtain a head lease until June 2013.
- [45] Meanwhile, in September 2011, Maureen and Leona gave formal notice to all Creek Run Park tenants that they did not have valid subleases and that they were required to pay pad rents to them in trust.
- [46] From June 2013 to July 2014, Mr. DeFehr, Mr. Gilchrist and Maureen attempted to negotiate terms upon which a head lease could be agreed to, granted and registered. At that point, the terms of reference were similar to the earlier agreement that would have provided Maureen with a yet-to-be subdivided ten acres that would be hers exclusively.
- [47] In the summer of 2014, Mr. DeFehr began a significant expansion of Creek Run Park, almost tripling its size to its current configuration of 81 lots. In doing so, he relied on the ICL that he understood Mr. Gilchrist had approved on behalf of the Simpson Trust.
- [48] In March 2015, Herbert's will was finally probated. Mr. Gilchrist was appointed the executor/administrator of Herbert's estate.

- [49] The Simpson Sisters continued to be unhappy with both Mr. DeFehr and Mr. Gilchrist. In June 2015, they attempted to evict 777 on 24 hours' notice, prompting Mr. Gilchrist to seek an interim injunction stopping them. On July 31, 2015, Justice Holmes ordered Creek Run Park's pad rentals be held in trust and that the Companies have unobstructed access to Creek Run Park pending hearing of the injunction application.
- [50] On August 21, 2015, the injunction application was heard by Justice Hyslop who ordered that the Simpson Sisters be enjoined from:
- ... trespassing, physically occupying or otherwise entering onto the lands and premises which will be collectively referred to as "Creek Run" and having the Creek Run. . . and physically obstructing, impeding or otherwise interfering with [Mr. Gilchrist]. . .his contractors, employees or agents in relation to the operation of Creek Run including, but not. . . limited to 777, BCL and their agents, employees, successors or assigns.
- [51] Rentals were to be paid to Mr. Gilchrist in trust pending the determination of the validity of the ICL and the Companies' right to occupy Creek Run Park. Subsequent to the Hyslop Order, no steps were taken by either Mr. Gilchrist or KPMG to determine the validity of the ICL. Meanwhile, 777 resumed operating Creek Run Park and collecting pad rentals.
- [52] Relying on Mr. Gilchrist's indication that a head lease would be approved, 777 continued expanding Creek Run Park. Neither OKIB nor the Crown accepted Mr. Gilchrist's approval as valid consent. Additional mobile home pads were constructed on Creek Run Park with uninspected and unauthorized electrical connections. BC Hydro refused to enter into the Lands or approve electrical hookups without OKIB and the Simpson Sisters' authorization.
- [53] Attempts to settle the dispute between the parties, including a judicial settlement conference before Justice Hyslop in October 2016, were unsuccessful.
- [54] In March 2017, Justice Rogers ordered that the Simpson Sisters were the sole beneficiaries of Herbert's estate and accordingly were the locatees of the Land under the certificates of possession. The Simpson Sisters continued to be upset with Mr. DeFehr's management of Creek Run Park, its failing infrastructure and his failure to properly account for rental revenues. They promptly gave the Companies notice of nonpayment of rent, sewage and electrical safety concerns, and a notice to vacate the Lands by April 1, 2017.
- [55] On April 28, 2017, the plaintiffs again demanded that the Companies deliver up vacant possession of the Lands, this time by May 15, 2017. Notwithstanding those demands, the Companies continued to occupy the Lands and manage Creek Run Park.
- [56] In July 2017, KPMG and Mr. Gilchrist applied to be discharged from their respective obligations as trustee of the Simpson Trust and administrator of Herbert's estate. The application was heard by Justice Davies who prepared comprehensive reasons indexed as *Ziprick v. Simpson Estate*, 2017 BCSC 1648. Justice Davies reviewed much of the background in detail which generally accords with the evidence before me. He ordered that the injunction issued by Justice Hyslop in August 2015 must be vacated. Allowing the Companies

an opportunity to apply to renew the injunction, he ordered that the injunction would remain in effect until September 13, 2017, and would then expire unless the Companies had applied for and obtained an extension of time. No such application was made.

- [57] After referencing a draft trust authorization respecting the Simpson Trust, Davies J. commented at para. 48 of his reasons:
- [48] The provisions of paras. 6.00 and 7.00 of the draft Trust Authorization underscore the very limited power of the Trustee to act as an effective decision maker not only generally with respect to the administration of the Simpson Trust but more specifically with respect to its ability to authorize or oversee the development of the Lands without the co-operation and agreement of not only Herbert Simpson but also that of Maureen Ziprick as the two registered locatees of the Lands.
- [49] Although it is not necessary to the decisions I must now make given that the discharge of the Trustee is unopposed, I also note the argument that notwithstanding that the Trustee has been appointed as and has at least in name acted as the Trustee of the Simpson Trust since 1998, the substitution of the Trustee for Maureen Ziprick by Hunter J. likely had the effect of converting the Simpson Trust into an "incompletely constituted trust."
- [50] That is so because the subject of the Simpson Trust not only did not, but could not, vest in the Trustee because "ownership" of the Lands could only vest in or be held by a member of the Okanagan Indian Band. See: Indian Act, R.S.C. 1985, c. I-5. s. 28; and D. Waters, M. Gill and L. Smith, *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Carswell, 2012) at pp 178-180.
- [58] Although Justice Davies accepted the trust reconciliations that were provided as correct for the purposes of the passing of the trustee's account, he specifically did not find that they fully discharged the Companies' liability to the Simpson Sisters with respect to entitlement to funds from Creek Run Park. He left that issue open for later determination.
- [59] Ultimately, Justice Davies discharged Mr. Gilchrist as the administrator of Herbert's estate and KPMG as trustee of the Simpson Trust. It was very shortly following the Davies' Order that Mr. DeFehr incorporated 067 to commence collecting rents from Creek Run Park's tenants.
- [60] On July 13, 2018, Karen Simpson died and her three children became the beneficiaries of her estate.
- [61] The surviving Simpson Sisters remained upset with how Mr. Gilchrist and KPMG had treated them on matters involving the Simpson Trust and the administration of Herbert's estate. They filed a formal claim against KPMG. That claim was settled on August 9, 2018, for \$44,000 (\$11,000 per Simpson Sister) (the "KPMG Settlement").

- [62] On September 27, 2019, Justice Wilson appointed Connaught Management Ltd. dba CML Properties as receiver/manager of Creek Run Park effective November 1, 2019 ("Receiver"). Since then, all pad rental income from tenants of Creek Run Park have been received by the Receiver.
- [63] It is noteworthy that throughout all this time, the Wilkinson Order made in December 1994, which everyone had seemingly forgotten about, was never set aside and remained in effect.

VI. Plaintiffs' Position

- [64] The plaintiffs' position is straight forward. The Companies are trespassing on the Lands and have been since 1993. While there may have been agreements in principle to develop the Creek Run Park, BCL and later 777 "jumped the gun" by developing it before a valid lease was issued by the Crown. Without a valid head lease in place the Companies have been operating Creek Run Park illegally. To add to the insult, the Companies have habitually failed to properly compensate them, have failed to maintain the Creek Run Park in accordance with safety, sanitary and electrical standards and have taken advantage of the Simpson family.
- [65] The plaintiffs say that enough is enough and the Companies must be ordered off the Lands and be ordered to pay damages for their actions.

VII. OKIB's Position

- [66] Only the Crown has the power to grant an interest in reserve land. Any non-band member without such an interest/lease is in trespass.
- [67] In this case, 777 does not have a valid lease approved by the Crown or OKIB to develop, operate or manage Creek Run Park and is therefore trespassing on the Lands. They apply the same argument to BCL in relation to the time it owned and operated Creek Run Park.

VIII. The Companies' Position

- [68] Since Creek Run Park was first developed in 1993, the Locatees (Herbert and Maureen in particular) have made numerous promises and agreements to allow the Companies to develop and manage Creek Run Park in exchange for 25% of gross pad rental revenues. In furtherance of those promises, applications to the Crown for a head lease were pursued but, through no fault of the Companies, never resulted in a head lease being issued. The Companies did whatever was asked of them, including paying rents as required. The problem is not the Companies, but is the infighting among the members of the Simpson family that prevented a head lease being approved and issued by the Crown.
- [69] While admitting that neither 777 nor BCL has ever been issued a head lease approved by the Crown pursuant to the Indian Act, and that no interest in the Lands has ever been granted to them, they say that because of the years of time, effort and money spent developing Creek Run Park, including the construction of an access bridge, sewer system and other

infrastructure, it would be manifestly unfair to evict them without compensation. If the Companies are ordered to leave the Lands, they seek compensation of \$3 million, an amount they assert is the current fair market value of Creek Run Park. In addition, they seek repayment of deposit monies paid to Herbert in 2010 when the ICL was executed, the value of lost equipment stolen from Creek Run Park, lost rents and other damages. Alternatively, they seek relief under the equitable doctrines of unjust enrichment, quantum meruit, and promissory estoppel.

IX. The Law

- [70] Section 91(24) of the Constitution Act, 1982, places reserve lands under federal jurisdiction to be held by the Crown for the use and benefit of Indian bands. The use and management of these lands is governed by the Indian Act.
- [71] There are clear provisions in the Indian Act and a long line of authorities that establish that only the Minister of Indigenous Services on behalf of the Crown may grant interests in reserve lands. Any non-band member occupying reserve land without being granted an interest by the Crown is in trespass: Indian Act, ss. 20-29, 37-41, 58(3); *The Queen v. Devereux*, [1965] SCR 567 at 572.
- [72] Neither the band nor any band members may enter into legally binding lease agreements and to the extent that they purport to do so, the agreements are void. Such informal arrangements (commonly referred to as "buckshee leases"), are illegal and unenforceable.
- [73] Before granting a lease of lands held by a locatee under a certificate of possession, the Crown is required to consult with the band, and consider and give weight to concerns and views of the band. This is done to protect the collective interest of the band in reserve lands that continues despite possession being allocated to individual members: *Tsartlip Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, [2000] 2 F.C. 314; [1999] F.C.J. No. 1767 (F.C.A.) at paras. 56-57.
- [74] This process is undertaken to give effect to the principle that reserve lands are to be held and protected by the Crown for the band against intrusion by others: *Devereux* at 572. This protection cannot be undermined by provincial legislation, common law or equity.
- [75] The relevant sections of the Indian Act, are:

Reserves to be held for use and benefit of Indians

18 (1) Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.

...

Possession of lands in a reserve

20 (1) No Indian is lawfully in possession of land in a reserve unless, with the approval of the Minister, possession of the land has been allotted to him by the council of the band.

Certificate of Possession

(2) The Minister may issue to an Indian who is lawfully in possession of land in a reserve a certificate, to be called a Certificate of Possession, as evidence of his right to possession of the land described therein.

...

Register

21 There shall be kept in the Department a register, to be known as the Reserve Land Register, in which shall be entered particulars relating to Certificates of Possession and Certificates of Occupation and other transactions respecting lands in a reserve.

...

Transfer of Possession

24 An Indian who is lawfully in possession of lands in a reserve may transfer to the band or another member of the band the right to possession of the land, but no transfer or agreement for the transfer of the right to possession of lands in a reserve is effective until it is approved by the Minister.

...

Grants etc., of reserve lands void

28 (1) Subject to subsection (2), any deed, lease, contract, instrument, document or agreement of any kind, whether written or oral, by which a band or a member of a band purports to permit a person other than a member of that band to occupy or use a reserve or to reside or otherwise exercise any rights on a reserve is void.

Minister may issue permits

(2) The Minister may by permit in writing authorize any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.

Exemption from seizure

29 Reserve lands are not subject to seizure under legal process.

Penalty for Trespass

30 A person who trespasses on a reserve is guilty of an offence and liable on summary conviction to a fine not exceeding fifty dollars or to imprisonment for a term not exceeding one month or to both.

Information by Attorney General

31 (1) Without prejudice to section 30, where an Indian or a band alleges that persons other than Indians are or have been

- (a) unlawfully in occupation or possession of,
- (b) claiming adversely the right to occupation or possession of, or
- (c) trespassing on

a reserve or part of a reserve, the Attorney General of Canada may exhibit an information in the Federal Court claiming, on behalf of the Indian or band, the relief or remedy sought.

...

Existing remedies preserved

- (3) Nothing in this section shall be construed to impair, abridge or otherwise affect any right or remedy that, but for this section, would be available to Her Majesty or to an Indian or a band.

...

Sales

37 (1) Lands in a reserve shall not be sold nor title to them conveyed until they have been absolutely surrendered to Her Majesty pursuant to subsection 38(1) by the band for whose use and benefit in common the reserve was set apart.

Other Transactions

- (2) Except where this Act otherwise provides, lands in a reserve shall not be leased nor an interest in them granted until they have been designated under subsection 38(2) by the band for whose use and benefit in common the reserve was set apart.

Surrender to Her Majesty

38 (1) A band may absolutely surrender to Her Majesty, conditionally or unconditionally, all of the rights and interests of the band and its members in all or part of a reserve.

Designation

- (2) A band may, conditionally or unconditionally, designate, by way of a surrender to Her Majesty that is not absolute, any right or interest of the band and its members in all or part of a reserve, for the purpose of its being leased or a right or interest therein being granted.

...

Uncultivated or unused lands

58 (1) Where land in a reserve is uncultivated or unused, the Minister may, with the consent of the council of the band,

- (a) improve or cultivate that land and employ persons therefor, and authorize and direct the expenditure of such amount of the capital funds of the band as he considers necessary for that improvement or cultivation including the purchase of such stock, machinery or material or for the employment of such labour as the Minister considers necessary;
- (b) where the land is in the lawful possession of any individual, grant a lease of that land for agricultural or grazing purposes or for any purpose that is for the benefit of the person in possession of the land; and
- (c) where the land is not in the lawful possession of any individual, grant for the benefit of the band a lease of that land for agricultural or grazing purposes.

...

Lease at request of occupant

- (3) The Minister may lease for the benefit of any Indian, on application of that Indian for that purpose, the land of which the Indian is lawfully in possession without the land being designated.

[76] While Indian lands are held for the band as a whole, generally speaking individual possession of lots of reserve land may be granted to band members by way of a certificate of possession under s. 20 of the Indian Act by decision of the band council with the approval of the Crown. The general scheme of the Indian Act is to maintain reserve lands intact for the band as a whole regardless of the wishes of individual band members who may hold certain lots by certificate of possession: *Devereux* at 572; *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at 382; *Joe v. Findlay* (1981), 26 B.C.L.R. (2d) 376 at 378 (C.A.); *Nicola Band et al v. Trans-Can. Displays et. al.*, 2000 BCSC 1209 at paras. 121, 127; *Songhees First Nation v. Canada (Attorney General)*, 2003 BCCA 187 at paras. 11, 16-17, 23, 27.

[77] After an interest is granted by the Crown, it is "registered" in the Indian Lands Registry in accordance with s. 21. The registry is simply a depository of legal interests granted by the Crown.

X. Discussion

- [78] Statutes and the rules and procedures established by them are important. In order for a lease on the Lands to be valid, there must be consent provided by the Crown, the OKIB and the Locatees. Consent cannot be imposed or presumed.
- [79] The plaintiffs have proven these facts, most of which are in the ASF:
- a) The Lands are reserve lands within the jurisdiction of the Indian Act and are held under Certificates of Possession by Maureen, Leona, Roberta, each as to a one-quarter interest pursuant to s. 21(1) of the Indian Act. The remaining one-quarter interest, which belonged to Karen, passed to her children, Alicia, Glen, and Dillon after her death. They are all members of the OKIB.
 - b) Neither the Companies nor their principals are members of the OKIB and are occupying the Lands and operating Creek Run Park on the Lands.
 - c) Neither of the Companies have ever had authorization from the Crown to occupy or conduct business on the Lands by way of lease, permit or otherwise.
 - d) From as early as 1993 when negotiations began and permission was sought from the OKIB for the development of the Creek Run Park, the OKIB made it clear that consenting to have the Lands surveyed and allowing BCL to construct a bridge allowing access to the Lands did not mean it was consenting to or approving a head lease for the Creek Run Park. It was simply allowing BCL to take the first steps towards an application for a head lease.
 - e) Likewise, the permission granted by OKIB for the installation of utilities on the Lands was always made subject to BCL obtaining approval from the Crown. That is, OKIB did not consent to the installation of utilities or services on the Lands unless and until a head lease was obtained from the Crown. The OKIB made it clear that no construction was to commence until a head lease was obtained.
 - f) Creek Run Park's sewer system is inadequate for the number of mobile homes in the park. It has malfunctioned in the past and does not meet the standards of the First Nations Health Authority. It remains a public health and safety issue. Attempts by the First Nations Health Authority in 2015 to have 777 upgrade the sewer system to meet standards set out in the Public Health Act, Environment Management Act and Municipal Wastewater Regulations, have been unsuccessful. The current system continues to violate these acts and regulations.
 - g) The ICL upon which the Companies rely to establish an interest in the Lands, is between Herbert and 777 only. It was never binding on the Simpson Sisters, OKIB or the Crown. OKIB did not recognize the ICL and always considered it invalid. At best, it is an interim agreement to attempt to secure the Crown's agreement to a valid head lease.
 - h) From the outset, the Companies and their successor 067 have operated Creek Run Park without lawful authority to be on the Lands.

- [80] What occurred in this case is precisely why it is important that the process set out in the Indian Act be followed. Failure to do so can lead to the kinds of disputes the parties in this case have been engaged in for 26 years.
- [81] The original discussions that took place between Herbert and BCL in 1993 resulted in a tentative buckshee agreement at best. For reasons that are not clear and despite knowing the risks and consequences, BCL anxiously chose to move forward with the development of Creek Run Park without a valid head lease in place. It ignored the lawful procedures, processes and protections prescribed by the Indian Act and thereafter attempted to impose agreements on the Simpson family over the years.
- [82] In as early as August 1993, the Crown informed BCL of the risks of continuing to develop Creek Run Park without its approval:

We are advised that you are presently doing some site preparation. Please be advised that without an approved lease you are on the site without the approval of the department. Accordingly, you are on the site at entirely your own risk.

- [83] BCL ignored this clear warning and proceeded with Creek Run Park's development regardless. In February and May 2003, after 777 acquired BCL's rights to manage Creek Run Park, it explained in an open letter to the existing tenants the reason why no upgrades or improvement were taking place that:

'... until such time as a head lease is in place, the company cannot (by court order) perform further upgrades to the park. . .

- [84] Mr. DeFehr purchased BCL and 777's shares knowing no head lease was in place and knowing the risks involved. Indeed, during submissions he stated that he knew it was "a little dicey until a head lease was in place". Interestingly, Mr. DeFehr agreed to purchase the shares of the Companies months before the ICL was entered into.
- [85] Mr. DeFehr candidly admitted that he was "a bit gullible" and purchased the Companies based on "bad advice" and accepting as correct what he was being told by Mr. Swetz, Ms. O'Brien and Mr. Gilchrist. He admits that prior to purchasing the Companies, he was told the history of the dispute between Herbert and Maureen and the other Simpson Sisters. He knew of the various court orders including the Wilkinson Order. He says that he assumed the Wilkinson Order had been vacated or somehow subsumed by subsequent orders, in particular, the Hunter Order appointing Mr. Gilchrist as trustee of the Simpson Trust. He also admits that, instead of taking steps to clarify which court orders continued to apply, he was content to "let sleeping dogs lie". He had prior knowledge and background of reserve land lease issues. He wrongfully assumed he could get all the approval he needed for a head lease from Mr. Gilchrist. Had he done a modicum of due diligence, he would have known that Mr. Gilchrist only had very limited authority respecting the Lands that did not include agreeing to a head lease on the Simpson Sisters' behalf.

- [86] The Indian Act guidelines contain a detailed list of requirements that have to be met before a head lease will be considered by the Crown, including consent of the locatees, provincial bodies such as the Ministry of the Environment and Ministry of Transportation and Infrastructure. The Crown also required a new survey setting out the proposed lease land, an environmental assessment, a new fair market value appraisal, environmental screening requirements and standards for water and waste systems to be approved by Health Canada, and environmental screening for historical impact and species at risk issues, among other things.
- [87] Following his purchase of the Companies' shares, none of these steps were taken or even initiated by Mr. DeFehr. From June 2011 through 2013, no steps were taken to even attempt to secure a valid lease from the Crown. Still, without any form of lease or valid right to operate the mobile home park on the Lands, he proceeded to more than double the size of the park to 81 lots, despite a court order that he was only to "manage" the park pending resolution of the dispute.
- [88] I conclude that Mr. DeFehr is the author of his own misfortune. It should come as no surprise to him that sooner or later, he would have to vacate the Lands.
- [89] BCL was a trespasser on the Lands from the outset. Herbert and BCL were frustrated with their lack of success in putting a valid lease in place and attempted to bypass the process. After years of attempts and with no lease in sight, Herbert and 777 attempted to manufacture something that simply had no legal validity--the ICL.
- [90] In sum, the Simpson Sisters have proven that the Companies have always been trespassers on the Lands and the plaintiffs are entitled to the orders they seek.

XI. Damages

- [91] The plaintiffs seek damages for trespass for the two-year period prior to the filing of the notice of civil claim on May 6, 2017. They also seek a tracing order in an attempt to determine what revenues were received by 777 and/or BCL and/or 067 from Creek Run Park, what legitimate expenses were incurred and where the net revenues disappeared to.
- [92] It is apparent that the Companies have no assets and are effectively judgment proof. BCL sold all its assets to 777 in 2003 and has not been involved in Creek Run Park since then. 067 has not been made a party to this action. Therefore, the plaintiffs' trespass damage claim must be limited to 777.
- a. Tracing Order

- [93] I agree with the Locatees' submission that a tracing order is necessary and proper. The Companies have provided very little financial disclosure respecting revenues received and expenses paid over the years. To the extent that financial statements have been provided, there is very little back up documentation. The plaintiffs have also established that a significant amount of money passing through 067's bank accounts was used to either fund Mr. DeFehr's personal living expenses and/or was withdrawn without proper explanation.
- [94] The evidence I accept respecting the net revenues of Creek Run Park is from the Receiver. I accept that, as a general rule and barring unusual or unforeseen expenses, Creek Run Park's gross monthly rental receipts are approximately \$30,000. Net revenues are approximately \$20,000 per month. On the whole of the evidence, I conclude that much of the Companies and/or 067's net revenues received each month were either unrecorded, deposited elsewhere, or misappropriated. I am not persuaded by Mr. DeFehr's explanations for what happened to these funds or the Companies' inability to earn a profit.
- [95] The plaintiffs are entitled to the tracing order they seek.
- b. General Damages
- [96] The plaintiffs propose three alternative methods of assessing damages against the Companies. The first involves a reconciliation of rents received by the Companies since May 2015, and takes into account monies that were paid either to the Simpson Sisters or paid into trust. The net amount of damages using this method is \$300,713.
- [97] The second method involves a valuation of the benefit received by the Companies by occupying the Lands on a "value received" approach based on the present value of Crown's fair market value assessment of \$65,000 per year in 1993 for the five years since May 2015. The net amount using this method is \$357,252.
- [98] The third method involves an assessment of what the Locatees would have been paid in rental revenues had the Creek Run Park been developed and rents paid to them in accordance with the original agreement in 1993, and subtracting what rents were in fact received. The Locatees concede it is impossible to assess the measure of damages using this third method because there is no way of knowing what rents were paid to the Companies over the years.
- [99] I conclude that the most appropriate and pragmatic method of assessing damages in this case is the first method. This approach is based on pad rentals that, according to Mr. DeFehr's records, were earned from and after May 2015 and taking into account monies paid into trust, less monies received by the Simpson Sisters from the KPMG Settlement. In the end, it calls for an assessment, not a calculation.
- [100] Considering the whole of the evidence, I conclude that damages ought to be awarded in favor of the Locatees against 777, net of the KPMG Settlement, in the sum of \$250,000.

c. Punitive Damages

- [101] The plaintiffs seek an order for punitive damages against the Companies based on their persistent misconduct, defiance of OKIB's authority over the Lands and defiance of the Wilkinson Order that specifically enjoined them from any activity other than maintaining the Lands pending resolution of the ownership dispute.
- [102] They rely on the *Mohawks of the Bay of Quinte v. Brant*, 2009 ONCA 581, leave to appeal to SCC refused, [2009] SCC No. 378 [Brant] and *Whiten v. Pilot Insurance Company*, 2002 SCC 18 [Whiten] in support.
- [103] In *Brant*, the court found that a punitive damages award of \$50,000 was appropriate to reflect a measure of general deterrence and denunciation for the defendant's "lawless" conduct.
- [104] The plaintiffs assert that the Companies' conduct was planned and deliberate. They point to Mr. DeFehr's evidence that he knew prior to purchasing the Companies' shares that there was no head lease in place and that he was told by Mr. Swetz that he could make money off the property without one. He decided to "let sleeping dogs lie". This is confirmed by Mr. DeFehr operating Creek Run Park for two years after purchasing the Companies' shares without taking any steps to pursue a head lease.
- [105] The plaintiffs argue that the Companies and Mr. DeFehr were knowingly trespassing and knowingly continued to illegally occupy the Lands. Indeed, part of the arrangement with Mr. Swetz was that if a head lease could not be secured, Mr. Swetz would re-purchase the Companies from Mr. DeFehr. Instead, Mr. DeFehr carried on operating Creek Run Park and collecting rents.
- [106] There is no doubt that BCL "jumped the gun" in 1993 when it proceeded with the development of Creek Run Park without a head lease in place. BCL knew it was doing so at its own risk. There is also no doubt that the development of Creek Run Park occurred because all parties then involved were attempting, at various points over the years, to negotiate the terms upon which a head lease would be obtained and registered. The Companies' principals, including Mr. DeFehr, were attempting to legalize the illegal occupation through discussions with the Simpson Sisters, who themselves were in internal conflict with one another. During the 2011-2017 timeframe, it was impossible to negotiate anything because it was unclear who ultimately had the authority to make decisions. Until that was sorted out by the Davies Order in September 2017, a lease could not have been put in place regardless of the bona fides of the parties.
- [107] During cross-examination, Mr. DeFehr admitted withholding rent to try and force the Simpson Sisters to the negotiating table.
- [108] However, it was not until recently that the Simpson Sisters were ad idem among themselves and would have been able to negotiate on a common front.

[109] The Companies and later 067 were able to continue operating Creek Run Park because of the bitter disputes between Herbert and Maureen initially, between Maureen and her sisters later, and more recently between the Simpson Sisters and Mr. Gilchrist/KPMG. To add to the mix, a number of injunctions and other court orders in various actions were in place affecting what could be done respecting the Lands and Creek Run Park. Some of the orders allowed 777 to remain on the Lands, manage the park, and collect pad rentals.

[110] In my view, the orders I am making, which will conclude the dispute between the parties, will allow them to move forward with certainty and will allow them to put the past behind them. While the past 27 years have been difficult, confusing and unfortunate, the fact remains that interim orders were put in place to govern the parties' conduct. Despite plaintiffs' counsel's passionate plea, this is not a case where an award of punitive damages would be appropriate.

[111] I decline to award punitive damages in this case.

XII. The Counterclaim

[112] The Companies' counterclaim against the plaintiffs for what they say is the lost value of Creek Run Park (which they assert is \$3.1 million) plus damages totalling over \$600,000. The breakdown is:

- a) \$185,000 representing the money paid to Herbert by 777 in November 2010, as part of the ICL;
- b) \$7,200 representing the cost of moving as a result of the Simpson Sister's attempted eviction in June 2015 ("Eviction") that was set aside in August 2015 by the Hyslop Order;
- c) \$12,980 representing the value of lost tools and equipment during the Eviction, which Mr. DeFehr suspects the plaintiffs might have had something to do with;
- d) \$19,800 representing the value of an effluent pump that went missing, which Mr. DeFehr suspects the plaintiffs might have had something to do with;
- e) \$7,500 for the rental of a storage container since the Eviction;
- f) \$27,000 representing lost pad rental resulting from the Eviction;
- g) \$23,587 representing lost rentals from Elite Roofing after it moved off the Lands; and
- h) \$3.1 million representing the difference between what Mr. DeFehr claims to have paid for BCL and 777's shares, and the current value of Creek Run Park. He suggests there are people on the sidelines who are prepared to purchase Creek Run Park for that sum, if and when a head lease is registered.

- [113] Mr. DeFehr testified that he purchased the Companies on the strength of assurances from Mr. Swetz, Ms. O'Brien and Mr. Gilchrist that securing a head lease would not be an issue. No one that he spoke to suggested otherwise. He therefore states that either there was an honest effort on the part of all parties to get a head lease duly registered, or there was a deliberate intent by the Simpson Sisters to deceive and mislead him. On balance, he suspects the latter. He testified that he no longer wants anything to do with Creek Run Park.
- [114] Mr. DeFehr argues that he is entitled to be reimbursed the costs incurred in upgrading the new sewer system. He admits that his only qualifications were his years of construction experience. He claims that the sewer system he installed was in accordance with engineered drawings he obtained and says it is far better than the system that existed in 2011 when he purchased the Companies' shares. He admits that the system was never inspected or approved by a qualified professional as was required by the First Nations Health Authority.
- [115] I conclude that the Companies have not proven their counterclaim. There is no evidence, let alone persuasive evidence, that proves the amounts claimed or that any such claim can be made against any of the Simpson Sisters. He has provided no evidence of the value of Creek Run Park's business. He has provided no evidence that Herbert was paid anything by 777 at the time the ICL was signed. Even if there was such evidence, the money was paid to Herbert, a one-half owner only and on the basis of an agreement to agree.
- [116] The Companies attempt to enforce the ICL as against the Simpson Sisters, who were not parties to it, on the theory that they somehow "inherited" Herbert's obligations under it. The ICL on its face and under the Indian Act is void and unenforceable and there is no liability that the Simpson Sisters could have inherited: *Casimir v. Parker*, 2019 BCSC 939. The Companies' claim on this front is rejected.
- [117] Further, the Companies have not provided any documentary evidence or proof of their other claimed damages.
- [118] What occurred is that in 2011, Mr. DeFehr decided to become involved in Creek Run Park hoping at some point a head lease would be registered. He did little, if any, due diligence. He knew the long and difficult history and disputes between Creek Run Park and the Simpson family. He entered this investment fully acknowledging its risks and hoping he could operate and expand Creek Run Park for as many years as possible.
- [119] He did so at his own risk.
- [120] The Companies also plead for relief under the equitable doctrines of unjust enrichment, quantum meruit, and promissory estoppel. Even if equitable principles applied to the Lands, in order for the Companies to claim under the equitable principles of unjust enrichment and quantum meruit, they must show that the equities are in their favor.
- [121] I conclude they are not.

- [122] Respecting their unjust enrichment claim, the Companies suggest that the Locatees have been enriched by the development of Creek Run Park on the Lands. Such a claim involves the Companies proving three things: i. the Locatees have been enriched; ii. the Companies have suffered a corresponding deprivation; and iii. there is no juristic reason for the enrichment: *Kerr v. Baranow*, 2011 SCC 10 at para. 32.
- [123] To the extent that the Companies are deprived as a result of their eviction from the Lands, it is as a result of their own recklessness in continuing to develop Creek Run Park without securing a head lease and in breach of the Wilkinson Order. By failing to secure a head lease under the Indian Act, the Companies never had the right to occupy the Lands. I have already set out why their eviction is justified.
- [124] Any value of Creek Run Park's business assumes a right to occupy the Lands. The Companies had no such right: *Capilano Mobile Park v. Squamish Indian Band*, 2016 BCSC 157; *aff'd* 2016 BCCA 437; leave to appeal denied: [2017] S.C.C.A. No. 5 ["Capilano"]. While on first blush, the evidence suggests that the Simpson Sisters have been enriched by the existence of Creek Run Park and its infrastructure, a closer look clouds the point. I conclude that instead of properly maintaining the operation to acceptable standards in accordance with the Wilkinson Order, the Companies essentially ran the operation into the ground and syphoned off as much money as they could pending the predictable outcome of this case. Even if the Locatees have received a benefit, there was no corresponding deprivation to the Companies because they had to build the infrastructure in order to move forward with the development of Creek Run Park, the cost of which they have likely recovered over the years many times over.
- [125] The loss of the unlawful development of Creek Run Park in the circumstances of this case, does not, in my view, constitute unjust enrichment. To the extent the Companies could argue that the Simpson Sisters have been enriched, that enrichment is outweighed by Creek Run Park's state of disrepair and failing infrastructure that does not meet required safety and environmental standards, both of which I am satisfied will require a significant investment on the part of the Simpson Sisters to address.
- [126] The Companies have led no admissible evidence of Creek Run Park's value, nor of the monies spent on its construction. Indeed, the evidence suggests the Companies have profited for years at the Simpson family's expense. The underlying premise of the Companies' claim against the Simpson Sisters is that they have lost the ability to run Creek Run Park as a going concern business. The flaw in that premise, however, is that it fails to recognize that there is no "business" to value because the Companies had no legal right to use and occupy the Lands. The "business" of Creek Run Park is inextricably interwoven with the Lands and cannot continue in another location: *Capilano*, at paras. 55 and 56. Therefore, there is no basis to find that the Simpson Sisters will be wrongfully taking the Companies' business inconsistent with any right the Companies had to use or occupy the Lands in the first place.

- [127] Although unnecessary to decide, I also find that, given the history of occupation of the Lands by the Companies without a valid lease to their knowledge, and given the history of the dealings between the parties, especially since 2010 when Mr. DeFehr purchased the Companies as detailed above, even if the Simpson Sisters have been enriched and the Companies have been deprived, there is a juristic reason for the enrichment, namely, the Companies have been knowingly trespassing on the Lands since 1993. In the beginning, BCL proceeded with the development of Creek Run Park despite warnings from the Crown and OKIB and knowing the risks. 777 assumed control of Creek Run Park with the same knowledge. Mr. DeFehr purchased the Companies knowing there was no lease in place and also knowing the risks. In my view, the Companies' conduct throughout, including proceeding without a head lease and knowing the risks, constitutes a juristic reason for any enrichment the Simpson Sisters may receive.
- [128] The remedy of unjust enrichment is an equitable remedy that necessarily involves discretion and questions of fairness. The background of this case does not favor the Companies nor the exercise of this Court's discretion in favor of the Companies.
- [129] For the same reasons, the Companies' claim for damages based on a quantum meruit analysis must also fail. The Companies have been collecting rents since approximately 1993 without a lease and have failed to account over the years for monies that may have properly been due to the Locatees. There is no basis for an award on a quantum meruit analysis.
- [130] The Companies also seek relief relying on the equitable doctrine of promissory estoppel. At best, the Companies had an agreement to agree or an agreement in principle on the part of the Simpsons to attempt to secure a head lease. They knew these agreements, including the ICL, were not legal and were unenforceable. They also knew that their attempts to contract with Herbert did not bind the Simpson Sisters. They knew that unless and until the Crown approved and issued a head lease, the "agreement in principle" with the Simpsons could not be enforced. The Companies were told early on by the Crown that any development or other work done on the Lands respecting Creek Run Park were at their own risk.
- [131] Accordingly, the Companies' promissory estoppel claim must also be dismissed.
- [132] It should come as no surprise to Mr. DeFehr that this day has finally come.
- [133] In sum, the Companies have not proven their counterclaim and it is dismissed in its entirety.

XIII. Decision

- [134] This case is a prime example of what can happen when parties hopeful of developing reserve lands, short-circuit or attempt to bypass the process and protections of the Indian Act. BCL and later 777 should never have begun or continued the construction of Creek Run Park without securing a properly registered head lease. Mr. DeFehr should never have agreed to purchase the Companies' shares without ensuring that a head lease was in place.

Likewise, the Companies and Mr. DeFehr should never have proceeded with further development of Creek Run Park when no head lease was in place and when they knew of the long-standing dispute between the Simpson Sisters, Herbert, and Mr. Gilchrist.

[135] The plaintiffs' trespass claim has been made out and is allowed.

[136] This longstanding dispute respecting the Lands is now over.

XIV. Orders

[137] In sum, I make the following orders:

- a) Maureen Ziprick, Leona Simpson, Roberta Simpson-Alec, and the Estate of Karen Simpson (through her three children, Alicia Michelle Simpson, Glen Shay Terry Simpson, and Dillon George Simpson) (together the "Locatees"), are the lawful possessors of the whole of the Lands described as:

Lots 125, 126, 128, 129 and 140, Plan 75843 CLSR formerly known as Lots 7-1 and 8-2, Plan 1457 RSBC, Duck Lake Indian Reserve #7 ("Lands"),

as evidenced by certificates of possession, and are lawfully in possession of the Lands and are entitled to the possession and quiet enjoyment of the Lands;

- b) 662777 B.C. Ltd., Braunfel Construction Ltd., or any other party asserting any right as assignee or successor in title, or any other company operated by Mr. Gordon DeFehr, whether directly or indirectly, and purporting to manage, operate or possess the Creek Run Mobile Home Park on the Lands (together the "Occupier"), have no lawful right of possession of the Lands, have no interest in the Lands, and have no legal or equitable claim against the Locatees in any way connected to the Lands;
- c) 662777 B.C. Ltd., Braunfel Construction Ltd., or any other company operated by Mr. Gordon DeFehr, whether directly or indirectly, and purporting to manage, operate or possess the Creek Run Mobile Home Park on the Lands, and each of them, are to deliver up immediate vacant and quiet possession of the Lands to the Locatees and to remove any personal property and/or chattels belonging to the Occupier within 60 days from the date of these reasons;
- d) An injunction is hereby granted restraining and enjoining the Occupiers or any person or corporation acting by or through them from directly or indirectly occupying or trespassing upon the Lands;
- e) The Locatees are granted general damages against 662777 B.C. Ltd. in the sum of \$250,000 for trespass and loss of use of the Lands;
- f) An accounting of monies received by BCL and/or 777, and/or any other company owned or operated by Gordon DeFehr, or their agents/employees from May 5, 2015 (two years prior to the date the NOCC was filed) to November 1, 2019 (date the Receiver was appointed);

- g) A tracing order; and
- h) Interest on the sum of \$250,000 pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79.

[138] The Companies' counterclaim is dismissed.

XV. Costs

[139] The parties have asked that costs be spoken to after the decision. Accordingly, the parties have liberty to make appropriate arrangements, within 30 days, through trial scheduling.

[140] If no arrangements are made, the plaintiffs and OKIB will have their costs, Scale B, against the defendants 662777 B.C. Ltd. and Braunfel Construction Ltd.

"G.P. Weatherill J."

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