COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *NV Highway Properties Ltd. v. 1155204 B.C. Ltd.,* 2025 BCCA 8

Date: 20250113
Docket: CA49743

Between:

NV Highway Properties Ltd.
and Catalina Facilities Rental Properties Ltd.

Appellants
(Defendants)

And

1155204 B.C. Ltd. and 1172111 B.C. Ltd.

Respondents
(Plaintiffs)

Before: The Honourable Madam Justice Horsman
The Honourable Justice Skolrood
The Honourable Justice Winteringham

On appeal from: An order of the Supreme Court of British Columbia, dated February 13, 2024 (*1155204 B.C. Ltd. v. NV Highway Properties Ltd.*, 2024 BCSC 248, Vancouver Docket S1813796).

Counsel for the Appellants:	J.L. Driedger S.T. Robertson
Counsel for the Respondents:	G. Allen N. Kamoosi V. Li, Articled Student
Place and Date of Hearing:	Vancouver, British Columbia September 13, 2024
Place and Date of Judgment:	Vancouver, British Columbia January 13, 2025

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Written Reasons by:
The Honourable Madam Justice Horsman

Concurred in by:
The Honourable Chief Justice Skolrood
The Honourable Justice Winteringham

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Summary:

The appellants argue that the trial judge erred in law by finding a binding contract between the parties unenforceable based on the principle of nemo dat quod non habet ("no one can give what they do not have"). The contract was for the sale of a number of properties, and included a share purchase option which the respondents ultimately elected. However, the shares were owned by a holding company which was not a party to the contract. Held: Appeal allowed. Nemo dat is a principle of property law typically applied where there is a dispute over entitlement to property or priority of interests. Nemo dat does not operate to render contracts unenforceable on the basis that the seller does not own what they are contracting to sell. Accordingly, the trial judge erred in holding that nemo dat rendered the parties' otherwise binding contract unenforceable because the owner of the shares was not a party to the contract. The evidence showed that the appellants were capable of conveying the shares to the respondents at the time of closing.

Reasons for Judgment of the Honourable Madam Justice Horsman:

Overview

[1] The central issue on this appeal is whether the principle of *nemo dat quod non habet* ("no one can give what they do not have") renders an otherwise valid and binding contract for the sale of property unenforceable if the seller does not own the property they have contracted to transfer.

[2] The appellants and the respondents were parties to a contract for the sale of properties in North Vancouver. The appellants were the sellers and the respondents were the buyers. The contract provided an option for the respondents to acquire the properties by way of a purchase of the shares of one of the appellants. The respondents exercised this option and paid a deposit of $1.25 million. However, prior to the closing date, the respondents indicated their intention not to complete the transaction.

[3] When the appellants refused to return the deposit, the respondents brought a civil claim against the appellants. The primary issue at trial was whether the deposit could be retained by the appellants as liquidated damages pursuant to the terms of a valid and enforceable contract, or whether the appellants were obliged to return the deposit to the respondents because the agreement was unenforceable.

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[4] The trial judge found that all of the requirements of a binding contract were met—the parties had an intention to contract, there was a meeting of the minds, and the essential terms of the contract were sufficiently certain. However, she found that the agreement was unenforceable based on the rule of *nemo dat quod non habet* (the "*nemo dat* rule") because the appellants did not own the shares they were bound to transfer under the agreement. Accordingly, the trial judge concluded that the respondents were entitled to the return of the deposit.

[5] On appeal, the appellants say that the judge erred in law in finding the agreement unenforceable on the basis of the *nemo dat* rule. They say the rule is a principle of property law that may be applied to determine interests and priorities where property is transferred without the consent of the true owner. However, it does not operate to render an otherwise valid contract for the sale of property unenforceable.

[6] For the reasons that follow, I find that the trial judge erred in law in finding that the contract was unenforceable. As such, I would allow the appeal.

Factual background

The contract

[7] The appellants are NV Highway Properties Ltd. ("NV Highway") and Catalina Facilities Rental Properties Ltd. ("Catalina Rental"). In 2018, both NV Highway and Catalina Rental were 100% owned by Catalina Facilities Holdings Ltd. ("Catalina Holdings"). NV Highway and Catalina Rental also had the same four directors, two of whom—James (Jim) Bond and Moray Keith—were the sole directors of Catalina Holdings.

[8] The properties in issue were 2855, 2875, and 2931 Mountain Highway, North Vancouver, which made up a residential complex (the "Properties"). The appellants held the Properties under a bare trust arrangement, whereby NV Highway held legal title and Catalina Rental held beneficial title.

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[9] The respondents are 1155204 B.C. Ltd. (“1155 Ltd.”) and 1172111 B.C. Ltd. (“1172 Ltd.”). 1155 Ltd. was the original contracting party, and later assigned its rights to 1172 Ltd.

[10] On May 1, 2018, the parties signed a contract for the purchase of the Properties (the “Contract”). The “Buyer” under the Contract was 1155 Ltd. NV Highway and Catalina Rental were listed as the “Seller”. The Contract included these terms:

a) Clause 1 set a purchase price of $25.9 million, plus GST, and provided that deposits were to be paid to the Seller at specified intervals. If the Buyer was in default at closing, the deposits would be retained by the Seller as liquidated damages.

b) Clause 2 set a closing date of November 15, 2018 (later extended to December 17, 2018) with the following provision:

> The Buyer shall cause its solicitor to prepare all closing documents, required to facilitate the transfer of the property to the Buyer and the completion of this transaction and to forward same to the Seller’s solicitor not less than seven (7) business days prior to the Closing Date.

c) Clause 4, titled “Time is of the Essence”, provided that if the balance of the purchase price was not paid on the closing date the Seller may cancel the Contract and, in this event:

> …any deposits paid by the Buyer to the Seller under this Agreement and interest accrued thereof shall be absolutely forfeited to the Seller as liquidated damages as a genuine pre-estimated [*sic*] of the damages, with no further recourse by either party against the other.

[11] The Contract was structured as an asset sale, with the Buyer acquiring legal title from NV Highway and beneficial title from Catalina Rental. However, the Contract also allowed the Buyer to elect to proceed by way of share acquisition (the “Share Purchase Option”). The terms of the Share Purchase Option were set out as follows in the Contract:

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> **13. ELECTION TO PROCEED BY WAY OF SHARE ACQUISITION**
>
> The Buyer may, up to 30 days prior to the Closing Date, unilaterally choose to convert this Agreement to purchase the Property to an agreement to purchase all of the outstanding and issued capital and shares in the Seller for the Purchase Price under the same payment terms set out above in paragraph 1, by providing the Seller with written notice of its election to do so (the "Share Election Notice").
>
> Prior to the Buyer issuing a Share Election Notice it may request in writing from the Seller copies of the following disclosure documents which the Seller shall promptly provide:
>
> i) The corporate minute book of the Company;
>
> ii) All material contracts the Seller is currently bound by including any debt instruments;
>
> iii) Current general ledger, balance sheet and income statement for the Seller;
>
> iv) All tax filings including corporate, source deductions, PST and GST for the 5 years immediately prior;
>
> v) Such further and other documents as the Buyer may reasonable [*sic*] require to complete its due diligence of the Seller.
>
> In the event that a Share Election Notice is issued by the Buyer to the Seller the parties agree to execute such further and other agreements as may be commercially reasonable and necessary to give effect to the transfer of the shares in the Seller to the Buyer.
>
> [Emphasis added.]

[12] The Buyer (then 1155 Ltd.) paid a $50,000 deposit once their offer to purchase was accepted.

[13] There were two addenda to the contract. The first addendum, executed on June 25, 2018, increased the deposit, waived three of four conditions precedent, and extended the deadline for removing the final condition precedent. The second addendum, executed July 5, 2018, decreased the purchase price (to $25.5 million) and remaining deposit (to $1.2 million) and waived the final condition precedent. The second addendum also amended the Share Purchase Option, "*mutatis mutandis*", so that the opening sentence read "under the same terms" rather than "under the same payment terms set out above in paragraph 1".

[14] On July 9, 2018, 1155 Ltd. paid the appellants a further $1.2 million, to bring the total deposit to $1.25 million (the "Deposit").

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[15] In September 2018, 1155 Ltd. assigned the Contract to 1172 Ltd.

The election of the Share Purchase Option

[16] In September 2018, the solicitor for 1172 Ltd. advised NV Highway and Catalina Rental that it might convert the transaction to a share purchase. The solicitor initially requested documents from NV Highway, but not from Catalina Rental. NV Highway provided the requested documents, including its minute book and central securities register, which indicated that NV Highway's sole shareholder was Catalina Holdings.

[17] On October 15, 2018, 1172 Ltd. issued a share election notice for "NV Highway Properties Ltd."

[18] On October 26, 2018, after the share election notice had been issued, 1172 Ltd.'s accountant requested documents from Catalina Rental on the purported basis that the Share Purchase Option included the shares of both NV Highway and Catalina Rental. The solicitor for NV Highway and Catalina Rental initially resisted the request, and explained that it was unusual for a buyer to acquire the shares of the beneficial owner, as this would result in the Buyer acquiring Catalina Rental's liabilities and cost base. However, the financial statements for Catalina Rental were later provided to 1172 Ltd.

The termination of the Contract

[19] On December 12, 2018, the respondents' counsel wrote to counsel for the appellants asserting that the Contract was not enforceable "[f]or the reasons set out in my letter to you dated November 26, 2018". The letter dated November 26, 2018, which the Court was advised was written on a "without prejudice" basis, is not in evidence. The respondents' December 12, 2018 letter also claimed that "despite requests pursuant to clause 13" of the Contract (the Share Purchase Option), the appellants had breached their obligation to provide documents under that clause.

[20] In a response letter dated December 13, 2018, counsel for the appellants set out their position that the Contract was binding and enforceable. The appellants

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stated that they remained ready, willing, and able to complete the transaction on the closing date of December 17, 2018 by way of a transfer of the shares in both NV Highway and Catalina Rental. This was despite their belief that the Share Purchase Option only applied to the shares in NV Highway. The appellants maintained that if the respondents did not perform their obligations under the Contract, the Deposit would be forfeited to the appellants.

[21] The respondents did not prepare and forward closing documents as required under the Contract, and did not pay the outstanding purchase price on the closing date. As such, the transaction did not close on December 17, 2018.

[22] By letter dated December 19, 2018, counsel for the appellants notified the respondents of their election to exercise their option under Clause 4 to cancel the Contract, and accept forfeiture of the Deposit as liquidated damages.

[23] In July 2020, the appellants sold the Properties for $17 million, which was $8.5 million less than the purchase price in the Contract.

The notice of civil claim

[24] On December 21, 2018, the respondents filed a notice of civil claim seeking a return of the Deposit due to the appellants' alleged breaches of the Contract. The pleaded breaches were: (1) the appellants entered into new tenancy agreements with the residents of the Properties, which impeded the respondents' efforts to redevelop the Properties; (2) the Properties contained asbestos; and (3) the appellants failed to provide the required documents under Clause 13 (the Share Purchase Option) of the Contract.

[25] On November 26, 2019, the respondents filed an amended notice of civil claim, advancing the new allegation that the appellants' alleged refusal to transfer the shares of Catalina Rental constituted an anticipatory breach of contract.

[26] On October 27, 2021, the respondents filed a second amended notice of civil claim that advanced, for the first time, the allegation that the Contract was

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unenforceable on the basis of the *nemo dat* rule because the respondents did not own the shares to be transferred under the Share Purchase Option.

[27] In their third amended notice of civil claim, filed April 11, 2022, the appellants abandoned the claim that the appellants breached the Contract because the Properties had asbestos. This was the final version of the pleading.

The trial judgment: 2024 BCSC 248

[28] At trial, the respondents challenged the enforceability of the Contract on two bases. First, they argued there was no *consensus ad item* on an essential term of the Contract because the Contract was not clear as to whether the Share Purchase Option applied to the shares of both NV Highway and Catalina Rental. Second, they argued that the Contract was unenforceable because the shares in both companies were owned by Catalina Holdings, who was not a party to the Contract. Relying on the *nemo dat* rule and this Court's decision in *Badesha v. Aujla*, 2016 BCCA 294 [*Badesha*], the respondents argued that the Contract was incapable of performance as drafted because the appellants did not own the shares.

[29] The trial judge first addressed the issue of whether the parties had reached *consensus ad item* on essential terms of the Contract. This issue turned on the question of whether the Share Purchase Option was an essential term of the contract, and whether it pertained to the shares of both of the appellants, or only the shares of NV Highway. The appellants took the position that the Share Purchase Option did not include the shares in Catalina Rental, although they were ultimately prepared to transfer the shares in both companies in order to ensure the deal completed. The respondents argued that the Share Purchase Option was an essential term, and there was no *consensus ad idem* as to what shares it covered.

[30] The judge accepted that the Share Purchase Option was an essential term of the Contract. She found that the words of the Contract itself were ambiguous as to whether the Share Purchase Option included the shares of both NV Highway and Catalina Rental, or only the shares of NV Highway. However, she held that when viewed in the surrounding circumstances, it was clear that the parties intended that

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only the shares of NV Highway would be transferred. Among other things, the judge found that it would not align with commercial reasonableness to interpret the Share Purchase Option as including the shares of Catalina Rental. This would result in the Buyer inheriting the historical cost base for the Properties, which would significantly increase their tax liability. The judge also found it telling that once it became clear that the appellants were willing to transfer the shares in Catalina Rental to close the deal, the respondents did not take further steps to close the transaction.

[31] In summary, the trial judge found that all of the requirements for a binding contract were present: there was an intention to contract, a meeting of the minds, and sufficient certainty regarding the essential terms of the Contract, including the Share Purchase Option. The respondents do not challenge these findings on appeal.

[32] The trial judge next addressed the question of whether the Contract was unenforceable due to the operation of the *nemo dat* rule. She interpreted this Court's decision in *Badesha* to stand for the proposition that in order for a contract for the sale of shares to be enforceable, the owner of the shares must be a party to the contract. The judge reasoned as follows:

> [120] On the facts of the case before me, I am satisfied that [for] the Contract for the sale of the shares to be enforceable…the owner of the shares, Catalina Holdings, had to be named in the Contract. It was not. While *Badesha CA* can be distinguished from the present case in some important respects as I will discuss below, the Court of Appeal was clear that a company cannot sell shares it does not own. In this respect, *nemo dat* operates to render the Share Purchase Option unenforceable as the Contract was drafted.
>
> [121] All of the shares of NV Highway and Catalina Rental were owned by Catalina Holdings. For the shares of NV Highway to be transferred pursuant to the Share Purchase Option, Catalina Holdings would have been required take steps to facilitate the transfer. However, Catalina Holdings is a distinct corporate entity and it was not a party to the Contract.
>
> [Emphasis added.]

[33] The judge noted that the only directors of Catalina Holdings in 2018, Moray Keith and Jim Bond, both testified that they were prepared to transfer the shares of NV Highway and Catalina Rental as required. Mr. Keith also described the shares as

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"an easy thing to transfer": at para. 122. However, the judge found that despite this evidence, "the obligation was on NV Highway to complete the Contract": para. 122.

[34] The judge was also not persuaded that provisions of the Contract—including the Share Purchase Option—changed the analysis, despite the fact they contemplated it may be necessary for the parties to enter further agreements to give effect to the Contract. She stated that the provisions were not enforceable against Catalina Holdings or its shareholders "without piercing the corporate veil", and this was not a case in which the veil should be lifted: at para. 123.

[35] The judge concluded that "[g]iven the unenforceability of the essential term, the Contract itself cannot stand as drafted": at para. 125. In light of this conclusion, it was unnecessary for the judge to consider the respondents' alternative arguments that: (1) if the Contract was enforceable, the appellants had breached it prior to closing by entering into new tenancy agreements, and (2) the appellants were not entitled to retain the Deposit because they were not ready, willing, and able to complete the share transfer on the closing date.

[36] The judge ordered that the appellants must return the Deposit, in addition to a $100,000 fee the respondents had paid to extend the closing date. She declined to award any additional damages.

On appeal

[37] The appellants advance the single ground of appeal: that the trial judge erred in finding that the *nemo dat* rule rendered a binding contract unenforceable.

[38] The respondents say that the judge's analysis of the *nemo dat* rule is correct, and alternatively that her order is supportable on the basis that the appellants were not ready, willing, and able to complete the share transfer at the time of closing. On appeal, the respondents do not pursue the argument that the appellants fundamentally breached the contract by entering into new tenancy agreements.

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[39] Both parties also filed further evidence applications. I will address these applications first before turning to the substantive issues on appeal.

The fresh evidence applications

[40] By consent, the parties included material in their joint appeal book related to this Court's hearing of the appeal in *Badesha*. Specifically, the appellants wished to rely on the factums filed by the parties in that case, while the respondents wanted to introduce a transcript of the oral hearing. This material was not before the trial judge in the present case. In this Court, the material was tendered in the form of exhibits to affidavits of legal assistants. Both parties referred to the exhibits in their factums in this appeal in support of their respective interpretations of the significance of the *nemo dat* rule to the judgment in *Badesha*.

[41] At the direction of the Court, both parties filed further evidence applications in advance of the hearing of this appeal. However, at the hearing of the appeal, they argued that a fresh evidence application was not necessary in light of *Economical Mutual Insurance Company v. Gill*, 2017 BCCA 351 at paras. 22–23. In *Economical*, this Court held that it was not necessary for a party to file an application to adduce further evidence on appeal when the evidence consisted of copies of insurance policies that were before the Ontario Court of Appeal in a decision that was referred to by the trial judge. By analogy, the parties to the present appeal say that evidence and argument filed in another court proceeding, and a transcript of the proceedings itself, is not evidence but rather part of the court record.

[42] I have some doubt as to the correctness of this proposition. It is difficult to reconcile with s. 26 of the *Evidence Act*, R.S.B.C. 1996, c. 124, which prescribes a specific process for adducing evidence of a court proceeding or record. However, it is unnecessary for me to address this point in any detail, and I am reluctant to do so given the limited argument we received on the point. Even assuming that a fresh evidence application is not required, it is my view that the factums and transcripts from the *Badesha* hearing are entirely unhelpful in assisting this Court in interpreting the judgment. The Court's reasons in *Badesha* speak for themselves.

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Analysis

Did the judge err in finding the Contract unenforceable based on the *nemo dat* rule?

[43] The focus of submissions on appeal was the trial judge's reliance on *Badesha* for her conclusion that the *nemo dat* rule rendered the Contract unenforceable. Given the centrality of the proper interpretation of *Badesha* to the issues on appeal, I will address that judgment separately when reviewing the relevant legal principles. For context, however, it is useful to begin with a review of the general law regarding the scope and application of the *nemo dat* rule.

The nemo dat rule

[44] The *nemo dat* rule is a long-established maxim of property law that is typically applied to resolve disputes over entitlement to property and priority of interests. The rule protects an owner's property rights "strictly as against anyone who deals with the goods inconsistently with the dominion of the true owner": *R.H. Willis and Son (a firm) v. British Car Auctions Ltd.*, [1978] 2 All E.R. 392, (*sub nom. Willis (R.H.) and Son v. British Car Auctions Ltd.*), [1978] EWCA Civ J0113-1 at 395. The object of the *nemo dat* rule is the protection of an owner's interest in property: *St. John v. Horvat*, 113 D.L.R. (4th) 670, 1994 CanLII 1005 at 679 (B.C.C.A.).

[45] The scope of the *nemo dat* rule can be understood by reference to two examples of circumstances in which the principle has been applied.

[46] First, the *nemo dat* rule has been codified, and in some instances modified, in Canadian legislation governing the sale of goods. In British Columbia, s. 26 of the *Sale of Goods Act*, R.S.B.C. 1996, c. 410, provides that if goods are sold by a person who does not own them, and who does not have authority or consent from the owner, "the buyer acquires no better title to the goods than the seller had" unless the owner's conduct precludes the owner from denying the seller's authority to sell. In *St. John*, this Court noted that s. 26 preserves the common law *nemo dat* rule: at 679.

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[47] Second, the *nemo dat* rule is also relevant to priority disputes in relation to security interests in property under the *Personal Property Security Act*, R.S.B.C. 1996, c. 359, and similar legislation in other provinces. The general rule is that if a seller sells property that is subject to an existing security interest, the buyer will take the property subject to that interest because "[a] person cannot give to the subsequent party an interest better than its own": Bruce MacDougall, *Canadian Personal Property Security Law*, 3rd ed. (Toronto: LexisNexis Canada, 2023) at §8.01. In this context, *nemo dat* operates as a "crucial 'background' priority rule": MacDougall at §2.03.

[48] Such a priority dispute arose in *Bank of Montreal v. Innovation Credit Union*, 2010 SCC 47, between a prior unregistered security interest in farm equipment owned by the debtor and taken under Saskatchewan's personal property security legislation, and a subsequent security interest in the same property taken and registered under the federal *Bank Act*, S.C. 1991, c. 46. The Supreme Court of Canada held that the statutory provisions operated in the same way as the common law principle of *nemo dat*, which protected the priority of the prior unregistered security interest:

> [51] As determined above, this dispute is between two competing valid legal interests in the same collateral. Under the common law, a priority dispute between two legal interests in the same property is determined in accordance with the maxim *nemo dat quod non habet*: see B. Ziff, *Principles of Property Law* (4th ed. 2006), at pp. 432-34. Simply put, under this rule where A conveys legal title to property first to B and subsequently to C, legal title vests in B. Since A no longer has legal title to give to C, A cannot transfer title to C. Thus, as between two competing legal interests in property, the *nemo dat* rule gives priority to the first party to take a legal interest in the property. The application of the common law rule to the present case grants priority to Innovation Credit Union's interest. As we have seen, the *Bank Act* establishes a property-based security scheme under which, by the combined effect of ss. 427(2) and 435(2), the Bank can receive no greater interest in the property than the debtor has. As such, these provisions operate in the same way as the common law *nemo dat* rule. At the time the Bank took its *Bank Act* security interest, the Credit Union already held a statutory interest in the same collateral which, in proprietary terms, is correlative to a fixed charge. Therefore, the Bank could only take its interest subject to this prior interest.
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> [Emphasis added.]

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[49] As is evident from the relevant case law, the *nemo dat* rule speaks to the ability of a seller to transfer property rights it does not own, and not to the seller's ability to contract to transfer property rights. This distinction has been explicitly drawn in a number of cases and secondary sources.

[50] Professor Stéphane Sérafin highlights the inapplicability of the *nemo dat* rule to a contract for the transfer of property rights in "Transfer Theory and the Assignment of Contractual Rights" (2023) 60 Osgoode Hall L.J. 251 at 271:

> …[A] contract is *not* subject to the *nemo dat* rule and so is unaffected by the quality of the rights that the promisor holds, or does not hold, at the moment that the contract is concluded. It is not even necessary that the promisor hold rights to an external thing at all before the promisor can undertake by contract to convey those rights, such a contract being entirely valid according to the common law.
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> [Emphasis in the original.]

[51] In support of this proposition, Professor Sérafin references, among other sources, a judgment of the English Court of Appeal: *Vehicle Control Services Ltd. v. HM Revenue and Customs*, [2013] EWCA Civ 186. This case addressed the question of whether a party could contract to grant a licence that it did not own. The Court stated:

> 21. The Upper Tribunal's reasoning on this part of the case was that since VCS did not have the right under its contract with the car park owner to grant a licence to park, it could not have contracted with the motorist to grant such a right. In my judgment there is a serious flaw in this reasoning.
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> 22. The flaw in the reasoning is that it confuses the making of a contract with the power to perform it. There is no legal impediment to my contracting to sell you Buckingham Palace. If (inevitably) I fail to honour my contract then I can be sued for damages. On the stock market it is commonplace for traders to sell short; in other words to sell shares that they do not own in the hope of buying them later at a lower price. In order to perform the contract the trader will have to acquire the required number of shares after the contract of sale is made.
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> [Emphasis added.]

[52] To the same effect is the decision in *Nazarinia Holdings Inc. v. 2049080 Ontario Inc.*, 2010 ONSC 1766, aff'd 2010 ONCA 739, leave to appeal to SCC ref'd, 34017 (5 May 2011). The defendants applied to stay an action on the ground that

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the dispute was subject to an arbitration clause contained in the parties' franchise agreement. The plaintiff argued, in part, that the franchise agreement was invalid because the rights under the agreement had already been granted to someone else. In rejecting this argument, the Court stated:

> [35] The plaintiffs' first argument is that the Franchise Agreement is invalid because the rights had already been granted to another company. They say that the defendants were in no position to convey those rights. The plaintiffs rely on the maxim *nemo dat quod non habet* – one cannot give that which one does not have. Leaving aside the fact that the letter of intent and the Franchise Agreement contemplated that the franchisee would receive the Alberta territory if the franchisor could not deliver British Columbia, the inability to convey the franchise rights would not make the agreement invalid. It would simply mean that the franchisor might not be able to perform the agreement, thereby giving rise to a breach of contract entitling the plaintiffs to damages.
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> [Emphasis added.]

[53] The same conclusion was reached in respect of a contract for the sale of property in *Millar v. 1189691 Alberta Ltd.*, 2010 ABQB 297. The Court cited J.V. Di Castri in *Law of Vendor and Purchaser*, 3rd ed. (Toronto: Carswell, 1988) at §230 for the general rule that "a person may make a valid contract to sell property he does not own", as it is "not necessarily the Plaintiff's concern how the Defendant plans to fulfill its obligations": *Millar* at para. 53.

[54] Similarly, in *Schmidt v. Wood*, 2014 ABCA 80 at para. 17, the Alberta Court of Appeal noted that:

> [o]ne can contract to sell what one does not own; it is done all the time. It is the vendor's problem how to buy or deliver the item at or before the closing date. If he does not, he is liable for breach of contract.

[55] Subject to the respondents' reliance on *Badesha*, which I will turn to next, the case law is uniform that the *nemo dat* rule does not apply in contract law to render contracts unenforceable on the basis that the seller does not own what they are contracting to transfer. In other words, while the *nemo dat* rule provides that one cannot legally convey title to property that one does not own, it does not provide that one cannot contract to sell what one does not own. If the seller is unable to perform

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the contract at the time of closing, the purchaser has a remedy in damages for breach of contract.

Badesha

[56] *Badesha* concerned two transactions that were intended to exchange a hotel property in Williams Lake for a commercial property in Chilliwack. The hotel in Williams Lake was owned by Snowland Sporting Goods Ltd., which in turn was owned by 0912494 B.C. Ltd. (referred to in the judgment as "494 BC"). The appellant, Mr. Aujla, owned 25% of 494 BC. The contract for the sale of the hotel named Snowland and Mr. Aujla as the seller and the respondent, Mr. Badesha, as the buyer. The contract was structured as a share purchase, so that the "seller" (Snowland and Mr. Aujla) would sell 100% of Snowland's shares to Mr. Badesha. The commercial property in Chilliwack was owned by the respondent 0909043 B.C. Ltd. (referred to in the judgment as "043 BC"). The contract for the purchase of the Chilliwack property was similarly structured as a share purchase, so that the "seller" (043 BC) would sell 100% of its shares to the "buyer" (Snowland and Mr. Aujla).

[57] As reviewed in the trial judgment, the transactions failed to complete because Mr. Aujla would not provide Mr. Badesha's solicitor with the information about who owned the shares in Snowland so that transfer documents could be prepared: *Badesha v. Snowland Sporting Goods Ltd.*, 2015 BCSC 1229 at paras. 101–108. Mr. Badesha and 043 BC commenced legal proceedings against Snowland and Mr. Aujla. The trial judge found that Mr. Aujla was liable to pay $1 million in damages under the penalty clauses contained in the contracts for default in performance.

[58] In allowing Mr. Aujla's appeal, this Court found that the contracts "did not describe transactions that are intelligible in law": *Badesha* at para. 11. The contracts were found to be unenforceable for a number of reasons, including that "the vendor in a contract for sale must be able to convey the asset sold. If not, the contract collapses for failure of consideration": at para. 12, emphasis added. Additionally, there was no evidence that the true owner of Snowland's shares (494 BC) had agreed to transfer them: at para. 29. Also, neither Mr. Aujla nor Snowland, who were

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named as the “sellers”, should have been parties to the contract at all since neither were selling anything.

[59] The *nemo dat* rule is not referenced at all in the trial judgment in *Badesha*. It is referenced twice in this Court’s judgment. First, at para. 7, the Court cited the *nemo dat* rule in setting out the parties’ positions. Second, at para. 22, the Court referenced the rule in the course of explaining why the hotel contract could not be rectified to require Mr. Aujla to acquire 100% of the shares and transfer them to Mr. Badesha. The Court observed that this was not the contract that had been pleaded, “and in any case would require other transactions to occur first to solve the *nemo dat* issue—none of which appears to have been considered”: at para. 22.

[60] The Court found that rectification was not available because the contract did not address, and the parties did not appear to have considered, how the change in control of the hotel property was to be achieved. Instead, the transaction “disintegrates” by reason of “incohesive legal intentions”: *Badesha* at para. 23.

Discussion

[61] The trial judge in the present case interpreted *Badesha* to stand for the proposition that the *nemo dat* rule renders a contract for the sale of shares unenforceable if the owner of the shares is not a party to the contract: at para. 120. On this interpretation of *Badesha*, the *nemo dat* rule generally operates to render an otherwise valid contract unenforceable if the seller does not own the asset it contracts to sell. In my view, the law, including *Badesha*, does not support such a broadly-stated proposition.

[62] As I have set out, the *nemo dat* rule is a principle of property law that operates to: (1) protect the “true owner” of an asset where assets are sold by a person who is not the true owner, and (2) establish priorities among competing claims to the same property. A binding contract is formed when the parties objectively intend to contract, the essential terms have been agreed to, and the essential terms are sufficiently certain: *Oswald v. Start Up SRL*, 2021 BCCA 352 at para. 34. It is not a prerequisite to a valid and enforceable contract that a seller owns

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the property they have contracted to convey. If the seller does not own the property, they undertake the risk of being unable to complete the transaction and becoming liable in damages for default in performance.

[63] I do not read *Badesha* to extend the *nemo dat* rule from its established role as a principle of property law so as to alter the legal requirements for a valid and enforceable contract. As I have noted, the *nemo dat* rule received limited attention in the judgment. The contracts in that case collapsed for a number of reasons, including because there was no consensus regarding the proper parties to the agreement, no clarity as to what the parties actually intended, and no evidence that the sellers were "capable of selling what they purported to sell": *Badesha* at para. 29. This is distinguishable from the present case in a number of important respects. Of importance, here there was certainty as to what the parties intended, and the evidence established the seller was capable of conveying the asset sold. Further, unlike in *Badesha*, the beneficial and legal owners of the property (NV Highway and Catalina Rental) were proper parties to the Contract because the transaction was structured as an asset purchase with an option to convert to a share purchase. I agree with the appellants that the fact that the respondents elected the Share Purchase Option, with full information about the share ownership structure, does not render the Contract unenforceable.

[64] On appeal, the respondents advanced a somewhat different argument. They say that the trial judgment can be supported on the basis that the "fatal flaw" in the Contract was not simply that the appellants did not own the shares, but that they had no enforceable mechanism to procure the shares from Catalina Holdings at closing. As such, the respondents would be precluded from obtaining the remedy of specific performance if the transaction did not complete. On this theory, as I understand it, the Contract may have been enforceable if Catalina Holdings was bound to deliver the shares to the appellants, but is not enforceable if there is no mechanism of transfer that is binding on Catalina Holdings.

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[65] This argument does not appear to me to relate to the *nemo dat* rule. Instead, the respondents say that their inability to obtain the remedy of specific performance in the event the shares were not delivered renders the contract unenforceable. It is not entirely clear to me that the equitable remedy of specific performance would not be available against Catalina Holdings on these facts, particularly in light of Catalina Holdings' commitment to transfer the shares. In any event, the respondents have not cited a legal doctrine, or case authority, to support the proposition that the potential unavailability of the exceptional equitable remedy of specific performance affects the enforceability, at common law, of a contract. Nor can I conceive of any basis on which such an argument could succeed, especially in circumstances where a party elects to acquire shares in place of an asset with full knowledge that the shares are not owned by the contracting party.

[66] For the reasons I have stated, the judge erred in law in finding that an otherwise binding contract was unenforceable based on the *nemo dat* rule. In my view, this is dispositive of the appeal, subject to the respondents' alternative argument (discussed below) that there was a "dual breach"—that is, that the appellants were not ready, willing, and able to complete the contract.

Was there a "dual breach" of contract?

[67] The respondents argue, in the alternative, that if this Court finds the Contract is enforceable, then the appellants were not in a position to complete the transaction at the time of closing because they did not have the NV Highway shares in their possession. Therefore, the respondents say, the appellants were not entitled to terminate the Contract, or to retain the Deposit.

[68] In support of this argument, the respondents rely on a number of cases of this Court holding that where neither party is ready, willing, and able to complete a real estate conveyance on the closing date, the contract continues and either party may set a new date for closing. The principle is stated as follows by Southin J.A. in *Shaw Indust. Ltd. v. Greenland Ent. Ltd.*, 54 B.C.L.R. (2d) 264, (*sub nom Shaw Industries*

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Ltd. v. Greenland Enterprises Ltd.), 1991 CanLII 3955 (C.A.) [*Shaw Industries*] at 272:

> From the proposition that the contract still subsists, it follows that neither party is relieved of his own contractual obligation to complete by the failure of performance of the other. He cannot treat that failure as a repudiation. In order that he may do so, he must himself first give such a notice and must at the time thereby fixed for completion be himself ready, willing and able to perform.

[69] In *Shaw Industries*, the purchaser provided closing documents to the vendor after the close of business on the closing date. This Court held that the vendor was not entitled to treat this breach as a repudiation because the vendor had not met its contractual obligation to clear title prior to closing.

[70] Similar fact scenarios underlie the other cases relied upon by the respondents. In *Taylor v. Aramenko*, 100 B.C.L.R. (2d) 245, 1994 CanLII 229 (C.A.), for example, the Court found the vendor was not ready, willing, and able to complete because he had not moved a house onto another lot prior to closing date, as required by the agreement, and had also failed to register title to the property in his own name as required by s. 6 of the *Property Law Act*, R.S.B.C. 1979, c. 340. Therefore, the vendor could not rely on the purchaser's failure to provide the purchase funds on the closing date as a repudiation of the contract. In *Toor v. Dhillon*, 2020 BCCA 137, neither party was ready, willing, and able to complete on the original closing date, thus the contract subsisted. The Court found that it was open to the purchaser to set a new date for closing, and to seek specific performance of the contract.

[71] In my view, the principle discussed in these cases has limited application on the present facts. In this case, the respondents communicated their intention not to fulfill their contractual obligations in advance of the completion date, and stated their position that the contract had terminated. The respondents did not meet their obligation under Clause 2 of the Contract to cause their solicitor to prepare "all closing documents required to facilitate the transfer of the property to the Buyer" no

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less than seven days prior to the closing date. They did not pay the balance of the purchase price on the closing date.

[72] The respondents do not point to any term of the Contract that required the appellants to do anything that they failed to do at or before the time of closing. There was no contractual provision that required the appellants to have the shares in their possession. Clause 13 (the Share Purchase Option) provided that in the event a share election notice was issued, the parties agree to execute "such further and other agreements as may be commercially reasonable and necessary to give effect to the transfer of shares in the Seller to the Buyer". There is no evidence that the appellants failed to take any necessary step to facilitate the transfer of shares. The judge seemingly accepted the evidence of the two directors of Catalina Holdings—who were also directors of NV Highway and Catalina Rental—that they were prepared to transfer the shares in NV Highway to the respondents, and that the transfer could be easily done: at para. 122. The judge found that: "it was the [respondents] that decided not to follow through with the transaction on account of their purported intention to purchase the shares of both NV Highway and Catalina Rental, which I found not to be credible": at para. 143.

[73] Once again, if the appellants had failed to take steps to effect the share transfer at the time of closing, the respondents would have had a remedy in damages for breach of the Contract. However, the Contract did not prescribe a particular mechanism of transfer beyond the obligation that Clause 13 placed on both parties to execute such agreements that were necessary to give effect to the transfer. Nor was it required that the Contract detail the precise mechanism of transfer in order for the Contract to be binding and enforceable.

[74] At least by the time of closing, the respondents had clearly repudiated the Contract by refusing to perform its essential terms: *Parker Cove Properties Limited Partnership v. Gerow*, 2024 BCCA 316 at para. 27. By their letter of December 19, 2018, the appellants communicated their acceptance of the repudiation, and their election to terminate the Contract and accept the forfeiture of the Deposit as

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liquidated damages under the Contract. In these circumstances, I see no basis on which the respondents were entitled to a return of their Deposit. They repudiated a binding and enforceable Contract, which entitled the appellants to a remedy in damages.

Disposition

[75] I would allow the appeal, and dismiss the respondents' action.

"The Honourable Madam Justice Horsman"

I AGREE:

"The Honourable Justice Skolrood"

I AGREE:

"The Honourable Justice Winteringham"

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