IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Interville Development Limited Partnership v. The Owners, Strata Plan BCS2313,* 2019 BCSC 112

Date: 20190130
Docket: S146300
Registry: Vancouver

Between:

Interville Development Limited Partnership

Plaintiff

And

The Owners, Strata Plan BCS2313

Defendant

Before: The Honourable Madam Justice Warren

Corrected reasons: The paragraph numbering throughout was corrected on February 6, 2019.

Reasons for Judgment

Counsel for the Plaintiff:	Michael J. Hewitt
Counsel for the Defendant:	Alexander W. Bayley
Place and Dates of Hearing:	Vancouver, B.C. October 24–26, 2018 November 2, 2018
Place and Date of Judgment:	Vancouver, B.C. January 30, 2019

Introduction

[1] The plaintiff, Interville Development Limited Partnership ("Interville"), was the developer of a large commercial and residential project in Vancouver known as the International Village, which includes four stratified groups of towers. The defendant, the Owners, Strata Plan BCS2313 (the "Strata Corporation"), is the strata corporation for one of the groups of towers known as the Firenze. The central issue in this case is whether the Strata Corporation is legally bound to indemnify Interville for a proportionate share of the costs Interville must pay in relation to a pedestrian thoroughfare, known as the Keefer Steps, which connects the International Village to downtown Vancouver. There is no written contract pursuant to which the Strata Corporation agreed to assume liability for any such costs but Interville says that a binding non-written agreement was nevertheless formed upon the Strata Corporation coming into existence.

[2] For several years after its inception in 2007, the Strata Corporation indemnified Interville for the proportionate share of the costs by paying the invoices Interville rendered from time to time. The Strata Corporation now claims that it made such payments because it mistakenly believed it was legally obliged to do so. It says it discovered the mistake in about October 2013, when it learned there was no written contract. The Strata Corporation has not indemnified Interville since then. In its claim, Interville seeks a declaration that the Strata Corporation is obliged to pay a proportionate share of the costs, as invoiced by Interville, and judgment in an amount that reflects the invoices issued since October 2013. The Strata Corporation has filed a counterclaim seeking the return of the payments it made between 2007 and October 2013.

[3] The Strata Corporation has applied for summary judgment dismissing the action as disclosing no reasonable claim and, alternatively, judgment on the merits dismissing the action on a summary trial. Interville opposes the summary judgment application, contests the suitability of a summary trial and, in the alternative, seeks a determination of the claim on the merits in its favour. No specific application has been brought in relation to the counterclaim but, unless I conclude that the claim is

unsuitable for resolution by summary trial, the outcome of the current applications will resolve the issues raised in the counterclaim.

Background

[4] Interville is a limited partnership. Henderson Development (Canada) Ltd. ("Henderson Development") has been Interville's only general partner since 1996.

[5] The International Village development process commenced in 1990. At that time, Concord Pacific Holdings Ltd. ("Concord Pacific") was the registered owner, and Interville was the beneficial owner, of the land on which the International Village was to be developed. In connection with the subdivision, rezoning and overall development of the land, the City of Vancouver required Concord Pacific to construct and maintain a pedestrian thoroughfare connecting the International Village site to downtown Vancouver. That thoroughfare became known as the Keefer Steps.

[6] In or about September 1990, the City of Vancouver and Concord Pacific entered into a written agreement pursuant to which Concord Pacific agreed to construct and maintain the Keefer Steps (the "Keefer Steps Agreement"). The Keefer Steps Agreement expressly provides that Concord will "keep the Keefer Steps … in good repair and free of defects and in a safe, neat, clean and tidy condition".

[7] Interville constructed the Keefer Steps in or about 1995. On or about March 16, 1995, Interville, as the beneficial owner of six parcels of land forming part of the International Village, entered into a written agreement with itself in its distinct capacities as beneficial owner of each parcel, the purpose of which was to apportion liability for the ongoing costs associated with the Keefer Steps (the "Keefer Steps Costs") among the owners of those parcels, including all successors in title (the "Cost Sharing Agreement"). One of the parcels in question was the land on which the Firenze was subsequently built.

[8] The Cost Sharing Agreement provided that the Keefer Steps Costs would be allocated among, and payable by, the owners of the six parcels in such proportions

as Interville may from time to time determine. It is not disputed that at all material times, Interville intended to stratify the parcels or some of them and pass on the obligations to pay the Keefer Steps Costs, as they related to such stratified parcels, to the resulting strata corporations in proportion to each particular development's share of the total buildable area of the site. This intention is clearly reflected in the Cost Sharing Agreement and the disclosure statement for the Firenze (the "Disclosure Statement") that was subsequently filed by Interville with the Superintendent of Real Estate, in accordance with the disclosure obligations imposed on Interville under the *Real Estate Development Marketing Act*, S.B.C. 2004, c. 41.

[9] The material portions of the Cost Sharing Agreement provide:

> 1. Allocation and Payment of Keefer Steps Costs. The Keefer Steps Costs shall be allocated between, and payable by, the registered owners (or, where the beneficial right, title and interest … is separately owned, then between/by the beneficial owners thereof in respect of such part) from time to time of the [International Village lands in question], including without limitation, the owners of any subdivided portions thereof and of any airspace parcels or strata lots created there from (collectively, the "Owners" and individually, an "Owner"), in such respective proportions as [Interville] … may from time to time determine.
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> …
>
> 4. Enurement. This Agreement and every provision hereof shall enure to the benefit of and be binding upon the parties hereto and their respective successors and assigns, including without limitation, all subsequent owners of any portion of the [International Village lands in question] (including without limitation, the owners of any parcels or strata lots subdivided therefrom).
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> 5. Release upon stratification. Upon the stratification of any Lot or other portion of the [International Village lands in question], and prior to the closing of any of the sales of the strata lots created thereby, [Interville] will cause the strata corporation formed as a result thereof to expressly agree to assume the obligation of [Interville] hereunder as they relate to the Lot from which the strata lots were created, in such proportion as [Interville] may determine, and from and after the date of such assumption by the strata corporation [Interville] will be fully released from its obligations under this Agreement with respect to such portion of the obligations applicable to the Lot in question as the strata corporation has so agreed to assume.
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> 6. Further Assurances. The parties shall do and cause to be done all things and shall execute and cause to be executed all documents which may be necessary to give proper effect to this Agreement.

[10] The material portions of the Disclosure Statement provide:

> 5. The Developer [defined in the Disclosure Statement as Interville] entered into an agreement which it will cause the Strata Corporation for the Development to assume, known as the Keefer Steps Cost Sharing Agreement, a copy of which is attached as Exhibit "G". The estimated cost to the Strata Corporation pursuant to the Keefer Steps Cost Sharing Agreement is set out as a separate line item in the Estimated Initial Operating Budget attached as Exhibit "E". The proportionate share for the Development [Lot 194] of the costs under the Keefer Steps Cost Sharing Agreement is 23.72% based on the formula:
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> $$\frac{\text{Total buildable area of the Development}}{\text{Total buildable area of International Village Site}}$$

[11] As noted, the Firenze is one of four groups of towers in the International Village. The other groups of towers are known as Paris Place, the Europa, and the Espana. Paris Place was constructed first, in or around 1995; the Europa was constructed in or around 2000; the Firenze was constructed in or around 2004; and the Espana was constructed in or around 2009.

[12] On or about March 24, 1995, Interville and the Paris Place strata corporation entered into a written agreement pursuant to which the Paris Place strata corporation agreed to pay a proportionate share of the Keefer Steps Costs as determined from time to time by Interville.

[13] In 1996, Henderson Land Holdings (Canada) Ltd. ("Henderson Land") acquired from Concord Pacific legal title to the International Village lands. Henderson Land held title as nominee, agent and bare trustee for Interville pursuant to a written declaration of trust dated October 1, 1996 (the "Trust Declaration").

[14] It is not apparent from the record before me what, if any, steps were taken at or around the time the Europa strata corporation was created to cause that strata corporation to assume liability for a share of the Keefer Steps Costs. However, from a 2007 Henderson Development operating budget, it appears that the Europa was allocated a proportionate share of the Keefer Steps Costs based on its buildable area.

[15] On or about May 19, 2009, Henderson Land and the Espana strata corporation entered into a written agreement pursuant to which the Espana strata corporation agreed to assume a proportionate share of the Keefer Steps Costs. The written agreement executed on behalf of the Espana strata corporation differed in form from that executed on behalf of the Paris Place strata corporation 14 years earlier. Among other things, the other named party to the Espana agreement was Henderson Land whereas Interville was the other named party to the Paris Place agreement.

[16] As noted, the construction of the Firenze occurred in and around 2004. The Disclosure Statement was initially filed with the Superintendent of Real Estate on March 4, 2004. It disclosed Interville's intention to cause the Strata Corporation to assume liability for 23.72% of the Keefer Steps Costs, a proportion based on the ratio of the buildable area of the Firenze to the total buildable area of the International Village site. It also attached an estimated interim budget that included a line item for "Keefer Steps Maintenance". The Disclosure Statement was subsequently amended but the portions dealing with the Keefer Steps Costs did not change. The forms of agreement of purchase and sale used in connection with the offering for sale of the Firenze strata lots were also attached as exhibits to the Disclosure Statement. These forms required purchasers to acknowledge having received a copy of the Disclosure Statement.

[17] Beginning in 2004, Interville entered into pre-construction contracts of purchase and sale for strata lots in the Firenze. According to Allen Lai, the president of Henderson Land, and who was a director of Henderson Development at the material time, the per unit prices reflected the fact that the responsibility for the Keefer Steps Costs would be passed on to the Strata Corporation. Mr. Lai deposed that if it had been contemplated that the developer would continue to bear that responsibility, this would have been reflected in higher per unit costs.

[18] Pursuant to s. 2(1)(a) of the *Strata Property Act*, S.B.C. 1993, c. 43 (*SPA*), the Strata Corporation was created on or about April 23, 2007, when an application

to deposit the strata plan was filed in the Land Title Office. The first closing of a sale of one of the Firenze strata lots occurred in May 2007. The first annual general meeting of the Strata Corporation was held on July 19, 2007. The first council of the Strata Corporation was elected at that meeting.

[19] Section 4 of the *SPA* provides that the powers and duties of a strata corporation must be exercised and performed by a council, "unless this Act, the regulations or the bylaws provide otherwise". Pursuant to s. 5 of the *SPA*, the "owner developer" must exercise the powers and perform the duties of a council from the time a strata corporation is established until a council is elected at the strata corporation's first annual general meeting. In other words, the owner developer has the "unique role" of "acting for and on behalf of the strata corporation" until a council is elected: *Phelps Holdings Ltd. v. Owners Strata Plan VIS 3430*, 2010 BCCA 196 at para. 23.

[20] The definition of "owner developer" in s. 1 of the *SPA* includes the person who is the registered owner of the land in question on the date that application is made for deposit of the strata plan in the Land Title Office. On that date, Henderson Land was the registered owner, holding title as nominee, agent and bare trustee for Interville pursuant to the Trust Declaration. The Trust Declaration provides that Henderson Land "acknowledges that it will have no independent decision-making powers or responsibilities" and that it will "do all acts and things in respect of the Property at the expense of and as directed by [Interville]". In the result, pursuant to the *SPA*, Henderson Land was required, as owner developer, to exercise the powers and perform the duties of the Strata Corporation from April 23, 2007 (when the application to deposit the strata plan was filed) until July 19, 2007 (when the first council was elected at the Strata Corporation's first annual general meeting). Pursuant to the Trust Declaration it was required to do so as directed by Interville. Simply put, Interville controlled the Strata Corporation between April 23, 2007 and July 19, 2007.

[21] Pursuant to s. 16 of the *SPA*, the owner developer must hold the first annual general meeting of a strata corporation and must give notice of the meeting "in accordance with s. 45", with such notice to include the first annual budget for the 12-month period beginning on the first day of the month following the date of the first annual general meeting. Section 45 requires the strata corporation to give notice of meetings and sets specific timelines for the giving of such notice.

[22] Prior to the Strata Corporation's first annual meeting, Interville caused the Strata Corporation to enter into a management agreement with Crosby Property Management Ltd. ("Crosby Management"). Its intention to cause the Strata Corporation to enter into this type of agreement was disclosed in the Disclosure Statement, as was a summary of the effect of s. 24 of the *SPA*, which provides that any contract entered into before the first annual general meeting by or on behalf of a strata corporation "for the provision of strata management services to the strata corporation" ends four weeks after the second annual general meeting unless the strata corporation resolves, by majority resolution, to continue the contract.

[23] Jason Black was a Senior Property Manager employed by Crosby Management at the material time. Prior to the Strata Corporation's first annual general meeting, Interville prepared the proposed first annual budget with the involvement of Jason Black. A portion of the budget, in the amount of $9,600, was allocated to payment of the Firenze's proportionate share of the Keefer Steps Costs for the 12 months commencing August 1, 2007.

[24] Notice of the first annual general meeting of the Strata Corporation was sent to the owners by letter dated June 21, 2007 from Crosby Management. The letter was signed by Jason Black. The letter enclosed a notice of the first annual general meeting to be held on July 19, 2007 and an agenda. The proposed first annual budget prepared by Interville and Jason Black was attached to the agenda.

[25] The Strata Corporation's first annual general meeting was held on July 19, 2007 (the "First AGM"). Jason Black was present and served as chairperson of the meeting. Interville was represented by Michael Mortensen, who was employed as a

development manager for Interville. Pursuant to s. 20(2) of the *SPA*, the owner developer is required to place the annual budget before the meeting for approval. In compliance with this requirement, the proposed first annual budget enclosed with the June 21, 2007 letter from Crosby Management was tabled at the meeting. There was discussion at the meeting about several items in the budget, including the Keefer Steps Costs. The minutes of the First AGM state:

> An owner asked if the Keefer steps are part of Translink and if they can get more explanation about the Keefer steps and how it falls in the Firenze complex budgets. The Developer explained that the Strata is responsible for contributing to the maintenance of these steps as are other buildings in the surrounding area. This is explained in everyone's disclosure statement.

[26] Mr. Mortensen deposed that the minutes of the First AGM "are accurate as best [he] can determine". He deposed that at the First AGM, he explained that the Strata Corporation was responsible for contributing to the maintenance of the Keefer Steps "as are other buildings in the International Village development area". He deposed that he also stated that this obligation was explained in the Disclosure Statement which was distributed to the owners before they purchased their units. He deposed that at the time of the First AGM, he believed that Interville had caused the Strata Corporation to assume the obligation, under the Cost Sharing Agreement, to pay a proportionate share of the Keefer Steps Costs.

[27] The minutes of the First AGM indicate that following the discussion referred to above, the first annual budget was approved by a vote of the owners, with one member opposed and two abstentions.

[28] The Strata Corporation maintains that Mr. Mortensen's representation at the First AGM about the Strata Corporation's responsibility for the Keefer Steps Costs was false in that:

- the Strata Corporation "was not responsible for contributing to the maintenance of the Keefer Steps because it had not been caused to 'expressly agree' to assume the obligations of the plaintiff, as required by the Cost Sharing Agreement"; and

- the Disclosure Statement did not explain that the Strata Corporation had already assumed obligations in relation to the Keefer Steps but only that Interville intended to cause the Strata Corporation to do so.

[29] Mr. Mortensen did not, and perhaps still does not, have a clear understanding of the specific source of the obligation he represented the Strata Corporation had in relation to the Keefer Steps Costs. For example, on examination for discovery he referred to agreements having been registered against the strata lots, which did not in fact happen. What is apparent from his evidence as a whole, is that Mr. Mortensen understood or assumed that the Strata Corporation was obliged to pay a proportionate share of the Keefer Steps Costs based on its buildable area, and that this understanding or assumption was based at least in part on what he read in the Disclosure Statement.

[30] From 2007 to October 2013, the Strata Corporation paid the invoices presented to it by Interville for the Firenze's proportionate share of the Keefer Steps Costs. The general ledger of Henderson Development indicates that Interville first invoiced the Strata Corporation for its share of the Keefer Steps Costs in November 2007, for the period from June 1, 2007 to October 2007. The allocation to the Strata Corporation back to June 1, 2007 is consistent with s. 14 of the *SPA*, which requires strata corporations to assume responsibility for expenses that accrue from the first day of the month following the month in which the first conveyance of a strata lot to a purchaser occurs.

[31] Although the Strata Corporation paid the invoices rendered by Interville for the Firenze's proportionate share of the Keefer Steps Costs between 2007 to October 2013, some of the owners say they often questioned the source of the Strata Corporation's obligation to do so and indicated an intention or desire to attempt to renegotiate that obligation.

[32] Louise McRae and Gordon McRae are owners in the Firenze. Mr. McRae is the former president of the Firenze's Strata Council. Ms. McRae is a former member of the Council, having been elected at the First AGM. They have both sworn

affidavits in support of the Strata Corporation's position. In summary, they say that on several occasions between 2007 and 2013, the owners questioned Mr. Mortensen and Mr. Black about why the Strata Corporation was contributing to the Keefer Steps Costs. They claim that Mr. Black and Mr. Mortensen gave vague answers to the effect that the Strata Corporation, along with the other strata corporations in the International Village, was legally obliged to contribute. Mr. Mortensen denies that representatives of the Strata Corporation raised concerns about their obligation to contribute to the Keefer Steps Costs. He acknowledges that from time to time owners expressed concerns about the condition and quality of the Keefer Steps and the quantum of the costs but says he does not recall anyone questioning the existence of the obligation itself.

[33] Eventually, the Strata Corporation retained counsel who wrote to Interville in July 2013 and asked to be provided with any document evidencing an assumption by the Strata Corporation of obligations under the Cost Sharing Agreement. Interville's counsel responded with a letter in August 2013 advising, in effect, that in his opinion a written document evidencing the Strata Corporation's obligations was not necessary to bind the Strata Corporation. Mr. McRae deposed that, following the exchange of these letters, the Strata Corporation concluded that it had been paying Interville's invoices in relation to the Keefer Steps "under a mistake of fact". The Strata Corporation ceased making payments shortly thereafter.

Positions of the Parties

[34] Pursuant to s. 10 of the *SPA*, in the period after the first conveyance of a strata lot to a purchaser (in this case, May 2007) but before the first annual general meeting (in this case July 19, 2007), no contract may be entered into by or on behalf of a strata corporation with either the owner developer or a person who is not at arm's length to the owner developer, unless the contract is approved by a resolution passed by a unanimous vote at a special general meeting. It is common ground that the agreement upon which Interville relies was not unanimously approved as contemplated by s. 10 of the *SPA*. As such, if an agreement exists it must have been formed prior to the first conveyance in May 2007. It is also common ground

that no written agreement was executed by the Strata Corporation pursuant to which the Strata Corporation agreed to assume liability for any portion of the Keefer Steps Costs. In other words, even though Interville controlled the Strata Corporation from April 23, 2007 and July 19, 2007, it did not cause the Strata Corporation to execute a written assumption agreement.

[35] Interville's position is that, despite the absence of a written assumption agreement, the Strata Corporation did agree, albeit not in writing, to assume liability for 23.72% of the Keefer Steps Costs, as calculated and invoiced by Interville. Interville claims that this agreement, which is referred to in Interville's pleadings as the "Firenze Cost Sharing Agreement", was entered into by Interville and the Strata Corporation in furtherance of their mutual intention, an intention Interville says they shared from the moment the Strata Corporation came into existence on April 23, 2007. Interville says that conclusion flows from several circumstances and events including, but not limited to:

- the overarching purpose of the International Village project, which was to develop strata units for sale and pass on all associated rights and obligations to the purchasers in exchange for the purchase price;
- Interville's specific intention, from the outset, to pass on a proportionate share of the Keefer Steps Costs to the resulting strata corporations, which was reflected in the Cost Sharing Agreement and disclosed, in the Disclosure Statement, to all prospective purchasers of Firenze strata lots;
- Interville's control of the Strata Corporation at the time of its creation, which created a mutuality of intention and allowed Interville to cause the Strata Corporation to agree to pay its proportionate share of the Keefer Steps Costs;
- the fact that the Strata Corporation approved and affirmed the agreement as evidenced by the allocation of a share of the Keefer Steps Costs to the Strata Corporation in the first annual budget, which was approved by the owners at the First AGM; and
- the fact that the Strata Corporation paid the costs as invoiced for several years, which Interville says evidenced and affirmed its intention to be bound to substantially the same obligations as contemplated by the Cost Sharing Agreement and the Disclosure Statement.

[36] In the alternative, Interville says that if the Strata Corporation is not contractually obliged to pay a proportionate share of the Keefer Steps Costs, then the Strata Corporation has been unjustly enrichment by avoiding payments that all parties intended the Strata Corporation to make and that the Strata Corporation would have been contractually bound to make but for an ineffective transaction.

[37] The Strata Corporation says that the only way it could become legally obliged to pay a portion of the Keefer Steps costs is through a written agreement pursuant to which it expressly assumed Interville's obligations under the Cost Sharing Agreement. Alternatively, the Strata Corporation says that even if a written assumption agreement was not required, Interville has failed to establish that the Strata Corporation agreed to assume any portion of the Keefer Steps Costs. The Strata Corporation says that the conduct of the owners in approving the first annual budget does not support the conclusion that the Strata Corporation agreed to be bound because of the legal distinction between a corporation and its members and, in any event, because the owners' conduct in approving the first annual budget was induced by Mr. Mortensen's misrepresentations as to the Strata Corporation's legal obligation. Similarly, it argues that the Strata Corporation's conduct in paying Interville's invoices between 2007 and 2013 cannot be characterized as supporting the conclusion that the Strata Corporation agreed to be bound because that conduct was also induced by Mr. Mortensen's misrepresentations. The Strata Corporation also says that its refusal to pay for something that it was not obligated to pay cannot be characterized as unjust enrichment.

Issues

[38] The following issues have been raised:

1. Has the Strata Corporation established that Interville's claim raises no triable issue or, in other words, that it is plain and obvious the action will not succeed such that the action must be dismissed pursuant to Rule 9-6(4)?

2. If not, is Interville's claim suitable for disposition on the merits by summary trial pursuant to Rule 9-7?

3. If so:

   (a) is the Strata Corporation obliged to indemnify Interville for a portion of the Keefer Steps Costs pursuant to the Firenze Cost Sharing Agreement, and

   (b) if Interville has failed to establish the existence of the Firenze Cost Sharing Agreement, is the Strata Corporation nevertheless obliged to indemnify Interville for a portion of the Keefer Steps Costs on the basis of unjust enrichment?

The Summary Judgment Application

[39] The Strata Corporation applies for summary judgment pursuant to Rule 9-6, which provides in relevant part:

> (4) In an action, an answering party may, after serving a responding pleading on a claiming party, apply under this rule for judgment dismissing all or part of a claim in the claiming party's originating pleading.
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> (5) On hearing an application under subrule (2) or (4), the court,
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> (a) if satisfied that there is no genuine issue for trial with respect to a claim or defence, must pronounce judgment or dismiss the claim accordingly,
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> (b) if satisfied that the only genuine issue is the amount to which the claiming party is entitled, may order a trial of that issue or pronounce judgment with a reference or an accounting to determine the amount,
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> (c) if satisfied that the only genuine issue is a question of law, may determine the question and pronounce judgment accordingly, and
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> (d) may make any other order it considers will further the object of these Supreme Court Civil Rules.

[40] The Court of Appeal recently summarized the burden on a defendant bringing a summary judgment application in *B & L Holdings Inc. v. SNFW Fitness BC Ltd.*, 2018 BCCA 221:

> [43] The purpose of the summary judgment rule is to prevent claims that have no chance of success from proceeding to trial. The rule aims to weed out meritless claims at an early stage, before they impose a heavy price in terms of time and cost on the parties to the litigation and on the justice system: *Canada (Attorney General) v. Lameman*, 2008 SCC 14 at para. 10.

> [44] The bar on a motion for summary judgment is high. The defendant who seeks summary dismissal bears the onus of proving that there is no genuine issue of material fact requiring trial: *Lameman* at para. 11.
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> [45] Mr. Justice Lambert summarized the defendant's task in *Montroyal Estates Ltd. v. D.J.C.A. Investments Ltd.* (1984), 55 B.C.L.R. 137 (C.A.) at 138–39:
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> > We were referred by counsel for T& A Holdings Ltd. to the judgment of Esson J. (as he then was) in *Progressive Const. Ltd. v. Newton*, 25 B.C.L.R. 330, [1981] 2 W.W.R. 741, 117 D.L.R. (3d) 591 (S.C.), and particularly at p. 334. There Esson J. summarizes, in my opinion, accurately, the law in relation to establishing a defence on an application for summary judgment in these words [pp. 334–35]:
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> > > The cases do not establish an invariable rule as to what steps must be taken to resist a R. 18 application for summary judgment. On all such applications the issue is whether, on the relevant facts and applicable law, there is a bona fide triable issue. The onus of establishing that there is not such an issue rests upon the applicant, and must be carried to the point of making it "manifestly clear", which I take to mean much the same as beyond a reasonable doubt. If the judge hearing the application is left in doubt as to whether there is a triable issue, the application should be dismissed.
> >
> > > In essence, if the defendant is bound to lose, the application should be granted, but if he is not bound to lose, then the application should be dismissed.

[41] The Strata Corporation's Notice of Application appears to identify two distinct bases for summary judgment:

1. generally, as pleaded in the Third Amended Notice of Civil Claim, there is no reasonable claim; and

2. more specifically, the contract claim is bound to fail because the agreement Interville purports to rely upon was not approved by a resolution passed by a unanimous vote at a special general meeting of the Strata Corporation as required by s. 10 of the *SPA*.

[42] The first basis was not developed adequately in argument at the hearing. On an earlier summary judgment application in this case, Justice Adair struck a previous version of Interville's Notice of Civil Claim as disclosing no reasonable claim, with leave to amend: *Interville Development Limited Partnership v. The Owners, Strata Plan BCS2313*, 2017 BCSC 1947. Interville then applied for leave to amend the Notice of Civil Claim to a form that, for all intents and purposes, is the same as the

pleading before me (the Third Amended Notice of Civil Claim). Justice Adair granted leave to amend in that form: *Interville Development Limited Partnership v. The Owners, Strata Plan BCS2313*, 2017 BCSC 2542. She found the Strata Corporation's arguments against granting leave went to the merits of the claims rather than the legal sufficiency of the pleadings. She concluded at para. 9:

> The proposed amended notice of civil claim is not, in my opinion, a model pleading. However, in my view, based on the essential elements that must be pleaded to state reasonable claims in contract and in unjust enrichment, and given the allegations in the proposed amended notice of civil claim, it is not plain and obvious that no reasonable claims in contract and unjust enrichment have been pleaded. That is sufficient to satisfy the test on an application for leave to amend.

[43] Although the Strata Corporation's current Notice of Application continues to assert that the claims as pleaded are bound to fail, with the one exception related to s. 10 of the *SPA*, its submissions at the hearing before me focused on the merits of the claims. That is understandable given Justice Adair's conclusions. In the circumstances, I am not persuaded by the general submission that the claims as pleaded do not raise a triable issue.

[44] I turn then to the specific submission concerning the effect of s. 10 of the *SPA*. As previously mentioned, that provision constrains the ability of an owner developer, during a particular period, to cause a strata corporation to enter into certain contracts. It provides:

> 10. In the period after the first conveyance of a strata lot to a purchaser but before the first annual general meeting, no contract or transaction may be entered into by or on behalf of the strata corporation with either the owner developer or a person who is not at arm's length to the owner developer, unless the contract or transaction is approved by a resolution passed by a unanimous vote at a special general meeting.

[45] Of course, the agreement Interville relies upon is a contract between itself and the Strata Corporation, and Interville is not at arm's length from the owner developer. As mentioned, it is common ground that the Firenze Cost Sharing Agreement was not approved by a resolution passed by a unanimous vote at a special general meeting. Accordingly, if that agreement was entered into in the

period after the first conveyance but before the First AGM, the contract claim is bound to fail.

[46] There could have been more precision in Interville's pleading about when it says the Firenze Cost Sharing Agreement was formed. However, during the hearing, counsel for the Strata Corporation conceded that he understood Interville's theory to be that the Firenze Cost Sharing Agreement came into existence immediately upon the Strata Corporation coming into existence; in other words, not within the period to which s. 10 applies.

[47] In my view, that theory emerges from the pleadings, notwithstanding the lack of precision. As I have already mentioned, Interville pleads that, "commencing from the stratification" (in other words, from the moment the Strata Corporation came into existence), it and the Strata Corporation shared the mutual intention to enter into the agreement it relies upon. As explained in more detail later, it is not even disputed that at all material times, Interville intended to cause the Strata Corporation, upon the stratification and prior to the closing of any of the sales of the strata lots created thereby, to agree to assume a proportionate share of the Keefer Steps Costs. In these circumstances, I have no difficulty concluding that there is a genuine triable issue with respect to whether an enforceable agreement to assume a proportionate share of the Keefer Steps Costs was entered into by the Strata Corporation before the first conveyance of a strata lot in May 2007.

[48] For these reasons, the Strata Corporation's summary judgment application is dismissed.

Suitability for Summary Trial

[49] Pursuant to Rule 9-7(15), judgment on a summary trial application may be granted unless the court is unable, on the whole of the evidence, to find the facts necessary to decide the issues of fact or law, or the court is of the opinion that it would be unjust to decide the issues on the application.

[50] The leading case on suitability is *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.), where Chief Justice McEachern emphasized (at 214) that the summary trial procedure "may not furnish perfect justice in every case" and that "the safeguards furnished by the Rule and the common sense of the chambers judge are sufficient for the attainment of justice in any case likely to be found suitable for this procedure". He set out several factors to be considered in determining whether it would be unjust to resolve issues on a summary trial:

> In deciding whether it will be unjust to give judgment the chambers judge is entitled to consider, inter alia, the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this important question.

[51] Interville says this case is unsuitable for resolution by summary trial because of the conflicts in the evidence about whether and to what extent the owners questioned the existence of the Strata Corporation's obligation to contribute to the Keefer Steps Costs in the period after the First AGM. Interville says that these conflicts cannot be resolved without making credibility findings and that, as a result, the matter is unsuitable for summary determination. This issue as to whether and to what extent the owners questioned the existence of the Strata Corporation's obligation to contribute to the Keefer Steps Costs is the only factual dispute that emerges from the evidentiary record.

[52] For reasons that will become apparent, it is my view that the conduct of the owners, after the First AGM, is not probative of the principal issue to be resolved, which is whether the Strata Corporation agreed, before the sale of the first strata lot, to pay a proportionate share of the Keefer Steps Costs. It is not necessary for me to resolve the conflicts in the evidence to decide that issue. In the circumstances, I am satisfied that I am able to find the facts necessary to decide the issues and that it would not be unjust to do so.

The Contract Claim

[53] Again, Interville relies on what it refers to as the Firenze Cost Sharing Agreement pursuant to which it says the Strata Corporation agreed to assume liability for 23.72% of the Keefer Steps Costs, reflecting the ratio of the buildable area of the Firenze to the total buildable area of the International Village site. Although this is the Strata Corporation's application, the burden remains on Interville to establish, on a balance of probabilities, the existence of the agreement on which it relies. However, before considering whether it has met that burden, it is helpful to address three of the submissions advanced by the Strata Corporation in opposing the contract claim. These are:

1. whether the legal principle that positive covenants do not run with the land is dispositive of this case in the Strata Corporation's favour;

2. whether a contract pursuant to which the Strata Corporation agrees to assume a portion of the Keefer Steps Costs must be in writing to be enforceable; and

3. whether ss. 10 or 20 of the *SPA* preclude the conclusion that there is a binding contractual obligation on the Strata Corporation to pay a portion of the Keefer Steps Costs?

Is the legal principle that positive covenants do not run with the land dispositive?

[54] The Strata Corporation invokes the common law rule that positive covenants do not run with the land (the "*Austerberry* rule"): see *Austerberry v. Corporation of Oldham* (1885), 29 Ch. D. 750. The *Austerberry* rule is founded on the principle that a person cannot be made liable to perform an obligation under a contract unless they are a party to that contract: *Heritage Capital Corp. v. Equitable Trust Co*., 2016 SCC 19.

[55] The Strata Corporation relies on three recent cases that affirm the presence of the *Austerberry* rule in British Columbia law: *The Owners, Strata Plan LMS 3905 v. Crystal Square Parking Corporation*, 2017 BCSC 71 [*Crystal Square*]; *The Owners, Strata Plan NWS 3457 v. The Owners, Strata Plan LMS 1425*, 2017 BCSC

1346 [*Scottsdale Village*]; and *The Owners, Strata Plan BCS 4006 v. Jameson House Ventures Ltd.*, 2017 BCSC 1988 [*Jameson House*]. In my view none of these cases is dispositive because none of them concerned the question that arises here: namely, whether an enforceable, non-written agreement was entered into between a developer, as former owner of land, and a strata corporation, representing the successor owners of the same land, at a time when, under the *SPA*, the developer controlled the strata corporation.

[56] In *Crystal Square*, the plaintiff strata corporation challenged the enforcement of positive covenants contained in a registered easement agreement (referred to as the "ASP Agreement"). The impugned provisions of the ASP Agreement purported to require the strata corporation to pay a fee to the owner of a parking facility, in a large multi-use complex in Burnaby, for use of the parking facility. The complex was developed on seven air space parcels. The plaintiff was the strata corporation for the owners of the strata lots within air space parcel 2 ("ASP 2"). One of the defendants, Crystal Square Parking Corporation ("CSPC"), was the owner of the parking facility, which had been constructed in air space parcel 5 ("ASP 5").

[57] The ASP Agreement was entered into by the developer and the City of Burnaby in March 1999, before the plaintiff strata corporation came into existence. It provided that the owner of ASP 5 grants rights to the owners of the other air space parcels to use the parking facility and, in exchange, the owners of the other air space parcels covenant to pay an annual fee to the owner of ASP 5. It contemplated that upon subdivision of any parcel by strata plan, the strata corporation so created shall "enter into an assumption agreement with the owners of the Other Parcels … to assume all of the then ongoing obligations of the Subdivided Lot owner hereunder". It also purported to bind successors in title by providing that the covenants in it "shall run with each Parcel, as applicable, and shall bind each Parcel …".

[58] The strata corporation came into existence two months after the ASP Agreement was executed and registered in the Land Title Office. Upon coming into

existence, the strata corporation became the owner of ASP 2. Three years later, CSPC became the owner of ASP 5 when it purchased the parking facility. CSPC also took an assignment of the ASP Agreement. No written assumption agreement was entered into by the strata corporation, but the strata corporation paid the parking fees for several years. In about 2007, the strata corporation began investigating whether the parking expenses could be reduced. This triggered a series of communications between the parties and ultimately a dispute about whether and to what extent the ASP Agreement was enforceable against the strata corporation.

[59] At para. 40, Justice Young identified the issues that had been raised:

> The following issues arise in this action:
>
> (i) Are any of the provisions under clause 7.5 of the ASP Agreement enforceable easements?
>
> (ii) Is the ASP Agreement enforceable as a pre-incorporation contract?
>
> (iii) Are the easements under clause 7.5 of the ASP Agreement enforceable against the plaintiff [strata corporation] because of its conduct?
>
> (iv) Has there been a breach of good faith by the plaintiff [strata corporation]?

[60] Justice Young found that the payment obligations were positive covenants that do not run with the land. In doing so, she reviewed the recent Canadian jurisprudence, including the decision of the Ontario Court of Appeal in *Amberwood Investments Ltd. v. Durham Condominium Corp No. 123* (2002), 58 O.R. (3d) 481 (C.A.), and concluded that certain English exceptions to the *Austerberry* rule (referred to as the "benefit burden doctrine" and the "exception related to conditional grants of benefits") have not taken hold in Canadian law. She also found that the ASP Agreement was not enforceable as a pre-incorporation contract. At paras. 62 and 63, relying on *Heinhuis v. Black Sheep Charters Ltd.* (1987), 19 B.C.L.R. (2d) 239 (C.A.), she noted that for a pre-incorporation contract to be enforceable, the parties, by their conduct, must show an intention to be bound by a new post-incorporation contract containing terms identical to those in the pre-incorporation contract. She concluded, at para. 68, that there was no evidence "that any party

belonging to what is now the plaintiff strata corporation agreed to the ASP Agreement terms and then refused to enter into a post-incorporation agreement" and that the ASP Agreement "was entered into by completely different parties who are attempting to impose obligations on non-existent successors in title who have not agreed". The third issue arose from CSPC's submission that even if the ASP Agreement obligations did not run with the land, they were still enforceable because the strata corporation acquiesced through its conduct. This submission was rejected on the evidence, largely on the basis that the strata corporation's conduct resulted from its members' mistaken belief that they were bound by the ASP agreement. Finally, Justice Young concluded that there was no foundation for the submission that the strata corporation had breached any duty of good faith.

[61] *Scottsdale Village* concerned a dispute between the strata corporations of two adjoining strata developments, Scottsdale Village and La Costa Green, over responsibility for the upkeep of a recreational facility located on the Scottsdale Village land. Scottsdale Village and the recreational facility were on land referred to as Lot B. La Costa Green was on land referred to as Lot A. Prior to stratification, Lot A and Lot B were owned by Scottsdale Village Ltd., which was the developer of both projects. Scottsdale Village Ltd. caused an easement agreement, to which the City of Surrey was also a party, to be registered against Lot A and Lot B. The easement agreement permitted residents of La Costa Green (which was yet to be constructed on Lot A) to use the recreational facilities and purported to require the owners of Lot A and Lot B to share the associated costs on a *pro rata* basis. The disclosure statements for both projects expressly disclosed the easement and the cost-sharing obligation. Scottsdale Village was constructed first, followed by La Costa Green. Following the development of La Costa Green and for the next 20 years, the residents of both projects enjoyed access to and use of the recreational facilities and La Costa Green paid for a proportionate share of the associated costs. In 2013, La Costa Green advised Scottsdale Village that it wished to withdraw from the terms of the easement and purported to surrender its rights thereunder. Scottsdale Village did not accept the surrender and commenced an

action for a declaration that the terms of the easement were binding on La Costa Green.

[62] Scottsdale Village relied on three alternative theories of liability:

1. a variation of the "conditional grant" exception to the common law rule that positive covenants do not run with the land that was said to have been recognized by the Ontario Court of Appeal in *Amberwood* as at least theoretically available;

2. the existence of a pre-incorporation contract; or

3. the operation of s. 219 of the *Land Title Act*, which provides that a covenant in favour of the Crown (and certain other government authorities) that is registered against title to the land subject to the covenant is enforceable against successors in title.

[63] Justice Branch dismissed Scottsdale Village's action. He followed *Crystal Square* in concluding that no exception to the *Austerberry* rule had taken hold in Canada and, even if the Ontario Court of Appeal in *Amberwood* had opened the door to a narrow exception, it was not applicable in the case before him. Justice Branch rejected the pre-incorporation contract argument for reasons similar to those expressed by Justice Young in *Crystal Square*. Specifically, he concluded that although La Costa Green took the benefit of the easement for years, this was an insufficient basis upon which to find a contract that extended beyond the date of surrender. Finally, Justice Branch found that while s. 219 of the *Land Title Act* protected and enhanced the rights of the Crown and the other named authorities, it did not confer rights on third parties.

[64] In *Jameson House*, the petitioner strata corporation sought a declaration that a parkade cost-sharing obligation in an easement agreement was unenforceable against it because it was a positive covenant that did not run with the land. The case concerned a condominium tower built on a single lot that had been divided into five air space parcels and a remainder parcel. Initially, the respondent developer owned all of the air space parcels and the remainder parcel. Prior to the creation of the strata corporation, the developer executed the easement agreement with itself

and the City of Vancouver. The easement agreement required the developer to operate, maintain and insure the parkade as the owner of the remainder parcel. As owner of the air space parcel that would later become the residential strata lots, the developer also agreed to reimburse itself a percentage of the associated costs. The easement agreement purported to bind successors in title, providing in part that "[t]he burden of the covenants, charges and agreements set forth herein shall run with each Parcel, as applicable, and shall bind each Parcel, as applicable, and shall attach thereto and run with each and every part into which the same may be subdivided or consolidated …".

[65] In *Jameson House*, the parties agreed that the parkade cost-sharing provisions in the easement agreement were positive covenants. They also agreed that the strata corporation was not a party to the easement agreement and merely stood in the position of a subsequent owner. The strata corporation relied on the common law *Austerberry* rule. The developer contended that two common law exceptions to the *Austerberry* rule exist and should apply. Relying on Ontario jurisprudence, it also submitted the covenant was binding because the grant of easement (the right to use the parkade) was conditional on the users assuming the positive obligation to pay to maintain it. In other words, the only issue framed for the court was whether the positive covenants ran with the land; the issue that had been decided in *Crystal Square* and *Scottsdale Village*. Justice Donegan followed *Crystal Square* in declining to recognize a modification or exception to the *Austerberry* rule and granted the declaration sought by the strata corporation.

[66] While there are obvious factual similarities between *Crystal Square*, *Scottsdale Village* and *Jameson House*, on the one hand, and this case, on the other, there are important distinctions. First, there is no suggestion in this case that the obligation to pay a proportionate share of the Keefer Steps Costs merely ran with the land. In other words, this is not a case involving a positive covenant in an easement registered against title to property subsequently acquired by a purchaser against whom the covenant is asserted. Furthermore, Interville does not rely on the mere notice to subsequent purchasers of strata lots, as set out in the Disclosure

Statement, of its intention to cause the Strata Corporation to agree to assume the obligation in question as the foundation for its position that the Strata Corporation is legally obliged to contribute to the Keefer Steps Costs. Rather, Interville says it actually did cause the Strata Corporation to agree to assume liability for 23.72% of the Keefer Steps Costs, and that the Disclosure Statement is material only as evidence that it always intended to do so and that all purchasers had notice of that intention before buying.

[67] Second, the nature of the obligation relied on by Interville is different, particularly from that relied on in *Crystal Square* and *Scottsdale Village*, as is the manner in which it is said to have arisen. *Crystal Square* concerned the claim by a subsequent owner of one parcel of land, which had taken a formal assignment of the ASP Agreement, that the subsequent owner of a different parcel, which had not, was nevertheless bound by the ASP Agreement because it ran with the land. Similarly, *Scottsdale Village* concerned the assertion of cost-sharing obligations under an easement agreement by the subsequent owner of one parcel as against the subsequent owner of a different parcel, on the basis that the agreement ran with the land. The Cost Sharing Agreement entered into by Interville in its various capacities is also an agreement pursuant to which the owners of contiguous parcels of land agreed to share certain costs. However, Interville does not allege that the Strata Corporation became a party to and liable under the Cost Sharing Agreement itself. This case concerns the assertion of a separate agreement, the Firenze Cost Sharing Agreement, between Interville as the former owner of one parcel and the Strata Corporation representing the successor owners of the same parcel, which is said to have arisen at a time when Interville controlled the Strata Corporation, pursuant to which the Strata Corporation is alleged to have agreed, as between it and the former owner, to assume certain of the former owner's obligations. These facts are more similar to those in *Jameson House*, but no such agreement was asserted in *Jameson House*. As mentioned, the only issue framed for the court in that case was the existence of an exception to the common law rule that positive covenants do not run with the land.

[68] To reiterate, the issue raised here is not whether there is or ought to be an exception or modification to the common law rule that positive covenants do not run with the land, but rather whether the evidence supports the conclusion that Interville, which had the authority to bind the Strata Corporation at the material time, actually did so. For these reasons, *Crystal Square*, *Scottsdale Village*, and *Jameson House*, are of limited, if any, assistance.

Must a contract pursuant to which the Strata Corporation agrees to assume a portion of the Keefer Steps Costs be in writing to be enforceable?

[69] The Strata Corporation relies heavily on the absence of a written agreement in support of its position that no enforceable agreement exists between it and Interville, pursuant to which it assumed liability for a portion of the Keefer Steps Costs. In its Notice of Application, the Strata Corporation refers to the execution of an assumption agreement as "the condition precedent required by the Cost Sharing Agreement". It also notes that Interville failed to cause the Strata Corporation to enter into a written assumption agreement and submits that "therefore no contractual obligation on the part of the [Strata Corporation] arose".

[70] In my view, the Cost Sharing Agreement does not mandate a written assumption agreement and, even if it did, that would not give rise to a condition precedent or even an impediment to the Strata Corporation agreeing, through less formal means and as between it and Interville, to assume liability for a portion of the Keefer Steps Costs.

[71] As noted, the Cost Sharing Agreement provides, in clause 5, that "[u]pon stratification" Interville will "cause the strata corporation formed as a result thereof to expressly agree" to assume Interville's obligations as they relate to the lot from which the strata lots were created. The requirement for an "express" agreement does not equate to a requirement for a "written" agreement. An express agreement arises where the parties have made manifest the terms of the agreement, whether they have done so orally or in writing: *Bentall Properties Ltd. v. Control Data*

Systems, Inc. (1998), 47 B.C.L.R. (3d) 233 (S.C.) at para. 20. As Professor Fridman puts it:

> The parties to a contract, in most instances, will have stated, orally or in writing, the nature, scope and extent of their individual, various obligations thereunder. Insofar as they have made manifest what those obligations are, the parties have expressly stipulated the terms of the contract [emphasis added]: G.H.L. Fridman, *The Law of Contract in Canada*, 5th ed. (Toronto: Thomson Canada Limited, 2006) [Fridman] at 437.

[72] Further support for the conclusion that the word "expressly" in clause 5 does not mean "in writing" is found in the words used in clause 8 of the Cost Sharing Agreement, which provides that amendments may not be made without the "express written consent" of all the parties. If the parties to the Cost Sharing Agreement intended the word "express" to mean "written", the word "written" in clause 8 would be redundant.

[73] The Strata Corporation submits that the obligation imposed on the parties to the Cost Sharing Agreement by clause 6 to "execute and cause to be executed all documents which may be necessary to give proper effect to this Agreement" supports its position that any assumption of liability for the Keefer Steps Costs must be in writing. However, clause 6 only requires the parties to execute documents that are necessary. It is trite that it is not necessary for agreements to be in writing to be enforceable.

[74] As noted, Interville did enter into a written assumption agreement with the strata corporation for Paris Place in 1995, while Henderson Land entered into a written agreement with the strata corporation for the Espana in 2009. The fact that different forms were used and the fact that Henderson Land is a party to one while Interville is a party to the other suggests that Interville did not intend one particular method of agreement to be used in causing the various strata corporations to assume responsibility for the Keefer Steps Costs. I will return to the issue of Interville's intentions. For now, I find only that the fact that written agreements were executed in relation to two of the International Village strata corporations does not indicate that all such agreements had to be in writing to be enforceable.

[75] Even if the Cost Sharing Agreement mandated a written assumption agreement in order to bind its parties to the assumption of the obligations of one of them by a third party (and the corresponding release of the party whose obligations were thereby assumed), that requirement would not serve as a condition precedent to the Strata Corporation agreeing as between it and Interville, through a less formal mechanism, to assume liability for a portion of the Keefer Steps Costs. The Strata Corporation is not a party to the Cost Sharing Agreement. This is not a case where the parties to an alleged contract have, in the course of their own negotiations, contemplated the execution of a formal written agreement but then failed to complete that formality such that it is necessary to determine whether the execution of the formal written agreement was a condition or term of the bargain or whether it was a mere expression of their desire as to the manner in which the agreement already formed would be documented. Again, the issue here is simply whether Interville caused the Strata Corporation to agree to assume liability for 23.72% of the Keefer Steps Costs immediately upon the Strata Corporation coming into existence, a time when the Strata Corporation was controlled by Interville.

Do ss. 10 or 20 of the *SPA* preclude the conclusion that there is a binding contractual obligation on the Strata Corporation to pay a portion of the Keefer Steps Costs?

[76] The Strata Corporation submits that the contract claim is bound to fail because the Firenze Cost Sharing Agreement was not approved by a resolution passed by a unanimous vote at a special general meeting of the Strata Corporation as is required by s. 10 of the *SPA.* As already discussed, s. 10 has no application if the agreement Interville relies upon came into existence between the Strata Corporation's creation on April 23, 2007 and the sale of the first strata lot in May 2007.

[77] The Strata Corporation also submits that Interville failed to place the Firenze Cost Sharing Agreement before the first annual general meeting of the Strata Corporation as required by s. 20(2) of the *SPA* and this too precludes enforcement of that agreement.

[78] Section 20(2) of the SPA provides, in material part:

> At the first annual general meeting, the owner developer must
>
> (a) place before the meeting and give the strata corporation copies of all of the following:
>
> …
>
> (iii) all contracts entered into by or on behalf of the strata corporation;

[79] The agreement Interville relies upon is not a written contract. It would not have been possible for Interville to give a copy of it to the Strata Corporation. I was not provided with any authority for the proposition that, as a matter of law, all agreements with strata corporations must be in writing to be enforceable and, in my view, s. 20 does not itself have that effect.

[80] In my view, the purpose of s. 20(2)(a)(iii) is to ensure that the owners present at the first annual general meeting have notice of the contractual obligations to which an owner developer has committed a strata corporation in the period before the election of a council. Among other things, this is necessary for the owners to assess whether the owner developer has acted prudently, honestly and in good faith with the view to the best interests of the strata corporation, as required by s. 6 of the *SPA*.

[81] The agreement Interville relies upon was "placed before the meeting" on July 19, 2007, in the sense that Mr. Mortensen advised those present that the Strata Corporation was bound to contribute to the Keefer Steps Costs as had been explained in the Disclosure Statement, and the Strata Corporation's share of the Keefer Steps Costs was included in the first annual budget, which was then approved. In light of my view of the purpose of s. 20(2)(a)(iii), I consider these circumstances to be sufficient to meet the requirements of that provision. However, even if I am wrong in that regard and Interville technically failed to comply with s. 20(2)(a)(iii), such non-compliance does not render a contract invalid: *299 Burrard Management Ltd. v. The Owners, Strata Plan BCS 3699*, 2014 BCSC 390, aff'd on appeal, 2015 BCCA 313 at para. 63.

[82] For these reasons, neither s. 10 nor s. 20 of the *SPA* precludes the conclusion that a binding agreement arose in the period between the Strata Corporation's creation on April 23, 2007 and the sale of the first strata lot in May 2007, pursuant to which the Strata Corporation is obliged to pay 23.72% of the Keefer Steps Costs.

Has Interville established that a contract exists between it and the Strata Corporation pursuant to which the Strata Corporation agreed to assume a portion of the Keefer Steps Costs?

[83] The narrow issue is whether Interville has established that an agreement was formed between it and the Strata Corporation, after the Strata Corporation came into existence but before the sale of the first strata lot, pursuant to which the Strata Corporation agreed to assume liability for 23.72% of the Keefer Steps Costs, reflecting the ratio of the buildable area of the Firenze to the total buildable area of the International Village site.

[84] The Strata Corporation argues that Interville has not established the requisite intention to contract on the part of the Strata Corporation during the material time. Indeed, the Strata Corporation submits there is no evidence whatsoever of its intentions and that the evidence speaks only to the intentions of Interville. The Strata Corporation also argues that the agreement relied upon by Interville fails for lack of consideration.

[85] I will start with the question of intention. The crux of the inquiry is whether the evidence supports the conclusion that the parties had a meeting of the minds at the relevant time. As explained by Professor John D. McCamus in *The Law of Contracts* (Irwin Law: 2009) at 31:

> The parties will be held to have reached an agreement when they have formed a mutual intention to enter into a bargain with each other and, further, are in agreement as to the terms of that bargain. It is only then that the parties have reached a true consensus ad idem or "meeting of the minds," which, in theory at least, is an indispensable requirement for the formation of an agreement.

[86] The test for determining the intention to create legal relations is objective. This was explained by Justice Dickson in *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, 2009 BCSC 1303 at paras. 324–325:

> [324] The test for determining the intention to create legal relations is objective. It is explained by G.H.L. Fridman in *The Law of Contract*, 5th ed. (Toronto: Thomson Carswell, 2006) as follows:
>
> > Constantly reiterated in the judgments is the idea that the test of agreement for legal purposes is whether the parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract. The law is not concerned with the parties' intentions but with their manifested intentions. It is not whether or not what an individual party believed or understood was the meaning of what the other party said or did that is the criterion of the agreement; it is whether a reasonable man in the situation of that party would have believed and understood that the other party was consenting to the identical terms.
>
> [325] The objective test serves the main purpose of contract law: to protect reasonable expectations created by promises. Accordingly, "the test of whether a promise is made, or of whether assent is manifested to a bargain, does not and should not depend on an enquiry into the actual state of mind of the promisor, but on how the promisor's conduct would strike a reasonable person in the position of the promisee": S.M. Waddams, *The Law of Contracts*, 5th ed. (Toronto: Canada Law Book, 2005), cited in *Hammerton v. MGM Ford-Lincoln Sales Ltd.*, 2007 BCCA 188.

[87] If the alleged agreement has not been reduced to writing, the court must consider what the parties said and did and assess objectively whether, in context, their words and actions establish an intention to be bound. The genesis and aim of the transaction is a factor relevant to that assessment: *Le Soleil Hotel & Suites Ltd.* at para. 328.

[88] In this case, the assessment of the parties' intentions is not typical because, at the material time, both parties had the same directing mind.

[89] Interville and the Strata Corporation can only act through natural persons to conclude contracts and otherwise enter into transactions. Their intentions must be gleaned from the actions of the natural persons authorized to act on their behalf. In other words, the state of mind of a company's directors and managers "is the state of mind of the company and is treated by law as such": *H.L. Bolton (Engr.) Co. v. T.J.*

Graham & Sons Ltd., [1957] 1 Q.B. 159, [1956] 3 All E.R. 624 at 172 (C.A.). As a limited partnership, Interville's intention is the intention of the natural persons authorized to act for its general partner, Henderson Development. There is no dispute that at the material time, which is from the moment the Strata Corporation came into existence until the sale of the first strata lot, the Strata Corporation was controlled by Interville. As such, it is inescapable that during the material time their respective intentions were one and the same.

[90] This point was made by the Court of Appeal in *Phelps Holdings Ltd.* That case concerned the enforceability of an option to purchase a parcel of land that formed part of a large development in Langford. Phelps Holdings Ltd. ("Phelps Holdings") was the developer. In the course of the development, the property was subdivided and ten strata corporations were created. The plaintiff was one of the strata corporations, consisting of 15 bare land strata lots on what was referred to as Lot A. Just south of Lot A was a parcel of land that had been sold by Phelps Holdings to the Sooke School District, which built a school on it. An effluent plant and septic field was constructed on a separate parcel of land, referred to as Lot B, to serve as the sewage treatment and disposal system for some of the plaintiff's strata lots. Raymond Phelps held power of attorney for his mother, who initially held legal title to all the land, and he was also the principal of Phelps Holdings. Mr. Phelps made a commitment to sell Lot B to the school district for use as a playing field once a public sewer system was available such that Lot B was no longer needed as a septic field. The District of Langford took the position that Lot B had to be registered in the name of the plaintiff strata corporation for enforcement purposes while it was being used as a septic field. On the day before the strata corporation was created, several documents affecting Lot B were executed. These included a freehold transfer (the "Transfer"), transferring Lot B to the strata corporation, and an option to purchase Lot B (the "Option Agreement") granted by the strata corporation in favour of Phelps Holdings, which could only be exercised following provision of public sewer services to Lot A. The next day the strata plan was deposited in the Land Title Office, creating the strata corporation, and then the Transfer and the Option Agreement were filed to satisfy the requirement of the District of Langford while

preserving the ability of Phelps Holdings to sell Lot B to the school district in the future.

[91] About 13 years later, after public sewer services had been built, Phelps Holdings sought to exercise its option under the Option Agreement. The strata corporation denied the enforceability of the Option Agreement. The Court of Appeal agreed with the trial judge's conclusion that although the Option Agreement itself was not enforceable, the conduct of the parties, after the strata corporation came into existence, was sufficient to create a new post-incorporation contract. Specifically, the strata corporation had taken the benefit of the Transfer post-incorporation, and that benefit and the corresponding burden (the Option) had been contemplated pre-incorporation and then acted upon as contemplated. At paras. 23–26, the Court of Appeal expressly commented upon the unique role of the owner developer under the *SPA* at the time the owner developer acts for and on behalf of the strata corporation. Mr. Phelps, who was authorized to bind both Phelps Holdings and the strata corporation (as developer), signed the Option Agreement and then caused the strata corporation to come into existence and the Transfer and Option Agreement to be filed. The Court of Appeal explained at para. 26:

> No argument can be sustained that the interested parties were not unanimous in their intentions, nor that Mr. Phelps could not have achieved the same result in the end by another, albeit more formal process. The fact that the entire transaction was carried out at one time by the one person with the ultimate ability to bind all of the interested parties provides ample factual support for the result. Although the process may have been completed with something less than the ideal level of formality, that lack of formality in the circumstances of this case does not provide reason for interfering with the declaration of the trial judge.

[92] Again, because of the unique role of the owner developer under the *SPA* at the time the owner developer controls the strata corporation, it is inescapable that Interville and the Strata Corporation had the same intentions during that time. The question is whether, assessed objectively, they intended to form an agreement pursuant to which the Strata Corporation would assume liability for 23.72% of the Keefer Steps Costs. As already noted, the Strata Corporation concedes that Interville intended, at all material times, to form such an agreement and to cause the

Strata Corporation to do so. Even without such a concession, the evidence amply supports the conclusion that, assessed objectively, this was Interville's intention.

[93] First, the Cost Sharing Agreement stated that upon the stratification of any portion of the International Village lands, and prior to the closing of any of the sales of the strata lots created thereby, Interville would cause the strata corporation formed as a result thereof to agree to assume the obligations of Interville for the Keefer Steps Costs as they relate to the land from which the strata lots were created. Second, the Disclosure Statement stated that Interville would cause the Strata Corporation to assume 23.72 % of the Keefer Steps Costs, which represented its proportionate share based on buildable area. Third, the various strata corporations assumed the obligation for a proportionate share of the Keefer Steps Costs in different ways—there was no single template used. Fourth, the intention was acted upon when the Strata Corporation's first annual budget, drafted by Interville and Jason Black of Crosby Management (who was a representative of the Strata Corporation), allocated 23.72% of the Keefer Steps Costs to the Strata Corporation and when Interville's representative, Mr. Mortensen, told the owners at the First AGM that the Strata Corporation was liable for those costs. Fifth, Interville actually allocated such costs to the Strata Corporation from June 1, 2007. Sixth, the overarching purpose of the development was the construction of strata units for sale to others, with all ongoing maintenance costs to be paid by the eventual owners, and this was reflected in the per unit prices set by Interville. If the developer was to assume ongoing responsibility for any such costs, that would have been reflected in a higher per unit price. All of this is objective evidence of Interville's intentions and also of the Strata Corporation's intentions during the time it was controlled by Interville.

[94] The first through fifth of these facts is plain from the uncontroverted documents. The sixth emerges from an affidavit sworn by Mr. Lai, the president of Henderson Land and a director of Henderson Development at the material time. I was troubled by Mr. Lai's affidavit. The portions of it that address the specific arrangements related to the Keefer Steps Costs contain manifest factual errors,

which were left unexplained. For example, he refers to "the strata corporation" delivering an "Assumption Agreement" dated March 24, 1995, in relation to the "Property", which is defined as the Firenze development. He says this "Assumption Agreement" is attached as Exhibit D to his affidavit. The document attached as Exhibit D is actually a copy of the Paris Place assumption agreement to which I have already referred. Of course, the Firenze Strata Corporation did not exist in 1995. There were several other such mistakes in his recitation of the details concerning the Keefer Steps Costs arrangements. In the absence of another explanation, these mistakes reflect either an intention to deceive or significant carelessness. I have concluded that intentional deception is unlikely because the errors are so obvious. This leaves carelessness as the more likely explanation. In the circumstances, I have concluded that much of Mr. Lai's affidavit is unreliable. The only portions that I consider reliable are the general background statements about the object of the development and the developer's intention, generally, to pass on the Keefer Steps Costs to the ultimate purchasers, as set out in paras. 1–16, which are largely corroborated by the Cost Sharing Agreement and the Disclosure Statement. I give no weight to the balance.

[95] I note that the Strata Corporation objected to para. 15 of Mr. Lai's affidavit on grounds that it contained inadmissible opinion evidence. Paragraph 15 reads:

> If it had been contemplated that the developer would continue to pay the Keefer Steps maintenance costs after development and sale of the properties then either that might have been an impediment to the development as a whole, because this is simply not how development projects operate, or the future cost would have had to be reflected in higher per unit sales costs. There was no fund established for that purpose.

In my view, this paragraph does not contain opinion evidence; rather, it reflects Mr. Lai's personal knowledge of this particular development.

[96] For the forgoing reasons, I have no difficulty concluding that, at all material times, Interville intended to enter into an agreement with the Strata Corporation, and to cause the Strata Corporation to enter into that agreement, pursuant to which the Strata Corporation would assume liability for 23.72% of the Keefer Steps Costs, and

that it intended to do so during the window between stratification and the first strata lot sale because, during that window, it controlled the Strata Corporation and agreements entered into during that window did not have to be unanimously approved by the owners under s. 20 of the *SPA*. Given the unique role of the owner developer under the *SPA* at the time an owner developer acts for and on behalf of a strata corporation, it is inescapable that the Strata Corporation shared this intention. Interville and the Strata Corporation acted on their shared intention when they allocated a proportionate share of the Keefer Steps Costs to the Strata Corporation in the first annual budget. As in *Phelps Holdings Ltd.*, no argument can be sustained that the parties were not unanimous in their intentions, nor that Interville could have achieved the same result in the end by another, more formal process.

[97] The Strata Corporation advanced what can fairly be described as an *in terrorem* argument against the conclusion that the intentions of a developer and strata corporation are one and the same during the period when the strata corporation is controlled by the developer. The Strata Corporation says:

> A very dangerous precedent would be set if all an owner developer has to do [during that period] in order to bind the strata corporation is to have a subjective intention to enter into a contract with the strata corporation. Think of the mischief and commercial uncertainty that would arise if that were the case.

[98] To be clear, my conclusion is not based on Interville's subjective intention expressed after the fact, but rather on the undisputed, objective, contemporaneous evidence of its intention. Any concern that an owner developer could falsely claim, after the fact, to have caused an agreement to be formed between itself and a strata corporation during the time it controlled the strata corporation is addressed by the need for objective evidence of the developer's intention. Further, a developer's ability to bind a strata corporation is subject to the fiduciary duty imposed on developers by s. 6 of the *SPA*. It is well established that an allegation of breach of fiduciary duty against a developer that arises out of the developer's conduct in causing a strata corporation to enter into an agreement is often met by adequate disclosure, particularly where the disclosure is made in the statutorily required

disclosure statements: see for example, *The Owners, Strata Plan VIS2968 v. K.R.C. Enterprises Inc.*, 2007 BCSC 774; *The Owners, Strata Plan BCS 3165 v. KBK No. 11 Ventures Ltd.*, 2014 BCSC 2276; and *Zaidi v. The Owners, Strata Plan LMS 3464*, 2016 BCSC 731. Of course, here, the Disclosure Statement clearly advised all prospective purchasers that the developer was going to cause the Strata Corporation to assume the costs in question and any purchaser negotiating to purchase a strata lot in the Firenze would have taken this into account in determining the appropriate purchase price.

[99] I wish to be clear that I do not consider the conduct of the owners at the First AGM, in approving the budget, as evidence of the Strata Corporation's intention. I agree with the Strata Corporation's submission that relying on the conduct of the owners for this purpose would ignore the distinction between a corporation and its members. I also do not consider the conduct of the Strata Corporation, after the First AGM, in paying Interville's invoices as relevant to determining whether the Strata Corporation agreed, upon coming into existence, to assume liability for a portion of the Keefer Steps Costs. By the time the invoices were paid, the Strata Corporation was controlled by its council. While I have concluded it is not necessary to resolve the conflicts in the evidence concerning whether and to what extent the owners questioned the existence of the obligation, I accept that at least some of the council's members merely assumed the Strata Corporation was legally obliged to pay the invoices.

[100] I turn now to the Strata Corporation's submission that the agreement relied upon by Interville fails for lack of consideration. Interville characterized the consideration flowing to the Strata Corporation in exchange for its agreement to assume a proportionate share of the Keefer Steps Costs as "*inter alia* the ongoing benefit of the existence and use of the Keefer Steps for its owners with authorization by the City of Vancouver". The Strata Corporation asserts that past consideration is not good consideration and compliance with a pre-existing obligation is not consideration for a new contract. Specifically, the Strata Corporation submits that Interville is already obliged, under the original Keefer Steps Agreement and/or under

the Cost Sharing Agreement, to maintain the Keefer Steps as a public thoroughfare and the owners of units in the Firenze, as members of the public, have the benefit of the existence and use of the Keefer Steps irrespective of any agreement by the Strata Corporation to contribute to the associated costs. Accordingly, the Strata Corporation says the Firenze Cost Sharing Agreement fails for lack of consideration.

[101] I do not agree with either party's position on the issue of consideration. The Strata Corporation's agreement to assume liability for a proportionate share of the Keefer Steps Costs was one part in the overall development of the Firenze, which included the creation of the Strata Corporation and the subsequent sale of units in the Firenze. As already explained, the price of the units reflected that agreement.

[102] Consideration flowing to a third party may be valid consideration as between the parties to a contract: see *Chitty on Contracts, General Principles*, 32nd ed. (London: Sweet and Maxwell, 2015) at 449. The same point is made in S.M. Waddams, *The Law of Contracts*, 6th ed. (Toronto: Canada Law Book) at 86:

> The notion of exchange as an element of bargain further requires that what is exchanged for the promise sought to be enforced must be of some substance. The exchanged act or promise need not, however, be of benefit to the promisor. For example, if B lends money to X in exchange for A's promise to guarantee repayment, there is no doubt that there is a bargain between A and B and that A's promise is enforceable without any enquiry into whether A benefited by the advance of the money to X. Similarly, any act or promise by B or any forbearance to act is sufficient consideration for A's promise if the promise is given in return.

[103] Here, Interville caused the Strata Corporation to come into existence and agreed to sell the units in the Firenze to the Strata Corporation's members in the context of the development as a whole, which included the Strata Corporation's agreement to assume liability for a proportionate share of the Keefer Steps Costs. The Strata Corporation's agreement is enforceable without any enquiry into whether the Strata Corporation, as a distinct legal entity, itself benefitted by the sale of the units to its members.

Conclusion

[104] I conclude that upon the Strata Corporation coming into existence, an agreement was formed between the Strata Corporation and Interville pursuant to which the Strata Corporation agreed to pay 23.72% of the Keefer Steps Costs as invoiced by Interville from time to time. The material terms of the agreement were as expressed in writing in the Disclosure Statement: the Strata Corporation would pay 23.72% of the Keefer Steps Costs, based on the buildable area of the Firenze. In the circumstances, it is not necessary to consider whether, in the absence of an agreement, the Strata Corporation would be unjustly enriched by not paying a proportionate share of the Keefer Steps Costs.

[105] I declare that the Strata Corporation is and was legally obliged to pay 23.72% of the Keefer Steps Costs, as invoiced by Interville from time to time. Interville shall have judgment against the Strata Corporation in an amount reflecting the unpaid obligation to date. If the parties are unable to agree as to the specific quantum of the judgment, they have leave to appear. Interville shall have its costs at Scale B.

"WARREN J."