

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Jeana Ventures Ltd. v. Garrow*,  
2023 BCSC 1831

Date: 20231019  
Docket: S2012442  
Registry: Vancouver

Between:

**Jeana Ventures Ltd.**

Plaintiff

And

**Phil Garrow also known as Philip Deane Garrow, ADC Projects Ltd., ADC Holdings Ltd., 1449 Sandhurst Place Holdings Limited and 1103 Gilston Road Holdings Inc.**

Defendants

**Jeana Ventures Ltd. and Leslie Louie Sallay  
also known as Les Sallay**

Defendants by Counterclaim

Before: The Honourable Justice Winteringham

## Reasons for Judgment

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Counterclaim:

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Place and Dates of Trial:

Vancouver, B.C.  
April 3, 5–6, 11–12, 17–20, 24–28,  
May 14, 17–18, 23,  
June 20, 2023

Place and Date of Judgment:

Vancouver, B.C.  
October 19, 2023

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**I. OVERVIEW**

[1] Les Sallay and Phil Garrow, through their closely-held companies, invested together to develop two residential properties in West Vancouver, BC. Through various investments vehicles, they both contributed cash to the projects. The business relationship ended badly. Both lost portions of their investments and any hope of realizing the anticipated profits from the projects.

[2] They now sue one another, each blaming the other for the failings of the projects. Jeana Ventures Ltd., Mr. Sallay's company, commenced this lawsuit in November 2020, applying for injunctive relief at the same time the claim was filed. Mr. Garrow counterclaimed in response to the Notice of Civil Claim.

[3] Mr. Sallay alleges that Mr. Garrow lied in material ways about his and his companies' contractual performance and submits that, as a result of his fraudulent conduct, the court should order the return of the money not recovered from his investment in the amount of approximately \$1.8 million.

[4] Mr. Sallay's fraud allegations focus on but are not limited to three payments that were to have been made by the defendants in accordance with the bargain struck between the parties. The plaintiff alleges that Mr. Garrow lied when he told Mr. Sallay that payments had been made when, in fact, they had not.

[5] Mr. Garrow denies that he in any way misrepresented the investment or his contractual performance to the plaintiff. He submits that Mr. Sallay was an astute investor, microscopically monitored the developments of the projects, and knew what he was in for.

[6] In the counterclaim, Mr. Garrow contends Mr. Sallay breached a buy/sell condition of their contract. He submits that when the relationship deteriorated, and pursuant to their contract, he presented a buy or sell option to Mr. Sallay and says that Mr. Sallay failed to exercise this option when he was legally required to do so. Mr. Garrow seeks over \$4 million dollars in damages as a result of the alleged breach.

[7] For the reasons that follow, I grant judgment in favour of the plaintiff and reject the counterclaim. Overall, I preferred Mr. Sallay’s evidence to that of Mr. Garrow. Mr. Garrow was not a credible witness. In respect of the claim, I find that the plaintiff has proven civil fraud and that they are entitled to damages. For reasons related to contractual privity and fundamental breach, I dismiss the counterclaim.

**II. PARTIES**

[8] Mr. Sallay is a director of Jeana Ventures Ltd. (“Jeana”). Jeana is a closely-held company by Mr. Sallay. Jeana is the plaintiff in this action and, together, Jeana and Mr. Sallay are the defendants by counterclaim.

[9] The plaintiff’s claim is against ADC Projects Ltd. (“ADC Projects”) and ADC Holdings Ltd. (“ADC Holdings”) (collectively, the “ADC Companies”), as well as Mr. Garrow who is the director and principal of the ADC Companies.

[10] Given the closely held nature of both Jeana and the ADC Companies, and the fact that key testimony came from Mr. Sallay and Mr. Garrow, I will sometimes refer to Mr. Sallay where he speaks for the plaintiff and Mr. Garrow where he speaks for the defendants.

[11] The plaintiff did not proceed with its claims against Raven Michelle Garrow, 1449 Sandhurst Place Holdings Limited, or 1103 Gilston Road Holdings Inc.

**III. BACKGROUND**

[12] The parties entered into agreements to govern construction projects located at 1103 Gilston Road, West Vancouver (“Gilston Property”) and 1449 Sandhurst Place, West Vancouver (“Sandhurst Property”).

**A. The Gilston Agreements**

[13] The holding company affiliated with the Gilston Property, 1103 Gilston Road Holdings Inc. (“Gilston Co.”) was owned by a realtor, Amir Hamzehali.

[14] On July 27, 2017, Gilston Co. granted a mortgage in favour of Wealth One Bank of Canada (“Wealth One”) in the sum of \$2,925,000, which was registered against the Gilston Property.

[15] In February 2019, Mr. Hamzehali and ADC Projects entered into a share purchase agreement where ADC Projects would buy all the shares of Gilston Co., the ultimate price of which is disputed as being either \$3.5 million or \$3.6 million with a \$100,000 payment to Mr. Hamzehali.

[16] On February 6, 2019, the parties entered into the following agreements:

- a) a letter of intent (“LOI”), entered into by Jeana and ADC Projects that set out how the parties would finance the Gilston Project, including seeking an additional \$3 million mortgage loan;
- b) a shareholder agreement, executed by Jeana, Mr. Sallay, ADC Projects, Mr. Garrow, and Gilston Co. (the “Gilston SA”); and
- c) a declaration of trust, where ADC Projects declared that it was holding 51 of the 100 common shares in Gilston Co. beneficially for Jeana.

[17] The payment for the acquisition of Gilston Co., is set out in the LOI. It would be part cash and part assumption of the \$2.4 million outstanding mortgage on the Gilston Property in favour of Wealth One (the “Wealth One Mortgage”). Jeana would pay \$690,000 to ADC Projects for the purpose of the acquisition.

[18] The Gilston SA sets out that ADC Projects would be contracted as the construction manager for a flat fee of \$3.01 million. It also sets out the various duties and arrangements to manage the company, including a shotgun clause.

[19] Jeana contracted to invest a total of \$2.01 million in three installments of USD\$670,000 towards the Gilston Property. This amount would be secured by a mortgage registered against the Gilston Property. The plaintiff contributed additional funds thereafter to help move along the project.

[20] A luxury residence was built on the Gilston Property, though with considerable financial challenges. By Order of Justice Horsman (as she then was), a receiver manager was appointed to the Gilston Property on August 4, 2021. The occupancy permit was obtained on August 13, 2021.

[21] On July 7, 2022, the Gilston Property was sold by the receiver manager pursuant to the Order appointing it. The sale price was \$7,2088,626 plus GST.

[22] As a result of the sale of the Gilston Property, Gilston Co. does not have any assets. The plaintiff does not seek anything against Gilston Co.

[23] The plaintiff states that the proceeds of sale of the Gilston Property were paid out first to satisfy the Wealth One Mortgage. An initial amount was paid to the plaintiff in the sum of \$2,435,100 in partial satisfaction of its mortgage. The receiver manager paid out to the plaintiff the sum of \$400,000, \$176,254 and \$3,124.81. In the end, the plaintiff alleges there is a shortfall of \$517,084.80 owing to the plaintiff with respect to the Gilston Property.

**B. The Sandhurst Agreements**

[24] The structure of the Sandhurst Agreements was very similar to the Gilston Property. A distinct company, 1449 Sandhurst Place Holdings Limited (“Sandhurst Co.”) was created to buy and hold title to the Sandhurst Property.

[25] On July 26, 2019, the parties executed the following agreements:

- a) a joint venture agreement, executed by Jeana and ADC Holdings;
- b) a shareholder agreement, executed by Jeana, Mr. Sallay, ADC Holdings, Mr. Garrow, and Gilston Co. (the “Sandhurst SA”); and
- c) a declaration of trust, where ADC Holdings declared that it was holding 51 of the 100 common shares in Sandhurst Co. beneficially for Jeana.

[26] The joint venture agreement sets out that Sandhurst Co. would purchase title to the Sandhurst Property for \$2.58 million. The financing would be cash and a

mortgage in the amount of \$1.9 million in favour of VWR Capital Corp. and Pursuit Capital Corp. Jeana and ADC Holdings would both pay \$1.2 million in consideration for their beneficial interests in the shares of Sandhurst Co. Jeana also received a lower priority mortgage registered against the Sandhurst Property. The agreement sets out that the \$1.2 million principal contributed by Jeana would earn interest not exceeding 8% per year.

[27] During the material time, a residence was never built on the Sandhurst Property. The plaintiff submits that nothing was done to advance the construction of the luxury home. The defendants reject this allegation, suggesting that considerable work had gone into preparing the property for the anticipated construction, including demolishing the existing house, conducting surveys of the property as well as other important steps. The gist of the defendants' position on this point is that they did not have an opportunity to advance the construction because of Mr. Sallay's failure to fulfill his side of the bargain.

[28] By Order of Justice Horsman, a receiver manager was appointed to the Sandhurst Property on August 4, 2021. On September 3, 2021, the receiver manager sold the Sandhurst Property for \$3,340,000. The proceeds of the sale of the Sandhurst Property were paid out first to the higher priority mortgagees and then the balance to the plaintiff in the sum of \$504,613. The plaintiff alleges that this left a shortfall owing on his mortgage in the sum of \$1,318,325.

[29] By Court Order of January 11, 2022, Sandhurst Co. was placed into bankruptcy.

#### **IV. ISSUES**

[30] It was readily apparent that there was little agreement between the parties about anything relating to their business ventures or this litigation. Several issues emerged requiring this Court's determination.

[31] The plaintiff claims that, in respect of the Gilston and Sandhurst SAs, the defendants created fraudulent documents, engaged in fraudulent claims and actions,

and fraudulently did not disclose key pieces of information in the performance of their contractual obligations. They claim damages flowing from these frauds in the amount of \$1,835,410.24. In the alternative, the plaintiff seeks damages for breach of fiduciary duty. Additionally, the plaintiff seeks aggravated and punitive damages as a result of the defendants' conduct pre-trial.

[32] In their counterclaim, the defendants claim that the defendants by counterclaim breached the buy/sell provisions—known otherwise as “shotgun clauses”—in the Gilston and Sandhurst SAs. They seek the following:

- a) damages of \$1,599,838.88 against Jeana and Mr. Sallay for breach of the Gilston SA dated February 6, 2019 in connection with the Gilston Property; and
- b) damages of \$2,319,455.42 against Jeana and Mr. Sallay for breach of the Sandhurst SA dated July 26, 2019 in connection with the Sandhurst Property.

[33] The plaintiff contends that they did not breach the Gilston or Sandhurst SAs. The plaintiff takes the position that Mr. Garrow's fraudulent conduct rendered the contracts “null and void.” With respect to one of the properties, the plaintiff takes the position that the wrong legal entity delivered the offer. As such, the defendants failed to deliver the offer in accordance with the Gilston and Sandhurst SAs and thus the plaintiff was not required to select either option. The plaintiff contends that the counterclaim should be dismissed regarding the Gilston Property and the Sandhurst Property. In the alternative, if the Court finds a breach of either or both of the agreements, the plaintiffs take the position that the defendants have not proven their damages, at all or, in the alternative, to the extent claimed.

[34] I find that the following legal issues emerge from the parties' submissions in respect of the claim:

- a) regarding the Gilston Property, is the tort of civil fraud proven in respect of two alleged tortious acts?

- b) Regarding the Sandhurst Property, is the tort of civil fraud proven in respect of three alleged tortious acts?
- c) Is the plaintiff entitled to an award of punitive damages?

[35] The following legal issues emerge from the parties' submission in respect of the counterclaim:

- a) Did the defendants, by counterclaim, breach the buy/sell provision of the Gilston SA?
- b) Did the defendants, by counterclaim, breach the buy/sell provision of the Sandhurst SA?

[36] This action was largely absent agreement amongst the parties with regard to the factual record. In consequence, my findings on the credibility of Mr. Sallay and Mr. Garrow, as well as certain other witness, are crucial to the resolution of the claim and counterclaim.

[37] I will commence by setting out the governing legal framework. I will then set out the evidence regarding the issues to be determined and key credibility findings. Thereafter, I will discuss the fraud allegations at issue, followed by general comments on loss (as it relates to the frauds at issue) and damages. Finally, I will set out the legal framework, key evidence, and my analysis of the counterclaim.

## **V. LEGAL FRAMEWORK**

### **A. Credibility**

[38] The parties challenge the credibility and reliability of one another.

[39] In light of the parties' submissions regarding credibility, I have kept in mind the well-known principles governing the court's credibility and reliability assessment.

[40] Credibility assessment involves a determination of a witness's testimony based on their veracity or sincerity, in addition to the accuracy of the evidence they provide: *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296.

[41] Credibility assessment involves consideration of various factors, including:

- a) the witness's ability and opportunity to observe events;
- b) the firmness of the witness's memory;
- c) the witness's ability to resist the influence of interest to modify his or her recollection;
- d) whether the witness's evidence harmonizes with independent evidence that has been accepted;
- e) whether the witness changes his or her testimony during direct and cross-examination;
- f) whether the witness's testimony seems unreasonable, impossible or unlikely;
- g) whether the witness has a motive to lie; and,
- h) the demeanour of the witness generally.

See: *Bradshaw* at para. 186; *Gichuru v. Smith*, 2013 BCSC 895 at para. 129, aff'd 2014 BCCA 414.

[42] Ultimately, when assessing the truthfulness of the testimony of any interested witness, I am to be guided by the words articulated in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357, 1951 CanLII 252 (B.C.C.A.):

In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[43] The burden of proof in a civil dispute such as this is a balance of probabilities. Where there is conflicting testimony, “the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred”: *F.H. v. McDougall*, 2008 SCC 53 at para. 49.

## B. Civil Fraud

[44] The plaintiff’s primary position is that the defendants committed several acts of civil fraud. The tort of civil fraud may also be referred to as the tort of deceit or as fraudulent misrepresentation: *LeRoy v TimberWest Forest Corp.*, 2020 BCSC 978 at para. 429 aff’d 2021 BCCA 326; *Singh v. ICBC*, 2022 BCCA 320 at para. 16.

[45] The standard of proof in a case such as this one involving allegations of fraud or deceit is the same as in any other civil case; namely, proof on a balance of probabilities: *McDougall* at para. 49; *Singh* at para. 23; *ICBC v. Mansur*, 2019 BCSC 2261 at para. 18. There is no longer a sliding scale of proof in civil cases where the allegation is criminal or serious: *Mansur* at para. 23.

[46] In *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8 [*Bruno Appliance*] following a review of the historical underpinnings of the elements of the tort of civil fraud, Justice Karakatsanis identified the four elements of the tort at para. 21:

- a) a false representation made by the defendant;
- b) some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness);
- c) the false representation caused the plaintiff to act; and,
- d) the plaintiff's actions resulted in a loss.

[47] In *Century Services Inc. v. LeRoy*, 2015 BCCA 120 at para. 24, the Court of Appeal used the above list in considering the elements of civil fraud.

[48] Notably, an element of inducement, that the misrepresentor must have intended the victim to act upon the misrepresentation, is sometimes included: see *Wang v. Shao*, 2019 BCCA 130 at para. 24.

[49] The plaintiff needs to establish a loss on the basis of the fraudulent conduct as alleged. As the Supreme Court set out in *Bruno Appliance* at para. 20:

Finally, this Court has recognized that proof of loss is also required. As Taschereau C.J. held in *Angers v. Mutual Reserve Fund Life Assn.* (1904), 35 S.C.R. 330, "fraud without damage gives ... no cause of action" (p. 340).

[50] Where a plaintiff is able to prove that the defendant made a misrepresentation calculated to induce the plaintiff to act to his detriment and where there is loss consistent with the plaintiff's having acted on the misrepresentation, the onus then shifts to the defendant to prove that the plaintiff did not in fact rely on the misrepresentation in issue: *Catalyst Pulp & Paper Sales Inc. v. Universal Paper Export Co.*, 2009 BCCA 307 at para. 58.

[51] In the context of contractual relations, civil fraud has traditionally been considered and applied in relation to fraudulent misrepresentations that induce a party or parties to contract. In *Catalyst Pulp & Paper Sales Inc. v. Universal Paper Export Co.*, 2009 BCCA 307 [*Catalyst Pulp*], Justice Bauman (as he then was) indicated that civil fraud can also operate in respect of fraudulent contractual performance: at paras. 56–61; see also *Shen v. West Continent Development Inc.* (BC0844848), 2020 BCSC 5 at para. 112.

[52] *Catalyst Pulp* involved a plaintiff that contracted with the defendant to distribute and deliver paper to a customer. In invoices to the plaintiff, the defendant misrepresented certain costs that were not contemplated in the parties' bargain. The plaintiff was successful at trial and on appeal on the ground that these invoices constituted false misrepresentations. The Court of Appeal endorsed the trial judge's findings that the defendant had intended the plaintiff to act on the misrepresentations and that the plaintiff had relied on the misrepresentations to their detriment: *Catalyst Pulp* at para. 187.

[53] Where civil fraud is ongoing as a feature of contractual performance, that a party carries on under the contract can constitute reliance on a fraudulent representation: *XY, LLC v. Zhu*, 2013 BCCA 352 [*XY*] at paras. 39–41. In *XY*, the

plaintiff licensed certain technology to the defendants in exchange for royalty payments based on sales. The defendants produced false reports to the plaintiff and underpaid their royalties. The plaintiff in XY was not actually induced to make payments or to otherwise act on a fraudulent basis. Instead, reliance was found on the basis of their continued contractual performance. To this extent, the fourth element of civil fraud may be established on the basis of such reliance.

### C. Measure of Damages

[54] In *BG Checo International Ltd. v British Columbia Hydro and Power Authority*, [1993] 1 SCR 12, 1993 CanLII 145, Justice La Forest and Justice McLachlin (as she then was) distinguished between damages in contract and tort:

The measure of damages in contract and for the tort of negligent misrepresentation are:

Contract: the plaintiff is to be put in the position it would have been in had the contract been performed as agreed.

Tort: the plaintiff is to be put in the position it would have been in had the misrepresentation not been made.

[55] This claim has been argued in and sounds in tort. The appropriate measure of damages, therefore, is that which will put the plaintiff in the position it would have been in had the misrepresentation not been made. The reliance interest is the focus of damages in civil fraud.

[56] The Court of Appeal has made clear that consequential losses are recoverable in the context of deceit actions: *Kuhnke v. Karner*, 2022 BCCA 399 at para. 73; *The Owners, Strata Plan LMS 3851 v. Homer Street Development Limited Partnership*, 2016 BCCA 371 at para. 80.

[57] In *Wiebe v. Gunderson*, 2004 BCCA 456, the court considered an award of consequential losses flowing from fraudulent misrepresentation made to induce contracting. The court noted that in cases of fraud inducing a plaintiff to enter into a contract, the trend in Canada and elsewhere is to de-emphasize one particular “measure” of damages and to:

[40] ... strive for an award that in broad and practical terms compensates the plaintiff for all aspects of his or her loss flowing from the fraud, without being overly restricted by the nature of the cause of action. I will therefore proceed on the basis that the plaintiffs here may claim, and the court may award, damages to compensate for lost profits to the extent they are proven to have resulted directly from the defendants' fraud, and subject to the usual rules of mitigation. The overarching question is what amount of money represents the financial loss suffered by the plaintiff as a direct result of the alteration of his or her position under the inducement of the defendant's fraudulent representations.

[58] There is no duty on a plaintiff to mitigate losses in respect of fraud until they are aware of the fraud: *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19 at para. 70.

## VI. EVIDENCE AND CREDIBILITY

[59] At the outset, I note that there was little agreement between the parties about anything relating to their business ventures or the litigation. All together, the parties tendered ten binders containing various documents. At no point during the trial, did the parties enter into a document agreement. Rather, witnesses were taken to some of the documents. At the end of the trial, counsel removed some of the documents not referred to by any witness. The use that could be made of many of the documents, however, was limited.

### A. Mr. Sallay

[60] I accept the defendant's submission that Mr. Sallay is an experienced businessperson and a well-versed real estate developer. Mr. Sallay testified that he had about 50 years of experience with real estate development when his business association with Mr. Garrow began. He also testified that he had less familiarity with residential development.

[61] Key allegations of civil fraud in this action emanate from documents provided by Mr. Garrow to Mr. Sallay to demonstrate compliance with the defendants' contractual obligations to deliver funds. The plaintiff argued that these documents ground claims in civil fraud. The defendants argued that Mr. Sallay, as an experienced real estate investor, should have raised concerns about these

documents and their implications sooner than he did. The relative credibility of Mr. Sallay and Mr. Garrow is, therefore, critical to the disposition of these issues.

[62] One example of this relates to a transfer of approximately \$400,000 that was to be credited to a mortgage on the Gilston Property but, for reasons Mr. Garrow could not provide, was never applied to the mortgage. To prove to Mr. Sallay that he had effected the transfer (as required by the bargain), Mr. Garrow sent a copy of a cheque to Mr. Sallay. The cheque never cleared and Mr. Garrow never disclosed that fact to Mr. Sallay.

[63] The importance of this example is that Mr. Sallay was not simply assuming that Mr. Garrow was fulfilling his part of the contractual bargain; rather, Mr. Garrow actively provided evidence to Mr. Sallay of his contractual compliance. This is not the only such example where Mr. Garrow actively provided “proof” of contractual compliance that held no weight.

[64] During cross-examination, Mr. Sallay was questioned about his access to the financial records of Gilston Co. and Sandhurst Co. He was also questioned about emails that he sent to Mr. Garrow requesting detailed information about the status of the Gilston Property and Sandhurst Property. It was suggested to him that the books were open to him and, as an astute real estate investor with some 50 years of experience, he had ample access to the financial records of Gilston Co. and Sandhurst Co.

[65] The problem with this suggestion, however, is that it is built on a house of cards. That is, Mr. Sallay believed in a certain state of affairs that were inaccurate from the start. His belief was reasonable in that it was based on information Mr. Garrow had provided to him at the outset and in an ongoing fashion. That is, that the defendants had fulfilled their contractual obligations.

[66] For the Gilston Property, Mr. Salay’s belief was that the defendants had reduced a prior mortgage by \$400,000. The defendants had not.

[67] Likewise, for the Sandhurst Property, Mr. Sallay's belief was that the defendants had contributed over \$1 million per the joint venture agreement. The defendants had not.

[68] I accept Mr. Sallay's testimony that he did not know, until about a year into his investment, about the problems with the Gilston and Sandhurst projects. Over the course of 2020, Mr. Sallay learned information that caused him to investigate the projects further. He began to worry that Mr. Garrow had duped him into believing the defendants had contributed money in accordance with the contracts. As he investigated further, he was skeptical that they had. All of this culminated in Mr. Garrow's attempt to force a sale (or purchase) of Gilston Co. and Sandhurst Co. through the shotgun clauses that I will discuss later in these Reasons.

[69] Mr. Sallay's testimony about his evolving understanding, in my view, is credible. He testified about the projects and his responsibility for investing the funds in accordance with the contracts. But for \$60,000, which he was unable to come up with, Mr. Sallay met all of his contractual and financial responsibilities to the defendants. It was only when he was learning about the defendants' questionable deposits—such as the one exemplified above and more that will be canvassed below—that he began to pay much more attention to the movement of funds for both projects.

[70] Throughout their business relationship, Mr. Sallay learned information about Mr. Garrow that raised various suspicions about Mr. Garrow's conduct. Ultimately and in response to these suspicions, Mr. Sallay retained a quality surveyor in an effort to better understand what was transpiring at the Gilston and Sandhurst Properties, as well as to examine more closely the financial transactions.

[71] The defendants submitted that Mr. Sallay's evidence was not credible, in part, due to inconsistencies in his testimony. They point to instances where Mr. Sallay acknowledged that he was wrong in previous aspects of his testimony. I view these instances, however, as lapses in Mr. Sallay's memory that he was forthright in acknowledging and correcting. Two examples follow.

[72] In one instance on cross-examination, Mr. Sallay indicated that he was told by Mr. Garrow that construction financing was in place for the Sandhurst project as of August 2019. Then Mr. Sallay suggested that Mr. Garrow had indicated that he was looking for other construction financing in May 2020. On being shown a cheque from Jeana payable to the Sandhurst Property for \$262,500 dated August 11, 2020, it became clear to Mr. Sallay that the original timeline he provided was incorrect. Mr. Sallay admitted that this was so.

[73] In my view, this is an example of Mr. Sallay agreeing that he made a mistake, when his memory was refreshed with a document about the timing of certain statements. On a point such as the this, this sort of mistake does not detract from his credibility.

[74] Mr. Sallay was also cross-examined at some length about when he was informed about the progress of the two projects. The defendants submit that his evidence about timing shifted. I have reviewed Mr. Sallay's evidence about the timing of his concerns. I agree that he sometimes corrected himself, often when faced with a document indicating an alternative timeline in respect of when some of his concerns arose.

[75] I note, however, that these were not matters of inconsistencies on material points. Mr. Sallay's substantive evidence on matters material to the fraud allegations addressed in these reasons remained consistent under cross-examination, despite some issues with respect to his recollection of timelines.

[76] Towards the end of their relationship and as the projects were collapsing, Mr. Sallay sent Mr. Garrow an email. The email was confrontational. Mr. Sallay was cross-examined about the tone of the email and the allegations contained in it. Mr. Sallay tried to explain the reasons for sending the email. He testified that he was extremely upset and anxious about the status of the projects. He could not understand why it was that the house on the Sandhurst Property had yet to be built, despite the fact that considerable money had already been spent. He had also learned that there were foreclosure proceedings commencing on the Gilston

Property. During cross-examination, Mr. Sallay agreed with counsel's characterization of the email and indicated some regret for sending it.

[77] Broadly, Mr. Sallay responded to cross-examination calmly and did not try to make excuses for sending the email. He was cross-examined thoroughly and appeared to me to be thoughtful in his answers. When he did not remember something, he said so. When his memory was refreshed by a document, he again said so. In all, I found him to be a candid witness who was truthful. Despite his occasional memory lapses, I accept his evidence. As I review the events of summer 2020 and the correspondence that followed, Mr. Sallay was doing his best to work through a myriad of issues.

[78] On September 20, 2020, when Mr. Garrow delivered the buy/sell offer, the financial picture was chaotic—in large part due to Mr. Garrow's often self-serving accounting methods. Interestingly, Farida Sukhia, someone retained by Mr. Garrow, voiced concerns similar to Mr. Sallay. During her investigation, she too was often not provided with banking statements despite repeated requests.

[79] In sum, I am confident in Mr. Sallay's credibility and accept his version of the transactions at issue. Moreover, I accept that Mr. Sallay received documents from Mr. Garrow and honestly relied on those documents as accurately reflecting the state of affairs of the Gilston and Sandhurst Properties. I make this determination having considered the principles from *Bradshaw* and other jurisprudence outlined above.

**B. Mr. Garrow**

[80] Mr. Garrow's testimony was flawed in many respects. He was quarrelsome and antagonistic in his responses during cross-examination and his demeanour, generally, was poor. And while I appreciate the frailties of assessing credibility by demeanour, my concerns with Mr. Garrow's testimony went far beyond that. His testimony often evolved and changed as different documents were presented to him and he tended to obfuscate his responses to avoid providing an answer to the question asked.

[81] Beyond his demeanour, three characteristics of Mr. Garrow's testimony negatively impacted my credibility analysis and revealed dishonesty. First, I have found Mr. Garrow blatantly lied about the production of a document critical to this litigation. Second, Mr. Garrow repeatedly relied on having provided proof of contractual adherence where, in reality, he engaged in no such adherence. And third, Mr. Garrow relied repeatedly—and caused Mr. Sallay to rely on—faulty accounting information that was faulty due to his own method of accounting.

[82] First, and for the reasons set out more fully below, I have found Mr. Garrow lied about a trust document relating to the ADC Companies. This trust document, if legitimate, would have rectified an issue related to contractual privity that arises in the counterclaim. I find, however, that Mr. Garrow lied in respect of the trust document and its creation, which, in turn, adversely impacts my assessment of his credibility.

[83] Second, I do not accept Mr. Garrow's evidence about significant payments that he was contractually bound to make and did not. Mr. Garrow sent "proof" of these deposits to Mr. Sallay: once by way of a copy of a cheque worth \$399,623.22; and, a second by way of a screenshot of his bank account showing available funds of \$765,000. He did so to demonstrate to Mr. Sallay that the defendants had fulfilled their financial obligations. Neither payment, however, reached its destination. I found Mr. Garrow's testimony on these matters to be unlikely.

[84] Third, Mr. Garrow's accounting rose repeatedly as an issue. At times, Mr. Garrow referred to the work of his bookkeeper and attempted to justify certain calculations because his bookkeeper had completed the work. Later, it became clear that Mr. Garrow's bookkeeper did not have access to most of the underlining documents that would have answered many of Mr. Sallay's questions. Simply put, the accounting records produced by Mr. Garrow constituted his own calculations and were based on invoices he chose to incorporate (or not) in the records. Mr. Sallay's suspicion of Mr. Garrow's accounting methods was reasonable in the circumstances.

[85] The problems with Mr. Garrow's evidence are not limited to the examples above and instead run through these reasons. Ultimately, Mr. Garrow's testimony demonstrated inabilities to resist the influence of interest to modify his recollection, often did not harmonize with accepted evidence, changed as between examination for discovery and cross-examination, and was often unreasonable or unlikely. I have determined that he lied multiple times. His demeanour, broadly, as described above, was generally poor.

[86] In result, where there is a conflict in the evidence, I have preferred the evidence of Mr. Sallay.

### **C. Other Witnesses**

[87] My conclusions on Mr. Garrow's credibility impact the weight I am able to give to other witnesses called by the defendants to the extent that those witnesses have relied on Mr. Garrow in material respects. I wish to discuss two such witnesses: Karim Virani (the defendants' bookkeeper) and Ms. Sukhia (certified business valuator retained to examine Gilston Co.'s banking and financial records).

[88] Mr. Virani and Ms. Sukhia gave testimony relevant to certain fraud allegations as well as to the counterclaim. Ultimately, I can give little weight to the evidence of either witness. This is not because I disbelieve them; to the contrary, both candidly admitted that they had limited access to independent financial records relevant to the matters on which they were meant to testify. Rather, much of the underlying information came from Mr. Garrow and not from independent sources; thus, the inaccuracies perpetrated by Mr. Garrow are simply carried through by his instructions to them.

[89] I deal with Mr. Virani first.

[90] Mr. Garrow often referred to financial statements during his testimony. Indeed, during the trial he produced a "damages workbook" that he had created to demonstrate the losses to the ADC Companies. In addition, he often referred Mr. Sallay to "in-house" financial statements said to be created by Mr. Virani. On

multiple occasions, Mr. Garrow attempted to attribute the accuracy (or inaccuracy) of corporate internal financial records to Mr. Virani.

[91] Mr. Virani testified that he was not responsible for the contents or the accuracy of the internal financial records of the companies. He testified that Mr. Garrow did not allow him access to the various bank accounts and, thus, the information that he was using (and which was input into the company's accounting program) came from Mr. Garrow. In other words, the numbers were not obtained from banks, or financial records or invoices. Rather, the information came directly from Mr. Garrow.

[92] I believe this aspect of Mr. Virani's evidence to be credible. I accept that he relied on Mr. Garrow for key information related to the records he produced.

[93] I have also considered the evidence from Ms. Sukhia. Ms. Sukhia was called on behalf of Mr. Garrow. She is a certified business valuator and prepared a report that was used in the defendants' application to set aside the Mareva Injunction. Her reports related to the Gilston Property. She later prepared a supplemental report dated September 15, 2022 correcting some of the information contained in her initial report.

[94] In her initial report dated February 19, 2021, Mr. Sukhia set out some of her findings regarding her examination of the Gilston Co. bank statements and accounting records. To place her testimony in context, I reproduce the portion of this report:

- 8.0 Gilston Inc. Bank Statements and Accounting Records
- 8.1 We reviewed Gilston Inc's Vancity bank statements for the period February 1, 2019 through September 30, 2020. Except for the receipt and disbursement of mortgage proceeds as described in sections 4.0 and 6.0 above, there was minimal activity in the Gilston Inc. bank accounts during the time period reviewed.
- 8.2 Further, based on our review, it did not appear that any construction costs pertaining to the Property were paid directly by Gilston Inc.
- 8.3 When we compared the activity in Gilston Inc.'s bank statements to the amounts recorded in the cash account general ledger, we could not reconcile the journal entries to the actual bank transactions. For

example, the 2019 general ledger....showed that there was a \$17,699.27 balance in the chequing bank account; however the December 31, 2019 bank statement indicated the balance was only \$405.95.

- 8.4 Further, the 2020 chequing bank account general ledger account....showed numerous withdrawals from Gilston Inc.'s bank account. Given that the bank statements showed minimal activity, as we noted above, we do not know the reason numerous journal entries were recorded in the chequing bank account general ledger account.
- 8.5 The difference in the amounts owing to ADC as per the account records and as calculated in this report....also represents another inconsistency between the information provided to us and Gilston Inc.'s accounting records.
- 8.6 it should be noted that we were not asked to undertake a forensic examination nor audit of the bookkeeping or financial records of Gilston Inc. As a result, we cannot comment on the overall accuracy and completeness of the financial statements of Gilston Inc. However, based on our limited review of the general ledgers for Gilston Inc. and as discussed above, we did note certain discrepancies/inconsistencies with respect to the accounting.

[95] In her supplemental report, Ms. Sukhia corrected some of her comments contained in the initial report and added further information. On April 25, 2023, Ms. Sukhia provided a document entitled "Revisions to February 19, 2021 Report" and "Revisions to September 15, 2022 Supplemental Report."

[96] During cross-examination Ms. Sukhia testified that, as her reports reflected, she was missing documents including bank statements. She testified that she asked for some of these missing documents on a few occasions and that is reflected in her report and during her testimony. She was cross-examined about some of the assumptions she was required to make in preparing her report. She testified that the information was coming from Mr. Garrow and not from financial records. She stated that she identified discrepancies between her calculations and what was recorded in the internal financial statements.

[97] Ms. Sukhia gave an example of a notable inaccuracy. She explained in her initial report that based on her calculations, Gilston Co. financial statements overstated the amount owing to ADC Companies as at December 31, 2020 by \$67,941.

[98] She was asked about her conclusion regarding the accuracy of the Gilston Co.'s financial statements, including those addressed above. In response, she stated:

I would doubt the accuracy but I have not done a full audit – it would warrant further investigation in my opinion.

[99] She testified that her conclusion about the inaccuracies of the Gilston Co.'s financial statements was based on the discrepancies she found following her calculations.

[100] I have concluded that I can place little weight on the evidence of Mr. Virani and Ms. Sukhia. That is not because I disbelieve either of them. To the contrary, both candidly admitted they had limited access to independent financial records. The problem with their evidence is that much of the underlying information came from Mr. Garrow and not from independent sources; thus, the inaccuracies perpetrated by Mr. Garrow are simply carried through by his instructions to them. In addition, and as stated by Ms. Sukhia, her investigation was limited. Her characterization about the accuracy of her review was telling. She believed further investigation was required.

## **VII. FRAUD ALLEGATIONS**

### **A. Gilston Property**

[101] The plaintiff alleges Mr. Garrow committed two acts of civil fraud with respect to the Gilston Property.

[102] First, the plaintiff alleges that Mr. Garrow failed to disclose a side deal that he had with Mr. Hamzehali directly relating to the value of the Gilston Property. This was characterized as a \$100,000 “kickback” to Mr. Hamzehali.

[103] Second, the plaintiff alleges Mr. Garrow represented that the Wealth One Mortgage was to be reduced by \$400,000 before Mr. Sallay would deposit his investment to the Gilston Property project. In this regard, Mr. Garrow delivered correspondence and documents to Mr. Sallay that he had fulfilled his requirements

about the payment of the money. The plaintiff alleges that this correspondence, including the documents, were illegitimate.

[104] In light of the following analysis, I find that that plaintiff has successfully established the tort of civil fraud on a balance of probabilities in respect of the second allegation but not the first.

**1. Side deal with Mr. Hamzehali**

[105] Mr. Hamzehali sold the shares in Gilston Co. to ADC Holdings in February 2019. The price reflected in the share purchase agreement was \$3,500,000. This fraud allegation concerns a \$100,000 payment to Mr. Hamzehali on top of the \$3,500,000, which, in effect, would raise the Gilston Co. purchase price to \$3,600,000.

[106] The plaintiff argues that it was never made aware of the \$100,000 payment to Mr. Hamzehali, and that the purchase price of Gilston Co. was only ever represented to it as being \$3,500,000. The plaintiff suggests that the \$100,000 was a side deal with Mr. Hamzehali that was not disclosed to them.

[107] For their part, the defendants characterize the \$100,000 payment as an addendum to the purchase price of Gilston Co. They argue that the plaintiff was made aware of this addendum in an email in which the plaintiff's corporate solicitor was copied.

[108] It is clear from the record that, in February 2019, Mr. Hamzehali sold to ADC Projects the registered and beneficial ownership of the 100 Class A common shares of Gilston Co. The purchase price set out in the share purchase agreement was \$3,500,000. Mr. Garrow was cross-examined about the purchase price of Gilston Co. and testified as follows:

The price for the purposes of the share purchase agreement that formed part of the transaction with Mr. Sallay and I was \$3.5 million and there was that separate \$100,000 addendum.

[109] The \$100,000 addendum was supposedly produced to provide some financial redress to Mr. Hamzehali for permitting his name to stay on the title to the Gilston Property because of favourable mortgage terms that he had secured during his ownership.

[110] Mr. Garrow was adamant that he told Mr. Sallay about the \$100,000 addendum. Mr. Garrow defended this allegation of non-disclosure by stating that the reference to \$100,000 can be found in a separate addendum and that it was in the email chain between Qainoor Nuraney (Mr. Garrow's corporate solicitor) and Mr. Thompson (Mr. Sallay's corporate solicitor).

[111] The plaintiffs state, however, that the reference to the \$100,000 was buried in an 18-page email and the plaintiff's lawyer was not copied on the email chain until after the \$100,000 payment was raised.

[112] I have reviewed Mr. Sallay's testimony about the arrangement between Mr. Hamzehali and Mr. Garrow regarding the valuation of the Gilston Property, and do not find that this arrangement constituted fraud.

[113] While I appreciate the plaintiff's arguments in respect of disclosure issues, the plaintiff has not proven the third and fourth elements of civil fraud on a balance of probabilities: namely, that a false representation caused the plaintiff to act in a manner that resulted in loss. Though plaintiff's counsel says he takes the position that the plaintiff wouldn't have invested funds in Gilston Co. had he known about Mr. Hamzehali's involvement, I am unable to determine that based on the evidence. In his testimony, Mr. Sallay was largely silent in respect of any effect of the \$100,000 payment.

[114] I need not decide the preliminary elements of civil fraud in light of my findings on the third and fourth elements.

**2. \$400,000 Mortgage Reduction**

[115] In January and February 2019, the parties were finalizing the paperwork setting out the terms of the Gilston Property transaction.

[116] At the outset of the arrangements between the parties, Mr. Garrow was to reduce the Wealth One Mortgage from \$2,800,000 to \$2,400,000. No party disputes that this was to occur. As the Gilston SA dated February 6, 2019 set out:

5.4 [Gilston Co.] has granted a first mortgage on the Property in favour of Wealth One Bank Canada of which the principal amount owing is \$2,400,000.00 as at February 6<sup>th</sup>, 2019.

[117] Mr. Garrow represented to Mr. Sallay, in an email and otherwise, that ADC Projects acknowledged it was required to reduce the Wealth One Mortgage on the Gilston Property by \$400,000. This representation was ultimately captured in an email sent by Mr. Garrow to Mr. Sallay dated January 28, 2019 stating:

As discussed, ADC is responsible (as a condition of moving P Garrow into sole guarantor position for allowing further construction funding) for paying down the mortgage to \$2,400,000. That cheque was certified then remitted to Wealth One today by courier. It is also enclosed for reference.

[118] Mr. Garrow attached a copy of the cheque to this email; however, the copy was poor in quality. From its face, the Court can determine the following from the cheque:

- a) The cheque was made payable to Wealth One re: Mortgage Ref #1720000XXXX;
- b) The cheque was drawn from the account of ADC Holdings in the amount of \$399,623.22; and
- c) The cheque included a reference to be for “mortgage paydown.”

[119] Despite the cheque, it is clear on the evidence that the amount of \$400,000 was never credited to the Wealth One Mortgage. Thus, Mr. Garrow did not reduce the Wealth One Mortgage to \$2.4 million as he was required to do.

[120] James Page, the Director of Operations at Wealth One, testified at trial. He testified that he had reviewed all of the monthly statements for Gilston Co. from November 2018–August 2022 and that he did not find any payment and/or credit to the Gilston Co. account for \$400,000 (or \$399,623.22). He also noted that the back of the copy of the cheque he was shown during his testimony, did not have Wealth One’s stamp on it, indicating to him that the cheque had not been processed.

[121] Mr. Hamzehali was named as the mortgagee for the Wealth One Mortgage. This did not change even after the sale between Jeana and ADC Projects. It seems that the regular Wealth One Mortgage statements continued to be sent to Mr. Hamzehali. This makes sense considering Wealth One was not told about ADC Projects’ interest in the Gilston Property.

[122] There was a suggestion that Wealth One would not have accepted payment from Mr. Garrow because neither he nor ADC Projects were mentioned on the mortgage. During cross-examination, Mr. Page was asked about what would happen if a payment was made on a Wealth One Mortgage and received by Wealth One from a person or an entity that was not a borrower or guarantor named on the mortgage. Mr. Page’s testimony was that it was his understanding that any payment received from someone not named on the mortgage would be returned to the sender. However, as I reviewed some of the Wealth One documents and evidence on this point, I agree with the plaintiff’s submission that it appears, on occasion, Wealth One did accept payments from individuals that were not named on the Wealth One Mortgage.

[123] As I have said, Mr. Garrow agrees that \$400,000 was not credited to the Wealth One Mortgage. He testified that he learned about the missing \$400,000 only after this litigation commenced. At that time, he took steps to find out what had happened to the ADC Holdings cheque.

[124] Mr. Garrow testified about his email to Mr. Sallay back in January 2019 wherein a copy of the cheque was transmitted to Mr. Sallay. He testified that he would have instructed someone named “Justin” to prepare the cheque and he would

have signed it. He then assumed the receptionist would have the cheque couriered to Wealth One. The only evidence about the cheque being couriered to Wealth One came from Mr. Garrow—he did not produce any courier slip to corroborate his testimony on this point.

[125] Mr. Garrow’s companies banked at VanCity. Mr. Garrow tried to explain VanCity’s method of certifying cheques and why it was he believed the Wealth One cheque had been processed. Mr. Garrow’s evidence on this point was based, in part, on bank statements from VanCity.

[126] Mr. Garrow testified that VanCity utilized a three-step process for certifying cheques.

[127] Regarding the cheque at issue here, the first two steps are revealed in the January 2019 VanCity bank statements and showed the following:

|                  |                                  |              |
|------------------|----------------------------------|--------------|
| January 30, 2019 | Cheque Cleared #5007 (31Jan2019) | \$399,623.22 |
| January 31, 2019 | Cheque deposit – branch          | \$399,623.22 |

[128] As explained by Mr. Garrow, VanCity issues the “official cheque” at the third step.

[129] In this case, the third step is missing. Mr. Garrow testified that this third step is required for a cheque to have cleared the ADC Holdings account. The VanCity bank statements show only a deposit for \$399,623.22 and a cheque clearing in the same amount. However, it is clear that the VanCity account balance is not reduced by \$399,623.22. In other words, despite what appears to be an in/out transaction, the payment to Wealth One was not made and the ADC Holdings account was not debited by \$399,623.22.

[130] Regardless of what occurred in the VanCity account, the Wealth One Mortgage was not reduced in accordance with Mr. Garrow’s contractual obligation to

do so. Having given evidence on the possible mechanics of the missed payment, Mr. Garrow went on to explain his lack of knowledge that the payment was missed.

[131] Mr. Garrow was cross-examined about this \$400,000. In particular, it was suggested that his testimony at trial was different than examination for discovery evidence and different from an affidavit he swore on February 17, 2021.

[132] In direct examination, Mr. Garrow testified that he would have signed the cheque and organized for it be sent by courier to Wealth One. He testified that steps were taken to have the cheque certified and that his efforts in this regard are reflected in the VanCity banking statements.

[133] On February 17, 2021, Mr. Garrow swore an affidavit to set aside the Mareva Injunction. He said this:

The approximate \$400,000 payment on the Wealth One Bank of Canada Mortgage was made.

[134] In addition, he attached a copy of the cheque issued to Wealth One for \$399,623.22 to this affidavit.

[135] He was cross-examined about the truthfulness of his affidavit, sworn some two years after this substantial cheque was not debited from ADC Holdings' bank account. Mr. Garrow testified that he swore this affidavit still not appreciating that Wealth One had not processed the cheque. He repeated his explanation that his multiple companies had many transactions and he simply missed this one. He testified that he still believed the ADC Holdings cheque had cleared the account when he swore his affidavit in February 2021. He testified that he did not learn about the error until he received the Wealth One Mortgage statements showing that the \$400,000 was never applied to the mortgage.

[136] Mr. Garrow attended an examination for discovery on May 25, 2021. At trial, he was cross-examined about his evidence regarding his knowledge of the missed \$400,000. At the discovery, he testified that he did not know that Wealth One had not processed the cheque for \$400,000.

[137] Mr. Garrow steadfastly maintained his position that he had certified the ADC Holdings cheque for \$400,000 and that it had been couriered to Wealth One (by a receptionist) back in February 2019. He maintained this position despite being confronted with documents demonstrating that the cheque had not been processed. At times, it was difficult to follow his explanations about how this was missed. He made clear that he was the person principally responsible for reviewing bank statements of all of the companies, including ADC Holdings. Indeed, he later acknowledged in his testimony that Mr. Virani did not even have access to some of the underlying accounting documents. Rather, Mr. Virani simply proceeded on instructions and information provided directly from Mr. Garrow. Except on this point, Mr. Garrow demonstrated an intimate knowledge of the corporate transactions and banking transactions for the ADC Companies. With respect to the missing payment, however, he claimed ignorance.

[138] Mr. Garrow was questioned about how he could have missed a \$400,000 error in circumstances where he agreed he was the person responsible for reviewing monetary transactions for the ADC Companies.

[139] Mr. Garrow defended this allegation, at least in part, on the basis that he did not receive the Wealth One mortgage statements. That was because Mr. Hamzehali was the person named in the mortgage and, as Mr. Garrow put it, ADC Holdings was unknown to Wealth One. Mr. Hamzehali and his spouse had remained named on the mortgage and their guarantees had also remained intact after the sale on February 6, 2019.

[140] Mr. Hamzehali testified that he did not believe he sent the mortgage statements to Mr. Garrow. He testified, however, that he was contacted four or five times by Wealth One, by phone or email, because payment had not been received for the mortgage. Mr. Hamzehali believed this happened four or five months in a row. He testified that he had to contact Mr. Garrow and request payment. Mr. Hamzehali learned that Mr. Garrow had not paid the mortgage on those occasions and so he followed up with him requesting that he pay. At one point, it

seems he asked Mr. Garrow to pay him directly just so he could make sure payment was made. Mr. Hamzehali did not say whether there were any subsequent failures to pay.

[141] Moreover, Mr. Hamzehali confirmed that he did not send the Wealth One mortgage statements to Mr. Garrow. He said it was not part of the agreement so he did not feel obliged to do so.

[142] Mr. Garrow was cross-examined in particular about the preparation of the Form B (Jeana Mortgage) created months after ADC was to have paid \$400,000. In the Form B, Mr. Garrow maintained the false statement that the Wealth One Mortgage was \$2.4 million.

[143] First, he was cross-examined about the Land Title Act Form B regarding the Gilston Property and reflecting the Jeana Mortgage. The Form B sets out the terms of the Jeana Mortgage and includes the following representation:

11. Prior Encumbrances permitted by the lender:  
First mortgage in favour of Wealth One Bank of Canada under number CA6178243 and Assignment of Rents No. CA6178244 not to exceed an outstanding balance of \$2,400,000.00

[144] The Form B was prepared by Ms. Nuraney. This document was entered as an exhibit at the trial. The copy tendered did not have a signature although there is a signature line for ADC Projects, as Covenantor by its authorized signatory (Mr. Garrow) and Mr. Garrow, as Covenantor.

[145] Beside the signature line, the Form B has a signatory date of June 24, 2019. Mr. Garrow agreed that the Form B was prepared by Ms. Nuraney, at his instruction, to reflect the Jeana Mortgage for the Gilston Property. He testified that at the time it was prepared, he simply had not learned about the missed \$400,000 payment and thus did not know there was an error.

[146] Mr. Garrow further testified that Mr. Virani simply did not catch this error. He explained that he had seven companies operating at that time and they did not

reconcile their bank statements on a monthly basis. Mr. Garrow testified that \$400,000 is “not an insignificant” sum of money but in the context of the volume of transactions and seven companies and aggregate of what the companies were doing, the error was “not caught – not noticed.” He testified that even so far as providing data to Ms. Sukhia in early 2021, this amount was again missed. Mr. Garrow later admitted that Mr. Virani did not have access to some of the underlying documents found in the corporate internal financial records.

[147] Having been cross-examined at length about his knowledge of the missed payment, Mr. Garrow adamantly denied any suggestion that he lied about sending the cheque to Wealth One.

[148] In sum, I don’t believe Mr. Garrow’s explanation about the cheque. I am satisfied that the plaintiff has established on a balance of probabilities that Mr. Garrow fraudulently misrepresented that the Wealth One Mortgage had been reduced in accordance with the Gilston SA by \$400,000.

[149] The parties agree, as do I, that the reduction of the mortgage from \$2.8 million to \$2.4 million was a material representation. Mr. Garrow’s email to Mr. Sallay in January 2019 that the paydown had occurred was incorrect. The parties agree that the mortgage was not reduced by \$400,000.

[150] The defendants, through Mr. Garrow, had knowledge of the falsehood of the representation. I reject Mr. Garrow’s evidence about what he knew about the \$400,000 reduction of the Wealth One Mortgage. I make this finding based on his testimony about the email sent to Mr. Sallay in January 2019, the VanCity bank statements showing that the ADC Holdings account was never debited for the \$399,623.22, the Form B Jeana Mortgage prepared some five months later representing the reduction of the Wealth One Mortgage to \$2.4 million, and Mr. Garrow’s affidavit of February 2021 swearing that ADC Holdings had made the payment.

[151] I am satisfied that Mr. Garrow knew this statement was false. He went to great lengths to explain VanCity's banking system which lured him, he said, into believing payment had been made. I agree that at first glance, the \$399,263.22 seems to be reflected in the VanCity banking statements. However, in my view, it is easily gleaned from the VanCity records, particularly with someone like Mr. Garrow's self-professed familiarity with their banking practices, that the money had not been withdrawn.

[152] Yet Mr. Garrow maintained the false statement in June 2019 when he instructed his solicitor to prepare the Form B for the Jeana Mortgage and again in February 2021 when he swore the affidavit. This is all in circumstances where Mr. Garrow testified to an intimate knowledge of the financial affairs of the ADC Companies.

[153] I do not believe him.

[154] The false representation induced the plaintiff to contract with the defendants in reliance thereon. It is clear, based on the documents, that this representation was made before Mr. Sallay signed off on the documents solidifying Jeana's investment in the Gilston Property. Mr. Sallay testified that the reduction of the Wealth One Mortgage to \$2.4 million was an important condition for him. That is because Mr. Sallay knew that his company was not a first mortgagee and that other lenders would be paid out before him. It therefore mattered to him the amount owing to the lenders positioned before him in any payout. Mr. Sallay testified that he delivered his cheque for \$690,000 after he received Mr. Garrow's email attaching the copy of the cheque for \$399,623.22. He did so because he believed Mr. Garrow had paid down the Wealth One Mortgage in accordance with ADC Projects' obligations and had contributed his share of the funding.

[155] The plaintiff's actions based on the false representation resulted in a loss, which I will refer to in my discussion of damages below.

**B. Sandhurst Property**

[156] The parties agreed that each was to contribute \$1.2 million when they entered into the agreement to purchase and develop the Sandhurst Property. Mr. Garrow testified that his contribution consisted of a \$765,000 transfer to the VanCity Sandhurst account, a \$300,000 assignment fee, and \$135,000 transfer to Sandhurst Co. account (paying for the deposit on the Sandhurst Property). The parties agree that the defendants paid the \$135,000. The defendants' contribution of \$765,000, however, is disputed, as is the contribution of \$300,000. The plaintiff alleges the defendants acted fraudulently regarding these transactions.

[157] The plaintiff also alleges fraudulent conduct regarding an invoice for \$200,000 for a kitchen.

**1. \$765,000 Transfer to Sandhurst Co. Account**

[158] The plaintiff and ADC Holdings agreed to each contribute the sum of \$1,200,000 on closing for the acquisition of the Sandhurst Property. The joint venture agreement between Jeana and ADC Holdings, dated July 26, 2019, stated the following in the recitals:

C Jeana will acquire beneficial ownership of fifty-one percent of the Company being fifty-one common shares, for a total contribution of one million two hundred thousand dollars (1,200,000.00);

D ADC will contribute One Million Two Hundred Thousand Dollars (\$1,200,000.00)(which includes any deposits under a contract of purchase and sale made to date) such that ADC will acquire and hold beneficial ownership of the remaining forty-nine per cent of the Company.

[159] Also dated July 26, 2019, the Sandhurst SA made provision for a mortgage to be granted in favour of Jeana. The Sandhurst SA stated as follows:

The Company is granting a second mortgage in favour of Jeana with ADC and Phil as covenantors, of which the principal amount owing will be One Million Two Hundred Dollars [sic] (\$1,200,000) as at July 26, 2019.

[160] On July 24, 2019, a few days before the closing of the purchase of Sandhurst Property, Mr. Sallay provided his payment of \$900,000 to Sandhurst Co. A few days later, Mr. Sallay, on behalf of Jeana, paid a further \$240,000 for a total of

\$1,140,000. There was a shortfall of \$60,000 on the amount that Mr. Sallay agreed to contribute. Mr. Sallay never paid the shortfall.

[161] The plaintiff’s payment of \$1,200,000 (less \$60,000) was secured by a loan agreement and a mortgage registered against the title to the Sandhurst Property.

[162] As I have stated, as part of a court-ordered sale, ADC Holdings paid the initial deposit of \$135,000 to Royal LePage Sussex (West Vancouver) (“Royal LePage”), the real estate company handling the transaction. There was thus a balance of \$1,065,000 to be paid by ADC Holdings pursuant to the joint venture agreement.

[163] By email dated July 24, 2019, Mr. Garrow stated to Mr. Sallay the following:

Further to my email, 1449 Sandhurst account balances enclosed.

[164] Attached to this email was what was described as a screenshot entitled “1449 Sandhurst Place Holdings Limited: Account Summary” and provided:

| <b>Account Name</b>                       | <b>Balance</b> |
|---|----------------|
| Independent Business Account 10008177XXXX | \$765,000      |

[165] Mr. Garrow testified that he took a screenshot of this VanCity account. He testified that it showed he had, on behalf of ADC Holdings, transferred, or would transfer the following day, the sum of \$765,000 into the Sandhurst VanCity account.

[166] According to Mr. Garrow’s email, the screenshot was sent to represent the status of the VanCity account at the time and to demonstrate that ADC Holdings was bringing its contribution to the Sandhurst Property to \$900,000.

[167] Before I turn to Mr. Garrow’s evidence on this point, it is useful to consider the evidence from Hida Zand, the branch manager at VanCity at the time. Ms. Zand testified that there was never a balance of \$765,000 in the account identified in the

screenshot. She testified that \$765,000 was not paid into that account on July 24, 2019 or at any other time.

[168] Ms. Zand was specifically examined about the screenshot. She testified that based on her review of the account, there was not \$765,000 in it at the time represented. She testified that the screenshot depicts a future dated transfer for July 24, 2019. However, it is not an actual transfer because it is dated in the future. She added that if the balance does not exist then the transfer would not go through. She stated that the screenshot is not an official bank statement from VanCity. Rather, it is what the member sees when they log in to their online banking.

[169] Ms. Zand stated that the \$765,000 was never deposited and never withdrawn out of the relevant account. She added that “there was no balance available for that transfer to happen.”

[170] Ms. Zand was examined about a second document. This document was attached to Mr. Garrow’s affidavit of February 2021 and it contained the following information:

7/23/2019  
Vancity  
ADC Holdings Ltd.  
Transfer Funds – Receipt  
....  
Transfer Status: Created  
Account Business Chequing  
Memorandum 1449 Sand Rem Closing Equity  
Transfer on July 24, 2019  
Transfer Amount \$765,000

[171] Ms. Zand testified that this was not an official bank statement from VanCity but was a screenshot from the online banking, available for viewing by the member.

[172] Ms. Zand was cross-examined about a “cover-draft,” the suggestion being that the account had a cover-draft available to it so that a transfer of \$765,000 would

have been honoured. She disagreed. She testified that she specifically confirmed whether the account had an overdraft or line of credit. It did not. She also testified that a member only had access to a cover-draft in much smaller amounts, to a maximum of \$2,500.

[173] I turn to Mr. Garrow’s evidence about these two documents and his representations about the \$765,000 payment.

[174] During his direct examination, Mr. Garrow was asked about the VanCity screenshot attached to his affidavit. Mr. Garrow testified that ADC Holdings was obligated to put in its final \$765,000 with regards to its total commitment of \$1.2 million. He testified that he emailed Ms. Nuraney and Mr. Sallay to say that ADC Holdings had effected such a transfer “to occur overnight into its account...I logged into the VanCity online portal – I hit print screen – and this is what I sent to Mr. Sallay and [Ms.] Nuraney.”

[175] He explained that based on the VanCity statement, “it appeared the transaction was never posted into VanCity bank account.” Mr. Garrow stated that there was a transfer back to ADC Holdings—1–2 days thereafter and that this has been a well-established process with the Gilston Property. He explained that “there were no transactions that flowed through Sandhurst. Any payment obligations were born directly by ADC directly out of their accounts.” And that’s where the cash would be used from.

[176] Mr. Garrow testified that he found out about the missed payment only after he saw the notice of civil claim. He suggested he made some inquiries and found out that the transaction “had not happened.”

[177] Mr. Garrow was cross-examined about this evidence, including the documents that he contends corroborate his evidence about transferring \$765,000 for the Sandhurst Property.

[178] When asked about the payment of \$765,000, Mr. Garrow stated:

The transfer was effected online through ADC Holdings account to be completed the next day – I logged in the next morning – we are aware now that the transfer did not transpire. But I also effected a corresponding transfer from Sandhurst to ADC Holdings because that's where all expenses were paid.

[179] Initially in his testimony, Mr. Garrow suggested he was surprised about the fact \$765,000 was not reflected in the bank statements. However, later in his testimony he suggested that the money came out of the Sandhurst Co. account two days later to the credit of ADC Holdings. Mr. Garrow became agitated as he tried to explain during his cross-examination that ADC Holdings was paying for everything so the money needed to be transferred back to it. On this point, I refer to Mr. Garrow's cross-examination:

Q: Was that payment [\$765,000] ever made into that Sandhurst bank account as you appeared to suggest to Mr. Sallay by way of your email of July 24, 2019? Was it ever paid into that account?

A: Number 1, my email was representing the screenshot associated with the account that was taken directly from VanCity, and, to answer your question, no, the 765,000 was not credited to the Sandhurst bank account.

Q: When did you tell that to Mr. Sallay?

A: I didn't – to my knowledge, I don't recall when Mr. – when, if ever, Mr. Sallay and I discussed it. He had complete access to the bank statements, and – I don't recall. I couldn't say with any certainty whether we had a specific discussion surrounding it....

... I didn't look at the Sandhurst bank statements. Number 2, he had complete access to the Vancity records and the Vancity statements, and he queried me in relation to other transactions...it would've been my expectation that if he had any questions surrounding this transaction he would have queried me about it; and number 3, as I stated, I had executed a corresponding transfer from the Sandhurst account to the ADC Holdings account for I believe the day or possibly two days after this transfer was to be effected to return the money to ADC Holdings for payment under the obligations that arose so the net effect would – in relation to this transaction would be none, essentially.

Q: So you never actually told him that the information contained in your email of July 24, 2019, that information and that screenshot actually turned out not to be true. You never told him that, did you?

A: As I say, I didn't have the information about what the veracity was of this screenshot. I simply took a screenshot and as far as what conversations, if any, we had about this specific transfer going forward, I don't recall him querying me about it....

[180] Mr. Garrow later testified that he did not tell Mr. Sallay that the transaction had not gone through because he “was never aware that the transfer had not taken effect.” He then corrected himself to state that he became aware after the issue was raised in the notice of civil claim. He testified that this caused him to reach out to Ms. Zand and ask her about the documents, “so at that point [he] was aware in relation to the proposition that the \$765,000 transfer had never actually been consummated by virtue of being credited to the Sandhurst bank account.”

[181] He explained that he never followed up on whether the transfer occurred because, in essence, it did not matter. That is because Mr. Garrow fully expected that the money would be returned to ADC Holdings so there was never a reason for him to review the Sandhurst Co. bank statements.

[182] This aspect of the cross-examination concluded as follows:

Q: You acknowledge that the transaction from an ADC company into Sandhurst never actually happened?

A: To be clear, correct, I acknowledge that the \$765,000 transfer, this transfer that we’re referring to here was not manifested in a completed transfer to the Sandhurst bank account.

[183] The gist of Mr. Garrow’s explanation is that he was true to his word about contributing his portion of the investment. That is, because ADC Holdings was paying for everything to support the Sandhurst project, the money would’ve come out of the Sandhurst Co. account.

[184] I am troubled by the fact Mr. Garrow was unable to corroborate his characterization of the transaction by reference to his company’s bank statements. If \$765,000 had been deposited, as he said he believed, he should have been able to point to bank statements demonstrating the deposit then the transfer out to ADC Holdings. He never did. In addition, he attempted to characterize the screenshots as official banking documents. And they were not.

[185] Based on my review of the numerous documents I was taken to on this point, I am unable to conclude that Mr. Garrow or his company, ADC Holdings, ever

deposited \$765,000 into the Sandhurst Co. account. I would have expected to see these funds flow through the account. On this point, I accept the plaintiff's submission that Mr. Garrow knew full well that this payment of \$765,000 had never been paid because he never intended to pay it.

[186] As I follow Mr. Garrow's explanation, I cannot see the purpose of sending an email with the screenshot. It served no purpose other than to represent to Mr. Sallay that ADC Holdings had fulfilled its obligation to fund the Sandhurst project. It is disingenuous to blame Mr. Sallay for missing this transaction because he failed to review the VanCity bank statements that he had access to. Mr. Garrow made a point of sending him the screenshot. In my view, that correspondence reflected a state of affairs much different than that described by Mr. Garrow in his testimony.

[187] Mr. Garrow tried to justify the failed transaction by suggesting it did not really matter, at the end of the day, because ADC Holdings would get the money anyways. He said the agreement between the parties was structured such that ADC Holdings could withdraw the money at any time and that it was always anticipated that ADC's contribution would be transferred out in short order. If that were true, Mr. Garrow's email to Mr. Sallay (enclosing the account balance of \$765,000) was unnecessary. Additionally, Ms. Zand testified that \$765,000 was not deposited into the VanCity account—either on July 24, 2019 or the day following or any day. Mr. Garrow took a screenshot to show Mr. Sallay that ADC Holdings was keeping its end of the bargain.

[188] The plaintiff has made out civil fraud on a balance of probabilities. Mr. Garrow emailed a screenshot of a bank account balance that he knew to be a false representation of his part of the agreement. He wanted to show Mr. Sallay that he was contributing \$765,000. He did not have \$765,000 to contribute in his account. By emailing the screenshot to Mr. Sallay he intended Mr. Sallay to act on it. Mr. Sallay was induced to contract in respect of the Sandhurst project, and to perform upon the relevant contracts, on the basis of this misrepresentation.

**2. \$300,000 Assignment Fee**

[189] The second fraudulent claim regarding the Sandhurst Property relates to Mr. Garrow's disclosure of an addendum or assignment he valued at \$300,000 (the "Assignment Fee"). The circumstances here relate to Mr. Garrow's initial purchase of the Sandhurst Property.

[190] Very briefly, in 2019, Mr. Garrow received word that the Sandhurst Property would be available at a Court-ordered sale and he took steps to organize a bid. He was the successful bidder. He later brought Mr. Sallay into the transaction. However, he says he was not going to give up the equity he believed he was entitled to. He thus increased the value of the Sandhurst Property by \$300,000 and says he papered this increase by drafting an addendum to the contract of purchase and sale. Mr. Garrow based the increase in value on an appraisal filed in connection with the court-ordered sale. Moreover, Mr. Garrow counted the Assignment Fee towards the equity contribution of ADC Holdings to the Sandhurst Property.

[191] The plaintiff contends he knew nothing about the Assignment Fee or that Mr. Garrow counted the Assignment Fee as a portion of his initial contribution.

[192] The gist of the plaintiff's allegation is that Mr. Garrow created the contribution of \$300,000 by writing a "sham" cheque and addendum. The parties testified about the ADC Holdings cheque drawn on the ADC Holdings VanCity account, dated June 30, 2019 and payable to Royal LePage in the amount of \$300,000. The cheque contained the following reference: "fee – 1449 Sandhurst Place."

[193] I have reviewed Mr. Sallay's testimony about his dealings with the cheque. I cannot determine, based on his testimony or the evidence tendered on this issue, when exactly it was that Mr. Sallay actually became aware of or came into possession of the cheque for \$300,000, nor did he testify about the date he received it. Mr. Sallay made clear, however—and I accept his testimony on this point in preference to Mr. Garrow's—at the time of the purchase of the Sandhurst Property, he did not know about the Assignment Fee or that it formed part of an addendum regarding the purchase of the Sandhurst Property. Or, more importantly, that

Mr. Garrow included the Assignment Fee as part of the defendants' equity contribution to the Sandhurst Property.

[194] Following his becoming aware of the Assignment Fee, Mr. Sallay testified that he investigated the legitimacy of this transaction in late 2020. It seems Mr. Sallay came into possession of two items, a copy of the cheque for \$300,000 and an addendum dated July 3, 2019, after he began to investigate the legitimacy of various transactions.

[195] The addendum provides as follows:

Contract of Purchase and Sale Addendum

Dated: July 3, 2019

1449 Sandhurst Place

Further to the contract of purchase and sale dated June 26, 2019 made between 1198801 BC LTD as Buyer and the Bowra Group Inc. (Receiver) as seller and governing the above mentioned property, the undersigned agree as follows:

This addendum serves to confirm that 1198801 BC Ltd. has assigned its interest in the contract to 1449 Sandhurst Place Holdings Ltd. for a sum of \$300,000.

[196] The addendum appeared to bear a signature of the buyer. Above the signing line, the addendum does not bear a signature for the seller, the Bowra Group (Receiver).

[197] Mr. Garrow testified that he provided the addendum, or at least the information contained in it, to Mr. Sallay at the time of the Sandhurst Property purchase.

[198] Counsel did not refer to any letter, email or other correspondence proving the cheque or addendum was delivered to Mr. Sallay.

[199] Mr. Sallay was adamant that he was not provided this addendum until he was conducting his investigation in late 2020. Importantly, he testified that he was never told that this \$300,000 was to form part of ADC Holding's equity contribution from the outset.

[200] The plaintiff called two witnesses to refute Mr. Garrow’s claim that he had a valid and subsisting assignment of \$300,000 for the Sandhurst Property.

[201] The managing broker at Royal LePage, Bill Binnie, testified first. He stated he reviewed the records of Royal LePage. In particular, he searched for a copy of the cheque for \$300,000. His testimony was that the cheque was never received by Royal LePage nor was it deposited to its bank account.

[202] His evidence on this point was not challenged.

[203] The second witness called by the plaintiff regarding the \$300,000 was Gordon Brown of the Bowra Group. He was acting as the receiver manager for the 2019 Court ordered sale of the Sandhurst Property. By email dated November 3, 2020, Mr. Sallay reached out to Mr. Brown attaching the addendum.

[204] Mr. Brown testified that he did not sign the addendum and that is why the signature line is blank. Additionally, he testified that the addendum did not appear in his files and the first time he saw it was when it was sent by Mr. Sallay, attached to the email.

[205] He was not challenged on this evidence.

[206] During his direct examination, Mr. Garrow tried to explain the cheque and addendum. He testified that this cheque “related to the assignment relating to 1449 Sandhurst – basically to vend the property which we had acquired.” He explained the transaction and where the \$300,000 fit in. He explained that ADC Holdings would always have one to two “shelf companies” on hand and those were used as vehicles to engage in quick real estate transactions. He testified that the purchase occurred because of a telephone call he received from Mr. Hamzehali about a Court-ordered sale of the Sandhurst Property. Based on this information, Mr. Garrow organized for one of his shelf companies, 1198801 B.C. Ltd., to bid on the property the following morning. He organized a deposit in the amount of \$135,000 and instructed a representative to deliver an offer in the court-ordered sale process. He

learned the following day that 1198801 B.C. Ltd was the successful bidder for \$2.758 million for the Sandhurst Property.

[207] Having invited Mr. Sallay to invest in the Sandhurst Property, Mr. Garrow testified that the appraised value of the Sandhurst Property was \$3.05 million. Therefore, in order to fairly value the property, ADC Holdings was going to take an assignment of \$300,000 “to enable or effect participation of other partners.”

[208] He went on and testified that ADC Holdings had purchased the Sandhurst Property for less than what it was worth. ADC Holdings was “not going to forgo that equity and that it is going to recapture in sum or in whole that equity of \$300,000, based on the appraisal.”

[209] Mr. Garrow explained that the initial intention was to fund Royal LePage with the \$300,000 and it would “flow back to us.” He testified that someone named “Laura” generated an addendum to that effect. However, “we learned this was not possible because this was a court ordered sale to an entity for a price and any variance not provided under the order and would require going back to court.” The addendum was thus not feasible. He said that the cheque for \$300,000 was given to Laura for the assignment but it was ultimately returned.

[210] Therefore, said Mr. Garrow, he proceeded with the partnership with Jeana and allocated 51% of the shares to Jeana and 49% of the shares to ADC Holdings. According to Mr. Garrow, the \$300,000 is “reflected as an equity contribution and didn’t flow through the financial statements.”

[211] Mr. Garrow produced a document that purported to summarize the details of the purchase of the Sandhurst Property, including the \$300,000 equity allocation. Mr. Garrow testified that he drafted it and delivered it to Mr. Sallay in an email. Again, he testified that it summarizes the breakdown of the purchase price, including the \$300,000 Assignment Fee. The document contained the following statement:

\$2,758,000 court ordered price plus \$300,000 acquisition fee – total  
\$3,058,000

[212] Mr. Garrow testified that he produced this document and provided it to Mr. Sallay when he expressed an interest in the Sandhurst Property. Mr. Garrow points to an email dated July 12, 2019 and stated he attached his summary to the email which disclosed the \$300,000 acquisition fee.

[213] Based on the evidence presented, I am unable to find that the summary (found at Tab 200 of the defendants' binder) was the same document attached to the July 19, 2019 email (found at tab 67 of the defendants' binder). Mr. Sallay testified that he did not know about the Assignment Fee. More importantly, I do not accept Mr. Garrow's testimony that he told Mr. Sallay part of his initial contribution was based on his self-assessed equity of \$300,000. This is not reflected in the email itself nor was it as stated in the summary, even if this is the document that was attached to the email.

[214] In summary, I find that it is more likely than not that Mr. Sallay did not discover the missing \$300,000 contribution until the late summer or fall 2020. Mr. Garrow never told Mr. Sallay that part of his contribution came by way of his determination of "fair" equity following the court-ordered sale. His non-disclosure on this point was not forthright. Conversely, Mr. Garrow specifically included reference to the \$135,000 deposit in the joint venture agreement confirming that he would be credited for his initial down payment. There was no such inclusion in respect of a \$300,000 contribution.

[215] I am satisfied that the plaintiff has proven civil fraud on a balance of probabilities regarding the \$300,000 representation. The funds themselves were never contributed, Mr. Garrow knew the funds were never contributed and made efforts to obscure this fact, the plaintiff acted upon the representation by contracting with defendants and continuing contractual performance, and the plaintiff ultimately suffered losses on account of its reliance.

### **3. European Kitchen Art invoice for \$200,000**

[216] This fraud allegation relates to an invoice created by ADC Holdings purporting to pay \$200,000 to European Kitchen Art for a kitchen for the Sandhurst Property.

The plaintiff submits that this invoice is obviously false because there is not a house on the Sandhurst Property and thus no kitchen.

[217] The principal of European Kitchen Art, Andriy Gaydukov, testified. He is a supplier of high-end kitchens to luxury homes and had worked with Mr. Garrow on a number of real estate projects. He testified that he had not been retained by ADC Holdings to provide any goods or services whatsoever for the Sandhurst Property. He testified that he never sent an invoice to ADC Projects or anyone else regarding the Sandhurst Property. Specifically, he testified that he never received a deposit of any kind regarding the Sandhurst Property in the amount of \$200,000 or otherwise.

[218] In response to this allegation, Mr. Garrow contends that he paid for a kitchen, intended initially for the Sandhurst Property but later used it in another project, called Millstream, with which he was involved. He testified that the Sandhurst Property was not ready for this kitchen, initially intended for it, so Mr. Garrow used the kitchen elsewhere.

[219] Mr. Garrow was cross-examined about this evidence. The plaintiff submitted that Mr. Garrow's trial testimony was different than his testimony at his examination for discovery conducted on September 28, 2022. At his examination for discovery, Mr. Garrow testified as follows:

Q: Mr. Garrow, on the same document you'll see under Pantera "European Kitchen Art, production deposit \$200,000". Do you see that?

A: I see that, yeah.

Q: I've looked through this material that you provided to CRA. I cannot find any invoice for \$200,000 received from European Kitchen Art. Am I wrong about that?

A: No. That would have simply been very likely an allocation. Again, pursuant to the fixed-price building contracts and pursuant to the terms of the contract, there is no requirement for ADC Projects – ADC Projects may have invoices that form – underlying expenses that form part of its invoices but may not. They may be deposits without an invoice. They may be payment which are being made unilaterally in anticipation of an expense. They may be commercial obligations that ADC has undertaken pursuant to its contract. So not in all – they may be in the case of Pantera. They may be an estimate an not an actual invoice.

So not in all cases was it required. Well, it wasn't required period, but not in all cases would ADC provide any underlying documentation that would support or provide detail or clarity to the invoice that it was issuing to Sandhurst or Gilston.

Q: Was there ever a kitchen built on that site?

A: Well, there was a kitchen which was built in Italy which the intended destination was the Sandhurst site, yes.

Q: And was any payment made to the entity in Italy that built the kitchen?

A: No. European Kitchen Art act as a broker or a dealer which they are in relation to the manufacturer in Italy and there were a series of payments that were made in European Kitchen Art in relation to that kitchen.

[220] During his direct examination, Mr. Garrow explained what had occurred with the European Kitchen Art kitchen. He stated:

That kitchen, we had specified for another project on Millstream road on 2019 – and that project was delayed. In the course of coming up with a design for Sandhurst, I realized that kitchen was unique...I thought it would be a benefit to the Sandhurst project and I allocated it to Sandhurst project.

[221] Mr. Garrow was cross-examined about what was characterized as “new information.” Mr. Garrow agreed that he did not mention Millstream during his examination for discovery. However, at trial, he testified that he was not asked about it. In addition, he testified at trial that this was “self-evident.”

[222] I have concluded that Mr. Garrow's evidence at trial was different than what he stated during his examination for discovery on this issue. This was an invoice for \$200,000 that was generated by ADC Holdings. Mr. Gaydikov's evidence was that he was not a party to the invoice and that his company was never contracted to build a kitchen for the Sandhurst Property. In my view, Mr. Garrow was not honest when he attempted to deal with this evidence. In his examination for discovery evidence, he made no mention of Millstream and the purported shifting of projects.

[223] While I do not find that the elements of civil fraud have been made out by the plaintiff in respect of this invoice, I question the sincerity of Mr. Garrow's testimony on this point. He modified his evidence from his earlier examination for discovery

evidence and gave evidence that did not accord with that of Mr. Gaydukov. This aspect of the claim has factored into my credibility assessment of Mr. Garrow.

**VIII. LOSS AND DAMAGES**

[224] In the foregoing analysis, I found that the plaintiff has successfully made out three instances of civil fraud:

- a) that pertaining to the \$400,000 mortgage drawdown as a part of the Gilston project;
- b) that pertaining to the \$765,000 payment as part of the Sandhurst project; and
- c) that pertaining to the \$300,000 Assignment Fee as part of the Sandhurst project.

[225] Each of these examples includes a payment that the defendants contracted to make, and then, without actually making any such contribution, fraudulently produced documents and made representations that caused the plaintiff to believe that the relevant payments had been made. These representations were made shortly before key agreements were signed in respect of the Gilston and Sandhurst Properties.

[226] I have detailed my findings that these representations were fraudulent and that, on a balance of probabilities and in light of my credibility assessments, the defendants had knowledge of these falsehoods. The representations were made to induce contracting and continued contractual performance by the plaintiff and, in fact, they did. Findings of civil fraud further require, however, that a loss was suffered in result.

[227] The plaintiff invited the court to find that the fourth element of civil fraud is proven by establishing that “but for the alleged fraudsters’ actions, the plaintiff would not have suffered the loss” because the plaintiff would never have invested the funds for either project. By extension, it seems that, with knowledge of the frauds

perpetrated, the plaintiff would not have signed the agreements relevant to the Gilston Property on February 6, 2019, or the Sandhurst Property on July 26, 2019.

[228] In respect of the loss itself, the plaintiff submits that the loss suffered was the shortfall in the repayment to Jeana of the amounts owing to it pursuant to its mortgages registered against the Gilston and Sandhurst Properties. Included in this loss are the interest payments relevant to these mortgages.

[229] I accept that but for the fraudulent misrepresentations outlined above, the plaintiff would not have entered the relevant contracts and continued their contractual performance and, on this basis, would not currently be subject to a shortfall on the basis of their contributions. Such loss flows from each of the fraudulent misrepresentations outlined above.

[230] The frauds perpetrated in this case overlap the boundary between inducement and performance. While the frauds were perpetrated in advance of the dates ascribed to the agreements relevant to the Gilston and Sandhurst Properties—and to this extent, as I have found, induced the plaintiff to contract—the frauds themselves pertained to elements of contractual performance: key contributions. To this extent, the plaintiff’s continued contractual performance on the basis of the frauds constitutes reliance: *XY* at paras. 39–41. Having also established losses flowing from this reliance—as I set out below—the burden shifts to the defendants to prove that the plaintiff did not in fact rely on the misrepresentation in issue: *Catalyst Pulp* at para. 58. The defendants did not discharge this burden.

[231] In respect of damages, the plaintiff seeks only to recover its initial contributions and the interest that has been accrued thereon. I accept that the mortgage accruals are reasonably foreseeable losses flowing directly from the fraudulent misrepresentations. The plaintiff has not sought rescission of the contracts.

[232] With respect to the Gilston Property, Mr. Sallay provided the following calculations of money paid by the plaintiff to the Gilston Property (and secured by the third mortgage):

|                    |                        |
|--------------------|------------------------|
| March 15, 2019     | \$690,000              |
| June 26, 2019      | \$879,844 <sup>1</sup> |
| September 13, 2019 | \$888,956 <sup>2</sup> |
| January 7, 2020    | \$525,000              |
| July 2, 2020       | \$100,000              |
| <b>Total:</b>      | <b>\$3,083,800</b>     |

[233] Mr. Sallay provided the following evidence of accrued interest owed pursuant to the third mortgage:

|                    |                           |
|--------------------|---------------------------|
| July 8, 2022       | \$322,492.97 <sup>3</sup> |
| July 8, 2022       | \$101,384.33              |
| September 23, 2022 | \$18,210.50               |
| October 17, 2022   | \$5,676.00                |
| <b>Total:</b>      | <b>\$447,763.80</b>       |

[234] Mr. Sallay testified that he received some money from the sale of the Gilston Property broken down as follows:

|              |                             |
|--------------|-----------------------------|
| July 8, 2022 | \$2,435,100.00 <sup>4</sup> |
|--------------|-----------------------------|

<sup>1</sup> \$670,000.00 USD at 1.31232 exchange

<sup>2</sup> \$670,000.00 USD at 1.3268 exchange

<sup>3</sup> Accrued interest at 1.2937 exchange

<sup>4</sup> Received from RM @\$0.773

|                    |                       |
|--------------------|-----------------------|
| September 22, 2022 | \$400,000             |
| February 14, 2023  | \$176,254.89          |
| March 20, 2023     | \$3,124.81            |
| <b>Total:</b>      | <b>\$3,014,479.70</b> |

[235] The plaintiff summarized its claim for damages:

|                   |                       |
|-------------------|-----------------------|
| Payments made     | \$3,083,800.00        |
| Accrued interest  | \$447,763.80          |
| <b>Total:</b>     | <b>\$3,531,563.80</b> |
| Payments received | (\$3,014,479)         |
| Shortfall         | (\$517,084.80)        |

[236] Regarding the Sandhurst Property, the plaintiff broke down its claim for damages with a similar formula. Mr. Sallay testified that the following payments were made for the Sandhurst Property (and secured by the third mortgage):

|                 |                    |
|-----------------|--------------------|
| July 25, 2019   | \$900,000          |
| August 1, 2019  | \$240,000          |
| August 11, 2019 | \$262,500          |
| August 11, 2019 | \$70,000           |
| <b>Total:</b>   | <b>\$1,472,500</b> |

[237] The plaintiff calculated the interest owing pursuant to the third mortgage as follows:

|                  |                     |
|------------------|---------------------|
| October 17, 2022 | \$232,766.80        |
| October 17, 2022 | \$ 61,699.80        |
| October 17, 2022 | \$ 55,971.84        |
| <b>Total:</b>    | <b>\$350,438.44</b> |

[238] On February 22, 2022, the plaintiff received \$504,613.00 from the sale of the Sandhurst Property. In July 2023, the plaintiff received a further \$812.19 as a final distribution to be applied against the mortgage. The plaintiff has thus received \$505,425.19.

[239] The plaintiff calculates the shortfall to be \$1,317,513.25 for the Sandhurst mortgage.

[240] In total, the plaintiff claims the following:

|                                 |                       |
|---------------------------------|-----------------------|
| Shortfall on Gilston Property   | \$517,084.80          |
| Shortfall on Sandhurst Property | \$1,317,513.25        |
| <b>Total:</b>                   | <b>\$1,835,410.24</b> |

[241] The defendants do not dispute that Mr. Sallay, on behalf of Jeana, contributed the amounts as described here. Nor did they make any submissions about the interest claimed. The plaintiff here does not seek damages for anything other than those lost by the contract, that is, the return of the principal sum plus interest. Jeana recouped some of its loss. I am satisfied that the plaintiff has proven its damages in accordance with the calculations set out herein, including its claim for interest pursuant to the mortgage.

[242] With respect to the calculations, I would grant leave to the parties to make further submissions should there be any mathematical errors requiring correction.

[243] In addition, the plaintiff seeks aggravated and punitive damages. The plaintiff did not provide any submissions to support an award for aggravated and punitive damages. Rather, the plaintiff submitted that it was within the court's discretion to grant an award commensurate with the extent of any fraud found by the court.

[244] In my view, proper pleadings and submissions on this point are required: *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at paras. 86–87; *SHH Management Limited v. Philip*, 2020 BCSC 1411 at para. 304.

[245] The plaintiff is granted leave to make submissions on an award for aggravated and punitive damages. If the plaintiff wishes to proceed with submissions on this point, they are to give notice of their intention to do so within thirty days of the date of receiving these Reasons for Judgment.

## **IX. COUNTERCLAIM OVERVIEW**

[246] As set out above, the relationship between the parties was deteriorating dramatically by the summer of 2020. The counterclaim against Jeana and Mr. Sallay claims that Mr. Garrow offered the ADC Companies' shares in the Gilston Property and the Sandhurst Property in accordance with the Shareholders Agreement for:

- a) \$900,000 with respect to the Gilston Property; and
- b) \$800,000 with respect to the Sandhurst Property.

[247] In its response to civil claim, the defendants sought specific performance of the Gilston and Sandhurst SAs. During closing submissions, the defendants contend they seek damages and not specific performance.

[248] Mr. Sallay and Jeana's response to counterclaim provides that s. 11 of the Gilston and Sandhurst SAs was "null and void." They say, in part, that because of the fraudulent conduct by the defendants with respect to the affairs of the Gilston and Sandhurst Properties that they were unable to make an "informed, reasoned and prudent determination of the true value of the shares."

[249] As evident in their communications, the business relationship began to breakdown as the projects faced funding issues and as Mr. Sallay discovered unusual activity regarding both projects.

[250] Mr. Sallay repeatedly stated in his testimony that he was trying to evaluate the offer but could not get a clear sense (or any sense) of the financial chaos of the projects including, foreclosure proceedings commencing on the Gilston Property, the fact the defendants had not even started building the residence on the Sandhurst Property despite significant expenditures, and Mr. Garrow's requests for further funds from him.

[251] The issue to be determined here is whether Mr. Sallay was lawfully obliged to respond to Mr. Garrow's offers.

[252] I start by setting out the legal framework governing this aspect of the dispute. I then set out the evidence relevant to the shareholders agreements and the shotgun clause. I then set out my analysis and determination of the merits of the counterclaim.

## X. LEGAL FRAMEWORK

### A. Contractual Interpretation

[253] The rules of contractual interpretation were summarized by Justice Stephens in *Han-Earl Consulting Ltd. v. 1048661 BC Ltd.*, 2022 BCSC 1073 at para. 28:

[28] Contractual interpretation requires a practical, common sense approach not dominated by technical rules of construction. The overriding concern is to determine the objective intent of the parties and the scope of their understanding. 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, otherwise known as a "factual matrix": *Penguin Enterprises* at para. 31 (relying on *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 3CC 53 at para. 47; *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, 1993 CanLII 145 (SCC), [1993] 1 S.C.R. 12 at 23–24); *Group Eight Investments v. Taddei*, 2005 BCCA 489 at para. 20, and *Sandhu BCCA* at para. 39. The factual matrix is the background facts both parties must clearly have been taken to have known and to have in mind when they composed the written text of their agreement and at the time the contract was executed: *Tang BCCA* at para. 16; *Sandhu*

BCSC at para. 41. However, surrounding circumstances cannot overwhelm or contradict the words employed in the contract. In addition, where the words of an agreement are unambiguous, extrinsic evidence is not permissible to alter, vary, interpret, or contradict the words in the contract: *Sandhu BCSC* at para. 40, following *One West Holdings Ltd. v. Greata Ranch Holdings Corp.*, 2014 BCCA 67 at para. 27.

[254] These principles likewise apply to the contracts in this case.

### **B. Duty of Honest Performance**

[255] It is clear that a party to a contract has no general duty to subordinate its own interest to that of the other party. However, there is a distinction to be drawn between a passive failure to disclose a material fact and active dishonesty. The Supreme Court of Canada stated in *Bhasin v. Hrynew*, 2014 SCC 71 at para. 86:

The duty of honest performance that I propose should not be confused with a duty of disclosure or of fiduciary loyalty. A party to a contract has no general duty to subordinate his or her interest to that of the other party. However, contracting parties must be able to rely on a minimum standard of honesty from their contracting partner in relation to performing the contract as a reassurance that if the contract does not work out, they will have a fair opportunity to protect their interests. That said, a dealership agreement is not a contract of utmost good faith (*uberrimae fidei*) such as an insurance contract, which among other things obliges the parties to disclose material facts: *Whiten*. But a clear distinction can be drawn between a failure to disclose a material fact, even a firm intention to end the contractual arrangement, and active dishonesty.

[256] In *Bhasin*, the Court went on to describe the distinction between a misrepresentation and a failure to disclose and how those concepts operate in commercial transactions. The Court put it this way at para. 73:

I would hold that there is a general duty of honesty in contractual performance. This means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. This does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract; it is a simple requirement not to lie or mislead the other party about one's contractual performance. Recognizing a duty of honest performance flowing directly from the common law organizing principle of good faith is a modest, incremental step. The requirement to act honestly is one of the most widely recognized aspects of the organizing principle of good faith: see *Swan and Adamski*, at s. 8.135; *O'Byrne*, "Good Faith in Contractual Performance", at p. 78; *Belobaba*; *Greenberg v. Meffert* (1985), 50 O.R. (2d) 755 (C.A.), at p. 764; *Gateway Realty*, at para. 38, *per Kelly J.*; *Shelanu Inc. v. Print Three*

*Franchising Corp.* (2003), 64 O.R. (3d) 533 (C.A.), at para. 69. For example, the duty of honesty was a key component of the good faith requirements which have been recognized in relation to termination of employment contracts: *Wallace*, at para. 98; *Honda Canada*, at para. 58.

### C. Repudiatory/Fundamental Breach

[257] The plaintiff takes the position that Mr. Garrow's primary obligation under the shareholders agreements was to advance the funds due for his interest in the company. Mr. Garrow fraudulently misrepresented that he advanced such funds, when he in fact did not, fundamentally breaching and/or repudiating the Shareholders Agreements.

[258] The defendants take the position that they did not fundamentally breach the shareholder agreements, nor was there any breach of those agreements whatsoever.

[259] A fundamental breach of a contract occurs where the failure of one of the contracting parties to perform a primary obligation under the contract has the effect of depriving the other party of substantially the whole benefit which the parties intended that party to receive: *Mantar Holdings Ltd. v. 0858370 B.C. Ltd.*, 2014 BCCA 361 at para. 11 [*Mantar*].

[260] As Justice Russell described in *Stearman v. Powers*, 2013 BCSC 1160 at para. 101:

In essence, the court must determine whether the foundation of the contract has been undermined, where the very thing bargained for has not been provided, as phrased by Madam Justice Wilson, dissenting on the cross-appeal, in *Hunter Engineering Co. v. Syncrude Ltd.*, 1989 CanLII 129 (SCC), [1989] 1 S.C.R. 426 at para. 137.

[261] The Supreme Court of Canada has confirmed that fundamental breach is a manner in which a contract may be discharged: *Jedfro Investments (U.S.A.) Ltd. v. Jacyk*, 2007 SCC 55 at para. 11.

[262] I note at the outset that, although the parties used the term "fundamental" breach, there is some dispute as to the proper terminology to describe this concept.

A better term may be “repudiatory” breach. Concurring in *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10 at para. 148, Justice Cromwell considered the terminology as follows:

The second terminological clarification deals with the term “fundamental breach”. The types of breach that are sufficiently serious to constitute repudiation are often referred to as “fundamental” breaches. However, use of the term “fundamental breach” can cause confusion because it is also used in the distinct context of deciding whether a contractual provision excluding or limiting liability is effective in the face of a radical departure from the contractual obligations: see, e.g., *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 104–23. To avoid that confusion, I prefer to refer to breaches of this nature as breaches of “sufficiently important terms” or “repudiatory” breaches: see, e.g., *McCamus*, at p. 651.

[263] Distinct from “fundamental” or “repudiatory” breach, however, is the doctrine of repudiation. Repudiation occurs when a party to a contract, either by words or conduct, evinces an intention not to be bound by a contract: *Mantar* at para. 11.

[264] To this extent, in the language preferred by Cromwell J., a repudiatory breach may entitle a non-breaching party to be discharged from contractual performance where that breach deprives the non-breaching party of substantially the whole benefit of the bargain, or where, by words or action, the breach evinces an intention not to be bound by the contract: *Potter* at para. 164. In other words, a repudiatory breach would encompass both a fundamental breach as well as repudiation.

[265] The Court of Appeal touched on this concordance in *Kuo v. Kuo*, 2017 BCCA 245 at para. 39:

... Termination by repudiation occurs when a party evinces an intention not to be bound by the agreement and the innocent party elects to accept the repudiation: *Guarantee Co. of North America v. Gordon Capital Corp.*, 1999 CanLII 664 (SCC), [1999] 3 S.C.R. 423 at para. 40. A fundamental breach of a primary obligation may also constitute a repudiation because it deprives the other party of substantially the whole mutually intended benefit of the agreement and thus amounts to a refusal to perform: *Mantar* at para. 11; *Doman Forest Products Ltd. v. GMAC Commercial Credit Corp. - Canada*, 2007 BCCA 88 at para. 109.

[266] Whether “fundamental” breach should stand alone, however, or whether it should fall under the umbrella of “repudiatory” breach is of little bearing on the remedy. As the Court of Appeal described in *Mantar* at para. 11:

The remedy for fundamental breach and repudiation is effectively the same – the innocent party may elect to terminate the contract or to accept the repudiation bringing the contract to an end. In either case, the parties are discharged from future obligations under the contract, and the innocent party may look to the other party for damages.

[267] The right to terminate a contract for fundamental breach exists independent from any terms contained in a contract, including express rights of termination: *Manfred Purtzki & Associates Ltd. v. Mackenzie (District)*, 2014 BCSC 1974 at para. 33.

[268] Where an innocent party accepts a repudiatory breach, this does not mean that the contract becomes void *ab initio*. The innocent party is discharged from further performance and may bring an action for damages, but the contract itself is not rescinded. Past obligations under the contract are not extinguished: *Argo Ventures Inc. v. Choi*, 2020 BCCA 17 at para. 39.

## D. Shotgun Clauses

### 1. Generally

[269] Buy-sell agreements known as shotgun clauses serve as a way to end a business relationship in a closely held company if the shareholder relationship breaks down: *Wolverton Pacific Partnership v. Triple F Investments Ltd.*, 2022 BCCA 262 at para. 2 [*Wolverton Pacific*]; *Western Larch Limited v. Di Poce Management Limited*, 2013 ONCA 722 at para. 41 [*Western Larch*].

[270] In *Aronowicz v. Emtwo Properties Inc.*, 2010 ONCA 96 at para. 50, the court wrote:

[50] ... A shotgun buy/sell provision is the quintessential corporate mechanism for the exercise of shareholder self-interest. Carefully drafted, it provides a delicate balance for the preservation of the parties' individual rights by ensuring that the pulling of the trigger generates the best and

highest price in exchange for the involuntary termination of the shareholders' relationship.

[271] *Aronowicz* highlights how a shotgun clause can be used to take over a corporation from an unwilling shareholder, while also ensuring that the offeree is not short-changed since they also have the option to buy the offeror's shares at the stated price. Indeed, shotgun clauses help align the parties' interests by incentivizing the offeror to put forward a price as close to market value as possible, as, otherwise they would risk selling at a discount or having to buy at a premium: *Blackmore Management Inc. v. Carmanah Management Corporation*, 2022 BCCA 117 at para. 44 [*Blackmore*].

[272] The exercise of a shotgun clause will not in itself attract a fiduciary duty. And it has been held that by using the shotgun clause, the offeror is not unilaterally exercising a power or discretion that affects the offeree's legal interests: *Aronowicz* at paras. 52–53.

[273] Shotgun clauses, however, are seen as harsh remedies. In result, courts have held parties to strictly complying with the terms therein. As one court opined, "[a] shotgun buy-sell is strong medicine" that must be taken "strictly in accordance with the prescription or not at all": *Trimac Ltd. v. C-I-L Inc.*, 52 Alta. L.R. (2d) 263, 1987 CanLII 3376 (K.B.) at para. 24.

## 2. Strict Compliance

[274] To engage the shotgun clause, the offeror must adhere to the pre-conditions agreed to in the contract. While there must be "strict" compliance with the terms in the contract, this does not mean "perfect" compliance. The court will prefer an interpretation of the contract that allows the contract to function and furthers its commercial purpose. The court will also not simply rescue a party that later regrets their contract: *Wolverton Pacific* at paras. 45–46.

[275] *Wolverton Pacific*, for example, concerned a company governed by a shareholders agreement with a shotgun clause. Following execution of the

agreement, the number of directors was decreased and new shareholders were brought in. A shareholder, Triple F, purported to exercise the shotgun clause by making an offer to all of the shareholders at the time. WPP, another shareholder, tried to oppose the offer by saying it was now impossible to strictly comply with the terms of the agreement since: (1) they were operating with fewer directors than contemplated in the agreement, and (2) since some of the original shareholders had sold to the new shareholders the offer could not be made to “all” of the shareholders as required in the agreement.

[276] The court took a more practical approach to reading the contract, and found that neither issue was fatal to the exercise of the shotgun clause. Regarding the requirement that the offer be made to all the shareholders, since WPP and Triple F were the only remaining original shareholders, then Triple F complied with the shareholders agreement and properly exercised the shotgun clause by making the offer to WPP: *Wolverton Pacific* at para. 55.

[277] Similarly, in *Western Larch*, the offeror tried to exercise a shotgun clause, but made two offers, 1 and 2, which differed in the timing of the payments. Offer 1 was non-compliant with the shotgun clause since it delayed payment of the purchase price, while offer 2 was compliant with the shotgun clause. The offeror also purported to impose offer 1 in the event the offeree did not answer the request. The Court of Appeal for Ontario held that there was sufficient compliance with the shotgun clause, despite the “strict” standard. They found that while the non-compliant offer could not be imposed on the offeree, the otherwise compliant offer was not made unenforceable by including an alternative. In other words, the offeree could refuse or accept offer 1, but it had to respond to offer 2.

[278] Strict compliance will also be imposed on the offeree. In *Trimac Ltd.*, the offeree tried to respond to the shotgun clause offer by agreeing to the price in the offer or another price to be determined by court order. The court found that this equivocal response was an attempt to lower the price of the offer and did not comply

with the shotgun clause. The offeror thus was able to buy out the offeree at the price it proposed.

### 3. Effect of Using the Clause

[279] A true shotgun clause, once exercised, is irrevocable. The purpose of the shotgun clause, to force an end of the business relationship, is inconsistent with the exercise of the clause being revocable, subject to being unilaterally ended, or merely a way to test the value of the company: *Blackmore* at paras. 43, 45, 47.

[280] The clause in this case is analogous to the clause considered in *Blackmore*. In that case, the court considered the mandatory language in the clause: the offer was called a “compulsory offer” and the offeree “must” elect to either buy or sell. It also included a deemed sale provision in the event the offeree refused to answer.

[281] The clause in both the Gilston SA and the Sandhurst SA included similar mandatory language, “requiring” the offeree to elect either to buy or sell, and the offeree “shall be obligated to” notify the offeror of the election within 30 days. There was also a default provision setting out that a failure to respond by the offeree was a deemed election to buy out the offeror.

[282] It is not in issue that the shotgun clause in this case is just that: a shotgun clause. The parties also agree in their interpretations of *Blackmore*, meaning that they agree that the court held that offers under a shotgun clause are irrevocable. Jeana seems to agree that, absent arguments to prevent enforcement, it was bound to comply with the shotgun clause.

## XI. EVIDENCE MATERIAL TO COUNTERCLAIM

### A. Shareholders Agreements

[283] The Gilston SA and Sandhurst SA both contained the same shotgun clause which is excerpted below:

- 11.1 If any Shareholder desires to terminate the arrangements with respect to the ownership of shares in the Company, the Shareholder wishing to so terminate such arrangements (hereinafter called the "Offering

Shareholder") shall offer in writing (the "Offer") to the other Shareholder (hereinafter called the "Notified Shareholder") to require the Notified Shareholder to elect either:

- (a) to sell all but not less than all the shares of the Company beneficially owned by the Notified Shareholder, together with the Notified Shareholder's portion of the Shareholder Loan (together, the "Notified Shareholder's Interest") for a stated purchase price (the "Compulsory Purchase Price), and
- (b) to purchase all but not less than all the shares of the Company beneficially owned by the Offering Shareholder together with the Offering Shareholder's portion of the Shareholder Loan (together, the "Offering Shareholder's Interest") for the Compulsory Purchase Price.

The Offering Shareholder shall specify in such offer the terms of the Offer and the Compulsory Purchase Price.

- 11.2 Within thirty (30) days after the receipt by Notified Shareholder of the Offer from the Offering Shareholder pursuant to Paragraph 11.1, the Notified Shareholder shall be obligated to advise the Offering Shareholder in writing of its election to either:
- (a) sell all but not less than all the Notified Shareholder's Interest to the Offering Shareholder for the Compulsory Purchase Price on the terms set out in the Offer; or
  - (b) purchase all but not less than all the Offering Shareholder's Interest for the Compulsory Purchase Price on the terms set out in the Offer.
- 11.3 If the Notified Shareholder does not notify the Offering Shareholder in writing within 30 days of receipt by the Notified Shareholder of the Offer of the election by such Notified Shareholder to purchase the Offering Shareholder's Interest or to sell the Notified Shareholder's Interest held by such Notified Shareholder to the Offering Shareholder, the Notified Shareholder shall be deemed to have accepted the Offer of the Offering Shareholder to purchase the Notified Shareholder's Interest in accordance with the terms of this section 11 and a binding contract of purchase and sale for such Notified Shareholder's Interest between the Offering Shareholder and Notified Shareholder shall be deemed to come into existence. By this paragraph 11.3 the Offering Shareholder expressly waives any requirement to receive communication from the Notified Shareholder, if any, of the Notified Shareholder's acceptance of the Offer and the deemed acceptance of the Offer to purchase provided by this paragraph shall be a complete estoppel to any action taken or defence raised by any person which in any way contests the validity, formation or existence of the contract of purchase and sale constituted by this paragraph 11.3.
- 11.4 The sale and purchase of the Offering Shareholder's Interest or the Notified Shareholder's Interest pursuant to section 11 shall close ten (10) days after the acceptance or deemed acceptance of the Offer

(the "Closing Date"). The selling Shareholder shall deliver to the purchasing Shareholder certificates representing the shares purchased, duly endorsed in blank for transfer (with signatures guaranteed by a Canadian Chartered Bank), together with duly executed assignments of the indebtedness of the Company to the selling Shareholder constituting part of the Interest of the selling Shareholder against payment of the Compulsory Purchase Price as provided in the Offer.

- 11.5 Notwithstanding any other provision herein contained, in the event of the sale of the Offering Shareholder's Interest or the Notified Shareholder's Interest in the Company pursuant to this section 11, a condition precedent to such sale shall be the Release of the selling Shareholder from all personal guarantees of indebtedness of the Company given by the selling Shareholder and the discharge of any security collateral to such guarantees by the closing date of the sale and purchase. This condition precedent may be waived by a selling Shareholder in writing to the purchasing Shareholder five (5) days prior to the Closing Date.

[284] The "Shareholders" defined in the Gilston SA were Jeana and ADC *Projects*. The "Shareholders" defined in the Sandhurst SA were Jeana and ADC *Holdings*.

[285] The shotgun clause provides that (if properly invoked) and 30 days pass without an answer from the offeree, then there is a deemed acceptance of the offer to buy the offeror's beneficial interest in the shares and their share of the shareholder loan.

[286] On September 20, 2020, Mr. Garrow purported to exercise both shotgun clauses in the Gilston and the Sandhurst SAs, and made offers of \$900,000 and \$800,000, respectively. This was done by letters that are identical besides changing the price and the name of Gilston Co. and Sandhurst Co. Otherwise, both letters were addressed from ADC *Holdings* and signed "ADC Holdings per Philip Garrow" [emphasis added.] The letters stated: "In accordance with the shareholder agreement, ADC Holdings Ltd is offering all its shares to Jeana Ltd for the sum of..." and requested an answer by October 20, 2020, again referencing the shotgun clause.

[287] Mr. Sallay responded on October 20, 2020, with the following:

IT IS MY POSITION THAT DUE TO YOUR BREACHES OF THE 2 SH AGREEMENTS THE SELL/BUY CLAUSE IN EACH IS NULL/VOID:  
IN BOTH SH AGREEMENTS SECTIONS NO. 5.1 & 5.2; 8.2, 8.5, 8.7  
ADDITIONALLY WE HAVE A DISPROPORTIONATE AMOUNT OF EQUITY IN THE SANDHURST PROJECT.

[288] It was Mr. Sallay's evidence that around this time he suspected Mr. Garrow was defrauding him. Therefore, Mr. Sallay believed that he could not adequately assess the value of his interest in either project. He also believed that since Jeana had put a disproportionate share of the funds into both projects, then the funds ADC Holdings would use to pay him for his interest in the projects would be the money he had contributed.

[289] The business relationship between the parties had fully broken down by November 23, 2020, when Jeana began this action and applied for a Mareva Injunction.

[290] The defendants argue that Jeana breached the Gilston and the Sandhurst SAs by refusing to comply with the shotgun clauses therein.

**B. Gilston SA**

[291] Regarding the Gilston SA, the plaintiff submits that ADC Holdings' purported attempt to exercise the shotgun clause was non-compliant since ADC Holdings was never a party to the Gilston SA.

[292] The defendants respond by suggesting that there was a trust document executed by ADC Projects (the "Trust Document"), declaring that it was holding its interest in Gilston Co. for the benefit of ADC Holdings. The defendants suggest that, in light of the Trust Document, it properly exercised the shotgun clause as the true owner of the 49% stake in Gilston Co.

[293] The defendant submits that the Trust Document is a full answer to the plaintiff's allegation that the wrong corporate entity delivered the offer.

[294] There are two key issues related to the veracity of the Trust Document. The first is the timing of its disclosure and the second is the evidence from the lawyer that Mr. Garrow contends signed it. The lawyer testified at the trial as a rebuttal witness and denied his involvement in the preparation of the Trust Document.

[295] On the first day of his cross-examination, Mr. Garrow was asked about the buy/sell offer for the Gilston Property. I refer here to the transcript of this portion of his evidence:

Q: Do you remember yesterday afternoon Mr. Garrow, we talked about the buy/sell agreement? And I'll just you back to it. Exhibit A, Volume 1, Tab 4?

A: Yes.

...

Q: We went through that yesterday and this, it's an offer made by ADC Holdings Ltd. for shares in Gilston and I put to you the fact that ADC Holdings does not hold any shares?

A: Yes.

[296] Mr. Garrow was then cross-examined about a declaration of trust for shares dated February 6, 2019 that had the effect of creating a beneficial interest for Jeana for 51% of the Gilston Property. This declaration of trust was signed by Mr. Garrow, on behalf of ADC Projects, and was witnessed by Mr. Garrow's lawyer, Ms. Nuraney ("Declaration of Trust"). The following exchange then occurred:

Q: You then went on to say that there was a similar trust declaration of sorts with respect to the 49 percent held in the name of ADC Projects, but in favour of [ADC] Holdings, correct?

A: Correct. 49 shares of the hundred were held by [ADC] Projects for [ADC] Holdings.

Q: And as far as I can tell, that document had not been disclosed in the materials that are in front of us, these eight binders and my two, the ten binders, correct?

A: To my knowledge, no.

Q: You agree?

A: I was further to your request yesterday, I looked through the documents to try to find some evidence of it and I did not.

Q: Do you know why that would be ... this key document that reflects beneficial ownership in the name of one of your companies other than

what's in the shareholders agreement, why that document did not get produced?

A: Well, because this question in relation to ADC Holdings has never been pled in relation to any of the documents. It's never – it was not – it was not suggested or alleged by Mr. Sallay in relation to his response. It was not suggested or alleged by Ms. Sukia (sp) in her subsequent response. It's, to my knowledge, never been suggested until you made broad reference to it, I believe, in an opening statement here.

[297] Mr. Garrow went on to explain that the Trust Document had not been disclosed because he did not produce the corporate binder for Gilston Co. and it was never requested in the litigation and it “never seemed to be of any relevance at all.” Mr. Garrow testified that it was not produced sooner because the allegation about the incorrect company tendered on the shotgun offer of September 20, 2020 only “materialized very much at the eleventh hour.”

[298] Mr. Garrow was then asked about the preparation of the trust document and, in particular, why he had used a different lawyer even though the Trust Document and Declaration of Trust were created only two days apart. The exchange proceeded as follows:

Q: ...the declaration of trust that you say as between Projects in favour of Holdings, was that done by Ms. Nuraney at the same time as the declaration of trust for the 51 % at Tab 6?

A: No, it was prepared by Mr. Barr.

...

Q: Why was it not prepared by Ms. Nuraney if there were – you were doing the transaction – the beneficial transfer of 51 percent of the interest – of the interest in Gilston on February the 6<sup>th</sup>? ...Why did you not have Ms. Nuraney do the same thing with the 49 percent in favour of Holdings?

A: Quite frankly because I didn't even note the shareholder agreement in relation to ADC Projects versus Holdings. I think it was until the day later and I discussed it with Ms. Nuraney. She said that there was a couple of options in relation to revising the documents that would be more cumbersome and that this would be a lot easier of a way to deal with it, which is what we did.

Q: So did she prepare it?

A: No. Mr. Barr prepared it?

Q: Why... she didn't prepare it?

A: No. Why would I need Ms. Nuraney to prepare something along those lines when there's a lawyer who's in our office who's very capable of doing this sort of thing?

[299] Mr. Garrow stated that it was easier for him simply to attend down the hall to the lawyer in his building rather than go back to Ms. Nuraney's office.

[300] The cross-examination then moved to questions about the Trust Document itself. Mr. Garrow confirmed that his signature appeared on the second page of the Trust Document as did Myron Barr's signature. He confirmed that the Trust Document was dated February 8, 2019.

[301] The cross-examination then proceeded as follows:

Q: .... You say he prepared this, correct?

A: The preparation of the document, I believe was within a template that he had available as far as the trust document.

Q: He prepared it, correct?

A: I can't say with certainty that he prepared – I believe that he prepared it from a template that he had available. I cannot say that with absolutely certainty.

[302] At this point, counsel suggested to Mr. Garrow that he compiled the Trust Document himself and simply attached the signature page with "Mr. Barr's signature affirming as a commissioner from an entirely separate document that had page two on it." Mr. Garrow rejected this submission stating it was "fundamentally and completely inaccurate."

[303] To refute Mr. Garrow's testimony on this point, the plaintiff called a rebuttal witness, Mr. Barr. Mr. Barr is a lawyer and was called to the bar in BC in 1988. He testified that he knew Mr. Garrow and had occasionally provided legal services to him in the form of witnessing signatures on documents. Mr. Barr added that he rarely provided legal advice to Mr. Garrow.

[304] On being presented with the Trust Document, Mr. Barr gave evidence contrary to that of Mr. Garrow's. Mr. Barr testified that he did not prepare, nor does he have a template for a document such as the Trust Document at issue here.

[305] Mr. Barr’s evidence on this point was not challenged.

[306] Having considered this evidence, including the Trust Document, I conclude that Mr. Garrow lied about the creation of the Trust Document. I reject his testimony that the Trust Document was not produced because it was not relevant to the pleadings nor was it requested. I find that Mr. Garrow manufactured the Trust Document, in the middle of a trial (where counsel filed ten binders of documents) and following over two years of litigation, because he realized the current state of his document production could be fatal to at least part of his counterclaim.

[307] I accept that it is possible for a party to discover a document that has not been disclosed and that counsel then make submissions about admissibility. In this instance, however, Mr. Garrow came to Court, in the middle of a trial, with what he purported to be a document that could answer the plaintiff’s position on this material point.

[308] Moreover, the Trust Document he produced does not appear authentic on its face. That is in part because the signing line for the lawyer states “Commission for taking oaths in the Province of British Columbia.” The signing line for the Declaration of Trust states “witnessed by.” The document also bears a page number for the second page but not the first.

[309] But most importantly, Mr. Barr denied that he prepared the document, contrary to Mr. Garrow’s quite elaborate testimony on this point. Mr. Barr denied he even had template for a document such as the Trust Document. Further, it was left unexplained why Ms. Nuraney would not have been the one to draft the Trust Document were it authentic. She had, in fact, drafted a very similar document dated February 6, 2019.

[310] I reject Mr. Garrow’s attempt to explain the switch in lawyers by stating it was easier to simply use the lawyer down the hall.

[311] In sum, I conclude that Mr. Garrow created the Trust Document. He then lied about what he did, producing the Trust Document in the middle of a trial. His conduct required the plaintiff to seek leave to call a rebuttal witness.

[312] Mr. Garrow's conduct, producing an inauthentic document and then lying about it, weighs heavily on my credibility assessment of his evidence overall.

[313] The plaintiff took the position that Mr. Garrow committed perjury when he presented the Trust Document and testified about it. This is a civil dispute and not a criminal trial. I do not agree with the plaintiff's submission that the Court is in any position to determine whether Mr. Garrow is "guilty of the crime of perjury." At this point of the proceedings, I have used Mr. Garrow's testimony about the Trust Document in my overall credibility assessment.

[314] A deliberate lie under oath or solemn affirmation is a factor that may bring the credibility of a witness' evidence into question, and therefore attracts special scrutiny of the witness' testimony (see *R. v. Khela*, 2009 SCC 4 at paras. 35–36). As summarized by the Court of Appeal in *R. v. Podolski*, 2018 BCCA 96, it is not then whether the trial judge personally finds the witness trustworthy but whether there are factors which experience teaches that the witness's story be approached with caution. I have found that there are.

### **C. Sandhurst SA**

[315] To defend the breach of the Sandhurst SA, and in the alternative for the claim that it breached the Gilston SA, the plaintiff argues that through Mr. Garrow's fraud the ADC Companies committed a "fundamental breach" of both SAs such that Jeana was relieved from performing its obligations under the SAs.

## **XII. SHOTGUN CLAUSE ANALYSIS**

[316] This section considers whether the shotgun clauses in the respective SAs were properly invoked by the ADC Companies. For the reasons set out herein, I have found that a proper offer was made under the Sandhurst SA but not the Gilston SA since the latter was made by a company not privy to the contract. Jeana is

nonetheless relieved from compliance with the Sandhurst SA shotgun clause on account of fundamental breach or, in the alternative, fraud.

#### A. Gilston SA

[317] I have found that it was ADC *Holdings*, not ADC *Projects*, that purported to exercise the shotgun clause in the Gilston SA. I have concluded that this was fatal to the defendants' claim that Jeana breached the Gilston SA. I base this finding in part by relying on the letter sent by Mr. Garrow effecting the shotgun offer, addressed from ADC Holdings and offering shares in Gilston Co. Additionally, and for the reasons set out above, I have found that Mr. Garrow lied about the Trust Document purporting to vest interest from one ADC company to the other.

[318] It is well understood that a corporation is a distinct legal entity. This is true even in the context of a closely-held corporation where the shareholder may wear various hats: *Wishing Star Fishing Co. Ltd. v. B.C. Baron (The)*, [1988] 2 F.C. 325 at 333–334, 1987 CanLII 5429 (F.C.A.). While the Court in *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 at para. 74, stated that the directors of closely-held companies should be given some latitude in terms of complying with formalities, this was held in the context of assessing their conduct for purposes of oppression claims.

[319] The doctrine of privity generally prevents persons who are not parties to a contract from enforcing or benefiting from it: *Holmes v. United Furniture Warehouse GP*, 2012 BCCA 227 at para. 10.

[320] Given that parties are held to strict compliance with the terms of a shotgun clause, it is proper to give full effect to the doctrine of privity. In this case, the Gilston SA set out that a "Shareholder" could exercise the shotgun clause. The Shareholders are clearly defined as Jeana and ADC *Projects*. Since I have rejected the evidence regarding the trust agreement between ADC Projects and ADC Holdings, there is no evidence or argument to suggest that ADC Projects otherwise had an interest in Gilston Co., or that it was somehow privy to the Gilston SA.

[321] The ADC Companies are distinct entities from each other and from their principal, Mr. Garrow. Therefore, *ADC Holdings*, not being a party to the Gilston SA, could not exercise the terms therein. If *ADC Holdings* was purporting to sell an interest in Gilston Co. or buy Jeana's interest in Gilston Co., then this was a merely an offer that Jeana could evaluate and either accept or reject. In this case, Jeana rejected the offer and was not in breach of the Gilston SA.

[322] This outcome is consistent with *Western Larch*, where a non-compliant offer to buy or sell shares, purportedly made under a shotgun clause, was treated as an offer the offeree could accept or reject. Here, Mr. Sallay rejected the offer in the letter dated October 20, 2020.

[323] I do not see this result as one demanding perfect compliance. Importantly, counsel did not provide the Court with any case authority where the court enforced a shotgun clause, despite it being purportedly used by a company not privy to the contract. The parties decided to structure their dealings in a particular way whether it be for liability, tax planning, or risk management reasons. It is not open to Mr. Garrow to rely on the legal structure he agreed to when convenient and disregard it when inconvenient.

[324] In sum, I dismiss the claim that Jeana breached the Gilston SA by failing to comply with the shotgun clause therein.

## **B. Sandhurst SA**

[325] The exercise of the shotgun clause in the Sandhurst SA does not suffer from the same privity issues as discussed for the Gilston SA. *ADC Holdings* purported to invoke the shotgun clause in the Sandhurst SA. It was properly a party to this agreement and was a "Shareholder" as defined therein. Jeana appears to consider that this shotgun clause was properly invoked by *ADC Holdings*.

[326] The plaintiff's submissions on the Sandhurst SA have focused instead on the frauds perpetrated by the defendants. They submit that, in circumstances where the person receiving the offer believes they have been defrauded, they are in no position

to evaluate the offer. In other words, the frauds perpetrated in respect of the Sandhurst SA, in totality, constituted a fundamental breach of that agreement. This would mean that the plaintiffs had the option to accept the defendant's breach and to be discharged from future obligations under the contract, including the shotgun clause.

[327] On this basis, the plaintiff takes the position that the legal framework regarding the enforceability of buy/sell agreements does not apply to the factual circumstances of this case.

[328] I appreciate Mr. Sallay's evidence about the Sandhurst SA. He testified that he could not imagine selling his 51% beneficial interest in Sandhurst Co. for \$800,000. He testified that one of his reasons was he had no way of realistically evaluating the offer because of his genuinely held belief that Mr. Garrow was in the midst of defrauding him and he had no idea about the extent of that fraud.

[329] He added that he also believed that if he accepted the \$800,000 (which was purportedly to be coming from ADC Holdings) then he believed he was essentially being paid with his own money. That is because it appeared ADC Holdings had only contributed \$135,000 to the purchase of the Sandhurst Property, that being the deposit required for the Court-ordered sale.

[330] In other words, the plaintiff had contributed \$1.2 million (less the \$60,000) shortfall but the defendants had only paid \$135,000. The plaintiff contends that because of the defendants' fraud, the offer was vitiated and hence the plaintiff was not obliged to determine which option it preferred.

[331] A fundamental breach occurs where the failure of one of the contracting parties to perform a primary obligation under the contract has the effect of depriving the other party of substantially the whole benefit which the parties intended that party to receive. The defendant's frauds, as I found earlier, resulted in two critical deprivations: first, Mr. Garrow flatly did not contribute funds that the bargain between him and Mr. Sallay required; and second, by perpetrating two key frauds against the

plaintiff in respect of the Sandhurst Property, Mr. Garrow deprived Mr. Sallay of any basis upon which to effectively evaluate the shotgun clause offer.

[332] I accept that, having not contributed the \$765,000 payment to Sandhurst Co. in respect of the \$300,000 addendum, the defendants fundamentally breached the Sandhurst SA. Together, these frauds constituted a substantial portion of Mr. Garrow's bargained-for \$1.2 million contribution. The substantial benefit promised in the Sandhurst SA—and that for which the parties had bargained—was a regime under which mutual investment would enable development on the Sandhurst Property. In practice, Mr. Garrow failed to contribute as required by the agreement.

[333] I note as well that, during the material time, according to Mr. Sallay's testimony, nothing was built on the Sandhurst Property. I acknowledge, however, that some pre-construction work might have occurred. In any event, the non-payments covered by Mr. Garrow's frauds satisfy the requirements of fundamental breach.

[334] There having been a fundamental breach of the Sandhurst SA, it was open to the plaintiff to terminate the contract as they elected to do in the letter dated October 20, 2020. In doing so, the plaintiff expressed the determination not to be bound by the contract and would be discharged from any requirement to abide the shotgun clause. In my view, the plaintiff did so sufficiently quickly after becoming aware of the frauds to avail themselves of this outcome: *Showtime Marketing Services Ltd. v. Lower Fraser Valley Exhibition Assn.*, 1991 CarswellBC 2328 at paras. 31–32, [1991] B.C.J. No. 3779 (S.C.).

[335] Not enforcing the contract in light of the lacking contribution—and, relatedly, the frauds—achieves justice in these circumstances.

[336] In light of the frauds, the plaintiff did not have any real basis to evaluate the Sandhurst SA shotgun clause. Accepting Jeana's claims that the defendants never contributed the funds they agreed to provide to the projects and lied about it, then it is true that their equity in the projects was unequal. The proper functioning and

reciprocal nature of the shotgun clause assumes that the shareholders have equal information and similar shareholdings. Absent these elements, Jeana, the party with less information and greater equity, risked being bought out with the money it contributed to the projects, or being forced to pay a business partner that did not pay for its equity in the projects. In turn, the defendants could propose a price that either overvalued their share of the project or where they could simply pay Jeana with its own money. There is an injustice in allowing the defendants to benefit from a contract that they performed in bad faith.

[337] Alternatively, I would find that the defendant's frauds themselves discharge the plaintiff from any obligation to comply with the Sandhurst SA shotgun clause. Fraud is a recognized a manner in which a part may resist the enforceability of a contract: *Douez v. Facebook, Inc.*, 2017 SCC 33 at para. 28. Here, fraud was operative both as an inducement for the plaintiff to contract as a means of obscuring the defendant's non-performance of key contractual obligations. That fraud directly impacted the plaintiff's ability to properly evaluate Mr. Garrow's September 20, 2020 offer.

[338] I am satisfied that Jeana was relieved from performing its obligations under the Sandhurst SA.

### **XIII. CONCLUSION/ORDERS**

[339] In the circumstances presented here, the correct remedy for a finding of civil fraud is damages. Counsel sought declarations of fraud (which may be important in the bankruptcy context) but did not provide any submissions in support of this form of relief.

[340] Declarations serve to clarify the legal rights of a party or parties where: (a) the court has jurisdiction to hear the issue, (b) the dispute is real and not theoretical, (c) the party raising the issue has a genuine interest in its resolution, and (d) the responding party has an interest in opposing the declaration being sought (*Ewert v. Canada*, 2018 SCC 30, at para. 81). An interpretation of a contract and its application to a specific set of facts may be a proper case for declaratory relief, but a

declaration of facts detached from the legal rights of the parties is not: *Interfor Corporation v. Mackenzie Sawmill Ltd.*, 2022 BCCA 228 at para. 25.

[341] The plaintiff also requests certain tracing and accounting remedies, but these matters did not form any part of the plaintiff’s submissions. Tracing is a complex remedy that would need to be considered at greater length and supported by evidence beyond that which has been tendered. The Supreme Court of Canada has held:

[75] Tracing is an identification process. The common law rule is that the claimant must demonstrate that the assets being sought in the hands of the recipient are either the very assets in which the claimant asserts a proprietary right or a substitute for them: *B.M.P. Global Distribution Inc. v. Bank of Nova Scotia*, 2009 SCC 15.

[342] I thus decline to grant the declaratory relief and tracing remedies sought.

[343] In sum, I grant the following orders:

- a) Damages in the amount of \$1,835,410.24 to the plaintiff, with leave to the parties to make further submissions should there be any mathematical errors requiring correction; and
- b) The defendants’ counterclaim against Jeana and Mr. Sallay is dismissed.

[344] If the plaintiff wishes to proceed with submissions on the points of aggravated or punitive damages, they are to give notice of their intention to do so within 30 days of the date of receiving these Reasons for Judgment.

[345] The plaintiff is entitled to their costs as the successful party. However, the parties sought leave to speak to the issue of costs. They have leave to do so subject to indicating their intention to do so within 30 days from receiving the Reasons for Judgment.

“Winteringham J.”