

In the Court of Appeal of Alberta

Citation: Douglas Homes Ltd v Rainbow Falls Development Inc, 2025 ABCA 185

Date: 20250526
Docket: 2401-0056AC
Registry: Calgary

Between:

Douglas Homes Ltd, Douglas Musak and Andoso Developments Inc

Respondents/ Cross-Appellants

- and -

Rainbow Falls Development Inc, Truman Development Corporation, Truman Homes 1995 Inc, Reflections 2015 Inc, Lionsworthe Homes Inc, Gojko Trutina, also known as George Trutina, Tony Trutina and Peter Trutina

Appellants/ Cross-Respondents

- and -

Ana Management Ltd and Ana Trutina

Not Parties to the Appeal

The Court:

**The Honourable Justice Frans Slatter
The Honourable Justice Jolaine Antonio
The Honourable Justice Joshua B. Hawkes**

Memorandum of Judgment

Appeal from the Order by
The Honourable Justice C.S. Anderson
Dated the 21st day of February, 2024
Filed on the 15th day of April, 2024
(Docket: 1801-18182)

Memorandum of Judgment

The Court:

[1] The parties developed a large parcel of land through the corporate appellant Rainbow Falls Development Inc. Some parts of those lands were transferred to related and other parties. The issues on this appeal and cross appeal relate primarily to the entitlement of the respondent minority shareholders to share in the profits of those sales, and specifically whether some aspects of the claim are barred by passage of the limitation period.

Facts

[2] The parties to this action developed and subdivided a 150 acre parcel of land near Chestermere Alberta. For that purpose they incorporated the appellant Rainbow Falls Development Inc. The Chestermere lands were serviced and subdivided, and sold off or developed between 2003 and 2015.

[3] The exact nature of the arrangement is unclear. Economically, the parties intended a joint enterprise. However, it is unclear whether it was an unincorporated joint venture between the three shareholders of Rainbow Falls Development Inc., in which the latter corporation would usually be a bare trustee holding the title to the land. Alternatively, it may have been a corporate development by Rainbow Falls Development Inc. itself, in which case the respondents are minority shareholders. There is neither a fully signed joint venture agreement, nor a unanimous shareholders agreement. The statement of claim includes a claim for corporate oppression, which implies this was not an unincorporated joint venture.

[4] Rainbow Falls was controlled as follows:

- (a) 75% of the company was owned by the appellant Truman Development Corporation, controlled by the appellant George Trutina. Trutina managed and oversaw the development and received a fee of 5% of gross sales. Truman Development bought parts of the lands, and from time to time it also received loans from Rainbow Falls.
- (b) 15% of the company was owned by the respondent Douglas Homes Ltd., controlled by the respondent Douglas Musak;
- (c) 10% of the company was owned by the respondent Andoso Developments Inc., controlled at the time by the late Don Andrews.

While George Trutina, Douglas Musak, and Don Andrews were all directors of Rainbow Falls, the development of the Chestermere lands was entrusted to George Trutina, assisted by his son Peter Trutina.

[5] There were other parties involved:

- (a) The appellant Lionsworthe Homes Inc. is owned by Tony Trutina, another son of George Trutina. Lionsworthe purchased portions of the lands from Rainbow Falls Development.
- (b) Reflections 2015 Inc. and Truman Homes 1995 Inc. are companies related to Truman Development, and controlled by the Trutina family. They also purchased land from Rainbow Falls Development.
- (c) Other members of the Trutina family and related corporations were also named as defendants.

[6] The respondents commenced this action against the appellants, alleging several statutory, contractual, and fiduciary causes of action, including corporate oppression claims related to the business of Rainbow Falls Development:

- (a) The Interest Claim, in which it is alleged that Truman Development borrowed money from Rainbow Falls and did not pay commercially reasonable rates of interest;
- (b) The Improper Sales Claim, in which it is alleged that portions of the Rainbow Falls lands, and housing units, were sold to the appellants on a non-arm's-length basis, and not on commercially reasonable terms. It is alleged some of the lands were subsequently sold to third parties at fair market value, generating a profit;
- (c) A claim for lost opportunities related to the Goodacre Lands.

The appellants brought an application for the summary dismissal of all or part of the claim, primarily on the basis that the limitation period had expired before the action was commenced.

[7] The summary dismissal application was initially heard by an Applications Judge. He concluded that the record was insufficient to fairly adjudicate a number of the issues on a summary basis. Many of the challenged transactions had occurred some time ago, and the 2 year base and 10 year ultimate limitation period were both engaged. The reporting of the business of Rainbow Falls could have been better, resulting in live issues as to when the respondents knew or ought to have known about the challenged transactions, as well as whether there was "fraudulent concealment" of the claim. While the limitations defence might ultimately prevail, it was not possible to adjudicate that issue with confidence on a summary basis.

[8] The Applications Judge did summarily dismiss the claim with respect to the Goodacre Lands, a discrete parcel that was not within the original development plan. There was no merit to this claim either on a limitations basis, or on a substantive basis. He also directed the discharge of a number of certificates of *lis pendens* that had been filed, as the respondents did not demonstrate a sufficient proprietary interest in the lands to support them.

[9] The appellant/defendants appealed the dismissal of parts of their summary dismissal application to a King's Bench chambers judge. The respondents/plaintiffs cross appealed the discharge of the certificates of *lis pendens*. They also appealed the dismissal of the claim respecting the Goodacre Lands but abandoned that part of their appeal. Some aspects of the appeal were conceded, and the chambers judge allowed minor parts of the appeal.

[10] The Interest Claim arose because Truman Development maintained a revolving line of credit with Rainbow Falls. The balance was alleged to have been about \$6.88 million in 2017. The parties were all aware of the line of credit, but the statement of claim alleges that the respondents were not aware of the terms of the loan, or that interest was not being paid at market rates. The appellants argued that the portion of the claim for interest on the loan arising more than two years before the issuance of the statement of claim should be dismissed, because the respondents knew or ought to have known about the terms of the loan at that time. The respondents countered that payment of the loan constituted a continuous course of conduct, and that the limitation period did not commence because payments were being made on the loan.

[11] The chambers judge concluded that she could not determine when any alleged breach occurred, because there was no loan agreement, and the periodic reports that included some information about the loan did not refer to the terms of the loan or interest rates. There was no clear evidence on when the respondents should have known about the terms of the loan. The chambers judge determined that it was not possible to summarily dismiss this part of the claim on a fair basis based on expiration of the limitation period. This issue required a trial following full disclosure.

[12] The chambers judge concluded that each alleged sale of land at an undervalue was a discrete event, giving rise to a separate claim. All the sales of the Chestermere lands could not be regarded as one continuing course of conduct, such that the limitation period did not commence until after the last piece of land was sold. Further, the claim arose when the land was sold, even if it was not paid for until a later date.

[13] The respondents conceded that they were aware of at least some of the non-arm's-length transactions said to have been conducted at an undervalue. However, they asserted that because of the haphazard way in which the development took place, the confusing array of sales methods used, and the vague reporting of the transactions, they were not aware of the values at which the lands were being sold.

[14] The respondents challenged the transfer of several blocks of land to Lionsworthe Homes. While the record was not entirely clear, the chambers judge concluded that five blocks were transferred prior to December 20, 2008, or 10 years before the issuance of the statement of claim: the Chalet Project and Brownstone #1, 2, 4, and 5. Since those five transfers were registered at the Land Titles Office, there could not have been any “fraudulent concealment”: *Domenic Construction Ltd v Primewest Capital Corp*, 2020 ABCA 265 at para. 31, 15 Alta LR (7th) 67. Further, the respondents did not exercise any due diligence in reviewing the transactions. The chambers judge concluded this portion of the claim was subject to summary dismissal.

[15] No Land Titles records were tendered for the sale of Brownstone #3 and 6 to Lionsworthe Homes. Given the inadequacy of the other Rainbow Falls records, the chambers judge concluded this portion of the claim could not fairly and safely be summarily dismissed.

[16] There were also no Land Titles records respecting the sale of Block 7 to Lionsworthe Homes, and the other evidence on its sale conflicted on the date and price. While all the parties knew about this sale, the reporting was incomplete and inadequate. The chambers judge concluded this portion of the claim could not fairly and safely be summarily dismissed.

[17] There were also no Land Titles records that clearly related to the sale of the Georgian Villas to Truman Development in about 2007. The appellants advised that many of the records had been destroyed. The respondents argue that these lands were never sold to Truman Development but were actually sold to third parties on undisclosed terms. On this record, it was unclear whether these lands were all sold more than 10 years before the issuance of the statement of claim. The chambers judge concluded this issue would have to be resolved at trial.

[18] There were incomplete records about the sale of The Cascades Project lands from Rainbow Falls to Truman Development. The appellants argued that the terms of the sale could be discerned by analysing the monthly reports that were provided. The respondents asserted that the lands were actually sold to third party purchasers. Because the dates of the transfers and the prices paid were not clear from the record the chambers judge concluded it was not possible to fairly and safely resolve this transaction on a summary basis, and it would have to go to trial.

[19] The Land Titles records disclosed that a multi-family site was sold to Reflections in 2016 or 2017, but the lands were not paid for until 2019, after the statement of claim was issued. The respondents argued that the appellants withheld financial information regarding this transaction, meaning that it could not be determined on a summary basis when the respondents “ought to have known” they had a claim. The chambers judge concluded this issue had to go to trial.

[20] Truman Development purchased land from Rainbow Falls for a commercial site and a business park. All the parties knew of these transactions. The Land Titles records disclosed transfers on January 24, 2012, and gave the purchase price for each parcel. While the respondents knew about these transactions, and knew that they had not been consulted about the price, they did not search the Land Titles Office or make any inquiries about the transactions. Even if Truman

Development owed a duty to disclose its interest in the transactions, the respondents also had an obligation to exercise some due diligence. Given the filings at the Land Titles Office, the respondents knew or ought to have known about these transactions before the limitation period expired. Due to the expiration of the 2 year limitation period the chambers judge summarily dismissed the claim alleging these transactions were at less than fair market value.

[21] Residential lots in phases 8 and 9 were sold by Rainbow Falls to Truman Development. The chambers judge concluded that on the record it was not possible to say with confidence when the respondents ought to have known that these lots were possibly sold for less than fair market value, and this issue had to be left for the trial judge.

[22] At this point the claim with respect to the following lands has either been summarily dismissed or conceded: Goodacre lands, residential lots in phases 3, 4, 5, and 6 of the subdivision, the Chalet Project; Brownstone #1, 2, 4, and 5; and the commercial site and business park.

Issues and Standards of Review

[23] The appellants appeal those parts of the decision of the chambers judge in which she declined to dismiss those portions of the claim relating to Brownstone Blocks 3 and 6, the Georgian Villas, Brownstone Block 7, the Cascades Project, Phase 9 residential lots, the Reflections Land, the Condo Unit Sales, and the claim respecting interest on the loan.

[24] The respondents cross appeal the dismissal of parts of their claim, the issue of fraudulent concealment, and the discharge of the certificates of *lis pendens*.

[25] The standard of review for questions of law is correctness. The findings of fact of the chambers judge will only be reversed on appeal if they disclose palpable and overriding error: *Housen v Nikolaisen*, 2002 SCC 33 at paras. 8, 10, 25, [2002] 2 SCR 235. Inferences drawn from the facts are also reviewed for palpable and overriding error.

[26] The statement of the test for summary dismissal, and the interpretation of the applicable law are questions of law which are reviewed for correctness. The findings of fact underlying the summary judgment or dismissal are entitled to deference on appeal. The chambers judge's assessment of the facts, the application of the law to those facts, and the ultimate determination on whether summary resolution is appropriate are also entitled to deference: *Hryniak v Mauldin*, 2014 SCC 7 at paras. 81-4, [2014] 1 SCR 87; *Weir-Jones Technical Services Inc v Purolator Courier Ltd*, 2019 ABCA 49 at para. 10, 86 Alta LR (6th) 240.

Summary Dismissal

[27] The procedures set out in R. 7.3 permitting summary judgment and summary dismissal are valuable parts of the litigation process. They enable the early resolution of issues or claims that

have no reasonable prospect of success, thus saving the litigants and the court system time and money.

[28] The test for summary disposition is summarized in *Weir-Jones Technical Services* at para. 47:

- (a) Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?
- (b) Has the moving party met the burden on it to show on a balance of probabilities that there is either “no merit” or “no defence” and that there is no genuine issue requiring a trial?
- (c) If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party’s case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.
- (d) In any event, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute.

Not every conflict in the evidence precludes the chambers judge from drawing inferences from the record, and the fact that there might be some conflicting evidence on the record does not mean that a “fair and just adjudication” is not possible: *Weir-Jones Technical Services* at para. 38; *Sturgeon Lake Indian Band v Canada (Attorney General)*, 2017 ABCA 365 at paras. 38-41, 60 Alta LR (6th) 226. However, even if the material facts are proven on a balance of probabilities, the presiding judge must still be sufficiently satisfied with the record to conclude there is no genuine issue requiring a trial.

[29] As explained in *Canada (Attorney General) v Lameman*, 2008 SCC 14 at paras. 11, 19, [2008] 1 SCR 372, in a summary judgment application each party has to “put its best foot forward”:

11 For this reason, the bar on a motion for summary judgment is high. The defendant who seeks summary dismissal bears the evidentiary burden of showing that there is “no genuine issue of material fact requiring trial” . . . The defendant must prove this; it cannot rely on mere allegations or the pleadings: . . . If the defendant does prove this, the plaintiff must either refute or counter the defendant's

evidence, or risk summary dismissal: . . . Each side must “put its best foot forward” with respect to the existence or non-existence of material issues to be tried. . . .

19 We add this. In the Court of Appeal and here, the case for the plaintiffs was put forward, not only on the basis of evidence actually adduced on the summary judgment motion, but on suggestions of evidence that might be adduced, or amendments that might be made, if the matter were to go to trial. A summary judgment motion cannot be defeated by vague references to what may be adduced in the future, if the matter is allowed to proceed. To accept that proposition would be to undermine the rationale of the rule. A motion for summary judgment must be judged on the basis of the pleadings and materials actually before the judge, not on suppositions about what might be pleaded or proved in the future. This applies to Aboriginal claims as much as to any others.

If the responding party fails to “put its best foot forward”, the summary dismissal application might well be successful. On the other hand, if the applicant for summary dismissal has failed to provide satisfactory evidence on the merits, the application may be unsuccessful because the claim has not been shown to be amenable to a fair and just summary disposition.

The Limitations Regime

[30] The action was commenced on December 20, 2018. Under s. 3(1)(a) of the *Limitations Act*, RSA 2000, c. L-12 the appellants are entitled to immunity from a claim if it was brought more than two years after the claimants should reasonably have discovered that they had a claim against the appellants that warranted a proceeding. Thus, any claims that could reasonably have been discovered prior to December 20, 2016 would be barred. In addition, the 10 year ultimate limitation period would bar any claims arising prior to December 20, 2008.

The Base Limitation Period

[31] With respect to the basic 2 year limitation period, the test for discoverability is objective. As stated in *Grant Thornton LLP v New Brunswick*, 2021 SCC 31 at para. 40, [2021] 2 SCR 704, “. . . the limitation period is triggered when the plaintiff discovers or ought to have discovered through the exercise of reasonable diligence the material facts on which the claim is based”. The Court explained further:

44 In assessing the plaintiff’s state of knowledge, both direct and circumstantial evidence can be used. Moreover, a plaintiff will have constructive knowledge when the evidence shows that the plaintiff ought to have discovered the material facts by exercising reasonable diligence. Suspicion may trigger that exercise (*Crombie Property Holdings Ltd. v McColl-Frontenac Inc.*, 2017 ONCA 16, 406 D.L.R. (4th) 252, at para. 42).

45 Finally, the governing standard requires the plaintiff to be able to draw a plausible inference of liability on the part of the defendant from the material facts that are actually or constructively known. . . .

The commencement of the limitation period is not deferred until the point where the respondents actually perceived there was something to be concerned about. Subjective knowledge of a claim would be sufficient to start the limitation period running, but it is not necessary if a “plausible inference of liability” can be drawn from the facts.

[32] The respondents argue that George Trutina was in a fiduciary position and had an obligation to report to them. They argue they had an entitlement to trust in his honesty in managing Rainbow Falls. That may have been so, but a duty to disclose does not displace the obligation on a claimant to take reasonable steps to determine whether it has a claim which warrants a proceeding, even if it had some basis in law to rely on the defendant: see for example *W.P. v Alberta*, 2014 ABCA 404 at para. 34, 7 Alta LR (6th) 319 and *Urichuk v Kent*, 2017 ABQB 432 at para. 27, 73 BLR (5th) 100. Otherwise this would effectively mean a fiduciary could never invoke a limitations defence, because the claimant would never have an obligation to determine whether it ought to know that it has a claim. There was a time when limitations did not run against fiduciaries, but that is no longer the law: see *Papaschase Indian Band No 136 v Canada (Attorney General)*, 2004 ABQB 655 at paras. 117-18, 125, 129, 43 Alta LR (4th) 41.

[33] On this issue the context is key. The respondents knew that the intention was that the raw land owned by Rainbow Falls (controlled by George Trutina) would be sold on a non-arms-length basis to related companies controlled by the Trutina family. The potential conflict of interest of the alleged fiduciary now asserted by the respondents was a known fact to all. There was no joint venture agreement or unanimous shareholders agreement, and no written arrangement about how the lands would be priced. In the circumstances, the respondents cannot simply assert that their belief in the honesty of the Trutina family displaced any obligation they may have had to monitor their own commercial interests. If they had any concerns about the pricing of the land, they had an obligation to raise them when the direct or circumstantial information available to them, or withheld from them, allowed them to draw a plausible inference or suspicion of liability.

The Ultimate Limitation Period

[34] Section 3(1)(b) of the *Limitations Act* provides immunity for claims that arose more than 10 years before the action was commenced, regardless of discoverability. For the purposes of the 10 year ultimate limitation period, s. 3(3)(a) deals with claims based on a number of breaches of duty arising from a continuous course of conduct:

(3) For the purposes of subsections (1)(b) and (1.1)(b),

(a) a claim or any number of claims based on any number of breaches of duty, resulting from a continuing course of conduct or a series of related acts or omissions, arises when the conduct terminates or the last act or omission occurs;

(b) a claim based on a breach of a duty arises when the conduct, act or omission occurs; . . .

While this provision does not apply to the 2 year limitation period under s. 3(1)(a), it is sometimes necessary to determine when, during a continuous course of conduct, the plaintiff knew or ought to have known that a discrete injury that was part of a series of related acts warranted a proceeding. That would start the 2 year limitation period, even though it may not start the ultimate limitation period.

[35] Under s. 4(1) of the *Limitations Act* the operation of the ultimate 10 year limitation period is suspended during any period of time that the defendant fraudulently concealed the fact that the injury had occurred. This provision does not apply to the standard 2 year limitation period, although if the injury was fraudulently concealed that would be relevant to when the claimant knew or ought to have known that it had a claim warranting a proceeding.

Specific Limitations Issues

[36] A number of sub-issues arise with respect to the application of the *Limitations Act*:

- (a) for limitations purposes, were some or all of the sales of the Chestermere lands discrete transactions or were they all part of a “continuing course of conduct or series of related acts”?
- (b) When agreements for sale of land were entered into, what impact does it have on the commencement of the limitation period if
 - (i) the closing of the transaction did not occur until some later time,
 - (ii) payment for the lands did not fully occur until later, or
 - (iii) the transferred lands stayed registered in the name of Rainbow Falls, and were ultimately transferred directly to third parties after development had taken place?

With respect to these types of transaction, the parties dispute when the 2 year or the 10 limitation period commences.

Continuing Course of Conduct

[37] Whether the claim in issue relates to a “continuing course of conduct or series of related acts” is primarily relevant to the expiry of the 10 year ultimate limitation period. This provision confirms that the ultimate limitation period does not start to run until the end of the last of the related acts, because s. 3(3)(a) of the *Act* only applies to subsections 3(1)(b) and (1.1)(b) which set the ultimate limitation period. The *obiter* comments in *Seidel v Kerr*, 2003 ABCA 267 at paras. 43-44, 330 AR 284 (which was actually decided under the previous *Limitations of Actions Act*) did not highlight the limited scope of the section.

[38] In this litigation the application of the rule regarding a “continuous course of conduct” depends on how one characterizes the claim. The appellants argue that it is a claim that particular pieces of land were sold at an undervalue at particular points in time. Thus they argue that each sale is a discrete transaction that triggered the limitation period. The respondents, on the other hand, argue that their claim is based in corporate oppression or breach of fiduciary duty. They claim that (as in *Seidel v Kerr* and *Champagne v Sidorisky*, 2018 ABCA 394 at para. 9(c), 78 Alta LR (6th) 1) the underlying breach is a continuing failure of Truman Development to discharge its fiduciary and corporate obligations to provide full disclosure of the business of Rainbow Falls to the minority shareholders. On the respondents’ theory of the case, the ultimate limitation period arguably did not start to run until the last of the lands were developed, or when George Trutina advised that no further distributions from Rainbow Falls’ retained earnings would be made to the minority shareholders. Only that, the respondents allege, commenced the 10 year ultimate limitation period.

[39] The chambers judge concluded that each alleged sale of land at an undervalue was a discrete event, giving rise to a separate claim. She did not consider the alternate formulation of the claim as one of continuous corporate oppression or breach of the duty to disclose. As such, the dismissal of some portions of the claim because of expiry of the ultimate limitation period was not inevitable, although in many cases the 2 year limitation would nevertheless have expired.

[40] As noted, whether the breach of duty in question was part of a “continuous course of conduct” is not directly relevant to the commencement of the 2 year basic limitation period. That period commences when the claimant knew or ought to have known that it had a claim against the defendant that warranted a proceeding. A claimant might acquire that knowledge on the first breach of any duty, even if that breach (or similar breaches) continued in other respects. Thus, if the claimants were or should have been aware of a sale at an undervalue, even though it was one of a series of related acts, the 2 year basic limitation period would commence with respect to that transaction.

[41] On this record, whether the claim involves a “continuing course of conduct or series of related acts” cannot be resolved on a summary basis. This will require an examination at trial of the background circumstances and the nature of the claim. As such, summary dismissal of the claim based on passage of the ultimate limitation period is not appropriate. However, the claim with respect to individual parcels of land might still be dismissed if the respondents had or ought to have had the requisite knowledge about the transaction more than 2 years before the statement of claim was issued.

The Timing of the Sale of Lands

[42] It is common for agreements for the sale of land to be entered into, with a closing of the transaction to occur at a later date. Assuming the parties treated the agreement of sale as legally binding, the date of the closing does not have an impact on the commencement of the limitation period. Once the respondents knew or ought to have known the appellants had entered into an agreement at an undervalue that warranted an action, that would commence the running of the 2 year limitation period. The fact that the transaction did not close until months later does not generally defer the limitation period.

[43] Likewise, assuming the agreement of sale was treated as legally binding, it does not generally matter that payment of the purchase price is not required until a later date, either the date of closing or even later than that. If payment is not made, that is a debt owing to Rainbow Falls. For example, if land is sold with a vendor take back mortgage, the fact that part of the purchase price is unpaid in cash does not extend the limitation period. Once the respondents knew or ought to have known the appellants had entered into an agreement at an undervalue that warranted an action, that would commence the running of the 2 year limitation period, even if the purchase price was not all payable on closing.

Failure to Register Transfers

[44] Assuming the parties treated an agreement of sale as binding, delaying registration of the transfer does not generally affect the commencement of the limitation period. In this case the transferor (Rainbow Falls) was controlled by the same parties that controlled the transferees. In those circumstances, it would be commercially reasonable for the land to be sold, but the title left in the name of Rainbow Falls as a matter of convenience. This saves the cost of preparing two sets of transfer documents, and two Land Titles fees. In those circumstances, the transferee is treated as the beneficial owner of the lands, and Rainbow Falls continues to hold the title as a bare trustee: ***Condominium Plan No 822 2630 v Danray Alberta Ltd***, 2007 ABCA 11 at paras. 35, 40.

[45] If legal title to the land remained in the name of Rainbow Falls, but buildings were constructed on the lands by some of the transferees (e.g. Truman Homes, Lionsworthe or Reflections), Rainbow Falls would still only be the bare trustee. The purchaser who developed the lands would be the beneficial owner of the lands and the buildings. Assuming that the parties

proceeded on the basis there was a binding agreement for sale (but at an undervalue), and the claimant knew or ought to have known of the circumstances of the transaction, the relevant date for commencement of the limitation period would be the date of discoverability of the agreement. Delayed registration of the transfer does not generally affect the commencement of the limitation period.

[46] Likewise, it generally makes no difference to the commencement of the limitation period if the lands are ultimately transferred directly from Rainbow Falls to a third party purchaser. Rainbow Falls, as the bare trustee, could be directed to transfer the title to the third party. Assuming that the parties proceed on the basis there was a binding agreement of sale (but at an undervalue), and the claimant knew or ought to have known of the circumstances of the transaction, the ultimate direct transfer to a third party would not affect or delay the commencement of the limitation period.

[47] It is also worth noting that the ultimate transfer or sale of the land to third parties is not necessarily relevant. The record strongly indicates that Rainbow Falls owned bare undeveloped land and sold that land to related parties. The related parties built housing units on that land and then sold those units to third parties. The prices paid by the third parties for a fully developed housing unit would bear no direct relationship to the value of the bare land that was transferred by Rainbow Falls.

[48] Against that background, this appeal and cross appeal can be assessed with respect to each parcel of land involved.

Brownstone Blocks 3 and 6

[49] The record discloses that the Brownstone Block 3 lands were transferred to Lionsworthe in 2007, and the Brownstone Block 6 lands were transferred to Lionsworthe in 2008. The original sales agreement for Brownstone Block 3 is no longer available. Some contemporaneous records show a sale price of \$598,000 for Block 6. Lionsworthe built condominium units on the land and sold them to third parties.

[50] The chambers judge had summarily dismissed some other parts of the claim because Land Titles records disclosed the transactions and the sale prices, leading to an inference that with due diligence the respondents ought to have known about those transactions. Because there were no Land Titles records entered on the record to show these particular transactions, and because of the general lack of clarity in the other reports from Rainbow Falls, the chambers judge concluded that she could not ascertain the details about these transactions “with confidence”. She concluded this part of the claim would have to be resolved at trial.

[51] The respondents argue that there is no evidence that these parcels were ever transferred to Lionsworthe, and that the finished condominium units were directly transferred by Rainbow Falls to third parties. As discussed, that in itself does not delay the commencement of the limitation

period, although it may be relevant to when the respondents knew or ought to have known about these transactions and whether they warranted a proceeding.

[52] If these transactions were part of a “continuing course” of nondisclosure, the ultimate limitation period may not have run. Whether the 2 year limitation period had run depends on whether the respondents knew or ought to have known about these transactions more than two years before the issuance of the statement of claim. The uncontradicted record is that the transactions closed in 2007 and 2008.

[53] While the chambers judge was concerned about the absence of Land Titles records, that was not the only evidence. Rainbow Falls sent monthly reports which listed all the transactions that occurred in that month. The monthly report of August 31, 2007 included:

Lionsworthe Homes Lot Closing: Phase 2A, Block 5, Lot 1 (31 Units Brownstones)
\$616,000

The records disclose that this was the sale of Brownstone Block 3. The monthly report of February 29, 2008 included:

Lionsworthe Homes Lot Closing: Phase 5, Brownstones Blocks X3 \$1,076,400

The records disclose that the price of \$1,076,400 was for the purchase of three parcels of land, with \$598,000 being for Brownstone Block 6.

[54] These records show that with reasonable diligence the respondents should have been aware in 2007 and 2008 of the prices being paid for these properties. Any undervalue would have been discoverable at that time. The respondents argue that these entries only give legal descriptions, but relating legal descriptions to the actual properties would not be difficult for the respondents, given their experience and expertise. In any event, even if these were sales of unidentified parcels, that would have triggered an obligation on the respondents to make further inquiries if they were concerned. The policy behind the *Limitations Act* precludes the respondents from waiting a decade to advance this claim.

[55] The appellants have shown a reviewable error in the conclusion that this issue had to be resolved at trial. The claim with respect to Brownstone Blocks 3 and 6 is summarily dismissed.

The Georgian Villas

[56] The Georgian Villas land was sold to Truman Homes in 2007, more than 10 years before the statement of claim was issued, and developed as a bare land condominium. Truman Homes constructed 44 villa units on the land between 2006 and 2010.

[57] The chambers judge did not summarily resolve whether the limitation period had expired because there were no Land Title records clearly relating to the sales, many records had been destroyed, and the chambers judge held it was unclear whether all the villas had been sold more than 10 years before the issuance of the statement of claim. While the availability of the villas for purchase was publicly advertised, there is no information on the record of when the sale price to Truman Homes would have been discoverable by the respondents. The chambers judge's conclusion there was no clear evidence when the respondents knew or ought to have known of the underlying transactions is entitled to deference.

[58] The respondents argue that some of these lands may never have been transferred to Truman Development but were actually sold to third parties on undisclosed terms. The record discloses that some of the lands were transferred to Truman Homes in 2007. However, as previously discussed, the ultimate transferee makes no difference to the limitations analysis. Even if Truman Development bought the land from Rainbow Falls and built the villas on them before title passed to third parties, Truman Development would have been the beneficial owner of the lands and the villas. The fact that some of the legal titles may have been left in the name of Rainbow Falls, or that the villas were ultimately transferred directly to third parties, does not determine whether the lands were sold at an undervalue, or directly determine when the respondents knew or ought to have known of the transactions.

Brownstone Block 7

[59] Brownstone Block 7 was sold to Lionsworthe in 2014 and developed as four condominium units. The records suggest that the purchase price was \$425,695, although the respondents argue this may just have been the deposit. A monthly report from Rainbow Falls dated May 31, 2009 discloses this transaction and the purchase price. Land Titles records indicate that one of the units was transferred to Lionsworthe on March 12, 2012. If the respondents knew or ought to have known about this transaction prior to December 20, 2016, the claim would be barred by the limitation period.

[60] While all the parties knew about this sale, the chambers judge declined to summarily dismiss this part of the claim because she agreed that the monthly reports provided by Rainbow Falls were unclear. The reporting by Rainbow Falls was generally confusing and inadequate. There was no convincing evidence about the transaction, and no evidence about when the respondents knew or ought to have known it warranted a proceeding.

[61] The chambers judge's conclusion that summary dismissal was not appropriate for this part of the claim is entitled to deference, and no reviewable error has been shown.

The Cascades Project

[62] The record discloses that Truman Development purchased this land from Rainbow Falls in 2009, subdivided the land, built a sales centre, and built and sold the condominium units. The chambers judge concluded that there was insufficient evidence on the date of transfer and the price paid to “make a fair finding with confidence as to when the lands were purchased by Truman”. As a result, when the respondents knew or ought to have known the circumstances of this transaction was “very much in dispute”.

[63] However, the sale agreement between Rainbow Falls and Truman Homes dated May 31, 2009, showing payment on the final unit to be due no later than May 1, 2011, was exhibited to one of the affidavits on the record. The sale price was shown as \$1,720,000, which is consistent with other parts of the record showing that 80 lots were sold at \$21,500 each. The respondents have not produced any evidence that would impeach these documents and thereby require a trial of an issue. The chambers judge’s conclusion that there was insufficient evidence about the date and terms of the sale cannot be sustained on this record.

[64] The chambers judge also concluded that there was insufficient evidence on the record as to when the respondents knew or ought to have known about this transaction. However, the respondent Musak admitted during cross-examination that information about the sales of these lots, and the sale prices, were available to him in 2010. It follows that with the exercise of due diligence the respondents could have discovered at that time whether the lands were being sold at an undervalue, and whether they had a claim that warranted a proceeding.

[65] The chambers judge was aware that some of these units may have been transferred by Rainbow Falls directly to third parties, and noted that the third party transfer documents were not on the record. As the appellants point out, whether the lands were ultimately transferred directly to third parties would not affect the limitations analysis: see *supra*, paras. 44-47. Further, as noted the prices paid by the third parties for the condominium units would not be relevant, because when the land was sold by Rainbow Falls to Truman Homes it was bare land, but the sales to the third parties were of completed condominium units. The absence of the documents transferring the units to third parties did not preclude summary dismissal.

[66] The appellants have shown reviewable error in this aspect the decision of the chambers judge sending this issue to trial. The claim respecting the Cascades Project should be summarily dismissed.

Phase 9 Residential Lots

[67] The 2012 and 2015 agreements whereby Rainbow Falls sold these lots to Truman Homes were on the court record. Those agreements give the prices paid. The chambers judge declined to summarily dismiss this portion of the claim on the basis that there was no evidence that the

respondents were aware of the prices paid. However, on further examination the respondent Musak admitted that he had received an inventory pricelist in about 2013 which showed the prices.

[68] On these transactions the chambers judge overlooked critical evidence, namely that Musak admitted receiving the price list more than two years before the statement of claim was issued. If these sales were at less than market value, with reasonable diligence the respondents could have ascertained whether they had a claim that warranted a proceeding.

[69] This aspect of the appeal is allowed, and this portion of the claim is summarily dismissed.

The Reflections Land

[70] The 2015 agreement reflecting the sale of this land from Rainbow Falls to Reflections 2015 for a price of \$2.28 million, and the related transfer of land on July 5, 2016, are on the court record. What is not clear from the record is whether, through due diligence, the respondents knew or ought to have known about this transaction prior to December 20, 2016 (two years before the statement of claim was issued).

[71] This land was not actually paid for until 2019, but as the chambers judge ruled if the parties treated the agreement of sale as binding, that does not defer the commencement of the limitation period. It merely means that Reflections was indebted to Rainbow Falls, and the latter may have had an unpaid vendor's lien.

[72] The appellants have not demonstrated any reviewable error in the conclusion of the chambers judge that the issues respecting this piece of land had to be resolved at trial.

The Condo Unit Sales

[73] Certain portions of the Brownstone Lands were developed as condominiums. The respondents pleaded that these lands were developed by Rainbow Falls, sold for \$1.00 to various of the appellants, and then sold to third parties at substantially higher prices. The appellants argue that the uncontradicted evidence is that the condominium units were developed by Truman Homes or Lionsworthe, not by Rainbow Falls, and so Rainbow Falls had no entitlement to the proceeds of sale to the third parties. The appellants seek dismissal of this claim on the merits, not because of the expiration of any limitations period.

[74] The respondents argue that the beneficial ownership of the units on the Rainbow Falls lands is in dispute. However, the fact that the lands may have eventually been transferred directly from Rainbow Falls to third parties is not inconsistent with the appellants' evidence.

[75] The chambers judge appears to have overlooked this aspect of the application, and did not rule on it. While the record confirms that the housing units were constructed by the related

corporations, not Rainbow Falls, there is still the unexplained fact that some of the lands were apparently transferred for \$1.00. Whether this was an undervalue, and when the respondents should reasonably have been aware of these transactions is unclear from this record. It is not possible to safely summarily dismiss this portion of the claim.

The Claim Respecting Interest on the Loan

[76] The record indicates that over the years some of the appellants borrowed significant sums of money from Rainbow Falls on a revolving basis. The respondents argue that the appellants did not pay market rates of interest on this loan. The appellants seek summary dismissal of any claim for interest more than two years before the issuance of the statement of claim.

[77] While the appellants argue that each month that interest was not properly paid creates a discrete claim, the respondents disagree. They argue that the failure to pay proper rates of interest is a “continuous course of conduct”. The appellants respond that even if non-payment was part of a continuous course of conduct, that would only defer commencement of the ultimate limitation period. The 2 year limitation period would still run with respect to any improper interest payment of which the respondents knew or ought to have known. As held in *Meek (Trustee of) v San Juan Resources Inc*, 2005 ABCA 448 at para. 49, 52 Alta LR (4th) 1, 376 AR 202 where the failure to pay a periodic payment is a breach of contract, for purposes of the ultimate limitation period each missed payment creates a separate claim. Similar considerations may well apply to the 2 year limitation period under the *Limitations Act*, and in an oppression or equitable claim: see *Champagne* at para. 9(b); *Fernandes v Jennings Capital Inc*, 2016 ABQB 594 at paras. 78-82, 93 CPC (7th) 179.

[78] There was no loan agreement or other documentation setting out the terms of this loan. The monthly reports issued by Rainbow Falls included line items indicating that sums were either due to or owed by some of the appellants. What is unclear from the record is when the respondents knew or ought to have known of the rate of interest that was (or was not) being charged on the loan.

[79] The decision of the chambers judge is entitled to deference, and the appellants have not shown any reviewable error in her conclusion there was no clear evidence of the terms of the loan, or when the respondents should have known they had a claim warranting a proceeding. While the appellants may be able to establish their position at trial, the appeal on this portion of the summary dismissal application is dismissed.

The Chalet Project and Brownstone #1, 2, 4, and 5

[80] The respondents cross appeal the summary dismissal of these portions of their claim by the chambers judge.

[81] These blocks of land were transferred more than 10 years before the issuance of the statement of claim. The transfers were recorded at the Land Titles Office. The chambers judge cited *Domenic Construction* at para. 31 for the proposition: “It is hard to conceive that a document registered at a public registry is ‘concealed’, much less that it is ‘fraudulently concealed’”. That meant that the commencement of the ultimate limitation period was not delayed by fraudulent concealment. However, as previously discussed (*supra*, paras. 37-38) this sidesteps the argument that the respondents’ claim is based on a continuous course of oppression, not a number of discrete land transactions.

[82] Therefore, while dismissal of this portion of the claim based on the expiry of the ultimate limitation period may have been problematic, these claims would have been properly dismissed based on expiry of the 2 year limitation period. As noted, the transactions were recorded at the Land Titles Office, and the chambers judge held that although the respondents knew the lands had been developed and transferred to Lionsworthe, they did not take any reasonable steps to inquire about them. In the circumstances, the respondents knew or ought to have known before December 20, 2016 whether they had a claim based on these transactions being at an undervalue. As previously noted (*supra*, paras. 31-33) the respondents’ reliance on the honesty of George Trutina did not displace their obligation to object to the pricing of these lands in a timely way.

[83] No operative error has been shown in dismissing these claims and this aspect of the cross appeal is dismissed.

The Commercial Site and the Business Park Site

[84] The respondents cross appeal the summary dismissal of these portions of their claim by the chambers judge.

[85] Truman Development purchased land from Rainbow Falls for a commercial site and a business park. All the parties knew of these transactions. The Land Titles records disclosed transfers on January 24, 2012, and the purchase prices for each parcel. While the respondents (whose principals were also directors of Rainbow Falls) knew about these transactions, and knew that they had not been consulted about the price, they did not search the Land Titles Office or make any inquiries about the transactions. The chambers judge held that even if Truman Development owed a duty to formally disclose its interest in the transactions, the respondents also had an obligation to exercise some due diligence. Given the filings at the Land Titles Office, the respondents knew or ought to have known about these transactions before the 2 year limitation period expired.

[86] The respondents have failed to show any reviewable error in the chambers judge’s analysis, and this aspect of the cross appeal is dismissed.

Amendment of the Pleadings and the Certificates of *Lis Pendens*

[87] The respondents argue that the chambers judge erred by not considering whether amendments to the pleadings might remedy some of the deficiencies in the claim. However, the chambers judge did not resolve any portion of the application for summary dismissal based on the state of the pleadings. Further, as indicated in *Lameman* at para. 19, a summary dismissal application cannot be resisted based on prospective amendments to the pleadings. What is required is an indication of evidence, or an absence of evidence, making summary disposition inappropriate.

[88] In any event, it has now been three years since the decision of the Applications Judge. If the respondents wanted to clarify their pleadings to avoid a discharge of the certificates of *lis pendens*, the time to do that has long since passed.

[89] The Applications Judge discharged the certificates of *lis pendens* on the basis that the respondents had no proprietary interest in the lands. He mentioned in passing that the statement of claim only pleaded “a constructive trust in the general sense”, but the state of the pleadings was not the basis of his decision.

[90] As noted, it is unclear whether the parties’ business relationship should be categorized as a joint venture, or whether it is better described as a development pursued through the corporate vehicle Rainbow Falls. The respondents as minority shareholders of Rainbow Falls have no interest in the lands owned by Rainbow Falls: *Taylor v 1103919 Alberta Ltd*, 2015 ABCA 201 at para. 33, 19 Alta LR (6th) 407; *Kosmopoulos v Constitution Insurance Co of Canada*, [1987] 1 SCR 2 at pp. 12-13. Their claim seeking an oppression remedy under the *Business Corporations Act* does not depend on there being an interest in land. An oppression claim is not a sufficient basis for them to maintain a certificate of *lis pendens* on the titles to the land owned by the corporation. In economic terms, the parties may have envisioned a form of “joint venture”, but to some extent at least they chose to execute that venture through shareholdings in the corporation Rainbow Falls Development Inc. As the Applications Judge pointed out, this is not a derivative claim commenced on behalf of the corporation, and the respondents are not entitled to maintain certificates of *lis pendens* on the titles based on any interest of Rainbow Falls Development Inc. The respondents cannot at the same time claim corporate oppression remedies, as if they were shareholders in a corporation, but also claim entitlements as if they were participants in an unincorporated joint venture.

[91] In any event, the dismissal of the cross-appeal respecting the commercial site and the business park site renders this issue moot, and the order discharging the certificates of *lis pendens* does not disclose any reviewable error.

Summary

[92] In summary, the appeal is dismissed except with respect to the Cascades Project, Brownstone Blocks 3 and 6, and the Phase 9 residential lots. To that extent, the appeal is allowed, and those aspects of the claim are summarily dismissed.

[93] The cross appeal is dismissed.

Appeal heard on May 16, 2025

Memorandum filed at Calgary, Alberta
this 26th day of May, 2025

Slatter J.A.

Antonio J.A.

Authorized to sign: Hawkes J.A.

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