COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *The Owners, Strata Plan LMS 3851 v. Homer Street Development Limited Partnership,* 2016 BCCA 371

Date: 20160915
Docket: CA43125

Between:

Patrick Joseph Burns, Angus Wilde Publications Inc., Dr. Domingo M. Lopez Corp., Shirley Mae McFadden, Executor and Trustee under the last Will and Testament of Bernard Ralph McFadden, deceased, Shirley Mae McFadden, Lipp Kan Chia, Cyril Yeve Wan Min Kee, Denise Ching Wan Min Kee, Betty Lai Sim Wong, Marion Merle Loney, George Tien, Amy Fu-Tak Tien, Harold Isao Morioka, Elaine Chiyeko Morioka, Bob Chin, Sarah Chin, Diana May Wilson, Executrix and Trustee under the last Will and Testament of Gordon Grant Wilson, deceased, Diana May Wilson, Arthur Philip Davis, Thomas Wai Kwok Lee, Tage Munk Pedersen, Linda Petersen, Virginia Emiko Sato, George Mok Yong Chan, Cameron Richard Essery, Cameron Richard Essery as Executor and Trustee under the last Will and Testament of Maria Michela Essery deceased, David Sui Mo Cheung, Bock Yip, James Christie Annable, Dawn Wai Jun Annable, Mary Winifred Chu, Dr. Howan Koo, Inc., Jenny Suk Ha Ho, Joseph Shaw, Ruby Shaw, Mohinder Jit Singh Grewal, Narinder Kaur Grewal, James Robert Bardal, Anita Bernita Bardal, Christopher Boyd and Patrick Boyd, as Executors and Trustees under the last Will and Testament of Jan Marie Boyd, deceased, Michael Yun Kei Lee, Helena Martha Wai Yin Lee, Scottsdale Investments Ltd., Samson Chi-Wang Mui, Frances Shuk Fun Lee, Man Ding Lam, Ngar Lai Ng, Timothy Shon Low, Margaret Kuen Low, Alpana Swarup Aggarwal, Newford Investments Ltd., Suki Enterprises Inc., Dr. William F. Yeung M.D., Inc., Chi-Lap Lin, Cindy Lin, Bel-Aire Agencies Ltd., Seran Holdings Inc., Woon Ying Lai, Michael John Engelbert, Susan Mary Engelbert, 347599 B.C. Ltd., Sandeep & Taseem Investments Ltd., Grant Leong Lee, Alnashir Amirally Premji, Rozina Premji, Bowman & Sons Investments Inc., Aman Investments Ltd., Alphonsus Zan-Lam Hui, Josephine Suk-Ying Hui, 462871 B.C. Ltd., Yin Ng, Joji Matsui, Douglas Paul Ashbee, Randi Christine Ashbee, Yoon Hee Ok, Beverly Ann Kaiser, Gordon Andrew Wang Kei Hsu, Mei Ling Hsu, Vincent Kin Chung Law, Kin Yee Lo, Lim Soon Noy, as Executor and Trustee under the last Will and Testament of Alvin Yong, deceased, Susan Chinn, as Executor and Trustee under the last Will and Testament of Albert Chinn, deceased, Susan Chinn, Eugene Wai Chiu Tsang, Stella Yuk Ping Tsang, Peng Loon Thong, Mi Lung Chan Thong, Kai Sun Chin, Donna May Wah Chin, John Patrick Meagher, Jan Lee Gibson, Brian George White, Yrsa Liselotte Jensen, Robert Vong, Catherine Vong, Richard Lonsdale, Sandra Lonsdale, Chi King Agnes Lam, Pak Ho Lam, Richard Chung-Sop Cook, Laurence Alexander Bosley, Narinder Kumar Dhir, Prem Lata Dhir, T.S.K. Ventures Ltd., Manhope Enterprises Inc., Richard Yan Wai Yau, Connie Yuet

Kwan Lam, Oluf Peter Skov, Roald Skov, Willis Higgins Building Corporation, Donald Wiseman, Mary Chan, Lulu Siu Yin Loh, Thomas Wahlig, Daisy Lan Lee, Wenceslawa Lenie Buenaventura, as Executor and Trustee under the last Will and Testament of Arsenio Buenaventura, deceased, Wenceslawa Lenie Buenaventura, Josh Holdings Ltd., David William Clark, Joanne Marylyn Clark, Gilberto Gerardo Talamo, Greta Lucia Talamo, Sze Hiong Liew, Sonia Rattan, Judy Charlotte Woodward

Respondents
(Plaintiffs)

And

Homer Street Development Limited Partnership, formerly Cressey (Homer) Limited Partnership, Trilogy Robson Development Limited Partnership, 455322 British Columbia Ltd. individually, and together doing business as The Grand Development Partnership, Cressey Development Corporation, Norman Cressey, Joan Cressey, Scott Cressey, 511953 British Columbia Ltd., formerly Trilogy Pacific Enterprises Corporation, John de C. Evans, Jonathon Wener, Douglas Pascal, MM&R Valuation Services Inc. doing business as HVS Hospitality Valuation Services, Canada, O'Neill Hotels & Resorts Ltd., OHR Grand Management Ltd., John Doe Nos. 1 to 10, Jane Doe Nos. 1 to 10, XYZ Company Nos. 1 to 10, persons unknown

Appellants
(Defendants)

Before: The Honourable Mr. Justice Frankel
The Honourable Mr. Justice Goepel
The Honourable Madam Justice Dickson

On appeal from: An order of the Supreme Court of British Columbia, dated September 1, 2015 (*The Owners, Strata Plan LMS 3851 v. Homer Street Development Limited Partnership*, 2015 BCSC 1564, New Westminster Docket S76792).

Counsel for the Appellants:	I.G. Nathanson Q.C. G.B. Gomery Q.C.
Counsel for the Respondents:	B.W. Dixon S.T.C. Warnett M.T. Maniago
Place and Date of Hearing:	Vancouver, British Columbia May 26 & 27, 2016
Place and Date of Judgment:	Vancouver, British Columbia September 15, 2016

Written Reasons by:
The Honourable Mr. Justice Goepel

Concurred in by:
The Honourable Mr. Justice Frankel
The Honourable Madam Justice Dickson

Summary:

This appeal arises out of the sale of strata units in the Westin Grand Hotel in downtown Vancouver. The Investors purchased their units in November 1996 after receiving a disclosure statement issued under the Real Estate Act. The sales closed in April 1999. At the liability trial, the judge found that the disclosure statement contained a material misrepresentation concerning a projection of anticipated occupancy rates. His conclusion was upheld on appeal. After a 26-day quantum trial, the judge assessed damages at $8,000,000, which represented the fall in the value of the units as of the date of closing. The Developers appeal, raising two grounds: first, that the judge erred in excluding evidence on the issue of reliance on the part of the Investors; and second, that the judge erred in his determination of compensation by choosing the incorrect date to assess the Investors' losses and by not limiting them to those caused by the misrepresentation.

Held: appeal allowed. With respect to the issue of reliance, the judge did not err in concluding that deemed reliance under the Real Estate Act can only be rebutted when the investor had knowledge of the misrepresented or omitted facts at the time of the investment. Thus, the evidence the Developers sought to lead was not relevant to any available defence. As for the assessment of damages, the judge erred in finding that the Investors were entitled to recover all damages sustained as a result of entering the sales agreements. Section 75(2) of the Real Estate Act, properly interpreted, does not require the Developers to compensate the Investors for losses suffered solely as a result of an external cause, here a change in market conditions, which did not result from the inaccuracy of the representation.

Reasons for Judgment of the Honourable Mr. Justice Goepel:

INTRODUCTION

[1] This litigation arises out of the marketing and sale of strata units in the Westin Grand Hotel (the "Westin Grand"), which is located in downtown Vancouver, British Columbia. The individual plaintiffs (the "Investors") purchased their strata units in the Westin Grand in November 1996 through offers to purchase and agreements for sale (the "Sales Agreements"). Before entering into the Sales Agreements, the Investors received a disclosure statement dated November 8, 1996, (the "Disclosure Statement") issued under the *Real Estate Act*, R.S.B.C. 1979, c. 356 (subsequently R.S.B.C. 1996 c. 397).

[2] The parties entered into the Sales Agreements before the Westin Grand was constructed. The Westin Grand did not open for business until April 1, 1999. The sales closed on April 13, 1999.

[3] The trial of this proceeding was conducted in several stages. Following a 46-day liability trial, the trial judge, in reasons for judgment indexed at 2008 BCSC 1160, found the Disclosure Statement contained a material false statement in a note to the financial statements which formed part of the Disclosure Statement ("Note 2(a)"). Note 2(a) concerned a projection of the anticipated occupancy rates of the Westin Grand relative to other major hotels in downtown Vancouver of similar quality between 1999 and 2003. The order arising from the liability trial was that the Developers were liable to make compensation to the Investors pursuant to s. 75 of the *Real Estate Act* as a result of the material false statement in Note 2(a).

[4] In reasons indexed at 2009 BCCA 395 (Appeal #1), this Court upheld the trial judge's finding that the Disclosure Statement contained a material false statement.

[5] The parties then returned to the trial court for the damage assessment phase of the proceeding. As I will set out in further detail, that process did not go smoothly and resulted in two further appeals to this Court in advance of the quantum trial. The reasons in those appeals are indexed at 2013 BCCA 99 (Appeal #2) and 2014 BCCA 77 (Appeal #3).

[6] The quantum trial took 26 days. The trial judge, in reasons indexed at 2015 BCSC 1564, assessed damages at $8,000,000 plus pre-judgment interest of $3,121,490.98. This sum represented the fall in value of the strata units as of the date of closing.

[7] The appellants, who I shall refer to as the "Developers", raise two main grounds of appeal. The first ground concerns the trial judge's decision to exclude evidence which the Developers sought to lead from the Investors on the issue of reliance. This ground requires consideration of the decisions in *Sharbern Holdings*

Inc. v. Vancouver Airport Centre Ltd., 2009 BCCA 224 ("*Sharbern Appeal*") and 2011 SCC 23 ("*Sharbern SCC*").

[8] The second ground concerns the manner in which the trial judge determined damages. The Developers allege that damages should be limited to the damage, if any, caused by the misrepresentation. This ground of appeal requires consideration of the principles set out in *South Australia Asset Management Corporation v. York Montague Ltd.*, [1996] 3 All E.R. 365 (H.L.) ("*SAAMCO*") and whether those principles apply to the statutory cause of action created by the *Real Estate Act* in light of the reasoning in *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co.*, [1991] 3 S.C.R. 3. In addition, the Developers argue that the trial judge erred in calculating damages as of April 15, 1999, the date of closing. They submit that instead the damages should be assessed as of November 1996, the date when the parties entered into the Sales Agreements.

RELIANCE

A. Overview

[9] In order to put this ground of appeal in context, it is necessary to discuss in some detail its factual and legal foundation. In this regard, I will first set out the statutory framework. I will then discuss the question of reliance at common law. Next, I will turn to the decisions in *Sharbern Appeal* and *Sharbern SCC*. I will then review how the issue of reliance has been considered in this proceeding both in the trial court and in this Court. Against that background, I will then analyze in further detail this ground of appeal.

B. Statutory Framework

[10] The Investors' claim is based on the statutory cause of action set out in the *Real Estate Act*. Pursuant to s. 75(2)(a) (all section references are to the 1996 legislation) purchasers of subdivided land are deemed to rely on representations found in a disclosure statement. If a disclosure statement contains a material false

statement, the purchasers, subject to certain enumerated exceptions which do not apply in this case, are entitled to recover any loss or damage they may have sustained (s. 72(2)(b)). The section reads:

> **Effect of prospectus**
>
> **75** (2) If a prospectus has been accepted for filing by the superintendent under this Part,
>
> (a) every purchaser of any part of the subdivided land, shared interests in land or time share interests to which the prospectus relates is deemed to have relied on the representations made in the prospectus whether the purchaser has received the prospectus or not, and
>
> (b) if any material false statement is contained in the prospectus,
>
> (i) every person who is a director of the developer at the time of the issue of the prospectus,
>
> (ii) every person, who having authorized the naming, is named in the prospectus as a director of the developer,
>
> (iii) every person who is a developer, and
>
> (iv) every person who has authorized the issue of the prospectus
>
> is liable to compensate all persons who have purchased the subdivided land, shared interests in land or time share interests for any loss or damage those persons may have sustained, unless it is proved
>
> …

[11] Pursuant to s. 66(2) of the *Real Estate Act* a disclosure statement is deemed to be a prospectus.

C. Reliance at Common Law

[12] Reliance is an essential component of a common law claim for negligent misrepresentation. To establish a cause of action in negligent misrepresentation a plaintiff must prove both that it relied, in a reasonable manner, on the negligent misrepresentation and that its reliance was detrimental in the sense that damage resulted: *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 at 110. A misrepresentation does not cause harm directly. A plaintiff does not suffer any damage before it takes some action in reliance on the misrepresentation. In this sense, reliance constitutes

the causal link between the misrepresentation and the loss suffered by the plaintiff: *McKenna v. Gammon Gold Inc.*, 2010 ONSC 1591 at paras. 132–133 per Strathy J. (as he then was), citing Allen M. Linden and Bruce Feldthusen, *Canadian Tort Law*, 8th ed. (Markham, ON: LexisNexis, 2006) at 446. If reliance is absent, the plaintiff cannot succeed in holding the defendant liable for its losses: *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 at para. 18.

[13] Reliance is a question of fact as to the plaintiff's state of mind. A plaintiff must prove that the misrepresentation was at least one factor that induced it to act to its detriment. Where a misrepresentation was calculated or would naturally tend to induce the plaintiff to act on it, reliance may be inferred. In such a case, the onus of rebutting that inference lies with the defendant: *Kripps v. Touche Ross & Co.*, (1997), 33 B.C.L.R. (3d) 254 at paras. 101–103 (C.A.), leave to appeal ref'd [1997] S.C.C.A. No. 380. The defendant may rebut the inference of reliance by, among other means, proving that the plaintiff had knowledge of the misrepresentation or by showing that the misrepresentation did not play any role in the plaintiff's decision to act as it did: *Parallels Restaurant Ltd. v. Yeung's Enterprises Ltd.*, (1990) 49 B.L.R. 237 (B.C.C.A.); *Rainbow* at 16–17.

D. The Decision in *Sharbern*

[14] Like the present case, *Sharbern* concerned the marketing of strata units in a proposed hotel. The plaintiff investors alleged the disclosure statement contained material misrepresentations. The action was certified as a class proceeding: 2005 BCSC 232, aff'd 2006 BCCA 96.

[15] The action came on for trial in January 2007. One of the common issues was whether the members of the Class were deemed to have relied on the impugned representations pursuant to s. 75(2) of the *Real Estate Act*.

[16] In reasons indexed at 2007 BCSC 1262, the trial judge found that the class members were entitled to rely on the deeming provision in s. 75(2) of the *Real*

Estate Act. She further found that the deeming provision was conclusive and not rebuttable. She reasoned:

> [332] VAC also submitted that deemed reliance under the *Real Estate Act* is rebuttable rather than conclusively presumed. However, *Wilson* [*Wilson v. CRC Canadian Retirement Corp.*, [1997] B.C.J. No. 141 (S.C.)] has decided that issue. Reliance was deemed even though the plaintiffs had not received the prospectus when they committed to the purchase of the property.
>
> [333] Further, the purpose of the legislation is to protect the investing public. A developer can issue a lengthy, detailed and complex prospectus and investors are taken to have read and understood it. However, if the developer misrepresents a material fact, investors are taken to have relied on it. That is the *quid pro quo.* As the developer is in possession and control of the facts, it is fair that the deeming provision be conclusive. Were it otherwise, the developer could direct the focus of the inquiry to what the investor knew rather than what the developer failed to disclose. That would undermine the purpose of the legislation.

[17] At the hearing of the *Sharbern Appeal* it was common ground that the deemed reliance provision in s. 75(2)(a) of the *Real Estate Act* applied to the class members' statutory claims; however, whether deemed reliance was rebuttable or conclusive was still in dispute. This Court held that deemed reliance was not conclusive and could be rebutted: see paras. 59, 124. This Court did not, however, discuss the circumstances in which deemed reliance could be rebutted.

[18] *Sharbern* was appealed to the Supreme Court of Canada. The matter of deemed reliance under the *Real Estate Act* was a live issue on the appeal. Both parties made submissions on the issue in their factums. The investors submitted that given the text, history, scheme and policy of the statute, the Court should conclude that the presumption of reliance in s. 75(2)(a) was conclusive and non-rebuttable. The developers sought to uphold this Court's decision that deemed reliance was rebuttable. They submitted that if a defendant could prove that the plaintiff was fully informed of the truth of the representation, it would be inconsistent with the purpose of the disclosure provisions of the *Real Estate Act* to hold the defendant liable.

[19] Rothstein J., writing for the court, found on the facts of the case that the developers could not be held liable for making material false statements under the *Real Estate Act*. In those circumstances, as he explicitly recognized, it was not

strictly necessary for the purpose of the decision to consider whether the deemed reliance provided for under the statute was rebuttable. He chose, however, to deal with the issue. He began his analysis by framing the issue and reviewing the conclusions of the trial judge and of this Court:

> **112** A final issue with respect to VAC's potential liability under the *Real Estate Act* is whether the deemed reliance provided for under the statute is rebuttable when the contrary is proved, with evidence, on a balance of probabilities. Section 75(2)(a) of the *Real Estate Act* provides that every purchaser of any part of land to which a prospectus relates "is deemed to have relied on the representations made in the prospectus whether the purchaser has received the prospectus or not". Given my conclusion that VAC cannot be held liable for making material false statements under the *Real Estate Act*, it is not strictly necessary to consider whether the deemed reliance provided under that Act is rebuttable. The issue is even less germane given the subsequent repeal of the *Real Estate Act*. Nevertheless, as both parties argued the issue on appeal, I will briefly comment on the matter.
>
> **113** The trial judge found that deemed reliance is not rebuttable. She concluded that the purpose of the *Real Estate Act* was to "protect the investing public" (para. 333). She wrote that it would "undermine the purpose of the legislation" to allow a developer to attempt to rebut the presumption and "direct the focus of the inquiry to what the investor knew rather than what the developer failed to disclose" (para. 333). The Court of Appeal came to the opposite conclusion. It found that deemed reliance is rebuttable because the language used in s. 75 did not expressly create a non-rebuttable presumption.
>
> [Emphasis added.]

[20] After analyzing the issue over several paragraphs, Rothstein J. summarized his reasoning and concluded as follows:

> **119** Given that similar statutes expressly allow deemed reliance to be rebutted, the legislature does not view rebuttable presumptions to be contrary to investor protection. Further, a non rebuttable presumption could be contrary to the legislative balancing that underlies the disclosure requirements in the *Real Estate Act* and would result in absurd and unjust results. I would therefore conclude that the presumption of deemed reliance under the *Real Estate Act* was rebuttable when it could be proven, on a balance of probabilities, that the investor had knowledge of the misrepresented or omitted facts or information at the time the investor made the purchase.
>
> [Emphasis added.]

[21] In the final section of the judgment, where Rothstein J. summarized his conclusions, he returned to the question of deemed reliance saying:

> **169** As to VAC's liability for material false statements under the *Real Estate Act*:
>
> …
>
> 5. The presumption of deemed reliance under the *Real Estate Act* was rebuttable when it could be proven, on a balance of probabilities, that the investor had knowledge of the misrepresented or omitted facts or information at the time the investor made the purchase.

E. Deemed Reliance in This Proceeding

[22] A long-standing point of contention between the parties has been whether the rebuttability of deemed reliance was determined in the liability trial. In Appeal #2 Frankel J.A. at paras. 6–46 exhaustively set out the chronology of events and the various positions taken by the parties. I need not repeat that background.

[23] For the purpose of this appeal it is sufficient to note that on May 6, 2009, this Court reserved its decision on Appeal #1. On May 22, 2009, a different division of this Court released its reasons in the *Sharbern Appeal* holding that deemed reliance under the *Real Estate Act* was rebuttable. The Developers then sought to re-open Appeal #1 in order to raise the issue that reliance was rebuttable.

[24] On September 16, 2009, this Court released its reasons in Appeal #1. The only mention of deemed reliance in the reasons was the following:

> [32] It should be noted that the trial judge made no reference in his reasons for judgment, or in the order, to s. 59(1)(a) of the *Real Estate Act*, which provided:
>
> > every purchaser or any part of the subdivided land or time share interest to which the prospectus relates shall be deemed to have relied on the representations made in the prospectus whether the purchaser has received the prospectus or not; ...
>
> [33] The issue of "deemed reliance" was not raised by any of the parties in any of the appeals or cross-appeals, and nothing in these reasons for judgment should be taken as addressing that issue.

[25] Contemporaneous with the release of the reasons, counsel were advised by way of memorandum that the division was not prepared to re-open the appeal to permit the Developers to raise the deemed reliance issue. The memorandum read:

> The division has reviewed the correspondence from Mr. Harbottle and Mr. Dixon, and the accompanying material, concerning the issue of "deemed reliance" under s. 59(1)(a) of the *Real Estate Act,* R.S.B.C 1979, c. 356, that has arisen since the hearing of these appeals.
>
> We understand that Mr. Justice Truscott, at a hearing on August 21, 2009, did not make any ruling or order with respect to whether the issue of deemed reliance was dealt with by him in his reasons for judgment or the order following the trial from which these appeals were taken.
>
> As we understand the positions of counsel, Mr. Harbottle seeks directions from this Court clarifying the issue, or leave to reopen the appeal to make submissions on it. Mr. Dixon takes the position that Mr. Justice Truscott decided the issue following submissions at trial, and that the appellants should not be given leave to appeal an additional issue at this stage of the proceedings.
>
> We are all of the view that in the absence of a ruling or order of the trial judge dealing substantively with the issue of deemed reliance or an order dealing with the question of whether the issue of deemed reliance is *res judicata,* there is nothing for this Court to review at this time.
>
> Thus, the appeal will not be reopened for further submissions on this issue.

[26] On November 18, 2010, the Developers filed a notice of application in the trial proceedings seeking declarations by way of a summary trial that: (1) as a matter of law, deemed reliance is rebuttable; and, (2) the issue of deemed reliance had not yet been determined in the action.

[27] On May 11, 2011, the Supreme Court released *Sharbern SCC*, holding (as I discussed earlier) that deemed reliance under the provisions of the *Real Estate Act* was rebuttable in certain limited circumstances.

[28] On February 17, 2012, in reasons indexed at 2012 BCSC 241, the trial judge dismissed the Developers' application. He held that the terms of the order entered after the liability trial prevented the Developers from now seeking to rebut deemed reliance.

[29] This led to Appeal #2. In Appeal #2 the majority of this Court allowed the appeal holding that as a matter of law, deemed reliance under the *Real Estate Act* is rebuttable and the issue of deemed reliance had not yet been determined in the action: para. 79.

[30] The parties then returned to the trial judge. Before the commencement of the quantum trial, the Developers sought to amend their pleadings to allege that they had a full right to rebut deemed reliance (the "Amendment Application"). They sought to plead that the Investors had not relied on the material false statements, but instead relied on other factors to make their investment. The trial judge held, on the authority of *Sharbern SCC*, that the only issue for rebuttal of deemed reliance under the *Real Estate Act* was whether an investor had actual knowledge of the misrepresented facts at the time of the purchase. He held the proposed amendments disclosed no reasonable defence at law: 2013 BCSC 2308 at paras. 1(b), 34–40.

[31] The Developers appealed the denial of their proposed amendments relating to materiality and to the rebuttability of deemed reliance (Appeal #3). In their factum, the Developers argued that *Sharbern SCC* does not stand for the proposition that deemed reliance may only be rebutted if it can be established that the Investors had knowledge of the misrepresented or omitted facts.

[32] Appeal #3 was heard on February 25, 2014. The transcript of the hearing was before us on this appeal. At the commencement of the hearing, the Court raised the issue of its jurisdiction to entertain the appeal. After hearing brief submissions from counsel, Lowry J.A. for the Court gave the following oral reasons:

> [1] **LOWRY J.A.**: The defendants seek to appeal the trial judge's refusal to allow amendments to the statement of defence during the course of the trial of this action.
>
> [2] We doubt that it is open to this Court to entertain the appeal because the judge's refusal was not an order but a ruling which cannot be the subject of an appeal until after the trial is concluded. In any event, the defendants accept this appeal turns on whether the judge is *functus officio* with respect to the order that was affirmed in material respects by this Court, after the first phase of the trial.

> [3] If the appeal is properly before us, we are all agreed it should be dismissed for the reasons given by the judge with respect to his being *functus officio* with which we agree.
>
> [4] The appeal is dismissed.

[33] After this Court dismissed Appeal #3, the Developers did not seek to amend their pleadings to allege that the Investors had knowledge of the material false statement at the time of the purchase. At the quantum trial, the Developers proposed to lead evidence to establish that the Investors did not rely on the misrepresentations in their decision to invest. This consisted of evidence they had taken on examinations for discovery regarding the factors or circumstances relating to the Investors' individual decisions to enter the Sales Agreements in 1996. The Developers took the position that the discovery evidence was relevant to the issue of causation, not to reliance. In light of the volume of evidence sought to be tendered by the Developers (approximately 14,000 questions and answers from 79 examinations for discovery), the Investors sought a ruling from the trial judge at the outset of the quantum trial that all such evidence was irrelevant and inadmissible.

[34] The trial judge, in reasons indexed at 2014 BCSC 1733, granted the requested ruling (the "Evidentiary Ruling"). Again relying on *Sharbern SCC* he held that the only circumstance available to rebut deemed reliance was knowledge by any investor of the falsity of the statement at the time of the investment. He held that evidence regarding factors that the individual investors considered in making their investment was irrelevant and inadmissible.

F. On Appeal

[35] The Developers submit that the trial judge erred in law in refusing their proposed amendments and excluding evidence that they sought to lead on the issue of reliance. They submit he erred in holding that deemed reliance could only be rebutted when the investor had knowledge that the misrepresentation was false. They say he also erred in treating the reasons in *Sharbern SCC* as supporting his view of the permitted scope of evidence on the issue of reliance. They argue there is

no binding authority or any principle that required the exclusion of the evidence of the Investors on the issue of reliance.

[36] The Developers argue that the only issue addressed in *Sharbern SCC* was whether deemed reliance under the statute was rebuttable. They say the Court did not purport to determine what the scope of the rebuttal inquiry should be. They suggest that a fair reading of *Sharbern SCC* is that the stated circumstance of an investor having knowledge that a representation was false was simply illustrative of why the deemed reliance presumption should be rebuttable and not a definitive statement that the grounds for rebuttal of reliance are so limited. The Developers contend that it would be an absurd and unjust result if they were put in the position of having to guarantee the loss of investors who were not influenced by the misrepresentation in making their investment decision.

[37] The Developers observe that at common law the rebuttal of deemed reliance is not limited to proving the plaintiff knew the truth of the representation. At common law a defendant may also rebut the inference of reliance by evidence that the representation, in fact, played no part in the plaintiff's decision to enter into the transaction: *Parallels Restaurant Ltd.*; *Sidhu Estate v. Bains* (1996), 25 B.C.L.R. (3d) 41 (C.A.). The Developers contend that the deemed reliance provision in the *Real Estate Act* performs the same function in the statutory action as does the inference of reliance in a common law action. They submit they should have been allowed to lead evidence to establish that the Investors did not rely on the representation.

[38] The Developers say that without the benefit of the evidence as to why the plaintiffs actually invested in the Westin Grand, it is impossible to conclude whether reliance has been rebutted. In these circumstances, they submit there must be a new trial.

[39] The Investors submit that the trial judge made no error in determining that there was only a limited right of rebuttal open to the Developers and that in this regard, the decision in *Sharbern SCC* is determinative. They say the Supreme Court

determined that deemed reliance is not rebuttable unless it can be proven on a balance of probabilities, that the purchaser had actual knowledge of the misrepresented or omitted facts at the time of the investment.

[40] The Investors further submit that the very issue that the Developers wish to argue on this appeal was before this Court in Appeal #3. They say that as a result of this Court's decision in Appeal #3 dismissing the Developers' appeal, this Court is *functus officio* and to allow the appeal on this ground would be tantamount to re-opening and reversing the result in Appeal #3.

G. Discussion

[41] This Court is bound by authoritative judgments of the Supreme Court of Canada. In *R. v. Henry*, 2005 SCC 76, the Court discussed the circumstances in which lower courts are bound by *obiter dicta* in Supreme Court of Canada precedents. At para. 57, Binnie J. writing for the Court, stated:

> **57** The issue in each case, to return to the Halsbury question, is what did the case decide? Beyond the *ratio decidendi* which, as the Earl of Halsbury L.C. pointed out, is generally rooted in the facts, the legal point decided by this Court may be as narrow as the jury instruction at issue in *Sellars* or as broad as the *Oakes* test. All *obiter* do not have, and are not intended to have, the same weight. The weight decreases as one moves from the dispositive *ratio decidendi* to a wider circle of analysis which is obviously intended for guidance and which should be accepted as authoritative. Beyond that, there will be commentary, examples or exposition that are intended to be helpful and may be found to be persuasive, but are certainly not "binding" in the sense the *Sellars* principle in its most exaggerated form would have it. The objective of the exercise is to promote certainty in the law, not to stifle its growth and creativity. The notion that each phrase in a judgment of this Court should be treated as if enacted in a statute is not supported by the cases and is inconsistent with the basic fundamental principle that the common law develops by experience.
>
> [Emphasis added.]

[42] In *Sharbern SCC*, the Court considered several questions concerning the statutory cause of action that arises pursuant to s. 75(2) of the *Real Estate Act*. Those questions included whether the statements at issue were material, whether any of the statutory defences found in s. 75(2)(b)(vii) applied, and whether the

presumption of deemed reliance under the *Real Estate Act* was rebuttable. As a result of the Court's decision on the first two issues, it was not necessary for it to consider the deemed reliance issue. It chose, however, to do so.

[43] I cannot accept the Developers' contention that the Court in *Sharbern SCC* did not definitively decide the circumstances in which deemed reliance could be rebutted. Its reasons, while *obiter*, were obviously intended for guidance and should be accepted as authoritative. Over several paragraphs, the Court analyzed the purpose of the *Real Estate Act* to determine whether deemed reliance under the *Act* was rebuttable. In doing so, it considered a range of factors including: the parties' submissions; the successor legislation to the *Real Estate Act*; a related statute, case law interpreting the meaning of "deemed"; and policy concerns.

[44] First, the Court stated that the word "deemed" does not necessarily import a conclusive, non-rebuttable presumption. Instead, the word must be interpreted in light of the entire context of the statutory scheme: para. 114. Then, it referred to provisions in the successor legislation to the *Real Estate Act*, the *Real Estate Development Marketing Act*, S.B.C. 2004, c. 41 (*REDMA*). The *REDMA* explicitly allows for the deemed reliance provided in s. 22(3) of that *Act* to be rebutted under s. 22(5) when it can be proven that "the purchaser had knowledge of the misrepresentation at the time the purchaser received the disclosure statement." The Court also observed that the related provisions in the *Securities Act*, R.S.B.C. 1996, c. 418 also provide for rebuttable deemed reliance on misrepresentations in a prospectus. It concluded the existence of rebuttable presumptions in the successor and related legislation suggested that the purpose of the *Real Estate Act* would not be undermined by allowing deemed reliance to be rebutted: paras. 116–117.

[45] Next, the Court stated that a non-rebuttable presumption could interfere with the legislative policy that balances the needs of the investor community against the burden imposed on issuers. It suggested a non-rebuttable presumption would allow an investor to claim reliance on the misrepresentation, even if the investor was fully informed and had complete knowledge of all the facts. It commented that to hold an

issuer liable in such circumstances would be an absurd and unjust result and would place issuers in the position of having to guarantee the losses of fully informed investors: para. 118.

[46] In the result, the Court concluded that the presumption of deemed reliance in the *Real Estate Act* was rebuttable when it could be proven on a balance of probabilities that the investor had knowledge of the misrepresented or omitted facts at the time the investor made the purchase: para. 119. It repeated this conclusion in its summary at para. 169.

[47] I also do not accept the Developers' submissions that *Sharbern SCC* did not limit the grounds of rebuttability to the circumstance of an investor having knowledge that a representation was false. I cannot agree with the Developers that the Court meant this circumstance to be only an example or illustration of when deemed reliance could be rebutted. The Court's comments at para. 119 and again in its summary at para. 169 belie these submissions. If the Court had intended for the deemed reliance provision in the *Real Estate Act* to be subject to full rebuttal in the same manner as at common law it surely would have said so. It did not. Rather it declared at para. 169:

> The presumption of deemed reliance under the *Real Estate Act* was rebuttable when it could be proven, on a balance of probabilities, that the investor had knowledge of the misrepresented or omitted facts or information at the time the investor made the purchase.

Similarly, if proof of knowledge of the misrepresentation was meant to be a mere example of when reliance could be rebutted, the Court would have explicitly left open the possibility that deemed reliance could be rebutted in other ways.

[48] I find that the presumption of deemed reliance under the *Real Estate Act* can only be rebutted in the circumstance described in *Sharbern SCC*: that is, when the investor had knowledge of the misrepresented or omitted facts at the time of the investment.

[49] In the result, the trial judge did not err in rejecting the proposed amendments as they did not disclose a defence known to law. Similarly he did not err in excluding

the evidence the Developers sought to lead concerning reliance, as that evidence was not relevant to any available defence under the *Real Estate Act*.

[50] Given these findings I need not consider the Investors' submission that this issue was decided in Appeal #3.

[51] I would not accede to this ground of appeal.

DETERMINATION OF DAMAGES

A. Overview

[52] This ground of appeal concerns the manner in which the trial judge assessed damages. The trial judge assessed damages of $8,000,000, which represented the difference between what the Investors paid for their strata units and the value of those units on April 15, 1999. As will be discussed in further detail, the loss of value was driven by market forces. The misrepresentation in the Disclosure Statement did not impact the value of the strata units.

[53] The Developers do not challenge the trial judge's finding that the strata units had decreased in value by $8,000,000 between November 1996 and April 15, 1999. They submit, however, that he erred in determining damages as of April 15, 1999. They say the cause of action arose in November 1996 when the parties entered into the Sales Agreements and damages should be determined as of that date. They further submit he erred in holding that market-driven losses were compensable.

[54] Before turning to the specific grounds of appeal, I will first set out some additional background details including a review of the Disclosure Statement and the Sales Agreements. I will then consider the history of the claims in the litigation and the reasons for judgment in the quantum trial. Against that background I will discuss and analyze the individual grounds of appeal.

B. The Disclosure Statement

[55] As a precondition to the marketing and sale of the strata units in the Westin Grand, the Developers, pursuant to the provisions of the *Real Estate Act*, had to first prepare and file with the Superintendent of Real Estate the Disclosure Statement and provide the Disclosure Statement to each prospective purchaser. The Disclosure Statement described in detail the development and management of the proposed hotel. It incorporated some 15 exhibits which formed an integral part of the Disclosure Statement. In total, the Disclosure Statement contained some 158 pages.

[56] The first page of the Disclosure Statement included various disclaimers including the following:

> **SECTION 59 OF THE REAL ESTATE ACT PROVIDES THAT EVERY PURCHASER OF ANY PART OF THE SUBDIVIDED LAND TO WHICH THIS DISCLOSURE STATEMENT OR PROSPECTUS RELATES SHALL BE DEEMED TO HAVE RELIED ON THE REPRESENTATIONS MADE IN THE DISCLOSURE STATEMENT OR PROSPECTUS AND, IF ANY MATERIAL FALSE STATEMENT IS CONTAINED IN THE DISCLOSURE STATEMENT OR PROSPECTUS, THE DEVELOPER, ITS DIRECTORS AND ANY PERSON WHO HAS AUTHORIZED THE ISSUE OF THIS DISCLOSURE STATEMENT IS LIABLE TO MAKE COMPENSATION TO THE PURCHASER, SUBJECT TO ANY DEFENSES AVAILABLE UNDER SECTION 59 OF THE REAL ESTATE ACT.**

[57] Article 6.8 of the Disclosure Statement set out in some detail the risk factors inherent in the investment. That article read:

> A real estate investment is, by its nature, speculative. If a purchaser is purchasing the real estate as an investment, the purchaser should be aware that this investment has not only the usual risks associated with purchasing real estate, but also those risks that are inherent to the nature of real estate securities. The following factors should be considered carefully before purchasing a Strata Lot:
>
> (a) *Real Estate Generally*. An investment in real estate which includes a mandatory rental pool involves certain inherent risks, including the relative performance of the Rental Pool and the relative marketability of the Strata Lot which is charged by a covenant such as the Hotel Use Covenant. Real estate developments and investments are generally subject to varying degrees of risk depending on the nature of the property. Such risks include changes in general economic conditions, local supply and demand conditions, the attractiveness of the property to potential owners or guests, competition from others and the degree of liquidity of real estate.

(b) *Absence of Operating History*. Although certain of the principal officers of the partners of the Developer have considerable prior experience in the real estate development industry, and certain of the principal officers of O'Neill and INVHC have considerable prior experience in the hotel and hospitality industry, the Hotel itself must be regarded as a new venture and has no prior record of achieving its business objectives. As a result, the purchase of a Strata Lot is subject to the risks associated with ventures of this kind in an early state of development, including uncertainty of revenues, markets and profitability. The Hotel has no operating history and no history of earnings. There can be no assurance that the Hotel will be able to achieve or sustain profitability.

(c) *Location*. As the Hotel is located in downtown Vancouver, the results of the Hotel operation will depend on the continued attractiveness of the area as a tourist destination. The area has in recent years experienced growth in this economic sector and the Developer is not aware of any factors which would adversely impact such growth in the future.

(d) *The Hotel Business*. The business of operating a hotel is competitive. To the extent that there are more hotel rooms available in a particular market than there is demand for those rooms, then both occupancy and room rental rates may be adversely affected.

(e) *Management*. The success or failure of the rental pool will depend in part on the abilities of the manager of the rental pool. Moreover, in the event that the management of the Hotel is not provided to the standards required under the Franchise Agreement, the Manager may be replaced or the Hotel may cease to be operated as a Westin Hotel. The rights of owners of Strata Lots to participate in the management and control of the Strata Corporation, to participate in the management of the business of the Hotel and to change the Manager will be considerably restricted in order to maintain the integrity of the Hotel.

(f) *Additional Contributions*. The purchase of any Strata Lot involves an ongoing commitment by a purchaser to pay strata maintenance fees to the Strata Corporation. If the revenue generated from the rental pool is less than the costs of operating the rental pool, then the purchaser must make additional contributions over and above the purchaser's initial investment and financing costs. There is no assurance that the Hotel will generate sufficient revenues to cover expenses. The net cash return to a purchaser will depend on the results of the Hotel operation as well as the amounts to be deducted for strata fees, taxes and debt service payments.

(g) *Resale Restrictions*. As described in section 6.5, the Hotel Lots will be subject to resale restrictions under applicable securities laws.

C. The Sales Agreements

[58] Pursuant to the provisions of the Sales Agreements, the Investors had to pay a 10% deposit on acceptance of their offer. The Sales Agreement called for a second deposit of 10% of the purchase price at a date set out in the Sales

Agreement and a third deposit of 5% of the purchase price 12 months after the date on which the second deposit was due for payment. The deposits were all to be held in trust until completion.

[59] The Investors were required to pay the balance of the purchase price on the completion date. The Sales Agreements were ultimately completed on April 13, 1999.

D. History of the Litigation

[60] The Investors commenced their action against the Developers on November 7, 2002. Neither the Statement of Claim (June 27, 2003), the Amended Statement of Claim (January 28, 2005), nor the Further Amended Statement of Claim (August 18, 2005) advanced any claim for misrepresentation based on Note 2(a), which is the sole basis of the present judgment. Many other claims, both under the statute and at common law, were advanced by the Investors but they were ultimately either dismissed or abandoned.

[61] On October 6, 2006, following a discovery in August 2006, the Investors filed the Second Further Amended Statement of Claim, which, for the first time, advanced a claim for misrepresentation based on Note 2(a).

E. The Quantum Reasons

[62] In the Evidentiary Ruling, the trial judge held that the Investors were entitled to recover all losses or damages sustained as a result of entering into the transaction. Relying on Mr. Justice Sopinka's comments in *Rainbow*, he found that the entry into the transaction provided the necessary causal link between the misrepresentation and the loss. He held that the only issue still to be determined at the quantum trial was whether the Investors did sustain any loss or damage from entering into the transaction.

[63] At the quantum trial, both parties led expert evidence concerning the market value of the Investors' strata units as of April 15, 1999. The reasons deal extensively

with the experts' evidence. The trial judge ultimately preferred the evidence of Mr. Reynolds, the expert called by the Investors, and he accepted Mr. Reynolds' opinion that the market value of the Investors' strata units, as of April 15, 1999, was $10,388,700. The Investors had on completion paid a total of $18,468,930 for the purchase of their units and based on Mr. Reynolds' appraisal, they suffered a capital loss of $8,080,230 in making the investment.

[64] I would comment briefly on Mr. Reynolds' methodology. In determining the loss, Mr. Reynolds used the direct capitalization method under the income approach to valuation. The income approach is typically used for income-producing properties such as hotels that trade based on their income-producing capabilities. The direct capitalization method involves a conversion of anticipated future benefits from the ownership of property into a present value estimate of the properties' market value. This is done through a capitalization process, which converts the anticipated future income and/or reversions to a present value estimate. Under the direct capitalization method, a properties' net income is determined through the stabilization of income and expenses for one year. The net income for that one year is then capitalized at an overall rate considered consistent with the market to yield an estimate of the market value of the property. The capitalization rate is determined based on the capitalization rates of similar recently sold properties.

[65] The capitalization rates chosen by Mr. Reynolds reflected the capitalization rates in regards to two other 1999 hotel sales. As will be apparent from the above, the April 15, 1999 evaluation was driven by market factors as those factors determine the capitalization rate. The misrepresentation in Note 2(a) played no role in Mr. Reynolds' evaluation.

[66] Having accepted Mr. Reynolds' evaluation, the trial judge then turned to the question of the proper date to assess the Investors' loss. He held damages should be determined as of April 15, 1999, being approximately the date when each of the Investors completed their purchase of the units. He held that pursuant to s. 75 of the *Real Estate Act*, the Investors' statutory cause of action only arose once title to the

units had actually passed to the Investors. He found as of that date the Investors suffered actual damages by parting with their money and receiving in exchange a property with less value than the price they paid. In reaching his decision he relied on comments of Lord Browne-Wilkinson in *Smith New Court Securities Ltd. v. CitiBank N.A.*, [1997] A.C. 254 (H.L.) at 265–266:

> Turning for a moment away from damages for deceit, the general rule in other areas of the law has been that damages are to be assessed as at the date the wrong was committed. But recent decisions have emphasised that this is only a general rule: where it is necessary an order adequately to compensate the plaintiff for the damage suffered by reason of the defendant's wrong a different date of assessment can be selected. Thus in the law of contract, the date of breach rule "is not an absolute rule: if to follow it would give rise to injustice, the court has power to fix such other date as may be appropriate in the circumstances." *per* Lord Wilberfoce in *Johnson v. Agnew* [1980] A.C. 367.
>
> …
>
> … the old 19th century cases can no longer be treated as laying down a strict and inflexible rule. In many cases, even in deceit, it will be appropriate to value the asset acquired as at the transaction date if that truly reflects the value of what the plaintiff has obtained. Thus, if the asset acquired is a readily marketable asset and there is no special feature (such as a continuing misrepresentation or the purchaser being locked into a business that he has acquired) the transaction date rule may well produce a fair result. The plaintiff has acquired the asset and what he does with it thereafter is entirely up to him, free from any continuing adverse impact of the defendant's wrongful act. The transaction date rule has one manifest advantage, namely that it avoids any question of causation. One of the difficulties of either valuing the asset at a later date or treating the actual receipt on realization as being the value obtained is that difficult questions of causation are bound to arise. In the period between the transaction date and the date of valuation or re-sale other factors will have influenced the value or re-sale price of the asset. It was the desire to avoid these difficulties of causation which led to the adoption of a transaction date rule.

[67] Using the transaction date of April 15, 1999, and relying on Mr. Reynolds' evaluation, the trial judge found the Investors' capital loss in making the investments to be $8,000,000. He held that this transaction date produced a fair result because what the Investors decided to do with their units thereafter was entirely up to them free from any continuing adverse effect of the defendants' wrongful act which was restricted to the time of their purchase of the units.

F. Position of the Parties

[68] The Developers do not challenge the trial judge's decision to prefer the evidence of Mr. Reynolds over the evidence of the experts that they had called at trial. For the purposes on the appeal, they agree that the strata units acquired by the Investors were, as of April 15, 1999, worth some $8,000,000 less than the price that the Investors paid. They argue however that the damage award cannot be sustained. They submit that damages should have been calculated as of November 1996, the date that the parties entered into the Sales Agreement. Further, they say that the Investors' losses should be limited to those caused by the misrepresentation and should not include those losses that were caused by market forces, which neither party could control.

[69] On the first ground of appeal, the Developers submit the transaction date for the purpose of assessing damages should be November 1996. They note that in the ordinary case, the parties enter into the agreement and transfer the property at nearly the same date. In such circumstances, the transaction date assessment isolates the effect of the misrepresentation. There is no time for other market forces to operate on the value of the investment.

[70] In this case, the Developers submit that the nearly three year delay between the signing of the Sales Agreements and the April 13, 1999 closing date opened the door to many influences on the value of the strata units apart from the misrepresentation. These potential changes in market conditions were specifically set out in the risk factors identified in the Disclosure Statement. The Developers submit that the wrong in this case was committed when the Disclosure Statement containing the misrepresentation led the Investors to enter into the Sales Agreement. At this time they paid the initial 10% deposit. It was then, according to the Developers, that the Investors had altered their legal position by acting on the misrepresentations to their detriment and the wrong had been committed. The Developers submit that the cause of action arose in November 1996 when the parties executed the Sales Agreements.

[71] The Developers contend that by assessing damages as of April 15, 1999, the trial judge ordered damages based on an entirely different market with different expectations from those that existed at the time of the wrong in November 1996. The Developers argue that the assessment of damages at November 1996 would have represented an "apples to apples" comparison that would have enabled the court to determine if the value of the assets acquired under the Sales Agreements were less than the purchase price of those units without regard to the misrepresentation. The Developers submit that the Investors, not having led evidence of any loss of capital value in November 1996, failed to establish they suffered any loss, with the result that their claim for damages must be dismissed.

[72] On the second ground, the Developers submit that they should only be liable to pay compensation for any loss or damage that was caused by the inaccuracy of the false statement (as distinct from that caused by the transaction). In support of this proposition, they rely on the decisions in *SAAMCO* and *Aneco Reinsurance Underwriting Ltd. (In Liquidation) v. Johnson & Higgins Ltd.*, [2001] UKHL 51 (*Aneco*). They also rely on the concurring reasons of Slatter J.A. in *Hogarth v. Rocky Mountain Slate Inc.*, 2013 ABCA 57; leave to appeal ref'd [2013] S.C.C.A. 160.

[73] The Investors resist the appeal. In regards to the first ground, they submit that under the provisions of the *Real Estate Act* the cause of action arose only when the transaction closed on April 13, 1999. They submit that even if the cause of action arose at the time the parties entered the contract, not at completion, it would be within the discretion of the trial judge to assess compensation as of the completion date to provide proper compensation for all loss or damage flowing from the transaction.

[74] In regards to the measure of damages, the Investors submit that *SAAMCO* does not apply to the statutory cause of action arising under the *Real Estate Act*. They say, pursuant to s. 75(2), they are entitled to recover "any loss or damage sustained." Alternatively they submit that *SAAMCO* does not set out the law in Canada and is contrary to the decision of the Supreme Court of Canada in *Rainbow*.

G. Discussion

i. Date of Assessment

[75] This proceeding was brought pursuant to the statutory cause of action set out at s. 75(2)(b) of the *Real Estate Act*. For ease of reference I will again set out the relevant portions of the section:

> (b) if any material false statement is contained in the prospectus,
>
> (i) every person …
>
> is liable to compensate all persons who have purchased the subdivided land …for any loss or damage those persons may have sustained, …

[76] I agree with the trial judge that the cause of action set out in s. 75 does not arise until the completion of the sale. In this case, the sale completed on April 13, 1999. Until then, the Investors did not have a cause of action. They had suffered no damage. I find no error in the trial judge's decision to assess damages as of that date.

[77] I appreciate the Developers' submission that the situation the parties faced in April 1999 was different than that in November 1996; however, it does not, in my view, change the appropriate date of determining the loss. The parties entered the contract in November 1996 knowing that it would not complete until the Westin Grand was constructed. They were aware that by the time the hotel opened for business, market conditions may have changed. In my opinion, the critical issue is not the date of assessment, but whether the Investors are entitled to recover compensation for those losses that arose as a result of a change in market forces over which neither party had any control. It is to that question I now turn.

ii. What Damages are Recoverable

[78] The question for determination is whether under the statutory cause of action for a material misrepresentation in s. 75(2)(b) of the *Real Estate Act*, an investor can recover for losses arising, not from the misrepresentation, but from market forces.

To put it another way, the issue is whether an investor is entitled to recover all losses sustained from entering into the contract or is compensation limited to those losses caused as a result of the inaccuracy of the representation.

[79] Before turning to the losses recoverable under the statutory cause of action, I will first consider the position at common law. This is necessary because the parties draw on the common law of negligent misrepresentation and deceit to support their respective interpretations of the statute. As noted earlier, all the common law claims brought in this proceeding were ultimately dismissed or abandoned.

[80] In the case of a fraudulent misrepresentation, it is common ground that a party is entitled to recover all damage arising from the fraudulent inducement however caused: *Doyle v. Olby (Ironmongers) Ltd.*, [1969] 2 Q.B. 158 (C.A.) at 167; *Wiebe v. Gunderson*, 2004 BCCA 456 at paras. 9–11. This case does not involve a claim in fraudulent misrepresentation or deceit, although the Investors argue that s. 75(2)(b) of the *Real Estate Act* properly interpreted calls for the recovery of the full extent of the loss the Investors sustained on the transaction.

[81] The damages a party is entitled to recover for a negligent misrepresentation is somewhat less settled. In *Rainbow*, the plaintiff bid on a food catering contract based on a representation concerning the quantity of meals that would be required. The plaintiff established that but for the misrepresentation it would not have entered the contract. It transpired that the estimate was incorrect and as a result, the plaintiff suffered significant losses. Sopinka J., writing for the majority, held that a plaintiff seeking damages for negligent misrepresentation was "entitled to be put in the position he or she would have been in if the misrepresentation had not been made." He held the plaintiff was entitled to recover all of its losses. He reasoned at 17:

> the entering into of the contract is a link in the chain with respect to the [plaintiff's] losses. These losses are causally and directly connected to the contract and the contract is causally connected to the negligent misrepresentation.

[82] McLachlin J., as she then was, dissented. In her view, the question was not what the total loss on the contract was but what loss was shown to have been caused by the negligent misrepresentation. She held that if the defendant could show the loss was caused by factors other than the misrepresentation, then the chain of causation was broken. She reasoned at 19:

> Tort liability is based on fault, and losses not caused by the defendant's fault cannot be charged to it.

[83] In *SAAMCO*, a decision handed down five years after *Rainbow*, the House of Lords adopted a position similar to that articulated by McLachlin J. in *Rainbow*. Lord Hoffman wrote the judgment of the court. At 369–370, he began by framing the issue of compensation:

> Much of the discussion, both in the judgment of the Court of Appeal and in argument at the Bar, has assumed that the case is about the correct measure of damages for the loss which the lender has suffered. The Court of Appeal… began its judgment with the citation of three well-known cases, [citations omitted], stating the principle that where an injury is to be compensated by damages, the damages should be as nearly as possible the sum which would put the plaintiff in the position in which he would have been if he had not been injured. It described this principle as 'the necessary point of departure' … .
>
> I think that this was the wrong place to begin. Before one can consider the principle on which one should calculate the damages to which a plaintiff is entitled as compensation for loss, it is necessary to decide for what kind of loss he is entitled to compensation. A correct description of the loss for which the valuer is liable must precede any consideration of the measure of damages. …
>
> …
>
> How is the scope of the duty determined? In the case of a statutory duty, the question is answered by deducing the purpose of the duty from the language and context of the statute [citation omitted]. In the case of tort, it will similarly depend upon the purpose of the rule imposing the duty. … In the case of an implied contractual duty, the nature and extent of the liability is defined by the term which the law implies. …
>
> [Emphasis added.]

[84] At 371, he characterized as "exceptional" those rules that make a wrongdoer liable for all of the consequences of his or her wrongful act:

> There is no reason in principle why the law should not penalise wrongful conduct by shifting on to the wrongdoer the whole risk of consequences

> which would not have happened but for the wrongful act. … But that is not the normal rule. …
>
> Rules which make the wrongdoer liable for all the consequences of his wrongful conduct are exceptional and need to be justified by some special policy. Normally the law limits liability to those consequences which are attributable to that which made the act wrongful. In the case of liability in negligence for providing inaccurate information, this would mean liability for the consequences of the information being inaccurate.
>
> [Emphasis added.]

[85] Lord Hoffman then set out the example of a doctor who negligently examines a mountaineer's knee in advance of an expedition (at 371–372):

> The climber goes on the expedition, which he would not have undertaken if the doctor had told him the true state of his knee. He suffers an injury which is an entirely foreseeable consequence of mountaineering but has nothing to do with his knee.
>
> On the Court of Appeal's principle, the doctor is responsible for the injury suffered by the mountaineer because it is damage which would not have occurred if he had been given correct information about his knee. He would not have gone on the expedition and would have suffered no injury. On what I have suggested is the more usual principle, the doctor is not liable. The injury was not caused by the doctor's bad advice because it would have occurred even if the advice had been correct.
>
> …
>
> ... I think that the Court of Appeal's principle offends common sense because it makes the doctor responsible for consequences which, though in general terms foreseeable, do not appear to have a sufficient causal connection with the subject matter of the duty. The doctor was asked for information on only one of the considerations which might affect the safety of the mountaineer on the expedition. There seems no reason of policy which requires that the negligence of the doctor should require the transfer to him of all the foreseeable risks of the expedition.
>
> [Emphasis added.]

[86] At 372−373, Lord Hoffman summarized his conclusion that a defendant's liability for damages should be determined with regard to the scope of its duty of care:

> … a person under a duty to take reasonable care to provide information on which someone else will decide upon a course of action is, if negligent, not generally regarded as responsible for all the consequences of that course of action. He is responsible only for the consequences of the information being wrong. A duty of care which imposes upon the informant responsibility for

> losses which would have occurred even if the information which he gave had been correct is not in my view fair and reasonable as between the parties. It is therefore inappropriate either as an implied term of a contract or as a tortious duty arising from the relationship between them.
>
> The principle thus stated distinguishes between a duty to provide information for the purpose of enabling someone else to decide upon a course of action and a duty to advise someone as to what course of action he should take. If the duty is to advise whether or not a course of action should be taken, the adviser must take reasonable care to consider all the potential consequences of that course of action. If he is negligent, he will therefore be responsible for all the foreseeable loss which is a consequence of that course of action having been taken. If his duty is only to supply information, he must take reasonable care to ensure that the information is correct and, if he is negligent, will be responsible for all the foreseeable consequences of the information being wrong.
>
> [Emphasis added.]

[87] The House of Lords revisited *SAAMCO* in *Aneco Reinsurance Underwriting Ltd. (In Liquidation) v. Johnson & Higgins Ltd.*, [2001] UKHL 51. Lord Lloyd summarized the principle arising from *SAAMCO* at paras. 11–12:

> 11. … What indeed is the *SAAMCO* principle? It is surely the principle which has been common ground throughout the argument before us that a defendant is not liable in damages in respect of losses of a kind which fall outside the scope of his duty of care. There was nothing new in that principle. It has been the rule in contract since the decision in *Czarnikow v. Koufos* [1969] 1 AC 350, if not before. It has been the rule in tort since *In Re Polemis and Furness Withy & Co Ltd* [1921] 3 KB 560 was disapproved in *Overseas Tankships (UK) Ltd v. Morts Dock and Engineering Co Ltd (The Wagon Mound (No 1)* [1961] AC 388).
>
> 12. What was new and important in *SAAMCO* was the application of the principle to valuers, so as to exclude their liability for loss due to a fall in the market: see *Platform Home Loans Ltd v. Oyston Shipways Ltd* [2000] 2 AC 190, 209 per Lord Hobhouse. Thus in the case of valuers, and their like, that is to say, those who undertake to provide specific information, the *SAAMCO* principle gave rise to a sub-rule, that valuers are not generally liable (the word is that of Lord Hoffmann, at p 214) for all the foreseeable consequences of their negligence, but only for the consequences of the valuation being wrong. …
>
> [Emphasis added.]

See also Lord Steyn at para. 37 and Lord Millett at para. 66.

[88] In *Hogarth,* the Alberta Court of Appeal considered the elements at common law for damages from a negligent misrepresentation. Slatter J.A. noted, at para. 34,

that the general test for causation in tort is that a plaintiff must generally establish on a balance of probabilities that the injury would not have occurred but for "the negligence of the defendant": *Fullowka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5 at para. 93; *Resurfice Corp. v. Hanke*, 2007 SCC 7 at paras. 21–22; *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 14; and *Clements v. Clements*, 2012 SCC 32 at paras. 6–8.

[89] Based on that foundation, Slatter J.A. concluded that in regards to the tort of negligent misrepresentation, a two-part test for causation arose. He found:

> [36] An application of the law set out in these binding authorities to the tort of negligent representation leads to a two part test for causation in negligent misrepresentation. The plaintiff must demonstrate that "but for" the representation, the damage would not have been suffered. This requires proof that but for the representations, the plaintiffs "would not have invested the monies they did", and that the damage would not have resulted if the representations had been true. If either of these two tests is not met, then the "but for" test is not satisfied. If the plaintiffs would have lost their investment even if the representation was true, then their losses did not occur "but for" the tort. In the words of *Clements*, there is no correlative relationship of doer and sufferer of the same harm.
>
> [37] It is true that "but for" making the investment, the respondents would not have suffered any damage. In a factual sense, entering into the investment contracts was one necessary cause of the losses. But the law is not concerned only with causation in fact. "Causation" is a legal concept about the relationship between the tort and the injury that is needed to claim damages: *Snell v Farrell*, [1990] 2 SCR 311 at p. 326. In order to tie the damage to the misrepresentations, there were two necessary preconditions: entry into the contract, and the inaccuracy of the representations. Where the investor plaintiff suffers other losses that are unrelated to the misrepresentation, the defendant representor is not responsible:
>
> > Separation of distinct and divisible injuries is not truly apportionment; it is simply making each defendant liable only for the injury he or she has caused, according to the usual rule. The respondents are correct that separation is also permitted where some of the injuries have tortious causes and some of the injuries have non-tortious causes: Fleming, *supra*, at p. 202. Again, such cases merely recognize that the defendant is not liable for injuries which were not caused by his or her negligence. (*Athey* at para. 24)
>
> The losses suffered by the respondents as a result of the inaccuracy of the representations are distinct and divisible from the losses they suffered as a result of external causes. Under the general rules of causation, the latter are not recoverable.
>
> [Emphasis in original.]

[90] Slatter J.A. then held that his conclusion was similar to the result in *SAAMCO*. He indicated that the same approach had also been followed in Australia (*Kenny & Good v. MGICA*, [1999] HCA 25 at paras. 26, 29, 48, 54–6, 80) and New Zealand (*Bank of New Zealand v. Zealand Guardian Trust Co. Ltd.*, [1999] 1 N.Z.L.R. 664 at 682–683 (C.A.); and *Sherwin Chan & Walshe Ltd. (in Liq) v. Jones*, [2012] NZCA 474 at paras. 36–41).

[91] Slatter J.A. then turned to the decision in *Rainbow*. Referring to *BG Checo International Limited v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12, he suggested it was unclear whether the Court in *Rainbow* intended to lay down a general principle or the case was limited to its specific facts. In *BG Checo* the Supreme Court distinguished *Rainbow* on the basis that in *BG Checo* the Court of Appeal was justified in finding that the plaintiff would still have entered the contract even if it knew the true facts regarding the representation. In these circumstances the Court held as follows (at 41):

> This means not giving the plaintiff compensation for any losses not related to the misrepresentation, but resulting from such factors as the plaintiff's own poor performance, or market or other forces that are a normal part of business transactions.

[92] Slatter J.A. also suggested that *Rainbow* was difficult to reconcile with the subsequent decisions in *Athey*, *Resurfice*, *Fullowka* and *Clements*. In this regard, he suggested that *SAAMCO* was more consistent with those later binding authorities. He summarized his findings at para. 43:

> [43] In summary, the causation test in *Cognos* is: “The reliance must have been detrimental to the representee in the sense that damage resulted.” In the ordinary case arising from an investment based on negligent misrepresentation, this requires the plaintiff to demonstrate that a) “but for” the representation, the investment would not have been made, and b) the losses would not have been incurred if the representation had been accurate.

[93] The other two members of the Court, O’Brien and Rowbotham JJ.A. did not agree with Slatter J.A.’s analysis. In jointly written reasons, they held that *Rainbow* was the governing authority and under *Rainbow*, all that was necessary to establish

the causal link between the representation and the loss was that the party relied on the misrepresentation to enter the contract: *Hogarth* at para. 9.

[94] This case, unlike *Hogarth*, does not concern the common law tort of misrepresentation. The issue is the measure of damages recoverable under the statutory cause of action found in s. 75 of the *Real Estate Act.* The trial judge relied on *Rainbow*. *Rainbow,* which concerns the common law measure of damage, is not however binding on the measure of damages under the *Real Estate Act*.

[95] The Investors submit that s. 75 is a complete code and the statutory measure of compensation has been construed to provide for recovery of the full extent of the loss sustained on the transaction, just as is available at common law for deceit. They say this measure of compensation was established more than a century ago in *McConnell v. Wright*, [1903] 1 Ch. 546 (C.A.). They submit the same result flows from *Rainbow*.

[96] The Investors also rely on the fact that the *Real Estate Act* does not contain a provision similar to s. 132(11) of the *Securities Act*. That section reads:

> 132 (11) In an action for damages under subsection (1) or (3) based on a misrepresentation affecting a security offered by the offeror in exchange for securities of the offeree issuer, the defendant is not liable for all or any part of the damages that the defendant proves does not represent the depreciation in value of the security resulting from the misrepresentation.

[97] The Investors submit that the absence of a similar defence in s. 75 in the *Real Estate Act* supports their position that under the *Real Estate Act*, a party who invested based on a disclosure statement that contained a material misrepresentation is entitled to recover the full loss flowing from the transaction. They submit a provision like s. 132(11) in the *Securities Act* that limits damages to those resulting from the misrepresentation cannot be read into the *Real Estate Act* because it does not expressly contain such a limit or defence.

[98] In my view, *McConnell* does not assist the Investors. In *McConnell*, the plaintiff purchased shares in a company based on a prospectus that alleged that the

company held certain assets. The company did not hold such assets and accordingly, was worth less than the amount the investor had paid. The plaintiff's loss arose because the representations in the prospectus were not true. If the representations in the prospectus had been true the plaintiff would not have suffered a loss. In this case, the reduction in value of the strata units had nothing to do with the representation concerning the occupancy projections and the Investors would have suffered the same loss even if Note 2(a) had been true.

[99] In regard to the submission concerning the *Securities Act*, it is similar to an argument made in *Sharbern SCC* in relation to deemed reliance. As noted in *Sharbern*, the related *Securities Act* provision did allow for rebuttable deemed reliance on misrepresentations in a prospectus. The Court did not conclude from this fact that rebuttable deemed reliance should not be read into the *Real Estate Act*. Rather, the Court noted that the existence of a rebuttable reliance provision in related legislation suggested that such provisions were not contrary to the investor protection purposes of the legislation: see paras. 116–117.

[100] As noted in *SAAMCO*, rules which make the wrongdoer liable for all the consequences of his wrongful conduct are the exception and need to be justified by some special policy. In the normal course the law limits liability to those consequences which are attributable to that which made the act wrongful.

[101] Southin J.A. highlighted a similar point in *Webster v. Ernst & Young*, 2003 BCCA 95. After referring to *SAAMCO*, she observed that there is no "moral foundation" for equating damages from a negligent breach of a duty with damages for fraudulent conduct:

> [87] In that judgment, I take the House of Lords to be saying that one must not carry the "but for" principle too far.
>
> [88] A reason for not carrying the "but for" proposition too far is that it will lead the law into equating, for the purpose of assessing damages, negligent breach of the duty of care and skill in the management of another's business with fraud. In my opinion, there is no moral foundation for such an outcome.

[102] The purpose of the *Real Estate Act* is to protect the investing public. However, the legislation also balances the needs of the investor community against the burden imposed on issuers: *Sharbern SCC* at paras. 118–119. Section 75 promotes this purpose by protecting investors from material false representations. It provides the statutory mechanism pursuant to which an investor can hold a developer liable with respect to the representations found in a disclosure statement. Through its deeming provisions it relieves the investor from the sometimes onerous task of proving reliance.

[103] I see no special reason why the liability of developers to pay compensation under s. 75(2)(b) of the *Real Estate Act* for a material misrepresentation should extend to losses arising, not from the inaccuracy of the representation, but from market forces. First, a deceit measure of damages is not appropriate as the statute imposes liability in situations far removed from where a developer engaged in fraudulent conduct. Imposing such an obligation would place developers in the role of insurers to investors for losses arising from market forces. This is not the function of the disclosure obligations of developers under the statute, nor is such a result required to serve the statutory purposes underlying disclosure obligations: *Sharbern SCC* at para. 118.

[104] Second, in my view, a developer's requirement to pay compensation for a material misrepresentation under s. 75(2)(b) must be interpreted in light of the nature of its statutory disclosure obligations. The principal statutory obligation placed on developers under Part 2 of the *Real Estate Act* is to provide full and accurate information in the disclosure statement. A developer is not required to advise potential investors generally.

[105] I would adopt the course charted by Slatter J.A. in *Hogarth.* To succeed in an action for compensation under s. 75 of the *Real Estate Act*, an investor must prove both the material misrepresentation and that a loss would not have resulted if the representation had been true. A developer is not liable to compensate an investor for

losses suffered as a result of external causes, such as changes in the market, which do not result from the inaccuracy of the representation.

[106] In this case, no loss or damage resulted from the inaccuracy of the misrepresentation. Instead, the losses arose from external causes. Thus, the Investors would have suffered a loss even if the representation was true. The loss arose because of a change in market conditions, a risk that was clearly identified in the Disclosure Statement. As the loss arose solely for reasons unrelated to the representation, it is not recoverable against the Developers.

[107] In the result I find that the Investors have not proven any damages arising from the material misrepresentation. I would allow the appeal and dismiss the action.

"The Honourable Mr. Justice Goepel"

I AGREE:

"The Honourable Mr. Justice Frankel"

I AGREE:

"The Honourable Madam Justice Dickson"