

# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *St. Alcuin College for the Liberal Arts  
Society v. Montaigne Group Ltd.*,  
2025 BCCA 370

Date: 20251029  
Docket: CA50422

Between:

**St. Alcuin College for the Liberal Arts Society d.b.a.  
Alcuin College**

Appellant  
(Appellant/Plaintiff)

And

**Montaigne Group Ltd.**

Respondent  
(Respondent/Plaintiff)

Before: The Honourable Mr. Justice Willcock  
The Honourable Justice Winteringham  
The Honourable Justice Gomery

On appeal from: An order of the Supreme Court of British Columbia, dated January 9, 2025 (*Montaigne Group Ltd. v. St. Alcuin College for the Liberals Arts Society*, 2025 BCSC 68, Vancouver Docket S233197).

Counsel for the Appellant:

A. Cocks  
G. Ringkamp

Counsel for the Respondent:

A.J. Piercy

Place and Date of Hearing:

Vancouver, British Columbia  
September 22, 2025

Place and Date of Judgment:

Vancouver, British Columbia  
October 29, 2025

**Written Reasons by:**

The Honourable Justice Gomery

**Concurred in by:**

The Honourable Mr. Justice Willcock  
The Honourable Justice Winteringham

**Summary:**

*The appellant seeks to set aside a chambers judge’s order which dismissed an application for summary judgment and an application to cancel a certificate of pending litigation (“CPL”) on the basis of hardship and inconvenience. Held: appeal allowed for the limited purpose of allowing the appellant to reapply in the Supreme Court, on fresh materials, to cancel the CPL. The appeal is otherwise dismissed. The chambers judge did not err in determining that there was a genuine issue for trial and summary judgment was therefore not available. Although it is manifestly clear that the respondent is not legally entitled to specific performance of its claim, it is not similarly clear that the respondent is not otherwise entitled to an equitable interest in the appellant’s property. A contingent equitable interest dependent on subdivision may exist. Further, the respondent’s potential claim to an equitable interest is not precluded by s. 73 of the Land Title Act, because subdivision is not a true condition precedent in this case.*

**Reasons for Judgment of the Honourable Justice Gomery:**

**Overview**

[1] Alcuin College operates a private school for students in grades K to 12 in North Vancouver. It acquired property on which it proposed to construct a new school building. It contracted with Montaigne Group Ltd. to build the school. They entered into a bespoke construction contract in late 2020.

[2] The contract was unusual in several respects, but especially in the provisions for Montaigne’s remuneration. Alcuin had planned for and obtained conditional approval to build a three-storey building. The contract contemplated that the parties would work together to add a fourth floor to the proposed building. The building would be stratified so that the fourth floor could be held under separate ownership, and it would be transferred to Montaigne as its payment for the work it was to perform. The contract described the fourth floor as the “Montaigne Amenity Space”.

[3] The contract contemplated construction of the building for a fixed hard cost to Alcuin of \$6.8 million. The project suffered cost overruns. Alcuin says that Montaigne breached the contract. Montaigne says that the overruns resulted from extra-contractual demands by Alcuin.

[4] In February 2023, Alcuin had spent \$6.5 million and Montaigne advised Alcuin that \$3.7 million more would be required. Montaigne proposed to cover \$1.7 million of this additional cost, leaving Alcuin to pay an additional \$2 million. Alcuin declined the proposal.

[5] Construction came to a halt with the building incomplete. Montaigne sued and obtained a certificate of pending litigation (“CPL”). Since then, the project and the litigation have been at an impasse. Alcuin says that it has terminated the contract pursuant to its terms, and that it would retain another contractor to finish the work, but the CPL prevents it from obtaining the necessary financing.

[6] In 2023, Alcuin brought an application to strike the CPL on the basis that Montaigne had not properly pleaded a claim for an interest in land sufficient to support a CPL. This application failed: *Montaigne Group Ltd. v. St. Alcuin College for the Liberal Arts Society*, 2023 BCSC 1257 [*Montaigne*].

[7] In late 2024, Alcuin brought a further application with the object once again of removing the CPL. This time it sought summary judgment dismissing those portions of Montaigne’s amended notice of civil claim that support the CPL, and cancellation of the CPL as a consequence of the dismissal. Alternatively, it sought an order that the CPL be cancelled on the basis of hardship and inconvenience. The chambers judge dismissed Alcuin’s application on both grounds (*Montaigne Group Ltd. v. St. Alcuin College for the Liberal Arts Society*, 2025 BCSC 68), and it appeals the dismissal.

[8] For the reasons that follow, I would dismiss the appeal of the judge’s refusal of the summary judgment of the application and cancellation of the CPL on that basis. While my analysis differs from the judge’s in some respects, I conclude that Montaigne has a claim for an equitable interest in the Montaigne Amenity Space, contingent upon construction of the building to the point of subdivision, and it is not manifestly clear that the claim is bound to fail. I would allow the appeal in respect of the cancellation application to a very limited extent by granting Alcuin liberty to apply again in the Supreme Court on fresh materials.

**Factual background**

[9] In 2017, Alcuin had acquired the property upon which it wished to build. It had obtained conditional approval from the City of North Vancouver to construct a three-storey building.

[10] Ryan Deakin is a principal of Montaigne. In 2019, he was the parent of two students at Alcuin College. He became aware that Alcuin was trying to find someone to build the school.

[11] The property is zoned to permit what is called “assembly use”. Mr. Deakin was interested in acquiring property zoned for assembly use with a view to operating it as an event space. Mr. Deakin proposed working with Alcuin to obtain zoning permission for and build a four-storey building for a fixed price of \$6.8 million in hard costs. Alcuin agreed to the proposal with Montaigne as the contractual counterparty.

[12] The contract is dated December 7, 2020. It appears to have been professionally drafted. While the contract describes itself as a “joint venture agreement” or “JVA”, and the parties and chambers judge adopted that terminology, clause 9.11 denies the existence of a joint venture, stating that “nothing contained in this Agreement ... shall be deemed to ... create a partnership or joint venture among the parties for any purpose”.

[13] The contract contemplates, among much else, zoning discussions with the City for the potential upzoning of the Montaigne Amenity Space. Alcuin is required to do all things necessary to permit Montaigne to stratify the Montaigne Amenity Space in order that it might be conveyed to Montaigne.

[14] Montaigne obtained the City’s consent to upzone the property to permit construction of the fourth floor.

[15] Construction took place until the spring of 2023, when relations between Alcuin and Montaigne broke down. Who is at fault for the breakdown is contested.

[16] Alcuin says that it terminated the contract pursuant to clause 5.3.1 (discussed below) on April 17, 2023. Montaigne denies that the contract was validly terminated and maintains that it is still in force.

[17] As of April 2023, Montaigne’s evidence as to the state of construction is that excavation is substantially complete, 95% of concrete has been poured, 50% of required electrical and mechanical work is done, 70% of interior framing is done on levels one and two, and 80% of exterior boarding work has taken place on levels one and two. The Montaigne Amenity Space on the fourth floor has not been constructed.

[18] Montaigne has been excluded from the building site and efforts to complete the building have been at a standstill since April 2023.

[19] Stratification of the Montaigne Amenity Space would require the City’s consent. It is common ground that significant further work is required before Montaigne or Alcuin would be in a position to seek the City’s consent to stratification. There is a conflict in the evidence as to the cost of the required work. Montaigne estimates the cost at \$356,000. Alcuin’s expert says that it would be more than that.

[20] The contract notes construction financing of the building project by Vancouver City Savings Credit Union (“VanCity”). The financing is secured by a mortgage against the property. VanCity takes the position that it will not advance any more funding for the project while the CPL remains registered against the property.

## **Legal background**

### **Summary judgment**

[21] There is no dispute as to the following principles, acknowledged by the judge at paras. 41–50 of his reasons, governing applications for summary judgment:

- a) Summary judgment is only available in the absence of a triable issue, described in *Supreme Court Civil Rule 9-6(5)* as a “genuine issue for trial”;

- b) A defendant seeking summary dismissal bears the evidentiary burden of showing that it is “plain and obvious” or “manifestly clear” that there is no genuine issue of material fact requiring a trial: *Canada (Attorney General) v. Lameman*, 2008 SCC 14 at paras. 10–11; *Beach Estate v. Beach*, 2019 BCCA 277 at paras. 48, 65, 67;
- c) The judge may not weigh evidence beyond determining whether it is incontrovertible: *Beach Estate* at para. 49;
- d) Summary judgment, as opposed to summary trial, is not well suited to determining novel points of law: *L.D. (Guardian ad litem of) v. Provincial Health Services Authority*, 2012 BCCA 491 at para. 12.

### **Certificates of pending litigation**

[22] Section 215(1)(a) of the *Land Title Act*, R.S.B.C. 1996, c. 250, authorizes registration of a CPL by a person who has commenced a proceeding who is “claiming an estate or interest in land”. Sections 252 to 257 of the *Act* authorize the court to order cancellation of the registration of a CPL on various grounds. The two grounds with which this appeal is concerned are:

- a) where the action or the claim to an estate or interest in land within the action has been dismissed: s. 254; and
- b) on the basis of hardship and inconvenience experienced or likely to be experienced by the registration: s. 256(1)(b).

### **Section 73 of the *Land Title Act***

[23] Section 73 of the *Land Title Act* limits the ability of landowners to subdivide their land “[e]xcept on compliance with this Part”. In particular, an owner must not agree to subdivide by transferring a part of a parcel, or by leasing a part of a parcel for life or for a term exceeding three years: s. 73(1). A written instrument executed in contravention of the prohibition cannot be registered on title: s. 73(6).

[24] In *Yi Teng Investment Inc. v. Keltic (Brighthouse) Development Ltd.*, 2019 BCCA 357 [*Yi Teng #1*] at para. 41, this Court held that, because of s. 73, a claim for an immediate interest in a portion of an unsubdivided lot conferred by contract is a claim for an interest in land unknown to law that cannot serve as the basis for registering a CPL.

**The judgment under appeal**

[25] The chambers judge addressed both Alcuin's application for summary judgment and its argument, in the alternative, for removal of the CPL under s. 256 of the *Land Title Act* on the ground of hardship and inconvenience.

[26] Alcuin's argument to the chambers judge for summary dismissal of Montaigne's claim for an interest in land focused on the availability of specific performance. It contended that specific performance of the contractual commitment to convey the Montaigne Amenity Space is unavailable because further construction is required and submitted that, as the claim for specific performance is bound to fail, Montaigne does not have an equitable interest in the property. Alcuin relied on *CareVest Capital Inc. v. CB Development 2000 Ltd.*, 2007 BCSC 1146, and *bcIMC Construction Fund Corporation v. Chandler Homer Street Ventures Ltd.*, 2008 BCSC 897.

[27] Montaigne argued that specific performance may be available even where additional steps must be taken by the party who is subject to an order for specific performance to obtain a subdivided parcel, citing *Dynamic Transport Ltd. v. O.K. Detailing Ltd.*, [1978] 2 S.C.R. 1072. It distinguished *CareVest* and *bcIMC* on several grounds, including among them a contention that, under the contract, Montaigne had an equitable interest in the Montaigne Amenity Space arising from the express terms of the contract.

[28] The chambers judge identified *CareVest* and *bcIMC* as cases involving pre-sale contracts for the purchase of units in large residential development projects. In both cases, the court held that specific performance of the pre-sale contracts would be unavailable, because construction was not yet complete. The judge contrasted

*Dynamic*, in which specific performance of an unsubdivided part of a parcel of land was ordered on the basis of an implied term requiring the owner to apply for subdivision. He was unable to conclude, on an application for summary judgment, that specific performance would be unavailable. He stated:

[63] Ultimately, I agree with Montaigne that *bcIMC* and *CareVest* cases are, at least arguably, factually and legally distinct. They are not directly applicable to the case at bar. At the very least, their application, and their interaction with *Dynamic Transport*, is not clear cut, especially in the context of the unique terms and conditions of the JVA. ... Where the contract envisions a high degree of cooperation to achieve stratification, and where the contract appears to contemplate the subsistence of an interest in the Amenity Space post-termination – I find the terms of the JVA create a materially distinct factual matrix that must be determined at trial. It is not clear that an order for specific performance would give rise to a set of obligations on the parties that was not envisioned when the contract was formed. Mutual participation in the stratification process was expressly envisioned by the parties.

[29] The judge further accepted Montaigne's submission that it might arguably claim an equitable interest in land under the terms of the contract, even if specific performance was unavailable. He stated:

[64] The other related legal dispute is based in [Alcuin's] conclusory statement that a purchaser cannot have any equitable interest in land, including by way of a trust or unjust enrichment, without a specifically performable contract, relying once again on *bcIMC*. In my view, it is not plain and obvious that the application of *bcIMC* would result in the dismissal of all of Montaigne's equitable claims.

[30] Turning to Alcuin's application to cancel the CPL on account of hardship, the judge rejected the application on two grounds. First, he was persuaded that, because the availability of specific performance is a triable issue, cancellation under s. 256 of the *Land Title Act* would be inappropriate. Second, he viewed Alcuin's evidence of hardship as insufficient in the circumstances.

[31] In his written reasons for judgment at para. 98, the judge stated that Alcuin would have liberty to apply again under s. 256 upon better evidence of hardship or inconvenience. The provision for liberty to apply was not included in the entered order of the court, which simply states:

2. The defendant's application to cancel the Certificate of Pending Litigation is dismissed.

### **Overview of the issues**

[32] In its factum, Alcuin alleges that the chambers judge committed two legal errors: misapplying the law of specific performance in addressing the application for summary judgment; and failing to consider issuing a tailored equitable CPL cancellation order in assessing whether to remove the CPL on grounds of hardship and convenience.

#### **The summary judgment application**

[33] In oral argument, both parties recognized that the judge's dismissal of the application for summary judgment raises legal issues apart from the application of the law of specific performance.

[34] Having regard to the judge's reasons, arguments advanced, and authorities cited, in my view, the summary judgment application engages consideration of the following issues, in each case having regard only to facts incontrovertibly established in Alcuin's favour by the evidence:

1. Is it manifestly clear that Montaigne is not legally entitled to specific performance of its claim to recover the Montaigne Amenity Space?
2. Apart from specific performance and s. 73 of the *Land Title Act*, is it manifestly clear that Montaigne is not legally entitled to an equitable interest in Alcuin's property?
3. Is Montaigne's potential claim to an equitable interest excluded by s. 73 of the *Land Title Act*?

#### **The s. 256 "hardship and inconvenience" application**

[35] Alcuin's complaint about the judge's dismissal of its alternative application for an order cancelling the CPL on grounds of hardship and inconvenience is that the judge did not address a possibility put forward in its written argument on the

application. Alcuin proposed that the judge might make a tailored cancellation order through which Montaigne could fund the work required to bring the project to the point where subdivision would be possible and, upon achieving subdivision, would register a CPL over the Montaigne Amenity Space in place of the existing CPL. Alcuin maintains that the existence of this possibility should bear on an assessment of hardship and inconvenience.

[36] Because the reasons do not address the possibility of a tailored cancellation order, it is not clear what the judge decided in this regard. Perhaps the judge considered that he need not address Alcuin's argument for a tailored cancellation order because it was not advanced in its notice of application. Perhaps he thought that the possibility would be better advanced on a further application for cancellation that he intended would be permitted, though the entered order does not so provide. Perhaps he considered, as Montaigne submits, that his finding that hardship was not made out was a full answer to Alcuin's claim for a cancellation order, tailored or otherwise.

[37] I would frame the issue arising from Alcuin's argument broadly as follows:

4. Did the judge err in law or in principle in refusing Alcuin's application for a tailored cancellation order?

**Standard of review**

[38] As framed, issues 1 to 3 engage questions of law, reviewable on a standard of correctness.

[39] Issue 4 may be viewed as involving a question of the adequacy of the judge's reasons. This would be a question of law, reviewable on a standard of correctness. If the basis of the decision can be discerned, issue 4 may be viewed as involving a challenge to an exercise of the judge's discretion under s. 256 of the *Land Title Act*. In that case, the standard of review is deferential, requiring a demonstration of error such as: by giving no or insufficient weight to relevant considerations; as the product of misdirection in law or in principle; or because the decision is so clearly wrong as

to amount to an injustice: *Penner v. Niagara Regional Police Services Board*, 2013 SCC 19 at para. 27.

**Analysis**

**1. Is it manifestly clear that Montaigne is not legally entitled to specific performance of its claim to recover the Montaigne Amenity Space?**

[40] In considering this issue, we must assume that Montaigne’s evidence could be accepted at trial so that the Court could conclude that Montaigne was not in breach in the spring of 2023 and Alcuin had no right to terminate the contract which remains in force. The chambers judge considered that specific performance might be available to Montaigne, permitting it to insist on a conveyance of the Montaigne Amenity Space, following stratification of the building.

[41] In my opinion, the judge erred in law in concluding that this contract could be specifically enforced for two reasons. First, the order would impose upon Alcuin substantial obligations not contemplated in the contract. Specific performance is a remedy that compels the performance of existing contractual obligations. It cannot serve as a vehicle for the creation of new obligations. Second, the order would offend the general principle that specific performance will be refused “where performance of the defendant’s obligation would require a complex series of acts or the maintenance of an ongoing relationship”: The Hon. Robert J. Sharpe, *Injunctions and Specific Performance* (Toronto: Thomson Reuters) (loose-leaf updated 2024) at 7:11.

[42] The following provisions of the contract are pertinent:

- Clause 3.1 requires each party to cooperate with the other to pursue the aims and pursuits of the contract.
- Clause 3.7 states that the construction budget for hard costs shall not exceed \$6.8 million. It continues:

This Budget shall be fixed as the maximum sum Alcuin will be liable to pay to construct Alcuin’s School and any shortfall in excess of the Budget shall be

borne exclusively by Montaigne. Alcuin shall also pay its soft costs relating to Alcuin's School, save and except for soft costs relating to the development, approval, stratification, and all other related costs to the planning and construction of the Montaigne Amenity Space which shall be borne by Montaigne.

- Clause 3.11 contemplates "the subdivision of the Alcuin Lands into Alcuin's School and the Montaigne Amenity space" at a date to be chosen by Montaigne at least 180 days following execution of the contract.
- Clause 3.12 requires the parties to jointly engage a strata lawyer to create "ownership, governance, management and operational rules relating to the Montaigne Amenity Space" whose overall tenor and requirements "should prioritize Alcuin School's reputation and ensure that its operational risk is always minimized". Clause 4.2 refers again to the document to be prepared by the strata lawyer and specifies that "each party shall have the opportunity to obtain independent legal advice concerning same". Clause 4.3 elaborates further:

The parties agree to consent to adopt all reasonable suggestions from the strata property lawyer that further protect Alcuin's reputation, campus or student safety and risk mitigation. In addition to the foregoing, Montaigne expressly agrees to consent to terms that address the Montaigne Amenity Space's operational use, opening and closing times, parking, and the right of Alcuin to gratuitously utilize the Montaigne amenity Space on key Alcuin dates such as graduation, admissions or other times when the business of Alcuin requires a larger gathering for which the Montaigne Amenity space is ideal.

- Clause 3.15.2 lists Alcuin's express responsibilities which include:  

To do all things necessary to permit Montaigne to stratify the Montaigne Amenity Space from Alcuin's School in accordance with this JVA.
- Clause 9.5 requires both parties to use commercially reasonable efforts to do promptly, or cause to be done, all things necessary, proper or advisable to consummate and effect the transactions contemplated in the contract.

[43] From these provisions, I take the following two points.

[44] First, Alcuin is required to pay for the construction of Alcuin's School (the first three floors of the building) but not the Montaigne Amenity Space (the fourth floor), to a maximum of \$6.8 million in hard costs. The hard and soft costs associated with the construction of the Montaigne Amenity Space are Montaigne's responsibility.

[45] Second, the Montaigne Amenity Space cannot be transferred to Montaigne until the Space acquires legal existence through subdivision. This will require substantial additional expenditures of at least \$356,000. It will also require the joint retention of a strata lawyer to draft ownership, governance, management and operational rules that must balance the needs and interests of both parties.

[46] In principle, even if Alcuin is at fault in the breakdown of the relationship between the parties, it would be inconsistent with the contract to require Alcuin to spend money for the establishment of the Montaigne Amenity Space. Moreover, the court would be unable to supervise and force agreement on the extensive rules contemplated in the contract as a precondition to stratification.

[47] This analysis is supported by the cases cited by the parties and the chambers judge. The first of these cases is *Dynamic*, a 1978 decision of the Supreme Court of Canada from Alberta. The plaintiff had contracted to purchase an unsubdivided portion of a lot and sought specific performance of the contract. Legislation similar (though not identical) to the *Land Title Act* forbade subdivision without approval. Speaking for the court, Dickson J. rejected an argument that obtaining subdivision approval was a true condition precedent to performance of the entire agreement. Rather, he held that the contract could be specifically enforced on the basis of an implied term, necessary to give business efficacy to the agreement, that the defendant vendor would apply for and use its best efforts to obtain approval of the subdivision.

[48] The court made an order for conditional specific performance. The vendor was ordered to use its best efforts to obtain subdivision approval and, if approval was obtained, to convey the subdivided property in exchange for the purchase price.

[49] *Dynamic* involved an uncomplicated contract of purchase and sale of land. It establishes that a requirement for subdivision approval is not necessarily an obstacle to enforcement of the contract, in the case of a contract lacking the complexities of the contract in the case at bar.

[50] In this Court, Montaigne relies on *van Dishoeck v. Centre Stage Holdings Ltd.*, 2023 BCSC 1500, but the case does not assist this part of its argument. The plaintiff contracted to purchase part of an unsubdivided parcel of land and sought a conditional order of specific performance equivalent to that ordered in *Dynamic*. Chief Justice Hinkson refused to order the defendant to use its best efforts to obtain subdivision, citing factual complexities and difficulties of supervision in the particular circumstances of the case (at paras. 173–177). Among the factual complexities was a claim for aboriginal title over the land in question advanced by the local First Nation. A process of consultation that the court could not control would be necessary in advance of subdivision.

[51] *CareVest* and *bcIMC* involved multi-unit residential real estate projects that had gone into receivership. The projects were partly built and an issue in each case was the specific enforceability of pre-sale contracts for the purchase of individual units. In both cases, the court held that specific performance was unavailable to the purchasers.

[52] In *CareVest* at paras. 13–15, Pitfield J. held that the properties in question did not yet exist and specific performance could not be ordered “without creating new rights and obligations in relation to the property, particularly insofar as procuring funds for completion, and securing the repayment thereof, are concerned”. He referred to the general rule that “specific performance is not a remedy that is available in relation to a contract that requires work and services to be performed or provided, or in circumstances where the ongoing supervision of the court ... will be required”. This is consistent with the reasoning that led Hinkson C.J.S.C. to refuse a conditional order of specific performance in *van Dishoeck*.

[53] In *bcIMC* at para. 73, Justice Burnyeat cited *CareVest* for the proposition that specific performance is available only in relation to contracts that require no further work or services to be performed or provided by a receiver and manager, quoting Pitfield J.'s more detailed reasoning as outlined above. Where subdivision had not occurred, he found that it was impossible to imply an obligation on the part of the developer to seek and obtain subdivision approval: at para. 77.

[54] Each of these cases applies settled legal principles governing the availability of the equitable remedy of specific performance. There is no inconsistency between them, and nothing that assists Montaigne's claim for specific performance in this case. The features of the contract and the case outlined above—that an order for specific performance would impose upon Alcuin obligations not contemplated in the contract, and that the court would be unable to supervise and force agreement on the rules contemplated in the contract as a precondition to stratification—are an obstacle to any claim for conditional specific performance.

**2. Apart from specific performance and s. 73 of the *Land Title Act*, is it manifestly clear that Montaigne is not legally entitled to an equitable interest in Alcuin's property?**

[55] As already noted, at para. 64 of his reasons, the judge rejected "[Alcuin's] conclusory statement that a purchaser cannot have any equitable interest in land, including by way of a trust or unjust enrichment, without a specifically performable contract". In this, the judge was correct.

[56] A purchaser who is entitled to specific performance obtains an immediate equitable interest in the property, entitling it to a certificate of pending litigation: John McGhee, ed, *Snell's Equity*, 31st ed (London: Sweet & Maxwell, 2005) at 22–02, 22–03. In the context of a simple contract for the purchase and sale of land, the purchaser's entitlement to specific performance is the only way an equitable interest may arise. In this particular context, in *bcIMC* Burnyeat J. stated:

[70] However, the status of a potential purchaser as having an equitable interest is contingent upon the contract being specifically enforceable: *Buchanan v. Oliver Plumbing & Heating Ltd.*, 1959 CanLII 141 (ON CA), [1959] O.R. 238 (C.A.); *Cornwall v. Henson*, [1899] 2 Ch. 710 at

p. 714; *Howard v. Miller* (1914), 1914 CanLII 604 (UK JCPC), 7 W.W.R. 627 at p. 631 (P.C.) (B.C.); and *Central Trust & Safe Deposit Co. v. Snider*, 1915 CanLII 435 (UK JCPC), [1916] 1 A.C. 266 (P.C.) (Ont.) at p. 272. A purchaser has an equitable interest in land only as long as he or she would be entitled to specific performance of the agreement: *DiGuilo v. Boland* (1958), 1958 CanLII 92 (ON CA), 13 D.L.R. (2d) 510 (Ont. C.A.); *Howard, supra*, at pp. 79-80; *Kimniak v. Anderson*, 1929 CanLII 367 (ON CA), [1929] 2 D.L.R. 904 (Ont. C.A.); *Freevale Ltd. v. Metrostore (Holdings) Ltd. et al*, [1984] 1 All E.R. 495 (Ch. D); and *St. James (Rural Municipality) v. Bailey* (1957), 1957 CanLII 442 (MB CA), 21 W.W.R. 1 (Man. C.A.).

[57] All of the cases cited by Burnyeat J. involved simple contracts for the purchase and sale of land.

[58] In contexts other than a simple contract of purchase and sale, equitable interests may arise by virtue of a promise contained in a contract or otherwise through the doctrine of promissory estoppel: *Cowper-Smith v. Morgan*, 2017 SCC 61 at paras. 1–3. Equitable interests may arise also through the imposition of a constructive trust imposed to remedy a breach of fiduciary duty (*Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 at para. 36, 1997 CanLII 346) or unjust enrichment (*Kerr v. Baranow*, 2011 SCC 10 at para. 50).

[59] In considering whether Montaigne can claim an equitable interest in property in this case, it is necessary to have regard to the contract to see what was promised. This engages consideration of clause 5.3.1 of the contract, which provides as follows:

#### 5.3.1 Breach by Montaigne

In the event that Montaigne is unwilling or unable to perform its duties herein, is bankrupt or unable to meet its financial obligations, or in material Breach of this Agreement, Alcuin shall notify Montaigne of the nature of the breach and provide a period of ten (10) days for Montaigne to cure such breach failing which this JVA may be terminated in writing by Alcuin. In the event that such breach by Montaigne is likely to result in any adverse or deleterious reputational impact on Alcuin by continuing to involved with the JV as determined in Alcuin's sole opinion, Alcuin shall have no obligation to insist that Montaigne cure the breach and Alcuin shall be at liberty to terminate this Agreement. In the event termination occurs prior to 180 days after the execution of this JVA, Montaigne shall have no recourse against Alcuin for the Montaigne Amenity Space however if the termination occurs after 180 days after the execution of this JVA, Montaigne shall continue to have its right

to the Montaigne Amenity Space subject to Alcuin's ROFR as defined in this JVA.

In the event of termination by Alcuin as a result of reputational risk, Alcuin is obligated to confirm the particulars of the breach to Montaigne and indicate the date the JV will be terminated, such period not to exceed fourteen (14) days). ... On the JV termination date (due to reputational risk only), Alcuin shall be permitted to refuse to subdivide the Montaigne Amenity Space from Alcuin's School and retain possession of same and pay out any costs that it is required to incur, in its sole determination, to complete the buildout of the Montaigne Amenity Space and Alcuin's School. Such costs shall be a debt to Alcuin and in addition to any other remedy it has, Alcuin is not bound to subdivide the Amenity Space from its lands and if Montaigne has not paid all such costs after a period of twelve months, Alcuin shall have the option to elect to subdivide the Montaigne Amenity Space and sell this asset to a third party to recover any monies owed to it. Any balance of monies remaining shall be paid to Montaigne, less a charge equivalent to fifteen (15) percent of the selling price.

[60] "Alcuin's ROFR" is a right of first refusal to be reserved to Alcuin when the Montaigne Amenity Space is transferred to Montaigne (clause 4.6). The reference to "a termination by Alcuin as a result of reputational risk" is a reference to a termination for Montaigne's breach of an obligation imposed by clause 3.5 of the contract which requires both parties "to vigorously protect and defend the goodwill and reputation associated with Alcuin College as an institution of independent educational learning and to not do anything, or omit to do anything, express or implied, that may bring Alcuin College's reputation into disrepute or otherwise harm its goodwill". Clause 3.5 states that a breach of this obligation by Montaigne is a fundamental breach of the contract.

[61] I take the following from this language considered together with the provisions summarized above at para. 42:

- a) If Montaigne is not in breach, it is entitled to obtain the Montaigne Amenity Space following subdivision; and
- b) If Montaigne is in breach and Alcuin is entitled to terminate the contract because of the breach and does so, Montaigne is still entitled to obtain the Montaigne Amenity Space if more than 180 days have passed since the

contract was made and the termination was not “as a result of reputational risk”.

[62] Putting aside s. 73 of the *Land Title Act*, on this summary judgment application, I conclude that it is not manifestly clear that Montaigne is not legally entitled to an equitable interest in Alcuin’s property. It was promised the Montaigne Amenity Space on certain conditions. It is uncertain whether Alcuin was entitled to terminate at all. If Alcuin was entitled to terminate, it is uncertain whether it was entitled to terminate as a result of reputational risk.

[63] It is not yet known whether subdivision of the building will be achieved so that the Montaigne Amenity Space will come into legal existence. Montaigne’s equitable interest would therefore be contingent in nature, dependent on the possibility of subdivision.

[64] Contingent interests are freely recognized in Equity. A settlor may settle a trust for the benefit of contingent beneficiaries who are as yet unborn. The trust deed may provide for the incorporation of trust assets that are not yet identified. Montaigne objects that, in the case of an express trust, there must at least be some trust property in existence when the trust is created. The answer to this is that there is property in existence—Alcuin’s land—to which Montaigne’s contingent interest may attach, pending determination of the contingency.

[65] Suppose that the contingency is realised: Alcuin completes construction and obtains stratification of the fourth floor, creating the Montaigne Amenity Space as a separate parcel of land. It is not manifestly certain that a court of Equity would deny Montaigne a right to the space. In anticipation of the contingency, on the supposition that it may be able to prove its case, Montaigne can claim a contingent equitable interest in the property. All this is subject to Alcuin’s argument still to be addressed based on s. 73 of the *Land Title Act*.

**3. Is Montaigne’s potential claim to an equitable interest excluded by s. 73 of the *Land Title Act*?**

[66] Having concluded that specific performance is unavailable but a contingent equitable interest may be available to Montaigne brings us to the nub of the problem. Is recognition of Montaigne’s contingent equitable interest in a subdivided parcel of land that has not yet come into legal existence foreclosed by s. 73 of the *Land Title Act*? The chambers judge did not address this question directly but seems to have assumed that it would not, probably on the basis of his conclusion (with which I disagree) that specific performance was potentially available.

[67] This engages consideration of this Court’s decisions in *Yi Teng #1*, the subsequent decision in *Keltic (Brighthouse) Development Ltd. v. Yi Teng Investment Inc.*, 2023 BCCA 375, aff’g 2022 BCSC 33 [*Yi Teng #2*], and a return to *Dynamic*.

[68] It will be recalled that, in *Yi Teng #1*, this Court held that the effect of s. 73 is that a claim for an immediate interest in a portion of an unsubdivided lot conferred by contract is a claim for an interest in land unknown to law. Yi Teng had contracted to purchase an undivided portion of a parcel of land, sued for specific performance, and obtained a CPL. On the defendant’s application, a chambers judge ordered cancellation of the CPL, and the judge’s order was upheld on appeal. Giving judgment for the Court, Justice MacKenzie distinguished *Dynamic* as a case in which the transfer was only intended to occur after subdivision approval was obtained. She stated:

[53] In conclusion, this case is fundamentally different from *Dynamic Transport*. First, there is nothing to indicate the respondent has an obligation to obtain subdivision approval. Second, even if the respondent had such an obligation, it could only be an implied term of the contract which was not argued. ...

[69] On receipt of this Court’s decision, Yi Teng sought leave to amend its pleading to claim not an unconditional but a contingent interest in the property. Leave to amend was granted by a chambers judge whose decision was upheld on appeal. In *Yi Teng #2*, Saunders J.A. gave judgment for this Court. She held that Yi Teng’s pleading could not support a claim for specific performance or any claim for

an interest in land: at para. 29. The pleading could support an *in personam* claim for damages.

[70] Justice Saunders held that Yi Teng's amended pleading could not avoid the prohibition in s. 73 of the *Land Title Act* because

...[T]here is no right of performance of the transfer of title until the condition precedent has been met: the claim is based upon an inchoate entitlement. To put it another way, the interest claimed relies upon a true condition precedent, a condition that depends upon an uncertain future event, performance of which is within the control of a third party...

[71] In brief, obtaining subdivision approval was a true condition precedent in *Yi Teng #1 and #2*, but not in *Dynamic*. Where obtaining subdivision approval is a true condition precedent, the plaintiff cannot claim a CPL based on the assertion of an interest in land. Where obtaining subdivision approval is not a true condition precedent, then s. 73 is not necessarily an obstacle to legal recognition of a contingent equitable interest in the land.

[72] The concept of a true condition precedent was explained in *Turney v. Zhilka*, [1959] S.C.R. 578 at 583–584, 1959 CanLII 12. *Turney* is a well-known case cited in *Dynamic* and *Yi Teng #2*. It may happen that an entire contract is framed in such a way that it depends on a future uncertain event within the control of an independent third party. Unless and until the event occurs, neither party has any obligation to perform. There can be no remedy for breach of contract, because there is no contractual obligation to breach. The uncertain event is a true condition precedent.

[73] The doctrine of true conditions precedent sometimes leads to harsh and problematic results because, in principle, a true condition precedent cannot be waived except, perhaps, by a mutual course of conduct: *Kempling v. Hearthstone Manor Corporation*, 1996 ABCA 254 at paras. 26–30 (Picard J.A.) and 76–84 (Harradence J.A.).

[74] Subdivision approval is not a true condition precedent in this case, because the contract imposes obligations on both parties in advance of subdivision approval

and whether or not it is ultimately obtained. Montaigne was obliged to provide and provided construction management services from 2021 until early 2023.

[75] In my view, it follows that s. 73 of the *Land Title Act* is not necessarily an obstacle to legal recognition of the contingent equitable interest claimed by Montaigne pursuant to the provisions of the contract. Montaigne's claim cannot be summarily dismissed, and it cannot obtain cancellation of the CPL on the basis that a dismissal of the claim is inevitable.

[76] I would observe, however, that a full appreciation of the contingent nature of the interest claimed may bear on the exercise of the court's assessment of a cancellation application under s. 256.

**4. Did the judge err in law or in principle in refusing Alcuin's application for a tailored cancellation order?**

[77] If this were an appeal from the order intended in the judge's reasons, I would be reluctant to conclude that he erred in denying Alcuin a tailored cancellation order, considering that: Alcuin did not seek a tailored cancellation order in its notice of application, but only in written argument; the judge found that hardship and inconvenience were not made out, on the materials at hand; and the judge stated in his reasons that Alcuin should have liberty to apply again, on better evidence of hardship or inconvenience. The failure to include a provision for liberty to apply in the entered order drafted by counsel is unexplained.

[78] Alcuin submits that what it wants is an opportunity to have its application for a tailored cancellation order properly considered in the trial court, on the basis of updated materials. On making a fresh application, it wants not to be faced with an argument that the application is barred by the doctrine of issue estoppel or constitutes an abuse of process.

[79] What Alcuin wants is what the judge intended. In these unusual circumstances, I would allow the appeal for the purpose of supplementing the order

pronounced by the judge with a term granting it liberty to apply again to cancel the CPL pursuant to s. 256 of the *Land Title Act*.

**Disposition**

[80] For these reasons, I would allow the appeal only to the very limited extent of granting Alcuin liberty to apply again in the Supreme Court, on fresh materials, to cancel the CPL on the ground of hardship or inconvenience pursuant to s. 256 of the *Land Title Act*. Otherwise the appeal should be dismissed.

[81] In my view, Montaigne has achieved substantial success and is entitled to its costs in this Court.

“The Honourable Justice Gomery”

I AGREE:

“The Honourable Mr. Justice Willcock”

I AGREE:

“The Honourable Justice Winteringham”