

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Smithe Residences Ltd., by its receiver,
MNP Ltd. v. Boffo Investment Corp.*,
2026 BCSC 334

Date: 20260302
Docket: S1711962
Registry: Vancouver

Between:

Smithe Residences Ltd., by its receiver, MNP Ltd.

Plaintiff

And

Boffo Investment Corp. and Boffo Developments (Smithe) Ltd.

Defendants

Before: The Honourable Justice J. Walker

Reasons for Judgment

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Introduction

[1] In 2011, the plaintiff Smithe Residences Ltd. (Smithe Residences), owned property earmarked for development on Smithe Street in Vancouver. Smithe Residences was controlled by James Schouw who was the principal of James Schouw and Associates and two other companies that also held properties slated for development: Hornby Residences and Homer Residences. By July 2011, all three properties were subject to foreclosure proceedings.

[2] Mr. Schouw had a unique design sense and had designed a condominium project for the Hornby property known as Artemesia. Of the three properties, the Hornby property was closest to being ready for construction. Mr. Schouw had also designed a mixed-use building for the Smithe property known as Thalia. The design drawings were in the early stages. There were no concrete development plans for the Homer property.

[3] The defendants are part of the Boffo Group of Companies (the Boffo Group), a group of companies controlled by its founder, Mr. Ottavio Boffo. After learning that the properties were in foreclosure, the Boffo Group approached the plaintiff to determine whether they could purchase the properties.

[4] The defendant Boffo Investment Corporation (Boffo Investment) reached an agreement with Mr. Schouw to purchase the properties and to develop them together through a joint venture agreement, although the Boffo Group had complete control of the direction of the projects and whether Mr. Schouw's designs would be developed at all. The joint venture agreement included a formula for the allocation of profits between Mr. Schouw's companies and the Boffo Group.

[5] As contemplated by the joint venture agreement, separate companies were formed by the Boffo Group to purchase the properties. The defendant Boffo Developments (Boffo Smithe) purchased the Smithe Property.

[6] Later, the parties entered into consulting agreements for the Hornby and Smithe projects in place of the joint venture agreement. The defendant Boffo Smithe

and the plaintiff were the parties to the consulting agreement with respect to the Smithe project. The consulting agreements also contemplated profit sharing upon completion of the projects.

[7] The Smithe project was completed in December 2021, after the property had been rezoned and developed by the Boffo Group without the plaintiff's participation. Boffo Smithe did not share the profits with the plaintiff, and the plaintiff now sues the defendants for breach of the consulting agreement. The plaintiff claims that its share of the profit is \$29 million.

[8] The plaintiff also claims that the defendants breached their duty of good faith in contractual performance and that in receiving the profits from the Smithe project owed to the plaintiff, Boffo Investment was unjustly enriched.

[9] The defendants deny the plaintiff's claims and assert that in 2016, the plaintiff repudiated their agreement. The defendants purported to accept the repudiation and terminated the agreement. The plaintiff does not accept that it repudiated the agreement and maintains that there was no basis for the defendants to terminate it.

[10] In this action, the defendants also argue that any profit-sharing agreement was only operative if the Boffo Group chose to develop the Thalia project designed by the plaintiff. Because they built an entirely different building without the assistance of the plaintiff, they assert that no profits are owed to the plaintiff.

Issues

[11] The following issues will have to be determined in this case:

- a) Was there a binding agreement between the plaintiff and the defendant Boffo Smithe to share profits from the Smithe Property development?
- b) Did Boffo Smithe breach the agreement by failing to pay the agreed upon share?
- c) Did the plaintiff repudiate the agreement?

- d) Did the defendants breach their contractual duty of good faith?
- e) Was Boffo Investment unjustly enriched to the detriment of the plaintiff?
- f) If either or both of the defendants breached the agreements, is the plaintiff owed any damages, and if so, what is the quantum of those damages?

Credibility and Reliability

[12] The plaintiff challenges the credibility and reliability of most of the lay witnesses associated with the defendants and the defendants challenge the credibility and reliability of two lay witnesses called by the plaintiff.

[13] At the outset, I observe that the reliability of the testimony of all the witnesses in this case requires careful scrutiny, particularly given the passage of time. The witnesses gave evidence about conversations and events that took place a decade ago or more.

[14] However, apart from a few key events, resolution of the issues in this case does not depend upon the reliability or the credibility of a witness's recollection because there are a substantial number of documents that can be relied on and were adopted by the witnesses as accurate.

The law

[15] The assessment of both credibility and reliability is context-specific and multi-factorial. Factors that inform the assessment include: the opportunity and capacity of the witness to observe or perceive the events; the ability to remember those events; whether, or the extent to which, a witness can resist being influenced by an interest in a particular outcome when recalling those events; inconsistency in the witness' evidence at trial or between prior accounts; whether the witness' evidence harmonizes with, or is contradicted by, other reliable evidence; whether the evidence seems unlikely, unreasonable, or improbable in light of the probabilities affecting the case; and the witness' demeanour, meaning the way they presented

while testifying: *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296, leave to appeal to SCC ref'd, 35006 (7 March 2013).

[16] The real test of the truth of a witness' story is "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": *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (BC CA) at p. 356.

[17] Contemporaneous documents created at the time of the events "provide the most accurate reflection of what occurred, rather than memories that have aged with the passage of time, hardened through this litigation, or been reconstructed": *Bradshaw* at para. 188.

[18] The evidence of litigants with the benefit of hindsight as to what they would have done if only they had known is inherently self-serving and must be approached by a trier of fact with a healthy skepticism: *Century Services Corp. v. LeRoy*, 2018 BCCA 279 at para. 74.

The witnesses

Ciaran Mulhall

[19] Mr. Mulhall testified for the plaintiff without a subpoena, compensation, or any promise of a reward, in circumstances where he and his family had lost substantial sums from investments in Mr. Schouw's property developments. The plaintiff argues that Mr. Mulhall was credible as he was honest and forthright about his involvement with, and recollection of, the material facts and events in this litigation. They point to the fact that he was not impeached or contradicted on any material point in cross-examination and was an appropriately careful witness, willing to admit to what he knew and remembered, as compared to what he didn't or could not.

[20] The defendants counter that Mr. Mulhall was a careful, self-protective witness who avoided responsibility whenever answers might cast him or Mr. Schouw in a poor light. While superficially cooperative, Mulhall repeatedly professed lack of recall

on obvious points he had reason to know, hedged when faced with documentary contradictions, and shifted blame to others (chiefly, Mr. Schouw) for key decisions.

[21] The defendants submit, as the development manager for the Schouw Group, and his involvement in the negotiations culminating in the joint venture, his stated lack of awareness of Mr. Schouw's operations or finances is not credible. The defendants point to several examples of Mr. Mulhall's professed inability to recall details which they submit were convenient and only arose at times when the facts could reflect badly on himself or on the Schouw Group.

[22] Mr. Mulhall candidly acknowledged that if the plaintiff was successful in the litigation there was a chance he might be able to recover some of his and his family's losses from investing with Mr. Schouw. However, he indicated that he was consciously trying not to let that influence his testimony.

[23] While I accept that Mr. Mulhall's evidence may have displayed a bias towards the plaintiff's case, which impacts the weight to be given to some of his answers, I find that Mr. Mulhall was a credible witness. Mr. Mulhall carefully considered the questions asked of him before providing answers and readily deferred to contemporaneous documentary evidence where it contradicted his memory.

[24] I do not accept the defendants' submission that Mr. Mulhall displayed selective recall and knew more than he was willing to testify to. It is apparent that Mr. Schouw did not divulge details of the extent of his creditors, debts, and business dealings to Mr. Mulhall. For example, in the course of the negotiations leading up to the joint venture agreement, representatives of the Boffo Group requested information from Mr. Mulhall that he was unable to provide. That information had to be obtained from Mr. Schouw.

James Schouw

[25] Mr. Schouw was an extraordinary witness. On one hand, he testified without a subpoena, candidly acknowledged his legal and financial problems, and was not impeached on his examination for discovery evidence. He also made some

reasonable concessions that reflected negatively on him. On the other hand, Mr. Schouw minimized his responsibility for his role in the financial harm that devastated individuals who believed in Mr. Schouw and invested in his projects. Mr. Hardip Siddoo and Ms. Fiorella Callocchia were two such investors who testified for the defendants at trial. They both said they found Mr. Schouw to be charismatic and smooth talking, persuading them to invest in his projects and they did so because they believed in him.

[26] Mr. Schouw was sanctioned by the British Columbia Securities Commission after having been found to have perpetrated investment fraud. To this day, Mr. Schouw does not accept the finding and disputes he committed any fraud. Mr. Schouw was also found guilty of failing to remit GST, which he unsuccessfully appealed.

[27] The plaintiff acknowledges that Mr. Schouw was an “imperfect witness”, and “overly cautious” but argues that on material points Mr. Schouw’s evidence had the ring of truth and was consistent with the surrounding circumstances. Although Mr. Schouw frequently answered that he did not recall to questions posed, the plaintiff points out that he was vigorously cross-examined for about four days, was asked detailed questions, in some cases about events that occurred 20 or 25 years ago.

[28] The defendants describe Mr. Schouw’s testimony as “prolix” and “evasive” and point to the numerous times Mr. Schouw said “I don’t recall” in response to questions in cross-examination. They argue that he was a dishonest witness. When asked difficult questions in cross-examination, Mr. Schouw did not answer the question directly or at all, gave long unresponsive explanations and acknowledged that he was exercising caution in answering questions because he was trying to understand where the questions were going.

[29] Mr. Schouw was not a credible witness, and I do not accept his evidence, except where it is corroborated by other credible evidence. While I accept that Mr. Schouw could not legitimately recall some of what was asked of him because of

the passage of time and the plethora of litigation he has been involved in, I find that at times Mr. Schouw reverted to “I don’t recall” as a way to avoid answering the difficult questions put to him. For example, Mr. Schouw’s inability to recall or shed any light on his relationship or dealings with 4 Corners Properties Ltd. (4 Corners) was not believable. Whatever happened between him and 4 Corners was significant, integral to the dissolution of his relationship with the Boffo Group, and caused this action. Mr. Schouw’s claims that he does not recall those key events is not believable and is just one example of many that cause me to reject his evidence.

Ottavio Boffo

[30] Mr. Otto Boffo was called by the plaintiff by way of an adverse party witness notice and was extensively cross-examined by plaintiff’s counsel. The plaintiff argues that Mr. Boffo was repeatedly impeached through his own examination for discovery evidence, affidavits and documents created at the material times. The plaintiff observes that when cross-examined by defendants’ counsel, Mr. Boffo readily and quickly agreed with propositions put to him. Mr. Boffo’s responses stood in stark contrast to the plaintiff’s cross-examination in which Mr. Boffo frequently indicated he did not understand the question being posed and asked for questions to be repeated. The plaintiff argues, with the exception of admissions against interest, Mr. Boffo’s evidence should be given very little weight.

[31] The defendants acknowledge Mr. Boffo was not a perfect historian but argue that he was a credible witness. Mr. Boffo is a practical, aging, second language businessman who gave straight-forward answers to questions asked. As an example of his candour, they point out that Mr. Boffo genuinely felt betrayed by Mr. Schouw as a result of the 4 Corners litigation but acknowledged that he still needed to use Mr. Schouw’s services to complete the sales process for Artemesia and he had personally guaranteed a loan relating to that project.

[32] Overall, with some exceptions, I find Mr. Boffo was a credible witness. Much of what he testified to had the ring of truth which was aided by his overall candour and statements made against interest. However, his perception that Mr. Schouw

deceived and betrayed him coloured his view of his dealings with the Schouw Group and as it relates to that aspect of his evidence, there is limited weight to it. Most of the inconsistencies in Mr. Boffo's evidence were understandable, nevertheless, they impact the reliability of his evidence. Where his evidence is not supported by other credible evidence, I am unable to place much weight on it. Furthermore, I do not place any weight on Mr. Boffo's answers given in response to his own counsel's leading cross-examination, except where those answers are supported by other credible evidence. Mr. Boffo did not appear to seriously consider the questions asked before agreeing to the suggested propositions.

Mike Boffo

[33] Mr. Mike Boffo is the son of Mr. Otto Boffo and a principal in the Boffo group. For the most part, the plaintiff does not challenge the credibility nor the reliability of Mr. Boffo's testimony. The plaintiff points out that Mr. Mike Boffo appeared to be more prepared to testify than when he was examined for discovery and argue his evidence adds little to the factual matrix as Mr. Boffo acknowledged he was not involved in key negotiations and that his father was the decision maker.

[34] I find that Mr. Mike Boffo was a credible and mainly reliable witness. Mr. Boffo was careful, candid and readily relied on documents created at the time as accurately reflecting the chronology of events. Mr. Boffo's evidence was consistent throughout his testimony and examination for discovery, was mainly objective, and he made concessions against interest.

James da Silva

[35] The plaintiff and defendants agree that Mr. da Silva was a credible and reliable witness. In his direct examination, Mr. da Silva carefully answered the questions asked to the best of his recollection and when shown documents (principally an affidavit he swore in 2013) his memory was refreshed, or he reasonably adopted the earlier statements as true. Mr. da Silva did not overstate his role and made fair concessions.

[36] I accept Mr. da Silva's evidence and find that he was a credible and reliable witness. His evidence was straight-forward, easy to follow, and was consistent with the documentary evidence.

James Ellis

[37] Initially, it appeared that Mr. Ellis was one of the few witnesses who had a clear recollection of the Boffo Group's dealing with the Schouw Group. He provided confident answers to questions that were asked; however, it soon became apparent that Mr. Ellis did not and could not differentiate between his personal knowledge and what he had learned from others. While Mr. Ellis readily conceded errors in his recollection when confronted with documents that contradicted his testimony, his purported confident recollection combined with proven errors in his recollection seriously calls into question the reliability of his evidence.

[38] Further, Mr. Ellis' disdain for Mr. Schouw was palpable. He was visibly annoyed when testifying about Mr. Schouw; his testimony was clearly coloured by his view of Mr. Schouw and his own loyalty to the Boffo Group. His animus combined with his unreliability calls into question his credibility. I do not accept Mr. Ellis' evidence unless specifically noted and where corroborated by other credible and reliable evidence.

Other lay witnesses

[39] Ms. Karen West worked in marketing for the Boffo Group and testified on behalf of the defendants. Ms. West provided careful, measured, and balanced evidence. Due to the passage of time her recollection was limited, which she readily acknowledged. Although her testimony is of overall limited significance, I accept that she was a credible and reliable witness.

[40] Ms. Fiorella Callocchia and Mr. Hardip Siddoo were called by the defendants. They both described their dealings with Mr. Schouw and explained that they never received the money back that they invested. While their stories were entirely credible and disheartening, their evidence had little relevance to the issues to be decided in

this case. Notably, both witnesses accept that their troubles with Mr. Schouw have nothing to do with the Boffo Group.

Facts

The Schouw Group

[41] Mr. Schouw is the principal of James Schouw & Associates. He had developed three previous projects in downtown Vancouver: the Iliad, 499 Drake Street, and the Grace projects. While lauded for their stunning design, it does not appear that they were profitable developments, in part because Mr. Schouw engaged in unconventional financing by issuing investment certificates with high rates of return for the investors. Some investment certificates were also conversion certificates which allowed the holder to obtain substantial discounts if they purchased a unit in the development project.

[42] In the 2000's, through separate corporations, the Schouw Group acquired three other parcels of land for further development: the Homer Property consisting of two parcels; the Smithe Property consisting of five parcels; and the Hornby Property (the "Properties"). Mr. Schouw incorporated a separate company for each property.

[43] To acquire the Smithe Property, the plaintiff Smithe Residences Ltd. was incorporated. Unlike other projects, investment or conversion certificates were not issued by the plaintiff. Mr. Schouw was the sole director and officer of the plaintiff, but there were other shareholders. Between April and June 2008, the plaintiff issued allotments of Class B shares to the shareholders as a way of raising money. Common shareholders were entitled to either a redemption payment on the earlier of four years from the date of subscription or the sale of 75% of the residential units, or, to have their shares convert to preferred shares.

[44] By 2009, Mr. Schouw and his companies were in significant financial distress. There were actions and petitions filed due to an inability to repay loans and other bills. Mr. Schouw attributed his financial peril to the 2008 financial crisis.

[45] Having failed to secure financing, by mid-2011 all three Properties were in foreclosure and court ordered sales were pending. Concord Pacific had been granted an option to purchase the Hornby Property. Concord Pacific could exercise its option to purchase and take title to the Hornby Property on August 6, 2011.

The Boffo Group's purchase of the properties

[46] Mr. da Silva was the Acquisitions and Development Manager employed by the Boffo Group. He learned that the Smithe Property was in foreclosure from a broker. After making some inquiries, he determined that it was worth exploring whether the Boffo Group should purchase the Smithe Property. Mr. Otto Boffo agreed with Mr. da Silva' assessment and authorized him to attend court and enter a sealed bid for the Smithe Property.

[47] When Mr. da Silva attended court, he was not able to place a bid on the property because Concord Pacific had taken out the second mortgage position of another mortgage holder. Mr. da Silva learned that Concord Pacific held an *inter alia* mortgage on the Properties, meaning that the Homer Property, Hornby Property, and Smithe Property all had to be purchased together.

[48] The Boffo Group was interested in purchasing all three Properties. They had yet to develop and build a project in downtown Vancouver which was something they wanted to do. To that end, Mr. da Silva contacted the Schouw Group and on July 19, 2011, spoke to Mr. Ciaran Mulhall, who was the Development Manager at the Schouw Group. Mr. Mulhall was upfront with Mr. da Silva about the Schouw Group's poor financial circumstances and recognized that there was not much time left before Concord Pacific could exercise its options and take the Properties.

[49] The Boffo Group clearly understood that the Schouw Group was in significant financial distress and considered that there might be an opportunity to obtain prime development properties in short order. Mr. da Silva got to work on obtaining as much information as he could about the Properties. Mr. Mulhall provided a "slide deck" to Mr. da Silva which set out some information about the state of the development of the Properties and the profit potential. Mr. da Silva testified that he didn't think much

of the slide deck, calling it a “fluffy” document. In his opinion, the pro formas in the slide deck were basic and not something to be relied on. Mr. da Silva’s evidence about the reliance placed on the slide deck contradicted the testimony of Mr. Otto and Mike Boffo, who said they relied on those pro formas. I prefer Mr. da Silva’s evidence over Messrs. Otto and Mike Boffo’s testimony. I do not accept that Mr. Otto Boffo, an experienced and savvy property developer, would have only relied on the pro formas in the slide deck as a basis for the negotiations.

[50] Mr. da Silva said there were red flags with Mr. Schouw right from the start. It was difficult to get in touch with him, which was strange considering that the Schouw Group urgently needed to save the Properties. Through inquiries in the real estate industry, Mr. da Silva learned that Mr. Schouw had a questionable track record, particularly in relation to his unconventional ways of funding projects.

[51] The first in-person meeting between the Schouw Group and the Boffo Group occurred on July 25, 2011, at a coffee shop in Yaletown. Messrs. Schouw, Mulhall, Da Silva, Mike Boffo and Otto Boffo were in attendance. During this meeting, the Boffo Group expressed its interest in purchasing the Properties and Mr. Schouw told the Boffo Group about his financial problems.

[52] Mr. Schouw provided general information about his previous developments, but Mr. Otto Boffo was primarily interested in the land and not the development of the Properties by the Schouw Group. The Boffo Group was focussed on what it would take to take clear title of the Properties.

[53] The Boffo Group proposed a joint venture and in advance of the meeting, had prepared a typewritten profit-sharing proposal based on the information contained in the slide deck. During the meeting, both Mr. Schouw and Mr. Mike Boffo made handwritten notations on the proposal.

[54] A second meeting between the parties occurred on July 27, 2011, where further negotiations took place. At this meeting, Mr. Schouw told the Boffo Group that the plaintiff had shareholders. In advance of this meeting, the Boffo Group

prepared a similar document setting out detailed profit-sharing proposals for both the Hornby and Smithe Projects. The document contains handwritten notations made by Mr. Schouw.

[55] On August 3, 2011, the Boffo Group obtained land title searches for the Properties. Mr. da Silva described them as fairly involved, murky, convoluted and complex. Mr. Mulhall also provided an estimated ‘cost to complete’ document for the Hornby project.

[56] The Boffo Group elected to proceed with the purchase of the Properties and on August 5, 2011, entered into a joint venture agreement with the plaintiff (the JVA). Mr. Schouw was not interested in a straight sale of the land and ideally wanted to see his projects built and to share in the profits. He needed the funds to satisfy some of his creditors.

[57] The focus of the Boffo Group was to acquire the Properties and have the complete control and freedom to develop them in the manner they chose.

The state of the properties at the time of the JVA

[58] The development of the Hornby property was well underway and was at the stage where an application for a development permit could be made soon. The fact that the Hornby property was close to “shovel ready” was attractive to the Boffo Group, as their construction crew was finishing up a project and did not have another project to go to. If they could purchase the Hornby property, the timing worked well for them.

[59] The Schouw Group had designed an interesting building that was planned for the Hornby property called Artemesia. It was not the style that the Boffo Group usually constructed, and if they elected to build the Artemesia they would need the help of the Schouw Group.

[60] The Artemesia units were larger than average and had unique floor plans which meant that they were more expensive and were not easy to market. The units would only appeal to a select group of purchasers.

[61] The Schouw Group had lined up purchasers for a majority of the units, but the Boffo Group knew, as a new owner, they would be required to enter into new contracts of purchase and sale with these purchasers.

[62] The Smithe property was not as far along as the Hornby property, but the Schouw Group had designed at least one concept, called Thalia, to be built on the Smithe Property. Thalia had been designed for the zoning of the Smithe property that existed at the time. The design plans were at an early stage and had not been issued for construction. A substantial amount of work was still required before a development permit application could be contemplated.

[63] The Homer property was on hold and there were no concrete design plans. The property was a candidate for a property assembly. At some point, Mr. Schouw introduced Mr. Otto Boffo to the owners of the neighbouring properties to allow him to explore purchasing those properties.

The debts and obligations of the Schouw Group at the time of the JVA

[64] Leading up to the joint venture agreement, the Boffo Group was trying to get a handle on how much it was going to take to clear title to the Properties. In addition to the mortgages there were judgments registered against title. The Boffo Group appreciated that the Schouw Group was in significant financial distress, but was only concerned with debts that could impact title to the Properties. The Boffo Group was also aware of some of the Schouw Group's existing liabilities and potential liabilities that were not registered against title including:

- a) Mr. Schouw had obtained financing for the Properties through various sources including through the use of investment certificates. Mr. Otto Boffo wanted to ensure that the Boffo Group would not be responsible for them.

- b) There were unpaid trades of approximately \$625,000 for work related to the Properties.

[65] While the Boffo Group expected that there were other liabilities or potential liabilities related to the Schouw Group, they did not conduct a thorough investigation as they were only concerned with obtaining clear title to the Properties. Mr. Otto Boffo believed that his lawyers conducted some court or land title searches before purchasing the Properties. The liabilities, or potential liabilities, that existed at the time included:

- a) On May 12, 2011, an *Income Tax Act* certificate had been filed in Federal Court relating to Mr. Schouw's unpaid taxes in the amount of \$834,748.88.
- b) On June 22, 2011, a Notice of Civil Claim had been filed by Fiorella Callocchia against Mr. Schouw.
- c) On June 24, 2011, a Notice of Civil Claim had been filed by Lien Tran et al against Hornby Residences and Mr. Schouw.

[66] Mr. Otto Boffo did not recall having any impression of Mr. Schouw after their first meeting, because the meeting was not about what he thought about Mr. Schouw, it was about whether there was an opportunity to purchase property. Despite knowing a lot of people in the development industry, Mr. Otto Boffo did not ask anyone about Mr. Schouw's reputation.

The joint venture agreement

[67] On August 5, 2011, Mr. Otto Boffo and Mr. Schouw met and executed the joint venture agreement. Mr. da Silva was present along with the Boffo Group's solicitor who had drafted the JVA. The JVA expressly stated that it was established regarding the Properties, and the signatories were Mr. Otto Boffo on behalf of Boffo Investment Corporation and Mr. Schouw personally.

[68] Mr. Schouw ceded control to the Boffo Group over all aspects of the development and design of the Properties. The Boffo Group was responsible for "all

aspects of the financing, development, construction and marketing of the projects” including a number of enumerated tasks. It was envisioned that the Boffo Group and Mr. Schouw would work together on some of the enumerated tasks, but the Boffo Group had the final say on any decision.

[69] The JVA provided that all encumbrances would be cleared from titles, and that the Boffo Group would form new companies to acquire title for each of the Properties, with Boffo Investment Corporation owning 100% of the shares in those corporations.

[70] The Boffo Group did not commit to building the Artemisia on the Hornby Property, but agreed that if a satisfactory quantity and quality of pre-sales and deposits were met, then the Boffo Group would proceed to build as planned, “if not then Boffo is free to develop the three sites as it feels appropriate”.

[71] Land costs for the Properties were fixed: \$8,100,000 for the Hornby Property; \$14,100,000 for the Smithe Property; and \$6,000,000 for the Homer Property. The values were negotiated between the Schouw Group and the Boffo Group for the purpose of minimizing the amount of property transfer tax. At trial, the defendants called Richard Young who was qualified as an expert in the appraisal of real property. Mr. Young appraised the Properties’ market values as of August 4, 2011, as follows:

- a) The Hornby Property: \$7,705,000.
- b) The Homer Property: \$6,480,000.
- c) The Smithe Property: \$11,250,000.

[72] The plaintiff argues that Mr. Young’s evidence should be given no weight because Mr. Young was unprepared, had not disclosed key information he had relied on and appeared to have engaged in a perfunctory analysis of the issues at Mr. Otto Boffo’s request with whom he had a longstanding business relationship. The comparables used by Mr. Young did not have adjustments made for differences

in location, zoning sub-area, FSR, or development potential, rendering them inadequate indicators of the value of the subject parcels. Many of the comparables were outdated and not adjusted for time, which could cause a downward effect on his valuation.

[73] Nevertheless, the plaintiff did not tender any appraisal evidence relating to the value of the property in 2011 and the plaintiff argues that whether or not the Boffo Group got a good deal on the Properties is irrelevant to any of the matters at issue in this trial.

[74] Upon execution of the JVA, the Boffo Group paid Mr. Schouw \$200,000. Mr. Schouw needed cash to help cover his costs going forward. The JVA prohibited Mr. Schouw from proceeding, soliciting or entering into any agreement with any other party to joint venture or partner in respect of the three projects/sites.

[75] The JVA provided that the Boffo Group and the Schouw Group would work towards execution of a more comprehensive joint venture agreement to replace this JVA but until another agreement is executed, this would be the only binding agreement between the parties. The JVA also contained an entire agreement clause.

[76] Schedule C to the JVA provided a formula for profit sharing and included hypothetical examples of the potential costs and revenue of developments on the Hornby and Smithe Properties. A handwritten provision was added to Schedule C indicating that in the absence of a future agreement, Homer would be treated the same, with a similar equity and profit structure to Hornby and Smithe, and a fixed land cost of \$6,000,000.

[77] Schedule B to the JVA included a work sheet with estimated amounts to clear encumbrances from the Properties. It contemplated that it would take \$28,300,000 to discharge the mortgages, liens, judgments and other charges against title to the Properties.

[78] The JVA did not incorporate any representations or warranties, and it did not contain any conduct clauses. There were no termination nor buy-out provisions.

[79] Prior to signing the JVA, Mr. Otto Boffo had some concerns about the Artemesia design as he thought that it would be expensive to build; however, he understood that even if they did not build Artemesia nothing would change as it related to the profit-sharing formula.

The process of clearing title and title transfer

[80] The Boffo Group entered into the JVA and agreed to purchase the Properties without having conducted the due diligence they ordinarily would have prior to agreeing to a deal of this magnitude. There was time pressure to reach an agreement with the Schouw Group as Concord Pacific's option to purchase could be exercised on August 6, 2011. Nevertheless, the Boffo Group elected to proceed knowing that they did not know a lot about the Properties or Mr. Schouw.

[81] On August 8, 2011, Mr. da Silva sent Mr. Schouw and Mr. Mulhall an email referring to the provisions of the JVA and advised "in light of recent judgments and orders of claim, please cease to enter into any further agreements, financial arrangements, partnerships, orders, promissory notes and/or investment certificates with any other parties with regards to the three projects."

[82] After the JVA was executed, the Boffo Group went about investigating the Properties and took steps to clear title for the Properties. Mr. da Silva coordinated the efforts and testified that he worked many late nights with Mr. Otto Boffo to finalize the transfer of the Properties. The Boffo Group engaged its legal counsel to ensure that they were able to obtain clear title of the Properties.

[83] The following are some steps the Boffo Group took after the JVA was signed:

- a) On August 9, 2011, Mr. da Silva asked Mr. Mulhall for property appraisals and enquired about the amount of rent the existing tenants were paying.

- b) On August 11, 2011, Mr. Mulhall sent Mr. da Silva a copy of the stage 1 environmental report for the Hornby Property.
- c) On August 15, 2011, Smithe Residences signed a Letter of Authorization allowing legal counsel for the Boffo Group to make inquiries about the Smithe Property and Smithe Residences, including inquiries relating to potential tax liability.
- d) On August 26, 2011, Mr. da Silva received information about the heritage density transfer that had been purchased for the Hornby Property.
- e) On August 26, 2011, Mr. da Silva asked if the insurance premium had been paid for the Smithe Property.

[84] Notably, the title search for the Smithe Property showed pending registrations relating to 4 Corners. The registrations were pending because 4 Corners could not register the charges due to a previously filed certificate of pending litigation.

[85] As a result, the Boffo Group's solicitor prepared Election and Authorization forms regarding the mortgage, option to purchase, and right of first refusal which 4 Corners had previously attempted to file on title to the Smithe Properties. These documents were sent to the Schouw Group for execution by 4 Corners. Executed copies were returned on August 17, 2011. As a result, the 4 Corners issue was resolved allowing for clear title to Boffo Smithe.

[86] On August 18, 2011, the Boffo Group entered into contracts of purchase and sale with the Schouw Group for the Properties. Boffo Smithe acquired title to the Smithe property on August 26, 2011.

[87] In total, the Boffo Group spent \$28,397,448.98 to purchase the Properties. Other than the \$200,000 payment to Mr. Schouw, the balance was paid to discharge debts of Smithe Residences, Hornby Residences, and Homer Residences to ensure that they could obtain clear title to the Properties.

[88] As will be discussed later in these reasons, on September 19, 2011, on behalf of the plaintiff, Mr. Schouw sent a letter to James Law, a director of 4 Corners, advising of the JVA with the Boffo Group and that Smithe Residences intended to honour all previous agreements including the purchase and sale agreement for the commercial-retail office space for the yet to be built project on the Smithe Property.

The Boffo Group proceeds with Artemesia

[89] By March 2012, the Boffo Group decided to proceed with Mr. Schouw's Artemesia design because the Schouw Group had managed to arrange for pre-sales of 15 units, which was sufficient to allow the Boffo Group to secure construction financing.

[90] The arranged presales had significant credits (or incentives) attached to them, far in excess of what the Boffo Group would ordinarily permit, but since the Boffo Group was the seller and signatory on the purchase and sale agreements the Boffo Group approved of the credits.

[91] During the development of Artemesia, the Schouw Group provided assistance on the design elements as requested by the Boffo Group.

The sale of the remaining Artemesia units

[92] The sale of the remaining Artemesia units took some time, but when sales inquiries were received, potential purchasers were directed to the Schouw Group. From 2012 until the last unit was sold in 2015, the Boffo Group chose to involve and associate itself with Mr. Schouw for the purpose of marketing the units for sale.

[93] The Boffo Group chose to associate themselves with Mr. Schouw as they felt that was the best way to secure further sales and to ensure that the purchasers who had initially been recruited by the Schouw Group would complete. The Boffo Group was concerned that dissociating themselves from Mr. Schouw might prevent further sales and dissuade existing purchasers from completing. As Mr. Otto Boffo acknowledged, he had personally guaranteed the construction loans the Boffo Group had taken out for the Artemesia development.

[94] In marketing the Artemesia, the Boffo Group touted that they were bringing Mr. Schouw's vision to life. Their marketing materials included reference to Mr. Schouw in the hoarding around the site, their website, and construction updates to purchasers. Mr. Schouw was asked by Boffo Group employees to participate in media interviews to assist in marketing Artemesia. The Boffo Group viewed Mr. Schouw as a marketing asset even though the Boffo Group was being sued and contacted by Mr. Schouw's creditors at the time. Mr. Schouw's mounting financial problems, and the Boffo Group's perceived association to them, were later claimed to amount to the plaintiff's repudiation of the agreements, justifying the termination of the agreements in 2016, after Artemesia was sold out.

[95] Of the 15 sales the Schouw Group had coordinated, only two purchasers failed to complete. In both cases the Boffo Group was able to resell the units for amounts higher than the originally contracted price. The Boffo Group also retained a \$100,000 deposit from one of the purchasers who did not complete.

James Schouw's financial problems continue

[96] Mr. Schouw's financial problems continued after entering the JVA:

- a) On October 11, 2011, a Notice of Civil Claim was filed by Morris and Anney Soronow against Mr. Schouw.
- b) On October 21, 2011, a Notice of Civil Claim was filed by Ernie and Cindy Malone against Grace Residences and Mr. Schouw.
- c) On October 27, 2011, a Certificate of Judgment was filed by Horizon Ventures Ltd. and Barbara La Van against Hornby Residences and Mr. Schouw.
- d) On November 15, 2011, a Notice of Civil Claim filed by Ashley and Deanna Lang against Hornby Residences and Mr. Schouw.

[97] The extent of Mr. Schouw's financial and legal problems began to come to the attention of the Boffo Group. In November 2012, two officers from the Canada Revenue Agency attended the Boffo Group's offices to inquire about Mr. Schouw.

[98] In late 2012, Ms. Callocchia approached the Boffo Group to ascertain information about funds that may be payable to Mr. Schouw through their joint venture. Mr. Ellis and Mr. Otto Boffo both corresponded with Ms. Callocchia. These emails led to conversations between the Boffo Group and Mr. Schouw about how to address creditors like her, and how to let them know that the Boffo Group did not have any obligations to them.

[99] In 2013, Floyd Gedak distributed posters at the Artemisia construction site about Mr. Schouw owing him money. There was a meeting between Mr. Schouw, Mr. Mulhall, and members of the Boffo Group to deal with "Floyd's threats of defamation" where, among other things, Mr. Schouw's proposal to be bought out of the projects was discussed. Mr. Mike Boffo wrote a note to himself that this should not happen until Artemisia is complete. During this meeting, Mr. Mike Boffo expressed concern that the Boffo Group was being "painted by the same brush" as Mr. Schouw.

[100] In 2013, other creditors of Mr. Schouw reached out to the Boffo Group, including Mark Manastyrski and Sunil Sinha. These individuals were directed to speak to Mr. Schouw.

[101] In January 2014, the CRA again visited the Boffo Group office regarding Mr. Schouw, delivering correspondence seeking information for Boffo Developments Hornby Ltd. There were conversations between the Boffo Group and Mr. Schouw about how best to address the request.

[102] In March 2014, the Afshin-Jam family contacted the Boffo Group with an email that read "JAMES SCHOUW AND BOFFO DEVELOPMENTS TAKE SENIORS RETIREMENT FUNDS FOR ARTEMISIA DEVELOPMENT". The emails from the family attached copies of their investment and conversion certificates.

[103] In April 2015, Otto Boffo received telephone calls from investigators from the BC Securities Commission regarding Mr. Schouw.

The negotiation of the consulting agreements

[104] Soon after entering into the JVA, the Boffo Group began discussions with Mr. Schouw to enter into a further form of agreement.

[105] On October 6, 2011, the Boffo Group's solicitor delivered a draft agreement which was a proposed "services agreement". Mr. Schouw did not agree to the proposal.

[106] In February 2012, discussions between Mr. Schouw and Mr. Otto Boffo began again, with proposals being exchanged through email and during a meeting in March 2012. These discussions resulted in an agreement between the parties.

[107] Principally, the purpose of the agreement was to modify the profit split in light of the amount of credits provided to the Artemesia purchasers. The Boffo Group felt that the credits were greater than they had accounted for. It was also agreed that any shortfall on Artemesia would be counted against the split on profits from the Smithe Project. Even though the revised profit-sharing agreement was less favourable for the Schouw Group, Mr. Schouw did not have any difficulty with modifying the profit-sharing agreement to benefit the Boffo Group.

[108] A draft Hornby Consulting Agreement and draft Smithe Consulting Agreement were provided in January and February 2013. The agreements were called consulting agreements based on advice from a Boffo Group advisor.

[109] The consulting agreements were drafted by the Boffo Group's legal counsel and were signed by Mr. Schouw in February 2013. The agreements were said to be effective March 19, 2012. Whether the consulting agreements replaced or were only a way of implementing the JVA is disputed and will be addressed later in these reasons.

[110] The Boffo Group agreed to enter into these agreements with Mr. Schouw despite knowing more about the extent of Mr. Schouw's financial and legal problems, including his difficulties with the CRA.

The rezoning of the Smithe Property

[111] Mr. Otto Boffo was sceptical that the Thalia design was feasible. He acknowledged this in a January 2012 email he sent to Mr. Richard Young. In the email he stated that from the start, his opinion was that Mr. Schouw's proposed project was not feasible. In other words, he didn't think it would be profitable. Shortly after acquiring the Smithe Property, the Boffo Group began to explore whether the property could be rezoned to increase the density. If rezoning were to be approved, then the Boffo Group would build the type of building they usually built. There was no need for Mr. Schouw's services if that were to be the case and no need for his assistance with a rezoning process.

[112] Although Mr. Otto Boffo agreed that starting in January 2012, the Boffo Group began working towards rezoning, Mr. Boffo would not agree that the Boffo Group never intended to build the Thalia project; he maintained that it was still a possibility up until the rezoning was approved. The Boffo Group was keeping all of its options open.

[113] In January 2012, architectural concept designs were started for an anticipated rezoning application and in June 2012, the Boffo Group sent a formal letter of inquiry to the City of Vancouver requesting that the City advise of the potential for rezoning to increase the density of the Smithe Property.

[114] On August 12, 2012, the City of Vancouver responded to the Boffo Group's June 2012 letter. The letter advised that the property had the potential for increased density subject to certain considerations. The City's Rezoning Planner invited the Boffo Group to arrange a meeting should they wish to proceed with a rezoning application.

[115] In March 2013, the Boffo Group met with the City of Vancouver to discuss a pro forma for the Smithe Project and the potential community amenity contributions that would be required to be paid to the City. In December 2014, the Boffo Group met with the City of Vancouver to again discuss the potential community amenity contributions.

[116] The formal rezoning application was made on May 5, 2015. The proposed development consisted of 93 residential condominium units, commercial retail space and office space, and six stories of underground parking.

[117] On November 2, 2015, the City of Vancouver published a Policy Report recommending that City Council approve the rezoning of the Smithe Property. On January 19, 2016, the Boffo Group received Vancouver City planning and Council approvals for the Smithe Project.

[118] The rezoning had a significant effect on the density of the residential portion of the Smithe Property. It more than doubled the buildable density from 80,000 square feet to 165,000 square feet.

[119] As noted, the Boffo Group did not involve the Schouw Group in the rezoning process. In September 2015, Mr. Schouw asked Otto Boffo for an update on the Smithe rezoning application. No response was ever provided. Mr. Schouw attended a public hearing relating to the rezoning application in December 2015.

The completion of Artemesia

[120] On April 17, 2015, Hornby Residences was assigned into bankruptcy, nevertheless, Mr. Schouw and Mr. Mulhall continued their efforts to arrange for purchases of the remaining Artemesia units.

[121] Artemesia was substantially completed in early 2014 and the final Artemesia unit sold in August 2015. The total revenue from sales of the 21 residential units was \$30,894,389.93.

[122] Boffo Developments (Hornby) made more than \$4,000,000 in profits on Artemesia. The profits were paid to Boffo Investment Corporation. Based on the profit-sharing agreement set out in the Hornby Consulting Agreement, Boffo Developments (Hornby) paid \$320,000 to Hornby Residences. The trustee in bankruptcy accepted that was the amount owing pursuant to the Hornby Consulting Agreement.

The Plaintiff performed no work under the Smithe Consulting Agreement

[123] No one from the Boffo Group ever requested that the plaintiff provide any services listed in the Smithe Consulting Agreement, although Mr. Schouw was paid \$8,000 per month for seven months commencing on April 1, 2012, for “services regarding the design, permit coordination, and other relevant matters for the Smithe Project”, as set out in Schedule B of the Smithe Consulting Agreement.

[124] Mr. Mulhall testified that Smithe Residences offered to provide assistance to the Boffo Group, but he understood that their assistance was not required as the Boffo Group was pursuing rezoning of the Smithe Property.

The 4 Corners issue

[125] In December 2012, Mr. Otto Boffo learned of the existence of the letter Mr. Schouw had sent to 4 Corners on September 19, 2011, but did not see a copy of it at that time. He obtained a copy of the letter in the summer of 2013.

[126] In June 2013, 4 Corners commenced litigation against a number of parties, including members of the Boffo Group, Mr. Schouw, and Mr. Schouw’s companies. The litigation related to the mortgage, option to purchase, and right of first refusal that had been shown as pending on the Smithe Property title search.

[127] A response to civil claim was filed on behalf of Mr. Schouw and companies he was a director of, which stated that the Boffo Group was not bound by the prior business dealings of Smithe Residences.

[128] The 4 Corners Action was dismissed as against the Boffo Group following a summary trial on October 18, 2013.

[129] As will be discussed later in these reasons, the 4 Corners letter was significant in the eyes of Mr. Otto Boffo and other members of the Boffo Group. It was the turning point in their relationship with Mr. Schouw. It is argued that because it appeared that Smithe Residences had sold the commercial portion of the Smithe Property, when they had no authority to do so, this action constitutes repudiation of the agreements between the parties.

The BC Securities Commission citation

[130] On November 6, 2015, the British Columbia Securities Commission issued a Notice of Hearing citation against Mr. Schouw and Hornby Residences asserting fraud against investors.

[131] Business in Vancouver published an article on November 12, 2015, concerning the allegations in the Notice of Hearing. That article included quotations attributed to Mr. Schouw, including “Rather than closing up shop and walking away from investors, I have since been working hard and focused on their returns, including agreements with the Boffo Development Group to construct planned projects.”

[132] The Vancouver Sun also published an article on November 14, 2015, concerning the allegations in the Notice of Hearing. The article reported that Mr. Schouw issued a statement referring to a joint venture between Hornby Residences and the Boffo Development Group to complete the Hornby Project.

The alleged repudiation and Boffo’s termination

[133] On January 11, 2016, Mr. Otto Boffo and Mr. Ellis met with Mr. Schouw and provided him with a letter. The letter stated that the Boffo Group would be commencing legal proceedings seeking a declaration and an order that both the August 5, 2011, agreement and the Smithe Consulting agreement are now frustrated and void as a consequence of Mr. Schouw’s personal affairs and conduct, and the

publicity related thereto. The letter proposed that Mr. Schouw voluntarily terminate the agreements. Mr. Otto Boffo was of the opinion that they no longer had an agreement, so it was not necessary to buy Mr. Schouw out.

[134] Mr. Otto Boffo also testified that Mr. Schouw accepted that their relationship was over, although he could not explain how he had reached that conclusion. Mr. Ellis offered a very different version of the meeting than Mr. Boffo related. Mr. Ellis described Mr. Schouw as very angry and storming off, essentially the opposite of Mr. Otto Boffo's version. Mr. Ellis' version was not put to Mr. Schouw and as I have already indicated I do not accept Mr. Ellis' evidence. I also do not accept that Mr. Schouw indicated he accepted that the parties' relationship was over.

[135] On March 30, 2016, Mr. Schouw sent Mr. Otto Boffo an email referencing their January 2016 meeting and the January 11, 2016 letter. Mr. Schouw emphasized that Smithe Residences remained committed to its obligations pursuant to the Smithe Consulting Agreement, regardless of the personal affairs of any individual. Mr. Schouw indicated that he was willing to consider a contract buyout or early conclusion with respect to either the JVA or the Smithe Consulting Agreement.

[136] On May 5, 2016, counsel for the Boffo Group sent counsel for Smithe Residences and Mr. Schouw notice that it considered the Smithe Consulting Agreement to have been repudiated and accepting such repudiation. The repudiatory conduct was said to involve: (a) The wrongful conduct and actions of James Schouw directly and on behalf of Smithe Residences subsequent to the execution of the March 2012 agreement; (b) The concealed prior wrongful conduct and action of James Schouw directly and on behalf of Smithe Residences; (c) the wrongful conduct and actions of Smithe Residences subsequent to the execution of the March 2012 agreement; and (d) the concealed prior wrongful conduct and actions of Smithe Residences.

[137] Specific examples of acts alleged related to: the 4 Corners matter; investment credits on the Hornby Project causing millions of dollars in lost revenue; an investment certificate related to Smithe Residences contrary to assurances that

there were none; a myriad of serious legal claims, actions and judgments; the BC Securities Commission allegations and Mr. Schouw's reference to the Boffo Group in connection with it.

[138] Counsel for Smithe Residences and Mr. Schouw wrote to the Boffo Group's lawyers on June 3, 2016, disputing repudiation and asserting that Smithe Residences was willing and able to perform their duties under both the JVA the Consulting Agreement.

[139] On June 6, 2016, the Boffo Group confirmed their position that all agreements were at an end. The legal proceedings referred to in the January 11, 2016 letter were never commenced.

The development of the Smithe Property

[140] Boffo Smithe pre-marketed the residential component of the Smithe Project soon after February 10, 2017, the date the property disclosure statement for the Smithe Project was filed with the Land Title Office.

[141] As a result of the pre-marketing of the Smithe Project, Boffo Smithe entered into pre-sale contracts for 92 of the 93 residential strata units in the Smithe Project.

[142] Boffo Smithe sold all the residential units, with titles transferred by December 2021. Boffo Smithe received total sales revenue of \$175,269,851 from the sales of the 93 residential units.

[143] The Smithe Project was substantially completed by December 5, 2021. The total project costs for the Smithe Project, including the Smithe Commercial Space, as set out in the Agreed Statement of Facts tendered as an exhibit at trial, were \$160,248,433. Although, the plaintiff now argues that the project costs were actually \$128,848,433.

The Smithe commercial space

[144] Bassano Land Corporation (Bassano), a Boffo Group company, acquired beneficial ownership of an air space parcel intended for the Smithe Commercial

Space and the associated area of the Commercial Parking Space from Boffo Smithe in accordance with an Acquisition Agreement between Bassano and Boffo Smithe. The agreement was created in 2017 but backdated to June 1, 2015. The purchase price was \$2.74 million, to be paid by assuming debt.

[145] Boffo Smithe and Bassano also entered into a Trust Declaration and Agreement dated June 1, 2015, which provided that the parties agreed to co-develop the Smithe Property. A Co-Development Joint Venture Agreement dated June 1, 2015, between Boffo Smithe and Bassano, provided that the purpose of the venture was to develop the Smithe Property and the project substantially in accordance with the plans, with Boffo Smithe beneficially owning the Residential Part and Bassano beneficially owning the Smithe Commercial Space.

[146] Mr. Otto Boffo testified that he decided on a price of 15.5% of construction costs to sell the beneficial ownership of the Smithe Commercial Space to Bassano, but according to the Boffo Group's financial statements, this ended up only being 7.8%. No one from the Boffo Group was able to explain this discrepancy.

[147] Smithe Residences was not informed of these agreements and is not a party to them. Mr. Otto Boffo testified that he didn't believe that he needed to inform Smithe Residences.

The value of the Smithe commercial space

[148] The plaintiff called Craig Hennigar who was qualified as an expert to provide opinion evidence on the appraisal and value of real property and improvements. His opinion was that the retrospective market value of the Smithe Commercial Space including the commercial parking space as of December 5, 2021, was \$31,000,000.

[149] The defendant called Angus Heaps who was qualified as an expert in appraisal of real estate. Mr. Heaps provided a report in response to Mr. Hennigar's opinion. Mr. Heaps opined that Mr. Hennigar overvalued the commercial space, and a more accurate assessment of the value of the Smithe Commercial Space including the commercial parking space as of December 5, 2021, was \$24,730,000.

The profit calculation under the Smithe Consulting Agreement

[150] The plaintiff called Ms. Suzanne Schulz who was qualified as an expert to provide opinion evidence on accounting, forensic accounting, the interpretation of financial statements and the methodologies of the quantification of damages. Ms. Schulz provided an opinion of the resulting profit from the Smithe Project and provided calculations of the amount owing to the plaintiff based on Schedule B of the Smithe Consulting Agreement.

[151] In response, the defendant called Ms. Frances Potgieter who was qualified as an expert in financial analysis, business valuation and business loss quantification. Ms. Potgieter provided a responsive report to Ms. Schulz's report, which offered a limited critique to Ms. Schulz's methods and conclusions.

Was there a binding agreement for profit sharing for the Smithe Project

[152] The defendants argue that the profit-sharing provisions in the Smithe Consulting Agreement only apply if the Thalia project was constructed. Since the Boffo Group built an entirely different project, the defendants contend they are not obliged to share profits with the plaintiff. While the Smithe Consulting Agreement does not refer to Thalia, the defendants argue that this was the clear intention and emphasize that any other interpretation is not commercially reasonable.

[153] The plaintiff argues if it was intended that the profit-sharing provision to only be operative if Thalia was built, the Smithe Consulting Agreement would have said that, particularly since, at the time the agreement was entered into, the Boffo Group knew Thalia would not be built.

The status of the JVA

[154] The plaintiff argues that the Smithe Consulting Agreement did not replace the JVA but rather flowed from the JVA and was a way of implementing it with some changes. Relying on *0930032 B.C. Ltd. v. 3 Oaks Dairy Farms Ltd.*, 2015 BCCA 332, the plaintiff argues that the JVA was an 'umbrella agreement' that continued to subsist. The Smithe Consulting Agreement only replaced the profit-sharing formula.

The plaintiff relies on emails exchanged between Mr. Otto Boffo and Mr. Schouw in March 2012 where the parties agreed that “Except as represented otherwise, the terms of the JV agreement shall prevail”.

[155] I do not accept the plaintiff’s argument, and I find that the Smithe Consulting Agreement replaced the JVA. The difficulty with the plaintiff’s position is that the Smithe Consulting Agreement was executed after the emails the plaintiff relies on, and the agreement included an entire agreement clause:

9. Complete Agreement. This agreement embodies the complete agreement and understanding between the parties regarding its subject matter and supersedes and pre-empts any prior understandings, agreements, or representations by or between the parties, written or oral, which may have related to the subject matter hereof in any way.

[156] This Complete Agreement clause in the Smithe Consulting Agreement precludes the plaintiff’s argument that the JVA continued to subsist after the Smithe Consulting Agreement was entered into: *Bison Properties Ltd. (Re)*, 2018 BCSC 1299 at paras. 278-279; *Kinross Gold Corporation v. Cyanco Company*, 2024 ONCA 441 at para. 21.

[157] Further, the plaintiff, in its fourth amended Notice of Civil Claim, pleaded that the consulting agreement was a “replacement for the Joint Venture Agreement” and in the Agreed Statement of Facts filed by the plaintiff as an exhibit at trial, it was agreed that the Smithe Consulting Agreement replaced the JVA:

The 2013 Agreements

32. Between December 2011 and April 2012, Ottavio and Mr. Schouw had various communications, discussions and meetings to discuss changing the financial terms of the relationship under Joint Venture Agreement.

33. In February 2013, new forms of agreement were executed and were made effective March 19, 2012 as a replacement for the Joint Venture Agreement, namely:

- a) An agreement entitled “Consulting Agreement” between Smithe Residences and Boffo Smithe (the “Subject Agreement”); and

b) an agreement entitled “Consulting Agreement” between Hornby Residences and Boffo Hornby.

[Emphasis added]

The law - contractual interpretation

[158] The Supreme Court of Canada outlined the basic process for contractual interpretation in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53:

[47] ... the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine “the 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 formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning...

[48] The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement....

[57] While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement. The goal of examining such evidence is to deepen a decision-maker’s understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract. While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement.

[citations omitted]

[159] The principles of interpretation of commercial contracts are well established:

(1) When interpreting a contract, the court aims to determine the intentions of the parties in accordance with the language used in the written document and presumes that the parties have intended what they have said.

(2) The court construes the contract as a whole, in a manner that gives meaning to all of its terms, and avoids an interpretation that would render one or more of its terms ineffective.

(3) In interpreting the contract, the court may have regard to the objective evidence of the “factual matrix” or context underlying the negotiation of the contract, but not the subjective evidence of the intention of the parties.

(4) The court should interpret the contract so as to accord with sound commercial principles and good business sense, and avoid commercial absurdity.

(5) If the court finds that the contract is ambiguous, it may then resort to extrinsic evidence to clear up the ambiguity.

(6) While the factual matrix can be used to clarify the intention of the parties, it cannot be used to contradict that intention or create an ambiguity where one did not previously exist.

RBC Dominion Securities Inc., v. Crew Gold Corporation, 2016 ONSC 5529, aff'd 2017 ONCA 648 at para. 52 as cited in *Canaccord Genuity Corp. v. Reservoir Minerals Inc.*, 2019 BCCA 278 at para. 20.

[160] Within this interpretation process of reading the words in the context of the agreement as a whole and the surrounding circumstances known to the parties, commercial reasonableness is an important, but non-determinative, interpretive aid: *Deloitte Management Services LP v. Homer Street Office Properties Inc.*, 2025 BCSC 652; *Spirit Bay Developments Limited Partnership v. Scala Developments Consultants Ltd.*, 2022 BCCA 407, at paras. 34-35.

[161] Commercial reasonableness is a central consideration when interpreting commercial contracts:

[42] . . . Courts prefer commercially reasonable interpretations because they are more likely to reflect the parties' objective intentions: *Resolute FP Canada Inc. v. Ontario (Attorney General)*, 2019 SCC 60 at paras. 142–144 at para. 142 (Côté and Brown JJ., dissenting but not on this point) [*Resolute*]. As Justices Côté and Brown explained in *Resolute*:

[144] Given, then, the choice between an interpretation that allows the contract to function in furtherance of its commercial purpose and one that does not, it is generally the former interpretation that should prevail. While a party cannot avoid its contractual obligations simply because the bargain that they entered into was undesirable or unusual, commercially absurd interpretations should be avoided. As this Court said in *Guarantee Co. of North America v. Gordon Capital Corp.*, “[i]f a given construction of the contract would lead to an absurd result, the assumption is that this result could not have been intended by rational commercial actors in making their bargain, absent some explanation to the contrary”.

Blackmore Management Inc. v. Carmanah Management Corporation, 2022 BCCA 117.

Discussion

[162] For the reasons that follow, I find that the profit-sharing arrangement set out in Schedule B to the Smithe Consulting Agreement was binding on the defendant Boffo Smithe. If the agreement was intended to apply only if Thalia was built (or to a project designed by the Schouw Group) it would have said so. A textual analysis when assessed in the context of the surrounding circumstances, and considering whether the interpretation is commercially reasonable, leads me to conclude that this was the intention of the parties when the Smithe Consulting Agreement was entered into.

A textual analysis

[163] The plaintiff argues that because the text of the Smithe Consulting Agreement does not refer to “Thalia” the parties intended that a share of the profits would be paid to the plaintiff regardless of what was developed on the Smithe Property. The plaintiff says that if the parties had intended that a share of the profits be paid to the plaintiff, if and only if Thalia was constructed, the agreement would have said that. Looking at the provisions of the agreement as whole, the only reasonable interpretation of the agreement was that profit-sharing was not limited to the construction of Thalia.

[164] Schedule A of the Smithe Consulting Agreement sets out the services the plaintiff was obliged to provide as requested by the defendant. The plaintiff argues that because the description of services in Schedule A is general and not specific to the Thalia project, this lends further to support to their position. Schedule A sets out that Boffo Construction Group will act as project manager for the Smithe Project and will be responsible for the specified work. It provides that the plaintiff shall provide Services with respect to:

- a) Rezoning and development approval;
- b) Engaging and supervising such engineers, architects and other consultants as may be required for the preparation of development plans and design and working drawings and specifications;

...

- h) Arranging for the preparation of the strata plans and related documents and registering them;
- i) Arranging for the preparation of the disclosure statement pursuant to the Real Estate Development Marketing Act and maintaining all required filings and receipts in respect of it;
- ...
- l) Designing and implementing a marketing program for the sale of the completed units and coordinating merchandising material, display suites and advertising.

[165] The plaintiff argues that this description of services is general and means that profit-sharing was not intended to be limited to the construction of Thalia. The inclusion of “rezoning” lends further support to an interpretation that the parties never intended to limit the application of the consulting agreement to Thalia alone. If Thalia was built as designed, there was no need for the property to be rezoned.

[166] The defendants argue that since the Smithe Consulting Agreement engaged the plaintiff as a consultant “with respect to the Smithe Street project”, instead of to “a Smithe Street project” or “the Smithe Property” this language supports a conclusion that the defendant was only obliged to share profits if a specific project was built. If this is ambiguous, the only commercially reasonable interpretation is that profit sharing did not apply if Thalia was not built.

[167] With respect to the inclusion of “rezoning” the defendants argue that it is of no moment. Until a development permit is issued, any proposed zoning-compliant project may require rezoning, as conditions and requirements may change. It is a dynamic process.

[168] The defendants further argue that the only reasonable interpretation is that the services would only be requested to be provided if the Boffo Group chose to build Thalia because the only value the plaintiff could offer was in relation to the design and marketing the plaintiff’s design.

[169] The plaintiff counters that the Compensation Fees provision set out in paragraph three of the Smithe Consulting Agreement and paragraph 3 of Schedule B does not limit payment for services to Thalia or to a specific design. Boffo Smithe

was obliged to pay James Schouw and associates \$8,000 per month “for services regarding the design, permit coordination, and other relevant matters for the Smithe Project”.

[170] I accept that on a textual analysis, the absence of reference to Thalia leads to the conclusion that it was not the parties’ intention that there would only be profit-sharing if Thalia was constructed. The list of services the plaintiff was to provide is general and is not limited to Thalia, or to a project designed by the plaintiff. The inclusion of rezoning, which would be unnecessary if Thalia was built, further supports the plaintiff’s position. In isolation, describing the project as *the* Smithe Street project might suggest some ambiguity as it connotes that the agreement could have been made in relation to a specific project; however, when the agreement is examined as a whole, I find that interpreting the agreement to mean that profit-sharing was required regardless of what the defendant chose to build on the Smithe Property accords with the intention of the parties.

The surrounding circumstances

[171] To give effect to the meaning of the text of the Smithe Consulting Agreement I must consider the surrounding circumstances to understand the mutual and objective intentions of the parties. At the same time, I must ensure that I do not allow the circumstances to overwhelm the words of the agreement. In this case, the surrounding circumstances includes the history of the relationship between the parties, the JVA, and the specific reasons that led the parties to enter into the Smithe Consulting Agreement.

The joint venture agreement

[172] As I have already explained, the Hornby Consulting Agreement and the Smithe Consulting Agreement replaced the JVA. Nevertheless, the JVA is an important surrounding circumstance to interpret the meaning of the Smithe Consulting Agreement, particularly since the JVA contemplated that the parties would enter into replacement agreements.

[173] The predominant purpose of the JVA was to facilitate the purchase of property by the Boffo Group that was held by the Schouw Group. The Boffo Group entered into negotiations with the Schouw Group that, from their perspective, were focussed on what it would take to obtain clear title of the Properties. The Schouw Group was attempting to get the best deal it could, before the option to purchase held by Concord Pacific could be exercised. Ideally, Mr. Schouw wanted to see his designs constructed.

[174] Secondly, the purpose of the JVA was to secure the Boffo Group's ability to construct Mr. Schouw's designs, but only at their sole discretion. The fact that Artemesia was close to being "shovel ready" and that there were already a number of pre-sale contracts was attractive to the Boffo Group. If the Boffo Group were to pursue building Mr. Schouw's designs, then his assistance would be required for the designs and to facilitate the sales of the units.

[175] If the Boffo Group were to build Artemesia or Thalia they would require the assistance of the Schouw Group, since Artemesia and Thalia were unique designs that the Boffo Group did not have experience with. The buildings were different from the type of buildings the Boffo Group normally developed and constructed.

[176] These goals formed the basis for the JVA and were understood by the parties when they entered into the JVA. The compensation to achieve these goals included a profit-sharing formula for both the Hornby Property and the Smithe Property. While the JVA specifically referred to Artemesia, it did not refer to Thalia.

[177] The starting point for negotiation of the profit-sharing agreement was information provided by the Schouw Group to the Boffo Group in a slide-deck. The slide deck set out anticipated costs and profits relating to the development of Artemesia and Thalia.

[178] The defendants argue that because the profit-sharing formula set out in the Smithe Consulting Agreement uses the same estimated aggregate gross sale revenue amount (\$63 million) set out in the JVA, this indicates that profit sharing

would only occur if Thalia was constructed. The estimated gross sale revenue amount was derived from the slide deck which explicitly referred to Thalia, although the JVA did not refer to Thalia, only to “Smithe”. The estimated gross sales revenue amount was the minimum amount of revenue required before the profit-sharing formula would be applied. The defendants note that the profit-sharing formula for Artemesia and Smithe were different, lending support to their contention that profit sharing was project specific and not general.

[179] In response, the plaintiff argues that the defendants’ submissions in respect of the factual matrix overwhelms the textual analysis, again noting that the Smithe Consulting Agreement does not refer to Thalia. The fact that the mandatory minimum profit-sharing floor was the same in the investment deck and in the joint venture agreement does lead to a conclusion that profit-sharing would only occur if Thalia was built. It is hardly surprising the parties would retain the mandatory minimum amount originally negotiated in the Smithe Consulting Agreement regardless of whether Thalia was constructed.

The consulting agreements

[180] The impetus for the Boffo Group’s decision to replace the JVA with consulting agreements was to alter the profit-sharing formula to account for the extent of credits offered to purchasers of units in Artemesia. Altering the profit-sharing formula would ensure that the Boffo Group’s profits would be closer to what they had hoped for before they entered into purchase and sale contracts with the individual purchasers of the Artemesia units.

[181] As a result, two consulting agreements were drafted by the Boffo Group: one for Artemesia and the second for Smithe. The Hornby Consulting Agreement engaged Hornby Residences as a consultant to Boffo Developments (Hornby) “with respect to the Hornby Street (Artemesia) project. . .”.

[182] The Smithe Consulting Agreement was executed at the same time and altered the profit-sharing arrangement set out in the JVA to include a provision that

would reduce the amount payable to the plaintiff to account for any shortfalls from the Hornby Street project.

[183] The consulting agreements were executed in February 2013, but dated and effective March 19, 2012. By February 2013, the rezoning process for the Smithe Property was underway. Although, the plaintiff and Mr. Schouw had no involvement in the rezoning process and were not kept apprised of the Boffo Group's steps taken toward rezoning the property, I accept that Mr. Schouw was aware that the Boffo Group was pursuing rezoning.

[184] The plaintiff contends that the Boffo Group never intended to build Thalia or that, at very least, by the time the Smithe Consulting Agreement was executed a decision had been made that Thalia would not be constructed.

[185] I do not accept the plaintiff's position that the Boffo Group entered into the Smithe Consulting Agreement never intending to build Thalia. From the outset, Mr. Otto Boffo was sceptical that Thalia would be a profitable venture, and it was unlikely that the Boffo Group would proceed with Thalia. However, I accept Mr. Otto Boffo's evidence that proceeding with Thalia remained a possibility, until it appeared that rezoning was likely to be approved. I accept that the Boffo Group was keeping all of its options open.

[186] In addition to the likelihood that rezoning of the Smithe Property would be approved, the Boffo Group no longer wanted to be associated with Mr. Schouw, except to further the remaining sales of the Artemisia units. The Boffo Group was getting drawn into Mr. Schouw's legal and financial problems and were concerned about the impact Mr. Schouw could have on their reputation.

[187] The plaintiff argues, and I accept, that if the consulting agreement was intended to only apply if Thalia was built, the Boffo Group would have insisted that the Smithe Consulting Agreement say that. An agreement to be cut out of any future potential profits for nominal consideration (\$8,000 per month for seven months) was not what was bargained for.

Commercial reasonableness

[188] The defendants mainly argue that interpreting the Smithe Consulting Agreement to mean that profits from their development of the Smithe Property are payable to the plaintiff is not commercially reasonable. They argue that “no reasonable commercial actor would negotiate and execute the deal that the Plaintiff envisions”. An experienced and sophisticated business enterprise would not:

- Pay full market value for the property;
- Contribute the entirety of the multi-million-dollar equity investment for development of those properties and accordingly bear the entire risk for those developments; and
- Give the plaintiff an uncapped profit position in any development project regardless of whether the plaintiff’s project was built or whether the plaintiff contributed otherwise to the development.

[189] They posit that interpreting the agreement to allow the plaintiff to share in the proceeds of the defendants’ labour, when the plaintiff did not share any risk and contributed nothing to success of the development is a commercially absurd result. The defendants also note that there was nothing preventing the defendant from selling the Smithe Property and had they done so, the defendants would not be under any obligation to share profits with the plaintiff.

[190] The plaintiff refers to *Kingsdale Partners LP v. Sprott Asset Management LP*, 2025 ONSC 2812 to counter the defendants’ submission and argues that the circumstances are similar to the case at bar. In *Kingsdale*, the court interpreted an agreement which provided for payment of a success fee to be enforceable even though “success” was achieved without Kingsdale’s assistance.

[191] Kingsdale was an advisory firm that entered into an agreement with Sprott to provide advice in relation to Sprott’s desire to gain control of a commodities business, CFCL. The agreement provided that Kingsdale would be paid a success

fee. Kingsdale suggested a meeting requisition strategy should be pursued. That failed, and two years later Sprott decided to embark on a different strategy: a Plan of Arrangement whereby Sprott obtained management of CFCL's assets by purchasing them and placing them in a newly formed trust.

[192] Sprott refused to pay the success fee because Kingsdale was not actively involved in carrying out the Plan of Arrangement strategy that led to the consensual purchase of control. Kingsdale argued that the agreement covered Sprott's efforts as a whole to obtain control of CFCL and was not limited to the meeting requisition strategy. Sprott was liable for the success fee regardless of whether Kingsdale was actively involved.

[193] In concluding that the success fee was payable, the trial judge placed emphasis on the fact that at the time the engagement agreement was signed "no particular strategy had been decided upon"; it was known to both parties that there might have to be a "pivot" in what precisely was pursued to further the agreement in the future; and there "were complications that could require flexibility and changes in approach". The trial judge also noted that if it had been intended by the parties that only a single strategy would be covered by the agreement then that would have been the language used in their agreement.

[194] In rejecting the argument that no payment obligation arose because no services had been provided in relation to the strategy that was ultimately successful, the trial judge noted Sprott's inaction (having focused its attention elsewhere), was not communicated to Kingsdale, and did not nullify its obligations under the agreement. Nothing in the agreement spoke to the amount of work required for Kingsdale to receive the success fee. In the end, Sprott got what it bargained for—management of CFCL's assets.

[195] Significantly, the relationship between Kingsdale's services and the ultimate transaction that took place between Sprott and CFCL was not severed.

[111] . . . Kingsdale was involved at the outset and was part of determining campaign strategy. The fact that Sprott chose to shut Kingsdale out does not sever the link between Kingsdale's services and the ultimate transaction.

[196] The plaintiff argues that the circumstances in *Kingsdale* are compellingly similarly to the circumstances in this case. They argue that just because Thalia was not built does not mean that profit sharing does not apply, which is analogous to the determination that the success fee was payable by Sprott even though success was achieved without the assistance of Kingsdale. The link between the original engagement for services with the plaintiff and the result was not severed.

[197] While each contract must be interpreted according to its own terms and factual context, I find that the circumstances in *Kingsdale* are somewhat analogous to the circumstances before me. The fact that the plaintiff did not participate in the development of the Smithe Property does not mean the profit-sharing provisions in the Smithe Consulting Agreement do not apply. The *Kingsdale* decision lends support to the plaintiff's argument that if profit-sharing only applied if Thalia was built, the agreement would have said so.

[198] In *Kingsdale*, payment for success was not dependent on the provision of services, the contract was goal focussed rather than for the services themselves. In my view, the Smithe Consulting Agreement is similar. The agreement provided for profit-sharing upon completion of the project and did not require a causal link between services provided by the plaintiff and completion of the project.

[199] Similar to the arguments advanced by the defendants in this case, the defendant Sprott also argued that interpreting the agreement to require it to pay the success fee would be commercially absurd considering that Sprott obtained CFCL's assets in a different manner than Kingsdale had advised. The Court rejected that argument because the eventual mechanism for Sprott to achieve success was entirely within the control of Sprott. It was Sprott's decision as to what strategy would be used. This was never in Kingsdale's control. In these circumstances interpreting the agreement to allow Sprott to redefine success would not be consistent with the intention of the agreement.

Conclusion

[200] I find, the text of the consulting agreement when considered in the context of the factual matrix and considering whether the interpretation urged by the plaintiff is commercially reasonable, the profit-sharing provisions in the Smithe Consulting Agreement did not apply only to the Thalia design. If the parties intended otherwise, the agreement would have explicitly limited the ability of the plaintiff to share in the profits.

[201] As it turned out, the development of the Smithe Property was very profitable, in part due to the fact that it was able to be rezoned which substantially increased the buildable density. However, another significant reason for the magnitude of profits was due to favourable market conditions.

[202] The defendants' reliance on commercial reasonableness effectively asks me to look at the result of the agreement and assess whether it was commercially reasonable considering that the plaintiff's potential share of the profits is significant. However, interpreting the agreement with the benefit of hindsight is improper. While it may seem unfair that the plaintiff is entitled to a share of the proceeds of a development that the plaintiff did not contribute to, but that was the defendants' choice. The purpose of favouring the interpretation of contracts in a manner that is commercially reasonable is not to allow parties to avoid its contractual obligations simply because the bargain they entered into was undesirable or unusual.

Did the plaintiff repudiate the agreement

[203] The defendants submit that by his conduct Mr. Schouw repudiated the agreement between the defendants both personally and on behalf of Smithe Residences. As a result, having accepted the repudiation, the defendants were entitled to terminate the Smithe Consulting Agreement. While maintaining that they were entitled to treat the agreements as repudiated and terminate them, the defendants also rely on "after acquired cause" (or after discovered cause) to justify the termination. Any information they learned about Mr. Schouw's conduct after they lawfully terminated the agreements adds further support to the termination.

[204] The plaintiff denies that Mr. Schouw's conduct breached the terms of the Smithe Consulting Agreement and disputes that the agreements between the parties were repudiated. Importantly, the plaintiff argues, Mr. Schouw's conduct must be considered in the context of the agreements, which did not include any representations, warranties, nor did it have conduct conditions. Furthermore, the Smithe Consulting Agreement did not contain a termination clause.

The law

[205] A contract may be said to be repudiated when one party acts in a way that evinces an intent to no longer be bound by the contract: *Jedfro Investments (U.S.A.) Ltd. v. Jacyk*, 2007 SCC 55 at para. 20; *Mantar Holdings Ltd. v. 0858370 B.C. Ltd.*, 2014 BCCA 361 at para. 11. A helpful summary of when breaches of contract amount to repudiation was set out by Voith J. (as he then was) in *Crosse Estate (Re)*, 2012 BCSC 26:

[88] Not every breach or intimation of an inability to perform some part of the agreement will amount to repudiation. In *Place Concorde East Limited Partnership v. Shelter Corp. of Canada Ltd.* (2006), 2006 CanLII 16346 (ON CA), 270 D.L.R. (4th) 181, 211 O.A.C. 141, LaForme, J.A., writing for the court, provided a useful summary of the law in Canada on when a breach repudiates the entire contract:

[51] Repudiation occurs in circumstances where the breach deprives the innocent party of substantially the whole benefit that it was intended he or she should have obtained from the contract: *Hunter Engineering Co. v. Syncrude Canada Ltd.*, 1989 CanLII 129 (SCC), [1989] 1 S.C.R. 426 at 499-500, 57 D.L.R. (4th) 321. A breach that allows the non-repudiating party to elect to put an end to all unperformed obligations of the parties is an exceptional remedy that is available only in circumstances where the entire foundation of the contract has been undermined, that is, where the very thing bargained for has not been provided: see *Hunter Engineering*, *supra*; see also *Gordon Capital*, *supra*, at para. 50.

[52] Various expressions have been used to define the sort of term that, if broken by one party, will excuse the other from future performance. Behind all of these expressions lies the notion of "substantial failure of performance": see S.M. Waddams, *The Law of Contracts*, 5th ed. (Toronto: Canada Law Book Inc., 2005), at para. 587. Thus, a breach of contract that rises to the level of a substantial failure of performance can operate as a repudiation of the contract.

[53] Weiler J.A. in 968703 *Ontario Ltd. v. Vernon* (2002), 2002 CanLII 35158 (ON CA), 58 OR. (3d) 215 (C.A.) at para. 16, outlines five factors that provide

guidance for the court's determination of whether or not a breach is a substantial breach such as would justify future non-performance of the innocent party's obligations. These factors are as follows:

- the ratio of the party's obligation not performed to the obligation as a whole;
- the seriousness of the breach to the innocent party;
- the likelihood of repetition of the breach;
- the seriousness of the consequences of the breach; and
- the relationship of the part of the obligation performed to the whole obligation.

[89] In assessing whether the breach deprived the innocent party of substantially the whole benefit of the contract, all of the circumstances of the commercial setting of the contract must be considered: *Bank of British Columbia v. Turbo Resources Ltd.* (1983), 1983 ABCA 160 (CanLII), 148 D.L.R. (3d) 598 at 607-608, 27 Alta. L.R. (2d) 17 (C.A.).

[206] A repudiatory breach does not, in itself, terminate or discharge a contract. In *Guarantee Co. of North America v. Gordon Capital Corp.*, 1999 CanLII 664 (SCC), [1999] 3 S.C.R. 423 at para. 40 the Supreme Court explained:

Contrary to rescission, which allows the rescinding party to treat the contract as if it were void *ab initio*, the effect of a repudiation depends on the election made by the non-repudiating party. If that party treats the contract as still being in full force and effect, the contract "remains in being for the future on both sides. Each (party) has a right to sue for damages for *past or future breaches*" (emphasis in original): *Cheshire, Fifoot & Furmston's Law of Contract* (12th ed. 1991), by M.P. Furmston at p. 541. If, however, the non-repudiating party accepts the repudiation, the contract is terminated, and the parties are discharged from future obligations. Rights and obligations that have already matured are not extinguished. Furmston, *supra*, at pp. 543-44.

See also: *Kaur v. Bajwa*, 2020 BCCA 310 at paras. 26 and 27.

[207] The party alleging repudiatory conduct and who wishes to be discharged from the contract must clearly and unequivocally communicate their election.

Communication of the election to disaffirm or terminate the contract may be accomplished directly, by either oral or written words, or may be inferred from the conduct of the innocent party in the particular circumstances of the case: *Brown v. Belleville (City)*, 2013 ONCA 148 at para. 45.

[208] The onus is on the party alleging repudiatory conduct to promptly and clearly accept the breach and terminate the contract to discharge themselves from future obligations: *Kaur v. Bajwa*, 2020 BCCA 310 at para. 29; *The Owners, Strata Plan LMS 3905 v. Crystal Square Parking*, 2025 BCSC 1017 at para. 133. It is essential

that such an election be made promptly and communicated to the guilty party: *Morrison-Knudsen Company Inc. v. B.C. Hydro and Power Authority*, 1978 CanLII 1977 (BC CA), [1978] B.C.J. No. 1218 at para. 50.

[209] After-acquired cause is primarily an employment law concept whereby the fact the employer did not know of the employee's dishonest conduct at the time the employee was dismissed does not detract from the validity of the termination, provided that grounds for dismissal existed at the time of dismissal. Justification for dismissal can be shown by proof of facts discovered after the dismissal or on different grounds from those alleged at the time: *Lake Ontario Portland Cement Co. v. Groner*, 1961 CanLII 1 (SCC), [1961] S.C.R. 553 at 563-564.

[210] Regardless of whether dismissal for after-acquired cause or for cause is being argued, the issue is whether the employer can establish, at the time of dismissal, there were facts sufficient in law to warrant a dismissal. If an employer knew of the misconduct and had expressly or implicitly condoned it, then claims of after-acquired cause will be defeated: *Van den Boogaard v. Vancouver Pile Driving Ltd.*, 2014 BCCA 168 at para. 34

The defendants' arguments

[211] The defendants argue that the plaintiff breached the Smithe Consulting Agreement in two ways. First, by its actions, the plaintiff impermissibly purported to bind the defendants, and second by failing to perform its obligations under the agreement in a trustworthy manner. The specific applicable terms are:

1. Consulting

(b) The Consultant agrees and acknowledges that it shall have no authority (and shall not in any manner hold itself out as having any authority or otherwise take any action) to bind the Company or any of its subsidiaries or affiliates (collectively, the "Boffo Companies", and individually, each, a "Boffo Company") to any contract, commitment, or undertaking without the express prior written consent of the Company.

2. Duties

(a) During the Consulting Period, the Consultant shall serve as a consultant to the Company and, as reasonably requested from time to time by the Company, shall devote its best efforts to providing the Company with

the services described in Schedule A (the “Services”). The Consultant shall perform the Services to the best of its abilities in a diligent, trustworthy, businesslike, and efficient manner.

[212] The defendants argue the plaintiff knew that reputation was important to the Boffo Group and claim that the plaintiff’s actions were “deeply detrimental to the defendants and their reputation”. This context is important, the defendants argue, as it relates to the plaintiff’s obligation to perform its services in a “trustworthy” manner. Through his conduct, Mr. Schouw showed that he was not trustworthy.

[213] The defendants’ witnesses testified as to the importance of reputation to the Boffo Group. Mr. da Silva testified that when the plaintiff and Mr. Schouw’s creditors initially approached the Boffo Group, the Boffo Group was concerned about potential damage to their reputation.

[214] Mr. Otto Boffo explained that prior to entering into the JVA, they did not have time to fully investigate Mr. Schouw because of the compressed timeline to complete the deal. However, this evidence must be viewed in light of the following: it was the Boffo Group’s decision to proceed and there was no obligation to do so, the Boffo Group was mainly interested in obtaining land and therefore was not that concerned about Mr. Schouw’s reputation. The Boffo Group knew that there were “red flags” with respect to Mr. Schouw and that he had a questionable track record.

[215] The defendants argue that since the Smithe Consulting Agreement required that the plaintiff perform services in a trustworthy manner, Mr. Schouw’s dishonesty is cause for termination. The defendants submit that their relationship with the plaintiff, pursuant to the terms of the Smithe Consulting Agreement, was analogous to an employer-employee situation. In the employment law context, dishonesty is always cause for termination.

[216] The defendants further say that Mr. Schouw, and by extension the plaintiff, indicated that they did not intend to perform their parts of their agreements with the defendants in the following ways:

- Mr. Schouw induced the defendants into the JVA under false premises by concealing significant liabilities of the plaintiff, despite being told by Mr. Otto Boffo that their agreement required that Mr. Schouw be forthright with the defendants.
- Mr. Schouw reaffirmed the plaintiff's commitment of the commercial portion of the Smithe Property to 4 Corners after the execution of the JVA, despite completing a transaction that transferred this property unencumbered to the defendants.
- Mr. Schouw executed a security agreement with 4 Corners that implicated and imposed liabilities on the defendants.
- Mr. Schouw's conduct resulting in securities fraud damaged the reputation of the defendants.

[217] The defendants argue that Mr. Schouw's misconduct is not conduct of an entity that wished to be bound by the agreement with the defendants and Mr. Schouw's misconduct deprived the defendants of substantially the whole benefit of the Smithe Consulting Agreement.

Artemesia

[218] The defendants argue that the plaintiff misconducted itself in relation to its work on Artemesia. The defendants submit that this relates to Mr. Weidinger failing to complete his purchase of an Artemesia unit. They allege Mr. Schouw made a side deal with Mr. Weidinger wherein Mr. Schouw told Mr. Weidinger that he would not have to complete. This was in flagrant breach of the direction Mr. Ellis gave to Mr. Schouw and the plaintiff that the Boffo Group had to approve any purchase and sale contracts or amendments to those contracts.

[219] The defendants rely on the hearsay evidence elicited through Mr. Ellis – whose evidence I reject in any event – in support of their argument. There is no admissible evidence in support of the defendants' position that the plaintiff breached

the terms of the agreement in relation to the Artemesia project. Further, while Mr. Schouw was involved in both the Artemesia and Thalia projects, the plaintiff was not involved in the Artemesia project.

Creditors

[220] The defendant complains that the plaintiff incurred significant liabilities on behalf of Smithe Residences and at times concealed them from the defendants.

[221] Specifically, the defendants rely on the evidence of Fiorella Callocchia who contacted the Boffo Group to determine whether they could assist her in satisfying the judgment she had against Mr. Schouw. She had discussed her outstanding judgment with Mr. Schouw in November 2012, and he advised that he had entered into a joint venture agreement with the Boffo Group. Notably, Ms. Callocchia had obtained judgment against Mr. Schouw, Homer Residences, and Hornby Residences but not against the plaintiff.

[222] Ms. Callocchia understood that the Boffo Group was not responsible for repayment of the debt Mr. Schouw owed her and had contacted the Boffo Group in an attempt to gain their assistance to persuade Mr. Schouw to repay her.

[223] The defendants argue that Mr. Schouw unilaterally made binding promises to Ms. Callocchia that involved the properties they had purchased without their authorization in breach of the terms of the Smithe Consulting Agreement. Furthermore, the defendants argue that Mr. Schouw misled them about his debt to Ms. Callocchia because he had represented in Schedule C to the JVA that Ms. Callocchia had been paid. However, at the time the Smithe Consulting Agreement was entered into, the Boffo Group was well aware of this alleged misrepresentation.

[224] Mr. Hardip Siddoo testified that he invested \$1,000,000 in Hornby Residences and another \$250,000 in Homer Residences. Mr. Siddoo was not repaid in accordance with the investment certificates issued by Mr. Schouw. Mr. Siddoo testified that Mr. Schouw told him that he could not repay the funds as he had a joint

venture agreement with Boffo. Mr. Schouw told him that he could not do anything with respect to Hornby, but he would be able to on Thalia.

[225] Mr. Siddoo obtained a garnishing order against Boffo Developments and Boffo Developments (Homer).

[226] The defendants say Mr. Schouw breached the terms of the Consulting Agreement when he represented to Mr. Siddoo that Thalia would be built and he was not permitted to refer to his relationship with the defendants.

[227] On September 21, 2012, the plaintiff, Mr. Schouw, and Hornby Residences consented to a judgment in favour of Karim Varini. The defendants say that this judgment was concealed from them and that had they learned in a timely fashion of this action, and the allegations therein, Boffo Smithe would not have requested any development services from the plaintiff.

4 Corners

[228] In February 2010, 4 Corners provided \$6.75 million in financing to the plaintiff and the parties entered into a series of agreements to secure 4 Corners' investment.

[229] After the JVA was executed and the parties worked to clear title for the Properties, the Boffo Group's solicitor prepared Election and Authorization forms regarding the mortgage, option to purchase, and right of first refusal which 4 Corners had previously unsuccessfully attempted to file on title to the Smithe Property. These documents were sent to the Schouw Group for execution by 4 Corners. 4 Corners returned executed copies of these documents. As a result, Boffo Smithe was able to acquire the Smithe Property free of any encumbrances and without the 4 Corners charges being registered.

[230] In a letter to 4 Corners dated September 19, 2011, Mr. Schouw on behalf of the plaintiff stated:

Smithe Residences Ltd. has entered into a joint venture agreement with Boffo Investment Corp. to develop the proposed mixed commercial-residential building at 225 Smithe Street in Vancouver. A separate company has been

established for the purpose of this joint venture, Boffo Developments (Smithe) Ltd.

The joint venturer, Boffo Investment Corp. is responsible for arranging and guaranteeing financing and construction management as well as some other administrative duties.

The agreements that Smithe Residences Ltd. contracted prior to this joint venture relationship are still all in place. Smithe Residences Ltd. intends to honour all previous obligations via the Joint Venture. We wish to confirm to you that this includes the Purchase and Sale Agreement between us dated February 1, 2010 for the commercial-retail-office space.

[231] The plaintiff says that the purchase and sale agreement referenced in this letter relates to the purchase and sale agreement entered into in 2010. This purchase and sale agreement was known to the Boffo Group at the time the JVA was entered into. Mr. da Silva testified that he had pulled this document from the Land Title Office, as did the Boffo Group's solicitors.

[232] The plaintiff further says that the letter must be read in the context of those agreements. The Purchase and Sale Agreement contained the following express terms:

2.5 Ultimate Application of Deposit

The Deposit will be:

...

(b) returned to the Purchaser with interest calculated at the rate of 8% per annum from the dates the Deposit was paid to the Vendor to the date they are returned to the Purchaser:

...

(vi) if foreclosure or realization proceedings are commenced in the Supreme Court of British Columbia under the Interim First Mortgage or the Amakhaya-Buccaneer Mortgage or the Construction Financing Security or any other financial charge against the Parent Lands unless the Purchaser elects to exercise the Contingent Option.

[233] Once the foreclosure proceedings were commenced a debt obligation came into being, therefore the Purchase and Sale Agreement was no longer operative.

[234] As already noted, Mr. Otto Boffo learned of the existence of the letter in December 2012 and obtained a copy of it in the summer of 2013. According to

Mr. Otto Boffo, it was primarily this letter that caused him to suggest to Mr. Schouw in January 2016 - more than three years after learning of the letter - that their relationship was at an end. Mr. Otto Boffo did not act sooner because Mr. Schouw was still facilitating sales of Artemesia. Mr. Otto Boffo and other members of the Boffo Group concluded that the letter meant the plaintiff and Mr. Schouw had sold the Smithe Project commercial space twice. However, no one from the Boffo Group looked into it further or asked Mr. Schouw about it.

[235] On June 20, 2013, 4 Corners filed a Notice of Civil Claim against Mr. Schouw, the plaintiff, James Schouw & Associates, Hornby Residences, Homer Residences, the defendants, Boffo Hornby, Boffo Homer and three individuals who were former shareholders of 4 Corners.

[236] The action centered on those agreements that the Schouw Group had entered into with 4 Corners which included the Purchase and Sale Agreement for the commercial space that was to be built on the Smithe Property. 4 Corners sought a declaration that it had a proprietary interest in the Smithe Property. The response to civil claim filed by the Schouw defendants stated that the Boffo Group was not bound to the prior business dealings of the plaintiff.

[237] The 4 Corners action was dismissed against the Boffo Group following a summary trial on October 18, 2013.

[238] The defendants argue that in the letter, Mr. Schouw represented that the Boffo Group had agreed to transfer the entire commercial component of the Smithe Project to 4 Corners. This demonstrates Mr. Schouw's "complete untrustworthiness" and a breach of the terms of the Smithe Consulting Agreement.

[239] In April 2015, the plaintiff and Mr. Schouw entered into a General Security Agreement with 4 Corners (GSA). The recitals to the GSA set out that pursuant to the JVA the Schouw Group had entered into a joint venture with the Boffo Group and the plaintiff transferred the Smithe Property to Boffo Smithe. The recitals also referenced that as part of the joint venture, the plaintiff and Boffo Smithe executed a

profit-sharing agreement whereby certain consulting services would be provided by the Schouw Group to Boffo Smithe in furtherance of the Project, as defined in the consulting agreement.

[240] According to the GSA, the plaintiff and Mr. Schouw undertook, covenanted, and agreed to perform and fulfill the terms and conditions of the JVA and the Consulting Agreement to the benefit and satisfaction of the Boffo Group. Further, that the plaintiff and Mr. Schouw would not release or agree to release the Boffo Group from its obligations under the JVA or consulting agreement, without 4 Corners' prior written consent.

[241] The plaintiff and Mr. Schouw also agreed to appoint a nominee of 4 Corners as a project monitor to conduct, among other things, "confidential communications from time to time with Mr. Boffo, using reasonable efforts to accomplish the desired business objectives of the parties".

[242] The plaintiff and Mr. Schouw, as part of the GSA, executed a Direction and Authority to Pay in favour of 4 Corners which provided that any monies owing to them by the defendants would be paid to a trustee for the benefit of 4 Corners.

[243] The defendants became aware of the GSA in April 2016. They take issue with the fact that the plaintiff did not disclose the existence of the GSA to Boffo Smithe, when it contains "multiple terms concerning the Boffo Group" and the Smithe Property, in breach of the Smithe Consulting Agreement. They argue that these actions constitute after acquired cause and can be relied on in support of the argument that their termination of the Smithe Consulting agreement was valid.

Securities fraud

[244] In November 2015, Mr. Schouw was charged with fraud under s. 161 of the *B.C. Securities Act* in relation to his misuse of funds obtained through a November 2009 investment certificate related to Artemesia.

[245] The allegations were reported in the media and Mr. Schouw was reported to have said that he was working hard to repay his investors, including through agreements with the Boffo Development Group to construct planned projects.

[246] The defendants argue that Mr. Schouw attempted to implicate the Boffo Group, despite knowing the importance of reputation to the Boffo Group. The defendants further argue that Mr. Schouw's misconduct frustrated the performance of any agreements between himself and the plaintiff, and that his actions constitute repudiation.

Summary of the defendants' position

[247] The defendants argue that Mr. Schouw's misconduct deprived the defendants of substantially the whole of the benefit of the JVA and the Smithe Consulting Agreement. The defendants, as consideration for a purchase at fair market value, obtained properties to develop and the option to engage the services of Mr. Schouw. The defendants could not make use of the plaintiff who was controlled by Mr. Schouw, and whose services are principally rendered by Mr. Schouw. They argue that while there was no obligation to use Mr. Schouw's services, they were also not able to do so because Mr. Schouw demonstrated to them his dishonesty and propensity to incur further liabilities and, subsequently, untenable costs.

[248] The defendants say that not only were they unable to gain the benefit of what they contracted for, but they were actively harmed as a result of Mr. Schouw's misconduct, both reputationally and financially through association with Smithe Residences and Mr. Schouw, and through 4 Corners' legal action against them, which was a direct result of Mr. Schouw's dishonesty

[249] Mr. Schouw's actions undermined and seriously impaired the essential trust and confidence that the defendants were entitled to place in Mr. Schouw and the plaintiff in the circumstances of their relationship. The defendants argue that Mr. Schouw, as an employee, damaged the reputation of the defendants, which is sufficient grounds for termination.

The plaintiff's response

[250] The plaintiff argues that the defendant has not met its onus to establish that the plaintiff repudiated the Smithe Consulting Agreement. The plaintiff also argues that the defendants' reliance on employment law concepts is of no assistance in these circumstances.

[251] When the Smithe Consulting Agreement was executed, the defendants knew that Ms. Callochchia's claim was not paid and that the CRA was looking into Mr. Schouw's activities. The defendants were also aware of the 4 Corners letter. Nevertheless, the defendants did not require that the Smithe Consulting Agreement contain morality clauses, representations, or warranties to govern the plaintiff's conduct.

[252] The plaintiff argues that the absence of any conduct clauses is of critical importance to the assessment of whether the plaintiff repudiated the terms of the Smithe Consulting Agreement. If the defendants were truly concerned that Mr. Schouw's conduct could damage the defendant's reputation they would have included such terms in the agreements.

[253] In the absence of such clauses, the plaintiff argues that there were no grounds for the defendants' termination of the agreement, based on the alleged acts of repudiation by the plaintiff and Mr. Schouw.

[254] In support of their position, the plaintiff relies on *Zigomanis v. 2156775 Ontario Inc. (D'Angelo Brands)*, 2016 ONSC 7053, aff'd 2018 ONCA 116 to demonstrate that even where a contract includes a morals clause, the standard to justify termination based on alleged repudiation is high.

[255] In *Zigomanis*, the defendant company purported to terminate an agreement between it and the plaintiff. The purpose of the agreement between the parties was to have the plaintiff, a professional athlete, promote a product. The 'morals clause' provided that the defendant could terminate if the "athlete commits any act which shocks, insults, or offends the community, or which has the effect of ridiculing public

morals and decency”. The defendant purported to terminate the contract pursuant to the morals clause after a nude photograph of the plaintiff was published online. The defendant said this violated the morals clause and undermined the plaintiff’s positive image as a “brand ambassador”. The trial judge found that the contract had been wrongfully terminated as the defendant had not been “deprived of substantially all of the benefit it was to receive under the contract”.

[256] The plaintiff also relies on *Canadian Soccer Association v. Hyundai Auto Canada Corp.*, 2011 ONSC 801, aff’d 2011 ONCA 704 as further support for their argument that in the absence of a morals clause, the defendants did not have a basis to terminate the Smithe Consulting Agreement. In *CSA* the defendant refused to pay CSA the agreed upon sponsorship funds after CSA had engaged in conduct that had tarnished CSA’s name and reputation. The defendant alleged that any benefit it would receive from the agreement was destroyed. The court noted the sponsorship agreement did not contain any covenant or term dealing with the reputation of CSA. Without a ‘reputation’ term and in the absence of any evidence of the trade practice relating to this sponsorship agreement or to sponsorship agreements in general, the termination was not justified. The court also found that it would be commercially unreasonable for the court to imply ‘reputation’ terms to the agreement.

[257] The plaintiff argues it is not possible to allege that Mr. Schouw’s conduct constituted repudiation of the Smithe Consulting Agreement, but at the same time rely on Mr. Schouw’s performance of the Hornby Consulting Agreement. They submit that the defendants’ contention that they had no obligation to provide timely notice that certain acts constituted repudiation is not supported by the authorities. Furthermore, any alleged acts of repudiation that took place before or during the time the defendants paid Mr. Schouw a consulting fee are irrelevant since those payments amount to affirmation. Consulting fees were paid until October 2012.

[258] The plaintiff argues that the timing of the defendants’ termination based on alleged repudiation is not coincidental. Mr. Otto Boffo chose to confront Mr. Schouw

about the 4 Corners letter and subsequently allege that the plaintiff had repudiated the agreement after the Artemesia sales were complete and after the rezoning of the Smithe Property was a near certainty:

- a) In August 2015, the final sales of Artemesia took place.
- b) On January 11, 2016, Mr. Otto Boffo confronted Mr. Schouw with the 4 Corners letter he had received 3 years earlier and advised Mr. Schouw that the Boffo Group would be commencing legal action to terminate the JVA and the Smithe Consulting Agreement.
- c) On January 15, 2016, Boffo Hornby entered into a release with the Trustee of Hornby Residences for payment of \$320,000 pursuant to the Hornby Consulting Agreement profit sharing formula.
- d) On January 19, 2016, the City of Vancouver approved the Boffo Group's rezoning application for the Smithe Property.
- e) On March 29, 2016, Mr. Schouw advised Mr. Otto Boffo that the plaintiff remained committed to its obligations under the agreements.
- f) On May 5, 2016, The Boffo Group advised the plaintiff and Mr. Schouw that they considered that the Smithe Consulting Agreement had been repudiated.

[259] The plaintiff argues that there is no merit to the defendants' alleged concerns about their reputation, nor is there any evidence that their association with the plaintiff or Mr. Schouw, harmed the defendants' reputation in any way. If the defendants were truly concerned about their reputation they would have severed their relationship with Mr. Schouw and the plaintiff when these alleged issues arose instead of waiting until the Artemesia units were sold.

[260] There is no dispute that the Boffo Group valued Mr. Schouw in relation to the sale and marketing of the Artemesia units. Many of the purchasers had been recruited by Mr. Schouw through his network, and it was important to the Boffo

Group that Mr. Schouw remain associated to Artemesia until sales were completed. The Boffo Group was concerned that dissociating itself from Mr. Schouw might result in purchasers failing to complete.

[261] The plaintiff argues that notice of repudiation is required to be provided promptly. The failure of the defendant to advise the plaintiff promptly not only weighs against the credibility of their assertions but also calls into question the validity of the termination.

[262] As noted, according to the Boffo Group's witnesses, the most significant event causing them to terminate the Smithe Consulting Agreement was their belief that the plaintiff had promised to sell the commercial space in the Smithe project to 4 Corners when the plaintiff had no ability to do so. This became known to Mr. Otto Boffo more than three years before he confronted Mr. Schouw about it.

Discussion

[263] In my view, the plaintiff did not breach any terms of the Smithe Consulting Agreement and did not repudiate the agreement. The plaintiff did not act in a way that exhibited an intention to no longer be bound by the agreement. It follows then, that there was no basis for the defendant to terminate the Smithe Consulting Agreement.

[264] The defendants tendered a substantial amount of evidence and testimony exposing Mr. Schouw's financial liabilities, conduct with individual creditors, lawsuits, and his problems with the B.C. Securities Commission and the CRA. However, none of the evidence demonstrates that the plaintiff (or Mr. Schouw) ever evinced an intention to not be bound by the agreements. Furthermore, I agree with the plaintiff that the Smithe Consulting Agreement did not require that Mr. Schouw be solvent, deal with creditors with the utmost good faith, not obtain financing in unconventional ways, abide by the law, or to be of good character generally.

[265] I reach this conclusion considering both the alleged repudiatory conduct at the time notice of repudiation was given and on the assumption that the defendants can rely on after-acquired cause justifying termination.

[266] I find it significant that neither the JVA nor the Smithe Consulting Agreement required the plaintiff make any representations or warranties, nor did it impose any conduct conditions on the plaintiff or Mr. Schouw.

[267] At the time of entering into the JVA, the defendants generally knew that Mr. Schouw's reputation was questionable and that he and his companies were in financial distress. The evidence is clear that the defendants saw the plaintiff's distress as a good opportunity to purchase prime development property from companies controlled by Mr. Schouw. The defendants were primarily concerned with how much it would cost to obtain clear title of the Properties.

[268] By the time the Smithe Consulting Agreement was executed, the defendants had a better understanding of Mr. Schouw's liabilities, creditors and reputation. Nevertheless, the defendants still did not require that Mr. Schouw enter into any conduct conditions. The defendants were primarily interested in securing a revised profit-sharing agreement to ensure that they received a greater share of the profits.

[269] The defendants argue that the plaintiff and Mr. Schouw's conduct must be viewed in light of their stated concerns about their reputation. They argue that the plaintiff imperiled the defendants' asserted good reputation despite knowing that reputation was important to the defendants. However, the conduct the defendant complains of is not rooted in the agreement and even assuming the plaintiff damaged the defendants' reputation, the plaintiff was not contractually obliged to protect it.

[270] I accept that the defendants were generally concerned about their reputation, but there is no evidence that the plaintiff or Mr. Schouw's conduct damaged it. On the contrary, the Smithe Project was very successful despite any association Mr. Schouw had to it or to the defendants. The defendants expressed concern about

their reputation and the plaintiff's impact on it, must be viewed in light of other circumstances. At the same time the defendant was entering into the JVA with the plaintiff, Mr. Otto Boffo was himself being sued by his brother for alleged breaches of fiduciary duty. Surely, these allegations could potentially harm the defendants' reputation.

Did the plaintiff evince an intention not to be bound

[271] The defendant argues that the plaintiff breached the terms of the parties' agreement by incurring significant liabilities and at times concealed them from the defendants. The Smithe Consulting Agreement did not require the plaintiff to cease incurring liabilities or to provide an accounting of them to the defendants. Even if there was relevant non-disclosure at the time of entering into the JVA, it is of no moment in relation to the Smithe Consulting Agreement since I have accepted the defendants' argument that the Smithe Consulting Agreement replaced the JVA. The defendants were well aware of any non-disclosure when they entered into the Smithe Consulting Agreement.

[272] The defendants argue that Mr. Schouw and the plaintiff misconducted itself in relation to the sales of Artemesia. There is no evidence that the plaintiff did anything wrong in relation to Artemesia and it is difficult to see how such allegations have anything to do with performance of the Smithe Consulting Agreement.

Did the plaintiff bind the defendants

[273] The defendants argue that Mr. Schouw purported to bind the defendants, contrary to the provisions of the Smithe Consulting Agreement. In my view, the defendant has not pointed to anything to suggest that Mr. Schouw did or attempted to bind the defendants.

[274] I accept that the defendants were concerned about their association with Mr. Schouw after he was charged with securities offences and Mr. Schouw then publicly referred to agreements he had with the Boffo Group. However, the Smithe Consulting Agreement did not prohibit him from referring to the agreements, nor by

referring to them did he purport to bind the defendants. Furthermore, what Mr. Schouw said was true.

[275] The defendants argue that Mr. Schouw made unilateral promises in relation to his creditors, including Ms. Callocchia and Mr. Siddoo, that bound the defendants in breach of the Smithe Consulting Agreement. The evidence does not support the defendants' position. The fact that Mr. Schouw correctly explained that he had entered into a joint venture with the Boffo Group, does not mean he purported to bind the Boffo Group. Both Ms. Callocchia and Mr. Siddoo testified that they understood the Boffo Group was not responsible for the debt the Schouw Group owed them.

[276] With respect to 4 Corners, I accept that on its face Mr. Schouw's September 19, 2011, letter suggests that the plaintiff confirmed that 4 Corners would be able to purchase the commercial space proposed to be built on the Smithe Property. The defendant Boffo Smithe owned the Smithe Property and had complete control over what might be built on it. The plaintiff had no control over what might be built nor any control over who Boffo Smithe might sell it to. While Mr. Schouw's representation that he could fulfill his prior agreements with 4 Corners, may have been technically correct (due to the foreclosure proceedings), Mr. Schouw was less than forthright when he stated that all agreements the plaintiff made prior to the JVA remained in place.

[277] Mr. Schouw's dishonesty with 4 Corners did not breach his agreements with the defendants, even though I accept that his dishonesty caused the defendants significant difficulties, including that they were sued by 4 Corners. Nevertheless, there is nothing in his letter that can be construed as binding the defendants. On the contrary, the letter explicitly states that the plaintiff intended to honour its agreements, and it did not suggest the defendants were going to honour the plaintiff's prior agreements or that the defendants were obligated to fulfill them.

[278] In my view, despite the plaintiff's conduct in relation to 4 Corners, the plaintiff did not purport to bind the defendants and did not repudiate their agreement. The defendants were not justified in terminating the Smithe Consulting Agreement.

Did the plaintiff fail to perform its obligations in a trustworthy manner

[279] The defendants also argue that Mr. Schouw's dishonesty and other detrimental conduct breached the term in the Smithe Consulting Agreement that required the plaintiff to perform the Services under the agreement in a "trustworthy" manner. In making this submission, the defendants lean on employment law concepts and argue that they are applicable because the relationship between the parties was akin to an employer-employee relationship.

[280] The defendants say that since employment law is just an instantiation of contract law, the law relating to repudiation of employment law contracts apply to repudiation of contracts generally. There is no dispute that employment law is an example of contracts in general, but that does not invariably lead to the conclusion that principles developed in the context of employment law are directly applicable to commercial contracts.

[281] The defendants further rely on the concurring reasons of Locke, J.A., speaking for himself in *Dover Corp. (Can.) Ltd. v. Victoria Chinatown Care Society*, 1988 CanLII 2822 (BC CA), (1988) 26 B.C.L.R. (2d) 240 (B.C.C.A.) at para. 20 to argue that in cases where the contract between the parties is for the provision of ongoing services, some level of trust is important, similar to that of an employer- employee relationship.

[282] Furthermore, the defendants argue that because the Smithe Consulting Agreement paid Mr. Schouw a "monthly salary" of \$8,000 in exchange for the defendants having the option to receive services from Mr. Schouw, the agreement effectively created an employer-employee relationship.

[283] As the plaintiff points out, the difficulty with the defendants' argument is that the Smithe Consulting Agreement specifically provides that the plaintiff was not an employee:

1. Consulting

(a) Effective March 19, 2012 . . . the Company [Boffo Smithe] agrees to engage the Consultant [the plaintiff], and the Consultant hereby accepts engagement with the Company as an independent contractor, and not as an employee, to serve as consultant to the Company . . .

[284] Furthermore, the plaintiff argues that employment law concepts are not generally applicable in a commercial context, and they are not applicable in this case. The plaintiff relies on *Wallace v. United Grain Growers Ltd.*, 1997 CanLII 332 (SCC), [1997] 3 S.C.R. 701 to support its position:

90. Although these decisions are grounded in general principles of contract law, I believe, with respect, that they have all failed to take into account the unique characteristics of the particular type of contract with which they were concerned, namely, a contract of employment. Similarly, there was not an appropriate recognition of the special relationship which these contracts govern. In my view, both are relevant considerations.

91. The contract of employment has many characteristics that set it apart from the ordinary commercial contract. Some of the views on this subject that have already been approved of in previous decisions of this Court (see e.g. *Machtiger, supra*) bear repeating.

[285] The concept of termination without cause in employment law, which has been described as relating to conduct by an employee that amounts to repudiation of the employment contract, is not directly comparable to commercial relationships: *CGI Credit Guard Inc. v. Kal Tire*, 2022 BCSC 1532 at paras. 28-32.

[286] The requirement that the plaintiff complete work in a trustworthy manner is not the same as a requirement that Mr. Schouw be a trustworthy person, which is the thrust of the defendants' submissions. There is no ability for the defendants to argue that the plaintiff failed to perform work under the Smithe Consulting Agreement in a trustworthy manner, since the defendants never asked the plaintiff to provide any services.

[287] While I accept that aspects of employment law can be applicable in a commercial contract case, considering the unique nature of an employment relationship, the employment law authorities the defendants rely on are not directly applicable. For example, the defendant analogizes dishonesty by a party in a real estate development business which may lead to a breach of a fundamental term of the contract and / or repudiation of the contract to dishonesty in employment law which constitutes grounds for dismissal. The defendants submit that misconduct of an employee outside the employment relationship may justify dismissal if it is prejudicial, or likely to be prejudicial, to the employer's interests.

[288] In my view, the analogy is inapt. Cause for termination in an employment relationship based on an employee's dishonesty is not the same as conduct amounting to repudiation justifying termination of a relationship governed by a commercial contract. I accept that in some cases dishonesty by a party to a commercial contract could lead to repudiation, but such a context is not present here.

Conclusion

[289] I do not accept that the plaintiff repudiated the Smithe Consulting Agreement. The evidence does not support the defendants' contention that the plaintiff's conduct evinced an intention to not be bound by the agreement.

[290] While Mr. Schouw's conduct may not have accorded with the defendants' reputation they sought to cultivate, the plaintiff's conduct must be looked at in the context of the contractual terms. The plaintiff's conduct did not breach any condition of the Smithe Consulting Agreement.

Did the defendants breach their duty of good faith in contractual performance

[291] The plaintiff argues that the defendants also breached their contractual duties of good faith, arising from the organizing principles of contract law, considered in the context of a joint venture agreement. First, the plaintiff argues that the defendants did not intend to honour the Smithe Consulting Agreement when they caused the

plaintiff to enter into it. Second, by affirming and requiring that the Hornby Consulting Agreement be performed when the defendants had determined not to honour the Smithe Consulting Agreement. Third, by conveying the commercial space to Bassano for inadequate consideration, with the effect of defeating the plaintiff's rights to a share of the profits.

[292] The defendants submit that the plaintiff's arguments require the court to make factual findings that the defendants' witnesses lied about their intentions for the Smithe Property and such a finding is unwarranted. Further, they submit that the defendants did not require the plaintiff to execute the Smithe Consulting Agreement in order to ensure completion of Artemesia, such an agreement had already been executed, and its performance was continued.

The law

[293] In *Bhasin v. Hrynew*, 2014 SCC 71 [*Bhasin*], the Supreme Court of Canada recognized a general duty of honesty in contractual performance:

[65] The organizing principle of good faith exemplifies the notion that, in carrying out his or her own performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner. While "appropriate regard" for the other party's interests will vary depending on the context of the contractual relationship, it does not require acting to serve those interests in all cases. It merely requires that a party not seek to undermine those interests in bad faith. This general principle has strong conceptual differences from the much higher obligations of a fiduciary. Unlike fiduciary duties, good faith performance does not engage duties of loyalty to the other contracting party or a duty to put the interests of the other contracting party first.

[66] This organizing principle of good faith manifests itself through the existing doctrines about the types of situations and relationships in which the law requires, in certain respects, honest, candid, forthright or reasonable contractual performance. Generally, claims of good faith will not succeed if they do not fall within these existing doctrines. But we should also recognize that this list is not closed. The application of the organizing principle of good faith to particular situations should be developed where the existing law is found to be wanting and where the development may occur incrementally in a way that is consistent with the structure of the common law of contract and gives due weight to the importance of private ordering and certainty in commercial affairs

...

[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 ... 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 ...

[Citations omitted.]

[294] However, the good faith duties recognized by the Supreme Court – honest performance and good-faith discretion – are narrowly defined and not open-ended duties of disclosure, loyalty, or altruism. As set out in *Bhasin*:

[70] The principle of good faith must be applied in a manner that is consistent with the fundamental commitments of the common law of contract which generally places great weight on the freedom of contracting parties to pursue their individual self-interest. In commerce, a party may sometimes cause loss to another—even intentionally—in the legitimate pursuit of economic self-interest. Doing so is not necessarily contrary to good faith and in some cases has actually been encouraged by the courts on the basis of economic efficiency. The development of the principle of good faith must be clear not to veer into a form of ad hoc judicial moralism or “palm tree” justice. In particular, the organizing principle of good faith should not be used as a pretext for scrutinizing the motives of contracting parties.

[295] The plaintiff further relies on *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45 and argue that the circumstances are very similar to the case at bar. In *Callow*, the Court recognized that the duty of good faith in contractual performance requires parties to a contract to correct a reasonable misapprehension when its deceptive representations materially misled the other party.

[296] In *Callow*, the Court found that a condominium corporation knowingly misled Callow into believing that a winter maintenance agreement would be renewed. While the defendant had the right not to renew the contract, its deceptive representations led Callow to believe that the contract would be renewed when, in fact, the corporation had already decided to exercise its right to terminate the contract. It was

a breach of the duty of good faith for the defendant to conceal the fact that it had made a decision to terminate the winter maintenance contract and withhold that information to ensure that Callow performed the summer maintenance contract.

[297] Justice Kasirer, writing for the majority, noted at para.49 “[i]t is not enough to say that, temporally speaking, dishonesty occurred while both parties were performing their obligations under the contract; rather, the dishonest or misleading conduct must be directly linked to performance”. The duty of honest performance in contract does not extend to dishonesty that was intended to influence the other party to enter into the contract: *Ocean Pacific Hotels Ltd. v. Lee*, 2025 BCCA 57, at para. 72

[298] The plaintiff also relies on *GATX Corp. v. Hawker Siddeley Canada Inc.* (1996), 1996 CanLII 8286 (ON SC), 27 B.L.R. (2d) 251 (Ont. C.J. (Gen. Div.)) [*GATX Corp.*], a decision which predates *Bhasin*, in support of their argument that Boffo Smithe’s transfer of the commercial space to Bassano breached their contractual duties of good faith.

[299] In *GATX Corp.*, the defendant transferred its shares to a wholly owned subsidiary which had the effect of circumventing a right of first refusal owed to the plaintiff. The defendant then sold the shares of the subsidiary to a third-party competitor. Justice Blair held, at paras. 45 and 71, that a grantor of the right of first refusal must act in “good faith in relation to that right and must not act in a fashion designed to eviscerate the very right which has been given”.

[300] The plaintiff emphasizes that the defendants and plaintiff were parties to a joint venture agreement which is a specific type of agreement. The relationship of the parties to a joint venture agreement may be fiduciary in nature. Even if a fiduciary relationship does not arise, joint venturers owe duties of good faith to each other: *Choi v. Paik*, 2008 BCSC 1122 at paras. 92-101.

Discussion

[301] As I understand the plaintiff's position, the alleged breaches of good faith are arguments made in addition to their breach of contract argument or alternative arguments relating to Boffo Investment in the event that Boffo Investment is not held liable for breach of contract.

[302] The plaintiff's arguments depend on an interpretation of the facts which I have rejected. First, I do not accept that the JVA remained in force after the consulting agreements were entered into. Second, at the time the Smithe Consulting Agreement was entered into, I do not accept that the Boffo Group had definitively decided not to proceed with Thalia. Third, I do not accept that the defendants misled the plaintiff when the Smithe Consulting Agreement was executed in order to ensure that the plaintiff performed its contractual obligations under the Hornby Consulting Agreement. Fourth, I do not accept that the transfer of the Smithe commercial space to Bassano was made to avoid Boffo Smithe's contractual obligations owed to the plaintiff.

[303] As I have explained, I find that it was unlikely that the Boffo Group would proceed to develop Thalia, but that it was still a possibility at the time the Smithe Consulting Agreement was executed. The defendants did not mislead the plaintiff at the time the Smithe Consulting Agreement was entered into.

[304] I also see no merit to the plaintiff's contention that the defendants breached their duty of good faith by causing the plaintiff to enter into the Smithe Consulting Agreement to ensure that the plaintiff performed its duties under the Hornby Consulting Agreement. The Hornby Consulting Agreement was executed at the same time as the Smithe Consulting Agreement; therefore, the plaintiff's performance of the Hornby Consulting Agreement was assured.

[305] Based on my factual findings, the circumstances in *Callow* are distinguishable from those before me. The defendants did not require the plaintiff to enter into the Smithe Consulting Agreement to ensure completion of Artemisia. In *Callow*, the plaintiff was lulled into a belief that its contract was to be renewed by the defendant,

when the defendant knew it did not intend to do so. Here, the defendants did not similarly mislead the plaintiff, they were unlikely to build Thalia but were keeping their options open.

[306] Neither do I accept that the transfer of the Smithe commercial space from Boffo Smithe to Bassano breached the defendant's duty of good faith in contractual performance. Neither the Smithe Consulting Agreement nor the predecessor JVA prohibited Boffo Smithe from selling the Smithe Property or any part of it. I accept that the Boffo Group chose to transfer the commercial space to a separate Boffo Group company for their own accounting and liability reasons.

[307] Mr. Otto and Mike Boffo testified that it was common practice for the Boffo Group to transfer the commercial space in mixed-use buildings they developed into separate corporations and to hold the commercial space rather than sell it. I do not find it surprising or suspicious that the Boffo's could not explain the precise reasons for the transaction. In my view, they reasonably relied on their advisor's advice and their accountant in effecting this transaction. I accept that the Boffo Group's financial statements do not accurately reflect the agreed upon compensation for the transaction, but I am unable to find that the transaction itself or the discrepancies in the Boffo Group's internal accounting mean that Bassano's acquisition of the commercial space breached the defendant's duty of good faith in contractual performance.

[308] The plaintiff's reliance on the decision in *GATX Corp.* does not assist as the circumstances are distinguishable. I do not accept, based on the facts I have found, that Boffo's actions as alleged by the plaintiff were for the purpose of denying the plaintiff's rights under the Smithe Consulting Agreement.

Conclusion

[309] The plaintiff's arguments are aimed at the manner the defendants conducted themselves and the ways in which they are alleged to have breached the agreements between the parties. As an organizing principle, the doctrine of good faith is not a free-standing rule but rather a standard that underpins and is

manifested in more specific legal doctrines. The plaintiff had not established that the defendants breached their duty of good faith in contractual performance.

Has the defendant Boffo Investment been unjustly enriched

[310] The plaintiff argues that the profits owed to it by Boffo Smithe under the Smithe Consulting Agreement were diverted to Boffo Investment and as a result Boffo Investment was unjustly enriched to the detriment of the plaintiff.

[311] The plaintiff relies on the evidence of Messrs. Otto and Mike Boffo who both acknowledged that profits from the Boffo Group's companies are routinely transferred to Boffo Investment. Mr. Otto Boffo confirmed that this had also occurred with respect to the Smithe Project and Mr. Mike Boffo testified, at the time of trial, all the profits from Boffo Smithe have been moved out.

[312] The plaintiff submits that the transfer of profits from Boffo Smithe to Boffo Investment enriched Boffo Investment and correspondingly deprived the plaintiff. They argue that there is no juristic reason for the enrichment, noting that the defendant did not present any evidence of a contract or any other reason for the transfer of funds and profits from Boffo Smithe to Boffo Investment. The defendants did not call an accountant or tender any other financial evidence to explain these transfers. The defendants' general ledger was not detailed, and the defendants' own witness Ms. Pogieter acknowledged that the general ledger does not have features one would expect to see in a reliable financial document.

[313] The defendants argue that the unjust enrichment claim advanced by the plaintiff is not consistent with the claim set out in the plaintiff's fourth amended notice of civil claim; the plaintiff should be held to its pleading, and the argument should be dismissed.

[314] The defendants submit that the plaintiff's claim that Boffo Investment was enriched by the sale of the Smithe property to the defendants is not a claim that can be advanced against Boffo Investment because the Smithe Property was sold to

Boffo Smithe. Boffo Smithe paid fair market value to acquire the Smithe Property; therefore, there is no basis to hold Boffo Investment liable.

[315] The defendant further argues that the plaintiff's unjust enrichment claim is premised on a misunderstanding of the Boffo Group's accounting and financial arrangements. Boffo Investment provided financing to Boffo Smithe for the construction of the Smithe Project. They submit that this arrangement was specifically contemplated in Paragraph 5 of the Smithe Consulting Agreement and in the predecessor JVA. Repayment of debt is a juristic reason.

The law

[316] Unjust enrichment is an equitable remedy. At the heart of the remedy is "the notion of restoring a benefit which justice does not permit one to retain:" *Bao v. Welltrend United Consulting*, 2025 BCCA 3 at para. 26, citing *Kerr v. Baranow*, 2011 SCC 10 and *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, 1992 CanLII 21.

[317] The test for unjust enrichment has three elements: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment: *Garland v. Consumers' Gas Co.*, 2004 SCC 25, at para. 30.

[318] For the first requirement — enrichment — the plaintiff must show that the plaintiff gave something to the defendant which the defendant received and retained. The benefit need not be retained permanently, but there must be a benefit which has enriched the defendant, and which can be restored to the plaintiff *in specie* or by money. Moreover, the benefit must be tangible. It may be positive or negative, the latter in the sense that the benefit conferred on the defendant spares themselves of an expense they would have had to undertake: *Kerr* at para. 38.

[319] For the second requirement – a corresponding deprivation – the plaintiff's loss is material only if the defendant has gained a benefit or been enriched. The plaintiff must not only establish that the defendant has been enriched but that the

enrichment corresponds to a deprivation which the plaintiff has suffered: *Kerr* at para. 39; *Moore v. Sweet*, 2018 SCC 52 at para. 44.

[320] The corresponding deprivation element does not require that the disputed benefit be conferred directly by the plaintiff on the defendant: *Moore* at para. 45.

[321] The third element, that the benefit and corresponding deprivation must have occurred without a juristic reason means that there is no reason in law or justice for the defendant's retention of the benefit conferred by the plaintiff, making its retention "unjust" in the circumstances of the case: *Kerr* at para. 40.

[322] In *Garland* at paras. 44-46, the Court set out a two-step analysis to determine whether there is an absence of juristic reason. First, the plaintiff must show that no juristic reason from an established category exists to deny recovery. The established categories of juristic reasons include a contract, a disposition of law, a donative intent and other valid common law, equitable or statutory obligations. If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis.

[323] Second, the defendant may nonetheless rebut the claim by showing that there is another reason to deny recovery. As a result, there is a *de facto* burden of proof placed on the defendant to show the reason why the enrichment should be retained. As part of the defendant's attempt to rebut, courts should have regard to two factors: the reasonable expectations of the parties, and public policy considerations.

Discussion

Is the plaintiff's argument consistent with its pleadings

[324] The fundamental purpose of pleadings is to define the issues to be tried with clarity and precision, give the opposing parties fair notice of the case to be met, and enable all parties to take effective steps for pre-trial preparation: *Mayer v. Mayer*, 2012 BCCA 77, at para. 215, citing *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56 at para. 43.

[325] In my view, the plaintiff's argument that the movement of profits from Boffo Smithe to Boffo Investment was contemplated by its pleading. In their 4th Amended Notice of Civil Claim, the plaintiff pleaded:

Unjust Enrichment

50. If the Agreement is not enforceable, which is not admitted but is denied, the Boff Defendants have been unjustly enriched.
51. In particular:
 - (a) Smithe Residences suffered a deprivation in vending the Smithe Project to the Boffo Defendants;
 - (b) The Boffo Defendants incurred a corresponding substantial benefit arising from the Smithe Project; and
 - (c) There is no juristic reason for the enrichment.
52. The profits of the Boffo Defendants ought to be disgorged as a remedy for their unjust enrichment.

[326] The 4th Amended Notice of Civil Claim defines "Agreement" as the Smithe Consulting Agreement and "Smithe Project" is defined as the Smithe Property.

[327] In its opening statement, the plaintiff explained that their unjust enrichment claim was against Boffo Investment and related to Mr. Otto Boffo's "own admission on discovery, 'surplus' (i.e. profit) from the Smithe Project was paid to Boffo Investment Corp., without legal justification."

[328] The agreement to sell the Smithe Property to a Boffo Group entity was an agreement initially reached between the plaintiff and Boffo Investment. That agreement – the JVA – contemplated that the Boffo Group would incorporate a separate company (Boffo Smithe) to purchase the land and it contemplated profit-sharing with the plaintiff. The JVA was replaced by the Smithe Consulting Agreement which included a revised profit-sharing agreement. As explained above, I have concluded that the profit-sharing provision applied regardless of whether the Boffo Group decided to construct a project designed by the plaintiff.

[329] I have found that Boffo Investment was not a party to the Smithe Consulting Agreement and cannot be held liable for breach of contract. The plaintiff's pleadings contemplated such a result, as they alternatively plead that Boffo Investment was unjustly enriched by the sale of the Smithe Property. The argument advanced by the plaintiff falls within the scope of its pleading.

Was Boffo Investment unjustly enriched

[330] I find that Boffo Investment – a non-arms length entity - has been unjustly enriched by Boffo Smithe's transfer of profits from the Smithe Project to Boffo Investment. Boffo Investment was enriched by the receipt of the portion of the profits owing to the plaintiff and correspondingly, the plaintiff was deprived of profits owed to it. There is no juristic reason for the benefit conferred on Boffo Investment.

[331] The defendant's argument that the unjust enrichment claim is not sustainable against Boffo Investment because the plaintiff did not vend the land to Boffo Investment but to Boffo Smithe, fails to appreciate the nature of the plaintiff's claim. The plaintiff's claim is not about who owns the land but whether Boffo Investment benefitted from the plaintiff's sale of the Smithe Property, whether the plaintiff suffered a corresponding deprivation, and whether there was a juristic reason for it.

[332] I accept that the plaintiff has proven that the transfer of the profits – a portion of which was owed to the plaintiff – resulted in an enrichment of the defendant Boffo Investment. The transfer of those profits owed to the plaintiff correspondingly deprived the plaintiff of the benefit they were entitled to. A direct relationship between the plaintiff and Boffo Investment is not required to substantiate the plaintiff's claim. There is, on the facts of this case, a sufficient nexus between the plaintiff and Boffo Investment.

[333] I also accept that there was no juristic reason for the transfer of profits. It is not suggested that the profits were moved to Boffo Investment pursuant to a contract or for another juristic reason from the established categories. The suggestion that Boffo Smithe transferred profits for debts owed Boffo Investment is not supported in

the evidence. I find that the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis.

[334] I find that the defendant has not rebutted the claim by showing that there is another reason to deny recovery or shown that there is a reason the enrichment should be retained. The defendant only offers general explanations for Boffo Investment's enrichment, such as "standard practice" or repayment of loans. However, the claim relates to the profit realized from the Smithe Project and not the costs or expenses. The defendants did not present any substantive financial evidence that would explain why Boffo Investment should retain the profits owned to the plaintiff.

[335] Boffo Smithe's failure to pay a portion of the profits owed to the plaintiff breached the provisions of the Smithe Consulting Agreement. I have found that the defendants' position that there was no obligation to share profits with the plaintiff because they had lawfully terminated their agreement was erroneous. Similarly, if the defendants took the view that profit sharing was not required because Thalia was not constructed, I have found that they were wrong in their view. The transfer of the profits to a non-arms length entity – Boffo Investment – deprived the plaintiff of their share of the profits.

[336] It is difficult to see how the defendants could show a juristic reason for Boffo Investment's enrichment, when the enrichment was enabled by Boffo Smithe's breach of their contractual obligations to the plaintiff.

Conclusion

[337] The plaintiff has proven its unjust enrichment claim against the defendant Boffo Investment. The plaintiff has established that Boffo Investment was enriched when Boffo Smithe transferred the profits made from the Smithe Project to Boffo Investment. The plaintiff suffered a corresponding deprivation, and no juristic reason has been shown for the transfer of profits, a portion of which were owed to the plaintiff.

Damages

[338] The plaintiff seeks that damages be paid in accordance with the profit-sharing formula set out in Schedule B to the Smithe Consulting Agreement. If the plaintiff's arguments succeed in relation to the amount of the project costs, the plaintiff seeks a rounded number of \$29,000,000. Alternatively, if the project costs are based on the defendants' financial statements, damages in the amount of \$13,945,170 are sought.

[339] The defendants submit that no damages are payable. If the defendants are found to have breached the contract, their position is that the breach crystallized when the defendants terminated the contract no later than June 2016.

[340] Damages for breach of contract should place the plaintiff in the same position as if the contract had been performed. The damages recoverable are those that naturally flow from the breach and should have been reasonably within the contemplation of the parties, or which were actually known by them, at the time the contract was made: *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, at para. 27; *Moore* at para. 44.

Is the profit-sharing agreement the appropriate measure of damages

[341] The plaintiff argues that Boffo Smithe is obliged to pay damages based on the profit-sharing agreement which provides that the profit allocation is based on the aggregate gross sales revenue. The parties agree that by December 5, 2021, the Smithe Project was substantially complete.

[342] The defendants argue that applying the profit-sharing formula is unjustified and monetary damages are adequate for any damage award. Any damage award should be assessed at June 2016 when the defendants' June 6, 2016, letter accepting repudiation and terminating the contractual relationship was delivered.

[343] The defendants argue that the application of the profit-sharing formula is unwarranted because the plaintiff did nothing to affirm the contract. The plaintiff's June 3, 2016 letter asserting that it was "ready, willing, and able" to perform

contractual services is meaningless because the plaintiff did nothing consistent with keeping the contract alive. There was no further tender of performance, and the plaintiff was not entitled to sit back, await completion of the Smithe Project and demand a share of the profits.

[344] The result, the defendant says, is that no damages are payable because in June 2016, the Smithe Project was not projected to be sufficiently profitable such that the profit-sharing agreement would be triggered.

[345] I do not accept that no damages are payable. The parties bargained for a share of the profits of upon completion of the development of the Smithe Property. Boffo Smithe's breach of contract occurred when the project was complete, requiring profit-sharing with the plaintiff, that the defendant declined to do.

[346] The defendants' argument that the plaintiff ought to have done more, ignores the nature of the contractual relationship between the parties. The decision to require the plaintiff to provide services under the Smithe Consulting Agreement rested entirely with the defendants. The defendants chose not to request the plaintiff to perform any services.

[347] In my view, the appropriate remedy is to award damages based in accordance with the profit-sharing formula contemplated by the Smithe Consulting Agreement.

Did the plaintiff fail to mitigate their damages

[348] The defendants argue that the plaintiff has failed to mitigate its losses. Single purpose corporations, such as the plaintiff, are not excused from mitigation duties, and simply pleading specific performance does not generally suspend mitigation duties: *Southcott Estates v. TCDSB*, 2012 SCC 51.

[349] The defendants suggest that they have met their onus by relying on Mr. Schouw's testimony that he continued to consult on development projects, although not through Smithe Residences. This consulting work should have been

channelled through the plaintiff and that the “record supports a finding that 100% of the claimed loss could have been avoided.” As a result, only nominal damages are appropriate if a breach is found and a failure to mitigate is found.

[350] The only evidence about any consulting work performed by Mr. Schouw since the defendants terminated the contract came from Mr. Schouw’s testimony. Only minimal information was provided and there was no evidence about whether his consulting work was profitable.

[351] The plaintiff again argues that the defendants’ position does not take into account the nature of the contract which only required the plaintiff to provide services if, and only if, they were requested to. Since the defendants never requested that the plaintiff perform services under the agreement there was nothing more the plaintiff could have done.

[352] The plaintiff argues that there is no duty to mitigate when a claim is made to compel agreed upon profit sharing until after that right to profit sharing is foreclosed: *Mill v. Orogenic Gold Corp.*, 2024 BCCA 359 at para. 25.

[353] In my view, assuming that the plaintiff had a duty to mitigate its losses, the defendant has not proven that the plaintiff failed to do so. The defendants’ argument overlooks the nature of the Smithe Consulting Agreement. The plaintiff was obliged to provide services if, and only if they were requested to do so. The defendants made no such requests. Further, there is insufficient evidence to support the defendants’ position that the plaintiff should have done more consulting work or that any work performed by Mr. Schouw garnered profits. As the defendants have emphasized, Mr. Schouw had a myriad of legal and financial problems. I am doubtful that he or the plaintiff were in a position to generate profitable consulting work.

The profit allocation formula

[354] Schedule B to the Smithe Consulting Agreement is entitled “Consulting Fees” and provides in part:

1. The Company shall pay the Consultant a portion of the profit, if any, on the Smithe Project as follows and in the following order and priority:

- (a) first, to the Company an amount equal to 15% of total project costs;
- (b) second, to the Consultant an amount equal to 5% of total project costs;
- (c) third, to the Company \$2,000,000;
- (d) fourth, the remaining balance split 60% to the `

The above profit allocation is based on the aggregate gross sales revenue for the Smithe Project being at least \$63,000,000, net of any credits.

[355] Schedule B also provides for an adjustment based on any shortfall in the aggregate sales revenue for the Hornby project.

2. Despite section 1 of this Schedule, if the aggregate gross sales revenue for the Hornby Street project developed by Boffa Developments (Hornby) Ltd. and Hornby Residences Ltd. is less than \$33,000,000, net of credits, the shortfall amount plus 20% thereof will be paid from the profit on the Smithe Project before any other portion of that profit is distributed to the Company or the Consultant pursuant to section 1 of this Schedule. Appendix 1 attached to this Schedule sets forth the shortfall amount assuming aggregate gross sales revenue of \$30,000,000 net of credits and total costs of \$25,000,000 net of credits and total costs for the Hornby Street project.

[356] The interpretation and application of the profit allocation formula requires me to determine what the project costs were for the Smithe Project, how the Hornby Shortfall is calculated, and whether the Smithe Project profits are limited to profits from the residential portion of the development or whether it also includes profits from the commercial space. If profits from the commercial space are captured by the profit-sharing formula, I must also consider whether Bassano's equity interest impacts the profits available for distribution.

[357] Ms. Suzanne Schulz was called by the plaintiff and was qualified as an expert to provide opinion evidence on accounting, forensic accounting, the interpretation of financial statements, and the methodologies of the quantification of damages. Her opinion, based on the Boffo's Group's financial statements, provided the calculation for the profit allocation pursuant to the Smithe Consulting Agreement.

[358] The plaintiff submits that Ms. Schulz's opinion should be accepted and relied upon by the Court in order to determine the quantum of damages. I have no hesitation in accepting Ms. Schulz's opinion. Ms. Schulz was a careful and thoughtful witness who provided reasonable responses to questions asked of her in cross-examination. She easily and clearly explained the basis for her conclusions and where there were some weaknesses for the conclusions she reached, she readily conceded them. She differentiated between facts that she was instructed to assume as opposed to facts that were supported by her review of financial statements or other documents she had been provided with. Ms. Schulz clearly understood her role as an expert and did not appear to be an advocate for the plaintiff.

Project costs

[359] Ms. Schulz based her opinion on total project costs of \$160,248,433. This amount was reported in and supported by the Boffo Group's financial statements. Furthermore, in the Agreed Statement of Facts (ASF) tendered as Exhibit 2 in this trial, the parties agreed that the total project costs for the Smithe Project, including the Smithe Commercial Space, were \$160,248,433.

[360] However, the plaintiff now argues that the agreed amount of \$160,248,433 is not an admission and based on the other trial evidence, the project costs were \$126,848,250. The difference significantly alters the amount payable to the plaintiff under the profit-sharing formula.

[361] In my view, for the reasons that follow, the plaintiff is bound by the ASF, and the agreed project costs of \$160,248,433 are supported by the evidence.

Is the plaintiff bound by the agreed facts

[362] The circumstances that have led the plaintiff to seek that this Court find the project costs were not what the parties agreed to were explained as follows. The ASF was signed on January 2, 2025, and before counsel met with Mr. Otto Boffo on June 3, 2025. In the June 3, 2025, meeting Mr. Otto Boffo confirmed that the cost for

land shown in reports relating to construction financing was not the cost but an agreed upon value for borrowings. The actual land cost was approximately \$28 million, and the project did not actually receive the difference of approximately \$33 million between the cost and the agreed upon value of the land. The project costs of \$160,248,433 included the value of the land, which was approximately \$61.9 million, as opposed to the cost of the land. The \$160,248,433 million in project costs included approximately \$33 million in land equity. Therefore, the plaintiff says the equity of approximately \$33 million should be deducted from the \$160,248,433 million resulting in project costs of \$126,848,250.

[363] The defendants argue that the plaintiff is bound the admission and it is not open to the plaintiff to resile from their admission in closing submissions. If the plaintiff wished to be relieved of their admission, they were obliged to seek leave to withdraw or amend the agreed fact. The plaintiff's unilateral recantation from their agreement prejudices the defendants because they conducted their case on the basis that the project costs were \$160,248,433. Furthermore, there is a difference between the value the lender ascribed to the land for the purpose of approving a construction loan and the true value of the land.

[364] Long before the trial commenced, the plaintiff was aware that the defendant took the position that the \$61,905,000 land value amount was only the agreed land value in the project budget approved by the lender, and not the true land value. The plaintiff, in their notice to admit dated December 6, 2024, requested that the defendant admit that \$61,905,000 was the true land value of the Smithe Property. The defendant declined to make the admission and advised that the figure was only the agreed land value in the project budget approved by the lender.

[365] The defendants reiterated this position during the trial, when Ms. Suzanne Schulz testified, the defendants indicated that it was not open to the plaintiff to put this alternative calculation to the witness, because the plaintiff had admitted that the project costs were \$160,248,433. The defendants agreed that this issue could be addressed during closing submissions.

[366] The plaintiff did not address the issue of whether they were bound by the ASF in their closing submissions. Instead, they did so in their reply submissions. The plaintiff argued that they were not bound by the ASF, the issue of project costs was known before the trial commenced and it was “flagged” when counsel read the ASF into the record. It was for the defendants to seek an adjournment or lead evidence to address the point. The plaintiff argues that defendant does not allege any specific prejudice.

[367] The plaintiff maintains that the agreed facts are not admissions that require leave of the court to withdraw under *Supreme Court Civil Rule 7-7(5)(c)*. They argue that even if leave is required, leave should readily be granted, as facts have come to the attention of the plaintiff and to the court only after the alleged admission was made.

[368] I accept the plaintiff flagged that their position was that equity had been included in the project costs when counsel read the ASF into the record. Further, in the plaintiff’s written opening statement, the plaintiff stated:

26. The quantum of damages sought is \$29,025,353 (including applicable sales tax). This amount is sought on the basis of the "waterfall" profit sharing formula in the Consulting Agreement, premised upon revenues and costs which are derived solely (and accepted for the purposes of trial, notwithstanding several indications they are overstated) from the Defendants' financial statements and records, along with Mr. Otto Boffo's admission that approximately \$34 million in "land costs" was actually equity in the project. Equity is profit. All of this is set out in the expert report of Ms. Suzanne Schulz of BDO, an accountant who will testify in the course of the Plaintiffs case, who based her opinion on the figures found in the Boffo Defendants' own accounting records. The inputs underlying Ms. Schulz's calculations are not challenged by the Boffo Defendants' responding expert.

[369] Nevertheless, after opening, the plaintiff tendered the ASF as an exhibit at trial.

[370] The plaintiff’s position that agreed facts formally entered into in a trial are not admissions under the *Supreme Court Civil Rules*, is an overly narrow view of what constitutes an admission. An agreed statement of facts is an admission as

to what facts need not be proven, as explained in *Sidhu v. Hiebert*, 2022 BCSC 1024:

[269] On the other hand, an agreed statement of facts is an admission as to what facts need not be proven at trial by the parties: *Berg v. British Columbia (Police Complaint Commissioner)*, 2006 BCCA 225 at para. 67.

[270] In *Patterson v. Scherloski* (1971), 1971 CanLII 703 (ON SC) 21 D.L.R. (3d) 641 at 644-645, [1971] 3 O.R. 753 (H.C.), the Court stated:

I must now determine the standing and legal effect of the agreed statement of facts. I had at first thought that this was a matter which would permit of a categorical imperative -- a general rule that a party was either bound or not bound by an agreed statement of facts. There is much authority for either proposition. It would be helpful if lawyers agreeing to facts could know in advance exactly what was the effect of such agreement. There are rules governing admissions, but in general these relate to pleadings and examinations and are unilateral. There are no rules governing agreed statements of facts but there is a strong and practical policy which should favour and encourage them for the quick resolution of disputes and expedition of the trial. That they are an agreement, are bilateral and are given in consideration of like agreements by others, are facts which I have not found discussed in the cases but which seem to me to be particular and significant...

[Emphasis added in *Sidhu v. Hiebert*]

[271] In Sidney N. Lederman, Michelle Fuerst, Hamish C. Stewart, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 6th ed. (LexisNexis Canada, 2022) at ¶19.2 it says:

A formal admission may be made: (1) by a statement in the pleadings or by failure to deliver pleadings; (2) by an agreed statement of facts filed at the trial; (3) by an oral statement made by counsel at trial, or even counsel's silence in the face of statements made to the trial judge by the opposing counsel with the intention that the statements be relied on by the judge; (4) by a letter written by a party's solicitor prior to trial; or (5) by a reply or failure to reply to a request to admit facts. The Manitoba Court of Appeal stated that "[e]xtreme care and clarity is required before describing discovery evidence as a formal admission," and that such evidence is generally used as an informal admission by the opposing party. A formal admission of fact, as distinct from an admission of law, cannot be withdrawn except with leave of the court or the consent of the party in whose favour it was made...

[Emphasis added in *Sidhu v. Hiebert*]

[371] In *Tirling Sheet Metal Ltd. v. Troutman Estate*, 2010 BCSC 958, B. MacKenzie, J. addressed a contradiction in an agreed statement of facts and the evidence before him. The agreed statement of facts stated that "for a

number of years prior to his death in 2007 Troutman told Tirling that Troutman intended to sell” his property. The evidence at trial established that the property was not purchased until 2006; therefore, it was not possible that Troutman had for “a number of years” advised Tirling that he intended to sell the property. MacKenzie, J. held that except in rare circumstances a court should accept an agreed statement of facts, unless it would be unjust to do so:

[8] Except in rare circumstances, a court should accept an agreed statement of facts, especially when opposing counsel has not sought to amend it or to withdraw agreement. However, in this case, it would be unjust to accept certain agreed facts that are contradicted by the evidence presented by the plaintiffs who drafted the statement of agreed facts.

[9] In *Patterson v. Scherloski*, 1971 CanLII 703 (ON SC), [1971] 3 O.R. 753, 21 D.L.R. (3d) 641 at 645 (H.C.J.), Wright J. determined that the court’s discretion to alter an agreed statement of facts should be “warily exercised, normally, to defeat fiction, to help establish truth, and to relieve clients of fatal mistakes by lawyers.” The rationale for altering an agreed statement of facts is likely that expressed by the court in *Avco Delta Corp. v. Mackay*, 1977 CanLII 1666 (AB CA), 76 D.L.R. (3d) 541, [1977] 5 W.W.R. 4 at 8 (Alta. S.C.), a case in which the agreed facts had the effect of establishing a fact contrary to the law:

As a general rule no court of whatever level should permit itself to be used and knowingly adjudicate upon any issues presented by opposing litigants based on an erroneous premise; to do so would only serve to erode the credibility and prestige of the judicial system.

[10] Further, if I did rely on erroneously stated material facts in this special case, my ruling could be set aside, as occurred in *Reichl v. Rutherford-McRae Ltd.* (1964), 1964 CanLII 766 (BC CA), 47 W.W.R. 227 at 229 (B.C.C.A.), to “avoid a possible miscarriage of justice”. Justice Davey at 230 further found that “[i]t would reflect little credit on the law if the mistakes of the solicitors in preparing the special case should prevent a proper decision on the merits.”

[11] Finally, as in *R. v. National Bank of Canada*, 1993 CanLII 2967 (FC), [1993] 3 F.C. 664 at 668, [1993] 2 C.T.C. 161 (T.D.):

This is not a case in which facts have been agreed upon, on the express understanding that while they may be inaccurate, the parties, for various reasons, have agreed to be bound by them notwithstanding. Nor to my knowledge is this a case in which one party or the other acted to its detriment as a result of the agreement as to facts.

Here, opposing counsel never actually acknowledged the agreed statement of facts, although they did proceed with the special case. Thus, there was no express understanding that the hearing would be based on inaccuracies. Further, the agreed statement of facts was not referred to at the hearing. There is no indication that counsel relied on any of the erroneous facts and did not present certain evidence because of them. Rather, it is the evidence they did present that led to this problem.

Therefore, when the evidence contradicts the agreed statement of facts, I rely on the evidence to make my findings.

[372] In my view, the amount of the project costs set out in the ASF was an admission that the defendants were entitled to rely on. The plaintiff requires leave to withdraw the admission; it was not sufficient for the plaintiff at the start of the trial to note that the anticipated evidence would disclose a different amount than the plaintiff had agreed to.

[373] The plaintiff argues that if leave is required, it should readily be granted, as facts have come to the attention of the plaintiff and to the Court only after the alleged admission was made, in advance of the earlier scheduled trial of this action which did not proceed.

[374] In deciding whether an admission should be withdrawn, the court must consider whether doing so is in the interests of justice. In my view, the factors that have been held to be relevant to the interest of justice consideration in the context of withdrawal of an admission under Rule 7-7(5) are equally applicable to an application to withdraw an admission made in an ASF.

[375] In *Hamilton v. Ahmed*, [1999] B.C.J. No. 311, 1999 CanLII 7029 the Court set out the “interest of justice” factors as clarified in *Sidhu v Hothi*, 2014 BCCA 510:

- (a) whether the admission was made inadvertently, hastily, or without knowledge of the facts;
- (b) whether the “fact” admitted was or was not within the knowledge of the party making the admission;
- (c) where the admission is one of fact, whether it is or may be untrue;
- (d) whether and to what extent the withdrawal of the admission would prejudice a party; and
- (e) whether there has been delay in the application to withdraw the admission and any reason offered for such delay.

[376] It is not in the interests of justice to allow the plaintiff to resile from the admission made. The timing of the leave application – in reply submissions at the close of the trial – weighs heavily against granting leave. I accept counsel's assertion that the plaintiff only confirmed that equity had been included in the project costs in June 2025, and that was not known when the ASF was signed on January 2, 2025. However, before the ASF was signed, the plaintiff at least suspected that equity had been characterized as a cost. Nevertheless, the plaintiff proceeded to trial and tendered the ASF as part of their case without seeking leave to amend the amount of project costs agreed to.

[377] The prejudice to the defendants is obvious. If I accept that the project costs were lower than the admission made, the damages payable increase significantly. The defendants were entitled to proceed to trial and rely on the project costs admission. Had the plaintiff sought leave before the defendant called its case, not only could the defendants have made proper submissions opposing the application, but the defendant could have considered whether to tender evidence in response to the plaintiff's revised position.

Were the project costs \$160,248,433

[378] In any event, project costs of \$160,248,433 are well-supported by the evidence and the plaintiff has not proven that the project costs were \$126,848,250. The total agreed upon project costs were derived from the financial statements of the Boffo Group. The plaintiff's position that project costs of \$126,848,250 are more accurate is mainly derived from disclosures and reports made related to construction financing. The plaintiff submits that the approximately \$33 million difference can only be attributable to the land value, which is not a cost but is equity.

[379] I accept the defendants' position that there is a significant difference between the value a lender might place on property for the purpose of advancing financing and the actual value of the property. Further, there is no evidence of the land value nor is there any evidence as to what post-draw costs were incurred and funded. No appraisal evidence has been tendered in support of the plaintiff's position.

[380] The defendant's position was supported by the testimony of Mr. Otto and Mike Boffo who testified that financial statements carry land at historical cost, not at revalued amounts. Construction budgets and reports are for lenders, covering items financeable under the construction facility, and do not represent all project costs borne by the developer.

[381] Ms. Schulz explained that she considered the financial statements to be reliable because they had been reviewed by an external accountant. Her opinion based on project costs of \$126,848,250 was based on instructions and was not supported by underlying documentation that had been reduced to a financial statement reviewed by an external accountant. In her view, financial statements are more reliable than construction loan related reports because they represent actual costs, as opposed to estimated costs.

[382] In my view, the plaintiff has failed to establish that the project costs are anything other than \$160,248,433.

The Hornby shortfall

[383] The Smithe Consulting Agreement provides that any shortfall amount from the Hornby project is to be paid to the defendant Boffo Smithe before any profit from the Smithe Project is allocated. There is no dispute that the net gross sales revenue fell below the \$33,000,000 floor, therefore, there is a shortfall amount to be taken into account. While there is some ambiguity as to the whether the Hornby shortfall is the actual project costs or whether the project costs were fixed at \$25,000,000, the defendant does not appear to contest the plaintiff's position that the provision contemplates actual project costs.

[384] In my view, the text of the Smithe Consulting Agreement is clear, the parties intended that the actual project costs be used to calculate the shortfall. If the parties had intended that the project costs be a fixed amount the agreement would have said so as it does for some other costs. Section 2 of Schedule B provides that Appendix 1 is an example *assuming* aggregate gross sales revenue of \$30,000,000

net of credits and total costs of \$25,000,000. In my view, both revenue and costs are assumed only for the purpose of the example and are not fixed amounts.

[385] The aggregate gross sales revenue for the Hornby Project was \$30,894,389.93 and the total project costs were \$26,487,235. Relying on Ms. Schulz's application of the profit-sharing provisions of the Hornby Consulting Agreement, I accept the shortfall amount is \$1,500,000. To that, a 20% premium is to be added, resulting in a total shortfall amount of \$1,800,000 to be deducted from the Smithe Project profit before the profit allocation formula is applied.

The project's profits

[386] It is not disputed that the amount of profit to be included in the profit-sharing formula includes the profit made by Boffo Smithe for the development of the residential portion of the Smithe Project.

[387] The defendants argue that the value of the commercial space should not be included in the calculation of profit-sharing because any contractual obligations to pay the plaintiff exist between the plaintiff and Boffo Smithe only. Boffo Smithe did not develop or own the commercial space.

Is the commercial space included in profit sharing

[388] The plaintiff argues that they are entitled to share in the profits from the development of the entirety of the Smithe Project. The defendant says that the agreement contemplated profit sharing as it related to the residential development only. The parking space and the commercial space are owned by entities that are not parties to the Smithe Consulting Agreement and therefore the plaintiff is not entitled to those profits. Any entitlement the plaintiff has to share in the profits is limited to profits earned by Boffo Smithe.

[389] The defendant argues that the mere fact that these two entities are Boffo affiliates does not accord the plaintiff the right to capture the profits of Boffo Parking or Bassano Land Corp. In order to do so, the plaintiff would need to pierce the corporate veil and show that those entities were instrumentalities of fraud or a sham,

for which there is no evidence: *B.G. Preeco 1 (Pacific Coast) Ltd. v. Bon Street Holdings Ltd.* 1989 CanLII 230 (BC CA), 60 D.L.R. (4th) 30, 37 B.C.L.R. (2d) 258 (C.A.).

[390] I do not accept that interpreting the agreement to include profits earned from the commercial space and parking requires the piercing of the corporate veil. In my view, the text of the Smithe Consulting Agreement and a consideration of the surrounding circumstances leads me to conclude that the parties intended the profit-sharing provisions apply to the profit from the whole of the development and not limited to only the residential portion.

[391] There is nothing in the text of the Smithe Consulting Agreement to support the defendants' position that profit sharing was limited to the profits from sales of the residential units. Neither does the text of the agreement support the defendants' position that as the contracting party only Boffo Smithe is liable to share profits. The projects profits are captured by the agreement, not Boffo Smithe's profits.

[392] Even if the defendants' theory that profit-sharing was only required if Thalia was built was accepted, profit-sharing would not be limited only to the residential profits because Thalia was intended to be a mixed-use development. If the intention of the parties was to limit profit sharing to only a portion of the development, the agreement would have said so.

[393] The plaintiff relies on the *Kingsdale* and *GATX Corp.* decisions to support their position. In *Kingsdale*, the defendant Sprott argued that because Sprott was managing the assets in a separate entity, Kingsdale was not entitled to payment of the success fee and was only entitled to nominal damages. The trial judge rejected this argument and held that the terms of the agreement could not be avoided because Sprott chose to restructure for tax reasons. The court further held:

[144] The CFCL agreement was a results-oriented agreement. It did not define expectations as to work product, time spent, or length of time required to achieve the result. I am satisfied that the success fee was owed if, and when, Sprott acquired management of CFCL's assets. That is what happened, and the success fee is owed. It is of no moment that the assets are now in a different trust of Sprott's own creation.

[394] In *GATX Corp.*, at para. 71, the court held that the grantor of the right of first refusal is not entitled to frustrate it by conveying the property in such a way as to avoid having to give the right in the first place.

[395] I accept that these cases provide some support for the plaintiff's position. The fact that Boffo Smithe transferred portions of the Smithe Project to related non-arms length companies does not mean the defendant can avoid the profit-sharing allocation as contemplated by the Smithe Consulting Agreement. In my view, the defendant's motives are immaterial. It does not matter whether the defendant's conveyance was intended to deprive the plaintiff of a share of the profits or whether it was done for legitimate commercial reasons.

What is the value of the commercial space

[396] The plaintiff relies on the report and testimony of Mr. Craig Hennigar who was qualified as an expert to provide opinion evidence on the appraisal of real property and the value of improvements. In Mr. Hennigar's opinion, the retrospective market value of the Smithe Commercial Space, including the commercial parking space, as of December 5, 2021, is \$31,000,000. In arriving at his opinion, Mr. Hennigar utilized both the income and direct comparison approach.

[397] The defendant called Mr. Angus Heaps as a responding expert who offered a critique of Mr. Hennigar's opinion. In his opinion, Mr. Hennigar's appraised value of the Smithe Commercial Space was too high, and he estimated that the market value of the commercial space including the commercial parking space was \$24,730,000.

[398] The defendant argues that Mr. Hennigar's opinion is unreliable, and the commercial space should be valued in accordance with Mr. Heaps appraisal as his was the more reliable of the two appraisals tendered by the parties. The defendant submits that Mr. Hennigar's methodology was mainly of his own making and was not supported by external authority, as opposed to Mr. Heap's assessment.

[399] Both Mr. Hennigar and Mr. Heaps offered careful and compelling evidence in support of their respective opinions. Mr. Hennigar's report relied on a substantial

body of information in support of his conclusions, and he conducted a careful analysis of all information that was available to him. Mr. Hennigar was thoroughly cross-examined and defended his opinion by providing reasonable responses to the questions asked.

[400] I do not accept that Mr. Hennigar's opinion is unreliable because he used methodology of his own making. Mr. Hennigar used reasonable methods to formulate his opinion. Further, Mr. Hennigar was able to access a vast amount of information held by Colliers International that Mr. Heaps did not have access to. The breadth of data available to Mr. Hennigar adds weight to his opinion.

[401] However, I accept some of Mr. Heap's criticisms of Mr. Hennigar's opinion. I find that Mr. Hennigar's opinion about rental rates for the commercial space is too high. For example, Mr. Hennigar did not adopt the rent for one of the commercial units (Citrus Design) in the Smithe Project which I find is one indicator of the market value. Further, I find that Mr. Hennigar did not make adequate adjustments to reflect the market conditions for commercial space as of December 2021, which were less favourable than Mr. Hennigar acknowledged. In my view, through examining the data provided by Mr. Hennigar in conjunction with Mr. Heap's critique, I find that Mr. Hennigar's assessment of value is marginally inflated.

[402] I do not accept that the bottom-line opinion offered by Mr. Heaps should be accepted either. In reaching his conclusion, Mr. Heaps factored in lease rates for properties that are not comparable to the Smithe Commercial Space including a property in Burnaby and a property outside of downtown Vancouver. Further, some of Mr. Heap's criticisms of Mr. Hennigar's report amount to nit-picking. I reiterate that Mr. Hennigar had a vast amount of data available to him that he was able to rely on to reach his conclusion, and I accept that Mr. Hennigar's use of two methods (the income and direct comparison approach) adds weight to his opinion.

[403] Considering the foregoing, I find that the value of the Smithe Commercial Space as of December 5, 2021, was \$29,000,000.

Whether Bassano's equity interest is deducted from the profits

[404] Paragraph five of Schedule B to the Smithe Consulting Agreement provides:

5. The Company's and any Boffo Company's equity or registered mortgages for the Smithe Project will carry an interest rate of HSBC Bank Canada prime rate plus 2% calculated monthly, and will be accrued and paid in full before any profit distribution to the parties. Any mortgage loan for the Smithe Project may be provided by a Boffo Company.

[405] The defendants submit that the evidence shows that Bassano continues to carry an investment in the Smithe Commercial Space and the amount of that debt has never been repaid. Bassano's financial statements tendered as evidence in this trial show that as of December 31, 2021, the outstanding amount was \$12,522,094.

[406] The defendants argue that as this amount has never been repaid in full, let alone with interest, then no profits can be distributed to any party until that equity and accrued interest has been fully recouped. The defendant also submitted that if this Court were to determine that the profit-sharing provisions were operative, any damage award must be reduced by \$12,522,094.

[407] While Ms. Schulz did not include the amount of Bassano's equity interest in the commercial space (because she was not instructed to), she had reviewed the Bassano financial statements and confirmed that Bassano has not been paid in full. In 2021, approximately \$12,500,000 of the total project costs had been allocated to the commercial space and was reported in the financial statements of Bassano.

[408] The plaintiff submits that Bassano's equity investment should not be deducted from the profits. In advancing this argument, in the main, the plaintiff criticizes the Boffo Group's accounting practices. The plaintiff argues that the outstanding amount cannot be considered to be equity because equity does not include "notional amounts" put on the balance sheet of one company after a non-arms length transfer for already paid for property. The plaintiff says Bassano's equity investment is in fact a paper profit and suggests that to the extent that Bassano is carrying an alleged paper cost, its own banking records show that in keeping with the opaque practices of Otto Boffo, millions of dollars were taken from his left hand and shipped over to

his right. Bassano has not accounted for its profit as a result of stripping any excess funds to Boffo Investments.

[409] I do not accept the plaintiff's arguments. While the accounting methods of the Boffo Group may not be entirely transparent, the uncontroverted evidence is that as of December 2021, Bassano held an equity interest in the Smithe commercial space. The commercial space had neither been sold nor fully leased at that time. There is no evidence that Bassano was profitable, let alone that its profits were diverted to Boffo Investments.

[410] The plaintiff effectively seeks to have this Court look behind the Boffo Group's transactions to find that Bassano's equity in the Smithe commercial space is not genuine. In doing so, the plaintiff seeks to have the value of the commercial space included as part of the plaintiff's share of the profits without having to share in the costs.

[411] Having concluded that the profit-sharing formula includes the commercial space, the parties did not dispute that the value of the commercial space as of December 2021, is to be considered as profit. As a result, in determining the amount of profit available to be allocated in accordance with the profit-sharing formula, I find that paragraph five of Schedule B to the Smithe Consulting Agreement means that Bassano's equity interest, as of December 2021, is to be deducted from the total amount of profit available for distribution.

[412] The total value of the Smithe commercial space is reduced by Bassano's equity investment of \$12,522,094.

Are profits considered to be after tax profits

[413] The defendants argue that the reasonable interpretation of profit in the Smithe Consulting Agreement is after-tax profit, because Boffo Smithe has already paid \$7,000,000 in tax. They submit that there is no commercial reason why the plaintiff should get a profit share without sharing in this burden.

[414] There is nothing in the Smithe Consulting Agreement that supports the defendants' position. The reason the defendants remitted tax on the whole of the profits from the Smithe Project is because they did not pay the plaintiff the share that I have found the plaintiff was entitled to.

[415] The defendants rely on Ms. Potgieter's report which opines that it is not unusual for stakeholders to share in after-tax profits, as allocating pre-tax profits could leave the operating party at the disadvantage of paying tax for 100% of the profits. However, in this case there is no evidence of such an agreement between the parties. In her testimony, Ms. Potgieter confirmed that "profits" does not have a standard meaning and ordinarily profits are taxed in the hands of the recipient.

[416] The plaintiff submits that in calculating compensation for breach of contract or unjust enrichment, it is improper to deduct the estimated tax from the award, because the plaintiff would then be subject to a double penalty in that the plaintiff would still be required to pay tax on the amount of the reduced award: *Re City Parking Ltd. and City of Toronto*, 1980 CanLII 1929 (ON SC).

[417] I agree with the plaintiff. There is nothing in the Smithe Consulting Agreement nor is there any other evidence that would suggest that profit means after-tax profits be paid to the plaintiff. The defendants' argument that there is no commercial reason for concluding that the plaintiff should receive pre-tax profits and not share in the defendants' tax burden would have the court provide a benefit to the defendants as a result of their failure to comply with the Smithe Consulting Agreement.

Conclusion on damages

[418] The gross sales revenue of the residential units was \$175,269,851 and I have found the value of the commercial space to be \$29,000,00. Thus, the gross revenue from the Smithe Project was \$204,269,851.

[419] From the gross revenue, the project costs of \$160,248,433 and Bassano's equity investment of \$12,522,094 must be deducted, leaving a total profit of \$31,499,324.

[420] Schedule B to the Smithe Consulting Agreement sets out the order and priority of profit distribution. First, the Hornby shortfall, which I have found to be \$1,800,000 is owed to Boffo Smithe. Second, Boffo Smithe is entitled to 15% of the project costs which amounts to \$24,037,265. Third, the plaintiff is entitled to 5% of the project costs which would amount to \$8,012,422. However, after allocating 15% of the project costs to Boffo Smithe, only \$5,662,059 of the remaining profit is available for distribution.

[421] The defendants are liable to pay GST on the profit owed to the plaintiff. I find that the defendants are liable to pay damages in the amount of \$5,945,162 including GST.

Interest

[422] The plaintiff is entitled to prejudgment interest in accordance with s. 1(1) of the *Court Order Interest Act*, RSBC 1996, c. 79, I order prejudgment interest at the Registrar's rate commencing on December 5, 2021. I also order post-judgment interest in accordance with s. 7(2) of the *Court Order Interest Act*, RSBC 1996, c. 79 payable at the Registrar's rate.

Costs

[423] The parties requested the opportunity to address the issue of costs following receipt of this judgment. If the parties are unable to reach an agreement on costs, the parties shall contact Supreme Court Scheduling within 30 days of the date of these reasons to request to appear before me.

Conclusion

[424] The plaintiff has proven that the Smithe Consulting Agreement was binding and enforceable. The defendant Boffo Smithe breached the agreement by failing to pay the plaintiff a share of the profits of the Smithe Project in accordance with the provisions of the agreement.

[425] The plaintiff has also proven that the defendant Boffo Investment was unjustly enriched to the detriment of the plaintiff when Boffo Smithe transferred profits made

from the Smithe Project, a portion of which was owed to the plaintiff, to Boffo Investment.

[426] The defendants are jointly and severally liable for damages in the amount of \$5,945,162, plus interest.

“J. Walker, J.”