

CANADA / JUDGMENT

Zwiro Holdings Ltd. v. Milanovic

2021 BCSC 1928

COURT

Supreme Court of British Columbia

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2021 BCSC 1928 Zwiro Holdings Ltd. v. Milanovic

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Zwiro Holdings Ltd. v. Milanovic,

2021 BCSC 1928

Date: 20211004

Docket: S191663

Registry: Vancouver

Between:

Zwiro Holdings Ltd. and Dave Tietzen

Plaintiffs

And

Robert Milanovic, Heather Milanovic,

Sun Land Utilities Ltd. and 552444 B.C. Ltd.

Defendants

Before: The Honourable Madam Justice C. Ross

Reasons for Judgment

Counsel for the Plaintiffs:

P.L. Krawus

P.K. Padda

The Defendants, appearing in person:

H. Milanovic

R. Milanovic

Place and Date of Trial:

Vancouver, B.C.

August 16-18, 2021

Place and Date of Judgment:

Vancouver, B.C.

October 4, 2021

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Introduction

- [1] This is an action to enforce a settlement agreement. The plaintiffs allege that the parties entered into a settlement agreement resolving the issues in a previous action commenced by the plaintiffs arising out of a failed business arrangement. The plaintiffs submit pursuant to the terms of the settlement agreement, the trial of the previous action was adjourned and the plaintiffs are entitled to payment. The plaintiffs seek damages for breach of contract and punitive damages.
- [2] The defendants allege that the settlement agreement is not a valid and enforceable contract, alleging that the defendants, and in particular Robert and Heather Milanovic, received no consideration. They further allege that the agreement is unconscionable and that Mr. Tietzen is guilty of breach of fiduciary duty. Finally, they invoke the doctrine of laches.

Parties

- [3] The plaintiff Dave Tietzen is the sole officer and director of the plaintiff Zwiros Holdings Ltd., which is a company incorporated under the laws of British Columbia ("Zwiros").
- [4] The defendant Sun Land Utilities Ltd. ("Sun Land") is a company incorporated under the laws of British Columbia. At times material to this action, Sun Land was the registered owner of a property in Powell River known as the 7406 Property. The defendant 552444 BC Ltd. ("552444") is a company incorporated under the laws of British Columbia (Collectively the "Milanovic Companies"). At times material to this action, 552444 was the registered owner of a property in Powell River known as the 7440 Property.
- [5] The defendant Robert Milanovic is the sole officer and director of Sun Land and is an officer and director of 552444. The defendant Heather Milanovic is the spouse of Robert Milanovic (Collectively the "Milanovic Individuals"). At times material to this action, the Milanovic Individuals were the registered owners of four strata lots (the "Apex Properties").

Background

- [6] The Tietzen and Milanovic families were neighbours who became friends in the late 1980s. At that time, Mr. Tietzen was employed as a hockey coach. Mr. Milanovic was a contractor and property developer.
- [7] In the 1990s, through the Milanovic Companies, Mr. Milanovic acquired two adjacent properties in Powell River known as the 7406 and 7440 Properties, with the intention of developing them (Collectively the "Powell River Properties"). The 7406 Property was a 26.05-acre parcel of mostly cleared land with a number of service pads for modular homes. Sun Land was the registered owner of the 7406 Property. The 7440 Property, the registered owner of which was 55244, was an 11.7-acre parcel which contained infrastructure for modular homes.

- [8] In or around 2001, Mr. Tietzen and Mr. Milanovic entered into an arrangement to develop the Powell River Properties, the terms of which were not reduced to writing. In general terms, the plan was to develop the 7440 Property as a modular home site with 55 fully serviced modular home pads. The 7406 Property was to be developed as a golf course, which Mr. Tietzen would operate through his company Zwiro. The golf course would be used as an attraction to market the sale of the modular homes on the 7440 Property.
- [9] The golf course was developed and operated until 2014, when it was abandoned. In addition, Mr. Tietzen acquired and completed three modular homes on the 7440 Property. However, the development of the modular home park was not completed.
- [10] In the present action, Mr. Tietzen and Mr. Milanovic, with considerable mutual recrimination, offered various explanations for the failure of the project to reach completion. While the causes cannot be identified with any certainty, it is clear that by 2014, despite the considerable expenditure of all parties' time, effort and money, the project as planned by the parties was a failure--the golf course abandoned; the modular home park not completed.
- [11] The plaintiffs commenced an action against the Milanovic Companies in 2015 in which the terms and conditions of the arrangement between the parties were the central issue (the "Original Action"). Neither of the Milanovic Individuals were parties to the Original Action and the Original Action did not involve any claims with respect to the Apex Properties. The plaintiffs filed a certificate of pending litigation against title to each of the Powell River Properties.
- [12] In the Original Action, the plaintiffs alleged that under the terms of the arrangement, Sun Land was to transfer a 50 percent ownership interest in the 7406 Property and that in breach of that agreement, it had refused to do so. The plaintiffs alleged that they had made contributions to the Power River Properties which had maintained and improved the properties. They sought an accounting and an interest in the Power River Properties pursuant to a resulting or constructive trust.
- [13] The defendants asserted in response that under the terms of the arrangement, Sun Land was to retain sole legal and beneficial ownership of the 7406 Property. They alleged that the plaintiffs had breached the terms of that agreement in failing to make the payments to Sun Land provided for in the agreement. With respect to the 7440 Property, the defendants alleged that, except for the revocable licence to use the pads for the three modular homes, the plaintiffs had no interest in the 7440 Property. The defendants, on the other hand, admitted that Mr. Tietzen owned the three modular homes and that he was entitled to remove, relocate, sell, or rent them to others.

- [14] Both the plaintiffs and the defendants were represented by counsel at the stage of the exchange of pleadings. A notice of trial was filed scheduling the matter for a 10-day trial commencing July 11, 2016. Examinations for discovery of Mr. Milanovic and his mother, Marija Milanovic, who was a director of 552444, were scheduled to occur on May 10 and 11, 2016. Before the examinations took place, counsel for the defendants withdrew, and on March 30, 2016 the defendants filed an intention to act in person.
- [15] Following the examinations for discovery, Andrew Morrison, who was counsel for the plaintiffs, had a discussion with Mr. Milanovic about the possibility of settlement. Further discussions ensued between Mr. Milanovic and Mr. Tietzen directly and between Mr. Milanovic and Mr. Morrison, which premised a resolution of the Original Action through the sale of the Powell River Properties and division of the proceeds. Mr. Milanovic was an active party throughout the negotiations.
- [16] At the time of the settlement discussions, both of the Powell River Properties were heavily encumbered with mortgages and judgments. In particular, First West Credit Union was registered on title of both properties in relation to an inter alia loan taken to fund other projects in which Mr. Milanovic was involved. At the time of the settlement negotiations, the First West mortgage was in default and foreclosure on the mortgage was contemplated as a possibility. In addition, it was contemplated that in the event of a foreclosure, the proceeds of sale would not be sufficient to cover the plaintiffs' share under the terms that were being negotiated to settle the Original Action.
- [17] In the result, the parties reached an agreement on the terms of settlement (the "Settlement Agreement"). The parties to the Settlement Agreement were the plaintiffs, the Milanovic Companies and the Milanovic Individuals. The agreement was dated June 8, 2016 and was signed by all parties.
- [18] Pursuant to the terms of the Settlement Agreement, the Powell River Properties were to be listed and sold. The plaintiffs' share was to be 25 percent of the gross proceeds of sale, which was a defined term in the Settlement Agreement. If the proceeds of sale were not sufficient to pay the plaintiffs' share, the Milanovic Companies were to immediately pay the shortfall to the plaintiffs. In the event that the Milanovic Companies failed to do so, the Milanovic Individuals were to transfer title or a portion of title of one of the Apex Properties owned by the Milanovic Individuals to the plaintiffs to cover the shortfall. The Milanovic Individuals covenanted not to sell, transfer, assign, pledge or encumber any of the Apex Properties until the amount owed to the plaintiffs was paid in full.
- [19] Following execution of the Settlement Agreement, the trial of the Original Action was adjourned generally.
- [20] First West Credit Union commenced foreclosure proceedings by way of petition on August 5, 2016. In the foreclosure proceedings, First West sought, inter alia, an order for sale of the Powell River Properties.

- [21] The Powell River Properties were ultimately sold in the foreclosure proceedings. Mr. Tietzen's three modular homes were expressly excluded from the sale. First West Credit Union filed a certificate of result of sale which stated the sale price was \$1,200,000 and that the realtor's fees amounted to \$36,750. Based on these figures, the amount owed to the Tietzen Plaintiffs pursuant to the Settlement Agreement is \$295,812.50 (the "Amount Owed").
- [22] On December 21, 2017, First West Credit Union filed a requisition for payment into court of \$112,444.90 to the credit of the foreclosure proceedings (the "Excess Funds").
- [23] The plaintiffs filed an application on September 18, 2018 seeking an order for payment out of court to them of the Excess Funds.
- [24] On December 6, 2018, the Milanovic Companies and Individuals filed a response to the application, opposing the orders sought and contesting the validity and enforceability of the Settlement Agreement.
- [25] The application for payment out of the Excess Funds was adjourned generally by consent.
- [26] In December 2018, the Milanovic Individuals sold their interest in the Apex Properties to BCL Holdings Ltd. and Elderres Holdings Ltd. At no time prior to the sale or transfer did they notify the plaintiffs.
- [27] On February 5, 2019, the plaintiffs sent a letter to the Milanovic Companies and Individuals demanding payment of the Amount Owed pursuant to the Settlement Agreement. To date they have not received the Amount Owed or any portion of it. They subsequently commenced the present action.

Discussion

Is the Settlement Agreement a valid and enforceable contract?

Intention to contract

- [28] The plaintiffs submit that the Settlement Agreement is a valid and enforceable contract. Mr. Milanovic negotiated the terms of the agreement both directly with Mr. Tietzen and with the plaintiffs' counsel, Mr. Morrison. The defendants signed the Agreement, thereby accepting the terms of the contract. The response to civil claim refers to a lack of intention to contract as a legal basis for opposing the plaintiffs' claims.
- [29] The test for intention to enter into contractual relations is objective: *Langley Lo-Cost Builders Ltd. v. 474835 Ltd.*, 2000 BCCA 365 at para. 21. In the present case, I am satisfied that a reasonable third party would have understood from all the circumstances, including the document itself and the circumstances of its execution, that the parties to the Settlement Agreement intended to be bound by its terms. The defendants' conduct leading up to and including the signing of the Agreement was consistent with an intention to enter into binding legal relations. Moreover, the defendants offered no evidence to the contrary.

Consideration

- [30] The plaintiffs submit that they gave a promise of forbearance from proceeding with the trial of the Original Action as consideration for the Settlement Agreement. They submit that forbearance is good consideration and one party's promise to forbear from proceeding with litigation over the other party's debt constitutes valid consideration: *Royal Bank of Canada v. Kiska*, [1967] 2 O.R. 379 (C.A.); *Fund v. Jeanrie*, [1992] 113 N.S.R. (2d) 45 (S.C.).
- [31] The defendants submit that consideration is an essential element of a valid and binding contract: *Century 21 Coastal Realty Ltd. v. 0863846 B.C. Ltd.*, 2017 BCSC 1498 at para. 28. The defendants assert that the defendants, and in particular the Milanovic Individuals, did not receive consideration, hence the Settlement Agreement is not a valid and binding contract.
- [32] I agree that consideration is an essential element for a valid and binding contract. However, the authorities in my view are clear; first, that forbearance constitutes consideration; and second, that the plaintiffs' forbearance to continue the suit against the Milanovic Companies is good consideration with respect to the Milanovic Individuals: *Gill v. Khural*, 2020 BCCA 332 at para. 16.
- [33] I find that the plaintiffs gave good and sufficient consideration to the defendants, including the Milanovic Individuals.

Is the Settlement Agreement Unconscionable?

- [34] The defendants submit that the Settlement Agreement is unconscionable, noting that they did not have legal representation during the negotiations and further that they were anticipating the Properties would sell for at least \$2,100,000, almost twice the amount of ultimate price in the foreclosure proceedings.
- [35] The plaintiffs submit that the Settlement Agreement was freely negotiated and agreed to by all parties. There was no inequality of bargaining power, no flaw in the process that would attract equitable relief. The bargain was not improvident.
- [36] The Supreme Court of Canada discussed the doctrine of unconscionability in *Uber Technologies Inc. v. Heller*, 2020 SCC 16 [Uber]. The majority confirmed at para. 60 that the doctrine is meant to protect people who are vulnerable in the contracting process from loss or improvident bargains. In order to obtain relief, the defendant must establish two elements: first, that there was an inequality of bargaining power; and second, that the bargain was improvident.
- [37] As the majority states at para. 64 in *Uber*, an inequality of bargaining power exists when one party cannot adequately protect their interests in the contracting process. The defendants rely upon their absence of legal representation during the process. In my view, however, this is not sufficient to establish that there was an inequality of bargaining, as that term is defined in the context of the doctrine of unconscionability.

- [38] Mr. Milanovic was an experienced businessman who had decades of experience in real estate development. He had extensive experience negotiating and entering into contracts. He testified that he believed he could negotiate the terms of settlement without a lawyer.
- [39] Mr. Milanovic also had experience working with lawyers and access to legal advice. Mr. Leathley was retained to represent the defendants in the Original Action from at least December 19, 2014 to March 30, 2016. Mr. Milanovic dismissed Mr. Leathley, prior to the negotiation of the Settlement Agreement; however, he acknowledged that he spoke with Mr. Leathley on a number of occasions after March 30, 2016 and prior to signing the Settlement Agreement. In addition, Mr. Milanovic instructed Mr. Morrison to speak with Tom Kampman, who was his corporate lawyer, about the value of the Powell River Properties, the Apex Properties and the extent of encumbrances.
- [40] I find that the defendants have not discharged their burden to establish that there was an inequality of bargaining power in the negotiation of the Settlement Agreement.
- [41] As noted above, the defendants also assert that the Settlement Agreement was an improvident bargain because the ultimate sale price was approximately half of what they believed was the fair market value of a likely selling price. In my view, this was not an improvident bargain. Mr. Milanovic well understood the vagaries of the real estate market. The Settlement Agreement was premised on sharing the proceeds of sale; hence, both sides stood to share in the upside of a profitable sale and in the risk of a sale at a lower price.
- [42] The Settlement Agreement did provide the plaintiffs with protection in the event of a shortfall, being a gap between the gross and net proceeds of sale. However this in my view did not render the agreement improvident given that a shortfall could only result as a consequence of the encumbrances that the defendants were solely responsible for placing on title. Moreover, the sale was conducted under the supervision of the court in the foreclosure proceedings. There is no suggestion that the defendants filed any objection with respect to the sale during those proceedings.
- [43] The defendants argue that they entered into the contract in the belief that the sale price would be in the region of \$2,100,000. However, it is clear that the parties contemplated at the time of negotiating the Settlement Agreement that the Properties might be sold at a price substantially less than \$2,100,000 and indeed at a price in which the Plaintiffs' share could not be satisfied from the net proceeds of sale. The clauses dealing with the responsibility of the Milanovic Companies and Milanovic Individuals in the event of such a shortfall clearly demonstrate that a sale price significantly below \$2,100,000 was specifically contemplated.
- [44] I find that this was neither an improvident bargain nor an agreement entered into based upon a fundamental mistake.

Did the Plaintiffs Breach the Settlement Agreement?

[45] The defendants submit that the plaintiffs breached the Settlement Agreement and that as a consequence the Agreement should be set aside. The defendants submit that under a term of the Settlement Agreement, Mr. Tietzen was given sole conduct of sale. As such he was a fiduciary of the defendants. The defendants assert that he breached his fiduciary duties by failing to properly market the properties and by having an interest in the purchaser of the properties, Grasshopper Developments Ltd.

[46] The relevant provisions of the Settlement Agreement are as follows:

3. Mr. Tietzen will have the exclusive right to market the 7406 property and the 7440 Property for sale until July 15, 2016 (the "Tietzen Marketing Period"). If a contract of purchase and sale of the 7406 Property and/or the 7440 Property is entered into on or before July 15, 2016, and the 7406 Property and/or the 7440 Property are subsequently sold to that purchaser or its assignee, the Tietzen parties will be entitled to an interest in the Properties equal to 28% of the Gross Proceeds of Sale.
4. If no contract of purchase and sale is entered into for the 7406 or the 7440 property on or before July 15, 2016 or if Mr. Tietzen elects to list the 7406 Property and/or the 7440 Property with a realtor at an earlier date, the 7406 Property and/or the 7440 property will be listed for sale with Warren Behan of Coast Realty and the Milanovic Parties will promptly execute an exclusive listing agreement, prepared by Mr. Behan, providing Mr. Behan with the exclusive right to market the 7406 Property and/or the 7440 Property for sale for a period of six months (the "Initial Listing Agreement").
8. The list price for the 7406 Property and the 7440 Property will be determined as follows:
 - (a) the parties will request a recommendation for the list price from Mr. Behan;
 - (b) the parties will have 48 hours to review and discuss Mr. Behan's recommendation. If the parties agree to a list price that differs from the price recommended by Mr. Behan, each property will be listed at that price; and
 - (c) if the parties are unable to agree to a list price, each of the 7406 Property and the 7440 Property will be listed at the price recommended by Mr. Behan.
9. Mr. Milanovic and Mr. Tietzen will review the list price of the 7406 Property and the 7440 Property every three months to determine whether the list price should be altered. If Mr. Tietzen and Mr. Milanovic cannot agree on whether the list price of the 7406 Property or the 7440 Property should be maintained, raised or lowered, they will seek a recommendation from the realtor who has the exclusive right to market the properties for sale at that time and the realtor's recommendation will bind the parties. The Milanovic Parties will promptly sign any and all documents required to adjust the list price in accordance with the agreement of Mr. Tietzen and Mr. Milanovic or the recommendation of the realtor.

11. If an offer to purchase the 7406 Property or 7440 Property is received during the Tietzen Marketing Period, Mr. Tietzen will immediately provide a copy of the offer to Mr. Milanovic and Mr. Tietzen and Mr. Milanovic will discuss the offer as soon as reasonably possible:
 - (a) if Mr. Milanovic and Mr. Tietzen agree on an appropriate course of action such as accepting the offer, making a counter-offer, the parties will pursue that course of action;
 - (b) if Mr. Milanovic and Mr. Tietzen cannot agree on an appropriate court of action:
 - i) if the offer is acceptable to Mr. Tietzen and is for a price of \$2,100,000 or more, Sun Land and 552444 will immediately execute all documents necessary to accept the offer; or
 - ii) if the offer is not acceptable to Mr. Tietzen or is for a price that is less than \$2,100,000, the offer will be rejected without counter-offer.
12. If an offer to purchase the 7406 and/or the 7440 Property is received at a time when a realtor has listed the properties for sale, the Milanovic Parties will immediately notify the Tietzen Parties of the offer and will immediately notify the Tietzen Parties of the offer and will immediately provide a copy of the offer to Mr. Tietzen. Mr. Milanovic and Mr. Tietzen will discuss any offer received as soon as reasonably possible, and:
 - (a) if Mr. Milanovic and Mr. Tietzen agree on an appropriate course of action as accepting the offer, making a counter offer or rejecting the offer without a counter offer, Sun Land and/or 552444 will instruct the realtor in accordance with that agreement; or
 - (b) if Mr. Tietzen and Mr. Milanovic do not agree to an appropriate course of action:
 - i) if the offer is for an amount greater than 90% of the list price at the time the offer is received, Sun Land and/or 552444 will instruct the realtor to accept the offer and will execute all documents necessary to accept the offer; and
 - ii) if the offer is for an amount less than 90% of the list price, Sun Land and/or 552444 will instruct the realtor to reject the offer without a counter offer.
- [47] Both Mr. Tietzen and Mr. Milanovic gave conflicting accounts of the sale process. Both claimed, each blaming the other, that the sale price for the Properties was not set prior to the foreclosure proceedings. Mr. Tietzen claimed that Mr. Milanovic refused to sign the listing agreement. However, I find that prior to the listing in the context of the foreclosure proceedings, the Properties were listed with Mr. Behan and accordingly the listing agreement must have been signed. Mr. Tietzen claimed that the sale was consummated with sealed bids at a hearing in the foreclosure proceedings. This was not the case.
- [48] Affidavit #1 of Raffaella Longhin sworn September 8, 2017 was filed in the foreclosure proceedings. It includes appraisals, a history of the listing of the Properties and the offers for sale. That document describes what I find to have been the actual course of events.

- [49] The Properties were listed by the Milanovic Companies commencing July 13, 2016 with Mr. Behan at \$2,500,000. No offers were received.
- [50] First West Credit Union was granted exclusive conduct of sale on November 8, 2016. First West entered into a listing agreement with Mr. Behan on April 27, 2017 at \$1,800,000 based on appraisals obtained in December 2016, which indicated a combined value of \$1,130,000.
- [51] On August 23, 2017, Mark Kaufmann made an offer of \$1,000,000. After a series of counter offers, \$1,200,000 was accepted. This was the offer that received the approval of the court in the foreclosure proceedings. The purchaser was subsequently altered, by order dated November 6, 2017, to identify the purchaser as Grasshopper Developments Ltd.
- [52] With respect to the first contention, the plain language of the Settlement Agreement does not give Mr. Tietzen exclusive conduct of sale. Rather, Mr. Tietzen is given an option to exercise an exclusive right to market the Properties until July 15, 2017, with the list price to be determined according to the collaborative process set out in clause 8. Any offers were dealt with pursuant to clauses 11 and 12, which again describe a collaborative process.
- [53] Mr. Tietzen testified that during the initial period, he made efforts to get the Properties in shape, cutting grass and the like, and he contacted many potential buyers endeavouring to obtain offers. Mr. Milanovic has criticized him for failing to find someone to operate the golf course; however, I find that the Settlement Agreement imposed no such obligation. It was in the interests of all parties to sell the Properties at the highest possible price. I find that the defendants have not established that Mr. Tietzen breached any obligations during the brief period in which he had the exclusive right to market the properties.
- [54] In addition, I am satisfied that Mr. Tietzen was not in a fiduciary relationship with the defendants, even during the relatively brief period when he had the option to exclusively market the properties and certainly not thereafter. There is no evidence of an express or implied undertaking on the part of Mr. Tietzen to act as a fiduciary in relation to the defendants: *Galambos v. Perez*, 2009 SCC 48 at para. 66. Since Mr. Tietzen was not a fiduciary, it follows that he committed no actionable wrong when he acquired an interest in the Properties through Grasshopper Developments Ltd.
- [55] I find that the Settlement Agreement is a valid and enforceable contract. The Powell River Properties have been sold, triggering the obligations to pay the plaintiffs' share pursuant to the agreement. I find further that the amount owed to the Plaintiffs pursuant to the Settlement Agreement is \$295,812.50

Did the Defendants Breach the Settlement Agreement?

The Modular Homes

- [56] It is common ground that the defendants have opposed the payout of the Excess Funds to the plaintiffs, have made no payments to the plaintiffs, nor have the Milanovic Individuals transferred any interest in the Apex Properties to the plaintiffs.
- [57] Although not alleged in the response to civil claim, at trial the defendants argued that there is in fact no amount owing pursuant to the Settlement Agreement because Mr. Tietzen retained the three modular homes, which Mr. Milanovic estimates have a collective value of approximately \$1,000,000.
- [58] The difficulty with this argument is that, as clearly set out in the preamble, the Settlement Agreement was intended to resolve all disputes between the parties. It is clear from a review of the pleadings in the Original Action that there was no dispute with respect to the modular homes. No claim is advanced in the notice of civil claim concerning the houses. As noted above, the response to civil claim acknowledged that Mr. Tietzen owns the three modular homes and that he is entitled to remove, relocate or sell the houses or to rent them out to others. Accordingly, retention of the modular homes does not constitute payment of amounts owing pursuant to the Settlement Agreement.

Commercial Activities

- [59] The defendants submit that the plaintiffs' commercial activity in the development of the properties and modular homes is a relevant factor to reduce their entitlement pursuant to the Settlement Agreement. I agree with the plaintiffs that the Settlement Agreement provides the plaintiffs with a fixed contractual amount, which constitutes liquidated damages that are not subject to a duty to mitigate: *Direct Cash ATM Processing Partnership v. Main Food Stop*, 2018 BCSC 1851 at para. 50-51.

Laches

- [60] The defendants further submit that the plaintiffs are estopped from recovery on the basis of the doctrine of laches. Mr. Milanovic testified that he believed that the plaintiffs were not going to pursue the matter further when he did not hear from Mr. Tietzen in circumstances in which Mr. Tietzen had retained the modular homes and was an investor in the purchaser of the properties.
- [61] The plaintiffs submit that there has been no unreasonable delay and the doctrine has no application.
- [62] As the Supreme Court of Canada stated in *M.K. v. M.H.*, [1992] 3 S.C.R. 6 at para. 98, there are two distinct branches to the laches doctrine: delays amounting to acquiescence, and delays that caused the defendant to alter his position in reasonable reliance on the plaintiff's acceptance of the status quo. Thus, important considerations are the length of the delay and acts undertaken during the interval that affected either party.

- [63] In the present case, the first date to consider is the date of the application by First West Credit Union for payment into court of the Excess Funds, December 21, 2017. The plaintiffs filed their application for payment out of the Excess Funds on September 18, 2018. This constitutes the relevant period of delay.
- [64] In my view, while there was some delay on the part of the plaintiffs in bringing their application for payment out of the Excess Funds, it was not excessive nor did it amount to acquiescence. Moreover, the defendants did not demonstrate that they changed their position during the interval of the delay. The material change was the sale of the Apex Properties; however, this occurred in December 2018, after the plaintiffs had filed for payment out of the Excess Funds, at a time when it was clear that the plaintiffs were asserting their entitlement pursuant to the Settlement Agreement.
- [65] I find that the defendants are in breach of their obligations pursuant to the Settlement Agreement.

Did the Defendants Breach the Contractual Duty of Good Faith?

- [66] The plaintiffs submit, citing *Bhasin v. Hrynew*, 2014 SCC 71 at paras. 73, 93, that the parties had a duty at common law to honestly carry out their contractual obligations:

... I would hold that there is a general duty of honesty in contractual performance. This means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. This does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract; it is a simple requirement not to lie or mislead the other party about one's contractual performance.

It is appropriate to recognize a new common law duty that applies to all contracts as a manifestation of the general organizing principle of good faith: a duty of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligations.

- [67] The plaintiffs submit that Mr. Milanovic knew what his contractual obligations were and decided not to fulfill those obligations. Indeed the defendants opposed the plaintiffs' application for payment out of the Excess Funds and opposed recovery in this litigation. Counsel submits that this conduct was dishonest and intentional and as such constitutes a breach of the contractual duty of good faith and gives rise to an entitlement to punitive damages: *Counterforce Inc. v. Volpe*, 2015 ONSC 4555 [Counterforce].
- [68] In my view, the defendants' conduct does not amount to a breach of the duty of good faith, nor is this a case for punitive damages. The plaintiffs have not established, as in *Counterforce* that the breaches demonstrated that the defendant never intended to honour the contract. There is no evidence that the defendants lied to or misled the plaintiffs.

- [69] I find that the defendants intended to enter into an agreement to settle the Original Action when they signed the Settlement Agreement. There is no evidence that at the time they entered into the Agreement, they did not intend to honour their obligations under that Agreement, nor is there evidence that they lied to or made material misrepresentations to the plaintiffs.
- [70] Subsequently, the defendants formed the view that for reasons discussed above, they were not required to pay the amounts set out in the Settlement Agreement. I have concluded that they were incorrect in this belief and found them liable in breach of contract. However, this does not amount to dishonest conduct or conduct that breaches the duty of good faith.

Counterclaim

- [71] The defendants filed a counterclaim on September 19, 2019. They advance the following:
- a) Cause of action estoppel. The proceeding constitutes an abuse of process because the plaintiffs had the opportunity to raise in the Original Action the claims advanced in the present action;
 - b) Unjust enrichment on the basis of breach of the arrangement between the parties that was the subject of the Original Action, non-disclosure of purchasing the Powell River Properties, and failing to assert their claim in compliance with the terms of the Settlement Agreement and in a timely manner;
 - c) The plaintiffs do not come to court with clean hands; and
 - d) Breach of fiduciary duty.
- [72] The plaintiffs objected on the basis that the counterclaim was filed out of time but, in the alternative, responded on the merits. In my view, it is preferable to deal with the matter on the merits.
- [73] The doctrines of clean hands and laches are defences, not affirmative claims. The doctrine of clean hands is inapplicable in any event because the plaintiffs are not seeking an equitable remedy. I have dismissed the allegation of laches above.
- [74] The proceeding does not constitute an abuse of process. The plaintiffs are not advancing the claims that were or could have been made in the Original Action. They are suing on the Settlement Agreement, a distinct cause of action.
- [75] I have concluded that the Settlement Agreement is a valid and enforceable contract that settled all then-existing disputes between the parties. It follows that the defendants are barred from advancing any claim relating to an alleged breach by the plaintiffs of the arrangement between the parties as that fell within the scope of matters that were or could have been raised in the Original Action.

[76] The plaintiffs were under no legal obligation to disclose their interest in the purchaser of the Powell River Properties and committed no wrong in failing to disclose their interest to the defendants. The lack of disclosure is not connected to any deprivation on the part of the defendants.

[77] I have disposed of the allegations of breach of fiduciary duty above.

[78] In the result, the counterclaim is dismissed.

Disposition

[79] In the result, I find the defendants jointly and severally liable to the plaintiffs for damages for breach of contract in the amount of \$295,812.50, together with pre and post judgment interest.

[80] Unless any of the parties give notice in writing within 30 days seeking to make further submissions on the issue of costs, the plaintiffs are entitled to their costs at Scale B.

"C. Ross J."

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