Court of King's Bench of Alberta

Citation: Khirbesh v 2098981 Alberta Ltd, 2025 ABKB 115

Date: 20250227
Docket: 2003 11409
Registry: Edmonton

Between:

Tark Issa Salem Khirbesh and Ousama S S Kabar

Applicants (Plaintiffs)

- and -

2098981 Alberta Ltd and Doaa Salah Abde El Naggar, also known as Doaa Alnajjar, also known as Doaa Salah Anajjar and Jane Doe and 2098987 Alberta Ltd

Respondents (Defendants)

- and -

Doaa Salah Abde El Naggar, also known as Doaa Alnajjar, also known as Doaa Salah Anajjar

Respondent/Plaintiff by Counterclaim

- and -

Tark Issa Salem Khirbesh

Applicant/Defendant by Counterclaim

Memorandum of Decision
of the
Honourable Applications Judge L.R. Birkett

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[1] The plaintiffs' applications for summary judgment and for summary dismissal of the defendants' counterclaim were set for a special chambers hearing. There was a late change of counsel for the defendants resulting in outstanding undertakings and in an affidavit and the response brief not having been filed. A procedural order was put in place to decide the applications on written submissions. This is the decision.

[2] The plaintiffs' application filed October 3, 2022 sought summary judgment against the defendants in the amount of $630,000 plus costs.

[3] There were four grounds for making the application. Primarily, the plaintiffs paid the defendants the sum of $630,000 in contemplation of entering into an agreement for the purchase of shares in a daycare business but were unable to reach an agreement on the terms of sale. Second, the plaintiffs' payment to the defendants was induced by fraudulent misrepresentations on the part of the individual defendant. Third, the defendants have been unjustly enriched. Fourth, if there was a share purchase agreement for the daycare business, the defendants repudiated the agreement.

[4] The plaintiffs rely on the record, including the pleadings, affidavit evidence, and questioning transcripts, to support their applications for summary judgment and summary dismissal. The plaintiffs seek return of the total amount paid by them in contemplation of the purchase of the daycare business, being $642,316.97, and a further payment of $10,471 paid directly to the landlord.

[5] The defendants argue that the matter is not suitable for summary determination as there are genuine issues for trial. In the alternative, if summary judgment is granted, the defendants submit that the proper remedy is fulfilling the expectations of the plaintiffs and completing the share purchase transaction. In addition, the defendants submit the counterclaim has merit and they ought to recover $168,000 for the costs to obtain an education licence and about $92,837 for reimbursement for rent, utilities, staffing, and operating costs.

The parties and background

[6] The plaintiff, Tark Issa Salem Khirbesh ["Tark"], was introduced to the individual defendant, Doaa Salah Abde El Naggar also known as Doaa Alnajjar also known as Doaa Salah Anajjar ["Doaa"] through a mutual acquaintance. The other plaintiff, Ousama S. S. Kabar ["Ousama"] is Tark's brother-in-law who wished to immigrate to Canada from Libya, along with Tark's sister.

[7] Tark and Doaa met in June 2019. Doaa provided her business card identifying her as owner/operator of MJD Daycares Consultants and Builders. Doaa understood that Tark was interested in purchasing a daycare business. Tark understood that Doaa offered to sell him a daycare business located on Princess Elizabeth Avenue in Edmonton, Alberta, known as "Kids Village" and that Ousama would be able to immigrate to Canada if he were to invest in a business. Doaa told Tark that if he paid the money in July, the daycare would open in September, with 43 children already lined up.

[8] Although the parties disagree on the timing of the conversation, Doaa acknowledges that she advised Tark that previous clients had used their daycare business as a means to obtain work visas for family members abroad. Doaa offered to assist by putting Ousama in touch with an immigration lawyer and translating documents if necessary. Tark was under the impression that Ousama and his whole family would be in Edmonton within two months of investing in the daycare business and he need not worry about them obtaining residency in Canada.

[9] Doaa advises that she is in the business of constructing, developing, and licencing daycares in Edmonton and then, when they are at or near ready for operation, she sells the daycare to prospective buyers, generally agreeing to stay involved for a short period of time to help the new owners over the first few hurdles of running the business. Doaa says that she has developed and sold more than 40 daycares in the Edmonton area since 2015.

[10] The defendant, 2098981 Alberta Ltd ["209"], is the corporation Doaa set up to operate as the Kids' Village Daycare in Edmonton in 2018. She remains the sole registered shareholder of 209.

[11] The defendant, 2098987 Alberta Ltd o/a MJD Daycares, is a holding company used by Doaa to purchase materials, pay contractors, pay licencing fees, and generally to pay expenses related to the development and operation of a daycare until the daycare is sold and taken over by new ownership and management.

[12] In 2018, Doaa identified commercial premises located on Princess Elizabeth Ave in Edmonton as a good location for a daycare business as it was at the intersection of four major communities and close to a mosque, church, school and NAIT. 209 entered a commercial lease effective May 31, 2018, with possession September 2018. Construction began in the fall of 2018 and by around May 2019 the daycare was nearly ready for licencing and operation. Beginning in February 2019, Doaa actively sought to sell 209, with advertising active in early April 2019.

[13] Doaa estimated the value of the daycare at around $650,000, accounting for the physical construction work, anticipating future licences in the fall of 2019, and rostering up to 113 pupils.

[14] Doaa prepared a draft share purchase agreement for another interested buyer. When Tark expressed interest in buying this daycare, Doaa sold the other interested buyer an alternative daycare corporation with a lease at a different location. The draft share purchase agreement was revised to incorporate the immigration terms negotiated with Tark.

[15] Tark and Doaa continued to discuss the purchase of the daycare, with the sale price set at $630,000 and with a five-month commitment from Doaa to assist in managing the business. On July 25, 2019, Tark confirmed that Ousama was willing to fund the purchase and arrangements for transfer of US funds into Doaa's holding company were made. Doaa provided the revised draft share purchase agreement to Tark on July 30, 2019. On August 5, 2019, Ousama arranged for $400,000 USD minus transfer fees to be deposited into the bank account owned by 2098987 Alberta Ltd resulting in a deposit on the transaction of $527,316.97. Approximately $103,000 was then remaining on the $630,000 purchase price.

[16] Doaa advised on questioning that she moved some of Ousama's deposit from her holding company to 209 and the balance remained there because she built the daycare as a loan from the holding company and 209 would have to pay the money back.

[17] On August 21, 2019, Tark paid $48,000 directly to 209 and on August 22, 2019, a further $17,000. On August 30, 2019, Tark paid $50,000 to cover the remaining balance, including $12,000 owing for rent, operating costs and utilities for the daycare. In total, between them, Tark and Ousama paid Doaa, 209, or her holding company $642,316.97.

[18] Tark states that the payments were made on the understanding that the transferring of ownership of the daycare would be completed in September 2019 so that he could operate the daycare while Doaa was processing the visa applications for Ousama and his family. On September 2, 2019, Tark asked Doaa whether the daycare would be opening the next day; she did not respond.

[19] Doaa says on questioning that because the full purchase price was not paid in July, and not until August 30, she was not able to get the licence and have the 43 children start in September. She had anticipated being able to submit a name change for the application she had already submitted and be licenced in 30 days.

[20] Following the receipt of the funds, Doaa says she began managing the daycare, including applying for the daycare operating licence under the name of 209, and marketing the daycare. Doaa had expected Tark's wife to complete her certification and begin training to take over management of the daycare operations, however Tark's wife was unable to do that.

[21] Doaa began advertising employment opportunities for a daycare director and teachers to staff the daycare in advance of receiving the licence to operate. One of the prospective teachers said that the neighbouring Mosque was interested in setting up an exclusively Islamic

kindergarten. Doaa advised Tark at the end of September 2019 of the potential for converting 209's daycare into a larger accredited Islamic kindergarten operating side-by-side with the daycare. Doaa said she would engage in active discussions with the Mosque administration to see whether the conversion would be in 209's interests.

[22] Around October 16, 2019, Doaa says she advised Tark that the Mosque proposal was in the best interests of 209 and the name of the daycare would change to Kids' Islamic Village to signal that the daycare was an Islamic daycare and kindergarten. Further, a new Alberta Education accreditation would be required to operate as an Islamic kindergarten at a cost of approximately $200,000 for the accreditation and licencing process.

[23] Doaa claims that Tark agreed with the proposal and to reimburse her for the costs of obtaining the accreditation.

[24] On questioning, Doaa explained that they needed to call each family who had expressed interest to tell them that Kids Village was not going to open as expected on October 1 or during the first week of November at the latest. The program had changed to Islamic and Arabic and they would have to wait a little bit to get approval from Alberta Education. She helped those families who chose to go to other daycares to find openings elsewhere.

[25] Doaa continued her efforts to assist Ousama with obtaining a work visa including contacting immigration consultants or law firms. On November 5, 2019, Doaa met with an immigration consultant who had some ideas on how to expedite Ousama's immigration to Canada, starting with a visitor's visa. Doaa tried unsuccessfully to reach Ousama during the meeting.

[26] On November 8, 2019, Doaa sent the list of documents and information needed from Ousama for the immigration consultant. Tark received a copy of the email and forms which caused him to hold out hope that Doaa would make good on her agreement to bring Ousama to Canada. There were subsequent unsuccessful attempts by Doaa and Ousama to contact one another up to December 4, 2019. There were no further communications about immigration.

[27] Doaa told Ousama that November 14, 2019 would be the opening of the daycare. Doaa confirms that the childcare licence for the daycare was approved by November 14, 2019. This allowed 209 to commence operations for more than six pupils. Although now licenced for 113 children, Doaa advises that 209 could not immediately commence operations as the childcare licence did not allow operation as an Islamic school and 209 had not yet been approved for daycare subsidies.

[28] On November 26, 2019, Doaa received the application documents she requested from Alberta Education to establish a private early childhood services program. She was advised of a deadline of January 20, 2020 to submit completed forms for consideration for the 2020/21 school year.

[29] Tark was informed by Doaa on November 27, 2019 that subsidy approval had not been received and she would let him know when it was. He further states that around this time Doaa informed him that the amount already invested would not be enough to enable Ousama to immigrate to Canada but that they could enter into a partnership with a mosque to add an Islamic school to the daycare business at an extra cost of approximately $168,000 in order to enable Ousama to immigrate to Canada.

[30] Tark informed Doaa that he and Ousama were generally agreeable to paying whatever cost was necessary to enable Ousama to immigrate to Canada, however, no specific information was presented about this further investment. Tark states that it did not matter to him whether or not the daycare operated in partnership with a mosque or as an Islamic daycare; his priority was to secure Ousama's immigration to Canada and to complete the purchase of the daycare for which the defendants had already been paid.

[31] Doaa advises that she was required to retain expert consultants to navigate the complex process of obtaining an education licence to operate as an Islamic school. She began meeting with consultants on December 6, 2019.

[32] Doaa forwarded the documents to a consultant to work on the application, including incorporating a society and preparing a business plan and childcare policies. Doaa also forwarded the documents to an educational consultant for assistance.

[33] On December 11, 2019, Doaa incorporated "The Canadian Association for Childcare and Education Services" (CACES) as a non-profit company.

[34] On January 7, 2020, the consultant provided Doaa with a draft of the completed application form noting CACES as the name of applicant Society/Company and Kids College as the proposed ECS name. On January 8, 2020, the consultant provided Doaa with the educational portion of the business plan for CACES with respect to 3 childcare and education institutions, namely Kids College, Green Heroes Academy, and Kids Village.

[35] Doaa advises that she submitted an application package on January 20, 2020 and continued to follow up with Alberta Education to finalize the operating licence when their office closed on March 15, 2020 because of Covid-19.

[36] Doaa advised Tark on January 23, 2020 that the application had been submitted and the consultants were confident that 209 would be in a position to open an Islamic daycare and kindergarten at the premises during the winter or spring of 2020.

[37] Doaa engaged a consultant to prepare digital graphic flyers to jointly advertise the Kids Village Daycare and Out of School Care starting March 2020 and the full-time kindergarten at Kids Village for 2020/21. An open house was held on February 2 and 8, 2020 leading to many confirmed enrollments.

[38] Tark and his wife attended the open house on February 8, 2020. Doaa reports that they were happy with the progress of the daycare and kindergarten and confirmed their good intentions to continue with the business. Doaa says that she continued to raise with Tark and his wife that they would need a plan in place to have the daycare operating without her.

[39] Doaa received correspondence dated February 24, 2020 from the licencing supervisor of Child Care Services to follow up on a telephone call they had and to note that if Doaa was changing the entire program from that approved in her licence granted November 14, 2019, to an Islamic and Arabic curriculum, she would need to submit a program plan update for review and approval.

[40] The daycare opened for business on March 2, 2020. On March 7, 2020, Tark paid the landlord $10,471 as Doaa said the rent needed to be paid or else the landlord would terminate the lease, and their investment would be lost.

[41] The next correspondence between Doaa to Ousama was on March 7, 2020, when Doaa sent photos of the daycare and the children she had placed there, along with the link to the Facebook page for the school.

Involvement of the lawyers

[42] Tark and Ousama hired lawyer Ali Rachid to complete the purchase of the daycare business.

[43] Tark learned that the Immigrant Investor Program had closed in approximately 2014. Tark deposes "I came to understand that Doaa was not in a position to assist Ousama in immigrating to Canada at all, and it was therefore decided by myself and Ousama that in order to attempt to recover the money already paid to Doaa, that we would seek to finalize the sale of the business with myself as the purchaser."

[44] Ousama confirms "I had come to understand that Doaa was not able to assist me in immigrating to Canada and that I was not eligible for permanent residency in Canada on the basis of being an investor and therefore my priority shifted to attempting to recover the money back that I had invested. It was agreed between myself and Tark that the sale agreement would proceed with Tark being the sole purchaser."

[45] On March 8, 2020, Doaa met with Mr. Rachid and Tark. Ousama called into the meeting. Doaa recalls that Ousama apologized for not communicating in some time and that Tark confirmed he and his wife needed to get more involved in the ownership and management of the business. Mr. Rachid asked for documents to help get share transfers completed and advised he would put together a new share transfer agreement consistent with the original agreement from August 2019. Doaa says that Tark confirmed he would pay the rental arrears owed from September to February 2020, pay the March 2020 rent, and reimburse Doaa for the costs of the school permit.

[46] On March 18, 2020, Doaa sent to Mr. Rachid the documents he had requested, including the interior and playground plans, city approval, daycare licence, plan approval, rent statement and lease. None of the documents related to the application to Alberta Education for the kindergarten were included.

[47] On March 21, 2020, Doaa obtained a Trademark Report and forwarded it to Mr. Rachid to show that Kids Village Daycare and OSC was not taken. She advised that Tark could use the document to register the tradename after the sale. On March 25, 2020, Mr. Rachid advised Doaa that they required her to register Kids Village Daycare and OSC as a tradename under 209. Doaa acknowledged on questioning that Tark had given her money to register the tradename, but she had not done so.

[48] Mr. Rachid communicated with Doaa on March 21, 2020 enclosing a list of required documents and information in order to complete the purchase share agreement. He highly recommended she hire a lawyer to look out for her interests.

[49] Doaa provided her comments on the list and advised that she did not think her hiring a lawyer was necessary given the scope of the work that needed to be done. In response to the request for all licences required to run the school, Doaa responded "you have this already". Doaa did not respond to the request for a list of students enrolled in the school and daycare and a list of all staff (teachers and administrators).

[50] On questioning, Doaa advised that she had sent Mr. Rachid the first 3 pages of a draft of the application for accreditation showing Kids Village Daycare and OSC as the applicant, when in fact the application submitted was by her non-profit corporation, CACES. She explained that she was concerned Mr. Rachid would contact Alberta Education and interfere in the approval process.

[51] On March 25, 2020, Mr. Rachid sent the draft purchase share agreement and schedule for a March 31, 2020 closing to Doaa for her or her lawyer's review. The purchase price was set at $780,000 for the daycare and school, being $150,000 above the original purchase price for the daycare alone. The share purchase agreement contained the usual terms and conditions, representations and warranties, and termination clause in the event the conditions were not satisfied or waived by the purchasers at or prior to the closing date.

[52] On March 27, 2020, Mr. Rachid confirmed a telephone conversation he had with Doaa wherein she indicated she that needed 3 to 4 days to think about completing the documents required to transfer the shares to Tark and that if Tark did not pay her the remaining $168,000 on the closing date, she will transfer the daycare business only but not the school business.

[53] On April 3, 2020, Ousama asked Doaa why she was not sending the documents required by their lawyer and offered to pay for the fees for a lawyer to follow-up on her behalf.

[54] On April 15, 2020, Mr. Rachid wrote to Doaa reminding her she agreed to prepare the documents required for transferring all the shares of 209 to Tark yet remained self-represented and continued to inquire about the necessity of the documents listed and required in the normal course for the purchase of a business. Tark's agreement to cover the legal fees of Doaa's lawyer was confirmed, provided she cooperate fully in providing the corporate documentation required for the transaction.

[55] On April 15, 2020 Doaa advised Ousama that she was willing to operate the daycare pro bono for the first three months followed by a percentage of the profit, explaining that if another manager was brought in without enough experience it would cause the school problems and complaints to the Mosque. Doaa said that this administration clause was to be added to the agreement.

[56] On April 21, 2020, Ousama asked Doaa what happened in regard to the lawyer. On April 29, 2020, Doaa told Ousama to ask his lawyer to send an email confirming certain specific terms regarding her lawyer's fees, payment of rent since September 2019, and her compensation for managing the daycare.

[57] Doaa required Ousama's agreement that the management of the two classes and kindergarten and prekindergarten in the daycare be through her own company. Specifically, a student from 9 am to 3 pm would be the responsibility of her school and she would take the money from the government for that student, with the daycare receiving the subsidy money for that student attending before and after school hours. Doaa stated that "With this condition unfortunately, there is no negotiation. I, the Mosque, and the students' parents that are registered with the Mosque are not under Tark's command… I cannot leave the management of something important like the school with the same reputation as the Mosque in the hands of an inexperienced person as Tark."

[58] Ousama responded on April 29, 2020: "When we agreed at the beginning on the business and the purchase of the daycare you stated that there are conditions in place amongst them the

residency for me and my family in exchange for the business which was an important condition. And that you will take care of the business for six months without anything in return. And that there were approximately 45 students registered and now I've discovered after you've received the full amount of money that is not the case.… In our last conversation we agreed that you hire a lawyer and I will cover their legal fees and now you are coming up with new conditions and compensations that you want to impose on me for situations not relating to me. Madame do you want to proceed with the sale and purchase process regarding the daycare with my lawyer and yours, please only answer yes or no." Doaa answered yes, but explained her lawyer would not contact Ousama's lawyer until her terms and conditions were agreed to.

[59] Doaa did not disclose to Tark, Ousama or Mr. Rachid, that Alberta Education had contacted her in February, and she responded on April 24, 2020 enclosing an unsigned sublease agreement between 209 and CACES dated April 6, 2020 to reflect that CACES was renting the space (about 1500 square feet) dedicated for the operation of the kindergarten and pre-kindergarten classes within the daycare location. Doaa advised Alberta Education that the signature of the sublease agreement was pending their accreditation.

[60] On June 25, 2020, Mr. Rachid received confirmation from a lawyer that they were representing 209 and Doaa with respect to Tark's interest in purchasing the shares of 209. Mr. Rachid responded with a demand letter dated June 29, 2020, confirming the verbal contract to buy the shares of 209 for $630,000 and the amounts paid, and advising that notwithstanding numerous requests to complete the share purchase transaction, Doaa and 209 failed, neglected or refused to complete the transaction. Accordingly, Doaa and 209 have therefore breached the contractual agreement with Tark and Ousama causing undue mental and psychological stress. "Our clients are requesting from your clients the return of the $650,000 plus legal costs" (of $7,000) to be paid by noon on July 14, 2020, failing which formal legal proceedings would be commenced.

[61] On July 14, 2020, Doaa's lawyer wrote that Doaa remained willing and able to complete the transaction as contemplated by the verbal contract between the parties. However, pursuant to the further agreement of the parties, Tark and Ousama are to pay Doaa $140,923.34 to cover the rent, operating costs, and utilities paid between August 2019 and February 2020.

[62] The administration clause Doaa had insisted on with Ousama was not mentioned, nor was the sublease and her intention to run the kindergarten in the same premises through her own company.

[63] Doaa's lawyer advised that Doaa was in the process of trying to transfer the Alberta Education licence to recover the $162,000 cost. It was suggested that the impetus for Tark and Ousama repudiating the agreement was the fact that on March 16, 2020 the Province closed the operations of daycares due to the Covid-19 pandemic.

[64] On July 16, 2020, Mr. Rachid filed the statement of claim to commence this action for damages for breach of contract on behalf of Tark and Ousama. The defendants filed their statement of defence on August 19, 2020 confirming their willingness to close and filed a counterclaim for Doaa's out-of-pocket expenses.

[65] Doaa continued to operate the Kids Islamic Village daycare and kindergarten from its opening on March 2, 2020 until January 2021 when staff quit over concerns about their safety arising from unresolved structural issues with the premises and parents unenrolled their children

for the same reasons. Doaa withheld the rent due February 2021. On April 23, 2021, the landlord terminated the lease with 209 for nonpayment of rent. Doaa removed the assets of 209 to another location.

[66] After significant structural repairs, the landlord re-leased the premises to another corporate entity operating as Kids Village Daycare and Out of School Care. A corporate search shows that Kids Village Daycare Ltd was incorporated January 7, 2019 and the directors are the same people who previously sued Doaa for the return of the deposit they made on this daycare and premises prior to it being sold to Tark and Ousama.

[67] Based on this information, Tark believes that the defendants sold or transferred to a third party the very same business for which the plaintiffs paid the $630,000 purchase price.

The draft agreements and subsequent details

[68] Doaa maintained, in defence to the plaintiffs' demand and claim for return of their money, that she was willing to complete the transaction as contemplated by the verbal agreement between the parties.

[69] Doaa's lawyer described the verbal agreement between the parties as the sale of the shares in 209 for the operation of the daycare business at a purchase price of $630,000 plus reimbursement for the rent, operating costs, and utilities paid between August 2019 and February 2020. Doaa abandoned her claim for reimbursement for the accreditation of the kindergarten, notwithstanding her claim that the plaintiffs agreed to the application process and resultant delay in the opening of the daycare.

[70] Mr. Rachid documented the verbal agreement between the parties as the sale of the shares in 209 for the $630,000 already paid by the purchasers (for the daycare) and a further $150,000 for the kindergarten school.

[71] The plaintiffs have come to realize that the original agreement they thought they had with the defendants to purchase the shares of 209 and its turn-key daycare operation would not have been possible.

[72] Several of the terms Doaa set out in her initial draft agreement and incorporated in Mr. Rachid's draft Share Purchase Agreement had already been breached or could not be met.

Representations regarding litigation and liabilities

[73] Doaa represented in Article 3.1.1 (c) of her draft agreement that:

> there are no actions, suits, investigations, arbitration proceedings or other proceedings in progress, pending or, to the best of the knowledge of the Vendor, threatened against or affecting the Vendor or the Corporation that would be expected to have a material adverse effect on the transfer of the Purchased Shares.

[74] Mr. Rachid's draft Share Purchase Agreement provided for the Vendor's representation in Article 4(r) that the Corporation has no liabilities other than those provided for in the financial statements or incurred in the ordinary course of business and further in Article 4(ii) that:

> Except as disclosed in Schedule 4.1(ii), the Corporation is not a party, directly or indirectly, to any legal proceedings or inquiries whatsoever, and there are no actions, suits or proceedings pending or, to the knowledge of the Vendors,

> threatened against the Corporation or affecting the Shares or the officers or directors of the Corporation by virtue of or arising out of their offices which involve claims against the Corporation…. The Corporation is not operating under or subject to or in default of any judgment, order, writ, injunction, ordinance, regulation or decree or any other requirement of any Governmental Authority.

[75] Tark deposes in his affidavit affirmed March 19, 2023 that he was unaware until after Doaa was cross-examined on February 9, 2023 that 209 had been sued by Kids Village Daycare Ltd. Tark states: "Doaa failed to disclose this claim against the company that I was intending to purchase, and neither myself nor Ousama would have agreed to purchase Kids Village Daycare had we known about the claim against the company."

[76] The statement of claim issued June 26, 2019 in Action Number 1903 13260 was an exhibit to Doaa's cross-examination. The affidavit of the owner of Kids Village Daycare Ltd sworn in support of an application for judgment in the sum of $150,000 is an exhibit to Tark's affidavit, along with the procedure card for that action.

[77] The affidavit of the owner of Kids Village Daycare Ltd sworn August 27, 2019, provides the details of the Asset Purchase Agreement for the sale of the assets of the daycare to be opened by 209 at the location on Princess Elizabeth Ave, Edmonton. The affidavit attaches the demand for return of the $150,000 deposit as 209 had not met the condition to obtain a licence for the daycare by May 31, 2019.

[78] It is clear from the procedure card that 209 was in litigation at the time Doaa was negotiating with Tark and Ousama for the purchase of shares. 209's statement of defence and counterclaim in Action Number 1903 13260 were filed July 30, 2019, the same date that Doaa forwarded the revised draft share purchase agreement to Tark.

[79] Prior to negotiating this sale of the assets of the daycare to Kids Village Daycare Ltd, Doaa had taken a $20,000 deposit from another potential purchaser on this same daycare under construction on Princess Elizabeth Ave, Edmonton. When the potential purchaser realized the vendor was 209 and not Doaa, he successfully sued for the return of the deposit. The court order issued March 13, 2019 in Action Number 1801 18075 granted summary judgment in the amount of $20,000 plus costs against Doaa personally.

[80] Tark's affidavit affirmed August 10, 2022 attaches other pleadings and orders evidencing lawsuits against Doaa including a statement of claim in Action Number 2003 04989 filed March 5, 2020 by the same directors whose names were inadvertently left in Doaa's draft Share Purchase Agreement. The statement of claim alleges that the plaintiffs entered into an agreement in September 2019 with the defendants to provide a turn-key daycare business with the closing date of October 21, 2019. After the closing date, it is alleged that Doaa said she was out of money and the plaintiffs advanced the purchase price so that materials needed for the daycare business could be obtained. By January 2020, the plaintiffs claim that the defendants were repudiating the agreement and sought the return of the $650,000 purchase price advanced.

[81] There is evidence of a builder's lien lawsuit commenced December 19, 2018 in Action Number 1803 25046, against Doaa and another of her numbered companies which was resolved by an order for judgment pronounced June 30, 2021.

[82] Tark also attaches to his March 9, 2023 affidavit evidence of a lawsuit filed in Action Number 1903 06784 wherein Doaa, another of her companies, and Doaa operating as MJD

Daycares Consultants & Builders were sued for the return of a $150,000 deposit made on the purchase of a childcare facility under construction at leased premises on Calgary Trail, Edmonton. At the time Doaa was meeting with Tark in June 2019, an attachment order and a notice of default by the landlord had been issued in this other action.

Conditions for the benefit of the purchaser

[83] Mr. Rachid's draft share purchase agreement provided in Article 6 a list of conditions for the benefit of the purchaser to be performed prior to closing, including clause 6.1(a) and (b):

> the Purchaser shall have completed its investigation into the Corporation, the Business, the Assets, the Shares, and all other matters the Purchaser deems relevant, and such investigation shall not have disclosed any matter which the Purchaser considers could have a Material Adverse Effect or considers to be materially adverse to its decision to acquire the Shares, in its sole and arbitrary discretion;
>
> all representations and warranties of the Vendor made or deemed to have been made in or pursuant to this Agreement shall be true, complete and correct as at the Closing Date…

[84] Clause 6.2 provided for termination by the purchaser:

> In the event that any of the conditions set forth in Section 6.1 hereof have not been satisfied or have not been waived by the Purchaser prior to the Closing Date, the Purchaser, at its sole option, may terminate this Agreement at or prior to the Closing by notice in writing to the Vendors, and the Purchaser's obligations and liability hereunder… shall then be at an end.

[85] I note that the Trademark Report forwarded by Doaa to Mr. Rachid starts at page 5 of 7. On page 7, the data provider information lists Alberta Corporate names at March 16, 2020. One would expect Kids Village Daycare Ltd which had been incorporated on January 7, 2019 to have been identified on this Nuans search. As discussed further below, Doaa and 209 had entered into a failed asset purchase agreement with this corporation on April 8, 2019. The existence of an Alberta Corporation called Kids Village Daycare Ltd was not disclosed by Doaa to the plaintiffs.

[86] Doaa was to provide the review engagement financial statements of the Corporation for the 2019 fiscal year. 2098981 Alberta Ltd (209) was incorporated February 14, 2018. The corporate search obtained by Mr. Rachid on March 19, 2020 showed the annual returns were outstanding for the 2019 file year. The only financial statements for 209 identified in the record are Projected Financial Statements for the years 2019 – 2021, prepared by a public business accountant on December 18, 2018.

[87] Doaa did not share the details with Tark or Ousama of the application process and requirements for private operators who wish to establish an ECS program in Alberta. Specifically, that private ECS operators must be incorporated as a society under the *Societies Act* or registered as a non-profit company under Part 9 of the *Companies Act*. Doaa did not disclose that she had incorporated The Canadian Association of Childcare and Education Services (CACES) for that purpose because 209 would not be able to operate the kindergarten.

[88] The invoices submitted by Doaa in support of her counterclaim against the plaintiffs for reimbursement for the cost of the application to Alberta Education are issued by CACES to Kids

Village Daycare. The first is dated October 24, 2019 in the amount of $96,002.39 and the second is dated May 1, 2020 in the amount of $72,561.25, for a total of $168,563.64.

[89] The second invoice includes charges for accounting and legal advice for the sublease agreement that was required by Alberta Education. That sublease agreement dated April 6, 2020 between CACES and 209 was not disclosed as a matter which could have a material adverse effect on the share purchase.

Immigration issues

[90] The draft Share Purchase Agreement provided by Doaa to Tark on July 30, 2019 had been revised in Article 5 to add that the Vendor would assist the purchaser in obtaining a work permit and permanent residency status in Canada by recommending immigration lawyers and providing advice if needed and to allow for the deposit to be refunded in full if the purchaser failed to obtain a work permit for reasons not related to him personally due to unforeseen change in laws.

[91] Tark and Ousama came to understand that Doaa was not able to assist Ousama in immigrating to Canada as he was not eligible for permanent residency in Canada on the basis of being an investor and that she was not in a position to assist Ousama in immigrating to Canada at all. Therefore, in order to attempt to recover the money invested and already paid to Doaa, it was agreed between Tark and Ousama that they would seek to finalize the sale of the business with Tark as the sole purchaser.

[92] Doaa details in her affidavit the contacts she made with immigration consultants or law firms in an effort to assist Ousama with obtaining a work visa. Doaa further deposes that Ousama did not provide her with the information she requested from him on November 8, 2019 or otherwise confirm completion of documentation to immigrate to Canada.

[93] Whether or not obtaining immigration status for Ousama and his family was a condition precedent to the share purchase agreement or a term that was breached by either Doaa or Ousama are not material facts I considered in determining this application. Any conflicts in the evidence on this particular matter do not preclude summary judgment.

Summary Judgment

[94] The applications are made pursuant to r 7.3 of the *Alberta Rules of Court*. The plaintiffs apply to the Court for summary judgment in respect of their claim for return of the monies paid to the defendants on the ground there is no defence to the claim. The plaintiffs apply to the Court for summary dismissal in respect of the counterclaim for reimbursement for the monies paid by the defendants for accreditation of the kindergarten and other out of pocket costs on the ground there is no merit to the claim against them.

[95] The defendants resist the application for summary judgment on the basis there are genuine issues for trial. The defendants resist the application for summary dismissal on the basis that the counterclaim has merit.

[96] The parties rely on ***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd***, 2019 ABCA 49 [***Weir Jones***].

[97] Paragraph 47 of ***Weir Jones*** provides a summary of the application of the principles for summary judgment:

> The proper approach to summary dispositions, based on the *Hryniak v Mauldin* test, should follow the core principles relating to summary dispositions, the standard of proof, the record, and fairness. The test must be predictable, consistent, and fair to both parties. The procedure and the outcome must be just, appropriate, and reasonable. The key considerations are:
>
> 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 that there is either "no merit" or "no defence" and that there is no genuine issue requiring a trial? At a threshold level the facts of the case must be proven on a balance of probabilities or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication.
>
> 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.
>
> To repeat, the analysis does not have to proceed sequentially, or in any particular order. The presiding judge may determine, during any stage of the analysis, that summary adjudication is inappropriate or potentially unfair because the record is unsuitable, the issues are not amenable to summary disposition, a summary disposition may not lead to a "just result", or there is a genuine issue requiring a trial.

[98] The plaintiffs rely on paragraph 25 of ***Weir Jones***:

> The procedures underlying summary judgment are established by *Hryniak v Mauldin*, and have already been set out, *supra* paras. 14-16, 20-21. It comes down to whether summary disposition is possible, considering the record, the evidence, the facts, and the law that must be applied to them. If the record allows the judge to make the necessary findings of fact and apply the law, then the summary procedure should be used unless there is a substantive reason to conclude that summary disposition would not "achieve a just result"

[99] The defendants rely on paragraph 35 of ***Weir Jones***:

> A dispute on material facts, or one depending on issues of credibility, can leave genuine issues requiring a trial.

[100] Although the plaintiffs set out four grounds for making their applications, the written arguments of counsel focus primarily on whether the parties reached an agreement for the purchase of the shares of 209.

[101] The plaintiffs argue that the defendants have been unjustly enriched by keeping the money paid to them. The defendants argue that the verbal contract between the parties provides a juristic reason for the enrichment.

[102] The plaintiffs argue that if there was an agreement for the purchase of the shares of 209, the defendants repudiated the agreement. The defendants argue that it was the plaintiffs who breached the verbal agreement. Further, the plaintiffs are estopped from recovering their purchase price due to their representation that the parties had entered an agreement.

[103] The plaintiffs did not pursue the allegation that the plaintiffs' payment to the defendants was induced by fraudulent misrepresentations on the part of the individual defendant. The Court is not required to make findings as to whether Doaa engaged in fraudulent misrepresentation to find summary judgment in this matter.

[104] The plaintiffs do rely on the nondisclosure of material information as a breach of the reasonable expectations of honesty and good faith in the contractual dealings between the parties. Although the plaintiffs were unaware of such nondisclosures at the time they demanded return of their investment, they submit that the defendants have received a benefit which justice does not permit them to retain. The plaintiffs also submit that the nondisclosure of material information and other misrepresentations amount to repudiation and entitle them to return of their money.

Unjust enrichment

[105] The doctrine of unjust enrichment was articulated by Justice McLachlin in delivering the judgment of the majority of the Supreme Court of Canada in ***Peel (Regional Municipality) v Canada; Peel (Regional Municipality) v Ontario***, 1992 CanLII 21 (SCC), [1992] 3 SCR 762 [***Peel***]:

> The concept of restitution for unjust enrichment in the common law world has evolved over the past century from a collection of fact-specific categories in which recovery was permitted, toward a body of law unified by a single set of coherent rules applicable to all cases. The evolving state of the law of restitution manifests itself in a series of tensions, all reflected in the present appeal.
>
> The first set of tensions is theoretical. There are two distinct doctrinal approaches to restitution at common law. The first is the traditional "category" approach. It involves looking to see if the case fits into any of the categories of cases in which previous recovery has been allowed, and then applying the criteria applicable to a given category to see whether the claim is established. The second approach, which might be called the "principled" approach, developed only in recent years. It relies on criteria which are said to be present in all cases of unjust enrichment: (1) benefit to the defendant; (2) corresponding detriment to the plaintiff; and (3)

> the absence of any juridical reason for the defendant's retention of the benefit: *Pettkus v. Becker*, 1980 CanLII 22 (SCC), [1980] 2 S.C.R. 834.…
>
> At the heart of the doctrine of unjust enrichment, whether expressed in terms of the traditional categories of recovery or general principle, lies the notion of restoration of a benefit which justice does not permit one to retain.

[106] The plaintiffs' position is that the defendants have been unjustly enriched. Doaa has admitted receipt of the amount of $642,316.97 and that Tark paid the rent for the month of March 2020. Such payments are an enrichment or benefit to the defendants, with a corresponding deprivation of the plaintiffs.

[107] In the amended statement of defence, the defendants deny that the plaintiffs have been unjustly enriched or if they have been unjustly enriched, then the existence of the share purchase and sale agreement is a juristic reason which justifies such enrichment.

[108] The draft share purchase agreement provided by Doaa July 31, 2019 was not signed, or signable. Doaa says it contains the terms agreed to, however the purchasers' names, the purchase price and the anticipated closing date were all incorrect. It was contemplated by the parties that the agreement was subject to review by the plaintiffs' lawyer. Doaa acknowledged that the lawyer might suggest other terms for her consideration.

[109] On cross-examination about other litigation she was involved in, Doaa says: "I also told you that the agreement between me and your client was supposed to be not the final one, and this is why they need to take it to a lawyer. So if it was the final and I am denying or saying there is no action towards the daycare, yes, then I am deceiving them, but I asked them clearly, take it to a lawyer, and let's go through lawyers." The plaintiffs argue that this confirms from Doaa's perspective that no legally binding agreement had been entered into between the parties.

[110] The draft share purchase agreement provided by Mr. Rachid March 27, 2020 was not signed; it contemplated further details to be inserted. On cross-examination as to why she had not sent Mr. Rachid the closing documents, Doaa explained that closing documents should be sent after a purchase agreement is signed. She didn't have a signed purchase agreement as: "They had to agree on the terms, sign it, and then put a date for closing.… he kept asking for documents without an agreement."

[111] In the amended statement of defence, the defendants state that Tark retained legal counsel who began to make demands of Doaa for documents and information, the substance of which was never agreed to between Doaa and Tark with respect to the share purchase and sale agreement. The majority of the written share purchase agreement proposed by Mr. Rachid contains terms to which Doaa and Tark did not originally agree. As such, Doaa did not agree to the new proposed terms as set out in the proposed written share purchase agreement.

[112] Notwithstanding the share purchase agreement drafted by Doaa was subject to review by lawyers, and that the share purchase agreement drafted by Mr. Rachid contained terms to which she had not agreed, Doaa pleads that she remains ready, willing and able to complete the required documentation to finalize her transfer of shares to Tark.

[113] Doaa maintains that the original oral agreement between the parties ought to be enforced, transferring the shares of 209 to Tark and providing a juristic reason for keeping the monies paid.

[114] The plaintiffs argue that any agreement for the purchase of the shares of 209 was repudiated by the defendants and they are entitled to their money back. The defendants argue that it was the plaintiffs who breached the oral agreement, and they are entitled to keep the money and seek reimbursement for out-of-pocket expenses.

[115] Further, the defendants argue that the plaintiffs are estopped from recovering their purchase price due to their representation that the parties had entered an agreement.

Estoppel by representation

[116] The defendants argue that plaintiffs made a clear and unambiguous representation to the defendants that they intended to purchase the daycare. The plaintiffs advanced funds to the defendants in performance of that representation. The act of advancing funds to the defendants represented to the defendants that the plaintiffs were in fact purchasing the daycare.

[117] Relying on the advance of funds, the defendants took steps to open the business contemplated. The plaintiffs did not inform the defendants that they did not intend to follow through with the representation. The defendants expended considerable time and resources in performance of the share purchase agreement. It would be inequitable to permit the plaintiffs to assert there was no contract after taking steps to lead the defendants to believe there was one.

[118] In their brief, the defendants submit that as a result of incurring expenses, 209 is unable to simply return the purchase price to the plaintiffs. 209 acted on the plaintiffs' representations that they were going to purchase and run the daycare. By failing to take over conduct of the daycare that they purchased and asking for their money back, they have caused a corresponding detriment to the defendants.

[119] The plaintiffs point out that the defendants did not plead estoppel, as required by r 13.6(3)(c) of the *Alberta Rules of Court*. Even if plead, and even if the defendants were led to believe there was a binding legal agreement, the principles of repudiation would apply to allow summary judgment in favour of the plaintiffs.

[120] The defendants reference the discussion of estoppel by representation in ***Muhammad v Canlanka Ventures Ltd***, 2015 ABQB 145 [***Muhammad***] quoting the Supreme Court of Canada in paras 70 and 71 (citations omitted)

> … The essence of estoppel is representation by words or conduct which induces detrimental reliance.…
>
> … The essential factors giving rise to an estoppel are I think:
>
> (1) A representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made.
>
> (2) An act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation is made.
>
> (3) Detriment to such person as a consequence of the act or omission.

[121] As observed by Jones J in ***Muhammad***, at paragraph 93: "A party can establish estoppel by representation only where it acts on a representation to its detriment.… For the plea to succeed, it must be unjust or unfair to allow a party to resile from the common assumption."

[122] Was there a representation by the words and conduct of the plaintiffs intended to induce the defendants to act to their detriment? Would it be unjust or unfair to allow the plaintiffs to not complete the share purchase agreement and require the defendants to return the monies paid?

[123] Was there a share purchase and sale agreement capable of completion? Should the plaintiffs be required to complete the transaction or did the defendants repudiate the agreement such that the plaintiffs are entitled to their money back?

Rescission, repudiation and misrepresentation

[124] The defendants maintain that the preponderance of evidence can only lead to the conclusion that the plaintiffs and the defendants entered into an oral agreement. The plaintiffs and Doaa arrived at a consensus *ad idem* on all the core essential elements of a contract in July 2019, namely, the parties, the product to be purchased, and the compensation for the product. This is coupled with part performance of the oral agreement by payment of the consideration and Doaa's actions in licencing and opening the daycare.

[125] The defendants refer to ***Syncrude Canada Ltd v Western Sterling Trucks Ltd***, 2019 ABCA 465 [***Syncrude***] at paras 37, 39 and 41:

> There are three requirements for a legally enforceable contract: (1) the parties intended to contract; (2) the essential terms of the contract have been settled; and (3) the terms are sufficiently certain. The standard for determining whether an oral agreement has been reached is whether, to an objective reasonable bystander, and in light of all the material facts, the parties have made their intention to contract and the terms of the contract known: *Ron Ghitter Property Consultants Ltd v Beaver Lumber C*o, 2003 ABCA 221 at para 9; *Matic et al v Waldner et al*, 2016 MBCA 60 at paras 55-57, leave to appeal to SCC refused, 37161 (19 January 2017).
>
> …
>
> The trial judge found as fact that there was an intention to contract. Whether parties have an intention to contract is assessed on the standard of an objective observer, the subjective state of mind of the parties is not relevant.
>
> …
>
> Essential terms of a contract must be determined with a "reasonable degree of certainty": *Ron Ghitter* at para 9.

[126] With respect to the change of plans in the fall of 2019 to include a kindergarten, the defendants say the plaintiffs agreed to the proposal to obtain accreditation for the Islamic kindergarten. In their written brief, the defendants suggest that Doaa obtained the accreditation through a not-for-profit company that was to be assigned to the plaintiffs.

[127] The defendants submit that the proposed share purchase agreement provided by Mr. Rachid in March 2020 substantially changed the terms which were originally contemplated by the parties when the verbal agreement was entered into. Therefore, the plaintiffs, not the defendants, breached the verbal agreement.

[128] The plaintiffs say that Doaa imposed a new condition on transferring the business to the plaintiffs, notwithstanding that she had already been paid in full for the shares of 209.

[129] On April 15, 2020 Doaa requested Ousama have an administration clause added to the agreement to confirm Doaa would operate the daycare *pro bono* for the first three months followed by a percentage of the profit.

[130] On April 29, 2020, Doaa told Ousama to have his lawyer confirm specific terms regarding Doaa's legal fees, payment of rent since September 2019, and compensation for managing the daycare.

[131] In that same communication, Doaa required Ousama to agree that the management of the kindergarten and prekindergarten in the daycare be through Doaa's own company and specified the allocation of the subsidy between her school and the daycare. Doaa stated that there is no negotiation with this condition.

[132] Ousama's response on April 29, 2020 was to remind Doaa of their agreement in the beginning and the conditions in place including the residency for Ousama and his family in exchange for the business, that Doaa would take care of the business for six months without anything in return, and that there were approximately 45 students registered. Ousama pointed out that he discovered this was not the case after Doaa had received the full amount of money. Ousama reminded Doaa that she agreed to hire a lawyer at his expense but now she was coming up with new conditions and compensations that she wanted to impose. When asked if she wanted to proceed with the sale and purchase process regarding the daycare between the lawyers, Doaa said yes, but that her lawyer would not contact Ousama's lawyer until her terms and conditions were agreed to.

[133] Doaa acknowledged this communication in her affidavit: "On April 29, 2020, I sent a lengthy text message to Ousama with a list of key items that, if addressed, would allow things to go forward."

[134] The plaintiffs submit that Doaa has unequivocally established in her own evidence her intention not to proceed with transferring the business for which Doaa had already been paid in full unless the plaintiffs agreed to new conditions, including allowing a company controlled by Doaa to operate the Islamic kindergarten and utilize the premises leased by 209 for her own financial benefit.

[135] The plaintiffs argue that even if there was a binding agreement reached in July 2019 and modified in the fall, Doaa clearly repudiated her own obligations arising from the contract such that there was a total failure of the consideration bargained for by the plaintiffs.

[136] Additionally, if there was an agreement, Doaa's subsequent attempt to negotiate better terms precludes her from now attempting to rely on any previous agreement reached between the parties. In refusing to honour the previous agreement, Doaa cannot rely on the existence of that agreement to provide a juristic reason for the enrichment of the defendants or to support estoppel by representation.

[137] The plaintiffs rely on Justice Romaine's analysis of repudiatory breach and the right to rescission in ***Baker v Warshawski***, 2010 ABQB 219 [***Baker***]. The Court found that a prospective purchaser was entitled to terminate a real estate purchase contract and to the return of the deposit. The vendors were not entitled to damages for the failure to close and their counterclaim was dismissed.

[138] At paragraph 63 of ***Baker***, Romaine J explains: "While there is considerable confusion and overlap in the case law with respect to the use of the term "recission" and the term "repudiatory breach," I adopt the term repudiatory breach in this decision to refer to the type of breach of contract that gives rise to an innocent party's right to terminate a contract or treat it as discharged by breach: *The Law of Contracts*, John D. McCamus, Irwin Law Inc, 2005 at page 617."

[139] The Court found there was a substantial breach of a contractual promise that the property would be in substantially the same condition as it was when the real estate purchase contract was accepted. At ***Baker*** paras 67 - 71, Romaine J explains the importance of contractual promises:

> … As noted by Professor McCamus the concepts of "promises" and "conditions" are commonly confused: supra, pgs. 624 and 625. An arrangement that expresses circumstances under which promises may be either enforceable or unenforceable is a condition, while the kind of undertaking that exists in this case, to deliver the property in substantially the same condition as when the contract was accepted, is an undertaking "that is subject to an understanding that its performance is a state of affairs that must exist if the other party's obligations are to be enforceable." While the "Conditions" in this contract are distinguishable as being non-promissory conditions that set out a state of affairs relating to the occurrence of something other than a contractual promise, the contractual promise to deliver property in substantially the same condition is an "innominate" term as such was characterized by Diplock, L.J. in *Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd.*, [1962] 2 Q.B. 26 (C.A.). The English Court of Appeal described these terms in the following language:
>
> > No doubt there are many simple contractual undertakings, sometimes express, but more often because of their very simplicity ("It goes without saying") to be implied, of which it can be predicated that every breach of such an undertaking must give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract. And such a stipulation, unless the parties have agreed that breach of it shall not entitle the non-defaulting party to treat the contract as repudiated, is a "condition." So, too, there may be other simple contractual undertakings of which it can be predicated that *no* breach can give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract; and such a stipulation, unless the parties have agreed that breach of it shall entitle the non-defaulting party to treat the contract as repudiated, is a "warranty."
> >
> > There are, however, many contractual undertakings of a more complex character which cannot be categorized as being "conditions" or "warranties." ... Of such undertakings, all that can be predicated is that some breaches will, and others will not, give rise to an event which would deprive the party not in default of substantially the whole benefit which it was intended that he

> should obtain from the contract; and the legal consequences of the breach of such an undertaking, unless provided for expressly in that contract, depend on the nature of the event to which the breach gives rise and do not follow automatically from a prior classification of the undertaking as a "condition" or a "warranty."

The *Hong Kong Fir* case was considered by the Alberta Court of Appeal in *First City Trust Co v. Triple Five Corp*. (1989), 1989 ABCA 28 (CanLII), 65 Alta LR (2d) 193 (C.A) at para. 56, where Stratton, J.A. commented that:

> The traditional test, in my view, can be readily reconciled with the so-called "third category" approach put forward in *Hong Kong Fir.* The approach which I believe to have been accepted by the authorities can be briefly summarized as follows: (1) the test enunciated by Bowen L.J. [in *Bentsen v. Taylor, Sons & Co*] remains the starting point, (2) the surrounding circumstances referred to in that test must include the commercial setting, and (3) if it cannot be determined by those considerations whether the parties intended the obligation in question to be a warranty sounding only in damages or a condition the breach of which would release the innocent party, then the basis for seeking out that intent should be as put forward by *Hong Kong Fir*, namely an assessment of the gravity of the event to which the breach gave rise.

It is not clear from this contract itself and the surrounding commercial circumstances whether the intention of the parties would best be carried out by treating the promise as a warranty or a condition precedent (the test set out in *Bentsen v. Taylor),* and the basis for seeking out that intention is best determined by the principles set out in *Hong Kong Fir.*

As set out by Professor McCamus at pages 634 - 636, *Hong Kong Fir* suggests a number of factors that can be applied to determine whether breach of this innominate undertaking should give rise to a right to repudiate the contract.

One is to consider the proportional effect of the breach on the total value of the performance being rendered by the party at fault, the "gravity" of the breach.

[140] Romaine J adopted the term repudiatory breach to refer to the type of breach of contract that gives rise to a right to terminate the contract. Based on the principles in the ***Hong Kong Fir*** case, the Court is to consider the proportional effect of the breach on the total value of the performance being rendered by the party at fault. There should be an assessment of the gravity of the breach in light of the surrounding circumstances including the commercial setting and the known purposes for which the contract was entered into by the party not at fault.

[141] Additionally, at para 74 of ***Baker***, "Professor McCamus notes that, where the breach gives rise to a reasonable belief by the innocent party that the other party is unreliable and therefore unlikely to perform acceptably in the future, this may tip the balance towards a repudiatory breach: *The Law of Contracts* at page 635".

[142] The potential purchaser in ***Baker*** also claimed she was entitled to rescind the contract on the basis of misrepresentation for failure to disclose a problem with respect to an encroachment. Romaine J states at para 77:

> While the traditional view is that a party negotiating a contract is not subject to a duty to disclose material facts to the other party, "there are exceptional circumstances in which ... non-disclosure is treated, in effect, as misrepresentation and provides a basis for recission of the alternate agreement:" McCamus at pg. 331. Partial disclosure of true facts that create a misleading impression is one such circumstance: McCamus at pg. 322, referring to *Nottingham Patent Brick and Tile Co. v. Butler* (1886), 16 Q.B.P. 778 (C.A.); *Doon v. Wilks* (1996), 5 R.P.R.(3d) 282 (B.C.S.C.); *Souder v. Wereschuk* (2004), 2004 ABCA 339 (CanLII), 245 D.L.R. (4th) 385 (Alta C.A.).

[143] At para 80, Romaine J lists the factors relevant to the issue of whether the potential purchaser can properly claim rescission as a remedy for misrepresentation: the misrepresentation was material in the circumstances; the misrepresentation caused or induced the purchaser to enter into the contract; the attempt to rescind the agreement occurred before the contract was fully executed or performed, thus removing a traditional impediment to recession; and whether the misrepresentation by non-disclosure may be characterized as innocent or was there knowledge.

[144] Romaine J further found that the exclusion clause of the contract "that there are no other warranties, representations or collateral agreements" did not preclude a claim for misrepresentation. This discussion is at paras 82 to 87 of ***Baker***. The Court concludes that paragraph 88:

> In summary, justice requires that rescission be available to Ms. Baker in this case, whether it is based on principles of repudiatory breach of contract or misrepresentation. Such relief is not barred by an effective exclusionary clause.

[145] Given the Court's decision on the claim for restitution, Romaine J found it not necessary to address the counterclaim and dismissed it.

[146] Justice Graesser looked at the principles of repudiation and recission in an action for damages for breach of a construction contract in ***Gaw v Yellowhead County***, 2018 ABQB 271, [***Gaw***] stating at paras 68 and concluding para 79:

> It seems to me that this case can and should be decided on the principles surrounding repudiatory breach of contract. For Mr. Gaw to succeed, he must be able to show that the County was in breach of contract, and that the "failure by the (County) to perform a primary obligation had the effect of depriving the other party of substantially the whole benefit which it was the intention of the parties that he should obtain from the contract," to quote from ***Photo Production***.

Analysis and conclusion

Summary of the facts

[147] I have considered the facts as set out in the record and applied the law of unjust enrichment, estoppel by representation, and repudiation, rescission and misrepresentation to

conclude that summary judgment is available to the plaintiffs for the return of their investment and for the dismissal of the defendants' counterclaim.

[148] I will summarize the material facts and provide my analysis and conclusion of how the law applies to those facts.

[149] When Tark and Doaa met in June 2019, it was understood that Tark was interested in buying the daycare business that Doaa was selling known as "Kid's Village" located on Princess Elizabeth Ave in Edmonton, AB. Doaa represented that if the purchase price was paid in July, the daycare would open in September, with 43 children already lined up.

[150] The sale price for the purchase of the shares of 209 for the daycare business was set at $630,000 with a five-month commitment from Doaa to assist in managing the business.

[151] A draft share purchase agreement was provided by Doaa. Tark and Ousama arranged for the purchase price to be paid, including some funds for rent, operating costs and utilities. In total, between them, Tark and Ousama paid Doaa, 209, or her holding company $642,316.97 by August 30, 2019.

[152] Although Tark made the payments on the understanding that the transferring of ownership of the daycare would be completed in September 2019, Doaa says that because the full purchase price was not paid in July, she was not able to get the licence to have the 43 children start in September. Doaa anticipated submitting a name change for the application she had already submitted and to be licenced in 30 days.

[153] At the end of September 2019, Doaa advised Tark of the potential for converting 209's daycare into an Islamic kindergarten and daycare. Around October 16, 2019, Doaa advised Tark that this was in the best interests of 209. The name of the daycare would change to Kids' Islamic Village. A new Alberta Education accreditation would be required to operate the kindergarten at a cost of approximately $200,000.

[154] The parents of the 43 children who had expressed interest in the Kids Village daycare were contacted and told the daycare would not be opening as expected on October 1, or by the first week of November at the latest, as the program had changed to Islamic and Arabic and there would be delay for the approval from Alberta Education.

[155] Doaa confirmed that the childcare licence for the daycare was approved by November 14, 2019, which would have allowed 209 to commence operations for 113 children. However, 209 could not immediately commence operations as the childcare licence did not allow for operation as an Islamic school and 209 had not yet been approved or the daycare subsidies.

[156] Doaa took the necessary steps towards accreditation for the Islamic school by incorporating the non-profit company CACES on December 11, 2019 and submitting an application package to Alberta Education on January 20, 2020.

[157] Digital graphic flyers were prepared to jointly advertise the Kids Village Daycare and Out of School Care starting March 2020 and the Islamic kindergarten at Kids Village for the 2020/21 term. An open house was held on February 2 and 8, 2020 leading to confirmed enrolments. The daycare opened for business on March 2, 2020.

[158] Tark paid the landlord directly for the overdue March rent on March 7, 2020 in the amount of $10,471.

[159] Tark and Ousama retained Mr. Rachid to prepare the share purchase agreement and complete the purchase of the daycare business. Doaa communicated with Mr. Rachid directly, providing him with documents as requested. On March 25, 2020, Mr. Rachid sent the draft purchase share agreement and schedule for closing to Doaa for her or her lawyer's review. The purchase price was set at $780,000, being the $630,000 agreed to for the daycare plus $150,000 for the school. Doaa asked for time to think about completing the documents required to transfer the shares to Tark. Doaa stated that if Tark did not pay her the remaining $168,000 on the closing date, she would transfer the daycare business only but not the school business.

[160] Doaa then engaged in communication with Ousama directly, accepting his offer to pay her legal fees, but advising that her lawyer would not contact Mr. Rachid until her terms and conditions were agreed to and confirmed in writing. Doaa required an administration clause to be added to the agreement to provide for compensation for her managing the daycare. In their communication on April 29, 2020, Doaa made it clear to Ousama that the kindergarten would be run through her own company and that was not negotiable.

[161] On June 25, 2020, Mr. Rachid was advised that 209 had retained a lawyer with respect to Tark's interest in purchasing the shares. On June 29, 2020, Mr. Rachid sent a letter to the lawyer demanding the return of the money his clients had paid as notwithstanding numerous requests, Doaa and 209 had failed, neglected or refused to complete the share purchase transaction.

[162] On July 14, 2020, Doaa's lawyer stated that Doaa remained willing and able to complete the transaction as contemplated by the verbal agreement between the parties, including payment of an additional $140,923.34 to cover the rent, operating costs and utilities paid between August 2019 and February 2020.

[163] On July 16, 2020, Mr. Rachid caused this action to be commenced for damages for breach of contract. This application for summary judgment and summary dismissal of the counterclaim was filed October 3, 2022.

Summary judgment

[164] In keeping with the principles of ***Weir Jones***, I find that the record allows me to make the necessary findings of fact and apply the law to achieve a fair and just result through summary disposition. Although there may be disagreement on some of the facts and concerns with credibility on some matters, there is no genuine issue requiring a trial.

[165] I have confidence in the state of the record such that I am prepared to exercise the judicial discretion to summarily resolve the main dispute between the parties.

[166] The plaintiffs have shown there is no defence to their claim for return of the monies paid to the defendants; the defendants have not shown there is merit to their counterclaim.

[167] I find it unnecessary to decide on the matter of Doaa's responsibility for Ousama's immigration or to determine if Doaa's representations were fraudulent.

Unjust enrichment

[168] Ousama's deposit of $400,000 USD went into the account of defendant holding company; some was transferred to 209; the balance remained in the holding company as repayment for the loan from the holding company to 209 to build the daycare. Tark's payments in August 2019 were to 209 and in March 2020, to the landlord.

[169] The plaintiffs have paid a total of $642,316.97 to the defendants. Tark paid $10,471 directly to the landlord. The plaintiffs have nothing to show for this money, to their detriment. The defendants have correspondingly benefited from full payment of the purchase price and the rental payment to the landlord.

[170] Taking the principled approach to the doctrine of unjust enrichment as articulated in ***Peel***, I find there is no juridical reason for the defendants' retention of this benefit. Justice does not permit the defendants to retain the monies paid by the plaintiffs.

[171] In all the circumstances, I find that there was never an enforceable agreement for the purchase and sale of the shares of 209 such that the transfer of the daycare business could be completed. Therefore, the defendants cannot rely on the existence of a share purchase and sale agreement to provide a juristic reason which justifies the defendants' enrichment.

[172] Neither the draft share purchase agreement initially provided by Doaa or the draft later provided by the plaintiffs' lawyer were finalized and signed.

[173] The oral agreement that the shares in 209 would be transferred for a set purchase price was fraught with misrepresentations and subsequent modifications.

[174] The plaintiffs' expectation that upon payment of the purchase price the ownership of the daycare would be transferred to them in September 2019 was not met. Rent, utilities and other operating costs continued to mount while Doaa pursued accreditation for an Islamic kindergarten.

[175] Ultimately, after the daycare finally opened in March 2020, the parties were unable to agree on the specific terms to complete the share purchase and sale transaction.

[176] The issue of who would operate the kindergarten within the daycare space was unresolved. Compensation for Doaa managing the daycare was not agreed to. An agreement on reimbursement for the rent, utilities, and other operating expenses and for the costs of accreditation was not reached.

[177] More fundamentally, the plaintiffs came to realize that Doaa had sold this daycare business to two prior purchasers, resulting in litigation and the potential for the shares of 209 to be encumbered. Other litigation has come to light affecting Doaa and her daycare consulting business.

[178] Additionally, the tradename under which the daycare was to operate was identical to the name of an existing corporation already registered as Kids Village Daycare Ltd. At the time Doaa was meeting with Tark in June 2019, a lawsuit had been commenced by Kids Village Daycare Ltd against Doaa and 209 for the return of a $150,000 deposit. That same corporation now operates Kids Village Daycare at the Princess Elizabeth Avenue location.

[179] I find justice does not permit the defendants to retain the monies paid by the plaintiffs. The plaintiffs are entitled to summary judgment, on the basis of unjust enrichment, against the defendants for the full purchase price paid and for the rent paid directly to the landlord.

Estoppel by representation

[180] Although not plead, the defendants raise the defence of estoppel by representation. The defendants relied on the plaintiffs' representation that they intended to purchase the daycare to their detriment. Relying on the advance of funds, the defendants took steps to open the daycare

business, expending considerable time and resources towards the performance of the share purchase agreement. By failing to take over conduct of the daycare and by asking for their money back, the plaintiffs have caused a corresponding detriment to the defendants.

[181] I have considered the facts surrounding the sale of this daycare as they unfolded, and the roles played by the parties in light of the discussion of estoppel by representation set out by the Court in ***Muhammad***.

[182] The essence of estoppel is representation by words or conduct which induces detrimental reliance. The defendants can establish estoppel by representation only where they have acted on the plaintiffs' representation to their detriment. For the plea to succeed, it must be unjust or unfair to allow the plaintiffs to resile from completion of the transaction.

[183] Doaa's evidence is that she identified these commercial premises located on Princess Elizabeth Avenue in 2018 as a good location for a daycare business. 209 entered into a commercial lease effective May 31, 2018; construction began in the fall of 2018 and by May 2019, the daycare was nearly ready for licensing and operation, and Doaa actively sought to sell 209. All of this took place, including two previous failed purchases, before Tark met Doaa.

[184] 209 maintained the leased premises until the daycare was opened in March 2020. The delay in opening was related to the decision to pivot to a combined Islamic daycare and kindergarten, requiring a change in daycare licence and accreditation through Alberta Education.

[185] Doaa incorporated the non-profit corporation CACES for the purpose of accreditation and insisted on retaining the kindergarten school within the daycare premises.

[186] I find that Doaa and 209 were not acting only on the plaintiffs' representation that they would purchase the shares of 209, but also for their own gain.

[187] Considering the problems with the litigation and Kids Village tradename, it would not be unjust or unfair to allow the plaintiffs to resile from completion of the share purchase transaction and seek the return of their money.

[188] For these reasons, the defendants cannot rely on the defence of estoppel by representation.

Rescission, repudiation and misrepresentation

[189] The defendants maintain that the plaintiffs and Doaa arrived at a consensus *ad idem* on the essential elements of a contract in July 2019, coupled with part performance of the oral agreement by payment of the purchase price and Doaa's actions in licencing and opening the daycare.

[190] The defendants submit that the three requirements for a legally enforceable contract, being the intention to contract, agreement on the essential terms, and that the terms are sufficiently certain, have been met on the standard of an objective observer. See ***Syncrude***.

[191] The defendants say the plaintiffs agreed to the proposal in the fall of 2019 to include an Islamic kindergarten with the daycare and suggest that the accreditation obtained through Doaa's not-for-profit company, CACES, was to be assigned to the plaintiffs.

[192] However, the suggestion that the accreditation would be assigned is not supported by any communication with the plaintiffs and is in direct contradiction to Doaa's communication with Ousama that she would maintain the school.

[193] The defendants argue that it was the plaintiffs not the defendants who breached the agreement between the parties as the proposed share purchase agreement drafted by Mr. Rachid substantially changed the terms which were originally contemplated by the parties when the verbal agreement was entered into.

[194] However, the defendants do not identify what was substantially changed by the March 2020 draft share purchase agreement. Doaa failed to provide the share transfer documents requested by the plaintiffs' lawyer, failed to secure the Kids Village Daycare tradename, and failed to advise that the application for accreditation of the Islamic kindergarten was made by her company, not 209.

[195] Justice Romaine's analysis in ***Baker*** and conclusion that there was a substantial breach of a contractual promise is applicable to this share purchase agreement. Based on the principles set out in the ***Hong Kong Fir*** case described in ***Baker***, I am to assess the gravity of a breach of contract in light of the surrounding circumstances to determine if it is the type of breach that gives rise to the right to terminate the contract, that is, if there has been a repudiatory breach.

[196] The balance may be tipped towards a repudiatory breach where the breach gives rise to a reasonable belief by the innocent party that the other party is unreliable and therefore unlikely to perform acceptably in the future.

[197] Additionally, Romaine J lists the factors relevant to the issue of whether a potential purchaser can claim rescission as a remedy for misrepresentation, including circumstances in which non-disclosure is treated, in effect, as misrepresentation.

[198] The original transaction between the plaintiffs and the defendants was for the purchase of shares in the numbered company operating a daycare business. At the time of entering into the agreement, Doaa made representations that upon payment of the purchase price, the daycare would be operational with 43 children, with licencing for 113 children expected.

[199] The daycare was to be operated as Kids Village Daycare and Out of School Care. However, Doaa did not disclose that Kids Village Daycare Ltd had already been registered at Alberta Corporate Registry by a former potential purchaser.

[200] In the fall of 2019, prior to the daycare opening, Doaa made plans for 209 to open as an Islamic daycare and kindergarten. This required an update to the daycare licence and for accreditation through Alberta Education.

[201] When the daycare opened in March 2020, the plaintiffs retained Mr. Rachid to complete the transaction. Mr. Rachid prepared a draft share purchase agreement to reflect the parties' verbal agreement for the purchase of the shares of 209 and the daycare and kindergarten business. The share purchase agreement included standard terms and conditions. The usual closing documents were requested.

[202] Doaa was provided with the funds and asked to register the Kids Village Daycare trademark. She provided an incomplete Nuans search instead.

[203] Doaa was asked to provide the documents related to the kindergarten accreditation. She provided an incomplete application form which did not disclose that the application had been made by her non-profit corporation, CACES, not 209. Doaa did not disclose the sublease she had prepared for 209 to accommodate the kindergarten.

[204] The usual representation in a share purchase agreement that there are no actions against or affecting the vendor or the corporation that would be expected to have a material adverse effect on the transfer of the purchased shares was made in both the draft agreement provided by Doaa and the draft prepared by Mr. Rachid. Doaa did not disclose that she and 209 were in litigation directly related to this daycare business.

[205] The plaintiffs say they would not have agreed to purchase Kids Village Daycare had they known about the claim against the company. Doaa acknowledged that failing to disclose the litigation in light of the representation in her draft agreement would be deceit.

[206] The defendants suggest that Doaa would assign the kindergarten accreditation obtained by her corporation to 209. However, that suggestion is inconsistent with her plans to sublease a portion of the daycare premises to operate the kindergarten through her own company.

[207] I find the non-disclosure of the litigation involving Doaa and 209, of the existence of the previously registered Kids Village Daycare Ltd, and of the true nature of the kindergarten accreditation and operation to be misrepresentations for which the plaintiffs can properly claim rescission as a remedy.

[208] These non-disclosures or misrepresentations also constitute repudiatory breaches. When I consider the proportional effect of these breaches on the total value of the share purchase agreement, I find they are of such gravity that they give rise to the plaintiffs' right to terminate the agreement.

[209] I conclude, as did Romaine J in ***Baker***, that justice requires that rescission be available to the plaintiffs in this case, whether based on principles of repudiatory breach or misrepresentation. The plaintiffs are entitled to the return of the full purchase price and the rent paid on behalf of 209 in March 2020.

[210] Similarly, in keeping with the analysis of Graesser J in ***Gaw***, I find that this case can and should be decided on the principles of repudiatory breach of contract. In this case, the plaintiffs succeed as they have been able to show that the defendants were in breach of contract and that the failure by the defendants to perform a primary obligation had the effect of depriving the plaintiffs of substantially the whole benefit which it was the intention of the parties that the plaintiffs should obtain from the contract.

[211] The plaintiffs were to have received the shares of 209, free of litigation claims and fully able to operate under the tradename of Kids Village Daycare. The defendants failed to meet those obligations, thereby depriving the plaintiffs of substantially the whole benefit of the share purchase agreement. The same analysis and conclusion apply to the failure of the defendants to include the Islamic kindergarten in the purchase of the shares of 209.

[212] Given that the plaintiffs are entitled to restitution based on repudiation and rescission, there is no agreement and there can be no counterclaim by the defendants for rent, utilities and operating costs incurred by 209 in leasing the space and setting up the daycare. There is no merit to the counterclaim for the costs of accreditation on the same basis. In addition, it was Doaa's company CACES which incurred those costs with the ultimate intention that Doaa would operate the kindergarten occupying a portion of the premises leased to 209.

[213] The plaintiffs shall have judgment against the defendants, jointly and severally, in the amount of $652,787.97, being the purchase price paid of $642,316.97 plus the March 2020 rent payment of $10,471.00.

[214] The plaintiffs are entitled to prejudgment interest on these amounts from the date paid to today's date.

[215] The plaintiffs are entitled to costs under the appropriate column of schedule C for the action and this summary judgment application. If the parties cannot agree on costs, they should be assessed.

[216] I am grateful for the timely submission of comprehensive materials by both Counsel. I regret not being able to have this decision released sooner.

Heard on the 9th day of May, 2023, followed by written submissions.
Dated at the City of Edmonton, Alberta this 27th day of February, 2025.

L.R. Birkett
A.J.C.K.B.A.

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