

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
PINELANDS (2002) INC.)
) Ryan Breedon and Jeffrey Kemp, for the
Plaintiff) Plaintiff
)
– and –)
)
THE MUSKOKAN RESORTS CLUB INC.)
)
Defendant) David Zuber and James Tausendfreund, for
) the Respondent
)
)
)
) **HEARD:** September 8 – 12 and 15, 2025

2025 ONSC 6468 (CanLII)

REASONS FOR JUDGMENT

HEALEY J.

Overview

- [1] The Plaintiff, Pinelands (2002) Inc. (“Pinelands”) is the former owner of waterfront property located in Port Carling, Ontario on Lake Joseph (the “Property”). Walter Prychidny is Pinelands’ President and CEO.
- [2] The Defendant, The Muskokan Resort Club Inc. (the “Club”) is a non-profit corporation that Prychidny incorporated in 2004.
- [3] In 2005, Pinelands transferred the Property to the Club. No money exchanged hands. Instead, the Club provided Pinelands with a promissory note in the amount of \$7,250,000, as security for the cost of acquiring the land.
- [4] Both Pinelands and the Club intended for the Property to be developed into a fractionally owned real estate facility (the “Project”).
- [5] Under the terms of a Development and Construction Agreement, Pinelands filled the role of the Development Manager for the Project.

- [6] The Project was to be developed in a series of phases. Each phase included several villas and shared facilities. Two out of three of the anticipated phases had been completed by the time this litigation commenced, with 21 out of the anticipated 35 villas built.
- [7] The Development and Construction Agreement in effect at the time of the relevant events preceding this litigation stipulates that if the Club cancels or purports to cancel that Agreement, including taking any action or threatening any action to prevent or restrict access to the Property by the Development Manager, the Club must then pay to the Development Manager, on demand, the unpaid amount owing under the promissory note.
- [8] Therefore, the key issue in this litigation is whether the Club cancelled or purported to cancel the Development and Construction Agreement by “taking any action or threatening to take any action to prevent or restrict Pinelands’ access to the Property.” If so, the Development and Construction Agreement stipulates that the Club is liable to pay to Pinelands the remaining amount owing under the promissory note.

Issues

- [9] The issues to be decided by this court are:
1. Whether the Club cancelled or purported to cancel the Development and Construction Agreement;
 2. If so, whether the Club had a legal right to prevent or restrict access, or threaten to do so;
 3. The damages incurred by Pinelands;
 4. Whether Pinelands failed to mitigate its damages by refusing to negotiate the terms of its continued development of the Project; and
 5. If the Club is liable under the terms of the Development and Construction Agreement to pay Pinelands the outstanding Land Acquisition Costs and/or damages arising from a breach, whether the court should grant the Club equitable relief from forfeiture pursuant to s. 98 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.
- [10] For the reasons that follow, I find: The Club cancelled the Development and Construction Agreement, and it did not have a legal right to do so. Pinelands is owed damages totalling \$6,157,525.25 as a result of the Club’s breach. I do not find Pinelands failed to mitigate their damages, and I do not find this is an appropriate case to grant relief from forfeiture.

Agreed Facts and Evidentiary Findings

The Resort Project

- [11] The Property is the former location of an old Muskoka resort. In 2002, Pinelands purchased the Property for \$4M. Prychidny's plan was to build fractional ownership vacation cottages with shared recreational amenities.
- [12] After purchasing the Property, Prychidny incorporated the Club. Pinelands' officers and directors were also appointed as officers and directors of the Club.
- [13] The Letters Patent stipulates that the objects for which the Club was incorporated are the establishment and operation of a residents' association and club for the purpose of:
- (a) providing facilities for the pleasure and accommodation of its members and their guests and other invitees;
 - (b) promoting the mutual interest of its members and their guests and other invitees;
 - (c) promoting aquatic, athletic, physical and other social and recreational activities for the exclusive use of its members and their guests and other invitees;
 - (d) opening and maintaining private recreational facilities including docks, a boat house, a health club and a recreational centre together with private roadways for the exclusive use of its members and their guests and other invitees on property owned by the association or in which the association has an interest or property whose owners give their consent;
- and such other complementary purposes not inconsistent with these objects.
- [14] In March 2005, Prychidny had Pinelands transfer the Property to the Club for \$7,250,000 (the "Land Acquisition Costs"). This amount reflected the value attributable to the Property based on an appraisal of the underdeveloped land, which assumed that the contemplated development could be completed and sold.
- [15] On June 30, 2004, Prychidny arranged for Pinelands and the Club to enter into their first Development and Construction Agreement, commencing the Project.
- [16] The Project was to be developed in a series of three phases. Each phase included several villas, each of which was to be sold in intervals of 10. Each interval entitles its owner with the right to use the villa to which it is assigned for a total of 5 weeks each year. The individuals purchasing the intervals are referred to as owners. Pinelands is responsible for the original sale of the intervals for each villa.
- [17] During each phase, there was also construction of common amenities such as a boat house, dock, swimming pool, and club house. One of the interval owners, John Groenewegen, has been an owner since 2009 and testified that Pinelands has constructed an excellent facility.

- [18] The Club is to pay the Land Acquisition Costs to Pinelands through the proceeds of the interval sales, with Pinelands retaining any profits or losses from the sales.
- [19] Phase 1 of the Project was completed by March 2006. This phase consisted of ten villas comprising the Carling units and the boat house, which is used as a gym facility.

Promissory Note

- [20] As earlier stated, the unpaid Land Acquisition Costs are secured by a promissory note dated March 6, 2006, in favor of Pinelands. Prychidny signed the promissory note as President of the Club. The amount of the promissory note was \$5,800,000 at the time of execution, being the Land Acquisition Costs minus a credit of \$1,450,000 for completion of Phase 1 of the Project.

Site Plan Agreement

- [21] A Site Plan Agreement between the Club and the Township of Muskoka Lakes (the “Township”) dated May 16, 2005 was registered on title in June 2005. Schedule B to the Agreement, being the Site Plan initially registered on title, shows a single access road to the property exiting from Highway 118.
- [22] The Site Plan Agreement provides that further site plan approval and a further site plan agreement registered on title is required for Phases 2 and 3. The Club obtained an Amending Site Plan Agreement for Phase 2 that was registered on title in May 2007.
- [23] Phase 2 got underway in 2007 and had been completed by the latter half of 2008. This consisted of nine villas known as the Sandfield villas.
- [24] In February 2008, the Club applied for a Site Plan Amendment because Pinelands was in the process of planning Phase 3. The letter sent by the Club’s planner to the Director of Planning for the Township noted that all the proposed villas in Phase 3 would have direct access from a new road extending from the existing internal road. That correspondence pointed out another change to the previous plan, being a building envelope shown as encompassing the proposed units to be built. This was, as noted in the letter, “to allow for minor flexibility to the final building location in the field, as minor shifting of the building location due to topographical constraints may occur when laying out the foundations of the proposed units.”
- [25] The amendment was granted, and the Site Plan Agreement was registered on title on May 8, 2008 (“SPA-08/08”). Like all earlier site plans, only one main access road is shown, with arteries to reach the villas (both built and contemplated) and a main parking lot.

Property Management Agreement

- [26] The Club retained another one of Prychidny’s companies, Resorts Muskoka Ltd., to act as property manager for the Club.

- [27] From 2008 until 2018, Resorts Muskoka Ltd., acted as the Club’s property manager. The relationship between Resorts Muskoka Ltd. and the Club was governed by a Property Management Agreement.

The Development Agreement

- [28] The Development and Construction Agreement went through several iterations as the Project unfolded. The final Amended and Restated Development and Construction Agreement was executed on October 20, 2008 (the “Development Agreement”). The parties agree that their relationship was governed by the Development Agreement at all material times. Pinelands remained the Development Manager.

- [29] Several provisions of the Development Agreement are key in the determination of this legal dispute.

- [30] Article 2.01 of the Development Agreement sets out the responsibilities and entitlements of Pinelands as the Development Manager:

2.01 Supervision of Development

Under and pursuant to the provisions of this Agreement the Development Manager, as independent contractor, will prudently administer and supervise all aspects of the Development.

The Club acknowledges that it is the intention of the Development Manager to construct the Development provided however that it is the Development Manager alone who shall have the absolute and unqualified right to determine:

- (a) the number, model and size of Club Buildings to be constructed in any development phase [...]; and
- (b) when any phase of the Development is completed whether the Club will complete any future phase of the Development.

- [31] Article 3.05 stipulates Pinelands’ standard of performance:

The Development Manager covenants and agrees to (i) act always in a good faith, without undue delay and (ii) use its best efforts in accordance with prudent commercial practices to efficiently perform its Development Duties and all obligations under this Agreement which the Development Manager hereby covenants and agrees to perform.

- [32] Article 2.02 addresses termination of the Development Agreement:

The Club shall have no right to terminate this Agreement provided that this Agreement shall terminate automatically following the completion by the Development Manager of the construction of thirty-five (35) Villas on the Lands and the sale of Three Hundred and Fifty (350) intervals.

- [33] Article 2.03, titled “Continued Access”, is particularly germane as it addresses Pinelands’ unrestricted access to the Property during the term of the Development Agreement:

The Development Manager shall have unrestricted access to the Lands during the term of this Agreement for the purpose of completing the Development and incidental thereto, shall have the unqualified right to close up portions of the Lands from time to time in order to facilitate construction and to ensure the safety of all individuals who are on site.

- [34] In their Agreed Statement of Facts, the parties have agreed that Article 2.03 provides Pinelands with unrestricted access to the Property for the purpose of developing the Project. The Club confirmed at the examination for discovery of Groenewegen that the access road is included in the lands to which the Development Agreement applies.

- [35] Pinelands’ obligations with respect to the design and construction of the Project are further detailed in Article 3.02 of the Amended Agreement, which is partially reproduced as follows:

PART I DESIGN PHASE

1. Determine the overall concept of the Development.
2. Provide liaison and co-ordination among Authorities, utility companies, and other groups evolving a basic program for the Development
3. Prepare the Plans and Specifications or, have them prepared by professional consultants.

PART II CONSTRUCTION PHASE

1. Arrange for adequate insurance for the Development.
2. Ensure that all approvals, permits and licenses required for the Development are obtained.
3. Provide a correct survey and layout of the structure and ensure that the construction lines and levels are maintained.

4. Provide planning, scheduling, expediting, technical coordination and supervision as necessary for the proper execution of the work of all trades. Perform any work with his own forces where circumstances demand.
5. Ensure that the Plans and Specifications, maintenance manuals, operating instructions, etc., are properly completed and handed over to the Club.

PART III POST-CONSTRUCTION PHASE

The duties outlined under the Post-Construction Phase include matters such as obtaining occupancy permits and a bacterial analysis water certificate.

[36] Additionally, the Development Agreement contains the following terms:

- a. Pinelands was entitled to implement the development without need for further approval by the Club (article 3.04);
- b. Pinelands was to have the obligations of a “contractor” provided for in the standard form contract approved by the Canadian Construction Association, including responsibility for construction safety (article 3.06(a));
- c. Pinelands is repaid the Land Acquisition Cost with the sale proceeds of the intervals (article 3.07(a)); and
- d. Any profits from the sale of intervals after reimbursement of the Land Acquisition Costs and costs of development belong to Pinelands (article 3.07(e)).

[37] Article 4.01 is the key provision in dispute in this litigation. The operative paragraph provides:

The Club agrees that if after the election by the Owners at their first annual meeting of a board of directors to replace the current board of directors of the Club cancel[s] or purports to cancel this Agreement, including taking any action or threatening to take any action to prevent or restrict access to the Lands by the Development Manager, then the Club must pay to the Development Manager on demand, the unpaid Land Acquisition Costs. Such payment, however, shall not limit the right of the Development Manager to seek damages for breach of contract from the Club with respect to the Club’s action in cancelling or purporting to cancel this Agreement or preventing or restricting the Development Manager’s access to the Lands without legal right to do so. It is also agreed that, if such event of default occurs after completion of the second phase of the Development but

before completion of the third phase of the Development and the completion of the sale of the maximum number of Intervals in that phase then the unpaid purchase price owing by the Club to the Development Manager is the amount determined by deducting one hundred and ninety (190) from three hundred and fifty (350) being the maximum number of Intervals in the Development where the maximum number of Villas that can be constructed on the Lands pursuant to the Township of Muskoka Lakes' by-laws is thirty-five (35) Villas and multiplying the resulting net amount by TWENTY-EIGHT THOUSAND AND NINETY-THREE DOLLARS AND SEVENTY-FIVE CENTS (\$28,093.75) such amount being referred to as the \$Multiplier. (The same procedure applies to subsequent Development phases). [Emphasis added.]

The \$Multiplier shall be adjusted on December 31, 2010 and on each succeeding anniversary of that date by an inflation factor of three (3%) percent per annum. This adjustment may be cumulative.

- [38] The parties agree that if this court finds that there has been a breach under this clause, the application of the \$Multiplier results in unpaid Land Acquisition Costs of \$6,127,680, which will increase again by 3% on December 31, 2025.
- [39] Groenewegen testified that he received a copy of the Development Agreement when he first bought an interval in 2009, and again when he became a Director of the Board. He confirmed that the Development Agreement currently remains in effect.

Lease Agreement

- [40] To allow Pinelands to fulfill its role, the Club and Pinelands entered a 10-year lease agreement (the "Lease") for the Property, which was subsequently renewed until March 8, 2026. The purpose of the Lease is to define that portion of the Property that is yet to be developed, and accordingly, the portion of the Property to which the Lease applies.
- [41] Schedule B to a Lease Amending Agreement dated June 26, 2008 makes clear that the access road from Highway 118 is included in the leased area of the Property.

Interval Owners Agreement

- [42] Each owner of an interval is bound by a written agreement made between the Club and any person who becomes an owner and member of the Club. This document was also amended; the operative one is the Amended and Restated Interval Owners Agreement (the "Interval Owners Agreement") dated July 2, 2009.
- [43] Articles 3.05 and 3.06 address the Club's powers and duties, as follows:

3.05 Club's Powers and Duties

Subject to the Rules, the Club can do all things it considers to be necessary, desirable or appropriate:

- (a) for the operation, management, administration and protection of the Project; and
- (b) for the maintenance, repair, alteration, addition, improvement, rebuilding and restoration of the Project.

3.06 Specific Powers and Duties

Some of the specific things that Club may or must do are explained throughout this Agreement and the Rules. They are not stated or summarized in any one section. All of the Club's powers and duties are not described expressly and specifically in this Agreement and the Rules. This does not mean that the Club does not have a power or duty that is not expressly and specifically described. Rather, this Agreement and the Rules are to be interpreted to give the Club broad and general powers and duties, and the Club may exercise these powers and duties, even on matters that are not expressly and specifically covered in this Agreement and the Rules.

[44] The "Project" referenced in article 3.05 is defined in the Interval Owners Agreement to mean "each phase of the Development when the Club Buildings and other facilities and services contemplated by the Plans and Specifications have been completed and the Villas are available for occupancy by Owners." The "Development" refers to the development of the Property pursuant to the Development Agreement.

[45] Article 3.09 of the Interval Owners Agreement provides that the Club will act through the Board.

First Board Elections

[46] In November 2009, the Club held its first election for a Board of Directors. The position of President came to be held by Peter Wise.

[47] Groenewegen, who has been on the Board since 2017, described the responsibilities of the President to include interfacing with the property manager and with any legal counsel. The President also signs the Certificate of Membership and Interval Ownership when there is a resale of an interval. However, all major decisions are to be made by the Board through a voting process.

Phase Three Construction

[48] Construction of the third phase began in or around 2010. Phase 3 was intended to include a clubhouse and up to 16 villas.

- [49] By 2012, Pinelands had completed the clubhouse as well as two villas. These villas were named “Sandfield on the Trail”¹ and “the Belmont”. Sandfield on the Trail was completed in 2011, and the Belmont in 2012.
- [50] On discovery, Groenewegen agreed that the access road to the two villas was built in the same general location as depicted on SPA-08/08.
- [51] Sandfield on the Trail was not constructed where it had been shown on SPA-08/08, but instead, across the road from its intended location. Prychidny testified that when the foundation plans were laid out for the two villas, it was discovered that there was not enough room to build them side-by-side without encroaching on the fire access route. Accordingly, he made the decision to build Sandfield on the Trail across the road from where it had originally been intended.²
- [52] The evidence establishes that the Township was aware of the new location of Sandfield on the Trail as of 2010. A drawing and sketch prepared by Pinelands’ engineers was submitted to the Township with the application for a building permit for Sandfield on the Trail, showing its location as across the road from where it was shown on SPA-08/08.³ The Township never raised any concerns or objections about the relocation of that villa. Similarly, when the building permit application for the Belmont was submitted, and granted, the accompanying sketch shows the revised location of Sandfield on the Trail.⁴
- [53] Groenewegen described the road that was built by Pinelands to access these two newest villas as being only the width of one car, as depicted in the photographs.
- [54] Prychidny testified that Sandfield on the Trail was occupied during some of the time that the Belmont was being built. All construction-related vehicles and equipment had to use the road in front of Sandfield on the Trail to reach the building site for the Belmont. There was never a concern raised regarding any safety issues, or any issues about damage to the roadway itself.
- [55] Following the completion of those two villas, Pinelands paused the development of Phase 3 because sales of intervals in Sandfield on the Trail and the Belmont were slow. Sales were so soft, that in 2015 Pinelands sold some of the intervals at auction for as low as \$40,000. This price was considerably lower than previous prices. For example, Groenewegen had purchased an interval in Sandfield on the Trail in March 2014 for \$175,000.

¹ Sandfield on the Trail is also referred to as “Sandfield 9” in some of the documents.

² The intended location of Sandfield on the Trail is marked in yellow on Exhibit 6, and its as-built location is marked in blue. The as-built location of the Belmont is marked in brown. The access road built by Pinelands to reach these two villas is in the location originally shown on SPA-08/08 and is marked in orange on Exhibit 6.

³ Exhibit 5, tabs 23 and 24.

⁴ Exhibit 5, tab 25.

[56] Groenewegen testified that he knew that there was a planned Phase 3 when he originally purchased in 2009. He was made aware of the anticipated development “up on the ridge” by a salesperson who was facilitating resales for the Club. Further, the information provided to him from the Club’s lawyers on closing indicated that a third phase was to be built.

The “Path to Liquidity”

[57] The auction was the turning point in what was to become a division among directors of the Board, and more importantly, an increasingly acrimonious rift between its President, Wise, and Prychidny.

[58] The conflict between Board members was about the scope of the Club’s mandate as a non-profit corporation. Some, like Wise, wanted to focus the Board on marketing for resale of intervals and rentals, and believed that the associated advertising expenses should be paid from the reserve fund. Some believed that this was contrary to the Club’s purpose and risked its not-for-profit status, and that the focus of the Board should be on spending its funds to operate and maintain the Club’s property. Prychidny stood with the latter group, although was not on the Board. He had never stood for election, believing it to represent a conflict with his role in the Club’s management company.

[59] The emails authored by Wise between October 2015 and April 2017 show that he was determined to have the Club focus on generating sales and rentals through its own website and promotional material. In an email with the subject “Re: Muskokan – Path to Liquidity”, he expressed the hope that the Board would make “resales and depressed prices” a top priority.

[60] As he found it increasingly difficult to work with the Board due to this divergence of opinion, in April 2017 Prychidny provided a proposal to the Club whereby the balance of the undeveloped land would be severed off and conveyed to Pinelands in exchange for the unpaid balance of the promissory note, which at that time was \$3.9 million. The parties would then enter into a shared service agreement, such that any new owners purchasing from Pinelands would share the Club’s amenities, and their cost. As part of this proposal, Prychidny offered that Pinelands would develop a separate entrance from Highway 118 to the severed lands.

[61] Ultimately, after discussion the Board was unwilling to allow use of the Club’s facilities and amenities by any of the owners who might purchase in the new development. The proposal died.

[62] The Amended Amended Statement of Defence alleges that this proposal was made by Prychidny because Pinelands was having financial difficulties. No evidence was led by the Club to prove that allegation.

[63] At the annual general meeting in June 2017, Wise started another term as the Board’s President. Groenewegen was elected to the Board for the first time.

[64] Matters came to a head at a Board meeting in November 2017, when Prychidny publicly berated Wise, telling him that he should not be the Club's President. A few days later, Resorts Muskoka Ltd. was given notice of termination as the Club's management company, effective February 28, 2018. Prychidny testified that he was relieved to receive that notice, as he was finding it increasingly difficult to try to work with the Board under Wise's direction.

The Club's Efforts to Prevent Prychidny from Running for the Board

[65] With his company no longer providing management services, Prychidny decided that he could run for the Board. He discussed his intentions with some of the Board members. He was hoping that he could influence the direction that the Board was taking.

[66] At the time, Prychidny's business partner, Dianne Mowbray, held the right to one interval in a Carling villa for herself and as trustee for Prychidny as to a 50% beneficial interest, pursuant to a written trust agreement.

[67] The first thing that the Club did was to refuse to recognize the trust agreement as a valid ownership arrangement. In a letter dated May 24, 2018 from its corporate lawyers, Miller Thomson LLP, the Club took the position that owners may own the right to an interval as joint tenants, but not as tenants in common. The record at this trial contains evidence, I find, that directly contradicts that position. The record kept by the Club to record interval ownership transfers shows a transfer recorded on January 30, 2015 to two owners "as tenants in common."

[68] Rather than contesting the Club's position, Prychidny bought out Mowbray's interest to become the sole owner of the interval. Shibley Righton LLP performed the Club's legal work with respect to interval sales, transfers, and generating certificates of ownership. In an email dated June 5, 2018 from Shibley Righton LLP to Miller Thomson LLP, counsel Les Mason confirmed that as of May 28, 2018, all of the documentation and monetary requirements set out in the Club's standard form Agreement of Purchase and Sale for the transfer of an interval had been satisfied by Prychidny. The email concluded by stating that "Mr Prychidny believes that Mr. Wise's objective is simply to prevent him from putting up his name for election to the Board of Directors at the upcoming AGM."

[69] That proposition was never responded to, and no evidence was heard during this trial to refute it.

[70] It proved to be true. At the Club's annual general meeting held on June 11, 2018, the Board refused to recognize any votes that were cast by members in favour of Prychidny.

[71] Wise made remarks at the meeting that were captured in the Minutes, and which are relevant to the issues to be decided in this case. He rationalized the Board's decision to disregard votes based on Prychidny not fulfilling certain notice requirements, and he attacked the validity of the transfer even though the transaction was completed through the Club's own lawyers. The comments include:

“The board has serious concerns as to the legitimacy and validity of a transfer of an interval that Mr. Prychidny claims to have occurred and the documents that claim to support it”; and

“Miller Thomson’s (sic) has informed Mr. Prychidny through Les Mason that the transfer violates the interval owners agreement. Over a period of 2 months, Miller Thomson sent approximately 6 letters to Les Mason clearly stating that Mr. Prychidny has not met the requirements of the interval owners agreement and he is not eligible to run for a board membership. Mr. Prychidny has chosen to ignore all such notices”; and

“These are the legal basis upon which his candidacy is denied. There are other reasons as well but they fall outside what is legal and what owner should know.”

[72] I agree with the submissions made on behalf of Pinelands that the implications of Wise’s comments are that Prychidny (and Shibley Righton LLP) had engaged in some sort of fraud with respect to his ownership claim, and that the final comment contains innuendo that there are other hidden reasons why Prychidny would not be suitable as a candidate for the Board.

[73] In his President’s report delivered at that same meeting, Wise noted that Pinelands had a \$3.9 million promissory note that would only be paid off once it sold the remaining intervals in Phase 3 that were to be built. He went on to state:

The legal ramifications of this are that if the default should occur, the lessor can assign the lease and the development construction agreement to a new assignee. The assignment would not affect the club’s freehold interest in the property.

[74] There are no provisions in the Lease or Development Agreement that permit an assignment. Groenewegen acknowledged that Wise’s remark was wildly inaccurate. He also stated that following that annual general meeting, the Board wished to review the President’s report before its delivery, as it did not want such problematic comments to reoccur.

[75] Wise then continued by addressing one of the issues that had preoccupied him since the auction. The Minutes continue:

Mr. Wise indicated the Board’s mandate is to make sure the property is well maintained. However, the price of intervals is falling in value and there are too many re-sales on the market. This is a serious problem. The resort is located in the prime of Muskoka where prices are the highest and cottages sell for many millions. The Board has to seize the problem of falling values and do their best to reverse this trend. Their first job is to determine what must be done with the

resources at hand and this will take money to promote. [Emphasis added.]

- [76] Obviously, Prychidny's intention to build more inventory stood in direct opposition to Wise's concern that an abundance of inventory was lowering the value of the owners' interests.

Further Development in Phase Three

- [77] In a letter sent to all owners in February 2018, Prychidny notified the Club that Pinelands was in the design planning phase for completing the development of Phase 3. Groenewegen confirmed that the Board was notified by the spring of 2018 of Pinelands' intention to proceed with the Project. The parties agree that the completed amenities were sufficient to support the growth associated with the development of Phase 3.
- [78] In May 2018, Prychidny notified the new property manager, Michelle Ainger, that work would be proceeding. He advised her that Pinelands' builder, Cottage Country Builders, would be siting four to five lots, and that "per site plan the villas will be up the trail past the Belmont." He noted that Cottage Country Builders would be clearing a walking trail and laying gravel or mulch to the sites, and he did not expect the work to take longer than one day.
- [79] Specifically, he advised that Jason Mortimer (of Cottage Country Builders) would let Brian Kearns know the day before the work was to be done. Kearns was employed as the Club's operations manager or "innkeeper", who lived on the Property.
- [80] Of great significance to this case, there is nothing in the Development Agreement or Lease that requires Pinelands to notify the Club in advance when it wishes to come to the Property to proceed with the Project. Prychidny testified that he attempted to do so as a courtesy, but this was not habitually done.
- [81] Prychidny explained that advance notice was not always possible because of the unpredictable schedules of tradespeople in the Muskoka region. When they became available to do a job, he did not want to have to turn them away due to constraints imposed by the requirement of giving notice, as they may not be available again for months.
- [82] In response, on May 30, 2018, Ainger communicated that the Board was requesting to see the formal site plan, and wanted confirmation that the "secondary road access for this new development that is to be built off of Muskoka Road will be done in the near future, so that there is no damage caused to the [Club's] road ways." Prychidny testified that the only time there had been a discussion about the construction of a secondary roadway off Hwy 118 was in his 2017 severance proposal, which had been rejected by the Board. Otherwise, a secondary road was not part of the site plan, and the cost would have been "horrendous." I find that the Board's request had no basis in reality, as a new access road was not part of the site plan agreement.

- [83] As this is the first time that a written request came from the Club for any documents, in this case the “formal site plan”, it is a good time to state the obvious. Despite any provision in the Development Agreement, the site plan agreement, the registered site plan and any amendments, any issued building permits and all approved drawings were available for the Club to obtain for themselves through the Township. The planning documents were registered on title to land owned by the Club; they had complete access to them. Furthermore, the Site Plan Agreement itself notes that the following are available for viewing in the Township’s offices: the Master Site Plan Agreement, the site plan for Phase 1, the architectural drawings, the stormwater management plan, the landscape and lighting plan, the amending site plan for Phase 2 and the architectural drawings, and the amending site plan for Phase 3 and the architectural drawings.
- [84] If at any time there was dissatisfaction around obtaining any of these documents from Prychidny, the Club had a readily available, alternative course of action.
- [85] The next day, Prychidny responded by attaching the registered site plan agreement showing the final phase approved by the Township. In his email, he noted that Pinelands would be adhering to the attached site plan and the terms of the Development Agreement. Ainger responded, “so your intent will be to traverse the existing roads within the club with heavy equipment to build on the next phases?” Prychidny’s response was to reiterate that Pinelands intended to abide by the terms of the Development Agreement.
- [86] Groenewegen confirmed that he would have seen SPA-08/08 around May 2018. The Board’s concern was that the existing roadway was not wide enough to allow some of its width to be roped off for pedestrians, and still allow the passage of construction vehicles. The Board’s concern was for younger children, who were accustomed to frequent use of the roadways.
- [87] The sites were cleared by Cottage Country Builders in June, 2018. In an email dated June 18, 2018, giving advance notice of the work as promised, Mortimer advised Ainger that “we will make extra effort to respect your guests and the property.”
- [88] That work was completed as scheduled without complaint from the Board about safety or damage to the access road in front of Sandfield on the Trail or the Belmont.
- [89] On September 25, 2018, Prychidny informed the Board that a local brokerage firm, Cayman Marshall, would be starting to market the final phase of the Club. He attached the design renderings for the new villas. He advised that construction would not start until an entire villa had been sold out.
- [90] Two days later, Prychidny was advised by Ainger that the Board had recently passed some new rules. Those new rules, I find, were specifically meant to target Prychidny’s new development.
- [91] Prychidny’s plan for the new villas that he intended for Pinelands to build was to market all ten intervals to one purchaser. He had communicated this to the Board and could not recall initially receiving any objection. The first new rule that the Board established was

that the maximum number of intervals that an owner could have was four or less. Prychidny testified that this number was not accidental; Wise owned three and Prychidny thought that another owner had four.

- [92] The second rule was that owners could only rent their interval for a maximum of three weeks per year. The third rule was to specify that the purchasing party could not be related or affiliated to another person that would put the related parties in contravention of rule number one. Finally, a security deposit equal to three years' estimated maintenance fees may be required, in the absolute discretion of the Board, if the Board believed the purchaser to be an offshore owner. None of these rules had ever existed previously.
- [93] In the concluding paragraph of her email, Ainger advised Prychidny that the Board expected Pinelands to move the road access for the new builds to behind Sandfield on the Trail. She did not cite the terms of any document that would require Pinelands to do so.
- [94] Prychidny testified that the topography of the ridge would not have allowed for moving the road behind Sandfield on the Trail. He was not cross-examined on this, and no contradictory evidence was led by the Club.
- [95] Additional work was done in October 2018, such as the delivery of five tandem loads of crushed gravel and grading for the continuation of the roadway past the Belmont. Prychidny did not receive any complaints about this work.
- [96] In or around the fall of 2019, Pinelands was preparing to develop a model villa for its third phase.

Board Liaisons - Guldemann and Groenewegen

- [97] Beat Guldemann and Groenewegen were tasked by the Board to follow up with Prychidny to discuss his development plans. Groenewegen said that the Board wanted them to engage with Prychidny so that they could discuss three things: Pinelands' concept for the new construction; the access road; and safety.
- [98] Prychidny understood that the Board had asked that Wise cease any direct communications with Prychidny by this point. Groenewegen confirmed that there would be no value in having Wise be part of their discussions, as the Board wanted a good relationship with Pinelands.
- [99] On the issue of Pinelands' concept for the new villas, the concern was that the Board was aware that Pinelands wanted to build a different villa design than it had in the past, incorporating more glass and a flat roof. The Board had a concern that Pinelands would be building a low-cost structure to attempt to recoup some of its losses from the auction. This could in turn affect the reserve fund.
- [100] Groenewegen said that from his review of the Development Agreement, there were four provisions in it that were particularly important:

1. insurance;
2. planning considerations – what was to be built and where;
3. the Developer’s duty of good faith; and
4. safety, which was paramount.

- [101] A meeting was arranged for October 2, 2018, which Groenewegen and Prychidny both described as productive, respectful, and congenial. An email exchange exists, sent by Guldimmann later the same day, which memorialized the content of their discussion.
- [102] At the meeting, they discussed the new rules that Ainger had conveyed. Prychidny testified that the two Directors confirmed that these new rules would only impact new purchasers, not the existing owners. He was not challenged on this during his cross-examination. Groenewegen was not asked about these rules during his examination.
- [103] They discussed marketing, site plan updates, and the fact that there was little chance of Pinelands completing any units within 2019. This meant that the Club did not need to plan for any revenues or costs relating to the next phase in their upcoming fiscal budget and that it was premature to discuss maintenance fees.
- [104] They also discussed the location of the current access road, with Guldimmann and Groenewegen suggesting that it be moved to behind Sandfield on the Trail. Guldimmann’s email states “we forgot to note to you our safety concern for children occupying the Sandfield on the Trail and the Belmont during the construction if the access road is not relocated.”
- [105] Groenewegen agreed on cross-examination that he did not specifically raise the issue of children’s safety during the meeting. His explanation for this was because safety was implicit in the discussion of moving the road behind Sandfield on the Trail, and implicit in the discussion around access to any new villas. Even though the email references only the issue of the grade of the access road, which Groenewegen described as at a higher elevation due to a ridge, he testified that he was positive that they discussed more than grade.
- [106] When asked why, if safety was a paramount issue, he and Guldimmann forgot to specifically mention it during the meeting, he answered that it was a very good lunch with lots of discussion points.
- [107] With respect to altering the road, by the end of the meeting Groenewegen and Guldimmann had been informed that the location of the access road had been surveyed and was in the location foreseen in the original site plan. With respect to safety, Prychidny confirmed that for earlier phases, Pinelands had followed workplace safety rules with appropriate signage and fencing to ensure the safety of everyone. Groenewegen testified that this answer did not satisfy the Board given the narrowness of the roadway.

- [108] Even though Groenewegen said that they were dissatisfied with that response, they did not articulate that to Prychidny because they expected to have another meeting.
- [109] They did not discuss insurance, building permits or a construction schedule during the October 2, 2018 meeting.
- [110] Another meeting was held between the three men in November 2018, with the discussion once again being captured in an email authored by Guldemann on November 11, 2018. Their discussion included topics raised in a different email that had been sent to Prychidny by Ainger on November 5, 2018. Like many of her emails, its tone is imperious and demanding, requiring that Pinelands submit various documents for the Board's review, such as a preliminary reserve fund study and a complete set of the plans and specifications of each model to be built, by a deadline imposed by the Board. As the discussion with Guldemann and Groenewegen bore out, they agreed that such requests were premature.
- [111] Groenewegen agreed that the email accurately confirms that these Directors said nothing during that second meeting about the road, safety issues, insurance, building permits or construction schedules, although he was positive that they would have discussed the timing of the build.
- [112] A follow up email from the two Directors said that they would communicate with Prychidny once the Board had met, and then update him on their deliberations.
- [113] Prychidny was the next to reach out, later in November, to ask whether the three should meet "to follow up on development issues" before Christmas. No meeting occurred.
- [114] Prychidny was again the next to reach out. In February 2019, he communicated with Guldemann and Groenewegen to provide further information, at which time he asked whether another meeting was required by them "to answer any queries they may have." Guldemann responded on March 1, 2019, stating that he did not think that they needed to meet at that point.
- [115] Prychidny did not have contact with these Directors again, nor communication from them or anyone else on the Board, until October 2019, a fact that was confirmed by Groenewegen.

Lawsuit Against Resorts Muskoka Ltd.

- [116] Two days before the annual general meeting in July 2019, the Club issued a statement of claim against Resorts Muskoka Ltd, the Club's former property manager. The claim seeks damages for breach of contract, unjust enrichment, and breach of duty of good faith and honesty in contractual performance, as well as aggravated and/or exemplary damages in the amount of \$50,000. In its claim, the Club alleged that while acting as the property manager, Prychidny improperly directed the Club's employees to perform management duties that were the responsibility of Resorts Muskoka Ltd.

- [117] At the annual general meeting on July 18, 2019, Wise announced the lawsuit and described the allegations contained in the claim.
- [118] Prychidny testified that this appeared to be a continuation of earlier allegations of dishonesty made against him, and further deteriorated the relationship between himself and the Board. Also, the scheduling of examinations for discovery and fulfilling his undertakings coincided with when he was attempting to build the model villa to move forward with Phase 3.
- [119] The Club has taken no steps to advance that action since discoveries were completed in February 2020, and Resorts Muskoka Ltd. is waiting for it to be administratively dismissed.
- [120] The Club's Amended Amended Statement of Defence in the action before this court raises those same allegations, specifically, that between 2008 and 2017, Resorts Muskoka Ltd. obtained benefits totalling some \$56,500 to which it was not entitled, by using employees of the Club to undertake work and services that Resorts Muskoka Ltd. was to provide. Paragraph 30 of the Amended Amended Statement of Defence alleges that an audit was undertaken by the Club that revealed that Resorts Muskoka Ltd. had surreptitiously used the Club's employees for its own purposes.
- [121] In this action, just as in the action commenced by the Club, the audit has never been produced. No evidence was presented by the Club to substantiate these allegations. This court only has Prychidny's uncontested evidence that the allegations are untrue, as he was not cross-examined on the topic and the Club led no contrary evidence.
- [122] The timing of the commencement of that earlier claim and the Club's failure to pursue it leads this court to conclude that it was a strategic lawsuit that was part of a smear campaign to further malign Prychidny's name and ensure that he did not stand for election to the Board. While the lawsuit does not name Prychidny personally, the allegations in it obviously point to his own personal wrongdoing, referencing Resorts Muskoka Ltd as "the company through which Walter managed the Resort and Resort property." Further, I find that there was no purpose in repeating these allegations in the Amended Amended Statement of Defence other than to attempt to vilify Prychidny. They are stand-alone allegations that bear no relevance to the issues in this proceeding.

Plans to Build a Model Home

- [123] In the first part of 2019, Pinelands moved ahead with its plan to build one model home to assist with sales of the final phase of the Project.⁵ It obtained quotes from subcontractors for items such as windows and doors, a staircase, appliances and furnishings, plumbing, and electrical. It also secured its construction financing through Vector. I find that this

⁵ Some of the documents refer to the ongoing development of phase three as "phase four," although a fourth phase is not contemplated in the Development Agreement.

evidence disproves the Club's allegations in its pleading that Pinelands was never intending to complete Phase 3.

- [124] The Lease contains a clause that requires the Club to execute an acknowledgment that the Lease remains in good standing. This acknowledgement was required for Vector to agree to postpone the interest accruing on the Phase 3 construction financing. On September 25, 2019, Pinelands' counsel at Shibley Righton LLP wrote to the Club's counsel at Miller Thomson LLP, enclosing the acknowledgment and noting that the construction financing was to be completed by the end of the week, so earliest attention to the matter would be appreciated. Despite follow-up, the signed acknowledgment was never returned. The email chain indicates that the Club was aware of the correspondence and that Miller Thomson LLP was awaiting instructions from the Club. No explanation has ever been provided to Prychidny for why the Club ignored its obligation to provide that document.
- [125] In October 2019, Prychidny formally advised the Club that Pinelands intended to build a model villa that fall. Following that announcement, Groenewegen arranged a conference call between himself, Guldemann and Prychidny, held on October 17, 2019. The purpose of the call was to get a better understanding of Pinelands' development plans to inform the Board. Both Prychidny and Groenewegen confirmed that the call entailed a short discussion confirming that financing was in place. Prychidny could not recall a discussion about the access road, or any safety issues being raised, nor a request being made for any further documents.
- [126] The Club then got its lawyer involved. A letter was sent by Justin McLarty of Miller Thomson LLP to Andrea White of Shibley Righton LLP on November 13, 2019. That letter accused Pinelands of not fulfilling its obligations by failing to provide the documents required by Article 3.02, Part II (5) of the Development Agreement. His correspondence referenced the Club's concern over Pinelands' use of the roads and the main driveway from Highway 118 for construction vehicle access, and its potential impact on the Property. Specifically, the Club's concern was stated to be: damage to the roads by construction vehicles; concern for the safety of children and motorized golf carts sharing the same roads; and noise and nuisance of the construction vehicles passing by occupied buildings. On behalf of the Club, the correspondence requested that Pinelands provide construction drawings, site plans and proposed maintenance fees for the new villas, as well as its construction financing information. The correspondence ended by stating that once Pinelands provided such information, the Club suggested that the parties arrange an in-person meeting to discuss the construction.
- [127] There is nothing in the Development Agreement or the Lease that requires Pinelands to disclose the details of its financing or proposed maintenance fees to the Club.
- [128] Prychidny testified that that letter was never forwarded to him by Pinelands' lawyer, and he did not become aware of it until the following January, when another letter was sent by Miller Thomson. I find as a fact that he knew nothing about it until January 2020. Prychidny's responses to all correspondence throughout the record are timely and,

particularly where significant issues were raised, the record bears out that he was not a person to ignore such matters.

- [129] Prychidny testified that prior to receiving a copy of that letter, he had not received any other requests from the Board for construction drawings, site plans or maintenance fees. He had also had no further contact from the Board representatives about the access road, safety issues, or a request for further documents.

Building Permit Issued for Model Home

- [130] In November 2019, correspondence was exchanged between Dan Mortimer of Cottage Country Builders and the planning department of the Township. Importantly, in that exchange, Rian Allen, a Township planner, confirmed that an amending site plan agreement was not required to proceed with Phase 3. Allen confirmed that only a revised site plan drawing was required, to include all of the existing and proposed future buildings. An email from Allen dated November 21, 2019, indicates that the Township's planning department was aware by that time that Sandfield on the Trail had been built across the road from where it was situated on the original site plan drawing included with the registered site plan agreement.

- [131] As directed by Allen, Prychidny provided a copy of the original site plan showing existing construction marked in purple, the proposed model villa in yellow, and future buildings in orange.⁶ The Club has attempted in this litigation to make something out of the fact that Sandfield on the Trail was marked in purple, with an arrow showing its new location across the road, suggesting that the Township may have been somehow misled. Again, I find that at the time that Allen received that drawing from Prychidny, the Township was aware of the as-built location of Sandfield on the Trail.

- [132] The Township issued a building permit for the model home on December 2, 2019. The building permit was issued to the Club.

Miller Thomson's Letter Dated January 23, 2020

- [133] On or around January 23, 2020, Miller Thomson LLP, on behalf of the club, sent another letter to Shibley Righton LLP, again alleging that Pinelands failed to meet its obligations under the Development Agreement by not providing requested construction drawings, site plans or the proposed maintenance fees for the construction of additional villas. The letter indicated, erroneously, that the Board had information that Pinelands had sold six new villas.

- [134] Significantly, the letter further stated that the Club would not permit construction vehicles to make use of the access road and would take all necessary steps to prevent this from occurring.

⁶ Exhibit 5, Tab 103.

- [135] The letter also stated that unless Pinelands provided the requested construction drawings, site plans, and proposed maintenance fees, the Club would not be in a position to allow newly constructed villas to connect to the Property's existing infrastructure and facilities.
- [136] Groenewegen explained that this letter was delivered because the Board was concerned that Prychidny had not provided these documents nor addressed safety protocols.
- [137] McLarty's letter confirmed that the Board remained open to discussion with Pinelands to find amicable arrangements to minimize disruption during the next phase of construction but that in order to move forward, "Pinelands must proceed with transparency and provide the necessary details for the new villas."
- [138] Prychidny testified that he did not know what McLarty meant in his allusion to transparency. His last meeting with Guldemann and Groenewegen was in October 2018, followed by a brief phone call in November 2019. During those meetings and in follow up, the Board had not requested anything from him. He had also not sold any intervals by January 2020.
- [139] He interpreted McLarty's comments to mean that the Club was denying Pinelands the use of the access roads for construction.
- [140] When asked at discovery about the Club's legal basis for taking the position that it would not allow access, its then-counsel responded that "the legal basis was the safety concerns...and the fact that under the lease agreement there couldn't be any nuisance, et cetera." The Club has never amended or changed that answer.
- [141] Groenewegen said that in instructing its lawyer to send the letter of January 23, 2020, the Board did not cancel nor intend to cancel the Development Agreement.
- [142] McLarty also corresponded with Cayman Marshall on January 23, 2020, repeating the same erroneous information about the purported sale of new intervals. The letter went on to note that the Board must consent to the transfer of any interval, and that the Board would not approve the transfer of any intervals by Pinelands until the Club had received necessary information such as plans, specifications, site plans, and maintenance fees for the proposed new villas.
- [143] The Club had not contacted Pinelands to determine the veracity of the claims made prior to instructing its counsel to issue these letters. There was no truth to the information that there had been sales of new intervals.
- [144] Groenewegen believed that this information had allegedly come through Kearns, the operations manager, through discussion with Prychidny, and Kearns having then passed it on to someone on the Board. However, in response to an undertaking the defendant confirmed that Kearns had no recollection of having had such a discussion with Prychidny.

- [145] Given the evidence that it was Wise's role to communicate information and instructions to outside counsel on behalf of the Board, I find that Wise, at a minimum, approved the information that found its way into the letter of January 23, 2020.
- [146] In Prychidny's view, the letter to Cayman Marshall, the brokerage firm associated with marketing of the Club, constituted an interference with the Development Agreement. Further, there is nothing in the Interval Owners Agreement that gives the Club the right to approve sales of new intervals; its role is simply to sign the certificates.
- [147] On January 28, 2020, Prychidny responded to both of Miller Thomson's letters. He first addressed the false assertion of the sales of intervals, asking for the source of the fabricated information. That information was never provided.
- [148] With respect to the documents requested by the Club, Prychidny set out his view that Article 3.02, Part II (5) allowed him to provide all drawings, instruction manuals etc. at the conclusion of the construction of the model villa. This is what had occurred in the past; Prychidny testified that once the villas in the first two phases had been completed, he placed all relevant documents in a box and provided them to the Club. Similarly, when the Belmont and Sandfield on the Trail were completed, the Board received all the drawings and specifications. On discovery, Groenewegen agreed that there had never been any problems with receiving these documents in the past, and what the Club needed was the as-built plans and specifications for when the villas had to be renovated or repaired in the future.
- [149] Last, Prychidny addressed the threat by the Club to not permit the existing roads to be used by construction vehicles or to allow the new villas to connect to existing infrastructure and facilities. He noted that there is only one access road to the Property, and that the next phase of development could not be completed if the Club were to restrict Pinelands' access to that road. He advised that the Club was in breach of the Development Agreement, and that it had severely impaired Pinelands' ability to complete the development.
- [150] Prychidny sent his letters of January 28, 2020 to Groenewegen - Guldemann having had a serious health issue to contend with by that date - who said that he would share them with the Board.
- [151] Neither the Club nor its counsel responded to Pinelands' letters, a fact that was admitted by Groenewegen on discovery.
- [152] Prychidny's uncontested evidence is that construction vehicles and equipment had traversed the main roadway many times in the past, going past existing and occupied villas. The ten Carling villas built in Phase 1 were occupied before Pinelands began to build the boat house. Photographic evidence shows how closely the access road is situated to one of the Carling villas before it reaches the boat house, which Groenewegen confirmed to be about six to eight feet. The Phase 1 intervals sold out quickly, and Phase 2 construction proceeded while those villas were occupied. Likewise, photographic evidence shows that some of the Sandfield villas built during Phase 2 are very close to the access road.

- [153] Additionally, after the completion of those first phases, extensive reconstruction of the dock was undertaken. This required heavy equipment and material to be transported along the access road, including steel pilings that had to be driven deeply into the lakebed. All of this was transported past occupied villas.
- [154] Yet Pinelands had never received any complaints about either safety or damage to the roads before indicating its intention to proceed with completing Phase 3.
- [155] Groenewegen said that the Board's view was that the continued development in Phase 3 was a scenario that the Club had not yet faced. The Carling villas were entirely built before any owners were on site, and the Sandfield villas were able to be constructed without effect on the Carling owners. And when Sandfield on the Trail and the Belmont were built, they were up on the ridge and away from the other villas. It was now a distinctly different scenario, in the Board's view, to build out the rest of Phase 3 using the existing, narrow road in front of Sandfield on the Trail. He acknowledged, however, that the boat house was built and dock rebuilt after the initial phases were complete.
- [156] Groenewegen did not become an owner until 2009, which was after the first two phases were completed and occupied. Accordingly, his knowledge of the pattern of construction cannot be preferred over Prychidny's first-hand knowledge.
- [157] On re-examination, Groenewegen contrasted the road in front of the Carling villas with that in front of Sandfield on the Trail. He said that the roadway by the former is wider and more firmly constructed, and two vehicles can pass by if one moves over. By contrast, the one in issue is narrower and can fit only one vehicle, and its base has always been subject to erosion and ruts.
- [158] On January 29, 2020, Groenewegen asked whether Prychidny had a timeframe to have an updated site plan and building specifications for the Board's review. Prychidny responded, stating "here is the site plan approved by the Township." What Prychidny attached to his email was a revised site plan dated January 30, 2020⁷, that had been completed by his planner after the building permit had been issued, to "clean up" his coloured and marked up drawing that had been submitted to Allen in November 2019. While the defendant appears to attach some significance to that, in my view there is none. The document that was shared with Groenewegen contained no different information than what was on the plan marked up by Prychidny and approved by the Township.
- [159] Groenewegen said that he noted that there was no stamp on it from the Township and considered it a "characterization of what had been proposed." He did not contact Prychidny to communicate any concerns.
- [160] On February 6, 2020, Prychidny forwarded to the two Directors all construction drawings that were approved by the Township's building department. Groenewegen acknowledged

⁷ Exhibit 9.

that Prychidny had previously told him that the drawings would be provided when available.

- [161] Groenewegen testified that the Board was dissatisfied in that Prychidny had not provided the building permit, construction timelines, and insurance certificate, nor had he addressed the Board's safety concerns. Notably, an insurance certificate had never been requested. Prychidny did not receive any communication to indicate to him that the documents he delivered were considered insufficient; no further information was sought by the Board. Groenewegen said that this was because there was no Board meeting in February, he was out of the country at the time, and Guldemann was no longer participating in Board work.
- [162] Groenewegen also said that he did not receive any follow up from Prychidny to inquire whether the information that he gave them satisfied their concerns. However, given the state of affairs at the time, with the threats made by the Board, I find that it was the clear obligation of the Board to let Prychidny know whether it was seeking other documents or information.

Events of February 19, 2020

- [163] Brent Quarry, the company engaged by Pinelands to perform some of the site work, intended to deliver an excavator to the construction site of the model villa. This company was also hired by the Club as its snow maintenance contractor. On February 19, 2020, its employee Danny Hamilton was on site to do winter maintenance and informed Kearns that an excavator would be delivered later that day.
- [164] It was admitted on discovery that Kearns informed Hamilton that he was prohibited from bringing any construction equipment onto the site. It was also admitted that Kearns had received that instruction from Wise, either directly from Wise or indirectly through Ainger. Groenewegen stated that, to the best of his recollection, the Board had not discussed or reached a decision about whether it would prevent Pinelands from continuing construction before Wise communicated his directive.
- [165] Prychidny's response was to deliver a letter to Miller Thomson LLP that same day, noting that the actions taken by the Club that day were consistent with the information conveyed in the January 23 letter. The Board was now actively taking the position that the Club would not permit the existing roads to be used by construction vehicles. He pointed out that the Club had breached the Development Agreement by preventing Pinelands' contractor from accessing the Property, and that he had referred the matter to legal counsel. Prychidny did not refer to payment of the Land Acquisition Costs in that letter.
- [166] Prychidny received a follow up email from Ainger that evening, stating that the Board and property management had not received prior notice of Brent Quarry's intention to be on site. She then went on to reference section 4.0 of the Interval Owners Agreement, which provides that the owner must stay off the Property except during an assigned use period. She did not say anything about safety, nuisance, or the roadway itself.

- [167] She failed to acknowledge the provisions of the Development Agreement and Lease, both of which were operative, that granted Pinelands access for the purpose of completing its development, including the roadway.
- [168] Ainger testified that when she communicated with Prychidny, it was usually at the direction of the Board unless in emergencies or time-sensitive situations, in which case she took instructions from Wise. She confirmed that she contacted Prychidny on the evening of February 19, 2020 on the direction of Wise. The emergency in question, according to her, was that the area in which equipment would be dropped off was directly in front of the Belmont, blocking access. On that day, she said that the son of an owner was expected to arrive at the Belmont, who was studying for a medical licencing examination. In addition to the disturbance to him, it would be difficult for him to get his car to the unit if the roadway was blocked.
- [169] Although Groenewegen testified that the roadway did not extend further than the Belmont in February 2020, the contradictory evidence is that Pinelands had already paid to clear the site of the model home and bring in gravel. The evidence does not satisfy me that the excavator would be placed in a position where ingress and egress from the Belmont would be prevented.
- [170] Groenewegen agreed that Ainger's email of February 19 was the only communication that Prychidny received from the Board after the event involving Brent Quarry, and that she referred only to the lack of notice.
- [171] Ainger testified that part of her role as property manager was to oversee the employees and contractors who came on site. She instituted a 48-hour notice provision. She would ensure that she obtained proof of insurance from any new contractor on site, such as WSIB insurance or possibly an insurance certificate that named the Club under a policy. This was one reason that the Board required notice 48 hours in advance of a contractor's arrival. In the case of Brent Quarry, the Club was already employing that company for snow removal so had presumably satisfied itself of these requirements. Another reason was so that owners affected by the work could be notified.
- [172] Groenewegen testified that Wise's direction was not meant to convey an intention of the Board to cancel the Development Agreement. However, no one on the Board responded to Prychidny's correspondence of February 19; the only response was from Ainger referring to lack of notice.
- [173] Two documents are in evidence that the Club relies on to support its contention that Pinelands was not in a position to proceed with its development on February 19, 2020. The first is a WSIB Clearance Certificate for Cottage Country Builders, bearing a validity period that expired on November 19, 2019. The second is a Liability Insurance Certificate for the builder that was to start on November 1, 2019 and expire on March 4, 2020.
- [174] Prychidny's uncontested evidence was that Cottage Country Builders had to satisfy Pinelands that the proper insurance coverage was in place, had always done so in the past,

and would have provided proof of coverage when construction was ready to begin. It was always their obligation to renew or extend its coverage, as had occurred in the past. The construction schedule indicates that building on the model home was intended to start in November 2019. This was pushed back because the building permit was not issued until the following month, and Brent Quarry was unable to start before February. I find that the change in plan for construction to begin in February 2020 adequately explains the state of the coverages, and the evidence does not prove a breach of Pinelands' obligation to ensure that insurance was in place.

Demand for the Land Acquisition Costs

- [175] On March 3, 2020, Ryan Breedon, litigation counsel for Pinelands, sent a letter to Miller Thomson LLP in which he stated that the Club was in breach of the Development Agreement, and demanded the immediate payment of the outstanding Land Acquisition Costs. That letter noted that Prychidny had advised the Club on two prior occasions of its breach of the Development Agreement, and yet it had done nothing to allow Pinelands' access to the Property.
- [176] Miller Thomson LLP responded by letter dated March 6, 2020, written by Caleb Edwards. Edwards claimed that "temporary refusal of access was prompted by Pinelands' attempt to begin construction without any notice. Had sufficient notice been provided, access would have been permitted." Edwards proposed that the Club will provide access if sufficient notice is given, proposing five days' notice. Groenewegen said that the Board would have been open to negotiating that time frame and agreed that it had never been the case that five days be provided.
- [177] Prychidny testified that this was the first time that the restriction of access had ever been characterized as "temporary."
- [178] Groenewegen said that it was the Board's position at that time that access be denied because neither notice nor a safety plan had been provided by Pinelands. When asked why Edwards' letter did not address the lack of a safety plan, his answer was that these were tense times, and the letter reflected the view of the President and not the view of the entire Board. He stated that the reason that Kearns was instructed to prevent Pinelands' contractor from moving equipment onto the site was both from lack of notice and the unresolved safety issue.
- [179] Again, on discovery, when asked for the legal basis for the board taking the position that it could prevent Pinelands from using the existing roads for construction vehicles, the answer given was "safety concerns" and that under the lease agreement nuisance was prohibited.
- [180] The letter of March 6 also requested plans "so that it can work with Pinelands to ensure that the property is still useable for its intended purpose while construction is ongoing." Groenewegen said that this was a reference to the registered site plan, some of the advertising brochures, and the construction timeline. He confirmed that as of the date of the letter, the Club had the site plan drawing and construction plans.

- [181] The letter of March 6 also referenced the risk to “neighbouring properties”, residents, and other users of the road due to heavy equipment, and alleged that Pinelands had altered the location of the access road, thereby not acting in good faith. It also requested a general construction timeline.
- [182] Again, the letter suggested that the parties work together to reach an agreement to move forward.
- [183] Prychidny did not accept the conditions set out in the letter of March 6, or take up the invitation to negotiate a solution. This was because he had been accused of bad faith and wrongdoing since 2017. The Club and their lawyer had ignored the fact that he had provided all requested documents, attended all requested meetings with the Board’s representatives, with no request for further meetings. He had heard nothing further about the issue of maintenance fees since the fall of 2018. He considered the Club’s conduct to be a way to stall a competitor from building more villas.
- [184] Breedon responded to this letter on March 9, 2020, advising that the Club remained in breach of the Development Agreement and demanded immediate repayment of the Land Acquisition Costs. That letter also stated:
- Rather than rectify this breach, you are attempting to impose additional obligations on Pinelands, and continue to restrict Pinelands’ access, thereby compounding the breach.
- [185] On March 25, 2020, Michael Shell, a new lawyer for the Club, wrote to indicate that he had been retained to respond to the litigation. In that correspondence, Shell wrote:
- [The Club] will take whatever steps are necessary to defend any claim which Pinelands might institute and it will resist any efforts that might impair the integrity of its property, limit the use or endanger the owners and residents by reason of construction methods your client seeks to employ and the manner of access upon which it is insisting.
- [186] On March 26, 2020, the statement of claim in this action was issued (the “Claim”).
- [187] Throughout his testimony, Groenewegen was adamant that the Club did not cancel or purport to cancel the Development Agreement.
- [188] On May 21, 2020, Wise sent an email to all owners regarding the continued development of Phase 3. After providing the rationale for doing so, Wise wrote that the Board denied construction vehicles and equipment from the use of the resort’s access road to reach the location where it was intended to construct housekeeping unit 22.⁸ The rationale presented

⁸ Housekeeping unit 22 was another name for the proposed model villa, 21 of the units having already been constructed.

was that the Board was concerned about construction vehicles using the existing road because doing so could: 1) affect the integrity of the road; 2) impact the safety of children; and 3) damage the integrity of the two buildings.⁹ He went on to say that “the Board conveyed to the developer that the access road for phase 3 must be constructed in accordance with the approved site plan.” There was no reference to the issue of notice.

[189] Even as he wrote those words, Wise already knew, for reasons to be explained, that the Board’s position that “the access road for phase 3 must be constructed in accordance with the approved site plan” was not supported by the Township’s planners.

[190] Wise did not run for re-election in 2021. The new President, John Oakes, was concerned about the cost of this litigation and wished to resolve this matter. Groenewegen confirmed that Wise objected to these attempts and “had strong views about things.”

Freedom of Information Act Request

[191] After being served with the Claim in this action, the Club and Shell embarked on a series of communications with the Township in April and May, 2020. The Club has never produced those documents in this litigation. They were obtained by Prychidny through a Freedom of Information Act Request (“FOIA Request”). The Club’s current counsel had never been informed about the existence of these documents. Groenewegen had no explanation for why they had not been produced, since all Board members were asked to produce relevant documents.

[192] Groenewegen confirmed that the Board was aware that Wise, and its then counsel, Shell, were communicating with the Township. With respect to Shell’s communications, Groenewegen confirmed that the purpose in doing so was to get as much information as possible to prepare the Club’s defence, and that Shell was working with Wise.

[193] As Wise was the author of some of these communications, and the person working most closely with Shell, I find that Wise would have known about all of these communications. At the time that this litigation began, he was still the President. I find as a fact that his concealment of them was more likely to be deliberate than inadvertent, given their content.

[194] Wise, on behalf of the Club, authored a letter directed to Cheryl Minty, Permit Administrator at the Township. Its aim was to attack the building permit issued on December 2, 2019. He requested that the Township do an immediate, on-site inspection of how construction equipment and material was to arrive at the site of the model villa. He cited “serious safety issues” and the structural integrity of two nearby buildings, presumably the Belmont and Sandfield on the Trail. He took the position that an access road in accordance with the 2008 site plan must first be constructed before any construction was to commence on the building. He characterized this matter as “URGENT.” This “urgency” was certainly a mischaracterization, given that no attempts had been made to proceed with the model home since February 19, 2020 and the matter was now in litigation.

⁹ Presumably referring to Sandfield on the Trail and the Belmont.

This letter appears to have also been forwarded to Minty by Shell on April 6, 2020, who passed it on to David Pink, the Township's Director of Planning.

- [195] When Shell began to communicate with the Township, his focus was to point out discrepancies between the registered site plan and the as-built location of Sandfield on the Trail. Groenewegen agreed that those are the same discrepancies that the Club has pointed to during this trial.
- [196] With respect to the view expressed by Shell to Pink that a new site plan agreement was required, Groenewegen said that he was uncertain as to whether this was a "tactic" or legally necessary; he only knew that Wise was working with Shell at this time to prepare a defence.
- [197] In his communication with Shell, Pink wrote:

With respect to the identified discrepancies between the approved plans and development on site, this is not entirely uncommon for a large, multi-phased, and multi-year development project. Based on my cursory review of the changes you have highlighted, I have not identified any zoning or significant issues, although I would note that to my knowledge no survey has been completed. If the current owner(s) are concerned that the approved plans do not depict development on site, we would recommend submitting an Amending Site Plan application in order to enter into an Agreement based on as-built development supported by an up to date survey.

- [198] In a follow-up email to his colleague Allen, Pink referenced a telephone conversation that he held with Shell on April 20, 2020 and that "[w]e left it that the current owners (his clients) would be wise to have a survey and submit an as built amending sp [site plan] agreement once all development is finished, however the discrepancies he raised did not appear to be major issues that the [Township] would be pursuing."
- [199] Groenewegen said that the Board was aware that the Township had advised Shell that it would not be taking action, with the Board later discussing whether Pink had ever been to the Property to look at the Project.
- [200] Wise then returned to the building permit issue, by sending to Pink the same letter that he had earlier directed to Minty. In his email to Pink, Wise stated that the Club believed that the building permit issued for the model home contravened an approved site plan.
- [201] Pink's response to Wise on May 13, 2020 was unambivalent. He believed that the concerns raised in the correspondence to be a private matter between landowner and parties undertaking construction. There is no evidence that the Township took any other action.
- [202] Accordingly, when Wise conveyed to all of the owners in his correspondence on May 21, 2020 that "the Board conveyed to the developer that the access road for phase 3 must be constructed in accordance with the approved site plan", he was aware that the Township

was not concerned with the location of Sandfield on the Trail in relation to the access road and the proposed continued development. He did not tell the owners anything about his, or Shell's, communications with the Township and the ultimate result that the Township was not taking any action.

Testimony from Brian Kearns

- [203] Kearns was called to testify on behalf of the Club. However, it was learned just before his scheduled attendance that the Club was paying him the equivalent of his full-day's pay to attend, although he was no longer an employee of the Club.
- [204] The Club's counsel explained that Kearns was paid by the Club because he would otherwise lose an entire day's pay, as testifying meant that he would miss his ride to work. The Club was reimbursing him for his lost wages.
- [205] This payment was discovered when Kearns informed Prychidny that he did not believe that he could speak to him about the matters to which he was expected to testify, since he was being paid by the Club.
- [206] This court ruled that Kearns would not be permitted to testify. The general rule is that it is impermissible to offer compensation to a lay witness for their participation in a trial beyond that prescribed by the tariff: *Legault v. TD General Insurance Company*, 2022 ONSC 3367, at para. 11; aff'd 2024 ONCA 439, 50 B.L.R. (6th) 180. The practice is discouraged out of a concern that such witness will be more inclined to provide testimony slanted in favour of the paying party, and to avoid having unnecessary doubt cast on the credibility or reliability of their evidence. In this case, there were no unusual circumstances to persuade the court that an exception should be made for this witness. He should have only been paid the attendance fee allowed by Tariff A in accordance with r. 53.04(4).

Opinion Evidence from Planning Consultant

- [207] Jamie Robinson is a land use planning consultant who the Club asked to be allowed to provide opinion evidence as to municipal planning compliance, land use planning considerations, and land development, including safety.
- [208] A *voir dire* was conducted to determine the admissibility of his evidence. Robinson had produced a report in which his conclusion was:

On the basis of my preliminary review, construction on Phase 3 should not begin until such time that the Site Plan is updated, as required by the registered site plan agreement, in order to include details surrounding road design, drainage, pedestrian movement, building locations, building plans, lighting and other site plan related items.

- [209] Pinelands objected to the expert providing such an opinion, on the basis of relevance. Furthermore, given that the Township was the ultimate decision-maker on all planning

issues in this case, his opinion that Phase 3 should not have been allowed to go ahead was irrelevant. Any attempt to explain away Pink or Allen's decisions was not germane to the issues in this litigation, and Robinson had not been provided with any of the correspondence obtained under the FOIA Request.

[210] On behalf of the Club, Mr. Zuber argued that the defendant's pleading alleges that the Site Plan Agreement dated May 16, 2005 requires further site plan approval and a further site plan agreement registered on title for Phases 2 and 3, that Pinelands failed to comply with the Site Plan Agreement, and that Pinelands was not in compliance with the Site Plan Agreement, Development Agreement and Lease and therefore was not in a position to undertake the balance of the construction. He submitted that Pink's remark that he had done a " cursory review " and that no survey had been completed opened the door for the Club to question the Township's decisions, at a minimum. One of the Club's defences is that as of February 19, 2020, Pinelands had not been in a position to proceed with construction, and therefore the Club's restriction of access was both necessary and not the cause of Pinelands' losses. Robinson's opinion was also relevant, he argued, to the reasonableness of the Board's concerns.

[211] After argument, this court ruled as follows:

I have a strong concern that the tendering of this planning expert will ultimately devolve into a back door attack on the soundness of the Township's decision. This is not permitted because he has not reviewed all of the correspondence for the relevant period of March to May 2020 and his report does not cover this topic.

Despite that concern, I am allowing Mr. Robinson to provide opinion evidence as to whether Pinelands was in a position to initiate road construction for further development of Phase 3 as of Feb 19, 2020.

If ultimately, I find either that the evidence is not relevant to the court's determination of whether there was a breach of the development and construction agreement or to the reasonableness of the defendant's conduct, his evidence is likely to be rejected on the basis of lack of relevance.

However, at this stage of my appreciation of the evidence, I find that his opinion may be relevant and necessary to this court's interpretation of the parties' obligations under the contractual documents where those obligations are related to planning issues, which is the focus of the alleged breach. Also, his assistance to the court as a professional planner may be relevant and necessary as no lay witness had sufficient expertise to give clear and reliable evidence with respect to nomenclature associated with the process of planning and development for this project.

- [212] Robinson provided evidence confirming the process behind zoning approval and registering a site plan agreement on title, and the process of making subsequent amendments to site plans. He confirmed that SPA-08/08 was the most recent site plan drawing attached to the Site Plan Agreement between the Township and Pinelands, which did not show the as-built location of Sandfield on the Trail.
- [213] Beyond that, his testimony amounted to no more than a critique of the Township's decisions to issue building permits for Sandfield on the Trail and the new model villa, and its decision to not require a new site plan agreement. He also believed that more attention should have been given to issues such as stormwater management and road design for Phase 3, because he believed that there may be unexplored safety issues. However, he confirmed that he is not an expert on issues of roadway design or safety. He recited those provisions of the Site Plan Agreement already known to the court, on which his opinion hinged. His testimony offers no relevant information about whether Pinelands was in a position to proceed with construction on February 19, 2020 and thereafter. The Township's decision to allow it to proceed is the determinative factor.
- [214] That being the case, no weight has been given to his evidence apart from his confirmation of SPA-08/08 and the background information that he provided the court about planning documents.

Issue 1: Did the Club cancel or purport to cancel the Development Agreement?

Position of the Parties

- [215] One of the key differences between the parties' viewpoints as to whether there has been a breach by the Club of the Development Agreement centers on the interpretation of Article 4.01 of the Development Agreement.
- [216] The Club maintains that there was no breach of Article 4.01 of the Development Agreement on a clear reading of that provision. As a reminder, it provides:
- The Club agrees that if [...] the Club cancels or purports to cancel this Agreement, including taking any action or threatening to take any action to prevent or restrict access to the Lands by the Development Manager, then the Club must pay to the Development Manager on demand, the unpaid Land Acquisition Costs.
- [217] The Club argues that as a necessary predicate to liability, the Club was required to have possessed an intention to cancel the Development Agreement. Blocking access for any other reason will not be enough to trigger liability. Even a temporary blocking of Pinelands' access, if done for a purpose other than to cancel the Agreement, does not render the Club liable to Pinelands for the payment of the Land Acquisition Costs.

[218] The Club submits that this interpretation is supported by the balance of Article 4.01, which contemplates that the Club may still be liable to Pinelands for other damages if access is blocked. Article 4.01 further provides:

Such payment [of the Land Acquisition Costs], however, shall not limit the right of the Development Manager to seek damages for breach of contract from the Club with respect to the Club's action in cancelling or purporting to cancel this Agreement or preventing or restricting the Development Manager's access to the Lands without legal right to do so.

[219] The Club's position is that these sentences in Article 4.01 should be interpreted to mean that Pinelands may seek other damages for breach of contract from the Club either because the Club cancelled or purported to cancel the Development Agreement or because the Club blocked Pinelands' access without legal right. The disjunction between damages for cancelling the Development Agreement, and damages for blocking access, means that there could be instances where access was blocked without intention to cancel the Development Agreement. In such a case, Pinelands could still claim damages, other than the payment of the Land Acquisition Costs.

[220] The Club asserts that this is what occurred, and at most, Pinelands' access was restricted from February 19, 2020 to March 11, 2020, if five days' notice was going to be adopted by the parties. And the notice period could have been less if Pinelands had been willing to engage in a discussion. The Club asserts that theirs is not the type of conduct that should give rise to the payment of millions of dollars.

[221] Further, Groenewegen was clear that the Board never had an intention to cancel the Development Agreement. The Board did not vote on such a major decision. The letters sent by Miller Thomson LLP do not support such an inference, as they call for further discussion to allow the development to move forward.

[222] The Club says that the Board was making reasonable requests for information, and the evidence of Robinson shows that they had a sound basis for having concerns for safety and the use of the existing road for further construction.

[223] In contrast, the position of Pinelands is that the Club's interpretation of Article 4.01 makes no commercial sense. Adopting the Club's interpretation would require Pinelands to have knowledge of the Club's state of mind, or to accurately guess its state of mind, before being able to invoke its contractual right to recover its Land Acquisition Costs. This is impossible; there is a reason that the word "intention" does not appear anywhere in the paragraph.

[224] If the Club's interpretation was adopted, it would render meaningless the second part of the phrase "including taking any action or threatening to take any action etc." To the contrary, the entire phrase is intended to be disjunctive, such that liability is triggered by cancellation *or* preventing access without legal right.

[225] Additionally, the Club’s interpretation would leave the highlighted “or” in the following phrase without meaning. The clear reading is that damages for breach of contract may be available in addition to payment of Land Acquisition Costs, and that the Club may be liable for such damages for either cancelling the Agreement or interfering with the access to the Lands.

Such payment [of the Land Acquisition Costs], however, shall not limit the right of the Development Manager to seek damages for breach of contract from the Club with respect to the Club’s action in cancelling or purporting to cancel this Agreement or preventing or restricting the Development Manager’s access to the Lands without legal right to do so. [Emphasis added.]

[226] Pinelands argues that the interpretation urged on this court by the Club would mean that it could restrict access to Pinelands and prevent its development from progressing for any length of time, for any reason, but as long as it did not intend to actually terminate the Development Agreement, Pinelands would have to satisfy itself with seeking only its damages for loss of opportunity and any out of pocket losses.

Analysis

[227] The applicable principles of contractual interpretation are described in *Earthco Soil Mixtures Inc. v. Pine Valley Enterprises Inc.*¹⁰ *Earthco* confirms, at para. 29, that the modern contractual approach described by the court in *Sattva Capital Corp. v. Creston Moly Corp.*¹¹ still applies. The overriding goal is to determine the intent of the parties and the scope of their understanding, and to do so, a “decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of the formation of the contract”: *Sattva*, at para. 47.

[228] Pinelands’ counsel has also drawn this court’s attention to *Austin v. Bell Canada*, which underscores that “courts will strive to give all provisions in a contract meaning and to avoid an interpretation of one provision that would render another provision meaningless or redundant.”¹²

[229] Reading and attempting to construe the Development Agreement as a whole, the parties understood that Pinelands was to be given unrestricted access to the Property for the purpose of completing the Project. The Project was the entire *raison d’etre* for the creation of all the primary contractual documents - the Lease, the promissory note, and the Development Agreement. It was critical for both parties that development be allowed to

¹⁰ 2024 SCC 20, 175 O.R. (3d) 240, at paras. 63-65.

¹¹ 2014 SCC 53, [2014] 2 S.C.R. 633.

¹² 2020 ONCA 142, 150 O.R. (3d) 21, at para. 26.

proceed; for Pinelands, to meet its development objectives and for the Club, to eliminate its debt.

- [230] For that reason, Pinelands wanted to be clear, as Prychidny testified, that interference with the Project would be severely problematic. So problematic that it would trigger payment of the debt. This liability would arise if the Club cancelled or purported to cancel the Development Agreement.
- [231] The wording of the contract unambiguously expresses this intention. What is also unambiguous, I find, is that the words “including taking any action or threatening to take any action to prevent or restrict access to the Lands” are meant to describe circumstances in which the Development Agreement was cancelled or purported to be cancelled. There is no other way to interpret the word “including.” The ability of the Developer to proceed was so fundamental that even a threat to take steps to prevent or restrict access was actionable.
- [232] This interpretation accords with the law in *Earthco* and *Austin*. If the restriction of access is to have no effect unless there was an accompanying intention to cancel or purport to cancel the Development Agreement, there was no purpose in including the phrase “including taking any action or threatening to take any action to prevent or restrict access to the Lands.” Otherwise, the result that *Austin* requires the court to avoid would be achieved, rendering meaningless a significant clause.
- [233] The intention of the parties is underscored by the fact that general damages are available in either instance – cancellation *or* restriction of access may give rise to liability.
- [234] This is not an ambiguous contract, and accordingly there is no need to look beyond it to determine the parties’ intentions, or to apply the doctrine of *contra proferentem*.
- [235] I agree with Pinelands’ counsel that Article 4.01 of the Development Agreement does not require that Pinelands prove an intention to cancel the agreement. Having said that, there is ample evidence of the Club’s intention to both threaten and restrict access for an indeterminate period.
- [236] While the letters from Miller Thomson LLP dated January 23 and March 6, 2020 attempted to set a somewhat conciliatory tone at the end, there was no suggestion in the first letter that the threat to block access was temporary. The second letter suggested that the restriction was temporary only after there was a demand for the Land Acquisition Costs. And what occurred next, under the direction of the Board, is telling. Shell’s letter of March 25, 2020 is clear in taking the position that the *status quo* was not going to change:

[...] [the Club] will resist any efforts that might impair the integrity of its property, limit the use or endanger the owners and residents by reason of construction methods your client seeks to employ and the manner of access upon which it is insisting. [Emphasis added.]

- [237] In the circumstances, it is not relevant that there was no Board vote. While I find as a fact that Wise initiated the instructions to bar access to Brent Quarry on February 19, 2020, Groenewegen’s testimony was clear that the position taken by Miller Thomson LLP in the letter of January 23 reflected the position of the Board. That position was that they would take all necessary action to prevent access until their demands were met. I further find as a fact that the position set out in Shell’s letter expressed a similar intent, and that the Board had approved its content.
- [238] The Club’s Amended Amended Statement of Defence contains further allegations that this court will address, even though not pursued by it at trial.¹³ In summary, the allegations are that Pinelands was never in a position to proceed with the continued construction of Phase 3, had decided against the financial viability of completing the Project, and so deliberately tried to trigger or cause a breach of the Development Agreement in order avoid construction costs and accelerate payment under the promissory note.
- [239] There is no evidence to support these allegations. To the contrary, as outlined earlier in this decision, there is ample evidence of the steps taken by Prychidny to move forward with the Project.
- [240] In conclusion, by first threatening, and then deliberately restricting Pineland’s access to the Property when it wished to continue its development, the Club breached the Development Agreement.

Issue 2: Whether the Club had a legal right to prevent or restrict access, or threaten to do so?

Position of the Parties

- [241] As reviewed in the discussion of the evidence, the Club has provided a variety of shifting explanations for why it threatened, and then actively prevented, Pinelands from using the access road for the continuation of the Phase 3 development.
- [242] As noted earlier, the reasons given on discovery for the position in McLarty’s letter of January 23, 2020 were: 1) safety concerns; and 2) the provisions of the Lease that prohibited nuisance. The Club’s position is that it had a responsibility to the interval owners to take steps to protect their safety, which it could not delegate solely to Pinelands.
- [243] Counsel for the Club argued for an expansive interpretation of “safety”, saying that it was meant to encompass everything from the location of the road passing in front of Sandfield on the Trail, its width, and the use of it by children and other residents.

¹³ Exhibit 19, at paragraphs 22, 25 and 26.

- [244] More reasons were given by counsel for the Club for blocking access on February 19, 2020. These are lack of notice, safety concerns, damage to roads and structures, failure to produce documents as required by Article 3.02, and a failure to abide by the Site Plan Agreement.
- [245] Regarding notice, the Club argues that there is an implied duty to give reasonable notice to the Club that arises out of Pinelands' obligation to act in good faith, as provided in Article 6.04 of the Development Agreement.
- [246] Regarding safety, the Club submits that its safety concerns were legitimate and motivated by a desire to ensure the safety of owners, particularly children. Those concerns had been brought to Prychidny's attention by Groenewegen and Guldemann and were never, in the Board's view, adequately addressed. Damage to the road itself was a legitimate concern, it was argued, due to the light covering of gravel and tendency for ruts to develop. No submissions were made regarding damage to the buildings.
- [247] With respect to the requests for information, from 2018 through to 2020 the Board had repeatedly requested details on the future development. These were reasonable requests which should have been fulfilled as soon as available, and in accordance with Pinelands' duties of good faith.
- [248] The second reason for threatening to restrict the access provided at discovery was "nuisance", a topic also raised in McLarty's correspondence of November 13, 2019. He wrote "[f]urther concerns include...the noise and nuisance of the vehicles passing by occupied buildings."
- [249] The Club also contends that resisting access was reasonable and necessary due to the failure to comply with the Site Plan Agreement.
- [250] Pinelands' position is that all of these "reasons" were excuses given to attempt to disguise the real reason for interfering with development. The true reason for the Club's breach was that the Board wished to prevent Pinelands from completing the Project. Its members had a clear financial reason to do so – more intervals on the market would depress the value of their own investments – a topic of great interest to Wise and other members of the Board.

Analysis

- [251] The Board's actions on behalf of the Club indicate that it was under a serious misapprehension about the scope of its powers. The Club's interference with Pinelands' role as Developer was neither legal nor warranted.
- [252] Under Article 3.04 of the Development Agreement, Pinelands did not have to seek or obtain any further approval from the Club to proceed with the development. The responsibility for virtually every aspect of the Project was placed on Pinelands through the Development Agreement. Dovetailing with these broad responsibilities are those that transfer to the Club under the Interval Owners Agreement. Only *after* the building and

services contemplated by the plans and specifications have been completed and the villas become available for occupancy does it fall to the Club, under Articles 3.05 and 3.06, to operate, manage, administer, protect, maintain, repair, rebuild, etc. The Club's right to participate in, be informed about or interfere with the development while ongoing is virtually nil, beyond being given insurance certificates under Article 5.02 and the documents required by Article 3.02, about which more will be said later. Accordingly, when the Board requested things such as a construction timeline, conceptual drawings and proof of financing, it had no entitlement to do so.

- [253] With respect to safety, the starting point is Article 3.06 of the Development Agreement, which gives responsibility for safety exclusively to Pinelands.
- [254] I find that Groenewegen was sincere in conveying his own concerns, possibly shared by other Board members, for younger children including his own grandchildren, who had been accustomed to unfettered use of the road to get to and from Sandfield on the Trail and the Belmont. Whatever financial motives may have been influencing the decisions of members such as Wise, I believe Groenewegen was sincere when testifying that he has never viewed his ownership as a financial investment.
- [255] However, the concern shared by Groenewegen, and other like-minded members of the Board does not change the fact that there is nothing in Pinelands' past conduct that should have led reasonable individuals to conclude that it would not take adequate measures to protect the safety of the Club's owners, families, and invitees. I accept Prychidny's evidence that he intended to use signage and markings as in the past, and that construction had previously occurred in the vicinity of, and passing close to, occupied villas without incidents. The evidence presented by the Club as to the narrowness of the existing roadway and its proximity to Sandfield on the Trail and the Belmont does not persuade me that safety issues gave rise to any legitimate reason to bar further development.
- [256] And while the Board was preoccupying itself with issues of narrowness of the roadway, its surface, and the potential for shared usage, it overlooked the fact that it was within Pinelands' right under Article 2.03 to go so far as to block use of the access road to Phase 3 while development was proceeding. Pinelands had never even proposed doing so.
- [257] I also accept that the issue of safety, from the Board's perspective, encompassed where the road was situated. However, the evidence is clear that the path of the roadway never changed from its position on the registered site plan. It was built where initially mapped out. All that changed was the position of Sandfield on the Trail. This issue falls under the same analysis as all other planning issues – if the Township found no reason to object, it did not fall to the Club to object by inserting itself in the development. There are no terms in any of the governing documents that gave them the right to do so, and no legitimate safety issue on which they can rely to justify pushing Pinelands to move the road.
- [258] I find that the evidence shows that “safety issues” were not the main motivation for the Board's decisions. Safety issues were not a focus during the meeting between Prychidny,

Groenewegen, and Guldimmann in November 2019 and none of Groenewegen's subsequent communications with Prychidny mention the topic.

- [259] The concern over damage to the roads by construction vehicles is baseless. All roads constructed by Pinelands are made of dirt and gravel. Even if there was disrepair during construction of the model home, as might be expected, there is no evidence on which to base the belief that Prychidny would have left it in that state. All evidence points to him creating a desirable resort setting; it is not believable that he would not remediate the condition of the road before attempting to make further sales.
- [260] The Club also took the position on discovery that it was entitled to restrict access to the Property because "under the lease agreement there couldn't be any nuisance." Pursuant to Article 4 of the Lease, Pinelands is prohibited from committing or allowing any nuisance on the premises. However, construction vehicles cannot constitute a nuisance, since the continued development was the reason for the Lease's existence. As previously noted, on a plain reading of the Lease, I find that its purpose is to define that portion of the Property that was yet to be developed, for the purpose of facilitating such development. Accordingly, "nuisance" does not provide a legal basis to threaten to restrict access to construction vehicles.
- [261] The first and only reason offered by Ainger following the outright denial of access on February 19, 2020, was Pineland's failure to give 48 hours' notice. Lack of notice was also a reason noted in Edwards' letter. The only provision of the Development Agreement to which the Club can point to attempt to establish such an obligation is Article 3.05, imposing a duty on Pinelands to always act in good faith. I find that this duty of good faith cannot reasonably extend to an implied obligation to provide notice to the Club.
- [262] The evidence bears out that Prychidny attempted to comply with Ainger's imposition of a 48-hour notice requirement, when possible, as a matter of courtesy. But both Ainger and the Board seem to have been acting on an unwarranted assumption that the Club could dictate such a "rule", when there is no express term in the Lease or the Development Agreement that requires any notice at all. To the contrary, Article 2.03 provides for "unrestricted access to the Lands during the term of this Agreement." While it is preferable for management to have been able to give owners some advance warning if possible, each owner knew that continued development was part of the price to pay for owning an interval. There is no "bad faith" on the part of Pinelands in proceeding with development even where it was not possible to give notice. As Prychidny testified, he was unaware that Brent Quarry planned to drop off the machinery that afternoon. He provided a rational explanation for why it was not always possible to accommodate both notice and the vagaries of contractors' availability.
- [263] It is also notable that McLarty's letter of January 23, 2020, says nothing about notice, and that neither he nor the Board acknowledged Prychidny's responding correspondence. If the Board sincerely just wanted 48 hours' notice, it certainly made no effort to convey that to Pinelands.

- [264] The “lack of notice” reason did not make its way into the Statement of Defence or its subsequent amendments, signalling that the Club is likely aware that there was never any legal basis to deny access due to lack of notice. This court reaches the same conclusion.
- [265] Although safety issues were offered again as one of the later reasons provided for restricting access on February 19, 2020, no new and improved grounds had developed between February 19 and March 23, or any time thereafter. On February 19, when Ainger corresponded to provide the Board’s reasons for denying access, she cited only a lack of notice. She also did not testify that safety issues were the reason behind Kearns being instructed to bar access that day. Instead, she relied on the presence of an individual who was studying, and that “it would have been very difficult for that individual to leave with heavy equipment moving up and down the road.” As I have previously found, the evidence does not support that construction equipment would have blocked access to the Belmont as of February 19, 2020. Further, mere inconvenience does not justify preventing access.
- [266] In his email to the owners in May 2020, Wise advised that one of the reasons that the Board restricted access was the risk of damage to the “integrity” of Sandfield on the Trail and the Belmont. The Club offered no evidence at this trial to support such a contention.
- [267] Another reason for restricting access, which was a later addition to the list, was that Pinelands had not constructed Sandfield on the Trail in accordance with the registered site plan, and that Pinelands was in breach of the Site Plan Agreement as earlier discussed. This was never raised in any of the correspondence from Miller Thomson LLP. As Groenewegen testified, he was not sure whether this was simply a “tactic” or a “legal reason” for denying access.
- [268] I find that it was the former. The evidence obtained through the FOIA Request leads to the obvious conclusion that that the Board and Shell were looking for after-the-fact justification for the Club’s denial of access. The Club has continued to maintain that defence even in the face of the position taken by the Township in April and May, 2020. There are no planning issues that provide a legal basis for the denial of access.
- [269] The last discussion point is the provision of documents as set out in Article 3.02 Part II (5), which requires Pinelands to “ensure that the Plans and Specifications, maintenance manuals, operating instructions, etc., are properly completed and handed over to the Club.” Notably, the alleged failure of Pinelands to do so was not addressed in Edwards’ correspondence of March 6, 2020. This is, I find, because Prychidny had already provided the necessary information to Groenewegen earlier that year. Despite his belief that all documents did not have to be provided during the construction phase, Prychidny provided what he had.
- [270] I find that where the Board had earlier made such demands, it was for the non-legitimate purpose of interfering in the ongoing development of the Project. While a plain reading of the Development Agreement contradicts Prychidny’s view that such documents did not have to be provided during the construction phase, I find that the intention behind this term

was so that the Club could fulfil its purpose of maintaining and repairing the buildings and infrastructure going forward.

- [271] This interpretation is supported by the wording of the Interval Owners Agreement, which expressly provides that the Club’s duties in relation to the Project starts for each phase when that phase has been completed. As previously noted, the “Project” is defined in the Interval Owners Agreement to mean “each phase of the Development when the Club Buildings and other facilities and services contemplated by the Plans and Specifications have been completed and the Villas are available for occupancy by Owners.” Further, the fact that Pinelands’ obligation to provide documents was not listed within the “Part I Design Phase” of Article 3.02 further supports the conclusion that the Club was to not be involved in the planning and development-related decisions entailed by each phase.
- [272] The evidence reveals that the Board was concerned about the design proposal for the new villas, believing that Pinelands was intending to erect inferior buildings to offset past losses, and concerned that their design and materials were much different than the earlier villas. The Board’s concerns are in ignorance of Article 3.04; Pinelands was entitled to implement the development without need for further approval by the Club and had complete control over design.
- [273] Yet the Board attempted to interject itself, I find, to purposefully thwart Pinelands. The Club’s actions as undertaken by its Board were a continuation of its earlier conduct, all aimed at sidelining Pinelands. Whether this was wholly financially motivated or because of a personal grievance Wise held toward Prychidny, or both, there was no legal basis for doing so. This conclusion may seem counter-intuitive, as the sale of more intervals would reduce the debt and thus be in the Club’s interest to facilitate. But it is to be remembered that the Club was offered a means of eradicating the promissory note when Pinelands offered a severance proposal that included the building of a new road, and the Board rejected it primarily because it did not want the Club’s facilities to be shared. The promissory note was not a significant concern for the Board, I conclude, whose members may have been misled by Wise’s erroneous interpretation of how to circumvent it.
- [274] In summary, the Club did not have a legal right to threaten to restrict access, nor to prevent it.

Issue 3: Pinelands’ Damages

Unpaid Land Acquisition Costs

- [275] In its 2023 financial statements, the Club reported that the outstanding land acquisition costs were \$3,933,125 as of December 31, 2023.
- [276] As indicated earlier, it is uncontested that under the terms of the Development Agreement, the Unpaid Land Acquisition Costs currently are \$6,127,680.

Costs Incurred for the Model Home

[277] Pinelands has proven that it incurred wasted expenses to prepare to build the model home.

[278] The evidence establishes that Pinelands paid the following construction costs for advancing Phase 3, from which it has derived no benefit:

Removal of trees	\$881.40
Prepping sites for new development plots	\$3,312.21
Gravel	\$2,079.20
Building Permit for model home	\$12,358.00
Planner	\$1,314.44
<u>Downpayment to builder for windows</u>	<u>\$10,000.00</u>
Total	\$29,945.25

[279] Prychidny was not cross-examined about these costs, and the expenditures were otherwise not challenged.

Lost Profits

[280] Pinelands also seeks to recover its expectation damages arising out of the breach of the Development Agreement, however, concedes that its claim for lost profits on the remaining villas to be built is speculative. It limits its claim for lost profits to the model home only.

[281] Pinelands argues that it is more likely than not that this model home would have sold if completed in 2020 or 2021, as the COVID-19 pandemic resulted in a sharp increase in the demand for recreational properties and rise in prices. This submission is not without foundation. The Club's newsletter from November 2021 reported that resales were strong, and that by the end of 2021, it was expected that the number of resales would reach 50, with the result that "approximately $\frac{1}{4}$ of our ownership will have turned over in an 18-month period." The average resale price for the Carling villas was \$95,000 and \$118,500 for the Sandfield villas during 2021.

[282] Prychidny points to the fact that Pinelands made profits of approximately \$430,000 per Carling villa and \$590,217 per Sandfield villa and argues that this trend would have continued with the model home. Pinelands' profit projection for the model villa was \$427,000 before interest and financing costs.

[283] The difficulty with such a comparison is that Pinelands was planning to sell all intervals to one owner for the model villa. There is a vast difference between the average resale price for the Carling and Sandfield villas, and the projected sale price for the model villa, which

was \$1.2M. This court has no evidence of sales of comparable properties from that time. The projected profit remains speculative. Nor does this court have evidence of the financing costs or interest to be deducted.

- [284] The other reason that Pinelands gives to justify this category of damages was Prychidny's testimony that he had a commitment from his construction lender to purchase the model home. This was hearsay and therefore not evidence on which this court can rely.
- [285] The claim for expectation damages fails for lack of evidence.
- [286] In conclusion, I find that Pinelands has proven damages totalling \$6,157,625.25, comprised of the Land Acquisition Costs now due and its out-of-pocket losses.

Issue 4: Whether Pinelands failed to mitigate its damages by refusing to negotiate the terms of its continued development of the Project?

- [287] The Statement of Defence pleads that Pinelands failed to take proper, or any, steps to mitigate any damages that it maintains are attributable to the Club. The Club bears the onus of proving Pinelands' failure to mitigate. It has not done so.
- [288] The Club's position is that by not responding to the request for further discussion, Pinelands failed in its duty to mitigate. Edwards' letter proposed that five days' notice be required for access, and therefore a denial of access would be limited to three weeks at most, running 21 days from February 19 to March 11, 2020. Had Pinelands reasonably responded to Edwards' letter to negotiate a notice period, which Groenewegen testified that the Board was willing to do, the time period in which access was being obstructed would have been even shorter. Further, Pinelands refused to have any discussions to attempt a negotiated resolution, even though invited to do so in the letters sent by the Club's lawyers.
- [289] Prychidny testified that he did not agree to the terms set out in the March 6, 2020 correspondence, because he had been accused of bad faith since 2017 and in his view, the Club was simply acting in ways to prevent a competitor from coming on site.
- [290] The evidence bears out that during the pivotal period in 2019/2020, the Club was never willing to abide by the terms of the Development Agreement. Even when it was put to Miller Thomson LLP by Prychidny's letter of January 28, 2020 that the Club was in breach of the Development Agreement and had "severely impaired Pinelands' ability to complete the Development", the Club took no steps to reassure Pinelands to the contrary. Instead, through its lawyers, the Club made demands and took legal positions which this court has found to be baseless. Even in the letter of March 6, 2020, the Club was still seeking to introduce new terms into Pinelands' contractual obligations.
- [291] I agree with the submissions made by Pinelands; given the conduct of the Club to that date, Prychidny had no reason to give it the benefit of the doubt and expect that such discussions would be undertaken in good faith. Negotiating the continued development was no longer a tenable solution. By that point, Prychidny had been accused of fraud, bad faith, his

company had been sued and accused of wrongdoing and there had been a deliberate restriction on his ability to develop – it was reasonable for him to suspect that the Club would continue to interfere with the Project, and to have rejected the Club’s invitation for further discussion.

[292] A party cannot take advantage of and benefit from a situation created by its own breach or wrongdoing: *Barclays Bank PLC v. Devonshire Trust*.¹⁴ As submitted by Pinelands, this principle acts as a control against unscrupulous parties who breach their contract for the purpose of forcing renegotiation.

[293] The Club breached the Development Agreement, and instead of immediately recognizing its wrong, it sought to impose additional terms and incite Pinelands into further negotiations. The Club cannot now use that situation to argue that Pinelands failed to mitigate its damages. In the circumstances, there was no obvious path to mitigation for Pinelands. The Club has not proven that Pinelands did not take reasonable steps to minimize their losses.

Issue 5: Whether the Court should relieve against forfeiture?

[294] On consent, the Amended Statement of Defence was further amended at trial to permit the Club to seek relief against forfeiture pursuant to s. 98 of the *Courts of Justice Act*.

[295] The remedy of relief from forfeiture is equitable in nature and purely discretionary: *Kozel v. The Personal Insurance Company*¹⁵, citing *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*¹⁶ It is a remedy to be exercised sparingly, in fact-specific circumstances in which enforcing the contractual right to forfeiture would result in an inequitable consequence for the party who breached the contract: *Ontario (Attorney General) v. 8477 Darlington Crescent*.¹⁷

[296] A court must consider three factors when deciding whether to grant relief from forfeiture: *Kozel*, at para. 31. These are: (i) the conduct of the party applying for the relief; (ii) the gravity of the breach; and (iii) the disparity between the value of the property forfeited and the damage caused by the breach.

[297] While relief from forfeiture is most often seen in the insurance context, it has been applied in other commercial litigation cases. For example, in *Scicluna v. Solstice Two Limited*, the Court of Appeal upheld a decision to relieve against forfeiture triggered by the breach of an agreement of purchase and sale.¹⁸ See also *ANC Business Solutions Inc. v. Virtualink Canada Ltd.*¹⁹

¹⁴ 2013 ONCA 494, 365 D.L.R. (4th) 15, at para. 149, leave to appeal refused, [2013] S.C.C.A. No. 374.

¹⁵ 2014 ONCA 130, 119 O.R. (3d) 55, at para. 29.

¹⁶ [1994] 2 S.C.R. 490, at p. 504.

¹⁷ 2011 ONCA 363, 333 D.L.R. (4th) 326, at para. 87.

¹⁸ 2018 ONCA 176, 421 D.L.R. (4th) 675.

¹⁹ 2014 ONSC 1619, 24 BLR (5th) 298.

[298] The three factors are a guide and not a three-part test. The court may refuse relief without considering each of the factors, for example, due to unreasonable conduct alone: *Scicluna*, at para. 29.

[299] In *Michele's Italian Ristorante v. 1272259 Ontario Ltd.*,²⁰ Perell J. provided a helpful list of the considerations that might be looked at when deciding whether to grant relief:

The court in exercising its discretion can and should consider all the circumstances including the history of the relationship; breaches of other covenants of the lease by the tenant; the gravity of the breaches; the tenant's conduct or misconduct; its good faith or bad faith or want of clean hands; whether the object of the right of forfeiture in the lease was essentially to secure the payment of money; and the disparity or disproportion between the value of the property forfeited and the damage caused by the breach. What should not be lost sight of is that a landlord undoubtedly is always going to be able to point to misconduct by the tenant, else there would be no grounds for forfeiture in the first place, but the ultimate question is whether the court should exercise its equitable jurisdiction to relieve against the forfeiture imposed by the common law because it is an excessive remedy in all the circumstances.

[300] The Club bears the onus to show why it is deserving of this remedy. It argues that with respect to its conduct, the evidence shows that it was at all times reasonable and acting in good faith and driven by legitimate and valid concerns.

[301] With respect to the gravity of the breach, the Club submits again that this was only a three-week denial of access. This denial of access, the Club argues, "was the result of miscommunications and misunderstandings that were at least partly due to the conduct of Pinelands itself, for instance the refusal to meet with the Club to discuss the issues that they had between them."

[302] Last, in terms of the proportionality analysis required, Pinelands is seeking payment of a "draconian" contractual penalty of over six million dollars for being denied access to the property for three weeks. Given that the Club is a non-profit organization, the individual unit owners would have to pay a damage award out of their own pockets, an unfair and unjust result.

²⁰ 2016 ONSC 4888, at para. 35.

Analysis

Conduct of the Club

[303] An examination of this factor requires the court to look at the reasonableness of the Club’s conduct “as it relates to all facets of the contractual relationship including the breach in issue and the aftermath of the breach”: *8477 Darlington Crescent*, at para. 89.

[304] As suggested throughout these Reasons, the Club was not acting in good faith or in a reasonable manner. The way it dealt with Pinelands and its principal was often malicious.

[305] Without repeating the evidence, the actions that lead to this conclusion are:

1. refusing to recognize Prychidny’s ownership as a tenant in common as a valid ownership that would allow him to stand for election, despite the Club’s own precedent;
2. not acknowledging Prychidny’s ownership transfer until after the election in 2018;
3. refusing to count any votes cast for Prychidny;
4. suggesting publicly at the annual general meeting that there was a problem with “the legitimacy and validity of an interval that Mr. Prychidny claims to have occurred”, which I have found to amount to an allegation of fraud;
5. insinuating publicly at the annual general meeting that there were other reasons why Prychidny may not be a suitable Board candidate;
6. supporting the inflexible “rule” of a 48-hour notice period when the governing documents imposed no such obligation;
7. maintaining its position that a secondary roadway had to be built by Pinelands from Hwy 118 when there is no document that supports such an obligation;
8. insisting that Pinelands provide documents that were available at the Township offices;
9. passing new rules in September 2018 that were targeted at Prychidny’s ongoing development and his intention to market and sell the intervals in a new way;
10. totally disregarding Pinelands’ role as developer, which gave it unrestricted access for development purposes and exclusive decision-making about development-related decisions;
11. taking inconsistent positions between discussions and understandings reached with the Board liaisons and what was demanded in the letters from Miller Thomson LLP in November 2019 and January 2020, with no prior discussion or warning;

12. issuing the statement of claim against Prychidny's other company two days before the 2019 annual general meeting to ensure that he would not stand for election in 2019;
13. providing shifting and inconsistent reasons for threatening to prevent use of the roadway, and for then doing so on February 19, 2020;
14. interfering in the economic relationship between Pinelands and Cayman Marshall and threatening to not allow newly constructed villas to connect to the existing infrastructure and facilities and/or refusing to approve sales of new intervals, neither of which the Club had the power to do under any governing document;
15. raising "concerns" by way of justification for its actions that were lacking any proof, such as damage to the existing buildings by construction vehicles passing by and blocking of access to its members or their guests;
16. raising "concerns" that lacked any historical precedent where Pinelands' behavior was concerned, such as pedestrian safety and road integrity;
17. maintaining that construction would constitute a nuisance;
18. maintaining that the roadway had to be moved to comply with the planning requirements, and communicating that to the members even knowing it to be false;
19. not responding in any manner to Prychidny's correspondence of January 28, 2020, in which he conveyed his belief that the Club was in breach of the Development Agreement and had "severely impaired Pinelands' ability to complete the development";
20. insisting on further negotiations after the breach on February 19, 2020, including the provision of a construction timeline, a notice period, and discussions "to ensure that the property is still useable for its intended purpose while construction is ongoing"; and
21. maintaining its unwarranted breach of the Development Agreement, as illustrated by the contents of Shell's correspondence of March 25, 2020.

[306] There is more, but this list suffices to explain why, in the context of the history between these parties, the Club's conduct cannot be described as reasonable. The Club's earlier actions in preventing Prychidny from having a voice on the Board are not collateral facts, but rather the initial stage of an ongoing, ill-conceived campaign to interfere with Pinelands' development efforts.

[307] Counsel for Pinelands also raises the issue of the Club's conduct in concealing the FOIA Request documents, stating that the Club does not come to court with clean hands and so is not entitled to equitable relief.

- [308] The evidence found in the FOIA Request emails proves that Wise and Shell were actively attempting to convince the Township officials to revoke the building permit for the model home, and to stall any development until a new site plan agreement was registered and the existing road altered. Their steps in April and May 2020 were a continuation of the positions taken by the Club at the time of the breach. There is a direct connection between the Club’s conduct with the Township and its breach of the Development Agreement.
- [309] However, one of the requirements for the invocation of the “clean hands” doctrine is that “the misconduct complained of must have secured a person an advantage in the very contract sought to be enforced”: *BMO Nesbitt Burns Inc. v. Wellington West Capital Inc.*²¹ Here no such advantage can be identified. Counsel for Pinelands submits that the advantage was that the defendant was able to maintain a baseless defence, but was caught concealing the truth after the FOIA Request was made. I view it differently; the revelation of the FOIA Request documents and their concealment has provided no advantage to the Club and in fact is more likely to disadvantage the Club when costs are determined. The Club’s actions are litigation conduct that is better addressed at a later stage.

Gravity of the Breach

- [310] The Club again argues that a denial of access for three weeks is not a grave breach. However, the evidence bears out that this was not simply a matter of notice, with a straightforward resumption of access being promised by the Club. At no time was Pinelands informed that the Club would simply abide by the Development Agreement. The terms that Edwards’ letter sought to impose were new terms, and the letter implied that further negotiations would be required before the Club would agree to allow the Project to continue.
- [311] When Pinelands rejected the terms in Edwards’ letter, the Club still did not confirm that it would honour the Development Agreement. That it was not willing to do so is made crystal-clear by the content of Shell’s letter.
- [312] The court rejects entirely the Club’s submission that Pinelands played a part in any “misunderstanding” or “miscommunication.” The record shows that during the time that Prychidny was engaged with Groenewegen and Guldemann he was more often than not the one to reach out to them. He expressly asked if they wished to meet so that an opportunity could be given to answer their questions. It was the Club who precipitously decided to involve its lawyers in the fall of 2019 rather than accept Prychidny’s offer. The Club bears the entire responsibility for escalating this matter.
- [313] The breach was serious and ongoing. The entire intent of the Development Agreement, Lease, and promissory note was to allow the Project to be carried out. The Club’s conduct went to the core of the parties’ contractual relationship.

²¹ (2005), 77 O.R. (3d) 161 (C.A.), at para. 28.

Proportionality

- [314] Pinelands' counsel argues that there can be no disproportionality in asking the Club to pay for land that it owns. Further, during the time that development has not proceeded, the owners have had the benefit of an increase in value due to lack of competition. Further, the payment of the current amount owing for the Land Acquisition Costs translates into a payment of \$29,322.03 for each owner of an interval, and the court has no evidence about the financial position of each owner and whether such expense would constitute a hardship.
- [315] I have also considered that if relief from forfeiture is granted and Pinelands continues to develop the Property in accordance with the Development Agreement, it faces unknown financial risk. For example, to break even to recover the increased Land Acquisition Costs now owed, each of the anticipated new 140 intervals would have to sell for \$43,983.04. With a 3% annual increase in the Land Acquisition Costs, by the time any new villas are built this sale price would have to be higher. This court has evidence that the average resale price for the Carling villas was \$95,000 and \$118,500 for the Sandfield villas during 2021, but that was four years ago and a different market post-COVID-19. Those villas built in the first two phases are close to waterfront; the villas contemplated in Phase 3 are further away from the water. There will also be a change in material and building costs; I take judicial notice of the fact that inflationary price increases have affected construction costs since 2021. Given that Pinelands was deprived of the ability to take advantage of the market in the 2020/2021 era through no fault of its own, it is unfair for it to now be forced to assume all the risk years later.
- [316] No evidence was led about how the Club's non-profit status might be affected by working with another developer to complete the Project, if that decision is to be made by the Board, or whether the Township would permit it to sever the Property to recoup some or all of the damages. The onus is on the Club as the party seeking relief to show how it would be affected by the requirement to pay damages and why that is a disproportionate outcome, and the court is lacking evidence to provide a clear understanding beyond the fact of the monetary amount per interval.
- [317] After considering the entirety of the circumstances, this court finds that it would not be equitable to order relief from forfeiture.

Order

- [318] This court orders and adjudges:
1. The defendant shall pay \$6,157,625.25 to the plaintiff comprised of:
 - (i) \$6,127,680.00 for the Land Acquisition Costs; and
 - (ii) \$29,945.25.00 for development costs thrown away.
 2. The defendant shall pay prejudgment interest on the amount of the judgment in accordance with s. 128 of the *Courts of Justice Act*.

Costs

- [319] If the parties are unable to agree on the issue of costs within 10 working days from the date of release of these Reasons, they may make submissions in writing. Pinelands' submissions are due on December 8, 2025, the Club's submissions are due on December 15, 2025 and any reply, if necessary is due on December 18, 2025. Written submissions are limited to 6 double spaced pages, plus a Bill of Costs. Counsel may extend these dates by mutual agreement, with notice to me through BarrieSCJJudAssistants@ontario.ca.
- [320] All authorities relied on are to be hyperlinked in the document or uploaded to Case Center with a tabbed (i.e., hyperlinked) index. The submissions are to be filed with the court, with a copy emailed to my judicial assistant at BarrieSCJJudAssistants@ontario.ca, in addition to being uploaded to Case Center.

HEALEY J.

Released: November 19, 2025