IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *SHH Management Limited v. Philip,*
2020 BCSC 1411

Date: 20200922
Docket: 173277
Registry: Victoria

Between:

SHH Management Limited and SHH Holdings Limited

Plaintiffs

And

Sinclair Philip, Frederique Philip, the Philip Family Trust and Sooke Harbour House Inc.

Defendants

And

SHH Management Limited, SHH Holdings Limited and Timothy Durkin

Defendants by Way of Counterclaim

Before: The Honourable Mr. Justice Basran

Reasons for Judgment

Counsel for Defendants:	J. Bloomenthal P.W. Klassen
Appearing on his own behalf and appearing as a Representative of SHH Management Limited and SHH Holdings Limited:	Timothy Durkin
Appearing as a Representative of SHH Management Limited and SHH Holdings Limited:	Rodger Gregory

Place and Date of Trial:	Victoria, B.C. January 13-16, 2020, January 27-31, 2020, February 3-7, 2020, February 10-14, 2020, February 24-28, 2020, March 2-6, 2020, March 9-13, 2020, June 8-12, 2020, June 15-19, 2020, June 24-26, 2020 June 29-30, 2020, July 2-3, 2020, July 6-10, 2020
Place and Date of Judgment:	Victoria, B.C. September 22, 2020

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GLOSSARY AND ABBREVIATIONS

[1] The following list describes the parties and other defined terms used throughout these Reasons for Judgment:

a) Sooke Harbour House Inc.: Registered owner of Sooke Harbour House Hotel and the related properties and chattels.

b) Frederique Philip ("Mrs. Philip"): Shareholder and director of Sooke Harbour House Inc. and vendor in the subject share purchase.

c) Sinclair Philip ("Mr. Philip"): Shareholder and Director of Sooke Harbour House Inc. and vendor in the subject share purchase.

d) Sinclair and Frederique Philip ("the Philips"): Collectively, the Shareholders and Directors of Sooke Harbour House Inc.

e) The Philip Family Trust ("Family Trust"): Shareholder of Sooke Harbour House Inc. and vendor in the subject share purchase.

f) SHH Holdings Limited: Purchaser of 100% of issued and outstanding shares of Sooke Harbour House Inc.

g) SHH Management Limited: Management company operating the Hotel under the injunction ordered on September 5, 2017.

h) Timothy Durkin ("Mr. Durkin"): Director and the operating mind of SHH Management Limited and SHH Holdings Limited. Representative at trial for both SHH Management Limited and SHH Holdings Limited.

i) Rodger Gregory ("Mr. Gregory"): Director of both SHH Management Limited and SHH Holdings Limited and the main representative of the investment syndicate.

j) Robin Parker ("Ms. Parker"): General Manager of Sooke Harbour House Inc.

k) Russell Chambers (“Mr. Chambers”): Investor in SHH Holdings Limited and named representative of the investment syndicate.

l) Turn/Two 643 LLC (“Turn/Two”): American LLC that entered into two share purchase agreements with the Philips in 2014. In the second share purchase agreement, Turn/Two purchased 15% of the shares of Sooke Harbour House Inc. and was granted a right of first refusal over the remaining 85%. Turn/Two failed to complete the share purchase agreement and filed a Notice of Civil Claim against the Philips and Sooke Harbour House Inc. two years later on April 11, 2016.

m) Jeffrey Alden Carrithers (“Mr. Carrithers”): Owner and principal of Turn/Two. Mr. Carrithers was responsible for negotiating the two share purchase agreements and filed the Turn/Two Notice of Civil Claim.

n) Qiu Fang “Mona” Mo (“Ms. Mo”): Invested $2 million ($1 million paid) in SHH Holdings Limited on December 9, 2015.

o) Patrick Trelawny (“Mr. Trelawny”): Lawyer at Jones Emery Hargraves Swan LLP. Solicitor for Mr. and Mrs. Philip and Sooke Harbour House Inc.

p) David Juteau (“Mr. Juteau”): Lawyer at Pearlman Lindholm LLP. Solicitor for SHH Holdings Limited and SHH Management Limited in 2016.

q) Real Properties owned by Sooke Harbour House Inc. (“Properties”): Lands and improvements at 1528 and 1529 Whiffen Spit Road, BC, V9Z 0T4, and legally described as: PID 004-068-432, LOT 3, SECTION 6, SOOKE DISTRICT, PLAN 16918; and PID 002-472-503, LOT 68, SECTION 6, SOOKE DISTRICT, PLAN 26921.

r) Order Made After Application – September 5, 2017 (“Injunction Order”).

OVERVIEW

[2] Over 35 years, Frederique and Sinclair Philip owned, operated and built the Sooke Harbour House Hotel and Restaurant into a world-class destination (the "Hotel"). In 2012, they decided to sell the Hotel and enjoy the fruits of their many years of hard work. Three separate deals to sell the Hotel to two different purchasers failed to complete. By 2014, the Philips were both anxious and eager to find a purchaser for the Hotel. In March 2014, they met Timothy Durkin and Rodger Gregory. They thought they had found honest and reputable business people who would comply with their contractual obligations and pay for the Hotel. Unfortunately for the Philips, Mr. Durkin and Mr. Gregory had neither the means nor the intention of paying them for their valuable asset. Instead, the Philips suffered a six-year odyssey of lies, excuses, threats, intimidation and bullying by both of these individuals. In the end, the Philips' substantial equity in the Hotel was entirely dissipated because of the actions of Mr. Durkin and Mr. Gregory. The Philips' reasonable expectation of a comfortable and well-deserved retirement has been effectively stolen from them because they unknowingly put their future in the hands of these two fundamentally dishonest individuals.

[3] The plaintiffs in this matter are SHH Management Limited ("Management") and SHH Holdings Limited ("Holdings"). Mr. Durkin controls and directs both companies. The defendants are Mr. and Mrs. Philip, their Family Trust and Sooke Harbour House Inc. ("Inc.").

[4] The parties executed three separate agreements for the purpose of transferring all of the shares of Inc. to Holdings:

a) a share purchase agreement ("SPA") executed on October 15, 2014, with a closing date of November 14, 2014;

b) a settlement agreement ("Settlement") executed on July 13, 2016, with closing dates of July 25, 2016, August 15, 2016 and September 5, 2016; and

c) an addendum (“Addendum”) executed on November 14, 2016, with closing dates of November 28, 2016 and March 15, 2017.

[5] Holdings failed to perform any of its obligations in respect of the SPA, Settlement and Addendum. It asserts that it had reasonable explanations for failing to comply with the terms of these agreements. These explanations largely consist of blaming the Philips.

[6] I have reviewed and interpreted each of the agreements, the obligations described therein and the various allegations surrounding Holdings’ failure to close on any of these agreements. I conclude that the defendants in this matter bear no responsibility for Holdings’ failure to comply with its obligations under these agreements. Mr. Durkin and Mr. Gregory deceived the Philips into believing that they had both the intention and capacity to purchase the Hotel. They had neither.

[7] In the reasons that follow, I have concluded that Mr. Durkin has been deceitful and dishonest in virtually all of his dealings with the Philips and in the manner in which he conducted himself during the trial. He deliberately lengthened this matter by repeatedly failing to comply with court orders to disclose all relevant documents and not adequately preparing for the trial. Furthermore, I found that Mr. Durkin swore a false affidavit in order to obtain an injunction. This injunction removed the Philips from the Hotel after they attempted to take it back from Mr. Durkin, who had been operating it despite failing to comply with any of his obligations under the agreements.

[8] The Court provided Mr. Durkin with detailed guidance on preparing for trial and conducting direct and cross-examinations. He ignored most of this advice. Instead, he deliberately and repeatedly asked a series of leading questions on direct examinations, particularly during his examination of Mr. Gregory. For reasons that are unclear, he failed to provide direct evidence on relevant matters that only he was aware of, and instead chose to elicit this evidence from other witnesses, who relied largely on what he had told them. I conclude that Mr. Durkin attempted to repeatedly

delay and elongate the hearing of this matter for reasons that were entirely unrelated to the resolution of the issues in this trial.

[9] The Philips and their Family Trust are entitled to:

a) $2,645,229 in compensatory damages for the plaintiffs' breach of the SPA as amended by the Settlement and the Addendum;

b) prejudgment interest of 4.75% on this compensatory damage amount from August 15, 2015, to the date of this judgment;

c) $1,359,544 in damages arising from the Injunction Order; and

d) costs.

HISTORY OF THE HOTEL

[10] Frederique and Sinclair Philip purchased the Hotel in 1979 when it was a small six-room bed and breakfast. The Hotel underwent several significant renovations between 1979 and 1997. In 1986, the Philips built a separate building with 10 additional guestrooms. In 1988, they renovated the original six guestrooms and added private bathrooms. In 1997, the Philips completed a substantial renovation that joined the two existing buildings and added 13 guestrooms.

[11] As a result of the Philips' hard work and creativity, the Hotel became an internationally recognized destination known for its award-winning restaurant and wine cellar. The Philips received various awards for the restaurant and hotel, including the Governor General's "Award in Celebration of the Nation's Table", which they received at a formal ceremony at Rideau Hall in 2010. The Hotel hosted a range of celebrities, food and wine critics, and national and international politicians, including a past President of France.

[12] Prior to 2008, the Hotel was generating substantial revenues. It was particularly profitable between 2001 and 2008. The global financial crisis in 2008 caused a significant decline in the Hotel's revenues, largely due to the significant

reduction in American clients who previously accounted for a considerable proportion of the Hotel's business. These financial difficulties were compounded by a series of personal tragedies suffered by the Philips.

[13] In 2012, the Philips decided to sell the Hotel and transition into retirement.

[14] In 2013, the Philips entered into a share purchase agreement with Murray Hubley. He failed to complete the transaction. Later that year, the Philips found another prospective purchaser, Mr. Carrithers. He also entered into a share purchase agreement and paid a $70,000 non-refundable deposit. This deal also failed to close because Mr. Carrithers did not produce the funds to complete on the closing date.

[15] Shortly thereafter, the Philips signed a subsequent agreement with Mr. Carrithers whereby they committed to sell 15% of the shares of Inc. to him with a right of first refusal for the remaining 85% of the shares. Mrs. Philip alleges that she signed this agreement under duress and without the assistance or advice of counsel. On the day after this agreement was executed, the Philips obtained legal advice, not from Mr. Trelawny, their usual solicitor, but from another lawyer. They decided not to accept the $140,000 purchase price for the 15% of shares of Inc. provided by Mr. Carrithers. They did not hear from Mr. Carrithers again until the spring of 2016 and, accordingly, concluded that this agreement had collapsed.

[16] By 2014, the Philips had fallen behind in their payments owing to the Business Development Bank ("BDC") in respect of their mortgage on the Hotel. Up to this point, the Philips had a very good relationship with BDC and an arrangement whereby they made interest payments only on their mortgage during the one-half of the year that was their slow season and then principal and interest payments during the other half of the year that was their busy season. Once they entered into share purchase agreements, first with Mr. Hubley, then with Mr. Carrithers, they stopped making all payments to BDC. They did so because they expected that the funds received from completing the share purchase agreement would enable them to pay off their BDC mortgage (the "BDC Mortgage"). When these deals collapsed, they

were under considerable pressure to find another purchaser in order to avoid BDC taking further steps to ensure repayment. This was when they first met Mr. Durkin and Mr. Gregory in May 2014.

CREDIBILITY

[17] My assessment of the credibility and reliability of the parties and their witnesses largely determines the issues in this case. This is because the evidence of Mr. Durkin and Mr. Gregory conflicted dramatically and diametrically with the evidence of Mrs. Philip and Mr. Philip. There was virtually no common ground in their evidence.

Legal Principles

[18] In a case such as this, it is useful to set out the principles governing credibility determinations. In assessing the truthfulness of the testimony of any interested witness, I am guided by the test set out in *Faryna v. Chorny*, [1951] B.C.J. No. 152 at 357 (C.A.):

> …In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[19] I will also apply the factors to be considered when assessing credibility as described by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296:

> Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Farnya v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Farnya*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on

> whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

[20] I have also considered Justice Dillon's statement in *Bradshaw* at para. 188 regarding the impact of the failure to produce relevant documents to support one's case:

> … The inability to produce relevant documents to support one's case is also a relevant factor that negatively affects credibility. …

[21] Applying these principles, what follows is my credibility assessment of Mr. Durkin, Mr. Gregory, Mrs. Philip, Mr. Philip and each party's witnesses.

Credibility of the Parties

Timothy Durkin

[22] Throughout his cross-examination, Mr. Durkin was evasive, combative, deliberately vague and frequently dishonest. He repeatedly refused to provide direct answers to basic questions and instead resorted to casting baseless aspersions on the Philips. He propagated various unfounded allegations of fraud and criminal conduct against the Philips, and some of their witnesses, without producing any supporting evidence.

[23] For example, when questioned on the origin of article 2.4(a) of the SPA that required Holdings to pay the BDC interest arrears within five days of October 15, 2014 (the "BDC Provision"), Mr. Durkin categorically denied any involvement whatsoever with proposing, drafting or incorporating the BDC Provision into article 2.4(a) of the SPA. Incredibly, he refused to admit that the BDC Provision was his idea despite clear documentary evidence that established that he proposed the interim payment structure to pay off the interest arrears in the draft share purchase agreement that he produced and presented to the Philips on September 24, 2014. Instead of admitting that he was responsible for the BDC Provision, Mr. Durkin insisted that it was the result of negotiation between the parties and speculated that perhaps Mr. Trelawny, the Philips' solicitor, told him to incorporate the BDC

Provision into the SPA. Over 30 questions were required before Mr. Durkin finally admitted that he drafted and proposed this provision.

[24] Another example of Mr. Durkin's evasiveness was his refusal to admit that he authored emails and letters signed, "SHH Management Limited." He had no direct answer for who else may have drafted this correspondence other than vague and unsupported speculation. For example, in respect of a post that Ms. Parker sent to the employees of the Hotel on August 26, 2017, which accused the Philips of recklessly endangering the safety of the employees, Mr. Durkin testified that it "looks like" Ms. Parker drafted the post notwithstanding the fact that it was signed "Tim – SHH Management Limited." After counsel pointed out that Mr. Durkin's name was signed under the posting, Mr. Durkin backpedaled and testified that perhaps he "may have talked to Ms. Parker on the phone and she may have sent this out to other employees." Ms. Parker testified that Mr. Durkin dictated the contents of this post to her verbatim and directed her to disseminate it to the staff. I accept Ms. Parker's evidence on how this post was created and disseminated.

[25] Another example of Mr. Durkin's propensity to lie and deliberately mislead the Court involves an affidavit he swore on August 31, 2017, in support of an injunction application. The details of the various falsehoods contained in this affidavit will be described later in these reasons. However, a few examples will help illustrate the extent to which Mr. Durkin lied in order to advance his own interests.

[26] In paragraphs 15 and 16 of this affidavit, Mr. Durkin deposed that he contacted BDC on November 14, 2014, in an attempt to pay the interest arrears and was advised by them that they had already issued a formal demand for repayment of the mortgage and would not accept any payment other than the entire $2.8 million owing. In paragraphs 17 to 20 of his affidavit, Mr. Durkin further deposed that he met with BDC, mortgage brokers and the Philips on several occasions between November 18 and November 20, 2014, in an attempt to "save the defendants who made it clear that they were not in a position to meet the demands of BDC." The documentary evidence demonstrates that each of these statements were false.

[27] During Mr. Durkin's examination for discovery on October 21, 2019, he admitted that these events did not occur in November 2014. Mr. Durkin conceded that the events that he was describing took place after BDC issued its demand for repayment of the mortgage on February 2, 2015.

[28] This admission is consistent with Mr. Durkin's email to BDC on February 11, 2015, in which he apologized for failing to keep them informed and admitted that he "simply dropped the ball." Tellingly, this position is also consistent with Mr. Durkin's first affidavit in the BDC foreclosure action, filed on April 12, 2016. At paragraph 12 of that affidavit, Mr. Durkin deposed that his first contact with BDC was in February 2015, rather than November 14, 2014. I conclude that Mr. Durkin did not attempt to propagate the falsehood that he had contacted BDC in November 2014 in his affidavit in respect of the BDC foreclosure action because he knew that BDC had direct information that would contradict this position.

[29] Mr. Durkin ultimately resiled from the numerous falsehoods contained in his sworn affidavit of August 31, 2017. Instead of taking responsibility for those statements, he attempted to minimize these falsifications by testifying that he dictated the contents of this affidavit to his lawyer at 5:00 a.m. on August 31, 2017, and did not have time to confirm the specific dates. He also went on to say that he "verily believed" that his initial contact with BDC was in November 2014.

[30] Two of the investors in Mr. Durkin's failed enterprise were Ms. Mo and Mr. Chambers. On several occasions during Mr. Durkin's cross-examination, he testified that Ms. Mo was the only investor that received documentation evidencing her investment. In respect of Mr. Chambers' investment, Mr. Durkin specifically testified that his investment in Holdings was provided based on a "handshake" deal. Mr. Durkin confirmed on a number of occasions that Mr. Chambers did not receive either a share subscription agreement or any other documentation. However, in direct contradiction to Mr. Durkin's testimony, Mr. Chambers testified that he received a share subscription agreement and a promissory note to secure his investment in

Holdings. I accept Mr. Chambers' testimony. This is yet another example of Mr. Durkin deliberately misleading the Court.

[31] On December 6, 2019, I ordered that Mr. Durkin produce every document in his control or possession relevant to investments received by Holdings. In January 2020, Mr. Durkin confirmed that he had disclosed all of these documents. Nevertheless, throughout the course of the 56-day hearing of this matter, Mr. Durkin repeatedly "discovered" new, unlisted, documents that he attempted to put into evidence. For example, he produced an email allegedly written by the Philips that purported to appoint him as the agent for Inc. Neither Mr. nor Mrs. Philip recall sending this email and both deny its veracity. I note that neither of them have had access to their Hotel email accounts since 2017, but Mr. Durkin has access to these email accounts.

[32] In yet another obvious example of a falsehood perpetrated by Mr. Durkin, he testified that a point of sale credit card "Square" device was only used to hold deposits for events and to collect funds from Art Gallery sales. However, Ms. Parker confirmed that for at least one weekend in October 2019, Mr. Durkin expressly ordered her to process all payments received by the Hotel through the Square device and deposit all of those revenues directly into the bank account of Management. Furthermore, Ms. Parker testified that Mr. Durkin ordered her to mislead the Hotel's front desk staff by directing them to use the Square device because of a purported problem with the Hotel's point-of-sale system. There was no problem with the Hotel's point-of-sale system. Interestingly, this weekend in October 2019 was immediately before the defendants' application to vacate the Injunction Order and remove Mr. Durkin from the Hotel.

[33] One of Mr. Durkin's excuses for failing to complete his obligations pursuant to the SPA was the litigation commenced by Turn/Two. In direct examination, Mr. Durkin testified that the certificate of pending litigation ("CPL") filed by Turn/Two was registered on July 14, 2016, and it prevented the completion of the share purchase agreement and refinancing on the closing date of July 25, 2016, as contemplated in

the Settlement. However, in cross-examination, when presented with title searches for the properties that clearly established that a CPL was not registered until August 30, 2016, Mr. Durkin resiled from his earlier testimony. He later admitted that he never actually knew when the Turn/Two CPL was registered.

[34] During his cross-examination, Mr. Durkin was asked to explain the difference between his representations to Mr. Trelawny on February 24, 2015, and his subsequent contradictory representations to the employees of the Hotel on August 26, 2017, regarding the financial position of Inc. and its capacity to refinance the BDC Mortgage. In an email to Mr. Trelawny on February 24, 2015, regarding the BDC's anticipated foreclosure action, Mr. Durkin stated that "[d]espite the arrears, the loan-to-value ratio is extremely low and the bank's position is simply not at risk." However, in an email to the Hotel staff on August 26, 2017, Mr. Durkin claimed that Mrs. Philip "lied about the ability to pay the BDC interest arrears forcing us to restructure $3 million in debt financing when the value of the [H]otel was less than the debt owed." When asked about his shifting opinion about the value of the Hotel, Mr. Durkin testified that his utterances depended upon whom he was writing to. In my view, this admission accurately describes Mr. Durkin's propensity to say whatever he thinks will serve his interests regardless of how disconnected these statements may be from the truth.

[35] The foregoing examples are only a few of the countless instances in which Mr. Durkin lied or deliberately misled the Court. Many other examples of his mistruths and deception are described in detail throughout these Reasons for Judgment. I have no hesitation in concluding that Mr. Durkin lied unabashedly throughout this trial and in virtually all of his dealings with the defendants.

Mrs. Philip and Mr. Philip

[36] Mrs. Philip and Mr. Philip testified consecutively on behalf of the defendants. Both were reasonable and reflective witnesses and neither was prone to exaggeration or embellishment. They made admissions where necessary and took responsibility for their mistakes. Their evidence on what transpired from the time

they first met Mr. Durkin in 2014 and over the succeeding six years was internally consistent and in accordance with the documentary evidence.

[37] Mr. Durkin extensively cross-examined Mrs. Philip and Mr. Philip. He made a series of baseless and unfounded allegations against them, including fraudulent misrepresentation, deceit, incompetence and thuggery. He did not produce any credible documentary evidence to support these specious allegations. Although he frequently indicated that he would be calling other witnesses, or bringing forward documentary evidence that would support his wide-ranging and nefarious allegations against the Philips, he failed to do so.

[38] Mr. Durkin repeatedly attempted to mock, belittle and undermine the Philips' evidence. He tried, and failed, to bully and intimidate both of them. His tone throughout his questioning, and more generally during his testimony, was condescending and patronizing. All of these inappropriate and immature manoeuvers failed. The Philips remained steadfast, resolute and dignified. They refused to descend to Mr. Durkin's level or be baited by his outrageous allegations, conduct and commentaries.

[39] The Philips' evidence was entirely unshaken by Mr. Durkin's barrage of spurious and vitriolic allegations. They testified in a coherent, logical and rational manner. Their evidence was reasonable, forthright and credible and I accept it unreservedly.

[40] Over the course of this 56-day trial, there was a substantial divergence in the evidence. On every single matter in which there is a conflict in the evidence between the Philips and Mr. Durkin, I prefer the evidence of Mrs. and Mr. Philip and reject the evidence of Mr. Durkin.

Credibility of the Non-Party Witnesses

Rodger Gregory

[41] The hallmark of Mr. Gregory's evidence was its combative and argumentative nature. He relied extensively on hearsay from non-witnesses and information

provided to him by Mr. Durkin. Despite repeated warnings and admonitions, Mr. Durkin relied extensively on leading questions during his direct examination of Mr. Gregory in order to elicit the answers he desired.

[42] An example of Mr. Gregory's reliance on information from Mr. Durkin is on the issue of the assumability of the BDC Mortgage. In direct examination, Mr. Durkin asked Mr. Gregory whether he recalled "any meeting with the Philips where they represented that the mortgage was assumable." In response, Mr. Gregory testified, "I recall a meeting where it was discussed and my recollection was that it was a prevalent consideration." Mr. Gregory emphatically testified that the assumability of the mortgage "was discussed and it was assumable." However, under cross-examination Mr. Gregory completely resiled from this testimony and confirmed that he did not attend a meeting during which this alleged representation was made. Mr. Gregory entirely abandoned his prior evidence and testified instead that he was only made aware of the alleged representation because Mr. Durkin told him that Mr. Trelawny had sent him an email shortly after they executed the SPA that contained the alleged representation that the mortgage was assumable. This purported email was not produced. On further inquiry, Mr. Gregory confirmed that he never saw this alleged email and that he simply trusted Mr. Durkin implicitly. It was beyond clear that Mr. Gregory had no direct knowledge of the alleged representation and was simply reiterating Mr. Durkin's position on this issue.

[43] Mr. Gregory's primary responsibility in working with Mr. Durkin was to raise the funds necessary to purchase and develop the Hotel. Mr. Chambers invested over $450,000 in this venture. Mr. Gregory testified that Mr. Chambers' investment was based solely on a "handshake deal" and that Mr. Chambers did not receive a subscription agreement or any other documents that verified his investment. However, Mr. Chambers testified under cross-examination that he received both a promissory note and a share subscription agreement that confirmed his investment in Holdings. I accept Mr. Chambers' evidence and conclude that Mr. Gregory intentionally misled the Court.

[44] For reasons that are completely unknown, Mr. Gregory categorically denied participating in the negotiations that resulted in the Settlement. Both Mr. Durkin and Mr. Philip testified that the Settlement was reached via negotiations conducted between Mr. Gregory and Mr. Philip in June 2016.

[45] As the first witness to testify in this trial, I conclude that Mr. Gregory intended to describe a narrative that would be consistent with Mr. Durkin's version of events. Under cross-examination, Mr. Gregory was bombastic, argumentative, evasive and needlessly and inaccurately scathing in his vilification of the Philips. His evidence was not at all credible and I rely on none of it in determining the issues in this trial.

Robin Parker

[46] Inc. hired Ms. Parker in February 2014. She does all the financial accounting for Inc., including payroll, accounts receivable and accounts payable. Throughout her evidence, she demonstrated unwavering loyalty to Mr. Durkin. For example, when Mr. Philip arrived at her residence on August 27, 2017 to retrieve the laptop that contained all of the financial information for the Hotel, she refused to give it to him. She knew that Mr. and Mrs. Philip were the owners of the Hotel, but after consulting with Mr. Durkin by telephone, she nevertheless refused to give Mr. Philip access to the vital financial information required to operate the Hotel.

[47] In the wake of the injunction, Mr. Durkin was required to provide biweekly financial reporting to the Philips. Instead, Mr. Durkin instructed Ms. Parker to provide them with only two line items: total revenue and total expenses. She unquestioningly complied with this direction.

[48] Ms. Parker was complicit in attempting to sabotage the Philips' ability to operate the Hotel when they retook it on August 27, 2017. Mr. Durkin instructed her to shut down the online reservation system in order to "debilitate them, to stop them from being able to do anything." Ms. Parker concurred with this tactic and seemingly did not consider, or otherwise dismissed, the reputational impact on the Hotel of taking this action.

[49] Another example of Ms. Parker's bias in favour of Mr. Durkin was her unsupported estimate of $100,000 in lost revenue during the period when the Philips retook control of the Hotel for 11 days in August and September 2017. Tellingly, she admitted that the revenue from the ongoing operation of the hotel and dining room during this period went into Inc.'s bank account and that these revenues were not subtracted from the $100,000 estimate of lost revenues.

[50] Ms. Parker complied with Mr. Durkin's request to redirect all point-of-sale purchases using the Square device to Management's bank account during a weekend in October 2019. She told the Hotel's staff that there was a problem with its point-of-sale system. She knew that this was not true, but nevertheless complied with Mr. Durkin's instructions. In so doing, she understood that all of the funds from the Square device went into Management's bank account instead of Inc.'s account where they belonged. Similarly, Ms. Parker also knew that payments for events, such as weddings or the proceeds obtained from the rental of the premises by a television production company, went into Management's bank account instead of Inc.'s bank account.

[51] At Mr. Durkin's instruction, Ms. Parker retroactively listed a series of 29 $8,000 wage payments made to the Philips as debits to their shareholder loan accounts. She complied with this instruction and seemingly every other direction given to her by Mr. Durkin. As an experienced bookkeeper, she should have known better. Her conduct and testimony suggests that she was beholden to Mr. Durkin.

[52] The tenor of Ms. Parker's evidence suggests that she bears some unexplained animosity towards the Philips and seemingly blind devotion to Mr. Durkin. I find that she was complicit in diverting funds from Inc. to Management.

[53] While I accept Ms. Parker's evidence in respect of the Square device, I reject her negative characterizations of the Philips' conduct over the past six years. She was complicit in Mr. Durkin's web of lies and deception.

Russell Chambers

[54] Mr. Chambers made periodic payments of $20,000–$30,000 and, on two occasions, $75,000 as investments in Holdings. He understood that the purchase price funds to pay the Philips would come from a group of investors put together by Mr. Gregory, and Mr. Chambers was a member of that group. This group was not in place by November 15, 2014.

[55] Importantly, Mr. Chambers was never asked to provide the $2 million required to close on the SPA. He also was not told, and did not know, that one of the requirements of the SPA was that the purchasers were to pay $182,135 within five days of signing the SPA. He was also unaware of the $100,000 deposit to be placed in trust.

[56] Mr. Chambers testified that his group of investors was ready to proceed, but they were not asked by Mr. Gregory to produce the funds required to close on the SPA and were under no legal obligation or commitment to do so. He says that if they had been asked for these funds, he could raise $1.75 million within a couple of months. He confirmed that Mr. Gregory knew that Mr. Chambers was capable of raising these funds, but Mr. Gregory never asked for them. Nobody asked Mr. Chambers for any of these amounts between October 14, 2014 and November 15, 2014.

[57] On cross-examination, when Mr. Chambers was told that Mr. Gregory had testified that Mr. Chambers was prepared to advance $182,135 to pay off the arrears interest to BDC, Mr. Chambers testified that Mr. Gregory did not ask for this amount and Mr. Chambers did not send that amount to Mr. Gregory. Mr. Chambers said that he did have the money available to do so, but Mr. Gregory did not ask for this amount.

[58] Mr. Chambers' evidence was entirely forthright, objective and credible. His admission that he had the ability to invest significant funds but was never asked to do so by either Mr. Gregory or Mr. Durkin is entirely believable. I also accept that he did in fact receive a promissory note and a subscription agreement in light of his

$450,000 investment in Holdings. To the extent that Mr. Chambers' evidence conflicts with that of Mr. Durkin or Mr. Gregory, I prefer the evidence of Mr. Chambers.

Kate Saunders

[59] Kate Saunders was a long time employee of the Hotel. Over her five days of testimony, she was credible, sincere and forthright. She admitted her mistakes and appropriately recognized when she was giving evidence with the benefit of hindsight.

[60] Ms. Saunders joined the Hotel in July 2014 and was there until her employment was terminated in January 2018. In May 2015, Mr. Durkin promoted her to the position of Director of IT and Marketing. Mr. Durkin was her supervisor, but she testified that he was only present at the Hotel for approximately eight hours per week. She described the management of the Hotel as "chaotic". For example, Mr. Durkin asked Ms. Saunders if she thought that Ms. Parker had a gambling problem because he was concerned about purportedly missing revenue from the Hotel's operations. Shortly thereafter, Mr. Durkin instructed Ms. Saunders to place an ad to replace Ms. Parker. He then quickly changed his mind and as of December 1, 2017, promoted Ms. Parker to the position of General Manager. Approximately a month later, Ms. Parker fired Ms. Saunders.

[61] In 2017, Mr. Durkin instructed Ms. Saunders to change the passwords to the email accounts of Mr. and Mrs. Philips. He specifically told Ms. Saunders not to warn them in advance that he was taking this step. Ms. Saunders recalled that Mr. Durkin described Mrs. Philip as an "obsessed lunatic". Ms. Saunders testified that given her own experience with Mrs. Philip, this characterization was entirely inaccurate.

[62] In August 2017, when the Philips took over the Hotel, Mr. Durkin instructed Ms. Saunders to shut down all of the Hotel's computer systems. He wanted to debilitate the Hotel's operations by shutting down access to the network, email, OpenTable dining reservation application and the point-of-sale system. Ms. Saunders complied with this instruction because she believed Mr. Durkin's assertion that he owned a majority interest in the Hotel. She recalls that the system's

shutdown created havoc because the Hotel had no access to new or existing reservations because she changed the password to its online reservation system.

[63] During this period, Ms. Saunders recalls asking Mr. Durkin if she should contact a large group who had made a dinner reservation to celebrate a significant birthday. He instructed her not to contact them in advance because he wanted to cause as much trouble as possible for the Philips.

[64] Ms. Saunders testified that Mr. Durkin's accusation that Mrs. Philip was sabotaging the Hotel was entirely untrue.

[65] Mr. Durkin falsely accused Ms. Saunders of paranoid delusions and obsession disorders. Ms. Saunders testified that she does not have any of the psychological or mental problems that Mr. Durkin described.

[66] After terminating Ms. Saunders' employment, Ms. Parker refused to pay her severance or provide her with a record of employment or T4. Six months later, at a mediation, Ms. Parker agreed that Ms. Saunders was entitled to severance pay.

[67] Mr. Durkin engaged in a relentless course of harassment against Ms. Saunders. He accused her of being a thief, suffering from emotional, psychological and mental problems, and negatively influencing staff. None of these allegations was true. They were yet another example of Mr. Durkin's attempts to bully and intimidate anyone who he perceives as a threat or disloyal to him. For example, in the wake of Ms. Saunders' termination, Mr. Durkin reacted aggressively to her decision to hire a lawyer. He made a number of serious and entirely unfounded allegations about Ms. Saunders' conduct, including the alleged misappropriation of photos of Mr. Durkin's family, stealing or misusing gift certificates, disloyalty to Mr. Durkin and allegations that she negatively affected junior members of the staff and other managers at the Hotel.

[68] Mr. Durkin also made several vile and false allegations in respect of Ms. Saunders' husband and he directed an employee to publish this inflammatory misinformation. I have no hesitation in concluding that Mr. Durkin undertook this

malicious behaviour because he perceived Ms. Saunders as a threat. She was aware of the true state of affairs at the Hotel and had the integrity, honesty and fortitude not to capitulate to Mr. Durkin's vindictive and abusive conduct and behaviour.

[69] Mr. Durkin attacked and vilified Ms. Saunders, her husband and, appallingly, her young son. All of his absurd and spurious allegations were entirely unfounded and designed to malign and discredit someone with far more integrity and honesty than himself. Ms. Saunders demonstrated uncommon strength, grace and dignity in standing up to Mr. Durkin's bullying antics. I completely accept Ms. Saunders' evidence and prefer it to that of Mr. Durkin on all relevant conflicts in their evidence.

Pat Trelawny

[70] Pat Trelawny was the Philips' solicitor in all of their dealings with Mr. Durkin. Mr. Trelawny firmly rejected the allegation that he made a representation to Mr. Durkin that the BDC loan was assumable. Mr. Trelawny does not recall saying anything to Mr. Durkin regarding the status of the BDC loan. He understood that the Philips provided full details of the operations of the Hotel and the status of the BDC loan to Mr. Durkin.

[71] In November 2014, Mr. Trelawny recalled that Mr. Durkin assumed responsibility for dealing with BDC because Mr. Durkin intended to refurbish, develop and stratify the Hotel. Mr. Trelawny recalls that Mr. Durkin did not keep him or the Philips updated regarding foreclosure proceedings launched by BDC.

[72] Mr. Trelawny recalls that Mr. Gregory and Mr. Durkin represented that they had $3 million available to close the SPA: $2 million in cash and $1 million in an "investment account". Despite repeated requests, neither provided credible documentary proof that they had these amounts. They were merely oral representations by Mr. Durkin and Mr. Gregory.

[73] Mr. Trelawny does not recall Mr. Durkin expressing any concerns regarding the financial status of Inc. or concerns that the Hotel was incapable of supporting

financing. Mr. Durkin knew the financial status of the Hotel was not strong, but it was clearly not bankrupt. In fact, Mr. Trelawny recalls Mr. Durkin stating that he thought the value of the real estate was significantly higher than the purchase price of the transaction.

[74] The primary purpose of Mr. Trelawny's testimony was to contradict Mr. Durkin and Mr. Gregory's assertion that Mr. Trelawny had represented to them that the BDC Mortgage was assumable. Neither Mr. Gregory nor Mr. Durkin were able to produce any documentary evidence, including purported emails, to support this allegation. Mr. Trelawny's evidence on this point was clear and unequivocal: at no time did he represent to Mr. Durkin or Mr. Gregory that the BDC Mortgage was assumable. I accept Mr. Trelawny's evidence on this and the other issues on which he testified. I reject the assertion that Mr. Trelawny, Mrs. Philip, Mr. Philip or anyone representing them ever suggested that the BDC Mortgage was assumable or that BDC would forbear payment of the loan for one year if the interest arrears were paid. I have no hesitation in concluding that Mr. Durkin and Mr. Gregory concocted this false narrative to suit their own interests.

SHARE PURCHASE AGREEMENT

Negotiation and Execution

[75] On May 13, 2014, Mr. Durkin sent an email to Mr. Trelawny with a letter of intent and a nondisclosure agreement. In the letter of intent, Mr. Durkin and Mr. Gregory affirmed their intention to purchase 100% of the shares of Inc. for consideration of $6 million.

[76] On May 26, 2014, Mr. Durkin sent an email to Mrs. Philip attaching a draft of the share purchase agreement that would ultimately become the SPA. In this email, Mr. Durkin stated: "Here is our proposed draft agreement. I've included everything and the kitchen sink." Both the SPA and the letter of intent referred to a purchase price of $6 million for the shares and liabilities of Inc. On this basis, the Philips believed that Mr. Durkin and Mr. Gregory had the resources and capacity to complete the contemplated transaction.

[77] Most of the terms in Mr. Durkin's original draft of the SPA are exactly the same as the terms agreed to in the final version of the SPA, except for the provisions in article 2.2 to article 2.4. The documentary evidence disclosed that Mr. Durkin was responsible for drafting these additional terms and he incorporated them into the SPA in October 2014.

[78] Mr. Durkin and Mr. Gregory had an opportunity to conduct their due diligence over the five-month period from the date they executed a letter of intent on May 13, 2014, and the execution of the SPA on October 15, 2014. During this period, the Philips gave Mr. Durkin and Mr. Gregory full disclosure of all documents related to the business operations of the Hotel and the financial circumstances of Inc. On May 28, 2014, Mrs. Philip provided Mr. Durkin with a list of Inc.'s liabilities.

[79] Mr. Durkin testified that during this due diligence period, he discussed the status of the BDC Mortgage with the Philips and Mr. Trelawny and he was aware of the impending risk of foreclosure. Specifically, Mr. Durkin acknowledged that he was aware that the Philips were relying on the sale of Inc. to discharge the BDC Mortgage. In fact, Mr. Durkin proposed an interim payment structure whereby Holdings would pay the interest arrears owing to BDC within five days of executing the SPA. This interim payment structure was proposed and drafted by Mr. Durkin and incorporated into article 2.4(a) of the SPA. However, in cross-examination, Mr. Durkin testified that the BDC Provision was "obviously" not his idea and suggested that perhaps Mr. Trelawny proposed it. A review of the email correspondence between Mr. Durkin and the Philips during this period confirms that Mr. Durkin proposed and drafted the interim payment structure. Under cross-examination, and when confronted with this documentary evidence, Mr. Durkin resiled from his previous assertion and conceded that he drafted the BDC Provision and encouraged Mr. Trelawny to incorporate it into the SPA.

[80] On July 12, 2014, Mrs. Philip wrote an email to Mr. Durkin in which she expressed concern that Mr. Durkin was musing about not paying off the BDC Mortgage until March 2015. She indicated that they could not go on from week to

week indefinitely and that the only thing that would alleviate her concerns would be if the BDC Mortgage was paid off as soon as possible. Mr. Durkin replied by suggesting that he could provide a loan to Inc. to bring the BDC interest up to date. He also confirmed that the Philips would have no further obligations to Inc. after the closing date for the SPA:

> At closing you will get 2 million Canadian for your shares. You will have no other obligation to [Inc.] save those obligations agreed in the Share Purchase Agreement and the Consulting Services Agreement.

[81] In response to Mr. Durkin's email, Mrs. Philip implored him to meet with BDC and she reminded him that BDC held a covenant that required their approval for the sale of Inc.'s shares.

[82] On July 14, 2014, Mr. Durkin responded to this email by stating: "Not to worry about BDC. They will be taken care of accordingly."

[83] On August 5, 2014, Mr. Trelawny sent an email to Mr. Durkin requesting an update on the status of the SPA. He advised Mr. Durkin that BDC "expected the loan to be repaid" concurrently with the proposed closing date for the SPA.

[84] Over the next two months, the parties exchanged a series of emails. The Philips and Mr. Trelawny repeatedly emphasized the importance of concluding this transaction quickly in order to pay off the BDC loan and avoid the risk of foreclosure.

[85] The parties finally reached an agreement on the terms of the SPA on or about October 8, 2014. On October 15, 2014, the parties executed the SPA, setting the closing date for November 14, 2014.

[86] Mr. Durkin did not contact BDC until February 11, 2015, nine days after it issued a notice of default on February 2, 2015. They demanded full repayment of the loan. Unfortunately for the Philips, over the past six years, Holdings failed to perform <u>all</u> of the contractual obligations relating to the BDC loan and payment of the purchase price to them.

Principles of Contractual Interpretation

[87] Courts must interpret contracts by reading the contract as a whole, giving the words their ordinary grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract such that the interpretation gives effect to the objective intentions of the parties: *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53 at paras. 47, 55 [*Sattva*].

[88] The surrounding circumstances or "factual matrix" consists of any "objective evidence of the background facts at the time of the execution of the contract… that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting": *Sattva* at para. 58.

[89] The relevant contextual factors include "…the purpose of the agreement and the nature of the relationship created by the agreement": *Sattva* at para. 48. The Court's consideration of the factual matrix is intended to "deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract" and cannot be relied on to support an interpretation that "deviate[s] from the text such that the court effectively creates a new agreement": *Sattva* at para. 57.

[90] Where there is an ambiguity in the wording of a contract, the court must read the contract in a manner that "promotes a sensible commercial result": *Consolidated-Bathurst v. Mutual Boiler*, [1980] 1 S.C.R. 888 at 901; *Eli Lilly & Co. v. Novopharm Ltd.,* [1998] 2 S.C.R. 129 at para. 56. Courts should favour an interpretation of an ambiguous term that is "consistent with the reasonable expectations of the parties, as long as that interpretation is supported" by the language of the contract: *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co*., 2016 SCC 37 at para. 50.

[91] In doing so, the court ensures that its interpretation of an ambiguous term does not "give rise to results that are unrealistic or that the parties would not have contemplated in the commercial atmosphere in which" the contract was created: *Ledcor Construction Ltd.* at para. 50.

Relevant Provisions of the SPA

The BDC Provision

[92] The documentary evidence is clear that Mr. Durkin proposed and drafted the BDC Provision whereby, within five business days of the execution of the SPA, Holdings was to pay to Inc. $182,135 in respect of the arrears interest owing on the BDC loan to November 15, 2014. In turn, Inc. was required to pay this amount to BDC. The parties' mutual intention in respect of the BDC Provision was to avoid foreclosure during the "Interim Period" between the date of execution of the SPA, October 15, 2014, and the closing date of November 14, 2014. As of this closing date, Holdings was to assume full responsibility for the BDC Mortgage.

[93] Importantly, there was no provision in the SPA that suggested that the BDC Mortgage was assumable. On July 12, 2014, in response to Mrs. Philip's inquiries as to whether or not Holdings would assume financial responsibility for all liabilities after closing the SPA, Mr. Durkin made the following representation regarding the Philips' continued responsibility to Inc. after closing:

> At closing you will get 2 million Canadian for your shares. You will have no other obligations to the company [Inc.] save those obligations agreed to in the Share Purchase Agreement and the Consulting Services Agreement.

[94] The Philips were induced into proceeding with the SPA because of Mr. Durkin's assurances that Holdings had the resources and capacity to refinance the BDC Mortgage and pay them $2 million dollars for the shares of Inc. Mr. Durkin also led the Philips to believe that they would be relieved of all further obligations to BDC and Inc. as of November 14, 2014. Mr. Durkin knowingly made these false assurances.

Purchase Price

[95] Article 2.2 of the SPA set out the purchase price for 100% of the shares of Inc. and the payout of the Philips' shareholders loan accounts. The parties agreed to a purchase price of $2.375 million plus assumption of the liabilities of Inc. not to

exceed $3.625 million, for a total of $6 million. This purchase price consisted of a payment of $2 million in cash and $375,000 in Holdings Class “A” Voting shares.

[96] At the time the parties entered into the SPA, they knew that the BDC Mortgage was in default and at risk of foreclosure. This was the reason why Mr. Durkin proposed and included the BDC Provision in the SPA. In my view, the objective intention of the parties was that Holdings was to assume responsibility for the BDC Mortgage as of November 14, 2014. Holdings was responsible for all costs associated with the SPA not closing on this date, including the additional costs associated with the BDC foreclosure and refinancing. This interpretation is supported by article 2.3(1)(e) of the SPA, which requires Holdings to pay “the prevailing per diem rate applicable to the” BDC Mortgage in the event that the SPA closed later than November 15, 2014, the day after the anticipated closing date contemplated in the SPA.

[97] Mr. Durkin drafted article 2.3(1) regarding the payment of the purchase price. This provision, when read in conjunction with the BDC Provision, the purchase price, and in considering the overall factual matrix and the Philips’ reasonable expectations, meant that Holdings’ fundamental obligations to pay the purchase price were as follows:

a) To transfer $182,135 to Inc. in order to discharge the BDC interest arrears within five business days of executing the SPA on October 15, 2014;

b) To place a $100,000 deposit into Mr. Trelawny’s trust account at least five business days prior to the closing date on November 15, 2014;

c) To tender $1.9 million in cash to the Philips and the Family Trust on November 15, 2014, as consideration for the shares of Inc.;

d) To transfer $375,000 in its Class “A” Voting shares to the Philips on November 15, 2014, as consideration for the shareholders loans;

e) If Holdings failed to complete the SPA on November 15, 2014, to pay $260.27 to the Philips for each calendar day up to the actual closing date; and

f) To either secure refinancing to pay off the BDC Mortgage concurrently with its completion of the SPA on November 15, 2014, or to assume the financial risk attendant upon failing to do so.

Business Plan and Project Provisions

[98] By all accounts, Mr. Durkin was eager to commence a number of projects at the Hotel in the interim period between October 15, 2014, and the anticipated closing date of November 14, 2014. Article 2.4(b) of the SPA sets out a number of "projects" that Holdings intended to begin during this interim period. These various projects are defined as the "Business Plan".

[99] Articles 2.4(c) and 2.4(e) address the basis upon which Holdings would implement its Business Plan during the interim period. These provisions make it clear that Holdings was to undertake the Business Plan "at no cost to the seller whatsoever" and "without equity nor debt incurring as except expressly set forth" in the SPA. These provisions also required that "[a]ll work conducted on or for the Business shall be evidenced with receipts of expenditure and copies, where required, of contracts for the supply of goods and services."

[100] It is important to note that Mr. Durkin proposed and drafted these provisions. These provisions clearly suggest that any capital expenditures incurred by Holdings related to the Business Plan would not be repayable by the Philips in the event that the SPA did not close. In any event, Mr. Durkin failed to produce receipts or contracts that comply with article 2.4(c). Specifically, he did not produce any objectively verifiable evidence to support the contention that Holdings spent hundreds of thousands of dollars on projects related to the Hotel. Holdings' failure to produce receipts or contracts in respect of the purported projects completed at the Hotel is relevant to both Mr. Durkin's assertion that he is entitled to a "Break-Up Fee"

arising from the Philips' election to terminate the SPA, and in respect of the bogus builders lien that Mr. Durkin placed on the property in April 2016.

[101] In my view, there is no contractual or other legal basis for Mr. Durkin's assertion that the defendants are indebted to Holdings despite his failure to perform any of Holdings' obligations in the SPA. For the same reason, Holdings is not entitled to an equitable interest in Inc. because of its alleged project expenditures.

The Break-Up Fee

[102] The plaintiffs assert that they are entitled to a Break-Up Fee in accordance with the provisions of the SPA. In June 2016, Mr. Durkin instructed his counsel to issue an invoice to the Philips in respect of a Break-Up Fee. Absurdly, Mr. Durkin claimed that every single expenditure incurred by Holdings represented a "capitalized investment in the property" and therefore fell within the scope of the Break-Up Fee provision in the SPA.

[103] Article 2.4(f) of the SPA is the provision that describes the Break-Up Fee:

> In the event the Sellers wish to terminate this Agreement for whatever reasons, Sellers, at their sole election, may do so if they pay to Purchaser a "Break-Up" fee of 150% … of the *bona fide Project expenditures* as incurred and due as at the date of notification of the break-up by the Sellers to Purchaser, plus $500,000 … The Break-up Fee shall be paid to Purchaser by Seller within 5 days of the notification date. Upon Break-Up notification all sums paid and due under the Project costs plus $500,000 shall be converted to debt of the Company and shall be so reflected on its books of account and Purchaser shall without protest, offset or counter-claim register a security interest in the Real Properties for the sums due herein.
>
> [Emphasis added].

[104] Based on the clear wording of this provision, Holdings was not entitled to claim the Break-Up Fee in the event that it failed to complete the SPA or committed an act of repudiation. Furthermore, given that the Break-Up Fee only applies when the defendants notified the plaintiffs of their intention to terminate the SPA, the plaintiffs are clearly not entitled to issue an invoice for the Break-Up Fee unless the Philips did something to suggest their intention to terminate the SPA. In my view, Mr.

Durkin used the threat of the Break-Up Fee to try to intimidate the Philips once their trust in his ability or willingness to close the deal collapsed.

Holdings' Breaches of the SPA

[105] Holdings failed to perform all of its fundamental contractual obligations under the SPA. In particular, Holdings did not:

a) wire $182,135 to Inc. for the BDC interest arrears within five business days of October 15, 2014, as required by the BDC Provision;

b) place the $100,000 deposit in trust at Jones Emery Hargreaves Swan LLP five business days prior to November 15, 2014, as required by article 2.3(1) of the SPA;

c) tender the remaining $1.9 million of the purchase price for the shares of Inc. on or before November 15, 2014, as required by article 2.4(d) of the SPA; and

d) transfer the $375,000 in Holdings' Class "A" Voting shares to the Philips on or before November 15, 2014 as required by article 2.4(d) of the SPA.

[106] It is important to note that these four contractual obligations constituted the valuable consideration that the Philips reasonably expected to obtain pursuant to the SPA. They were deprived of the entire benefit that they expected to receive under this contract. Mr. Chambers' evidence confirms that neither Mr. Durkin nor Mr. Gregory made any effort to obtain the funds necessary to close the SPA. Although Mr. Chambers was capable of investing up to $1.75 million in this venture, he was never asked to provide this money in order for the purchase price to be paid to the Philips.

Holdings' Explanations for Non-Performance of the SPA

[107] Between the execution of the SPA on October 15, 2014, and the negotiation of the Settlement in May 2016, Mr. Durkin and Mr. Gregory provided a variety of excuses and explanations for Holdings' failure to comply with its obligations in the

SPA. During the initial period between October 23, 2014 and February 11, 2015, Mr. Durkin took full responsibility for Holdings' failure to complete the SPA. He blamed these delays on Holdings' syndicate members failing to fulfil their alleged share subscription commitments.

[108] Mr. Durkin and Mr. Gregory made numerous oral and written commitments to the Philips and Mr. Trelawny regarding Holdings' capacity and intention to perform its obligations under the SPA. In fact, on a number of occasions Mr. Durkin assured the Philips that the monies to complete the SPA would be available imminently. Mr. Gregory made similar assurances during this period. However, the evidence reveals that Holdings simply did not have the resources to pay the purchase price to the Philips. There is also scant evidence to suggest that there was any kind of a syndicate of investors, aside from Mr. Chambers, who was not called upon, to invest in the venture in order to enable the plaintiffs to pay the purchase price to the defendants.

[109] Between November 13, 2014 and July 14, 2016, the Philips agreed to multiple amended closing dates for the SPA proposed by Mr. Durkin and Mr. Gregory. A detailed review of email correspondence between the parties reveals that Mr. Durkin and Mr. Gregory asked for extensions of the closing date on 13 occasions during this period. Holdings obtained each of these extensions based on repeated assurances from Mr. Durkin and/or Mr. Gregory that it would complete the SPA on the newly proposed date.

[110] Mr. Durkin repeatedly lied to the Philips during this period. For example, on October 23, 2014, he advised Mr. Trelawny "[y]our wire should have gone out before 5:00 pm yesterday. I will check and revert." He sent this email to Mr. Trelawny in response to an inquiry from him regarding the nonpayment of $182,135 owing to the Philips on October 22, 2014, pursuant to the BDC Provision. Under cross-examination, Mr. Durkin admitted that there was no basis for this representation. As of October 23, 2014, Holdings had no money in its bank accounts nor any

enforceable share subscription agreements with any of the members of its so-called syndicate.

[111] Also on October 23, 2014, Mr. Durkin sent an email to Mr. Trelawny stating that "[Holdings] has sold $260,000 in share capital for delivery in October" and that it was merely an "unforeseen error on [the plaintiffs'] part and only a portion was paid in on October 23." He went on to reassure Mr. Trelawny that Mr. Gregory was "cleaning it up and should get the remaining paid-in by tomorrow." Under cross-examination, when Mr. Durkin was confronted with this email, he indicated that Mr. Chambers was the investor expected to provide $260,000. Mr. Chambers directly contradicted this assertion. He testified that neither Mr. Durkin nor Mr. Gregory asked him for $260,000 in October 2014. Mr. Durkin fabricated this narrative.

[112] As of December 19, 2014, Mr. Durkin and Mr. Gregory both conceded that Holdings had raised a total of $20,000 and had no enforceable subscription agreements that could possibly support the payment of the purchase price contemplated in the SPA to the Philips. They were merely stringing them along with false promises and assurances that they would be able to close the SPA "tomorrow", "next week", "next month", or in the "first weeks of the new year". For example, on December 19, 2014, after failing to meet several proposed closing dates, Mr. Durkin advised the Philips that Mr. Gregory had assured him that "the log jam was broken and the monies will flow at the stream speed of the upper Sooke River in December". Mr. Durkin and Mr. Gregory had no basis for making this exaggeratedly optimistic statement.

[113] Throughout this period, Mr. Durkin described Holdings' shares as "oversubscribed", suggesting that there were more than enough investors involved to ensure that the SPA would close. This was false. There is no evidence to suggest that there were other investors willing to provide funds to Holdings. At various times throughout the trial, Mr. Durkin and Mr. Gregory referred to several people who they say were part of the "posse" or "syndicate" of investors in Holdings. This included purported individuals from Zürich, Tehran and approximately 10 individuals with

whom Mr. Gregory asserted he had “handshake deals”. Neither Mr. Durkin nor Mr. Gregory produced any documents to substantiate or support the assertion that shares of Holdings were oversubscribed. The only two known investors in Holdings were Ms. Mo and Mr. Chambers.

[114] Mr. Durkin conceded that as of February 13, 2015, Holdings had only raised a total of $54,000 and that none of these funds were used to acquire Inc. Mr. Chambers, who testified that he provided $54,000 on a short-term loan basis, confirmed this. Mr. Chambers directly contradicted Mr. Durkin’s assertion that Holdings was “oversubscribed” by testifying that neither Mr. Durkin nor Mr. Gregory ever asked him to produce the funds required to complete the SPA.

[115] Throughout this period, the Philips clearly communicated both their increasing impatience with the delays and their desire to be paid the purchase price. Specifically, there is no indication from the Philips whatsoever that they agreed to delay the closing of the SPA until after the redevelopment of the Hotel, as alleged by Mr. Durkin.

[116] When confronted with the barrage of email communications in which Mr. Durkin sought various extensions to the closing date based on false assurances, he characterized these communications as “placating emails that are used in business all the time.” A more apt description is that they were fraudulent misrepresentations intended to induce the Philips into extending the closing date in reliance on Mr. Durkin’s assurances that Holdings would close the SPA imminently: see *Bruno Appliance and Furniture Inc. v. Hryniak*, 2014 SCC 8 at para. 21.

[117] From February 2015 to June 2016, Mr. Durkin and Mr. Gregory’s excuses for failing to close on the SPA shifted. At first, they blamed their investors for failing to fulfil their share subscription commitments, but later they began blaming the Philips and Mr. Trelawny for Holdings’ failure to complete the SPA. These explanations include:

a) the assertion that Mr. Trelawny and the Philips represented that Holdings could assume the BDC Mortgage upon performance of the BDC Provision;

b) the claim that the parties entered into a period of promissory estoppel after BDC issued its demand letter on February 2, 2015; and

c) the allegation that Mrs. Philip "tortiously interfered" with Ms. Mo on April 17, 2016.

[118] I will deal with each of these issues.

Was there a representation that the BDC Mortgage was assumable?

[119] Mr. Durkin and Mr. Gregory testified that Mr. Trelawny told them that BDC would permit them to assume the BDC Mortgage, and reschedule the unpaid amortization owing for at least one year, upon Holdings' payment of the arrears interest of $182,135, pursuant to article 2.4(a) of the SPA (the "BDC Representation"). They justified Holdings' failure to close the SPA on this basis.

[120] Article 9.10 of the SPA is an entire agreement clause. Therefore, in order for Holdings to rely on the BDC Representation, the plaintiffs must establish the existence of a collateral agreement: see *Grewal v. Grewal*, 2017 BCSC 573 at paras. 37–49. Although Mr. Durkin asserts that the BDC Representation was made before the execution of the SPA, there is no term in the SPA that refers to it. Mr. Durkin drafted this document.

[121] There is no provision in the SPA that suggests that Holdings can assume the BDC Mortgage. There is also no cogent evidence to support the assertion that Mr. Trelawny told either Mr. Durkin or Mr. Gregory that they could assume the BDC Mortgage. Mr. Trelawny's evidence on this point was clear and unequivocal. In my view, there is no credible evidence to support the assertion that there was a collateral agreement by which the parties had a meeting of the minds in respect of the assumability of the BDC Mortgage. If there had been such an agreement, one would think that Mr. Durkin, as the author of the SPA, would have reduced it to

writing. In fact, there is no evidence to suggest he relied on or even mentioned the existence of the BDC Representation until April 2016, long after the original SPA closing date in November 2014.

[122] As described earlier in these reasons, Mr. Gregory's evidence on this issue shifted significantly and was maddeningly inconsistent. At first, he said he was present at a meeting where this alleged representation took place. He also suggested that the Philips made the BDC Representation rather than Mr. Trelawny. In cross-examination, he admitted that he was not present at the alleged meeting with Mr. Trelawny and instead was relying on information provided to him by Mr. Durkin. He also testified that Mr. Durkin told him that the BDC Representation was in an email but admitted that he had not seen this purported email. He later testified that it was an oral representation. In any event, the evidence is clear that Mr. Gregory has no direct knowledge of the BDC Representation.

[123] Mr. Durkin testified that the BDC Representation was made at Mr. Trelawny's office in a meeting between himself, the Philips and Mr. Trelawny. However, he could not recall the date of this meeting nor whether it occurred before or after October 15, 2014, the SPA execution date. He could only recall that this meeting took place "in the colder months".

[124] In any event, the evidence is clear that Mr. Durkin did not rely on this BDC Representation. He did not pay the $182,135 because Holdings simply did not have the funds required to make this payment. Mr. Durkin and Mr. Gregory both admitted that neither of them had any contact with BDC prior to the execution of the SPA. Mr. Durkin testified that he did not contact anyone at BDC until February 11, 2015; nine days after BDC issued a demand for repayment of all principal and interest.

[125] As purportedly experienced businesspersons, with knowledge of commercial lending, corporate transactions and equity syndications, one would think that Mr. Durkin and Mr. Gregory would have contacted BDC before the execution of the SPA to verify the status of the loan and to demonstrate their financial ability to assume it. I conclude that they failed to take these reasonable steps because they knew that

neither they nor Holdings had the resources or capacity to pay the arrears interest, let alone assume the BDC Mortgage.

[126] On February 11, 2015, Mr. Durkin wrote to BDC in respect of their demand letter. In this correspondence, he did not mention the purported BDC Representation, nor did he indicate that Holdings anticipated assuming the mortgage. He did take responsibility for not keeping BDC informed in respect of Holdings' intention to purchase shares of Inc.

[127] I conclude that Mr. Durkin and Mr. Gregory fabricated the BDC Representation in 2016 as an excuse for Holdings' failure to complete the SPA.

Did the parties enter into a period of promissory estoppel after BDC issued its demand letter on February 2, 2015?

[128] In direct examination, Mr. Durkin further justified Holdings' failure to close the SPA on the basis that after BDC issued its formal demand letter on February 2, 2015, the parties entered into a period of promissory estoppel during which they would cooperate together to develop and refinance the Hotel.

[129] The test for promissory estoppel was set out by the Supreme Court of Canada in *Maracle v. Travellers indemnity Co. of Canada*, [1991] 2 S.C.R. 50 at 57:

> The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position. In *John Burrows Ltd. v. Subsurface Surveys Ltd.*, [1968] S.C.R. 607, Ritchie J. stated, at p. 615:
>
> > It seems clear to me that this type of equitable defence cannot be invoked unless there is some evidence that one of the parties entered into a course of negotiation which had the effect of leading the other to suppose that the strict rights under the contract would not be enforced, and I think that this implies that there must be evidence from which it can be inferred that the first party intended that the legal relations created by the contract would be altered as a result of the negotiations.

[130] Although rare, in certain circumstances, this Court has endorsed the view that silence may amount to an implied promise or assurance: see e.g. *ADESA Auctions of Canada Corp. v. Southern Railway of British Columbia*, 2001 BCSC 1421 at paras. 38–39; *Elk Valley Properties Ltd. v. Video Update Canada Inc.*, 2000 BCSC 1862 at para. 16.

[131] As an equitable doctrine, estoppel is not available where the parties seeking relief are guilty of wrongdoing amounting to unclean hands: *Hong Kong Bank of Canada v. Wheeler Holdings Ltd.*, [1993] 1 S.C.R. 167 at 188–89.

[132] The evidence is clear that there is no basis for a finding that the Philips made a promise to Holdings that they would not enforce their legal rights under the SPA until Holdings was able to secure new financing to replace the BDC Mortgage. More specifically, Mr. and Mrs. Philip both testified that they were not interested in forming a partnership or working as part of a joint venture with Holdings. Their motivation was to transition to retirement and they wanted the $2 million owed to them for the shares of Inc. in order to do so.

[133] Furthermore, the evidence does not support a finding that the Philips were silent or abstained from asserting their rights such that their inaction amounts to an implied promise encouraging the plaintiffs to change their course of action or expend funds in reliance of this silence or inaction. On the contrary, between November 15, 2014 and the finalization of the Settlement on July 13, 2016, the Philips indicated their expressed desire to complete the SPA and receive the purchase price on 25 separate occasions, including two formal demands for strict performance of the SPA. Therefore, there is no basis for a finding of acquiescence in the circumstances of this case.

[134] During Mr. Durkin’s examination for discovery on October 23, 2019, he stated that he knew the BDC Provision was “an unfulfillable obligation” from the day he entered into negotiations with the Philips. I take this rare moment of honesty by Mr. Durkin to mean that he had no intention, and no ability, to comply with the provisions of the SPA when he executed it in on behalf of Holdings on October 15, 2015. I have

no doubt that if he had been forthright with the Philips regarding his lack of intention or capacity to pay them $2 million and other valuable consideration for the shares of Inc., they would not have entered into the SPA with Holdings.

[135] The plaintiffs in this matter are not entitled to rely on equitable remedies because their hands were not only unclean, they were irretrievably soiled.

Did Mrs. Philip Tortiously Interfere with Ms. Mo on April 17, 2016?

[136] During his examination in chief, Mr. Durkin testified that Mrs. Philip met with Ms. Mo on April 17, 2016, and engaged in “tortious interference”, which caused Ms. Mo to default on her agreement to invest in Holdings and guarantee a mortgage to refinance the BDC Mortgage.

[137] Holdings and Ms. Mo executed a share subscription agreement, a shareholders agreement and a promissory note all dated December 9, 2015, whereby Ms. Mo’s Corporation, G.B. Techniques Co. Ltd., entered into a contract to purchase 40% of the issued and outstanding shares of Holdings for $2 million. In these agreements, Mr. Durkin misrepresented Holdings’ interest in Inc. In particular, he represented in the subscription agreement that:

a) Holdings holds legal and beneficial interest in all issued and outstanding shares of Inc.;

b) Neither Holdings nor Inc. had any outstanding obligations to repurchase, redeem or otherwise acquire any shares or other equity securities in its capital;

c) Holdings and Inc. had good marketable title to its properties and assets subject to no material mortgage;

d) Holdings and Inc. had no liabilities or obligations;

e) Neither Holdings nor Inc. were subject to litigation, action, suit or proceeding, threatened or contemplated; and

f) Inc. was a wholly owned subsidiary of Holdings.

[138] Each of these representations is false:

a) Holdings had not completed the SPA and accordingly did not hold a legal or beneficial interest in the shares of Inc.;

b) Holdings had an outstanding obligation to purchase the shares of Inc.;

c) BDC held a mortgage over Inc.'s assets;

d) Inc. owed a significant liability of approximately $2.8 million to the BDC in respect of its mortgage over Inc.'s assets;

e) BDC had commenced a foreclosure action against Inc.; and

f) It was completely untrue that Inc. was a wholly owned subsidiary of Holdings.

[139] Mr. Durkin admitted that he drafted the subscription agreement that included these false representations. He conceded that each of the impugned representations were false in all material respects. I conclude that Mr. Durkin tried to use a fictitious interest in the assets of Inc. to raise investment funds for Holdings.

[140] Sonia Lee was Ms. Mo's real estate agent and translator. Ms. Lee was not present during the meeting between Mrs. Philip and Ms. Mo on April 17, 2016. However, Mr. Durkin testified that Ms. Lee told him that Mrs. Philip somehow discouraged Ms. Mo from investing in Holdings. To be clear, Mr. Durkin's evidence regarding this meeting is purely speculative. Neither he nor Ms. Lee have any direct knowledge of what took place during this meeting.

[141] Mrs. Philip testified that she attended the meeting with Ms. Mo at Ms. Mo's request. She indicated that Ms. Mo was concerned about Mr. Durkin's trustworthiness. Mrs. Philip testified that she actually wanted Ms. Mo to complete her investment in Holdings so that Mr. Durkin would have access to the funds necessary

to close the SPA. Accordingly, she did not actively discourage Ms. Mo from completing her investment.

[142] By April 2016, 18 months had passed since the closing date agreed to by the parties in the SPA. Mr. and Mrs. Philip never wavered from their stated desire to receive the $2 million owed to them for the shares of Inc. I accept Mrs. Philip's description of the events that took place during her meeting with Ms. Mo. She was the only witness in this proceeding with direct knowledge of this meeting. Mr. Durkin's baseless speculation is not supported by any admissible evidence. In particular, I note that he did not subpoena Ms. Lee or Ms. Mo to testify at this trial and he listed Ms. Lee as a witness he intended to call in his Trial Brief. There is no evidence to support the allegation that Mrs. Philip tortiously interfered with Ms. Mo.

The Hand-Delivered Letter

[143] Mr. Durkin and/or Mr. Gregory fabricated a "hand-delivered" letter purportedly signed by Mr. Gregory to support the false narrative that Mr. Durkin tried to pay the interest arrears to BDC, but they would not accept payment in November 2014. The SPA required Mr. Durkin to pay the Philips the interest arrears, who were in turn required to then pay BDC, so it makes no sense whatsoever for Mr. Durkin to have attempted to pay BDC directly. There is no credible documentary evidence to support the allegation that Mr. Durkin tried to pay BDC. Furthermore, there is no evidence to support the position that BDC rejected that payment. Unsurprisingly, Mr. Durkin and Mr. Gregory's evidence regarding this letter contradicted one another: Mr. Durkin testified that Mr. Gregory signed the purported letter, but Mr. Gregory adamantly denied doing so. The entire narrative surrounding this fabricated letter that Mr. Gregory and Mr. Durkin testified to is a pack of lies.

THE SETTLEMENT

[144] By April 2016, Mr. Durkin had reneged on no fewer than eight amended closing dates. On April 12, 2016, he threatened to issue notice for a Break-Up Fee for $1,672,631 based on an allegation that Holdings spent $781,754 as of that date in respect of the Hotel. He also threatened to file a $1.7 million CPL to encumber the

assets of Inc. This would have prevented the Philips from finding a new buyer for their shares.

[145] Mr. Trelawny, on behalf of the Philips and Inc., responded to these threats by issuing a demand that Holdings perform its obligations under the SPA between April 22, 2016 and May 24, 2016. This included payment of the BDC interest arrears, payment of a $100,000 deposit and payment of the remaining $1.9 million. On April 25, 2016, Mr. Durkin responded by causing Management to file a builders lien for $831,750 against the Properties. This action was consistent with Mr. Durkin's threat to file a CPL on title to the Properties. There is no credible explanation for the additional $50,000 that was purportedly spent in respect of the Properties between April 12, 2016, when Mr. Durkin first threatened to file a CPL, and April 25, 2016, when he filed the builders lien.

[146] Throughout May and into June 2016, Mr. Trelawny negotiated with Mr. Durkin's lawyer, David Juteau. On June 16, 2016, Mr. Trelawny sent his final offer to Mr. Juteau, which proposed a settlement of the SPA on the following terms:

a) The Purchase Price was reduced to $1.5 million plus $375,000 in Holdings' Class "A" Voting shares in recognition of the cash draws received by the Philips over the past two years;

b) On July 15, 2016, the Philips would place the share transfer documents in trust and execute any documents required to facilitate the refinancing of the BDC Mortgage;

c) On the same day, Holdings would facilitate the refinancing, pay out the BDC, pay $1 million to the Philips as an installment on the reduced purchase price and pay the corporate credit cards;

d) The Philips would continue to operate the Hotel and remain as the sole directors and officers of Inc. until the reduced purchase price was paid in full;

e) The Philips would be entitled to retain the excluded assets listed in the original SPA; and

f) The balance of the purchase price of $500,000 and $375,000 in Holdings' Class "A" Voting shares would be paid and delivered within 14 days of July 15, 2016, after which the share transfer documents would be released from trust and control over the Hotel would transfer to Holdings.

[147] Mr. Trelawny added that if this offer was not accepted by 10:00 am the following day, Mr. Durkin would no longer permitted to attend the Hotel, would be treated as a trespasser if he did, and the Philips would be at liberty to deal with all other parties.

[148] On June 17, 2016, Mr. Juteau sent an email to Mr. Trelawny advising that the proposed closing date was "unworkable" and he attached the plaintiffs' Break-Up Fee invoice claiming $1,932,291 based on the claim that Holdings had incurred $954,861 in project expenditures. No supporting receipts, invoices or contracts were provided to substantiate this figure.

[149] On June 20, 2016, Mr. Durkin sent a letter to the employees of the Hotel implying that Mr. and Mrs. Philip may bully and target them for dismissal. He committed to assist them in filing wrongful dismissal claims against the Philips if this were to occur. He was attempting to interfere with the operations of the Hotel by misleading the employees into believing that their employment was somehow at risk. This was part of an ongoing false narrative perpetuated by Mr. Durkin that the Philips were harmful to the Hotel's business and posed a threat to their livelihoods.

[150] On June 22, 2016, Mr. Trelawny sent a letter to Mr. Juteau accepting his earlier email as a repudiation of the SPA. In particular, Mr. Trelawny noted that by claiming the Break-Up Fee, Holdings "is clearly asserting that it will not be performing its obligations to purchase" the shares of Inc.

[151] Despite Mr. Gregory's denial, the evidence is clear that he and Mr. Philip continued negotiating a settlement. On June 23, 2016, Mr. Durkin sent an email to

the Philips attaching a form of settlement agreement executed by Mr. Durkin and Mr. Gregory and asked that the Philips return a fully executed copy immediately so he could “close on the BDC matter forthwith”.

[152] Understandably, the Philips were not prepared to execute the settlement agreement without assurance that Holdings had the capacity to obtain $3.1 million in refinancing to pay out BDC. On June 29, 2016, Mr. Philip sent an email to Mr. Durkin requesting an executed copy of a commitment letter establishing that Holdings had access to $3.1 million in financing. In response, later that day, Mr. Durkin sent an email to Mr. Philip attaching an executed copy of a commitment letter from 1 City Financial Ltd. for a $2.21 million first mortgage. In this email, Mr. Durkin represented that the additional $1 million required to discharge the BDC Mortgage was “coming from equity participants” in Holdings and this amount would be coming in the following week.

[153] On July 6, 2016, despite the repudiation, Mr. Trelawny advised Mr. Durkin’s counsel that the Philips would sign the necessary mortgage documents the following day and return them to his offices subject to an undertaking. The undertaking was that these documents not be released unless the plaintiffs placed sufficient funds in the trust account of their law firm to ensure that the BDC Mortgage was paid out in full upon release of the signed documents (the “Undertaking”). In response, Mr. Durkin’s counsel advised that he had no information regarding the additional $1 million required to pay out BDC and that it was “being handled by the investing party and will be coordinated with the BDC lawyers concurrently to this loan.”

[154] It was entirely reasonable for Mr. Trelawny to insist on Mr. Durkin’s confirmation that the additional $1 million necessary to pay out the BDC Mortgage was available before the release of the mortgage documents. Doing so avoided the prospect of a new first mortgage being placed on the Properties before the BDC Mortgage had been discharged. The Undertaking that Mr. Trelawny required was both common in these sorts of transactions and necessary in these particular circumstances. Nevertheless, Mr. Durkin refused to place any funds in trust or even

acknowledge that he had access to this additional $1 million until Mr. Trelawny forwarded the executed financing documents to his counsel without any undertakings. This was completely unreasonable.

[155] Incredibly, on July 8, 2016, Mr. Durkin sent a threatening email to the Philips in which he chastised them for not allowing him to execute mortgage documents on behalf of Inc. He claimed that the financing was completed and the funds were paid into trust before he realized that he did not have the authorization to sign documents on behalf of Inc. This was not true. No funds had been paid into trust and Mr. Durkin had no reason to believe that he had the authority to do anything on behalf of Inc., let alone sign mortgage documents.

[156] On July 13, 2016, the Philips executed the settlement agreement subject to two substantive amendments. Importantly, Mr. Durkin and Mr. Gregory both initialed these amendments on July 13, 2016. On this basis, it is reasonable to conclude that the Settlement came into effect as of July 13, 2016.

[157] Mr. Durkin ultimately failed to produce the $1 million as promised. Instead, the parties had to secure a second mortgage to bridge some of the gap between the net proceeds from the first mortgage and $3.1 million required to pay out the BDC Mortgage. When this financing was finally completed in February 2017, the Philips were forced to obtain additional funds from their friends, secured by a third mortgage for approximately $100,000, to complete the financing and pay out BDC.

[158] The Settlement was intended to vary specific terms of the SPA. It was not intended to be a rescission of the SPA. An examination of the terms of the subsequent agreement and the surrounding circumstances reveals that the parties intended to modify and vary the terms of the SPA, not create a new contract. I note that one of the introductory recitals that describes the purpose of the Settlement states:

> The parties wish to resolve all matters and complete the purchase and sale of the shares of SHH Inc. to Holdings Ltd. and by doing so wish to fully resolve any and all matters in any way related to the SPA so as to fully and finally resolve all matters among them.

[159] There is no evidence of any offer made by the plaintiffs to terminate the SPA and discharge the parties from their respective obligations. I note that the basic structure of the sale of Inc. shares to Holdings remained in place after the Settlement. On this basis, I conclude that the Settlement was a variation of the SPA.

[160] The Settlement sets out three closing dates. The first was to be July 25, 2016, when Holdings was required to pay $3.1 million in refinancing to pay out the BDC loan pursuant to article 2(a) of the Settlement.

[161] The second closing date was August 15, 2016, when Holdings was required to:

a) Tender $1 million in cash consideration to the Philips by bank draft or solicitors' cheque in accordance with s. 2(b) of the Settlement;

b) Transfer the $375,000 in Holdings' Class "A" Voting shares to the Philips in accordance with s. 2(d) of the Settlement;

c) Pay out the corporate credit cards of Inc. pursuant to article 5 of the Settlement; and

d) Discharge the builders lien filed by Management pursuant to article 9 of the Settlement.

[162] The third closing date was September 5, 2016, when Holdings was required to tender the final $500,000 instalment of the reduced $1.5 million purchase price pursuant to article 2(c) of the Settlement.

[163] Article 10 of the Settlement provides that the Philips would not resign as directors and officers of Inc. until they received payment of the entire $1.5 million in cash and transfer of $375,000 in Holdings' Class A Voting shares.

[164] Article 11 of the Settlement provides that there will be no further adjustments to the purchase price.

Purchase Price and Payment Clause

[165] The Settlement contains a purchase price and payment clause that is the subject of considerable disagreement between the parties. Article 2 of the Settlement sets out the cumulative purchase price for the shares of Inc. and the shareholders loans as follows (the "Purchase Price and Payment Clause"):

> 2. The purchase price for the shares of SHH Inc. and shareholders loan is $4.975 million dollars payable as follows:
>
> a. $3.1 million by way of payment of the BDC Mortgage via the financing set out below on the Closing Date;
>
> b. $1,000,000 by way of bank draft or solicitors trust cheque on the Closing Date;
>
> c. $500,000 21 days from the Closing Date;
>
> d. $375,000 in shares of Holdings Ltd. on the Closing Date.

[166] Mr. Durkin believes that this clause should be interpreted to mean that arranging and guaranteeing financing to pay out the BDC Mortgage constitutes valuable consideration paid to the Philips. He admits that Holdings did not comply with its obligations contained in paragraphs 2(b), 2(c), and 2(d) to pay the Philips $1.5 million and give them $375,000 in shares of Holdings. He also acknowledges that Holdings did not arrange the refinancing until February 2017, and not by the July 25, 2016 closing date described in article 1 of the Settlement.

[167] The first mortgage arranged by Mr. Durkin provides that Inc. is the borrower on a first mortgage of $2.21 million. Inc.'s assets secure this mortgage. Management, Holdings, Mr. Durkin and Mr. Gregory are the covenantors on this loan. By virtue of arranging and guaranteeing the payout of the BDC loan, Mr. Durkin contends that he has effectively paid 69.35% of the purchase price contemplated in the Purchase Price and Payment Clause. On this basis, he believes he has purchased a majority interest in Inc. and is therefore entitled to receive 69.35% of the shares of Inc.

[168] Mr. Durkin's interpretation of the Purchase Price and Payment Clause is inconsistent with the parties' objective intentions as set out in the Settlement, the SPA and the surrounding circumstances. It is abundantly clear that the Philips'

interest in selling the shares of Inc. was entirely motivated by their desire to obtain $2 million, and then later the reduced amount of $1.5 million, in order to fund their retirement. In fact, the payment of the $1.5 million contemplated in the Settlement comprises the substantial portion of the valuable consideration that the Philips expected to receive for the sale of their shares of Inc.

[169] It is inconceivable that they would have agreed to the Settlement if they had known that Mr. Durkin would be entitled to a majority interest in the shares of Inc. by simply arranging financing that they were legally responsible for and secured by Inc.'s assets. Even if I found the term to be ambiguous, which I do not, this interpretation is not commercially reasonable and it is inconsistent with sound business principles. Mr. Durkin's baseless interpretation of the Purchase Price and Payment Clause would result in an outcome that the Philips could not have possibly contemplated and never would have agreed to.

[170] Furthermore, article 3 of the Settlement required Holdings to tender the purchase price in full before the shares and share transfer documents were released from trust to effect the share purchase. Therefore, even if I were inclined to accept Mr. Durkin's interpretation of the Purchase Price and Payment Clause, which I completely reject, Holdings still would not be entitled to receive any of the shares of Inc. This interpretation is consistent with article 8 of the Settlement, which required Holdings to tender the purchase price in full before the Philips abdicated their control over Inc.

[171] Holdings' failure to tender either the $1.5 million in cash or the $375,000 in Holdings' shares deprived the Philips and their Family Trust of substantially the entire benefit that they bargained for in the Settlement. This total failure of consideration whereby the Philips received nothing of economic value constitutes a fundamental breach of contract: *Williams v. Ron Will Management & Construction*, 2009 BCCA 543 at para. 14, quoting *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426 at 499–500.

[172] Mr. Durkin and Mr. Gregory both testified that they personally have negligible assets. The evidence at trial showed that neither Holdings nor Management had any significant assets. Accordingly, the guarantees provided by Mr. Durkin, Mr. Gregory, Management and Holdings are virtually worthless. In effect, Mr. Durkin is urging an interpretation of the Purchase Price and Payment Clause that would enable him to obtain a significant majority interest in the shares of Inc. by virtue of merely arranging financing. I reject Mr. Durkin's interpretation of the Purchase Price and Payment Clause.

[173] Holdings did not perform any of its obligations under the Settlement. In addition to not complying with the Purchase Price and Payment Clause, Holdings also failed to pay off the corporate credit cards as contemplated in article 5 of the Settlement. There is approximately $115,000 in corporate credit card debt still owing on credit cards, personally guaranteed by the Philips. Holdings also failed to remove the builders lien by August 15, 2016.

Holdings' Explanations for Non-Performance of the Settlement

[174] Mr. Durkin relies on three explanations for Holdings' failure to comply with its obligations under the Settlement:

a) The commencement of an action against the Philips on April 11, 2016 by Turn/Two seeking to enforce a prior agreement entered into in May 2014 for 15% of the shares of Inc. and a right of first refusal over the remaining 85% of the shares (the "Turn/Two Action");

b) The effect of the Undertaking that Mr. Trelawny placed on the release of the documents required to complete the refinancing. This Undertaking required Mr. Juteau to confirm that Holdings paid $1 million into trust in order to bridge the deficit between the proceeds of the 1 City Financial mortgage and the funds required to pay out BDC in full; and

c) The CPL filed by Turn/Two on August 31, 2016, and its alleged impact on Holdings' completion of the refinancing.

Did the Turn/Two Action Prevent the Philips from Tendering their Shares of Inc.?

[175] The Turn/Two Action is the plaintiffs' primary excuse for Holdings' failure to comply with their obligations in the Settlement and SPA to complete the share purchase. Mr. and Mrs. Philips both testified that at all material times the shares of Inc. were in their possession, unencumbered, and there were no restrictions on the transfer of them.

[176] The plaintiffs were aware of the Turn/Two Action approximately two weeks prior to finalizing the Settlement on July 13, 2016, when Mr. Gregory and Mr. Durkin initialed the amendments that the Philips inserted into the Settlement. Mr. Durkin testified that Mr. Carrithers apprised him of the details of the Turn/Two Action on June 29, 2016. Mr. Durkin confirmed that he received a copy of the Notice of Civil Claim for the Turn/Two Action on or about that date.

[177] On July 6, 2016, Mr. Durkin sent an email to Mr. Philip in which he confirmed that he was aware of the Turn/Two Action. The Settlement does not refer to the Turn/Two Action, nor does it impose a condition requiring the Philips to resolve this matter before Holdings completes its obligations under the Settlement.

[178] In my view, the plaintiffs expressly accepted any potential risk caused by the Turn/Two Action when they initialled and finalized the Settlement on July 13, 2016. Furthermore, there is no basis for the proposition that the mere existence of the Turn/Two Action somehow encumbered the shares of Inc. such that they could not be transferred pursuant to the terms of the Settlement.

[179] Pursuant to article 3 of the Settlement, the shares of Inc. and the share transfer documents were to be released from trust upon the payment of the purchase price in full pursuant to the Purchase Price and Payment Clause. Holdings could have avoided any conflict with Turn/Two regarding the ownership of the shares of Inc. by simply paying for them as contemplated in both the SPA and the Settlement. If they had, Turn/Two's only recourse would have been to pursue a claim for damages against the Philips. On that basis, the existence of the Turn/Two

Action is not a viable or reasonable excuse for Holdings' failure to complete its obligations under the Settlement.

Did the Undertaking Prevent Holdings from Completing the Settlement?

[180] Another explanation advanced by Mr. Durkin for Holdings' failure to comply with its obligations in the Settlement is that Mr. Trelawny placed what Mr. Durkin describes as an improper undertaking on the release of the mortgage documents required to complete the refinancing. Mr. Trelawny placed Mr. Juteau on the Undertaking not to release the mortgage documents until Mr. Juteau confirmed that the plaintiffs had $1 million in trust required to pay out BDC in full. The 1 City Financial loan commitment produced by Mr. Durkin on June 29, 2016, only provided for $2.21 million in financing, and $3.1 million was required to pay out BDC. Mr. Durkin was aware that an additional $1 million was required to discharge the BDC Mortgage and he assured the defendants that this amount was "coming from equity participants" in Holdings.

[181] The purpose of the Undertaking was to ensure that Mr. Durkin would provide the additional $1 million required to pay out the BDC Mortgage.

[182] It is worth noting that the plaintiffs did not produce $1 million from Holdings' equity participants. Mr. Durkin arranged a second mortgage for $656,073. This amount combined with the $2.21 million, to be provided by 1 City Financial Ltd., was still insufficient to pay out BDC. As a result, the Philips were forced to obtain a third mortgage from friends in order to pay out the BDC Mortgage.

[183] In my view, the Undertaking was obviously necessary and entirely appropriate. I come to this conclusion not only with the benefit of hindsight, but simply because Mr. Trelawny understood the risk that his clients would face if the 1 City Financial first mortgage had been placed on the Properties without the BDC Mortgage being fully discharged.

[184] During his testimony, Mr. Durkin seemed to misunderstand the nature and importance of the Undertaking. He suggested that it somehow prevented him from

obtaining the financing necessary to discharge the BDC Mortgage. This is false. He failed to procure the equity investment of $1 million in Holdings and was therefore unable to satisfy the condition for the removal of the Undertaking. The outcome was that Inc. borrowed all of the funds necessary to pay out the BDC Mortgage without any equity investment by Holdings. The Undertaking did not prevent Holdings from complying with its obligations under the Settlement.

Did the Turn/Two CPL Prevent Holdings from Completing the Settlement?

[185] The third explanation put forward by Mr. Durkin for Holdings' failure to complete the Settlement was the existence of the Turn/Two CPL. In his direct examination, Mr. Durkin testified that this CPL was filed before July 21, 2016, and that it was the reason for the delay in completing the refinancing. This explanation does not accord with the facts because the Turn/Two CPL was not filed or registered on title to the Properties until August 31, 2016, more than a month after the July 25, 2016 closing date for the refinancing set out in article 1 of the Settlement. Title searches for the Properties conducted before August 31, 2016 establish that BDC was the only party with a charge registered on title during that period.

[186] On cross-examination, Mr. Durkin admitted that the Turn/Two CPL was not an impediment to Holdings' performance of its obligation to complete the $3.1 million refinancing on or before July 25, 2016. If Holdings had completed the refinancing by this date, the Turn/Two CPL would not have been an impediment.

[187] None of the explanations for Holdings' failure to complete its obligations under the Settlement withstands scrutiny. They are merely *ex post facto* excuses. Importantly, Mr. Durkin could have obtained $1.75 million from Mr. Chambers, but he did not ask him to invest these funds. I conclude that Mr. Durkin demonstrated neither the willingness nor the ability to comply with his obligations under the Settlement.

THE ADDENDUM

[188] In September 2016, after the parties became aware of the Turn/Two CPL, they commenced negotiations to extend the closing dates set out in the Settlement in order to provide sufficient time to remove this CPL.

[189] On November 14, 2016, the parties reached a final agreement and executed the Addendum. The Addendum required Holdings to perform its obligations in the Settlement as follows:

a) Pay out the BDC Mortgage in full within 10 business days of November 14, 2016;

b) Transfer $375,000 in Holdings' Class "A" Voting shares to the Philips by March 15, 2017;

c) Tender $1.5 million in cash to the Philips on or before March 15, 2017; and

d) Discharge the builders lien filed by Management on or before March 15, 2017.

[190] Once again, Holdings failed to perform all of its obligations as set out in the Addendum. Holdings did not pay out the BDC Mortgage within 10 business days of November 14, 2016, nor tender $1.5 million in cash and $375,000 in Holdings' Class "A" Voting shares by March 15, 2017.

[191] Mr. Durkin justifies Holdings' failure to comply with the terms of the Addendum on the basis that the Turn/Two Action remained outstanding. He somehow concluded that a bare allegation in a Notice of Civil Claim constituted a reasonable explanation for failing to proffer the purchase price and complete the necessary refinancing as required by the three written agreements he executed on behalf of Holdings. There is no reference in the Settlement or the Addendum to the Turn/Two Action, let alone a condition requiring the Philips to settle this action prior to Holdings' completion of the share purchase.

[192] Mr. Durkin's financial statements for Holdings revealed that as of December 31, 2016, it had cash of only $55,444. Without obtaining funds from Mr. Chambers, which, according to Mr. Chambers, were readily available, it was impossible for Holdings to comply with its contractual obligations. As the operating and directing mind of Holdings, Mr. Durkin was completely aware of this reality. I conclude that Mr. Durkin, on behalf of Holdings, entered into the SPA, the Settlement and the Addendum with neither the intention nor the capacity to comply with the obligations contained therein.

REPUDIATION

Legal Principles

[193] Repudiation occurs "by words or conduct evincing an intention not to be bound by the contract": *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 432 at para. 40.

[194] The Court's determination of whether a party has repudiated a contract through conduct that amounts to a total rejection of their obligations under the contract is a fact specific inquiry that requires the Court to consider the totality of the circumstances: *Terrien Bros. Construction Ltd. v. Delaurier*, 2006 BCSC 1645 at para. 51, aff'd 2007 BCCA 623.

[195] Repudiation may be effected by a fundamental breach of contract: *Mantar Holdings Ltd. v. 0858370 B.C. Ltd.*, 2014 BCCA 361 at para. 11.

[196] The effect of repudiation generally depends on the election of the innocent party following the event amounting to a repudiation. "Repudiation of a contract by one party is of no consequence in law unless the other party accepts it as such and communicates the acceptance to the repudiator within a reasonable time": *Salminen v. Garvie*, 2011 BCSC 339 at para. 36, quoting *Ginter v. Chapman*, [1967] B.C.J. No. 27 (C.A.), aff'd [1968] S.C.R. 560.

[197] When confronted with repudiation, the innocent party has two options:

> …If the non-repudiating party treats the contract as still being in full force and effect then it remains in effect for both sides. However, if the non-repudiating party accepts the repudiation, the contract is terminated (*Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, 178 D.L.R. (4th) 1). Acceptance of repudiation can be inferred through conduct that indicates that the non-repudiating party does not intend to continue with the contract…
>
> *ASEAN Technology Partners Inc. v. Canada (National Research Council)*, 2007 BCSC 1539 at para. 109, aff'd 2009 BCCA 126.

[198] An innocent party's election to affirm does not mean that a repudiator "is free to commit fundamental breaches without fear that the contract will be terminated, nor does it mean that a party guilty of fundamental breach may continue to refuse to perform with impunity": *Dosanjh v. Liang*, 2015 BCCA 18 at para. 42. Each time a party commits an act of repudiation, the other party is entitled to either affirm the contract or accept the repudiation. Furthermore, "a party that has affirmed a contract after repudiation by the other party may, if the repudiation is continuing, choose to accept it and treat the contract as at an end": *Dosanjh* at para. 43.

Were the Philips Entitled to Accept the Repudiation of Their Contracts with Holdings?

[199] Holdings failed to perform all of its obligations in the SPA, Settlement and Addendum. Most importantly, it failed to pay the BDC interest arrears and tender the purchase price, the valuable consideration bargained for by the Philips. Furthermore, Holdings expressly repudiated the SPA by issuing a Break-Up Fee invoice on June 17, 2016. However, the Philips affirmed the SPA after each instance of repudiation between November 15, 2014 and the final amended closing date of March 15, 2017, set out in the Addendum.

[200] After the new financing was put in place in February 2017, Holdings refused to perform its obligations in the SPA as amended by the Settlement and Addendum. Specifically, Mr. Durkin refused to pay the Philips the $1.5 million owed to them pursuant to the terms of the Settlement. Instead, he insisted that Holdings had "paid" for 69.35% of the shares of Inc. and he began threatening to sue the Philips to have them removed as directors and to compel them to transfer 69.35% of Inc.'s shares.

Through these words and conduct, it is clear that Holdings did not intend to complete the SPA in accordance with the Settlement or Addendum.

[201] In his communication with the Philips, Mr. Durkin's language became increasingly abusive, bullying and threatening. For example, in asserting that he owned a majority interest of Inc.'s shares, he referred to the Philips as "lame ducks". He threatened to "immediately apply for judicial intervention to have [the Philips] struck and [Inc.'s] shares transferred forthwith". He also asserted the Philips were "minority shareholders" and he had *de facto* directorship and oversight over all fiscal matters pertaining to Inc. He threatened to have the Philips removed as directors "for breach of fiduciary duty, conflict of interest, deception, reckless governance [and] egregious self payment." Notwithstanding the seriousness of these allegations, Mr. Durkin provided no credible evidence whatsoever to substantiate any of them during the course of the trial.

[202] In a final demand letter, Mr. Trelawny set August 31, 2017 as the date for strict performance of the plaintiffs' obligations under the various agreements. In response, on August 10, 2017, Mr. Durkin wrote a letter to Mr. Trelawny in which he declared that "there is **NO** current agreement either written or oral obligating [Holdings] to complete the purchase of the remaining 30.65% of the issued and outstanding shares of [Inc.] by August 31, 2017."

[203] Mr. Durkin also sought to reduce the $1.5 million purchase price by $429,854 on the basis that the Philips reduced the cash assets of Inc. by this amount. This figure is entirely unsubstantiated and his attempt to reduce the purchase price contravenes the clear language of article 11 of the Settlement, which states, "there shall be no further adjustments made to the purchase price".

[204] On August 18, 2017, Mr. Durkin wrote to Mr. Trelawny and erroneously claimed that when the parties entered into the Settlement, the Philips "recklessly, deceptively and with malicious intent, failed to disclose (intentionally concealed)" the Turn/Two Action. This is a lie. Mr. Durkin admitted during his testimony that he

became aware of the Turn/Two action on June 29, 2016. In this same email, he stated:

> [The Philips] are in breach of their fiduciary duties as directors. Their misconduct and fiscal mismanagement has rendered them "unfit"! We will be applying to the courts to have them removed in conjunction with our motion to have the shares transferred if they do not resign.

[205] On August 21, 2017, Mr. Durkin sent a condescending and patronizing email to the Philips with the subject line, "Retirement." He wrote:

> Sinclair, you and Mrs. Philip need to move on with your lives. You have a pension program that most small business owners would die for, you have plenty of time to enjoy your pursuits, you are intelligent capable people but you hang on to the past in this cloud of self-destruction. Yes you built the Sooke Harbour House and pioneered a great little business but in the same breath as sure as you built it, you destroyed it! Very nearly killed it, had I not come along. I know it's hard! Sooke Harbour House was your life for 37 years. But like all people who retire there is a sense of loss. You just have to deal with it.

[206] On August 22, 2017, Mr. Durkin ordered Ms. Saunders to disable the Philips' Sooke Harbour House email accounts and block their personal email addresses to prevent them from contacting any Hotel employees. Importantly, Ms. Saunders confirmed that only she and Mr. Durkin had access to the Philips' Sooke Harbour House emails.

[207] Also on August 22, 2017, Mr. Durkin wrote to Mrs. Philip and confirmed his intention to sue the Philips rather than completing the SPA:

> You cannot abide by agreements you sign and now have become a threat to the lenders, guarantors and investors that saved the business from your fiscal mismanagement. It is without question in my mind that a receiver needs to be appointed promptly to safeguard the hotel while the courts deal with you and the various existing and future claims against you!

[208] I infer from Mr. Durkin's reprehensible conduct and behaviour that he had no intention of paying the Philips $1.5 million and completing the purchase of Inc.'s shares. In reviewing the totality of the circumstances, including Mr. Durkin's words and conduct, I have no hesitation in concluding that he evinced an intention for Holdings not to be bound by the SPA. Mr. Durkin, on behalf of Holdings, repeatedly

repudiated the SPA, the Settlement and the Addendum. In my view, the Philips were entitled to accept the repudiation of these agreements and they did so in a letter Mr. Trelawny wrote to Mr. Durkin and Mr. Gregory on August 25, 2017. On this date, the Philips re-entered the Hotel.

THE PHILIPS' RE-ENTRY TO THE HOTEL

[209] On August 25, 2017, the Philips regained control of the Hotel. In their letter to Messrs. Durkin and Gregory, they advised that all agreements between the parties were formally terminated because of Holdings' repudiation of these agreements. They also indicated that Mr. Durkin's management services were no longer required at the Hotel and that neither he nor Mr. Gregory were permitted to attend at the Hotel or contact the Hotel's employees. They demanded the immediate return of all property belonging to Inc. that was in his possession or control, including accounting records and passwords that Mr. Durkin had previously refused to disclose.

[210] On the same date, Mr. Philip visited Ms. Parker's residence and asked her to give him the laptop that contained the accounting records of Inc. After consulting with Mr. Durkin by telephone, she refused to give Mr. Philip this laptop.

[211] Mr. Durkin responded to the August 25, 2017 letter by sending threatening and abusive emails to the Philips. He accused them of violating agreements, making the Hotel an unsafe workplace and causing the Hotel to become inoperable. He also purported to "formally charge" Mr. Trelawny with reckless endangerment of the Hotel's staff and accused the Philips of inflicting emotional and bodily harm to an employee of the Hotel. Throughout the 56-day trial of this matter, Mr. Durkin adduced absolutely no credible or independent evidence to substantiate any of these allegations. Specifically, he did not call any witnesses who were either present, or had direct knowledge of the events that transpired at the Hotel on that day.

Mr. Durkin's Attempts to Sabotage the Operations of the Hotel

[212] From the date when the Philips re-entered the Hotel, Mr. Durkin took a series of steps intended to sabotage the operations of the Hotel. He directed Ms. Saunders, Ms. Parker and other employees to disable the Hotel's internal operating systems and server that contained the accounting records of Inc. He also directed them to change the login passwords for the front desk network to prevent the Philips from accessing the Hotel's reservation information. Ms. Parker testified that Mr. Durkin advised her and the other managers that the Philips unlawfully re-entered the Hotel and directed her not to comply with their demands. She also confirmed that Mr. Durkin directed her and Ms. Saunders to disable the software system used for booking hotel rooms and restaurant reservations. Mr. Durkin also directed Ms. Parker and Ms. Saunders to disable the software used to record the revenues received by the Hotel.

[213] In cross-examination, Ms. Parker was asked to explain Mr. Durkin's intention in disabling the software systems. She testified that Mr. Durkin attempted to shut off these systems "to debilitate them, to stop them from being able to do anything." She confirmed that it would have been impossible for prospective patrons to make reservations through online platforms because these systems had been disabled. When asked to comment on the impact to the reputation and welfare of the business flowing from these decisions to disable the Hotel's operating systems, Ms. Parker testified that they "were not thinking of that" and were instead focused on disabling the Philips' ability to operate the Hotel.

[214] Ms. Saunders testified that Mr. Durkin directed her to disable the computer servers. Mr. Durkin also discouraged the Hotel's employees from attending their shifts at the Hotel. Many of these employees had been hired by Mr. Durkin and were unaware that the Philips were the owners of the Hotel. Mr. Durkin promised the employees that he would pay their regular hourly wages as long as they refused to attend for their scheduled shifts. He also sent a vitriol-laden email to the department heads at the Hotel in which he made a series of false and entirely unsubstantiated comments:

> Once again I am faced with deception and deceit. Mrs. Philip is a danger to herself and the employees of Sooke Harbour House Hotel. The property is not a safe work place …
>
> Mrs. Philip has sold all the shares of [Inc.] to [Holdings] of which 69.5% of the shares of [Inc.] have been paid for. If any of you have any doubts about this and would like to see the Agreement that she has signed I can send it to you. She has violated the Agreement 18 times. We finally got sick of her ridiculous conduct and last week informed her that we were going to file an action in the Supreme Court of British Columbia to enforce the Agreement and get our shares registered.
>
> [Mrs. Philip] has violated the Securities Transfer Act of British Columbia. She has been lying since the day we met her. She lied about the ability to pay the BDC interest arrears forcing us to restructure $3 million in debt financing when the value of the hotel was less than the debt owed. She defaulted on secured debt and forced the lender to take foreclosure action. Getting the business to a state where I could get lenders interested was no easy task. We loaned the company to date $457,000. This was to keep the company as a going concern and to make sure that all your wages were paid. If you have any doubts about this ask Robin. Of the $457,000, Mrs. Philip took $187,000 to purchase a residential lot next to her home on Murray Road. She and her husband removed hundreds of thousands of dollars in cash assets from the company. If you have any doubts about this I can show you her account.

[215] None of these allegations are accurate. Specifically, the plaintiffs did not adduce any evidence to substantiate Mr. Durkin's allegations that Mrs. Philip violated the Settlement 18 times nor that she violated the *Securities Transfer Act* or any other provincial or federal enactment. His description of the circumstances resulting in the BDC foreclosure is completely inaccurate, as is his assertion that he paid any of the employees' wages. Inc. paid these wages from its bank account. The allegation that the Philips removed "hundreds of thousands of dollars in cash assets" from Inc. is entirely unsubstantiated.

[216] In this email, Mr. Durkin also stated that Mrs. Philips "systemically (sic) destroyed the company" and that the business was deteriorating until he "showed up". He ended the email by referring to her as "a menace and a coward and a despicable human being." This last statement is particularly rich coming from Mr. Durkin because it accurately describes his own behaviour and conduct as opposed to that of anyone else involved in this litigation.

[217] On August 26, 2017, Mr. Durkin directed Ms. Parker to disseminate the following message to all staff at the Hotel advising them not to attend for their shifts because the Philips made their workplace unsafe. This message stated:

> To all staff. [Management] is the lawful manager of the Sooke Harbour House Hotel. It has been installed so by its senior secured lenders that have provided $3.5 million mortgage financing to the property. Frederique and Sinclair Philip cannot threaten you with the loss of your job if you do not show up for your assigned shifts. As long as Mr. and Mrs. Philip and their security detail remain on site your work place is unsafe. They have intimidated you with a lawyers letter recklessly endangering your safety. A lawyers letter means nothing. It is not a court order and you do not have to obey instructions from it. It has no legal value. The reason the Philips acted so recklessly is because they do not have the law on their side, hence the security detail and force protection. They did not follow due process or rule of law. They pulled this stunt on a Friday, knowing I was away and the courts are closed Saturday and Sunday. We are going to Court in Vancouver on Monday and the hotel should be resuming normal operations by Monday afternoon. Tim SHH Management Limited.

[218] Mr. Durkin originally denied that he was responsible for this message, but later admitted that he may have spoken to Ms. Parker about it. Ms. Parker testified that Mr. Durkin dictated this message to her and asked her to send this message verbatim to all Hotel employees. I accept her evidence on this issue.

[219] Although neither Mr. Durkin nor Ms. Parker were at the Hotel on the day the Philips re-entered it, Mr. Durkin made a series of unfounded allegations regarding the Philips' treatment of Hotel employees and the presence of a "group of private security guards" that in fact consisted of one security guard at the Hotel. Mr. Durkin also alleged that multiple employees filed complaints with WorkSafe BC. None of these purported employees were called as witnesses at trial and none of these purported complaints were in evidence. This was yet another of countless falsehoods Mr. Durkin perpetrated.

[220] Mr. Durkin went to significant lengths to attempt to sabotage the operations of the Hotel from the time the Philips re-entered it. Although he alleged that the Hotel lost approximately $100,000 during the period the Philips were operating it, this amount is entirely unsubstantiated. Mr. and Mrs. Philip testified that they had two or three cancellations of hotel rooms that were quickly refilled by other guests. They

also indicated that the dining room was busy throughout the two-week period during which they operated the Hotel. They acknowledge that they did not operate the Copper Room during this period, but indicated that the small margins of operating that restaurant resulted in no significant loss of revenue because of its closure.

COMMENCEMENT OF THIS ACTION

[221] On August 31, 2017, in a bid to reassert its control of the Hotel, the plaintiffs filed a notice of civil claim and two sworn affidavits of Mr. Durkin. The plaintiffs also filed an application seeking an interim injunction to remove the Philips from the Hotel. On the same date, the plaintiffs also brought a short notice application seeking leave to set down the injunction application the following morning on less than one day's notice to the Philips. This application was granted with leave for the plaintiffs to serve the defendants with the application materials by 2:00 pm on August 31, 2017. As a result, the Philips did not have an opportunity to review Mr. Durkin's affidavits, let alone instruct their counsel and provide response affidavits.

Mr. Durkin's Affidavit #1

[222] In paragraphs 14 to 21 of Affidavit #1, Mr. Durkin deposed to a series of representations regarding his contact with BDC and the circumstances that led to their foreclosure action. At paragraph 14 of his Affidavit, Mr. Durkin deposed that the defendants had represented that the BDC Mortgage could be brought into good standing by the payment of arrears to BDC, which would provide a minimum of one additional year of term on this mortgage.

[223] Mr. Philip, Mrs. Philip and Mr. Trelawny each denied making this representation. Furthermore, Mr. Durkin did not submit any credible evidence to establish the existence of some sort of collateral agreement that contains this representation. As previously discussed, Mr. Durkin did not refer to this alleged representation until April 13, 2016. Even if this representation had been made, Holdings' right to assume the BDC Mortgage would have been contingent on its performance of the BDC Provision. Holdings failed to perform this provision, so it could not have assumed the BDC Mortgage even if this representation was made.

[224] Under cross-examination, Mr. Durkin could not verify when this purported representation was made. In particular, he could not recall if it was made before or after October 15, 2014, the date on which the parties executed the SPA. I conclude that no such representation was made to Mr. Durkin.

[225] In paragraph 15 of Affidavit #1, Mr. Durkin deposed that the plaintiff corporations contacted BDC with respect to payment instructions for the payment of $182,135 on or about November 14, 2014. This representation is inconsistent with the terms of the SPA under which Holdings was required to pay $182,135 to Inc., which was then required in turn to pay this amount to BDC. It is therefore illogical for Holdings to have attempted to pay this amount directly to BDC. Furthermore, the evidence is clear that Holdings did not have $182,135 to pay to BDC. This is confirmed by the financial statement produced by Mr. Durkin for Holdings that showed that it had a total of $37,000 in cash as of December 31, 2014.

[226] In paragraph 16 of Affidavit #1, Mr. Durkin deposed that BDC informed them in November 2014 that a formal demand had been issued for the entire principal and interest and that for this reason, the bank would not accept the interest arrears payment and instead demanded full repayment of approximately $2.8 million. There is no evidence of a demand issued by BDC prior to February 2, 2015.

[227] In paragraph 17 of Affidavit #1, Mr. Durkin deposes that he immediately informed the Philips of this communication with BDC. There is no credible evidence of this alleged communication.

[228] In paragraph 18 of the Affidavit #1, Mr. Durkin deposes to “attempting to save the defendants” by meeting with mortgage brokers and advisors on November 18, 2014, to discuss the possibility of raising funds to pay out BDC. He further deposes that after investigation and inspection of the property and business, the consensus was that there was “insufficient value” to raise the necessary financing. Mr. Durkin produced no documentary evidence to support these allegations or to establish that any of these discussions took place in November 2014.

[229] In paragraph 19 of Affidavit #1, Mr. Durkin deposed that he contacted BDC in an attempt to obtain a solution but was rejected by them when they reasserted their demand for full repayment. Again, there is no documentary or independent evidence to substantiate this statement.

[230] At paragraph 20 of Affidavit #1, Mr. Durkin deposed that on or about November 20, 2014, the plaintiffs and defendants met to discuss the problem involving the BDC Mortgage. Mr. Durkin further deposed that he informed the defendants that a completed business plan for the Hotel would be necessary to obtain new debt to pay out the BDC Mortgage. Mr. and Mrs. Philip deny that this meeting took place and Mr. Durkin was unable to provide any documentary or other independent evidence to support the veracity of this statement.

[231] Under cross-examination, Mr. Durkin conceded that each of the purported interactions with BDC described in paragraphs 15 to 20 of his Affidavit #1 occurred after BDC issued its formal demand for repayment of the loan on February 2, 2015. He completely resiled from his affidavit evidence in which he firmly asserted that these interactions took place in November 2014, around the time when the SPA was supposed to close. Mr. Durkin attempted to excuse his error by saying that he had an "honest but mistaken belief" that these interactions had taken place in November 2014 as opposed to after February 2, 2015. This statement is not credible because on February 11, 2015, Mr. Durkin wrote an email to BDC in which he apologized for not keeping them informed with respect to the developments at the Sooke Harbour House Hotel and the status of the company's obligation to BDC. In this email, he admitted, "we simply dropped the ball" by not communicating prior to then about the status of the sale of the Hotel. This statement is entirely inconsistent with Mr. Durkin having any ongoing contact and meetings with BDC in November 2014.

[232] Mr. Durkin swore an affidavit for the BDC foreclosure action on April 12, 2016. In paragraph 12 of this affidavit, Mr. Durkin deposed:

> My dealings with the Petitioner began on or about February 2015. At that time I offered to pay the bank $182,500 which at the time was 100% of the interest arrears and I offered to maintain the interest current through July 2015 at

> which time I planned to refinance. I had requested only the principal portions to be rescheduled. Further, we provided a detailed description of the improvements needed to increase earnings and ready the property to enter the capital markets for re-financing the existing debt obligation.

[233] Mr. Durkin knew that BDC could verify the dates on which he contacted them. It is for this reason that Mr. Durkin accurately described the timing of his communications with BDC in the affidavit he swore in respect of the BDC foreclosure action. This paragraph conflicts directly and diametrically with the facts he deposed to in Affidavit #1. In so doing, Mr. Durkin demonstrated his willingness to swear to different facts and different events depending upon which narrative best supports the position he is advancing. He was unconstrained and unbothered by the requirement to tell the truth when swearing an affidavit. Instead, he swore to whatever version of events that would serve his interests.

[234] In paragraph 21 of Affidavit #1, Mr. Durkin deposed that at a meeting that took place on or about November 20, 2014, the defendants agreed to hold the SPA in abeyance and authorized the plaintiffs to restructure the debt. The Philips adamantly deny that this meeting took place. They also reject the assertion that they agreed to put the SPA in abeyance or authorized Mr. Durkin to act for them to restructure the debt. The Philips' version of these events is consistent with their repeated demands between October 23, 2014 and January 28, 2015 that Holdings complete the SPA forthwith. As previously discussed, Mr. Durkin and Mr. Gregory made no less than nine detailed representations in which they promised to complete the SPA imminently. In fact, between December 20, 2014 and June 6, 2016, the parties discussed closing the SPA by email on no fewer than 26 occasions. The assertion that the Philips agreed to hold the SPA in abeyance is preposterous. Mr. Durkin advanced this dishonest narrative in paragraph 21 of Affidavit #1 in order to support the false inference that the Philips permitted Holdings' failure to complete the SPA.

[235] Notwithstanding Mr. Durkin's sworn evidence in paragraphs 22, 25, 26, 35 and 36 of Affidavit #1 that the Philips requested loans from Mr. Durkin, there is no evidence to suggest that this is true. Specifically, there are no loan agreements

between the parties. Mr. Durkin indicated that he had emails from Mrs. Philip requesting these purported loans, but he failed to produce these emails or any other documentation to prove the existence of any loan agreements.

[236] The plaintiffs assumed responsibility for the liabilities of the Hotel as of November 14, 2014. If they had complied with their obligations to complete the SPA by this day, they would have been responsible for all expenses incurred thereafter. Furthermore, the SPA clearly indicates that the Philips would not be responsible for any liabilities or expenses incurred by Holdings or Management. To the extent that Holdings may have incurred any amounts in respect of the Hotel, none of which have been substantiated with invoices or contracts as required by the SPA, these expenses are its responsibility alone.

[237] At paragraph 23 of Affidavit #1, Mr. Durkin deposed that on or about November 21, 2014, the plaintiffs "in consultation with the defendants" undertook a development program for the Hotel. Mr. and Mrs. Philip vigorously deny that they agreed to enter into any type of an informal partnership with Mr. Durkin and Holdings. They repeatedly reiterated that they simply wanted to be paid the purchase price so that they could retire. They denied agreeing to undertake a new Business Plan to redevelop the hotel in conjunction with Mr. Durkin. In fact, they firmly assert that the Business Plan was entirely Mr. Durkin's undertaking that they expected him to pursue once he purchased all of the shares of Inc. from them. I accept the Philips' evidence and reject the assertions that they agreed to work with Mr. Durkin on the development of the Hotel and delay the receipt of the purchase price.

[238] In paragraph 43 of Affidavit #1, Mr. Durkin reiterated his narrative that Mrs. Philip somehow interfered with Ms. Mo's expected investment in Holdings. As previously discussed, this allegation is entirely unsupported and purely speculative.

[239] At paragraph 47 of Affidavit #1, Mr. Durkin incorrectly states that the parties entered into the Settlement on June 23, 2016, rather than the date when the Philips

actually signed this agreement and he and Mr. Gregory initialed it, which was on July 13, 2016.

[240] At paragraph 48 of Affidavit #1, Mr. Durkin perpetuates the false accusation that the plaintiffs were not advised of the Turn/Two Action prior to the execution of the Settlement and instead "discovered" it on August 25, 2016 as a result of a "cursory title search". Mr. Durkin swore to this blatant falsehood in order to advance the argument that the plaintiffs were improperly induced into entering into the Settlement. The evidence does not support this position because Mr. Durkin later admitted that he became aware of the Turn/Two Action on June 29, 2016, two weeks before the final execution of the Settlement. I conclude that Mr. Durkin made this untruthful statement to create the misimpression that the Philips falsely induced the plaintiffs into executing the Settlement and were somehow at fault for Holdings' failure to complete the SPA.

[241] At paragraph 64 of Affidavit #1, Mr. Durkin swore to another entirely false statement. He deposed that the plaintiffs advanced the sum of approximately $156,000 as unsecured lending to Inc. on February 21, 2017. This is a lie. The Philips obtained a third mortgage for $156,000 from their friends in order to complete the payout of BDC. Mr. Durkin had nothing to do with raising these funds.

[242] Paragraphs 67 and 68 of Mr. Durkin's Affidavit #1 suggest that the parties agreed to extend the SPA to permit the defendants to remove the claim against the shares of Inc. brought by Mr. Carrithers. Like most of the facts deposed to by Mr. Durkin in this Affidavit, this is false. The Philips at no time agreed to delay completion of the SPA pending resolution of Mr. Carrithers' claim. Notably, neither the Settlement nor the Addendum refers to the Turn/Two Action. The evidence is clear that Mr. Durkin was aware of this litigation well before the execution of these agreements.

[243] Exhibit "P" of Mr. Durkin's Affidavit #1 is entitled "Sooke Harbor House Hotel Revenue and EBITDA analysis 2001–2020 (Revised)". During the trial, Mr. Durkin produced an identically styled document that purported to be the same document as

the one attached as Exhibit P of Affidavit #1. Mr. Durkin admitted in cross-examination that he was solely responsible for drafting these documents. A cursory comparison of these two identically styled documents reveals a number of discrepancies. Most importantly, the Hotel's revenue for fiscal 2017 contained in the document at Exhibit P of Affidavit #1 shows significantly higher revenues from all sources compared to the identically styled document that Mr. Durkin relied on at trial. If I accept Mr. Durkin's contention that the document he relied on at trial is accurate, the Hotel's revenues as set out in Exhibit P of Affidavit #1 was inflated by approximately $1.2 million. This is an incomprehensible difference between Mr. Durkin's affidavit and what he suggested is the true state of affairs based on the document he produced at trial. I conclude that the document that Mr. Durkin included as Exhibit P to Affidavit #1 deliberately overstated the financial performance of the Hotel in order to create the misimpression that he had been far more successful in operating the Hotel than was actually true.

[244] I conclude that Mr. Durkin knowingly and deliberately swore a false affidavit in order to obtain the injunction. He concocted a narrative in which Holdings was not responsible for its failure to complete the SPA, the Philips could not be trusted to operate the Hotel, and he was effectively and successfully managing it. None of these assertions are true.

The Interim Injunction Decision

[245] On September 5, 2017, the Court released its decision granting the Injunction Application. A review of the oral reasons for judgment shows that the misrepresentations contained in the false affidavit significantly influenced the Court's decision to grant the injunction in favour of Mr. Durkin. For example, at paragraph 14 of the reasons, the Court held that the parties did not complete the SPA on November 14, 2014 "as a result of the delay in making improvements to the Hotel, and disputes that arose between the parties." This indicates that the Court accepted the misrepresentations perpetrated by Mr. Durkin in paragraphs 15 to 21 of Affidavit #1. The evidence at trial shows that the disputes between the parties were caused

by Holdings' failure to acquire the funds necessary to complete the SPA and pay these funds to the Philips.

[246] At paragraph 78 of the oral reasons for judgment, the Court held that despite the disagreements between the parties since the SPA was executed, "SHH Holdings has remained committed to achieving completion of the purchase and sale of shares." Mr. Durkin's false affidavit was the basis for this finding. In my view, the Court would not have reached this conclusion if it had been aware of the myriad of blatant falsehoods contained in Mr. Durkin's affidavit and the reality that the plaintiffs made virtually no efforts to raise the funds required to pay the Philips pursuant to the terms of the SPA.

[247] At paragraphs 101 and 102 of the oral reasons for judgment, the Court referred to the "chaos" caused by the Philips' re-entry to the hotel. I am convinced that the Court would have viewed this situation differently if it had been aware of Mr. Durkin's central role in creating this chaos by debilitating the Hotel's internal operating systems and discouraging staff from attending for their shifts.

[248] Mr. Durkin intended to, and did, mislead the court by filing a false affidavit. The Injunction Application was heard on short notice that provided the Philips with virtually no time to prepare for it. As a result, the false evidence provided by Mr. Durkin significantly influenced the Court's decision to grant the injunction. I conclude that it is extremely unlikely that the Court would have granted the injunction if it had evidence that disclosed the true state of affairs at the Hotel, in particular, details of Mr. Durkin's lies, excuses and misrepresentations.

LITIGATION CONDUCT

[249] Throughout the course of this litigation, Mr. Durkin has failed to disclose relevant documents. For example, Mr. Durkin told the Court that Holdings did not have any undisclosed share subscription or shareholders' agreements. This was untrue. Mr. Chambers testified that one of Mr. Durkin or Mr. Gregory provided him with a share subscription agreement and a promissory note for his investment in Holdings. On two occasions during his cross-examination, Mr. Gregory expressly

denied that Mr. Chambers executed a share subscription agreement and testified that all of Holdings' share commitments were "handshake deals" with the exception of Ms. Mo.

[250] I note that the subscription agreements provided to Ms. Mo were drafted by Mr. Durkin and contained entirely false representations that indicated that Inc. was a subsidiary of Holdings. Mr. Durkin did not disclose the subscription agreements during the course of this litigation; they were obtained from Ms. Mo's counsel. This was despite two court orders that required Mr. Durkin to disclose these agreements.

[251] Throughout the trial, Mr. Durkin and Mr. Gregory faced several allegations that they attempted to intimidate witnesses. Both vehemently denied accosting and insulting Ms. Saunders and her husband outside of court. Mr. Durkin made a number of inappropriate comments and gestures during the direct examination of Ms. Saunders. I reprimanded him for this conduct and warned him that if it continued, he would face consequences. Mr. Durkin responded by making various allegations of criminal conduct against both Mr. and Mrs. Saunders, none of which were substantiated by any documentary or independent evidence during the course of the trial.

[252] On June 19, 2020, Mr. Durkin allegedly approached Mr. Philip in the bathroom at the courthouse and insisted that he accept service of court documents. Mr. Philip reasonably told Mr. Durkin to give these documents to his counsel, but Mr. Durkin forced the documents on him and allegedly stated, "if you know what is good for you, watch your step" in an intimidating and threatening tone. Counsel for the Philips brought this matter to my attention. I questioned Mr. Durkin about it and he admitted giving the documents to Mr. Philip but completely denied making this statement or threatening him. I note that this took place at a time when Mr. Durkin was conducting his cross-examination of Mr. Philip. I admonished Mr. Durkin in the strongest possible terms not to engage with or in any way attempt to intimidate Mr. Philip or any other witness in this matter. Unfortunately, Mr. Durkin did not heed this warning.

[253] On July 6, 2020, during the afternoon break, Mr. Durkin allegedly directed an expletive ridden insult to Mr. Philip in the hallway outside the courtroom. I provided Mr. Durkin with an opportunity to address this allegation. At first, he completely denied it and insisted it "did not happen". When I told him that the Sheriffs had witnessed the exchange and had spoken to me about it, he changed his story. He admitted swearing at Mr. Philip. He also admitted that he lied to me when he told me that the allegation was a fabrication. I have no difficulty in concluding that Mr. Durkin sought to intimidate Mr. Philip and Ms. Saunders.

[254] Mr. Durkin seemingly has no understanding of or regard for the truth. Notwithstanding the oath he swore, he did not comply with his obligation to speak truthfully. His view of the truth is whatever will serve his interests in the moment. He is entirely unencumbered by ordinary norms of morality, integrity and decency. He is a garden-variety bully who preys upon those whom he perceives to be weaker than himself and vulnerable to his mistruths and manipulation. Unfortunately for the Philips, they were victims of Mr. Durkin's countless lies and deceptions.

ARE THE PLAINTIFFS ENTITLED TO EQUITABLE REMEDIES?

[255] In their notice of civil claim, the plaintiffs seek two equitable remedies: specific performance of the SPA and restitution of $1,344,328 based on unjust enrichment.

[256] A litigant seeking an equitable remedy must come with clean hands: *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534 at 585–86.

[257] Although characterized by Justice Cromwell in *Bhasin v. Hrynew*, 2014 SCC 71 at para. 33, as an "organizing principle of the common law of contract", the doctrine of good faith and the common law duty to act honestly in the performance of contractual obligations established in *Bhasin* are closely tied to equitable concepts: *Concord Pacific Acquisitions Inc. v. Oei*, 2019 BCSC 1190 at para. 513; *Bhasin* at para. 74. As Justice Cromwell explained in *Bhasin* at paras. 65 and 73, the law requires contracting parties not to act in bad faith, lie or otherwise knowingly mislead one another:

> 65 The organizing principle of good faith exemplifies the notion that, in carrying out his or her own performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner. While "appropriate regard" for the other party's interests will vary depending on the context of the contractual relationship, it does not require acting to serve those interests in all cases. It merely requires that a party not seek to undermine those interests in bad faith …
>
> 73 …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. Recognizing a duty of honest performance flowing directly from the common law organizing principle of good faith is a modest, incremental step. The requirement to act honestly is one of the most widely recognized aspects of the organizing principle of good faith.

[258] The court may refuse to grant an equitable remedy if the plaintiff committed fraudulent misrepresentations that were directly related to the subject matter of the claim: *Redican v. Nesbitt*, [1924] S.C.R. 135; *LBEL Inc. v. Ten Veen*, 2018 BCSC 1991 at para. 36.

[259] In my view, the plaintiffs' considerable misconduct and bad faith in respect of its non-performance of the SPA, Settlement, and Addendum, over the past six years establishes a clear basis for a finding that they failed to act honestly or in good faith in their contractual performance. Specifically, the evidence shows that Holdings and its principals never intended to perform their fundamental obligations under these agreements and they knowingly misled the Philips into believing that they would.

[260] For example, during Mr. Durkin's examination for discovery on October 23, 2019, he was asked about Holdings' non-performance of the BDC Provision that required Holdings to pay arrears interest of $182,500 within five business days of the execution of the SPA. Mr. Durkin indicated that BDC would not accept this payment. He referred to this as an "unfulfillable obligation" and confirmed that he signed the SPA knowing that he could not comply with this obligation, presumably because Holdings did not have the funds to pay this amount to BDC. I note that Mr. Durkin was responsible for proposing, drafting and incorporating the BDC Provision into the

SPA. He certainly did not tell the Philips that BDC would not accept payment of the interest arrears nor did he suggest to them that it was an “unfulfillable obligation”. I conclude that Mr. Durkin acted in bad faith and breached the duty of honest contractual performance. He deliberately and knowingly misled the Philips on Holdings’ ability and willingness to pay the interest arrears owing to the BDC.

[261] I also conclude that Mr. Durkin and Mr. Gregory deliberately misrepresented their intention to pay the purchase price to the Philips. This was their primary contractual obligation but they did not have the intent or the financial capacity to pay this amount at any time during the past six years. Nevertheless, they proposed or agreed to at least 10 amended closing dates for completing the SPA.

[262] Mr. Durkin and Mr. Gregory induced the Philips into extending the dates for the closing of the SPA by telling them that the shares of Holdings were “oversubscribed” and that they had sufficient capital commitments to complete the share purchase. None of this was true. In fact, for the period ending December 31, 2014, Holdings had only raised $37,500. The financial statements for Holdings for the period ending December 31, 2015 show that as of this date, they only had access to approximately $416,000, most of which was probably obtained from Ms. Mo. By the end of 2016, Holdings’ financial statements show that it only had access to $55,444 in cash.

[263] Mr. Chambers testified that neither Mr. Durkin nor Mr. Gregory ever asked him to raise any portion of the $2 million purchase price nor the $182,135 that was required to perform the BDC Provision. He indicated that if he had been asked to provide funds, his investor group would have been “ready to go” and could have raised at least $1.75 million within 30 to 60 days. He further confirmed that Mr. Gregory was expressly aware that Mr. Chambers had the capacity to raise these funds.

[264] The financial statements of Holdings combined with the testimony of Mr. Chambers clearly demonstrate that Mr. Durkin did not intend to complete the SPA notwithstanding his repeated promises to do so between November 2014 and

November 2016. Holdings did not have the financial capacity to complete the share purchase and neither he nor Mr. Gregory made any effort whatsoever to obtain the funds necessary to pay the purchase price for the shares pursuant to the SPA or the Settlement. In my view, Mr. Durkin's repeated promises to complete the share purchase constitutes a contravention of the duty of honest contractual performance because he knowingly misled the Philips in regards to Holdings' primary contractual obligation to pay the purchase price to them.

[265] Similarly, I also conclude that Mr. Durkin breached his duty of honest contractual performance by misleading the Philips in respect of the refinancing that he was arranging. Specifically, he indicated to them that equity investors were contributing the $1 million shortfall required to pay out the BDC Mortgage. This amount never materialized and Mr. Durkin provided no credible evidence to suggest that he had any reasonable basis for suggesting that there were any investors prepared to provide this amount. As a result, additional second and third mortgages were required to cover the shortfall.

[266] During his examination in chief, Mr. Durkin admitted that he knew his representations were false. He attempted to minimize his culpability by characterizing these representations as "placating emails" used in business all the time. This admission indicates that Mr. Durkin and Mr. Gregory intended for the Philips to rely and act upon their fraudulent misrepresentations. If the Philips had known at the outset that Holdings did not intend to perform the BDC Provision, the so-called "unfulfillable obligation", and did not have the funds necessary to pay the purchase price, it is likely that they would have exercised their option to terminate the SPA pursuant to article 2.3(1)(f). This provision would have permitted them to terminate the SPA without engaging the Break-Up Fee.

[267] In my view, the extensive record of lies and fraudulent misrepresentations deployed by Mr. Durkin and Mr. Gregory throughout the history of their dealings with the Philips illustrates considerable bad-faith that is more than sufficient to preclude Holdings from obtaining an equitable remedy.

ARE HOLDINGS OR MANAGEMENT ENTITLED TO DAMAGES?

[268] As previously discussed, Mr. Durkin and the companies he controls are not entitled to the equitable remedies of specific performance or restitution based on unjust enrichment because they failed to perform their contractual obligations honestly in good faith, and their hands are far from clean.

[269] With respect to specific performance, a party cannot take advantage of its own default nor can he take advantage of a state of affairs that he has produced: *Go Ha & Associates Ltd. v. 611414 B.C. Ltd.*, 2018 BCSC 2118 at paras. 38–39, quoting *McLaughlin v. Canadian Service Management Inc.*, 2018 ONSC 1937 at paras. 49, 52. Furthermore, the plaintiffs have not established that they were at any time ready, willing and able to complete the share purchase, nor that the shares of Inc. are unique: *Basra v. Carhoun*, [1993] B.C.J. No. 1648 at para. 31 (C.A.); *Lalani v. Chow*, 2011 BCCA 499 at para. 17.

[270] The plaintiffs are also not entitled to restitution based on unjust enrichment because they have not discharged their onus to show that the Philips were enriched. The Philips did not receive any portion of the $2 million purchase price that they expected pursuant to the SPA nor the $1.5 million they expected pursuant to the Settlement. The plaintiffs have also not established an absence of juristic reason for the defendants to retain benefits, if any. This is because a contract that provides for the enrichment is a juristic reason for it: *Ileman v. Rogers Communications Inc.*, 2014 BCSC 1002, at para. 108, aff'd 2015 BCCA 260. The SPA permitted the plaintiffs to commence work on various projects, but clearly indicated that this work would be entirely at their expense and the Philips would not be liable or responsible for any of the expenses associated with work on these projects. In my view, this contractual language is a juristic reason for any amounts incurred related to improvements to the Hotel.

[271] Now that the Hotel has been sold to a third party, and the proceeds paid into court, it is unlikely that the Philips will receive anything after all debts have been discharged. The fruit of their life's work and the funds they intended to rely upon

during their retirement have been lost entirely because of Mr. Durkin's lies and deceptions.

[272] Mr. Durkin became emboldened by his success in fraudulently obtaining an injunction. He described himself as the owner of the Hotel because he concocted a delusional narrative that he had paid for 69.35% of the shares of Inc. He fabricated financial information to support this false assertion.

[273] He also manufactured information that suggested that Management and Holdings had made loans to Inc. There is no evidence to suggest that Inc. agreed to these loans. In particular, the $187,000 payment made on March 16, 2016, by Management to the Philips was to repay a portion of their shareholders loans. This amount was deducted from their shareholder loan accounts. It was not a loan advanced by either Holdings or Management to Inc. The approximately $26,500 that was advanced by Holdings to Inc. was for amounts paid to meet payroll obligations that would have been the responsibility of Holdings if they had complied with their obligation to close the SPA on November 14, 2014. The SPA clearly indicates that any amounts incurred by Holdings or Management after this date are on its account and are specifically not the responsibility of the defendants. I reject the allegation that the Philips are liable for any loans purportedly advanced to Inc. by Holdings or Management.

[274] By refusing to provide the Philips with relevant financial information, Mr. Durkin prevented them from finding other sources of financing to replace the privately placed high-interest loans.

[275] Mr. Durkin's allegation that Management provided a "revolving line of credit" to Inc. is unconvincing. The Philips were not aware of it, let alone agreed to it. Furthermore, the Notice of Civil Claim does not refer to a purported line of credit. During the trial, Mr. Durkin indicated that he intended to elicit evidence about this line of credit during his examination of Ms. Parker but she did not provide any testimony to establish the existence of a line of credit.

[276] A claimant is not entitled to restitution for debts forced upon them without their consent and agreement: *Globalnet Management Solutions Inc. v. Cornerstone CBS Building Solutions Ltd.*, 2018 BCCA 303 at para. 56. The plaintiffs did not tender any evidence demonstrating that the defendants made an implicit or express request for a revolving line of credit. I reject the proposition that Management or Holdings extended a line of credit to Inc. and that the Philips somehow benefited from it.

[277] The Notice of Civil Claim alleges that the plaintiffs directly invested $661,000 in the Hotel and its operations. Neither Ms. Parker nor Mr. Durkin produced any credible evidence to substantiate this quantum of purported investments. Mr. Durkin instead relied upon a general ledger that he maintained in which he classified a range of operational expenses as “capital investments”. These included expenses for casual labour and construction materials without any supporting evidence to establish that these amounts were paid. Importantly, the plaintiffs failed to produce any receipts, invoices, contracts, cancelled cheques or any other credible evidence to support their alleged investments. Notably, Mr. Durkin conceded that the Copper Room was the only major project that the plaintiffs completed in the past six years. This consisted of an approximately $66,000 expenditure, as set out in the SPA. However, Mr. Durkin was unable to provide any credible documentary evidence in respect of the actual expenditures on the Copper Room.

[278] Mr. Durkin made general and vague references to work done in respect of the wastewater treatment plant, but he did not provide any credible documentary evidence to support these purported expenditures. He acknowledged that he classified the plaintiffs’ personal legal expenses as capital investments in the Hotel. He also listed $7,000 in payments to his wife as capital investments in respect of “executive housekeeping”. On cross-examination, Mr. Durkin admitted that he classified every single expenditure incurred by the plaintiffs over the past six years, for any reason, as a capital investment in the projects. These included his own personal food and beverage purchases, fuel purchases for his personal vehicle, and expenses in respect of the purchase of children’s toys for his grandchildren.

[279] Mr. Durkin's own evidence in respect of the total amount that he purportedly "invested" varied. The Notice of Civil Claim refers to the amount of $661,000. On April 12, 2016, he threatened to issue a Break Up Fee invoice based on a calculation that the plaintiffs had incurred $781,754 in capital investments. On May 30, 2016, Mr. Durkin's counsel threatened to issue a Break Up Fee invoice in respect of $800,000 in capital investments. A mere two-and-a-half weeks later, on June 17, 2016, his counsel issued a Break-Up Fee invoice based on Mr. Durkin's calculation that $954,861 in capital investments had been incurred. None of these amounts were substantiated. In cross-examination, Mr. Durkin testified that he had sufficient receipts, invoices and contracts for goods and services to substantiate the quantum of $781,544, but he failed to put any of these receipts or other documents into evidence and instead relied solely on the general ledger that he created as proof of payment. I reject Mr. Durkin's oral evidence in respect of these amounts as well as the general ledger that he created.

[280] I also note that the SPA contemplates the plaintiffs' expenditures on projects related to the Hotel. Article 2.4(c) of the SPA provides:

> 2.4(c) Sellers and Purchaser hereby agree that for and in consideration of the implementation of the Project prior to Closing *at no cost to the seller whatsoever*; and that upon the date hereof and up to the actual date of closing, the Sellers permit and appoint Purchaser to expend time and monies in accordance with the Project schedule and budget and for the betterment of the Business and Company, *without equity nor debt incurring as except expressly set forth herein*. Purchaser shall commence the Project from the date hereof and ensure all project items are performed and conducted in the best standards equal to or better than the physical standards of design and esthetics of the Business, existing or past and in the same good workman like manner and with the consultation and agreement of the Sellers, its employees, contractors and assigns. All work conducted on or for the Business shall be evidenced with receipts of expenditure and copies, where required, of contracts for the supply of goods and services … (emphasis added).

[281] Furthermore, article 2.4(e) of the SPA provides that the Philips and Inc. "shall not incur any debt in association with the implementation of the Project". The express wording of these provisions clearly allocates the liability for the projects to the plaintiffs and not the defendants.

[282] The plaintiffs have not credibly established the amounts that they purportedly invested in the Hotel. To the extent that some investments were made, they were the responsibility of the plaintiffs.

[283] The plaintiffs have also not established that they are entitled to a Break-Up Fee. They did not provide sufficient receipts, invoices and contracts for goods and services as required by the SPA. This claim is entirely unsubstantiated.

[284] The plaintiffs have not come close to establishing that they are entitled to either specific performance of the transfer of Inc. shares nor to any damages whatsoever.

ARE THE DEFENDANTS ENTITLED TO DAMAGES?

[285] The defendants' counterclaim seeks an order for damages arising from Holdings' breach of contract and an order for damages against the plaintiffs and Mr. Durkin in his personal capacity in respect of their purported intentional interference with the economic relations of Inc. and the Philips. The defendants also seek enforcement of the plaintiffs' undertaking to pay damages that was a condition of the Injunction Order. During their closing submissions, the defendants also sought an award of punitive damages against Holdings and Mr. Durkin.

Damages in Breach of Contract

[286] The purpose of damages for breach of contract is to put the plaintiff, so far as money can achieve, in the position they would have occupied had the contract been performed: *Robinson v. Harman* (1848), 1 Ex. 850, 154 E.R. 363 at 855; *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30 at para. 27.

[287] In assessing the quantum of these damages, the general principle is that such damages must be "such as may fairly and reasonably be considered either arising naturally…from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties": *Fidler* at para. 27, quoting *Hadley v. Baxendale* (1854), 9 Ex. 341, 156 E.R. 145 at 151.

[288] Expectation damages focus on the value the plaintiff would have received if the contract had been performed: *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43 at para. 26.

[289] Generally, expectation damages are assessed by measuring the difference between the position that the plaintiff would have occupied if the contract were performed, and the position the plaintiff currently occupies because of the defendant's breach of contract. An appropriate interest rate applies to this amount to account for the time value of money: *Bank of America Canada* at paras. 28–29.

Quantum of Compensatory Damages

[290] The defendants are seeking $1,996,665 in compensatory damages based on the amounts they expected to receive as of March 15, 2017, the closing date set out in the Addendum. This consists of the $1.5 million cash purchase price set out in the Settlement, $375,000 in for the shares of Holdings and $121,665 in respect of the credit cards that Holdings committed to pay off in the SPA.

[291] The interest arrears was $182,135 as of five days from the initial closing date for the SPA of October 15, 2014. The defendants seek $318,186 in respect of Holdings' failure to perform the BDC Provision. This is the amount of interest arrears that had accrued as of February 2017, when the debt was refinanced and BDC paid out. Mr. Durkin and Mr. Gregory specifically and repeatedly promise to pay the arrears interest owing to BDC. However, neither of them ever asked Mr. Chambers for the funds to do so. Furthermore, article 2.3(1)(e) of the SPA states: "in the event this Agreement closes later than November 15, 2014, Purchaser shall pay… the prevailing per diem rate applicable to the first mortgage security owned by BDC."

[292] Finally, in addition to the foregoing claims of damages, Inc. claims the amount of $330,379 in respect of accounts payable by it as of June 15, 2020, on the basis that Holdings would have assumed responsibilities for these liabilities had it completed the SPA or either of the subsequent amendments to it, as contemplated in those agreements.

[293] The defendants claim a total of $2,645,229 in respect of compensatory damages arising from Holdings' repeated breaches of contract. I agree that Holdings is liable to pay this amount to put the defendants in the position they would have occupied had Holdings not breached its contractual obligations.

Prejudgment Interest

[294] The defendants assert that an interest rate of 4.75% per annum is applicable to the compensatory damage award. Section 1(1) of the *Court Order Interest Act*, R.S.B.C. 1996, c. 79, provides that the court may set a prejudgment interest rate that "the court considers appropriate in the circumstances." Article 2.3(1)(a) of the SPA states:

> In the event that this Agreement closes later than November 15, 2014, Purchaser shall pay an additional sum to Seller (late payment fee) of $260.27 per calendar day for each day up to and the day prior to the actual closing date …

[295] The amount of $260.27 per calendar day when applied to the $2 million purchase price set out in the SPA amounts to an interest rate of 4.75% per annum. On this basis, the defendants submit that the parties agreed to this interest rate if Holdings failed to close on the SPA. The interest rate of 4.75% per annum agreed to by the parties in reference to the $2 million purchase price is, in my view, a reasonable basis for establishing the prejudgment interest rate that is appropriate in the circumstances of this case.

[296] Pursuant to the Addendum, the Philips were to receive all of their valuable consideration by March 15, 2017. Accordingly, prejudgment interest will run from March 15, 2017 to the date of this judgment.

Damages for Intentional Interference with Economic Relations

[297] The three essential elements of the tort of intentional interference with economic relations are:

a) the defendant intended to injure the plaintiff's economic interests;

b) the interference was by illegal or unlawful means; and

c) the plaintiff suffered economic harm or loss as a result.

Pro-Sys Consultants Ltd. v. Microsoft Corporation, 2013 SCC 57 at para. 81.

[298] The defendants assert that Mr. Durkin sought to injure their economic interests by debilitating the Hotel's operations during the Philips' attempt to retake control of the Hotel in August and September 2017. While I am satisfied that Mr. Durkin's conduct may have induced some employees not to attend their scheduled shifts, the defendants have not established that they suffered economic harm or loss because of these actions. Specifically, Mr. Philip testified that the dining room and hotel were at or close to full capacity throughout the re-entry period during which they operated the Hotel. Although the Philips did not operate the Copper Room restaurant, Mr. Philip testified that it operated on a break-even basis and accordingly, he did not believe that any material revenue was lost because of its closure.

[299] The defendants assert that Inc. lost approximately $100,000 in revenue during the 11-day re-entry period. This amount is nothing more than a rough estimation provided by Ms. Parker based on no verifiable financial information. During the re-entry period, the defendants have not established that they or Inc. suffered economic harm or loss because of the actions of Mr. Durkin. On this basis, they are not entitled to damages for intentional interference with economic relations during the re-entry period.

ARE THE PLAINTIFFS LIABLE FOR PUNITIVE DAMAGES?

[300] Unlike compensatory damages, punitive damages are awarded to punish a defendant for "'malicious, oppressive and high-handed' misconduct that 'offends the court's sense of decency'": *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at para. 36, quoting *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 196. In this way, punitive damages "straddle the frontier between civil law (compensation) and criminal law (punishment)": *Whiten* at para. 36.

[301] For the court to make a punitive damages award, the misconduct must represent a "marked departure from ordinary standards of decent behaviour": *Whiten* at para. 36. These damages "should be resorted to only in exceptional cases and with restraint.": *Whiten* at para. 69.

[302] Punitive damages may be awarded in breach of contract cases where the defendant's conduct giving rise to the claim is itself an "actionable wrong": *Whiten* at para. 78.

[303] In their closing submissions, the defendants/plaintiffs by counterclaim submit that Mr. Durkin should be liable to pay punitive damages to Inc. in his personal capacity at a quantum that is sufficient to punish his malicious, oppressive and high-handed misconduct, which they submit should be in the range of $50,000–100,000. The defendants raised this claim for the first time in closing submissions.

[304] In *Whiten*, Justice Binnie stressed the importance of sufficient pleadings in claims for punitive damages. In that case, the plaintiffs had specifically requested "punitive and exemplary damages" in their statement of claim. The defendant argued that this pleading was insufficient. The Court rejected this argument, holding that the pleadings in that case were sufficient as they specifically asked for punitive damages and pleaded the basis for the independent actionable wrong. In doing so, Justice Binnie made the following observations, at paras. 86–87:

> 86 There is some case law that says a claim for punitive damages need not be specifically pleaded as it is included conceptually in a claim for general damages… In my view, the suggestion that no pleading is necessary overlooks the basic proposition in our justice system that before someone is punished they ought to have advance notice of the charge sufficient to allow them to consider the scope of their jeopardy as well as the opportunity to respond to it. This can only be assured if the claim for punitive damages, as opposed to compensatory damages, is not buried in a general reference to general damages. This principle, which is really no more than a rule of fairness, is made explicit in the civil rules of some of our trial courts… It is quite usual, of course, for the complexion of a case to evolve over time, but a pleading can always be amended on terms during the proceedings, depending on the existence and extent of prejudice not compensable in costs, and the justice of the case.
>
> 87 One of the purposes of a statement of claim is to alert the defendant to the case it has to meet, and if at the end of the day the defendant is

> surprised by an award against it that is a multiple of what it thought was the amount in issue, there is an obvious unfairness. Moreover, the facts said to justify punitive damages should be pleaded with some particularity…

[305] In reviewing the Counterclaim, the relief sought includes damages for breach of contract and damages for the tort of intentional interference with economic relations. Punitive damages are not claimed under "Relief Sought", or anywhere else in the Counterclaim. At no time did the defendants/plaintiffs by counterclaim apply to amend their pleadings to include a claim for punitive damages; rather, it was raised for the first time in closing submissions.

[306] Regardless of whether the defendants by counterclaim have acted maliciously in a way that gives rise to an independent actionable wrong, in my view, the above paragraphs of *Whiten* are clear that a failure to plead punitive damages is fatal to the claim. Because of the quasi-criminal nature of punitive damages, fairness requires that the defendants by counterclaim have notice of the jeopardy they face.

[307] For this reason, I decline to award punitive damages against the plaintiffs/defendants by counterclaim.

ENFORCEMENT OF THE UNDERTAKING

[308] In *Ralph's Auto Supply (B.C.) Ltd. v. Ken Ransford Holdings Ltd*., 2020 BCCA 120 at paras. 68–72, the Court confirmed that an undertaking to pay damages arising from an interim injunction is enforceable in cases where:

a) the plaintiff does not establish a meritorious claim; or

b) the injunction was wrongfully obtained, either because there was impropriety in obtaining the interim injunction (such as non-disclosure of material facts) or because the plaintiff failed to establish their case on its merits.

[309] In this case, both approaches set out by the Court in *Ralph's* are applicable. The plaintiffs did not prove their claim on its merits and the Injunction Order was wrongfully obtained based on the numerous misrepresentations set out in Mr.

Durkin's Affidavit #1 and the non-disclosure of material facts during the injunction application. As previously discussed, I am satisfied that the Court would not have granted an injunction in favour of the plaintiffs had it been fully apprised of the history and circumstances of dealings between the parties.

[310] The Injunction Order gave Mr. Durkin control over the business and accounting records of Inc., which he steadfastly refused to disclose to the Philips, even when ordered to do so by this Court. The Philips were entitled to these records as the sole directors and shareholders of Inc. Mr. Durkin prevented them from finding other sources of financing to replace the privately placed high-interest loans that he arranged by refusing to respond to their reasonable requests for financial information.

[311] Furthermore, while operating the Hotel after receiving the Injunction Order, Mr. Durkin made a series of irresponsible decisions that destroyed the Philips' equity in Inc. Specifically, he exposed the Philips to personal liability as directors of Inc. by failing to pay necessary remittances and taxes. He also misappropriated approximately $125,000 in revenues by installing a Square credit card device (the "Square") in the Hotel and diverting revenues from it directly into Management's bank account. Further details in respect of these failures to remit and diversion of revenues are set out below.

What are the Damages Arising from the Injunction Order?

[312] The basis for the assessment of damages pursuant to an undertaking given for an interim injunction order is analogous to the principle applied in awarding damages for breach of contract. The damages are limited to "losses which are the natural consequence of the injunction of which the party obtaining the injunction had notice at the time": *Village Gate Resorts Ltd. v. Moore*, [1999] B.C.J. No. 127 at paras. 6–7 (S.C.), aff'd [1999] B.C.J. No. 2499 (C.A.).

[313] The defendants are therefore entitled to damages arising from the Injunction Order during the period between September 5, 2017, to the date of judgment in

respect of losses that would not have arisen but-for the terms of that Order that restrained the Philips from attending at the Hotel or managing their business.

[314] During this period, Mr. Durkin had exclusive control over the finances, operations and payment of liabilities involving the Hotel. He had complete authority to direct payments on account of the liabilities of Inc. For example, he instructed Ms. Parker to stop making payments on the first and second mortgages. In so doing, these mortgages went into default with interest accumulating at 18% compounded monthly on the first mortgage at a per diem rate of $1,526.48 and 16% compounded monthly on the second mortgage at a per diem rate of $288.43.

[315] The initial principal under the first mortgage was $2,860,000. As of June 25, 2020, the date on which the Court approved the sale of the Hotel, the amount owing had increased to $3,672,888. The original second mortgage amount was $656,073, but by June 25, 2020, the amount owing had increased to $763,663. The difference between the original principal amounts and the amounts owing on June 25, 2020, represents the unpaid interest on these two mortgages. Accordingly, at Mr. Durkin's direction, Inc. failed to pay interest on these two mortgages of $920,478.

[316] Importantly, Mr. Durkin provided no explanation whatsoever for what happened to any of the revenue that the Hotel earned in 2019 and 2020. The Hotel continued to operate until the Covid-19 pandemic forced its closure in April 2020.

[317] Mr. Durkin not only failed to make payments on the first and second mortgages, he did not secure replacement financing on terms that are more reasonable. Furthermore, he actively frustrated the Philips' attempt to do so by failing to provide them with the financial information that they needed, and were entitled to, to try to find replacement financing. As of May 30, 2017, Mr. Durkin had irrationally taken the position that the Philips were not entitled to any financial information other than reports that "SHH Management compiles on a quarterly basis for its Lenders and Investors."

[318] In my view, Mr. Durkin was responsible for the depletion of the Philips' equity in Inc. by refusing to disclose this critical financial information and by his failure to mitigate the damage caused by the default interest rates charged under the first and second mortgages. Devastatingly, the Philips' equity in Inc. decreased by approximately $60,000 per month commencing in March 2019. This ongoing loss of equity continued until the Court's approval of the sale of the Hotel to third-party investors in June 2020.

[319] Mr. Durkin's failure to pay the interest on the existing mortgages, failure to replace these mortgages, and decision to prevent the Philips from doing so, resulted in additional interest payments of $920,478.

[320] During the period after the Injunction Order was granted, Mr. Durkin regularly failed to remit corporate income tax, GST and source deductions. Inc.'s 2016, 2017, 2018 and 2019 financial statements and tax returns have not been completed because Mr. Durkin and Ms. Parker refused to provide Inc.'s accountant with the essential information necessary to complete this work. Ms. Parker testified that filing income tax returns was "not a priority". As a result, the CRA arbitrarily assessed unpaid corporate income taxes of $94,524 against Inc. and obtained a judgment for that amount. As of the date of the Court-ordered sale of the Hotel on June 25, 2020, this assessment had increased to $100,911 because of accrued interest.

[321] Mr. Durkin also directed that $26,071 owing to the federal government for source deductions not be remitted. At Mr. Durkin's direction, Inc. also failed to pay approximately $177,432 in GST and associated penalties and interest. Ms. Parker withheld this amount at Mr. Durkin's direction. It is likely that Mr. Durkin realized that failing to pay this amount would expose the Philips to personal liability for this unpaid GST because they were the directors of Inc. Mr. Durkin was also responsible for incurring penalties of $8,903 in respect of the late payment of provincial sales tax and $12,000 in penalties for the nonpayment of municipal property taxes.

[322] Mr. Durkin misappropriated at least $120,000 in amounts payable to Inc. by redirecting payments into Management's bank accounts. For example, a television

production company entered into a contract with Management to use the Properties to shoot footage for a television production. This company paid a rental charge of $25,593 for the use of the premises. This amount was paid to Management as the "Grantor" of the contract, thereby purporting to have the authority to rent the premises and receive the associated funds. Management did not have the authority to enter into contracts on behalf of Inc. The Philips were unaware that Mr. Durkin had entered into this agreement. At Mr. Durkin's direction, the rental fee was paid into Management's bank account instead of Inc.'s bank account.

[323] Shortly after obtaining the Injunction Order, in September 2017, Mr. Durkin sent an email to Ms. Parker inquiring as to whether she could change the point-of-sale bank account. In April 2019, Mr. Durkin directed the installation of the Square at the Hotel in order to bypass the Hotel's point-of-sale system. Proceeds received from the Square point-of-sale system were deposited into Management's bank account instead of Inc.'s. In 2019, $98,137 in Hotel revenue was diverted from Inc. to Management by using the Square device instead of the Hotel's point of sale system.

[324] Mr. Durkin lied to the Court when he testified that the Square was only used to collect Art Gallery proceeds and to pay artists on consignment. Ms. Parker confirmed that the Square was also used to divert payments received for events at the Hotel directly into Management's bank account.

[325] On a weekend in October 2019, Mr. Durkin directed Ms. Parker to divert 100% of the revenues received that weekend into Management's bank account. Ms. Parker testified that Mr. Durkin ordered her to tell the Hotel's employees to process all payments through the Square because there was a problem with the Hotel's point-of-sale system. Ms. Parker testified that she knew that there was nothing wrong with the Hotel's point-of-sale system. She willingly lied to the Hotel's employees to facilitate the diversion of Inc. revenues to Management's bank account. Notably, the weekend in October 2019 when this took place was immediately before the date when this Court heard the defendants' application to

vacate the Injunction Order and remove Mr. Durkin from the hotel. I reject Ms. Parker and Mr. Durkin's explanation that they took this action in order to meet their payroll obligations because throughout the period after the Injunction Order was granted, they had access to Inc.'s bank account for the purpose of meeting payroll obligations. I conclude that Mr. Durkin took this action in order to divert as much revenue as possible from the Hotel before potentially being removed from it.

[326] I am satisfied that Mr. Durkin diverted at least $123,749 from Inc. to Management in respect of the rental fee and use of the Square device in 2019.

[327] The defendants further seek damages of $69,300 in respect of the difference between the salary of an existing employee who was fired shortly after the Injunction Order was obtained and the salary paid to Mr. Durkin's wife, who replaced her. The defendants have not discharged the onus on them to establish that Mr. Durkin owes this amount. I did not hear evidence from either this employee or Mrs. Durkin about their respective responsibilities. The evidence on this issue was second-hand and insufficient to establish this claim for damages.

Is Mr. Durkin Personally Liable for the Damages Arising From the Injunction Order?

[328] The defendants submit that, in addition to the corporate plaintiffs, Mr. Durkin should be personally liable for damages arising from the Injunction Order.

[329] In *642947 Ontario Ltd. v. Fleischer*, [2001] O.J. No. 4771 (C.A.), the Ontario Court of Appeal considered when a corporation's principals should be personally liable in circumstances where the corporation tenders an undertaking to pay damages on an interlocutory injunction. In that case, the trial judge found the corporate plaintiff to be liable on its undertaking for damages and found the corporation's two principals to be jointly and severally liable because the corporation was merely their alter ego. They knew when the undertaking was given that the corporate plaintiff had no ability to pay, rendering the undertaking fraudulent and "misconduct on the part of [the principals] as officers of [the corporate plaintiff] to offer it to the Court".

[330] The Court upheld the trial judge's decision to pierce the corporate veil and hold the principals personally liable, affirming the view that the principals could not hide behind the corporate veil: at para. 67. The Court explained that the decision to disregard the separate legal personality of a corporation could be made in exceptional cases where failing to do so would be flagrantly unjust: at para. 67. This includes circumstances where the corporation is "completely dominated and controlled and being used as a shield for fraudulent or improper conduct": at para. 68, quoting *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 at pp. 433-34 (S.C.), aff'd [1997] O.J. No. 3754 (C.A.). In *Fleischer*, the following factors supported the decision to pierce the corporate veil:

a) the corporate plaintiff had no assets to honour its undertaking;

b) the two principals controlled the corporation and they knew when tendering the undertaking that it had no assets;

c) the principals were sophisticated individuals who tendered an undertaking to the court knowing it was worthless to gain and advantage;

d) when called on to honour the undertaking, the principals tried to hide behind a shell company that they controlled to escape liability; and

e) the principals completely controlled the corporation and were using it as a shield for improper conduct.

[331] Despite the high standard required to pierce the corporate veil, in my view, the circumstances of this case meet that standard. This case is factually similar to *Fleischer* in that Mr. Durkin directed and controlled the corporate plaintiffs, knew when he gave the undertaking that they did not have the assets to be able to honour the undertaking, and knew he was tendering an undertaking to the Court that was effectively worthless in order to gain an advantage.

[332] In my view, it would be flagrantly unjust to allow Mr. Durkin to hide behind the corporate veil in order to escape liability from his improper conduct. As was the case

in *Fleischer*, protecting Mr. Durkin from liability in these circumstances would "be a mockery of injunction proceedings" as it "would effectively mean that worthless hollow undertakings could be given to the Court, leaving the Court powerless to grant effective sanctions by way of damages which…could never be collected by the injured party": at para. 70.

[333] Mr. Durkin is jointly and severally liable, with Holdings and Management, for all of the damages arising from the Injunction Order.

COSTS

[334] The defendants are entitled to costs at Scale B. If they choose to apply for enhanced or special costs, they may do so by contacting Supreme Court Scheduling in Victoria within 60 days of this judgment to arrange a date for the hearing of this application.

SUMMARY

[335] The plaintiffs' claim is dismissed and the defendants' counterclaim is allowed. The defendants are entitled to damages as follows:

a) $2,645,229 in compensatory damages for Holdings' breach of the SPA as amended by the Settlement and the Addendum;

b) Prejudgment interest of 4.75% on the compensatory damage amount from August 15, 2015 to the date of this Judgment;

c) $1,359,544 in damages arising from the Injunction Order consisting of:

   i. $920,478 for increased interest on Inc.'s mortgages;

   ii. $100,911 in federal corporate income tax plus interest;

   iii. $26,071 in unpaid source deductions;

   iv. $177,432 in unpaid GST, interest and penalties;

v. $8,903 in interest for late payment of provincial sales tax;

vi. $12,000 for late payment of municipal property taxes; and

vii. $123,749 for revenue wrongly diverted from Inc. to Management.

d) Costs at Scale B or as subsequently determined if the defendants apply for enhanced or special costs.

"Basran, J"