# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Premier Canadian Properties (Okanagan) Ltd. v. Craig,* 2023 BCSC 856

Date: 20230523
Docket: S127509
Registry: Kelowna

Between:

**Premier Canadian Properties (Okanagan) Ltd.**

Plaintiff

And

**Donna Merle Craig, Geri Surinak and Menethil Properties Ltd.**

Defendants

Corrected Judgment: The text of the judgment was corrected at paragraph [91] on May 26, 2023.

Before: The Honourable Justice G.P. Weatherill

## Reasons for Judgment

| | |
|---|---|
| Appearing on behalf of the Plaintiff: | E. Romanowski |
| Counsel for the Defendants, Donna Craig and Geri Surinak: | K. Burnham |
| Counsel for the Defendant, Menethil Properties Ltd. | D. Chen |
| Place and Date of Trial/Hearing: | Kelowna, B.C.<br>April 12 and 13, 2023 |
| Place and Date of Judgment: | Kelowna, B.C.<br>May 23, 2023 |

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## I. INTRODUCTION

[1] This case revolves around a property management business arrangement between the plaintiff Premier Canadian Properties (Okanagan) Ltd. (“PCP”), a real estate brokerage firm, and the defendants Donna Merle Craig (“Craig”) and Geri Surinak (“Surinak”), both licensed real estate agents and property managers.

[2] Craig and Surinak bring a summary trial application to have the plaintiff's claim against them dismissed and their counterclaim allowed.

[3] The other defendant, Menethil Properties Ltd. (“Menethil”), is a real estate brokerage firm where Craig and Surinak are currently associates. Menethil has not brought its own application, but supports Craig and Surinak’s position and seeks to have PCP’s claim against it also dismissed.

## II. BACKGROUND

[4] PCP carries on business in Kelowna, British Columbia. Surinak has been a licensed realtor and property manager since 1990 and a certified property manager since 2000. Craig has been a licensed realtor and licensed property manager since 1991. Surinak and Craig are close friends and have known each other for thirty years.

[5] For approximately nine years prior to February 2013, Craig and Surinak were associated with Coldwell Banker, another real estate brokerage firm in Kelowna, where they worked as independent realtors. In addition to acting as a realtor, Surinak developed a property management portfolio of clients (the “Portfolio”).

[6] After nine years at Coldwell Banker, Surinak left to work under the umbrella of Realty Executives, another Kelowna real estate brokerage firm, taking the Portfolio with her. While at Coldwell Banker and Realty Executives, she paid between eight and ten percent of her property management fees to the brokerage in exchange for it performing all bookkeeping, banking, bank reconciliations, cheque writing and deposits. Although Surinak used Coldwell Banker’s and Realty Executives’ names on all contracts and trust accounts, the Portfolio always belonged to her.

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[7] Craig initially left Coldwell Banker to work at another realty firm and then moved to Realty Executives, where she purchased an interest in the Portfolio from Surinak. From that point forward, they worked together managing and growing the Portfolio. Again, they paid a percentage of property management revenue to Realty Executives in exchange for bookkeeping, banking, reconciliations and paperwork services.

[8] In early 2013, Mr. Bert Chapman ("Chapman") approached Craig and Surinak. Chapman, then the owner of PCP, encouraged them to move to PCP with the Portfolio. Chapman considered that having the Portfolio under PCP's umbrella would be good for PCP's business even though it belonged to Surinak and Craig. Many of the owners of properties in the Portfolio (the "Owners") were active in acquiring and disposing of real estate. If Surinak and Craig joined PCP, it would probably secure the listing and sales contracts for these transactions, generating commissions and revenues for PCP.

[9] Craig and Surinak agreed. In February 2013, they entered into an oral agreement with PCP and Chapman (the "Oral Agreement"), the relevant terms of which were:

a) PCP would provide Craig and Surinak with administrative support, contract forms and trust accounts for the Portfolio, in accordance with the requirements of the *Real Estate Services Act*, S.B.C. 2004, c. 42 [*RESA*];

b) Craig and Surinak were free to leave PCP at any time;

c) Craig and Surinak would remain the owners of the Portfolio, including all property management contacts, clients, tenants and fees it generated;

d) Craig and Surinak would each have their own property management program. They would pay for administration services and banking fees actually incurred by PCP in the usual and ordinary course of the real estate brokerage business, commonly referred to in the industry as desk fees (the "Desk Fees");

e) Craig and Surinak would use PCP's name on all contracts and, in accordance with *RESA*, provide original contracts to PCP;

f) Craig and Surinak would provide PCP with monthly reconciliations of their respective trust accounts;

g) Save for the Desk Fees, PCP would receive no share of the revenue or profits generated by the Portfolio; and

h) Respecting their roles as realtors, PCP would pay Craig and Surinak commissions in the normal course as it did with other PCP realtors.

[10] A major incentive for Craig and Surinak to enter the Oral Agreement was that they would keep 100% of the property management fees generated by the Portfolio, unlike their previous brokerage arrangement. They would pay only the Desk Fees to PCP.

[11] Upon joining PCP, Craig and Surinak divided the Portfolio. Thereafter, Craig and Surinak each managed and maintained their portion separately.

[12] From February 2013 through July 2019, PCP, Craig and Surinak operated pursuant to the Oral Agreement. Property management contracts were written on PCP's letterhead, but PCP asserted no proprietary interest or contractual relationship in the Portfolio. Craig and Surinak were responsible to fulfil all obligations to the Owners and their tenants (the "Tenants") under the Portfolio's contracts and retained all benefits and revenues derived from them.

[13] On June 27, 2013, some six months after Craig and Surinak became associated with PCP, Chapman presented them with a standard-form agreement for sales representatives and independent contractors (the "Written Agreement"). Craig and Surinak both signed the Written Agreement, which read in part:

> Whereas Sales Representative has been issued a Real Estate Licence issued by the Province of British Columbia and is desirous of availing himself/herself of the services, facilities, programs and opportunities offered by [PCP] …

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> ENGAGEMENT: [PCP] hereby retains the SALES REPRESENTATIVE/INDEPENDENT CONTRACTOR to act as a sales REPRESENTATIVE of [PCP] for the purpose of soliciting and procuring buyers for properties which are listed with [PCP] for sale or exchanged and for the purpose of soliciting and procuring for [PCP] listing of properties for sale or for exchange …

[14] Under the Written Agreement, PCP agreed to make a variety of services available to the sales representative: an office and desk space, reception area, transaction services, listing forms, advertising, telephone and other communications. PCP also agreed to promptly pay all commissions it received, less the agreed-upon fees. The responsibilities and duties of the sales representative included the following:

> …SALES REPRESENTATIVE agrees that any and all listings of real estate or any interest therein and all employment in connection with the purchase, sale, rental or management of real estate or any interest therein shall be taken in the name of [PCP], as required by the rules and regulations of the Real Estate council, …Said listings and employment agreements shall, upon the expiration or termination of the Agreement, become and remain the exclusive property of [PCP]. Upon termination or expiration of this Agreement, [PCP] shall have the option to release listings and employment agreements to the SALES REPRESENTATIVE, subject to contract laws of this Province. All listings and employment agreements shall be shared with all other contractors and sales representatives…
>
> Either party, without cause, may terminate this Agreement at any time upon the giving of thirty (30) days advance written notice to the other.
>
> SALES REPRESENTATIVES shall be entitled to their percentage share of any commissions on real estate transactions which were under contract prior to said terminations date.

[15] Craig and Surinak's contracts with the Tenants were on PCP letterhead, but in a form adopted from the Residential Tenancy Branch. Craig and Surinak continued to use the same property management contracts with the Owners that they had prior to joining PCP. PCP provided no policies, forms, contracts, manuals or supervision to either Craig or Surinak.

[16] PCP designated trust accounts to Craig and Surinak for the Portfolio. Tenants paid security deposits and rent due to the Owners into the trust accounts. Security deposits remained in trust in the accounts until the end of their respective tenancies. Section 38 of the *Residential Tenancy Act*, S.B.C. 2002, c. 78 [*RTA*] requires

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security deposits to be returned to tenants within 15 days of the end of their tenancy, subject to loss or damage to the rental property. If a landlord misses the 15-day deadline, then double the security deposit must be paid back to the tenant.

[17] When rental income was received, Craig and Surinak would deduct their fees and then forward the net amount to the Owners.

[18] Craig and Surinak never paid any part of the Portfolio property management fees to PCP. PCP only received the Desk Fees.

[19] Chapman was first introduced to Mr. Fred Johnston ("Johnston") in the fall of 2018. Johnston was interested in acquiring a real estate brokerage. Chapman was interested in retiring. Chapman gave Johnston full access to PCP's business records and informed him about PCP's business, including its property management arrangement with Craig and Surinak. Chapman advised Johnston several times that:

a) PCP did not own the Portfolio;

b) Craig and Surinak's property management clients were their own;

c) Craig and Surinak paid only the Desk Fees to PCP; and

d) PCP benefited from the repeat buying and selling done by Craig and Surinak's clients.

[20] Effective July 1, 2019, Chapman sold his shares in PCP to a numbered company called 1199697 (BC) Ltd. ("119"), making it PCP's owner. 119 retained Johnston to act as PCP's general manager. Craig had been introduced to Johnston in the fall of the 2018 because he was interested in buying PCP. He told her then, and several other times prior to PCP's sale, that the sale would not impact how she ran the Portfolio. Indeed, he requested that she give him the right of first refusal if she decided to sell her interest in the Portfolio.

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[21] PCP then became associated with Realty Executives, the large real estate brokerage that Craig and Surinak had previously worked with. Craig did not want to be associated with such a large firm again.

[22] Craig became increasingly uncomfortable with PCP's management. In October 2019, she arranged to return all monies in the trust account PCP maintained on her behalf to the Owners, together with monthly account reconciliations. This decision was made openly to PCP's management, including PCP's managing broker, who signed the trust cheques that were issued to the Owners. Thereafter, she retained no trust funds with PCP.

[23] Surinak was similarly uncomfortable with PCP's new management style and with Johnston in particular. One concerning incident occurred when Johnston withdrew $15,000 from her trust account, monies that belonged to the Owners. Johnston did so because Surinak owed PCP $7,000 and was behind in remitting that money. Surinak was also concerned by a shouting match she witnessed between Johnston and PCP's bookkeeper, which resulted in the bookkeeper's termination.

[24] In December 2019, Johnston again approached Craig and again requested a right of first refusal to purchase the Portfolio. At about the same time, Craig and Surinak decided to leave PCP and made inquiries of Menethil, which had recently opened a brokerage in Kelowna, as to whether they could move the Portfolio to Menethil. Menethil was interested. The defendants informed the Owners and Tenants that they were leaving PCP and joining Menethil. They gave the Owners the option of moving with them or staying with PCP.

[25] On January 24, 2020, Craig and Surinak officially gave notice to PCP that they were leaving PCP and joining Menethil. All but one of the Owners elected to move with them to Menethil and provided PCP with a letter terminating their relationship. Johnston was not happy with this turn of events, begged Craig to stay with PCP and offered to buy the Portfolio from her.

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[26] Craig and Surinak provided PCP with one month's Desk Fees in advance, a trust account reconciliation and notices of termination that the Owners had executed. The financial information they provided contained the same data and was in the same format as the financial information they had always provided PCP, which had previously always been accepted by PCP.

[27] Following Craig and Surinak's departure, PCP took the position that the Portfolio belonged to it, not Craig and Surinak. Despite having received notices of termination from all but one of the Owners, PCP sent notices to the Owners stating that PCP would be assigning them a new property manager because Craig and Surinak had left PCP.

[28] On February 18, 2020, Johnston sent a letter to the Tenants stating in part:

> As you may know [Ms. Craig/or Ms. Surinak] has resigned her position with Premier Canadian Properties (Okanagan) Ltd. effective January 24, 202 and we have assigned a new property manager within the company to manage your rental agreement….
>
> Your rent payments must continue to be made payable to and forwarded to Premier Canadian Properties (Okanagan) ltd. (or Realty Executives Ultra) …If you have been advised to make or forward you payment to someone other than Premier Canadian Properties (or Realty Executives Ultra) please advise us immediately by phone…or by email to fred.johnston@re-ultra.com as you payment may not be property accounted for or paid to the owner of your unit if it is re-directed to someone else…

[29] The letter resulted in confusion. Some Tenants mistakenly sent rental monies to PCP instead of Craig and Surinak, monies which PCP then retained.

[30] Following Craig and Surinak's departure, PCP refused to provide vacating Tenants with their security deposits in accordance with the *RTA*. This was done under the guise of PCP requiring accounting information in a different format, despite PCP having been provided all accounting data and information in the same format and detail as had always been provided. In the result, Surinak paid $4,645.50 of her own funds and Menethil paid an additional $13,043 to departing Tenants to honour security deposits that PCP had refused to release.

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[31] Further, PCP retained rental income for approximately eleven months despite specific instructions from the Owners. PCP eventually paid the funds into court in December 2020, and they were subsequently paid out to the Owners.

[32] PCP filed its notice of civil claim on May 15, 2020. Craig and Surinak filed a response to civil claim and counterclaim on June 11, 2020.

## III. POSITIONS OF THE PARTIES

### A. PCP's Notice of Civil Claim and Position

[33] In its notice of civil claim, PCP claims ownership of the Portfolio. PCP further alleges breach of contract, breach of fiduciary duty, inducement of breach of contract, unlawful interference with economic relations, conversion and conspiracy. PCP seeks a variety of relief including the following: injunctions restraining Craig and Surinak from further breaches of contract and fiduciary duty; injunctions requiring Craig, Surinak and Menethil to return confidential information to PCP; the disgorgement of profits resulting from unlawful conduct; general, special, punitive and aggravated damages; and special costs.

[34] PCP maintains that it has been the legal and beneficial owner of the Portfolio since the Written Agreement came into effect. It argues that Craig and Surinak are attempting to "side-step" the Written Agreement. PCP notes that the contracts with the Owners are in PCP's name and argues therefore that it was the contracting party with the Owners, not Craig or Surinak. PCP further notes that the Tenants made all payments in PCP's name into PCP's trust account, and that PCP was responsible for accounting for the funds as brokerage. PCP submits that the strict terms of the Written Agreement should prevail.

[35] PCP also relies on the provisions of *RESA*. PCP maintains that it owns the Portfolio because *RESA* requires all services, contracts and trust accounts to be provided on behalf of and in the name of a brokerage, in this case PCP.

[36] PCP accuses Craig and Surinak of dealing deceptively with the Owners, Tenants and PCP. It argues that when Craig and Surinak left PCP, they

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surreptitiously took the Portfolio from behind its back. It says that Craig and Surinak executed a premeditated plan to take the Portfolio, which PCP always owned.

[37] PCP argues that from September 2019 until their departure in January 2022, Craig and Surinak solicited the Owners to follow them to Menethil, undermining PCP's business, breaching their contract and their fiduciary duty to PCP. It says that it lost listings, sales and consequent commission revenues with the loss of the Owners.

### B. The Response to Civil Claim and the Defendants' Position

[38] In their response to civil claim, Craig and Surinak maintain that they beneficially owned the Portfolio, not PCP. Craig and Surinak set out the nature of the Oral Agreement and assert that PCP was a bare trustee for them, nominally holding contracts in their favour without any right, title or interest in the Portfolio. They submit that although management and tenancy contracts were in PCP's name as *RESA* requires, Craig and Surinak were always equitable owners of the Portfolio.

[39] Craig and Surinak assert that the Portfolio has been their beneficial property at all times before, during and after their association with PCP. They argue that, to the extent it suggests otherwise, the Written Agreement is unenforceable for failure of consideration because PCP paid nothing for the Portfolio at any time. They further submit that PCP is estopped from enforcing the Written Agreement or claiming equitable ownership of the Portfolio because it never exercised any rights under the Written Agreement or made any claims on the Portfolio for seven years. They observe that PCP only asserted beneficial ownership over the Portfolio when they advised Johnston that they were leaving PCP. Craig and Surinak contend that PCP is using the court system to threaten, intimidate and bully them when it knows it has no claim to the Portfolio and its claim has no prospect of success. Accordingly, they say PCP's claim is an abuse of process.

[40] In the counterclaim, Craig and Surinak assert that PCP wrongfully retained funds owing to them and to the Owners and Tenants and unlawfully interfered with their contractual relations with the Owners. Craig and Surinak make further claims in

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defamation and breach of contract. They seek a declaration that all funds held in relation to the Portfolio belong to them, along with orders for payment of monies PCP owes to them, damages for defamation, aggravated and punitive damages, and special costs.

[41] Craig and Surinak say that PCP took an improper position by claiming that a lack of proper accounting information prevented it from paying out security deposits to departing Tenants or rental income collected on behalf of the Owners.

## IV. SUITABILITY FOR SUMMARY TRIAL

[42] Although the notice of application is silent on the point, the parties proceeded on the basis that the application was brought under the summary trial provisions of R. 9-7 of the *Supreme Court Civil Rules* [*Rules*].

[43] Rule 9-7(15) permits the court to grant judgment in favour of any party at a summary trial application, unless the court is unable to find the facts necessary to decide the case or the court is of the opinion that it would be unjust to decide the issues on the application.

[44] The plaintiff took no strenuous objection to the application proceeding under R. 9-7 and was content to argue the issues on that basis.

[45] In determining whether summary trial is appropriate, factors for consideration include: the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise from delay, the cost of taking the matter to trial in relation to the amount involved, the course of the proceedings and whether the evidence is sufficient to resolve the dispute*: Cepuran v. Carlton*, 2022 BCCA 76 at para. 149, citing *Inspiration Mgmt. Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202, 1989 CanLII 229 (C.A.).

[46] In a summary trial, the parties are required to take every reasonable step to adduce the evidence necessary for judgment: *Royal Bank of Canada v. Tyran Transport Ltd.*, 2019 BCSC 2294 at paras. 31–33. In each case, the court should

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have regard to the objectives of the *Rules*, including proportionality and efficiency in deciding whether summary trial is appropriate: *Morin v. 0865580 B.C. Ltd*., 2015 BCCA 502 at paras. 48–49.

[47] On the admissible affidavit evidence before me, I conclude that I am able to find the facts necessary to decide the case and, having regard to the relevant factors, that it would be just to do so under R. 9-7.

## V. DISCUSSION

### A. The Ownership of the Portfolio

[48] The core dispute between the parties is the beneficial ownership of the Portfolio. PCP asserts it is the legal and beneficial owner of the Portfolio, pursuant to the Written Agreement and *RESA*. Craig and Surinak maintain that they were always the beneficial owners of the Portfolio, including long before they joined PCP.

[49] For the following reasons, I accept Craig and Surinak's position and reject PCP's position.

[50] I agree that *RESA* requires the legal ownership of the Portfolio to be in PCP's name in order to protect the public, however that does not equate to PCP holding an equitable interest. *RESA* requires all sales, listing contracts, trust accounting, and banking to be managed, supervised and governed by a registered brokerage who is answerable to the regulatory authority. Two of *RESA*'s purposes are to regulate the real estate industry and protect the public. *RESA* is not intended to regulate realtor's property or determine equitable ownership of business portfolios.

[51] Essentially, the Portfolio was 'goodwill' that Craig and Surinak had built up over many years, including prior to joining PCP. Property management included vetting tenants, retaining trades such as plumbers, appliance repair persons, landscapers and others as needed, and collecting rents from tenants. Craig and Surinak built up the Portfolio by providing good service to Owners. When Craig and Surinak joined PCP in February 2013, it was this goodwill that brought the Owners with them. PCP gave no consideration to Craig or Surinak for bringing the Portfolio

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and goodwill with them. The Portfolio never became PCP's property. Despite PCP's argument to the contrary, it cannot rely on *RESA* or the Written Agreement to claim entitlement to an asset it never owned.

[52] The terms of the Written Agreement appear to be essentially a regurgitation of the requirements of *RESA*. Neither *RESA* nor the agreement have the effect of transferring beneficial ownership of the Portfolio and neither preclude Craig and Surinak from continuing to hold beneficial ownership.

[53] The evidence is overwhelming that Craig and Surinak always beneficially owned the Portfolio. This did not change when they joined PCP. For their entire tenure with PCP, it was clear that they continued to be the Portfolio's beneficial owners. The need to comply with *RESA* led to the Written Agreement and to the use of PCP's letterhead. This did not transfer ownership of the Portfolio to PCP.

[54] Based on the evidence before me that I accept, I make these findings:

a) Craig and Surinak started their property management business while with Coldwell Banker. The Portfolio moved with them to other brokerage firms without issue.

b) In February 2013, they entered into the Oral Agreement with PCP through Chapman, its then owner. Chapman's evidence completely supports Craig and Surinak. At all times, PCP, Craig and Surinak conducted themselves in accordance with the Oral Agreement, including that they all recognized that Craig and Surinak were the beneficial owners of the Portfolio.

c) The terms of the Oral Agreement did not change with the execution of the Written Agreement. The Written Agreement was a boilerplate agreement executed in order to comply with *RESA*, and did not alter the existing Oral Agreement. At all times, Craig and Surinak were the beneficial owners of the Portfolio.

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d) The Portfolio is a valuable commodity. Craig and Surinak received no consideration from PCP for the Portfolio. To the extent PCP relies on the Written Agreement to demonstrate ownership of the Portfolio, it is void for failure of consideration: *Quach v. Mitrux Services Ltd*., 2020 BCCA 25 at paras. 12–15, 21.

e) In any event, PCP is estopped by its conduct from arguing that the Written Agreement gives it ownership of the Portfolio. At all times prior to Craig and Surinak's departure, PCP treated the Portfolio as Craig and Surinak's beneficial property: *Adtronics Signs Ltd. v. Sicon Group Inc.*, 2004 BCSC 1201 at paras. 145–50.

f) The change in ownership of PCP in 2019 did not alter the terms of the Oral Agreement. Johnston at all times knew, or should have known, that Craig and Surinak beneficially owned the Portfolio, not PCP. On three occasions, Johnston asked Craig either for the right of first refusal if she sold her business, to buy her portfolio of clients, or to purchase her portfolio outright. He told Craig that he liked the way she ran her business. If PCP owned the Portfolio, then Johnston would never have sought a right of first refusal or to buy the Portfolio outright.

g) Craig and Surinak were entitled to take the Portfolio with them when they left PCP and were entitled to the full benefit of the Portfolio. Neither Craig nor Surinak were fiduciaries to PCP: *Valley First Financial Services Ltd. v. Trach*, 2004 BCCA 312 at paras. 52–63.

h) PCP deliberately tried to retain the Portfolio by contacting the Owners and Tenants under the guise of ownership when it knew that it belonged to Craig and Surinak.

i) PCP filed its claim despite knowing that it did not own the Portfolio and that it had never derived any profit from the Portfolio.

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j) Craig and Surinak used PCP's letterhead on their property management contracts as a matter of convenience and to comply with *RESA*. From February 2013 through January 2020, Craig and Surinak prepared their own reporting and filings for PCP, which were always accepted by the Real Estate Council.

k) Contrary to demands and the Owners' directions to pay, PCP improperly withheld rental income of $76,866.37 for nearly one year. PCP's attempt to justify the retention of this trust money under the guise of accounting deficiencies is disingenuous.

[55] In sum, PCP has not proven any of its claims against Craig or Surinak. Specifically, it has not proven a breach of contract, a breach of fiduciary duty, inducement of breach of contract, unlawful interference with economic relations, conversion or conspiracy.

[56] Accordingly, I conclude that the action against Craig and Surinak must be dismissed.

**B. Abuse of Process**

[57] Even if I did not dismiss the action for the reasons stated above, I would have dismissed it as an abuse of process based on the above findings.

[58] Despite knowing that the equitable ownership of the Portfolio belonged to Craig and Surinak, PCP commenced this action in an attempt to unilaterally assert ownership of the Portfolio after Craig and Surinak's departure, knowing that it had suffered no loss or damage.

[59] On the evidence, I accept that PCP made its claim:

a) as a bullying tactic to gain control of the Portfolio;

b) as a way of sanctioning its improper retention of trust funds belonging to the Owners and Tenants;

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c) knowing that its claim had no prospect of success and that it could never prove that it had suffered damages; and

d) otherwise using the court process for an ulterior motive or other improper purpose.

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[60] Accordingly, I accept that PCP's action is a sham, was knowingly brought without foundation, and should be dismissed: *Jensen v. Ross*, 2014 BCCA 173 at para. 40, citing *Babavic v. Babowech*, [1993] B.C.J. No. 1802, 42 A.C.W.S. (3d) 447 at paras. 17–18.

[61] In my view, PCP is guilty of the very same conduct alleged in its unfounded claims against the defendants. PCP breached its duty to account and remit rental receipts to the Owners and unlawfully interfered with the Owners' contractual relationships.

**C. Unpaid Commissions Owing to Craig**

[62] In her notice of application, Craig claimed that PCP still owed her $2,676.85 in outstanding commissions. During submissions, counsel indicated that those commissions had recently been paid and therefore were not being pursued.

[63] In the weeks following the application being heard, counsel advised Supreme Court Scheduling that, in fact, outstanding commissions of $2,676.85 were still owing and sought to speak to the matter.

[64] If the parties are unable to agree on whether outstanding commissions are still owing to Craig, she has liberty to apply to speak to the matter.

**D. Defamation**

[65] A defamatory statement is a publication which tends to lower a person in the estimation of right-thinking members of society or to expose a person to hatred, contempt or ridicule. The law assumes that a person is entitled to a good reputation. The test is whether the words published, objectively measured, *could have* reasonably held a defamatory meaning and lowered a person's reputation. The test

is not whether the words *actually did* lower a person's reputation: *Kamloops-Cariboo Regional Immigrants Society v. Herman*, 2015 BCSC 886 at paras. 64–70.

[66] I accept Craig and Surinak's submission that PCP, through Johnston, wrongfully embarked on a campaign of defaming them by communicating with the Owners and Tenants, stating that they had resigned from PCP, and asserting ownership to the Portfolio, management contracts and rents. PCP then purported to assign a property manager to the Portfolio contracts that beneficially belong to Craig and Surinak. Indeed, in some cases, PCP threatened to sue the Owners if they did not move their contracts to PCP.

[67] I find that PCP knowingly published a misrepresentation with the intent to convey that Craig and Surinak were in breach of contract, that they did not own the Portfolio, that they had acted improperly in moving from PCP to Menethil and that the Tenants and Owners were contractually obligated to remain with PCP.

[68] PCP's letters to the Owners and Tenants implied that:

a) Craig and Surinak were acting in a disloyal and dishonest manner or were not to be trusted;

b) Craig and Surinak improperly induced breach of contract;

c) Craig and Surinak breached their obligations to PCP;

d) Craig and Surinak breached their duty to the Owners and Tenants;

e) Craig and Surinak misappropriated contracts and management fees; and

f) Craig and Surinak put the Owners in a vulnerable position likely to be sanctioned by law.

[69] In short, the evidence satisfies me that PCP's letters to the Owners and Tenants implied that Craig and Surinak were acting improperly by trying to steal PCP's clients. This misrepresentation was made in an attempt to seize the Portfolio

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and with the intent to injure Craig and Surinak in their business, trade and calling. The allegations injured them in fact as they lost clients and their reputation in the community suffered. However, there is no need to prove damages for defamation: *Lawson v. Thompson* (1969), 5 D.L.R. (3d) 550 at 555, 1969 CanLII 741 (B.C.C.A.).

[70] Craig and Surinak rely on *Olive Hospitality Inc. v. Woo*, 2006 BCSC 1554, in seeking awards of $50,000 each in damages for defamation, the amount the plaintiff company in that case received in 2006. Craig and Surinak say the equivalent amount in 2023 dollars is $71,500. The defendant in that case had said that the plaintiff was unreliable in business dealings, in breach of its tax obligations, and indebted to suppliers, that the plaintiff had failed to pay or improperly withheld wages from employees, and that the plaintiff could not meet its financial obligations and would become insolvent.

[71] I conclude that PCP's conduct in this case is not as egregious as the defendant's in *Olive Hospitality Inc.* Nevertheless, PCP's actions were defamatory of Craig and Surinak and had the effect of damaging their reputation as realtors and property managers.

[72] I award them each $25,000 in general damages for defamation.

### E. Aggravated and Punitive Damages

[73] Craig and Surinak each seek aggravated and punitive damages of $25,000 against PCP for abusing the process of the court.

[74] Aggravated damages augment compensatory damages for such intangible elements as pain, anguish, grief, humiliation, wounded pride, and damaged self-confidence that are caused by the conduct of the defendant and ought reasonably to have been foreseen. This part of the damage award acknowledges the aggravation of injury by the defendant's high-handed conduct: *Habib v. Wilson*, 2023 BCSC 585 at para. 103.

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[75] Punitive damages are awarded to punish, deter and denounce conduct that merits condemnation by the court. They are only resorted to with restraint, in exceptional cases of egregious or outrageous conduct: *Habib* at para. 107.

[76] I accept that aggravated damages are appropriate in this case. PCP's high-handed conduct negatively affected Craig and Surinak. Relying on *Habib*, I conclude that Craig and Surinak are each entitled to aggravated damages of $2,500.

[77] I am not persuaded that punitive damages are appropriate in this case. Although it is close, I consider the general and aggravated damages to be adequate compensation for Craig and Surinak and to provide a measure of deterrence for PCP's behaviour. A punitive damages award would unduly punish PCP and violate the proportionality principle.

**F. Special Costs**

[78] Craig and Surinak also seek an order for special costs against PCP based on its conduct. They point to PCP's allegations of conspiracy, its failed attempt to seize the Portfolio, its appropriation of trust funds belonging to the Owners and Tenants and its refusal to pay commissions owed to Craig. They point out that they have incurred substantial costs to defend this action, which should never have been brought.

[79] Special costs may be ordered in circumstances where a party:

a) brings a meritless claim and continues to pursue it after the absence of merit is brought to the party's attention;

b) makes improper allegations of conspiracy or breach of fiduciary duty;

c) has displayed reckless indifference by not recognizing early on that its claim is manifestly deficient;

d) has made the resolution of an issue far more difficult that it should have been;

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e) brings a claim for an improper purpose; or

f) pursues a claim frivolously or without foundation,

*Mayer v. Osborne Contracting Ltd*., 2011 BCSC 914 at para. 11.

[80] All these circumstances exist with respect to PCP's claim.

[81] Accordingly, Craig and Surinak are entitled to one set of special costs against PCP.

## VI. THE CLAIM AGAINST MENETHIL

[82] In its notice of civil claim, PCP claims that Menethil wrongfully caused the Owners and Tenants to breach their contracts with PCP, unlawfully interfered with PCP's economic relations with the Owners and Tenants, converted funds owed to PCP, and conspired with Craig and Surinak to injury PCP, all of which caused PCP to suffer the loss of management fees, clients, business, accounts, sales, profits and goodwill.

[83] There is no evidence that Menethil did anything to remotely justify PCP's allegations against it. All Menethil seems to have done is agree to Craig and Surinak joining its Kelowna brokerage, bringing the Owners and Tenants along with them.

[84] Indeed, the only evidence of Menethil's involvement is that it paid $8,320.50 to departing Tenants after PCP refused to do so, and that PCP unlawfully collected $4,875 in rental income that should have been paid to Menethil.

[85] Menethil did not file its own application for the summary dismissal of PCP's action against it. Nonetheless, I am inclined to dismiss the claim against Menethil for the same reasons that I have dismissed the claim against Craig and Surinak. The *Rules* encourage the speedy resolution of claims on their merits. PCP's claim against Menethil stands or falls on my determination as to who owns the Portfolio. It serves no purpose to have PCP's claim against Menethil continue given my finding that the Portfolio is owned beneficially by Craig and Surinak.

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[86] However, I am reluctant to dismiss the claim without providing PCP and Menethil with an opportunity to make further submissions on this point, because Menethil did not bring its own application for summary determination of the claim.

[87] PCP shall have 14 days from receipt of these reasons to advise Supreme Court Scheduling in writing of its position on continuing its claim against Menethil, failing which PCP's claim against Menethil is dismissed.

## DECISION

[88] For the reasons noted above, Craig and Surinak's application is allowed. I make the following orders:

a) PCP's claim against Craig and Surinak is dismissed;

b) Craig and Surinak's counterclaim is allowed;

c) Craig is entitled to judgment against PCP for $25,000 in damages for defamation and $2,500 in aggravated damages;

d) Surinak is entitled to judgment against PCP for $25,000 in damages for defamation and $2,500 in aggravated damages; and

e) If the parties cannot agree on whether any commissions are still owing to Craig, she may apply to speak to the matter.

[89] Craig and Surinak are also entitled to special costs.

[90] Because PCP is self-represented, there will be an order that Craig and Surinak's counsel will draft the order and forward it to PCP and Menethil. This will ensure the formal order is filed in a timely manner. PCP shall have 14 days from receipt of the order to sign and return it, failing which there will be an order dispensing with requirement to have PCP sign the order.

[91] Although Menethil appeared on the application, it played no substantive part. Accordingly, it will bear its own costs of the application. If PCP's claim against

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Menethil is dismissed pursuant to paragraphs 82 - 87 of these reasons, Menethil is entitled to Scale B costs of the action.

"G.P. Weatherill J."

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