IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Badesha v. Snowland Sporting Goods Ltd.,* 2015 BCSC 1229

Date: 20150716
Docket: S127004
Registry: Vancouver

Between:

Kuldip Badesha and 0909043 B.C. Ltd.

Plaintiffs

And

Snowland Sporting Goods Ltd. and Jasjit Singh Aujla

Defendants

Before: The Honourable Madam Justice Loo

Reasons for Judgment

Counsel for the Plaintiffs:	G.E. Sourisseau A. Young
Counsel for the Defendants:	N.T. Mitha C.J. Edstrom
Place and Dates of Trial/Hearing:	Vancouver, B.C. October 14, 2014, February 2-6, 10, 16, 20, 2015, and March 11, 2015
Place and Date of Judgment:	Vancouver, B.C. July 16, 2015

[1] In June 2012 the plaintiffs Kuldip Badesha and 0909043 B.C. Ltd.(“090 Ltd.”) and the defendants Jasjit Aujla and Snowland Sporting Goods Ltd. (“Snowland”) entered into two written contracts: the hotel contract and the Young Street contract. The performance of the two contracts was contemporaneous, dependent on each other, and referred to as the “swap agreement”.

[2] The plaintiff 090 Ltd. owns commercial property on Young Street, Chilliwack. The shares in 090 Ltd. are held equally by the plaintiff Kuldip Badesha and his partners Harvinder Rai and Sarbjit Pannu. The defendant Snowland owns hotel property in Williams Lake. The shares of Snowland are owned by 0912494 B.C. Ltd. (“494 Ltd.”). The shares of 494 Ltd. are held 25 percent by the defendant Jasjit Aujla, 25 percent by his son, Tajinder Aujla, and 50 percent by Parminder Kaler, in trust for her husband, Harchet Kaler. To avoid confusion, I will refer to Tajinder Aujla as Tajinder.

[3] The hotel contract and the Young Street contract were prepared by Jasbir Banwait, a realtor with Lighthouse Realty Ltd., by using the BC Real Estate Association and Canadian Bar Association (BC Branch) standard form contract of purchase and sale. A term of the hotel contract provides that the buyer purchase all of the shares of Snowland. A term of the Young Street contract provides that the buyer purchase all of the shares of 090 Ltd. A term in both of the contracts provides that if either the buyer or the seller fails to complete the terms and conditions of the contract, the defaulting party must pay $500,000 to the other party within 60 days of the default. The plaintiff Kuldip Badesha was at all material times ready, willing and able to complete the swap agreement. The defendant Jasjit Aujla failed to complete.

THE ISSUES

[4] The agreed primary issues for determination are:

1. whether the contracts as written are sufficiently certain to be enforceable? The defendant Jasjit Aujla contends they are unenforceable for the following reasons:

(a) they lack an essential term; namely, the proper parties to the contracts;

(b) the hotel contract contains a fraudulently inserted term; or a term on which there was no *consensus ad idem*; and

(c) the swap agreement consists of two contracts that are dependent on each other, such that if one contract is unenforceable, the swap agreement or both contracts are unenforceable;

2. if the contracts as written are not sufficiently certain to be enforceable, ought the court rectify the contracts to reflect the common intention of the parties; and

3. is the $500,000 damages clause in each of the contracts a penalty clause; if so, ought the defendant Jasjit Aujla be granted relief from the penalty.

[5] Unfortunately, credibility is also in issue.

THE PLEADINGS

[6] One of the purposes of pleadings is to define the issues. The pleadings are also important in terms of the material facts alleged and admitted, and the relief sought.

[7] By their notice of civil claim filed November 2, 2012, the plaintiffs allege that the defendants breached terms of the swap agreement, and sought specific performance; alternatively, $500,000 for breach of the hotel contract and $500,000 for breach of the Young Street contract, for a total of $1 million in liquidated damages. The defendants filed a response to civil claim on November 2, 2012 and *admitted* the following allegations:

> The Swap Agreement
>
> 5. On or about June 15, 2012 Mr. Badesha, and Mr. Aujla, made an agreement that:

a. Mr. Badesha would purchase property in Williams Lake, more fully described below, and to facilitate that sale would purchase 100% of the shares of Snowland Ltd., a company owned and controlled by Mr. Aujla;

b. Mr. Aujla would purchase property in Chilliwack, more fully described below, and to facilitate that sale would purchase 100% of the shares of 0909043 B.C. Ltd., a company owned and controlled by Mr. Badesha; and

c. Each of these sales would be contemporaneous and each dependent on the other.

(the "Swap Agreement")

6. Pursuant to the Swap Agreement, on or about June 15, 2012, Mr. Badesha as buyer and Mr. Aujla and Snowland Ltd. as seller made a written agreement (the "Hotel Contract") that Mr. Badesha would purchase, and Mr. Aujla would sell, real property located at 55 S. Sixth Avenue, Williams Lake, B.C., known as the Howard Johnson Hotel, and legally described as follows:

   P.I.D. - 026-577-453
   Lot 1 District Lot 71 Cariboo District Plan BCP22145

   P.I.D. - 026-577-461
   Lot 2 District Lot 71 Cariboo District Plan BCP22145

   P.I.D. - 026-577-470
   Lot 3 District Lot 71 Cariboo District Plan BCP22145

   (the "Hotel Property")

7. The Hotel Property is owned by Snowland Ltd. It was a term of the Swap Agreement and the Hotel Contract that the Defendants would sell, or facilitate the sale of, 100% of the shares of Snowland Ltd. to Mr. Badesha.

8. Pursuant to the Swap Agreement, on or about June 15, 2012, Mr. Aujla as buyer and Mr. Badesha and 0909043 B.C. Ltd. as seller made a written agreement (the "Young Street Contract") that Mr. Aujla would purchase and Mr. Badesha would sell real properties located adjacent to each other at 8559 Young Street, Chilliwack, B.C. and 45928 Hocking Avenue, Chilliwack, B.C. and legally described as follows:

   P.I.D. - 012-036-242
   Lot B (J103765) Except: Part dedicated Road on
   Plan LMP54297 Block 16 District Lot 114 Group 2
   New Westminster District Plan 1216

   P.I.D. - 012-036-153
   Lot 5 Block 16 District Lots 114 and 27"A" Group 2 New
   Westminster District Plan 1216

   (the "Young Street Properties")

…

The Hotel Contract

11. It was a term of the Hotel Contract that Mr. Badesha would pay a deposit of $50,000 to the Mr. Aujla's real estate agent on or before July 9, 2012. Mr. Badesha paid that deposit.

12. It was a term of the Hotel Contract that Mr. Badesha would have vacant possession of the Hotel Property on June 30, 2012.

13. It was a term of the Hotel Contract that the purchase price for the Hotel Property was $3,000,000.

14. It was a term of the Hotel Contract that completion of the sale and purchase of the Hotel Property would take place on August 31, 2012.

…

17. Pursuant to the Hotel Contract, Mr. Badesha took possession of the Hotel Property on or about July 1, 2012 and has continued in possession.

The Young Street Contract

18. It was a term of the Young Street Contract that Mr. Aujla would pay a deposit of $50,000 to the Plaintiffs' real estate agent on or before July 7, 2012.

19. It was a term of the Young Street Contract that Mr. Aujla would pay a further deposit of $50,000 to the Plaintiffs' real estate agent on or before July 22, 2012.

…

21. It was a term of the Young Street Contract that completion of the sale and purchase of the Young Street properties would take place on August 31, 2012.

22. The Young Street Contract also contained the following written terms:

    a. if either party failed to complete the terms and conditions of the Hotel Contract the defaulting party will have to pay $500,000 to the other party within 60 days of the default. This provision was added at the specific request of Mr. Aujla;

    b. Mr. Badesha or his nominee would lease back the Young Street properties at $20,000 per month for the months of July and August 2012 and would enter into a five-year Triple net lease from September 2012 to September 2017 at $30,000 per month with an option to renew;

    c. Mr. Aujla would assume all obligations under a first mortgage in favor of Envision Credit Union of approximately $3,000,000 registered against the Young Street properties.

[8] The plaintiffs allege in paragraph 16 of the notice of civil claim (and the defendants denied) that the hotel contract contained the following terms which the defendants breached:

a. if either party failed to complete the terms and conditions of the Hotel Contract the defaulting party will have to pay $500,000 to the other party within 60 days of the default. This term was added at the specific request of Mr. Aujla;

b. Mr. Badesha would assume all the terms and conditions of Mr. Aujla's franchise agreement with Howard Johnson;

c. Mr. Badesha would assume all obligations under a mortgage in favour of BDC Bank of $1,500,000 registered against the Hotel Property;

d. the seller would remove the debris of the burnt down building and clean the Hotel Property on or before the completion date of August 31, 2012;

e. the seller would provide power to all the existing buildings at the seller's expense on or before the completion date of August 31, 2012;

f. the damaged hotel rooms in the buildings would be repaired by the seller on or before the completion date; and

g. all business expenses of the hotel were to be the sole responsibility of the buyer from July 1, 2012.

[9] The defendants allege that:

a. Mr. Badesha consented to Mr. Aujla applying to Howard Johnson Hotel for a transfer of the franchise agreement to Mr. Badesha, but the application was rejected;

b. the handwritten damaged rooms clause was inserted after Mr. Aujla signed the contract, and his purported initials adjacent to the handwritten clause was a forgery;

c. the term obliging the vendor to provide power to all of the existing buildings at the vendor's expense was frustrated by the following:

    (i) following a fire on February 22, 2012, the electrical services to a portion of the hotel property was cut-off as the servicing occurred through the building that burned down;

    (ii) The City of Williams Lake and BC Hydro would not approve an alternative route of electrical service prior to the August 22, 2012 completion date;

    (iii) the defendants were not permitted to provide electrical service to all of the existing buildings absent the explicit approvals of the City and BC Hydro;

d. Mr. Aujla paid the second installment of $50,000 towards the $100,000 deposit pursuant to the Young Street contract on the following terms:

(i) $25,000 was paid to the realtor Jasbir Banwait; and

(ii) the remaining $25,000 was credited as a set-off to Mr. Aujla "for credit card payments received by the Plaintiffs subsequent to taking possession of the Hotel Property but which were for the period prior to the Plaintiffs' possession."

[10] In March 2013 the plaintiffs abandoned their claim for specific performance.

[11] On July 19, 2013, Mr. Aujla filed a counterclaim and a third party notice adding Jasbir Banwait, Lighthouse Realty Ltd., Parminder Kaler and Harchet Kaler, as third parties. By his counterclaim, Mr. Aujla alleges that the plaintiffs breached the swap agreement and claims $500,000 in liquidated damages pursuant to the terms of the agreement. By his third party notice, Mr. Aujla alleges fraud on the part of Mr. Banwait, and breach of contract by the Kalers as follows:

> The Kalers
>
> 25. Prior to the Swap Transaction, Mr. Aujla and Mr. Kaler were business partners in Snowland. Mr. Kaler was at all material times active in the management and operation of Snowland.
>
> 26. Mr. Kaler and Ms. Kaler were parties to the Swap Transaction. In particular,
>
> a. Mr. Kaler and Ms. Kaler were knowledgeable of all material terms of the Swap Transaction;
>
> b. Mr. Kaler and Ms. Kaler approved the Swap Transaction;
>
> c. Mr. Kaler instructed Ms. Kaler to sell her shares in Snowland as part of the Swap Transaction;
>
> d. Mr. Kaler was present when the Swap Transaction contracts were executed;
>
> e. Mr. Kaler and Mr. Aujla met with Mr. Badesha to demand payment under the Swap Transaction and demand that the parties enter into a lease agreement;
>
> f. Mr. Kaler attended at the Hotel Property on June 28-30, 2012 with Mr. Aujla to facilitate the transfer of possession.
>
> …
>
> Breach of Contract
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> 28. Mr. Kaler and Ms. Kaler were parties to the Swap Agreement, as noted above.

[12] Lighthouse Realty Ltd. objected to the third party notice being filed outside the 42-day time limit, contrary to Supreme Court Civil Rule 3-5(4). Mr. Aujla applied for leave to file the third party notice, and his application was dismissed by Master Taylor on December 3, 2013. On January 23, 2014 Mr. Justice Ehrcke dismissed his appeal (indexed at 2014 BCSC 270), and stated:

> [19] Master Taylor went on to consider the position of the parties and relevant factors that he had enumerated. He observed that if he granted leave to file the third party notice, it would result in the plaintiffs losing the current trial date and would also put them to the additional expense of having to sit through additional portions of the trial that are of negligible interest to them, as they relate only to the dispute between the defendants and the third parties.
>
> …
>
> [21] The Master alluded to the fact that the issues in dispute in the original action differ from those in dispute between the defendant and the third parties. In the original action, the issues are the terms of the contracts and who breached them. The issues of alleged fraud and negligence on the part of the realtor are separate and distinct and can only be properly determined after the issues in the original action have been decided. He noted that there is no evidence that the plaintiffs knew or facilitated any fraud and no evidence that they conspired with the realtor to alter the terms of the contract. The Master said:
>
> > I am of the view that there will be prejudice to the plaintiff, who has prosecuted his case with some alacrity and will lose his trial date if I grant the order. I am of the view that this is a contractual dispute only at this juncture.
>
> …
>
> [26] In the present case, the decision of Master Taylor was clearly interlocutory and was not a ruling on a question vital to the final issue in the case. The order does not prevent the appellant from pursuing his claims against the third parties. He is free to do so by initiating an action against them. There is no suggestion that he is precluded from doing so by any limitation period.

[13] On the first day of trial on October 14, 2014, Mr. Mitha, counsel for Mr. Aujla sought to provide his opening statement before the plaintiffs called their case. Before doing so, Mr. Mitha candidly informed the court that Ravi Hira, Q.C. was initially counsel for Mr. Aujla, Mr. Kaler, and Snowland, and filed the response to civil claim on behalf of the defendants Snowland and Mr. Aujla. In late March 2013, a dispute arose between Mr. Aujla and Mr. Kaler, and therefore Mr. Hira withdrew as counsel

for Snowland and Mr. Aujla. On May 28, 2013 Mr. Mitha was appointed to act as counsel for only Mr. Aujla. Snowland was not represented at trial, and has had no representation after Mr. Hira withdrew as its counsel. A separate notice of civil claim was filed by Mr. Aujla against Parminder Kaler and Harchet Kaler who failed to respond and Mr. Aujla obtained default judgment against them.

[14] Mr. Aujla in his opening statement on October 14, 2014 asserted that the plaintiffs' claim must fail because the "proper parties", Parminder Kaler and Mr. Badesha's partners, Harvinder Rai and Sarbjit Pannu were not named as parties, or before the court, and furthermore, the swap agreement was unenforceable because its terms were vague, and there was no *consensus ad idem*.

[15] On the basis that those matters were neither pled or raised in the trial brief, the trial was adjourned, and Mr. Aujla granted leave to amend his response to civil claim and counterclaim.

[16] On November 18, 2014, an amended response to civil claim was filed by Mr. Mitha on behalf of *Snowland* and Mr. Aujla. Although no one raised that point, I assume that the reference to Snowland was simply a typographical error as Mr. Mitha does not represent Snowland. The amended response to civil claim alleges:

> 2. As an overall response to the entire Notice of Civil Claim, the Defendants say that the Hotel Contract and the Young Street Contract (together referred to as the "Swap Agreement"), are unenforceable for the following reasons:
>
> a. the Contracts do not contain the proper parties as buyers and sellers;
>
> b. the Contracts contain a material term relating to fixing of damaged rooms (the validity of which term is disputed by the Defendants) that is not capable of meaning, and over which the parties did not have *consensus ad idem*.
>
> 3. The Hotel Contract names Snowland Sporting Goods Ltd. ("Snowland") and Mr. Jasjit Singh Aujla as the sellers and Mr. Kuldip Singh Badesha as the buyer. While Snowland owns the Hotel, the shares of Snowland are owned by a numbered company, being 0912494 B.C. Ltd. Snowland was not the seller of the shares, and could not in law be a seller of its own shares.

> 4. Further, the buyers are not correctly listed. The buyers are, in fact. Mr. Badesha and his two partners, Mr. Pannu and Mr. Rai.
> 5. The Young Street Contract incorrectly lists 0909043 B.C. Ltd. as the seller, when, in fact, that numbered company is not lawfully capable of selling its own shares. The sellers should have been listed as Mr. Badesha, Mr. Pannu and Mr. Rai.
> 6. The Young Street Contract is also incomplete in that it only lists Mr. Aujla as a buyer, when it should have also listed Mrs. Parminder Kaler as one of the buyers.
>
> …
>
> 13. Further, or alternatively, the real estate agent who drafted the Swap Agreement communicated to the Plaintiffs that the Defendants had agreed to the Damaged Rooms Clause, and, at the same time, communicated to the Defendants that the Damaged Rooms Clause did not form part of the Swap Agreement.
> 14. Further, or alternatively, even if the Damaged Rooms Clause formed part of the Swap Agreement (which is denied), there was no *consensus ad idem* as to which rooms were to be fixed and what was to be fixed in those rooms.
>
> …
>
> 18. The Defendants say that Mr. Aujla paid the Second Installment pursuant to the Young Street Contract on the following terms:
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> …
>
> b. The remainder was ~~credited as~~ a set-off to Mr. Aujla for ~~credit card~~ payments which the Plaintiffs had failed to make, including the mortgage payment under the Hotel Contract, and the lease payment under the Young Street Contract ~~received by the Plaintiffs subsequent to taking possession of the Hotel Property but which were for the period prior to the Plaintiffs' possession~~.

[17] The amended counterclaim filed by Mr. Aujla – and only Mr. Aujla – on November 18, 2014 repeats the allegations in his amended response to civil claim that the swap agreement is unenforceable as it names the incorrect parties, and there was no *consensus ad idem* on a material term; alternatively, if the court determines that the swap agreement is a valid agreement then the swap agreement was breached by Mr. Badesha, and Mr. Aujla claims liquidated damages of $500,000 in accordance with the terms of the swap agreement.

THE BACKGROUND

[18] It is important to note that at the material times Mr. Badesha, Mr. Aujla, and Mr. Banwait communicated with each other in Punjabi, but testified at trial in English. It was obvious from their accented English, that Mr. Banwait and Mr. Aujla are more comfortable speaking Punjabi, but I understood what they were saying, although at times, Mr. Aujla's evidence was incomprehensible, not because of an inability to speak English, but because his evidence as to what occurred constantly changed throughout his testimony and at times, defied common sense.

[19] The plaintiff Kuldip Badesha is 51 years old. He completed grade 11 in Williams Lake where he lived for nearly three years. In 1983, he moved with his family to Abbotsford where his brother and father purchased a raspberry farm. The family farmed until 1990. Mr. Badesha is now a businessman. He is equal shareholders with his partners Harvinder Rai and Sarbjit Pannu in 090 Ltd. which owns a "mini-plaza" on Young Street and Hocking Avenue in Chilliwack. The commercial property occupies nearly two acres, and consists of a one-storey building and two-storey building. The businesses in the mini-plaza include a bar, which Mr. Badesha operates, a liquor store, restaurant, beauty salon, sporting goods and outdoors store, and other businesses. Mr. Badesha and his partners purchased the Young Street property in 2011.

[20] The defendant Jasjit Singh Aujla is 63 years old. He was born in India, completed grade 11, and came to Canada in November 1972. He worked in a sawmill from 1973 to 1976 and then worked as a custodian until 1980. From 1981 until his retirement in 2006, he worked in the maintenance department of the North Vancouver School District. Following retirement, Mr. Aujla decided to go into business by purchasing property, and is now a businessman.

[21] Jasbir Banwait has been a realtor for 26 years, and with Lighthouse Realty Ltd. in Abbotsford for nearly 18 of those years. His son Manbir Banwait is also a realtor at Lighthouse Realty Ltd.

[22] Mr. Badesha and Mr. Banwait have known each other for at least 25 years and have done business with each other. Mr. Banwait and Mr. Aujla have known each other for about 20 to 25 years. Mr. Badesha and Mr. Aujla did not know each other until the events giving rise to this litigation.

[23] In July 2011 Mr. Aujla, Tajinder, and Parminder Kaler in trust for her husband Harchet Kaler, purchased the hotel property in Williams Lake by acquiring the shares in Snowland from Rajendar Gautam. A sketch of the hotel property shows five buildings, the largest of which is building 1 or the hotel building with 44 rooms, a manager's suite, a restaurant, and a pub. Directly behind building 1 is building 2, followed by building 5 and building 3. At right angles or perpendicular to buildings 2, 5, and 3, is building 4.

[24] Mr. Aujla testified that building 2 has 12 rooms, building 3 has 12 rooms and an electrical or furnace room, and building 4 had 28 rooms and a manager's suite. Building 5 has two storage rooms on the main floor, and five rooms upstairs, but they never rented out building 5 because it needed to be "passed" by the city. Mr. Aujla claims that the 44-room hotel building operated under a Howard Johnson franchise. The remaining buildings were not subject to the Howard Johnson franchise, and some of the rooms were rented out as the Williams Inn Hotel.

[25] From early July 2011 to the end of that month, Mr. Aujla, Tajinder, and Mr. Kaler operated the hotel property. At the end of July 2011 they leased the entire five-building hotel property to Philip Chan for $25,000 a month.

[26] On February 22, 2012 a fire destroyed building 4 and left a pile of debris. The fire also damaged building 2 because building 4 supplied the electric power that was cut off and due to lack of electricity, the water pipes in building 2 burst and caused damage.

[27] At the end of February 2012 Philip Chan ceased leasing the property. From that point, Mr. Aujla and Mr. Kaler travelled from Surrey to Williams Lake once a week or so to operate and manage the hotel property.

[28] There is a dispute about when Mr. Aujla first told Mr. Banwait that he was interested in selling the hotel property, and a dispute about an undated four-page document entitled INFORMATION PACKAGE - FOR SALE - HOWARD JOHNSON HOTEL PROPERTY. Underneath the title there is a photograph of the Howard Johnson Hotel. There are two versions of page 1: on one version has contact information for Jasbir Banwait and Manbir Banwait at Lighthouse Realty Ltd., and the other version of page 1, has only Jasbir Banwait's name and contact information.

[29] Mr. Banwait testified that it was in the summer of 2011 that Mr. Aujla first expressed to him an interest in selling the hotel. He cannot remember the exact date that he first saw the property, but it was some time between October 2011 and January 2012. He drove up to Williams Lake with his client Deep Brar and Tajinder, and remembers that when they arrived at the hotel it was snowing. While he was at the hotel, he met Paul Kandola.

[30] Mr. Banwait said that the information package was prepared before he had a listing agreement – just a "verbal commitment" for the listing – with Mr. Aujla. Mr. Aujla gave him details of the property and photographs, and he and his son Manbir prepared the information package.

[31] Pages 2 and 3 of the information package contains information under the following headings: property information, legal description, zoning, building overview, valuation, future potential and price, and reads in part:

> Property Information
>
> Offering: Rare opportunity to acquire a 110 Room, five building hotel property located in Williams Lake, BC on 2.58 acres of commercial property.
>
> …
>
> Building Overview
>
> Building 1 - 18,346 sq.ft including 50 rooms, Pub, Restaurant, Banquet Room, Guest Laundry, Mechanical and Electrical. Note: Restaurant is leased @ $2,600/month.
>
> Building 2 - 7,926 sq.ft including 11 rooms, Meeting rooms, Group Suite, Storage and Mechanical.

> Building 3 - 16,818 sq.ft including 32 rooms, Manager's Suite, Laundry, Mechanical, and Electrical. This building also contains a full restaurant and has potential to serve as a Seniors Care Facility.
>
> Building 4 - 4,252 sq.ft including 5 rooms, Meeting Room, Storage, Mechanical, and Electrical.
>
> Building 5 - 3,982 sq.ft including 12 rooms, Mechanical and Electrical.
>
> Total - 51,324 sq.ft including 110 rooms.
>
> Valuation
>
> An appraisal valuation in 2008 conducted by Collingwood Appraisals Ltd. yielded a final valuation of $4,900,000.
>
> …
>
> Price
>
> Howard Johnson Hotel offered at $4,200,000

[32] Mr. Banwait testified that he is confident that he gave a copy of the information package to Mr. Aujla, but he does not recall when.

[33] Mr. Aujla denies that Mr. Banwait ever gave him a copy of the information package and he testified that the first time he ever saw the information package was at his examination for discovery in October 2013. However, like much of his evidence, Mr. Aujla's evidence on this point was contradictory. In his examination for discovery he testified:

> 57 Q Now, sir, that's an information package listing for sale the Howard Johnson hotel property?
>
> MR. MITHA: Let him just have a look at it. Yes. Okay.
>
> MR. SOURISSEAU:
>
> 58 Q You've seen that document before?
>
> A Yes.
>
> 59 Q Okay. And that was put together by Mr. Banwait on your instructions, correct?
>
> A Not for list, because at that time when we deal with Mr. Badesha, no list to Mr. Banwait, and this is -- this is after that he got all the pictures from there. We give him pamphlet when he took Mr. Badesha over there. He took pamphlet from the office.

[34] Mr. Badesha testified that around the end of April or beginning of May 2012, he phoned Mr. Banwait who told him that he was in Williams Lake showing the

Howard Johnson hotel to his two nephews. Mr. Banwait and his nephews then stopped off at his Young Street pub on their way back from Williams Lake, had dinner with him, and he learned that the hotel had five buildings but one of them had burned down. His nephews were uncertain whether they were interested in the property. A couple of days later, Mr. Banwait came to see him, gave him the information package, told him a bit more about the property, and they briefly discussed the possibility of swapping the Young Street property for the hotel property.

[35] Mr. Badesha was not challenged on when he received the information package so it is reasonable to infer that the information package existed at the end of April or beginning of May 2012.

[36] However, Mr. Aujla denies that he ever discussed the sale of the hotel with Mr. Banwait before April 2012. He testified that he and Mr. Kaler got tired of driving back and forth each week between Surrey and Williams Lake, they wanted to get rid of the headache and decided to sell. They were driving from Williams Lake to Surrey in mid-April 2012 when he phoned Mr. Banwait and told him for the first time that they were interested in selling the hotel property and asked him if he could help them find a buyer. Mr. Banwait asked him for information about the hotel, and he explained that there were four buildings, one building had burned down, the number of rooms in each building, and the size of the property. Mr. Banwait then said that he would give him a call if he found someone.

[37] Mr. Aujla testified that a couple of days later he called Mr. Banwait again, and Mr. Banwait told him he was bringing someone up to look at the hotel, and sometime in May 2012 he came up and introduced Mr. Badesha to him and Mr. Kaler.

EVENTS LEADING UP TO THE SWAP AGREEMENT

[38] There is a conflict in the evidence over who showed Mr. Banwait and Mr. Badesha around the hotel property in May 2012. Mr. Banwait and Mr. Badesha say it was Mr. Aujla, and that Mr. Kaler was not present. Mr. Aujla testified that it was Mr. Kaler who showed the two men around the property, and not him.

[39] On May 22, 2012 Mr. Banwait and Mr. Badesha drove to Williams Lake to look at the hotel property. Mr. Banwait had been there twice before, but this was the first and only time with Mr. Badesha. The evidence of Mr. Banwait and Mr. Badesha is that they spent approximately four hours there: a couple of hours with Mr. Aujla who showed them around the property, and then another couple of hours talking in the bar. Mr. Aujla joined them for a while in the bar, left them alone again, and then returned and had something to eat and drink with them.

[40] Mr. Aujla and Mr. Badesha did not deal directly with each other on anything of substance; their communication went through Mr. Banwait.

[41] Mr. Badesha testified that he spoke primarily to Mr. Banwait, because he was the realtor, he had never met Mr. Aujla before and did not know him. Mr. Kaler was not at the hotel and he is certain that the first time he met Mr. Kaler was on June 28, 2012 when he went to the hotel a few days before taking possession.

[42] Mr. Banwait testified that he is certain and has a clear recollection that Mr. Kaler was not present when he went to Williams Lake with Mr. Badesha. Only Mr. Aujla was present and took them on a tour of the property.

[43] Mr. Banwait testified that they could not see inside buildings 2 and 5. He could not remember why they could not see inside building 2, but he understood from Mr. Aujla that the building had no power.

[44] Mr. Badesha testified Mr. Aujla had a card when he showed them around the property. They saw between 10 to 15 of the 44 rooms in hotel building 1. They also went into the pub and walked through the restaurant. Mr. Aujla told them that building 2 had no water, power, or heat, but they saw about three to four rooms in building 2. It was daytime, and he could not see if any lights were on. They walked around building 5, then up some stairs to a deck, but it was not very safe because the deck was broken. Mr. Aujla's card did not work for building 5 so all they did was look through the windows of about five or six rooms. Mr. Banwait told him that building 5 had no power. Mr. Aujla said that there was water damage to buildings 2

and 5. He saw no lights in building 5, but then again, it was daytime. They went to building 3 where some of the rooms were rented out. Mr. Aujla did not want to show them those rooms, but he showed them four or five vacant rooms.

[45] They spoke about the hotel building 1 and that renovations were needed to paint the walls, change the carpets and the furniture. But Mr. Aujla was not willing to pay for the cost of renovating the hotel; it was being sold "as is". However, both Mr. Badesha and Mr. Banwait insisted that the two buildings that had damage – buildings 2 and 5 – had to be up and running by the completion date. Mr. Banwait testified with respect to building 5 that "whatever had to be done so that the city would pass" the building so that it could be rented out.

[46] The three men spoke about the Howard Johnson franchise. Mr. Banwait testified that they discussed that if there was no Howard Johnson franchise, but just a no name hotel, business would not be as good. Howard Johnson was a good franchise and good for the business. Mr. Badesha's evidence was similar.

[47] Both Mr. Badesha and Mr. Banwait testified that Mr. Aujla made it clear to Mr. Banwait that Mr. Badesha would have to take the Howard Johnson franchise if he was going to buy the property. Mr. Banwait testified that Mr. Aujla told him that "this is a franchise that we have", there was a huge Howard Johnson sign outside the hotel building, everyone knew the 44 room hotel was a Howard Johnson franchise, Mr. Aujla insisted that Mr. Badesha take the franchise, and Mr. Badesha wanted the franchise.

[48] Mr. Banwait testified that he made Mr. Aujla aware that Mr. Badesha was interested in selling the Young Street property, and there was discussion about the price for the hotel property, the price for the Young Street property, and a swap of the properties. Mr. Badesha wanted $5 million for the Young Street property; Mr. Aujla wanted $3.2 million for the hotel property. Mr. Badesha spoke to each of the men about their numbers, and the meeting was left at $4.8 for the Young Street property, and $3 million for the hotel property.

[49] Mr. Badesha testified that he never spoke to Mr. Aujla again until they met to sign the two contracts at Tim Hortons in Abbotsford on June 20, 2012, and that he never returned to the hotel property again until June 28.

[50] Mr. Aujla denies that he took Mr. Banwait and Mr. Badesha on a tour of the property, and says that it was Mr. Kaler who toured the property with them. Afterwards he went into the pub with them, they discussed what they had seen, and he told Mr. Banwait and Mr. Badesha that "we don't have Howard Johnson franchise". He also told them that they had not used building 5 since they purchased the property, and when they asked why not, he told them that it needed to be inspected by the city inspector, and they replied "fine". There was no discussion about price.

[51] Mr. Aujla says that the next day Mr. Banwait phoned him and told him that Mr. Badesha was interested in buying the hotel property with a swap of property in Chilliwack, and if he and Mr. Kaler were interested, they could talk further.

[52] A few days later, he and Mr. Kaler drove to Chilliwack and spent a couple of hours viewing the Young Street property, and all that was discussed about price, was the amount they paid for the hotel property. The next day he phoned Mr. Banwait and told him they were interested in swapping the properties if the price was good. Mr. Banwait replied that he and Mr. Badesha wanted to return to look at the hotel property; and they did.

[53] According to Mr. Aujla, the second time that Mr. Banwait and Mr. Badesha came to the hotel property they did not tour the property, but had a discussion with him and he told them that "we selling as it is", referring to the hotel property. Mr. Badesha said that he had experience running a hotel, this is his home town, he loves the town enough to buy the hotel, and he is happy to come back to Williams Lake.

[54] Mr. Aujla also testified that they discussed the Howard Johnson franchise and he told them that they were working with Howard Johnson through their lawyer: "if

we get, you can have; if we don't get, then we can't do nothing." Both Mr. Banwait and Mr. Badesha agreed. He then left the pub and Mr. Banwait and Mr. Badesha spent a couple of more hours in the pub before they met him in the hotel office, and Mr. Badesha said, "I'm very happy to buy the hotel".

[55] Mr. Aujla testified that he and Mr. Kaler subsequently met with Mr. Banwait at the Tim Hortons in Abbotsford and told him they were looking at $3 million for the hotel property, and were willing to pay $4.8 million for the Young Street property. Mr. Banwait told them that Mr. Badesha also wanted to run the Young Street property and wanted to lease the property back from them for $30,000 a month, triple net, and a five-year lease term.

[56] Mr. Aujla testified that Mr. Banwait phoned him on June 14, 2012 and asked to meet the next day at the Abbotsford Tim Hortons. He and Mr. Kaler showed up and Mr. Banwait gave them a contract which Mr. Aujla signed on June 15, 2012. Mr. Kaler complained to Mr. Banwait that the contract was written in red ink. Mr. Banwait said to give him a few days and he would prepare the contract in blue ink. Mr. Badesha was not present at that meeting. Mr. Aujla testified that Mr. Banwait never asked him to return the red ink copy of the contract that he signed, so he kept it at home.

[57] The red ink copy that Mr. Aujla produced has the signatures of both Mr. Badesha and Mr. Banwait although neither of them recalls signing it. None of the parties rely on the signed red ink version of the hotel contract, but the clauses in the addendum bear repeating. The addendum reads:

> Both parties (The buyer and the seller) agree that this contract is a firm and binding contract. If any party the buyer or seller fails to complete the terms and conditions of this contract the defaulted party will have to pay a penalty to the other party in the amount of $500,000.00 within 60 days upon the date of default.
>
> Both parties (the buyer and the seller) agree that the deposit paid in trust of Lighthouse Realty in the amount of $50,000 be released to Jasbir Singh Banwait within 24 hours upon deposit is made as an advance payment of his commission.

> The subject property is being sold on the basis of "As is where is". All the renovation needs to be done is buyer's responsibility.
>
> The buyer [has] to assume all the terms and conditions of the contract signed by the seller with Howard Johnson franchise for only 44 rooms.
>
> The seller [agrees] to sell and the buyer [agrees] to buy 100% shares of the company "Snowland Sporting Good LTD."
>
> The buyer to assume all the obligations held under first mortgage in the amount of $1,500,000.00 with BDC Bank monthly interest only payment of $6000.00,
>
> Seller to take back a second mortgage in the amount of $400,000.00 at an interest rate of 5% per annum calculated annually not in advance with a monthly payment of $1667.00 interest only starting from September 1st/2012 until December 31/2013.
>
> The debris of the burnt down building must be removed and cleaned properly on or before completion date August 31/2012.
>
> There is no power to some of the buildings back of the motel and the seller to provide the power to all the existing buildings on seller's expense on or before completion date August 31/2012.
>
> The insurance claim filed by the seller belongs to the seller if any money shall be paid by the insurance to the seller.

[58] The first clause of the addendum describes a penalty. The clause originally noted the amount of the penalty was $5000,000.00 but the third zero was crossed out in red ink so that it reads $500,000.00 and the change was initialled by Mr. Badesha and Mr. Aujla.

[59] On June 20, 2012 Mr. Banwait, Mr. Aujla, and Mr. Badesha met at the Tim Hortons on Clearbrook Road in Abbotsford to sign the two contracts in blue ink.

[60] Mr. Banwait testified that Mr. Kaler was also at the meeting at Tim Hortons.

[61] Mr. Badesha testified that when he arrived at the Tim Hortons, Mr. Aujla and Mr. Banwait were already there, and he joined them. He does not recall if Mr. Kaler was at the meeting because it was Mr. Aujla who signed the contracts.

The Hotel Contract

[62] Similar to the red-inked form of the hotel contract of purchase and sale dated June 15, 2012 signed by Mr. Aujla on June 18, 2012, the blue ink hotel contract also

dated June 15, 2012 but signed on June 20, 2012 notes that the seller of the property described as the "Howard Johnson Hotel in Williams Lake, B.C." was Snowland Sporting Goods Ltd. and Kuldip Singh Badesha, the possession date was June 30, 2012, and the adjustment date or closing date was August 31, 2012.

[63] The addendum to the hotel contract was identical to the red ink copy, except for some handwritten additions by Mr. Banwait, and later some handwritten changes by Manbir Banwait, including the legal description of the property. At the end of the paragraph or sentence dealing with the $50,000 commission, Mr. Banwait wrote "THIS COMMISSION IS NON-REFUNDABLE". There is no dispute about these clauses.

[64] At the end of the paragraph or sentence which reads: "There is no power to some of the buildings back of the motel and the seller to provide the power to all the existing buildings on seller's expense on or before completion date August 31/2012", Mr. Banwait wrote: "AND THE DEMAGED (sic) ROOMS IN THESE BUILDINGS TO BE REPAIRED BY THE SELLER ON OR BEFORE THE COMPLETION DATE" ("the damaged rooms clause").

[65] There is a dispute about the damaged rooms clause.

The Young Street Contract

[66] The Young Street contract of purchase and sale is dated June 15, 2012, and signed by Mr. Badesha on June 20, 2012. The seller is noted as 0909043 Ltd. and the buyer is noted as Jasjit Singh Aujla. The purchase price is $4,800,000, a $50,000 deposit forms part of the purchase price, the completion date and possession date is August 31, 2012 and the adjustments date is June 30, 2012.

[67] Similar to the hotel contract, on June 20, 2012 at Tim Hortons, Mr. Banwait wrote in the addendum that the commission was non-refundable, and Mr. Badesha and Mr. Aujla initialled the clause.

[68] The addendum includes the following typed provisions:

> The seller will lease back the whole property on a 5 year term and will pay $20,000.00 per month for the month of July 2012 and August 2012 and will pay $30,000.00 triple starting from September first/2012 until September 30/2017 net with 5 year option to renew on same terms and conditions. The cost of major maintenance inside or outside of the subject property shall be paid by the buyer who becomes the landlord upon completion of this transaction and all the cost of minor maintenance of the building inside or outside shall be paid by the seller who becomes the tenant after the compilation of this transaction.
>
> This is the fundamental condition of this contract that the seller agree and the buyer agree to buy 100% shares of the company 0909043 BC LTD.
>
> The buyer to assume all the obligation held under first mortgage in the amount of approx. 3,000,000.00 with Envision Credit Union Surrey.
>
> The seller to lease back the whole property and becomes the tenant and the buyer becomes the landlord of the subject property.
>
> The tenant hereby has the first right of refusal to buy the subject property from the landlord. Also if the tenant sell the business, he may assign the lease to the buyer of the business with landlord's consent.

[69] At the end of the typed addendum, Mr. Badesha wrote the following words, and the additional clause was initialled by Mr. Badesha and Mr. Aujla:

> THE BANK [ACCOUNTS] UNDER THE SUBJECT COMPANY 0909043 B.C. LTD. TO BE ASSIGNED TO THE BUYER AND THE BUYER WILL [HAVE] FULL ACCESS TO THIS ACCOUNT ON OR BEFORE JULY 1ST/2012.

[70] Page 2 of the addendum includes the following clauses:

> The $50,000 deposit is to be released directly to the seller - 0909043 BC Ltd.
>
> …
>
> Buyer and seller acknowledges that 0909043 BC Ltd. will provide a draft payable to Lighthouse Realty Ltd. in the amount of $50,000 upon receipt of the deposit funds, which will form a part of the commissions payable to Jasbir Banwait.

[71] Mr. Aujla testified that he asked Mr. Banwait for copies of the contracts, but Mr. Banwait was leaving the country the next day. He obtained copies of the contracts "a couple of weeks later," or on July 17 or 18 when he went to Abbotsford and picked them up from Manbir Banwait.

EVENTS LEADING UP TO THE COMPLETION DATE

[72] Mr. Badesha testified that the second time he went to the hotel property was on June 28, 2012 before the closing. He spent most of the next three days with Mr. Aujla and Mr. Kaler showing him the operations of the hotel. He took possession the early morning of July 1 when Mr. Aujla and Mr. Kaler left the property at around 2:00 a.m. However, the evening before he took possession, at about 11:00 p.m. on June 30, a liquor inspector named Holly issued a warning slip about the pub being overcrowded, and around the end of July she shut the pub down for 10 days. As a result, pub revenue was lost for 10 days, and when the pub was re-opened, many of the former clientele had gone other places to drink and never returned.

[73] Mr. Aujla insisted in direct and cross-examination that Mr. Badesha obtained possession at 6:00 p.m. on June 30, the stampede weekend, and that Mr. Badesha even interviewed and hired a server the night the incident with the liquor inspector occurred.

[74] However, in his examination for discovery, Mr. Aujla testified:

> 864 Q Mr. Badesha took over possession the day after --
>
> A No
>
> 865 Q -- that event?
>
> A No, same night. Please sir, June 30th, he got the key. 11:30 P.M., before the pub close, he and my partner give all the keys, everything same night, June 30th.
>
> …
>
> 869 Q Sir, you've said in your pleadings that Mr. Badesha took over July 1st, and that's when he took over possession, isn't it?
>
> A July 1st, yes, yes, sir.
>
> 870 Q And you were in possession on June 30th, weren't you?
>
> A 30th, yes.
>
> 871 Q And that's when the incident happened, isn't it?
>
> A Yes, sir.

[75] Mr. Aujla tried to wiggle his way out of the answers he gave on his examination for discovery with a number of excuses, such as he was mistaken, he

did not understand the question or how his answer came out the way it did. However, I do not believe him because the question was clear and he volunteered his answer.

[76] Mr. Aujla's evidence relating to when Mr. Badesha obtained possession and the pub incident is typical of his testimony throughout the trial. He was frequently unresponsive to questions he was asked, and frequently gave answers that were long and at times incomprehensible, implausible, or defied common sense. His evidence was often internally inconsistent, and inconsistent with documentary evidence. As Mr. Badesha contends, it was plainly evidence that Mr. Aujla was loath to answer even simple questions when he was concerned that his answer, however innocuous, might hurt his case.

[77] Mr. Aujla never paid the second $50,000 deposit on or before June 22, 2012 (or at any date thereafter) as required by the Young Street contract. He insisted that he paid the second deposit, and then offered various explanations for why it was not paid to Lighthouse Realty, including an alleged agreement with Mr. Banwait that he pay $25,000 directly to Mr. Badesha and that the other $25,000 would be offset against monies that were owing, an alleged agreement whereby Mr. Banwait agreed to waive the second deposit which formed part of his commission so that he could give $100,000 to Mr. Badesha for his failure to deliver power to the back buildings. At another point, he testified that he transferred $50,000 in insurance monies to Snowland's RBC account, but in cross-examination, the funds were transfers of loan monies. Little of what Mr. Aujla said made sense, and more often than not, his allegations were never put to Mr. Banwait or Mr. Badesha during their cross-examination. I give little weight to Mr. Aujla's explanations for his failure to pay the second $50,000 deposit. His evidence is simply not credible.

[78] There were also matters relating to the hotel contract that Mr. Badesha became aware of, that could not be remedied prior to the August 31, 2012 closing. They included the fact that there was no Howard Johnson franchise, the power would not be restored to the back buildings by August 31, and the rooms in the back

buildings would not be repaired by August 31, 2012. I will deal with each of these matters.

1. The Howard Johnson franchise

[79] Mr. Badesha testified that when he took possession of the hotel he noticed that there were no documents relating to the Howard Johnson franchise, only documents relating to the Williams Inn. Some time later, before August 31, 2012 when he arrived at the hotel, he found that the Howard Johnson sign had been removed, and learned that Mr. Aujla had arranged for its removal.

[80] Mr. Badesha complained to Mr. Banwait who, in turn, complained to Mr. Aujla who stated that they just had to pay some fees. However, despite repeated questions by Mr. Banwait about the Howard Johnson franchise, Mr. Aujla never told the truth. There was no Howard Johnson franchise – and there was no franchise at the time he was negotiating the sale of the hotel to Mr. Badesha.

[81] At the material time, the Vancouver law firm Hunter Litigation Chambers was litigation counsel to Howard Johnson in relation to the hotel's Howard Johnson franchise. By letter dated March 15, 2012, Claire Hunter of the firm Hunter Litigation Chambers wrote to Snowland "c/o Rajendar Kumar Gautam", and sent a copy of the letter to 494 Ltd. care of Mr. Aujla by e-mail, and to Rajdeep Deol of the law firm Pinpal & Associates by e-mail. Mr. Aujla testified that he never received a copy the letter because the e-mail address is his son Tajinder's e-mail address, but his lawyer Mr. Deol "told me what's in the letter."

[82] The letter dated March 15, 2012 confirms that Howard Johnson had terminated the franchise agreement dated January 7, 2011 between Howard Johnson and Snowland for breaches of the franchise agreement, and as a consequence, Snowland "must immediately stop using any of Howard Johnson's materials, signage, systems, (including the System and Reservation System), or anything that could reasonably lead a customer to believe that [Snowland's] hotel property in Williams Lake is affiliated with Howard Johnson." The letter further demands payment of liquidated damages in the amount of $96,320, an outstanding

account of $11,759.95, and franchise fees of $957.65, for a total of $109,037.60 within 30 days.

[83] An action was commenced by Howard Johnson against Snowland on May 30, 2012.

[84] At no time prior to the signing of the hotel contract, did Mr. Aujla ever inform or suggest to Mr. Banwait or Mr. Aujla that the Howard Johnson franchise had been terminated on or before March 15, 2012, and that Snowland owed Howard Johnson nearly $110,000.

[85] At no time prior to the completion date, did Mr. Aujla inform Mr. Banwait or Mr. Aujla that Snowland was in litigation with Howard Johnson.

[86] Mr. Aujla insisted in cross-examination that when he phoned Mr. Banwait in April 2012, he knew the Howard Johnson franchise had been cancelled, and he told Mr. Banwait about it in the phone conversation.

[87] Mr. Aujla also testified that he told Mr. Banwait “when he put this clause” in the contract relating to the franchise, that he had a phone call from his lawyer, Mr. Deol, who told him that Howard Johnson was willing to give him a franchise for 44 rooms, if they completed an application and paid the $10,000 fee. Mr. Aujla, almost in the same breathe, then testified that he told Mr. Banwait before they signed the hotel contract that he had a phone call from his lawyer’s office that Howard Johnson was willing to give 44 rooms, and he could put in the contract a clause that if they got the franchise, Mr. Badesha had to take the franchise. But the wording Mr. Banwait put in the contract was different and “I didn’t take serious” because “I thought the lawyer [Mr. Deol] told me they [are] willing to give 44 rooms”.

[88] With respect to the Howard Johnson clause red inked contract signed on June 15, Mr. Aujla similarly testified that Mr. Banwait never put the word “if”, meaning, if they got the franchise, but “I didn’t take serious”.

[89] At another point in his cross-examination, Mr. Aujla testified that before he signed the hotel contract on June 20, his lawyer Mr. Deol called him and told him that Howard Johnson was now willing to reinstate the franchise for 44 rooms.

[90] However, Mr. Aujla's evidence is inconsistent with the letter dated June 18, 2012 from Claire Hunter, counsel for Howard Johnson, to Rajdeep Deol, Mr. Aujla's counsel at the time. It is clear that the franchise had been cancelled, but that Howard Johnson was prepared to consider an application for a franchise – not willing to reinstate the franchise.

[91] Mr. Aujla completed an application for a Howard Johnson franchise in the name of Mr. Badesha, without Mr. Badesha's knowledge, and purportedly paid a $10,000 application fee. In his examination for discovery, he testified:

> 670 Q Because pursuant to the contract you were supposed to deliver the Howard Johnson franchise, and that's why you were prepared to pay the $10,000 fee; right?
>
> A Yes.

[92] There can be no dispute that the hotel contract on its face is for the sale of a Howard Johnson hotel and that the buyer had "to assume all the terms and conditions of the contract signed by the seller with Howard Johnson franchise for only 44 rooms."

[93] Mr. Aujla clearly knew at the time he was negotiating and signed the hotel contract that there was no Howard Johnson franchise and that Snowland was not permitted to use or do anything that suggested that the hotel was in any way related to Howard Johnson. Similarly, I find that the information package was prepared by Mr. Banwait on false information from Mr. Aujla that the hotel was a Howard Johnson hotel.

2. Power not restored by completion date

[94] Mr. Banwait testified that before the closing was to take place on August 31, 2012 Mr. Badesha who was in possession of the hotel property complained to him that nothing was being done by Mr. Aujla regarding restoration of electric power. He

then spoke to Mr. Aujla who told him that the work for restoring the power and repairing the damaged rooms would be done.

[95] Mr. Aujla testified that at the end of June 2012 he spoke to Glen Doughty of Cariboo Sterling Electric, an electrical contractor in Williams Lake, who told him that the power could not be restored until October 2012 or as late as summer 2013. He then went on to suggest that at a meeting with Mr. Kaler and Mr. Banwait, he and Mr. Kaler agreed with Mr. Banwait's proposal that he waive his $50,000 deposit fee, Mr. Kaler pay him another $50,000, and he would give the $100,000 to Mr. Badesha to look after the power.

[96] The suggestion that Mr. Banwait would waive his deposit and pay $50,000 to Mr. Badesha so that he could restore the power not only defies common sense, it contradicts Mr. Badesha's evidence that Mr. Aujla told him that the power would be restored and the rooms repaired prior to the completion date.

[97] Mr. Doughty was called as a witness by Mr. Aujla, but he contradicted Mr. Aujla's evidence that they spoke to each other before August 2012. Mr. Doughty testified that in about March 2012, he prepared an initial quote for the insurance company for the cost of restoring power to building 2. The power had to come from building 5, which was the subject of a do not occupy order. He then prepared a second quote in August 2012 that involved an aerial crossing but that was rejected by BC Hydro. Instead he was required to meet certain demands by BC Hydro and the city to install a new underground power source into building 5, and from there an electrical feed to buildings 2 and 3. The costs of the upgrades were to be borne not by the insurer but by the owner. He prepared a third quote in June or July 2013 and it was only after he prepared his third quote (which was the same as the second quote, but with the addition of taxes) that he had any discussion with Mr. Aujla.

[98] Mr. Doughty testified that depending on how motivated people were to get things done, the power requirements could have been completed by June 2012.

3. Damaged rooms not repaired

[99] It was evident to Mr. Badesha that the damaged rooms would not be repaired prior to the August 31 completion date. Mr. Aujla maintains that the damaged rooms clause was inserted after he signed the contract, and his initials are a forgery. I will deal with this issue later in these reasons. However, Mr. Banwait testified that after Mr. Badesha complained to him that the damaged rooms were not being repaired, he spoke to Mr. Aujla who said the work would be done soon. At one point, Mr. Aujla suggested to him that Mr. Badesha should do all of the work, including repair of rooms, and he should get a quote to find out how much it would cost.

[100] Mr. Badesha did just that. He obtained a quote dated July 27, 2012 from BCL General Contracting that set out the cost for repairing the vacant units in buildings 2 and 3, water damage in building 5 and other work, for $176,500, excluding taxes.

MR. AUJLA FAILS TO COMPLETE

[101] There is no dispute that Mr. Badesha was ready, willing, and able to complete on August 31, 2012. Through counsel, he made it clear that notwithstanding the various breaches, he was ready, willing, and able to complete the swap agreement, reserving his right to seek all available remedies.

[102] Tony Sandhu is a lawyer with the law firm Linley Welwood LLP in Abbotsford. Mr. Sandhu testified that the week of August 20, 2012 he was retained by Mr. Badesha, Mr. Pannu and Mr. Rai to act for their numbered company 090 Ltd. and as the solicitor for the swap agreement and share transaction. Gurminder Singh was the lawyer acting for Mr. Aujla and his partners.

[103] Mr. Sandhu testified that in order to complete the transaction he needed information from Mr. Singh, including Snowland's minute book so that he knew who owned the shares in Snowland, and as Mr. Badesha and his partners were to assume the mortgage, he also required particulars of the mortgage. Without the minute book, he could not prepare a transfer of the shares, and the transaction could not complete.

[104] Correspondence between Mr. Sandhu and Mr. Singh indicates that Mr. Sandhu was unsuccessful in having Mr. Aujla deliver the minute book to him. Mr. Aujla says otherwise. He claims that he delivered the minute book to his lawyer. I do not believe him.

[105] Mr. Aujla's evidence is contradictory. He testified that Mr. Singh was not his lawyer, but also testified that he instructed Mr. Singh to complete the transaction.

[106] In his examination for discovery, Mr. Aujla testified:

> 346 Q All right. Well, you met with Gurminder Singh in August of 2012; correct?
>
> A Yes, correct.
>
> 347 Q And you instructed him to tell Mr. Sandhu that you were ready to complete the transaction; correct?
>
> A Yes, I told Gurminder I'm ready to complete, yes.

[107] However, Mr. Aujla failed to complete the transaction.

[108] It was made clear to Mr. Aujla in correspondence between counsel that the parties attempted to negotiate amendments to the contracts, without prejudice to the plaintiffs' rights under the original contracts to seek specific performance and/or damages for breaches of contract.

ANALYSIS OF THE ISSUES

[109] In closing argument, Mr. Aujla took little or no issue with Mr. Badesha's complaints that in breach of the hotel contract, there was no Howard Johnson franchise, the defendants failed to provide power or repair the damaged rooms. Rather Mr. Aujla focussed on the issues as set out in paragraph 3 of these reasons. Before I deal with those issues, I will deal with the law on whether contracts are sufficiently certain to be enforceable, evidence relating to the negotiations, and the use of extrinsic evidence.

[110] The law relating to whether the contracts are sufficiently certain to be enforceable, is set out in *Hoban Construction Ltd. v. Alexander*, 2012 BCCA 75 at paras. 47-48:

> [47] However, the inquiry is not whether the contracts were competently drafted, but rather whether they disclose the parties' intentions as to the substance of their agreement. In *Marquest Industries Ltd. v. Willows Poultry Farms Ltd.* (1968), 1 D.L.R. (3d) 513 (B.C.C.A.), the majority outlined the role of the court at 517-18:
>
> > In the first place, consideration must be given to the duty of a Court and the rules it should apply, where a claim is made that a portion of a commercial agreement between two contracting parties is void for uncertainty or, to put it another way, is meaningless. The primary rule of construction has been expressed by the maxim, *ut res magis valeat quam pereat* or as paraphrased in English, "a deed shall never be void where the words may be applied to any extent to make it good". The maxim has been basic to such authoritative decisions as *Scammell v. Ouston*, [1941] 1 All. E.R. 14; *Wells v. Blain*, [1927] 1 D.L.R. 687, [1927] 1 W.W.R. 223; *Ottawa Electric Co. v. St. Jacques* (1902), 31 S.C.R. 636, as well as many others, which establish that every effort should be made by a Court to find a meaning, looking at substance and not mere form, and that difficulties in interpretation do not make a clause bad as not being capable of interpretation, so long as a definite meaning can properly be extracted. In other words, every clause in a contract must, if possible, be given effect to. Also, as stated as early as 1868 in *Gwyn v. Neath Canal Navigation Co.* (1868), L.R. 3 Ex. 209, that if the real intentions of the parties can be collected from the language within the four corners of the instrument, the Court must give effect to such intentions by supplying anything necessarily to be inferred and rejecting whatever is repugnant to such real intentions so ascertained.
> >
> > Clause 10 of the contract is admittedly a highly inartistic piece of draftsmanship and clearly poses difficulties in construction. However, keeping in mind the rules of interpretation which I have outlined, and approaching the terms of the contract and cl. 10 in what I consider a "reasonable and business manner" (see *Wells v. Blain* at p. 691), it is my opinion that cl. 10 is not so uncertain as to be meaningless. On the contrary, I consider it has a clear meaning but is badly expressed. ...
>
> [48] In *Langley* [*Langley Lo-Cost Builders Ltd. v. 474835 B.C. Ltd.*, 2000 BCCA 365] before citing *Marquest Industries*, McEachern C.J.B.C. stated the following at para. 37:
>
> > [37] Having determined that the legal force of the arrangements represented by the communications I have

> described is not contingent upon the preparation of a formal document, it is necessary to consider what the terms of the bargain are and whether they are legally sufficient to constitute a binding agreement. This analysis is carried out according to the standard rules of contract construction: give the words their plain and ordinary meaning where that meaning does not conflict with the context of the communications as a whole. Where there is ambiguity, extrinsic evidence may be considered.
>
> [Underline emphasis added in *Hoban Construction*.]

[111] With respect to the evidence relating to the negotiations between the parties, McEachern C.J.B.C. in *Langley* stated at para. 29:

> 2. To What did the Parties Agree?
>
> [29] In considering this question it is important to remember that negotiations between the parties are not relevant in determining the meaning of the language used by the parties. This is because parties often change their views and positions during negotiations. The fact that the parties were in negotiations, and the reasons for these negotiations, however, including the commercial objectives of the parties is relevant as a part of the factual matrix, or factual underpinning of the agreement: *Prenn v. Simmonds*, [1971] 3 All E.R. 237 (H.L.). In this case, for example, the fact that Mr. Al Johnson was about to be examined for discovery in the foreclosure action where there were allegations of fraud, and the further fact that he did not look forward to that experience, is one of the reasons why the parties were trying to reach an accommodation. Also in this connection, it has often been held that ambiguity is not a pre-condition to the admission and consideration of the factual matrix so long as extrinsic evidence is not used to create an ambiguity that otherwise does not exist.

[112] With respect to the use of extrinsic evidence in interpreting a contract, the Court of Appeal in *Water Street Pictures Ltd. v. Forefront Releasing Inc.*, 2006 BCCA 459 stated at paras. 23 to 25:

> [23] Recourse to extrinsic evidence to aid in the interpretation of an agreement is the court's last resort. It is only when the intentions of the parties cannot be objectively determined from the words they have chosen to employ, such that there is ambiguity, that the law permits consideration to be given to evidence of their conduct in making their agreement and in fulfilling their obligations. If it were otherwise, the certainty that is essential to documenting commercial transactions would be seriously undermined. The two-step approach to be taken has been succinctly stated by the Manitoba Court of Appeal in *Geoffrey L. Moore Realty Inc. v. Manitoba Motor League*, [2003] 9 W.W.R. 385, 2003 MBCA 71 at para. 26:

> [26] In brief summary then, to determine the intentions of the parties expressed in a written contract, one looks to the text of the contract as a whole. In doing so, meaning is given to all of the words in the text, if possible, and the absence of words may also be considered. If necessary, the text is considered in light of the surrounding circumstances as at the time of execution of the contract. The goal is to determine the objective intentions of the parties in the sense of a reasonable person in the context of those surrounding circumstances and not the subjective intentions of the parties. If, after that analysis, the text in question is ambiguous, extrinsic evidence may be considered.

[24] Thus, the court looks first to the words of the agreement, read as a whole, aided, if necessary, by evidence of the circumstances or what is referred to as the factual matrix existing when the agreement was made. Such evidence is generally restricted to circumstances known to both parties that illuminate the meaning a reasonable person would give to the words employed: *Glaswegian Enterprises Inc. v. BC Tel Mobility Cellular Inc.* (1997), 49 B.C.L.R. (3d) 317 (C.A.) at paras. 18 to 20. See also Lord Hoffman's discussion of the principles of interpretation in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society* (1997), [1998] 1 W.L.R. 896 (H.L.). The wording of the agreement must not, however, be overwhelmed by a contextual analysis: *Black Swan Gold Mines Ltd. v. Goldbelt Resources Ltd.* (1996), 25 B.C.L.R. (3d) 285 (C.A.) at para. 19.

[25] If, after undertaking the first step of the analysis, the text is ambiguous, extrinsic evidence becomes admissible for the purpose of resolving the ambiguity and determining what was actually agreed. But there must be a true ambiguity before recourse can be had to evidence of the way in which the parties conducted themselves. It is well recognized that a court is not to search for ambiguity. In *Melanesian Mission Trust Board v. Australian Mutual Provident Society*, [1996] UKPC 53, [1996] J.C.J. No. 63 at para. 9, Lord Hope of Craighead expressed the caution a court must exercise in this regard, as follows:

> [9] The approach which must be taken to the construction of a clause in a formal document of this kind is well settled. The intention of the parties is to be discovered from the words used in the document. Where ordinary words have been used they must be taken to have been used according to the ordinary meaning of these words. If their meaning is clear and unambiguous, effect must be given to them because that is what the parties are taken to have agreed to by their contract. Various rules may be invoked to assist interpretation in the event that there is an ambiguity. But it is not the function of the court, when construing a document, to search for an ambiguity. Nor should the rules which exist to resolve ambiguities be invoked in order to create an ambiguity which, according to the ordinary meaning of the words, is not there. So the starting point is to examine the words used in order to see whether they are clear and unambiguous. It is of course

> legitimate to look at the document as a whole and to examine the context in which these words have been used, as the context may affect the meaning of the words. But unless the context shows that the ordinary meaning cannot be given to them or that there is an ambiguity, the ordinary meaning of the words which have been used in the document must prevail.

[113] There is no dispute that Mr. Badesha and Mr. Aujla agreed to enter into binding legal relations. The issue is whether the essential terms of the contracts are so vague and uncertain so as to be incapable of reasonable interpretation, and therefore, meaningless: *Hoban Construction* at para. 58.

[114] Turning now to the issues as framed by the parties.

1. (a) Is the contract enforceable for lacking an essential term: namely the proper parties to the contracts?

[115] Mr. Badesha contends that at the material time there was no issue with regard to the terms or enforceability of the swap agreement.

[116] Mr. Badesha and his two partners Mr. Pannu and Mr. Rai were the shareholders of 090 Ltd. which owned the Young Street Property, and Mr. Aujla, Mrs. Kaler (for the benefit of Mr. Kaler) and Tajinder were shareholders of 494 Ltd. that owned the shares of Snowland, which in turn owned the hotel property. Mr. Badesha at all times had the authority to bind his two partners. Mr. Aujla had the authority to bind 494 Ltd.

[117] At trial, Mr. Aujla testified that he had the authority to, and was prepared to complete both contracts on August 31, 2012. He retained a solicitor to do so. Neither he, nor his solicitor, ever made any complaint or raised any concern about uncertainty regarding the parties or any other aspect of the contract as being an impediment to closing.

[118] There is no evidence from any of the lawyers that Mr. Aujla expressed to them any uncertainty about the terms of the contract. Mr. Aujla counterclaimed for specific performance of the swap agreement, and until the first day of trial date, took the position that the swap agreement was enforceable despite the parties not being properly named.

[119] Mr. Aujla relies on *Rana v. Nagra*, 2011 BCCA 392 (*Rana*) at para. 19:

> [19] It is a trite principle of law that in order for an agreement to be binding between the parties they must have reached consensus on the essential terms of their contract. Viscount Dunedin expressed the principle in the decision of *May and Butcher, Limited v. The King*, [1934] 2 K.B. 17 at 21 (H.L.) as follows:
>
> > To be a good contract there must be a concluded bargain, and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties.
>
> In G.H.L. Fridman, *The Law of Contract in Canada*, 5th ed. (Toronto: Thomson Carswell, 2006), the author stated the principle and gave an example at 18:
>
> > What this means is that the parties must have evinced clear agreement on the essential terms of the intended contract. For example, for an agreement for a lease to be valid, it has to show the parties, a description of the premises to be demised, the commencement and duration of the term, the rent, if any, and all the material terms of the contract not being matters incident to the relation of landlord and tenant ...
>
> In the case of an agreement for the sale and purchase of an asset, there can be no doubt that one of the essential terms is the purchase price.

[120] In *Rana*, the purchase price was found to be uncertain. The share purchase agreement provided for the sale of shares for a certain sum, with a provision that if either party considered adjustments to the purchase price was necessary, the matter would be arbitrated. The Court of Appeal dismissed the plaintiffs' appeal on the basis that the terms of the agreement gave no guidance as to the nature of any adjustments, the basis upon which adjustments were to be made, or what types of adjustments were to be arbitrated. Additionally, there is no law, custom, or objective standard that an arbitrator could rely on to determine what adjustments were appropriate, and therefore what an arbitrator was to arbitrate was neither clear nor certain.

[121] Mr. Aujla also relies on *Strata Plan VIS6599 v. Strata Plan VIS4843*, 2013 BCSC 1263 at para. 80, that the essential terms of a contract are the parties to the contract, the subject-matter of the contract, and the price to be paid by each party for the performance of the other party. If an essential term is missing, an alleged

agreement will be uncertain and unenforceable. The onus is on the party relying on a contract to prove on a balance of probabilities the terms of the contract that he or she seeks to enforce: *Cutts v. Alterra Property Group Ltd.*, 2013 BCSC 1951 at para. 48.

[122] Mr. Aujla contends that on all of the evidence, the swap agreement was a share purchase agreement so that the parties could avoid paying property transfer tax on what was essentially two property transactions. However, the swap agreement is impossible to perform because the hotel contract requires Snowland and Mr. Aujla to sell their shares in Snowland, when the only shareholder of Snowland is 494 Ltd., and 494 Ltd. is not a party to the swap agreement. As the parties are an essential term of the swap agreement, their absence makes the swap agreement unenforceable. If the hotel contract fails, then the Young Street contract also fails as it is dependent on the hotel contract.

[123] Mr. Aujla argues that the Young Street contract also fails independently because, like the hotel contract, it fails to name the proper parties to the agreement. 090 Ltd. is named as the seller on the Young Street contract, but 090 BC has no capacity to sell its own shares. The shareholders of 090 Ltd. are Mr. Badesha and his partners Harvinder Rai and Sarbjit Pannu, and the only persons who can be the sellers. Neither Mr. Rai nor Mr. Pannu is a party to the Young Street contract, and thus an essential term of the contract is missing.

[124] Mr. Badesha relies on the Court of Appeal decision in *Topgro Greenhouses Ltd. v. Houweling*, 2006 BCCA 183:

> [79] The fundamental impediment to Topgro's claim of rescission of the contract between Mr. Houweling and Mr. De Vries is that Topgro was not a party to the contract it claimed should be rescinded. Topgro could have attacked the contract between Mr. De Vries and Mr. Houweling by claiming that Mr. De Vries breached the shareholders agreement by entering into a contract with Mr. Houweling that was in contravention of the shareholders agreement. But Topgro made no such allegation. More importantly, Topgro never joined Mr. De Vries as a party to this action. Nevertheless, it claimed relief that, if granted, would fundamentally affect Mr. De Vries' rights under his agreement with Mr. Houweling.
>
> …

> [82] In the case at bar, Topgro was not a party to the share purchase agreement between Mr. De Vries and Mr. Houweling. Topgro's role under the shareholders agreement would seem to be limited to ratifying the share purchase by Mr. Houweling. If Topgro intended to claim relief that would affect both Mr. De Vries and Mr. Houweling (and rescission of their contract would presumably affect them both), then Mr. De Vries was an essential party to be joined in Topgro's action.
>
> …
>
> [85] The question of what makes a party necessary to an action was discussed in *Orman v. Canadian Mountain Minerals Ltd.* (2000), 268 A.R. 338, 86 Alta. L.R. (3d) 307 (Q.B.) at para. 27:
>
> > It is clear that a party is not necessary merely because he has an interest in the matter. A party is necessary only if the questions involved in the action cannot be adjudicated upon without him being made a party, or if it is necessary to add him so that he should be bound by the result of the action: *Fullwood and Fullwood v. Master Excavators Ltd. et al* (1981), 34 A.R. 541 at pg. 550.
>
> [86] The decisions referred to in *Orman* and the above passage were in regard to applications by a third party to be joined in an ongoing action and relate specifically to the Alberta Rules of Court, although the definition has a general application. Based on this definition, I conclude that Mr. De Vries was a necessary party.

[125] Mr. Badesha also relies on Supreme Court Civil Rule 22-5(9):

> Misjoinder or nonjoinder of parties
>
> (9) A proceeding must not be defeated by reason of the misjoinder or nonjoinder of a party and the court may deal with the matter in controversy so far as it affects the rights and interests of the parties before it.

[126] In my view, there is little merit to Mr. Aujla's argument that the swap agreement is unenforceable as it fails to name the proper parties who are also not before this Court. The shareholders of 494 Ltd. are Mr. Aujla, Tajinder, and Mrs. Kaler. Mr. Banwait testified that Mr. Aujla told him that he had the consent of both Tajinder and Mrs. Kaler to sell their respective shares and Mr. Aujla testified that he had the consent of Tajinder and Mrs. Kaler to sell their respective shares.

[127] Mr. Banwait testified that before the contracts were signed, he had a couple of meetings with Harvinder Rai and Sarbjit Pannu and understood from them that Mr. Badesha had signing authority for both of them. Mr. Badesha testified that he had signing authority for both of his partners.

[128] When Mr. Banwait was asked in cross-examination why he did not note Mrs. Kaler as the seller of the Snowland shares, he testified that in the presence of Mr. Kaler, Mr. Aujla told him that he had signing authority for Snowland, Mr. Kaler never disputed that fact, and Mr. Kaler was present at the Tim Hortons when Mr. Aujla signed the two contracts.

[129] Mr. Badesha and Mr. Aujla clearly understood that the swap agreement was a share purchase agreement, or what was essentially two property transactions, and that they both had the consents of the necessary parties to transfer their respective shares. Mr. Aujla, by his response to civil claim, admitted that Snowland was owned and controlled by him, and that to facilitate the swap agreement, he would purchase all of the shares in 090 Ltd., and Mr. Badesha would purchase all of the shares of Snowland. By his third party notice, Mr. Aujla also alleged that the Kalers knew of the material terms of the swap agreement, approved the swap transaction, Mr. Kaler instructed Mrs. Kaler to sell her shares in Snowland as part of the swap transaction, and Mr. Kaler was present when the contracts were signed.

[130] Mr. Aujla commenced a separate action against the Kalers and obtained default judgment against them. Mr. Aujla also served the Kalers with the third party notice and they again failed to respond. I see no useful purpose in adding the Kalers or Mr. Badesha's partners to the action. The matters in issue can be adjudicated upon without them being made a party. I do not find that the failure to add them as parties to the swap agreement renders the swap agreement so vague, uncertain, or meaningless.

[131] All of the parties had legal representation prior to and at the time of closing. There was never any suggestion that other persons or corporations needed to be made a party to either of the contracts. The intention of the parties and their business partners is not contested, and it is not contested that at all times Mr. Badesha and Mr. Aujla had the authority to act for their respective business partners.

[132] All of the parties were in agreement as to what the bargain was, who the relevant parties were, and what needed to be done to effect the swap. Ultimately, both parties sued for specific performance.

[133] As Mr. Badesha contends, the court should have no doubt about what the agreement was about because the parties had no doubt what the agreement was about. Mr. Aujla merely seeks to avoid his contractual obligations under the penalty clause and raises as a defence, the issue of the incorrect naming of parties to the swap agreement.

1. (b) Does the hotel contract contain a fraudulently inserted term; or a term on which there was *no consensus ad idem*?

[134] This issue relates to the damaged rooms clause.

[135] Mr. Badesha testified that before they met at Tim Hortons on June 20, 2012 he spoke to Mr. Banwait about the damaged rooms that had to be repaired before the completion date, and he raised the issue again at the meeting at Tim Hortons. Mr. Banwait then added the damaged rooms clause, and both he and Mr. Aujla initialled his handwritten changes.

[136] Mr. Banwait testified that Mr. Badesha and Mr. Aujla were sitting with him at Tim Hortons, when Mr. Badesha said that the damaged rooms had to be repaired. Mr. Aujla replied that it would not cost too much, maybe $20,000 to $25,000, and that they were willing to repair the damaged rooms. He then wrote the damaged rooms clause and, adjacent to the clause, drew a circle and a square, and saw Mr. Badesha initial the circle and Mr. Aujla initial the square.

[137] Mr. Aujla testified that he, Tajinder, and Mr. Kaler met Mr. Banwait at the Tim Hortons on June 20, and Mr. Banwait had the contracts. Mr. Badesha was not present at the meeting, but his initials were already in the little hand drawn circles adjacent to the handwritten changes to the contract. That is why Mr. Banwait drew little boxes to the right of Mr. Badesha's initialled circles, so that he could initial the

changes. However, the handwritten damaged room clause was not there when he signed the contract on June 20.

[138] Mr. Aujla testified that he asked Mr. Banwait for copies of the signed contracts, but Mr. Banwait was leaving for Europe the next day and so he obtained copies of the contracts from Manbir Banwait a couple of weeks or so later. When he obtained a copy of the signed contract from Manbir Banwait, he saw that the damaged rooms clause had been added and his purported initials next to the clause were not his. He phoned Mr. Banwait and asked him why he inserted the clause and "who did my initials?" Mr. Banwait told him not to worry, he was not giving a copy of that contract to Mr. Badesha, and he would not tell Mr. Badesha about the damaged rooms clause.

[139] In his examination for discovery, Mr. Aujla testified:

267 Q And when was the first time that you say you noticed that this handwriting was there?

A When -- soon I see the contract.

268 Q So as soon as you got it from Mr. Banwait, you noticed this handwriting?

A Yes.

269 Q Okay. And this was at his office?

A No. I don't know where he's at.

270 Q Well, no, sir, you went to his office to pick up the document?

A Yes.

271 Q You met with him there?

A Yes.

272 Q He gave you this copy you say?

A Yes.

273 Q Okay. And you noticed while you were still at his office --

A I -- I --

274 Q -- this handwriting?

A I took the copy. Didn't read in the office. We met. We had coffee together. I came home. When I go through the contract --

275 Q Yes?

A -- then I phone him. I said, Mr. Banwait, we sold as it is. What is this?

276 Q So sometime in late July, you go to his office, you pick up a copy of the contract?

A Correct.

277 Q And you say it's later that night that you call him?

A Yeah, sometime in the evening, yes.

278 Q Okay. So do you remember the language you used when you spoke to him?

A Very politely asked, why did this. He said, don't worry.

279 Q But how did he know what you were referring to when you said "this"?

A I write the contract. I said, we sold the hotel as it is, no damaged room repair, so why -- why -- what is this? He said -- why you write this? He said, don't worry, that's -- that's between you and me. I'm not going to give copy to Mr. Badesha. That's he told on the phone.

…

282 Q But did he give you any explanation as to why he did that?

A No. He -- he told me -- yes, he gave explanation. He said, if your part -- if you can repair the room, whatever the money, we can collect from your partner. …

[140] Both parties called expert witnesses to provide an opinion on whether Mr. Aujla's initials next to the damaged room clause were his or a forgery. There is no dispute that Mr. Aujla initials his documents with the initials JS, presumably referring to the first two words of his name Jasjit Singh Aujla.

[141] Jean M. Kovacs is a forensic document examiner who was employed for 26 years by as an examiner of questioned documents in the RCMP Forensic Laboratory. Mr. Kovacs in his report dated March 4, 2014 concludes that he is "unable to either identify or eliminate" Mr. Aujla as having written the questioned initials next to the damaged rooms clause. At trial, he put it another way: based on all of factors that he considered, including a microscopic examination, "it fell right in the middle of the range" and he could not say "one way or the other".

[142] Dan C. Purdy has been a forensic document examiner since 1969, was employed by the RCMP from 1985 to 1999 in the forensic laboratories, and from 1989 to 1999 was chief scientist. Mr. Purdy is of the opinion that it is highly probable that Mr. Aujla did not write the questioned JS initials next to the damaged rooms clause.

[143] Mr. Badesha argues that Mr. Kovacs was straightforward, conceded points where appropriate, but did not change his opinion. Mr. Purdy, on the other hand, was clearly irritated when he was challenged on cross-examination, and he was unwilling to concede common sense observations about the specimen samples of Mr. Aujla's handwritten initials.

[144] I prefer to base my findings, not on the expert evidence, but on Mr. Aujla's dealings with his lawyer and with Tajinder after he obtained a copy of the signed hotel contract.

[145] Mr. Aujla repeatedly stated on cross-examination that he did not remember taking the contracts to his lawyer Rand Buckley for advice. However, in his examination for discovery on August 6, 2014, he testified:

> 1248 Q When did you go to a lawyer Grant Buckley about the -- well, let's start with that. When did you go and see this lawyer?
>
> A I don't remember. In July sometime. He's my family lawyer.
>
> 1249 Q Who is that?
>
> A Grant Buckley.
>
> 1250 Q Okay. So did you go see Mr. Buckley in July 2012 about the term in the contract or dealing with the insurance company?
>
> A Not dealing for anything. Just to get advice. That's all.
>
> 1251 Q About what?
>
> A To get the power before the -- if we can't get power before completion. And he said --
>
> …
>
> 1252 Q So was there anything else or was that the main topic?
>
> A And clause of repair room too.
>
> 1253 Q And you discussed with him the clause regarding the repairs to the room?

A Um, how I can explain. Not repair room. Discuss about the contract copies when we go through there [are] so many mistakes. He found it. He said he advise me next time --

…

1254 Q So Mr. Buckley has been your lawyer for some considerable period of time?

A Yes.

1255 Q How many years?

A Over ten years.

…

1258 Q And I haven't seen any documents, but you will agree with me that Mr. Buckley never sent any letter to Mr. Badesha or his companies or his lawyers about any problems with the contract, did he?

A I didn't ask.

1259 Q Right. But you'll agree with me that he never took any steps with respect to the contract, did he?

A I never asked him.

[146] Common sense tells me that if a reasonable man observes that a clause imposing additional liability on him has been fraudulently inserted without his consent, and he takes the contract to his lawyer for advice, he would inform the lawyer about the fraudulently inserted clause, and his forged signature. Mr. Aujla did not do that. Instead he testified that he never asked his lawyer to take any steps with respect to the contract.

[147] Tajinder testified. He is a part time residential realtor, lives with his father Mr. Aujla, and they (father and son) have done various real estate deals together.

[148] Tajinder denies that he knows Deep Brar, or that he ever drove to Williams Lake with Mr. Banwait and Mr. Brar. He denies giving photographs of the hotel to Mr. Banwait, or ever discussing the sale of the hotel with him.

[149] If I accept Mr. Aujla's evidence, Tajinder was at Tim Hortons when his father signed the hotel contract on June 20, 2012. However, Tajinder testified that he had no discussion with his father about the hotel contract or the Young Street contract until October 2012 when this litigation was commenced, and that it was not until

November 2012 that his father discussed the damaged room clause and his forged initials. However, he agrees that his father is strong willed businessman, and he is not someone who would agree with something that he was not totally in favour of.

[150] In my view, Tajinder's evidence defies common sense. I do not believe him. He and his father live in the same house, they do real estate deals together, they are partners in the hotel property, they both worked at the hotel, and the damaged rooms clause imposed additional liability on them as sellers of the property. There is no air of reality with either Mr. Aujla's evidence or Tajinder's evidence about the damaged rooms clause and the forged initials. Common sense tells me that if Mr. Aujla's initials had been forged, he would not have waited for five months before ever raising the issue with Tajinder.

[151] I prefer the evidence of Mr. Banwait and Mr. Badesha to the evidence of Mr. Aujla and Tajinder. Mr. Banwait and Mr. Badesha generally gave their evidence in a straightforward manner, and their evidence was internally consistent. Mr. Aujla's evidence was otherwise, and I could not help but gain the impression that he made up much of his evidence as he went along.

[152] I conclude that the hotel contract does not contain a fraudulently inserted term.

[153] Next, Mr. Aujla argues that there was no discussion or agreement about the number of rooms that needed repair, and there was therefore no *consensus ad idem*. However, Mr. Badesha and Mr. Banwait never saw all of the rooms, and were unable to see all of the rooms.

[154] The damaged rooms clause and the preceding clause read:

> There is no power to some of the buildings back of the motel and the seller to provide the power to all the existing buildings on seller's expense on or before completion date August 31/2012.
>
> And the [damaged] rooms in these buildings to be repaired by the seller on or before completion date.

[155] I find that there was a meeting of the minds in connection with the damaged rooms clause. The factual matrix included the fact that a fire that destroyed building 4 caused consequential damage to rooms in other buildings. Snowland was receiving insurance proceeds as a result of the fire, and it was agreed that the damaged rooms would be repaired by Snowland. There is no need to include the number of rooms in the clause or the contract, in order to make the term of the contract enforceable.

[156] The contracts as written are therefore sufficiently certain to be enforceable, there is no dispute that the two contracts are dependent on each other, and the issue of rectification need not be considered.

2. Is the $500,000 damages clause in each of the contracts a penalty clause; if so, should Mr. Aujla be granted relief from the penalty?

[157] Mr. Badesha testified that a few days before he and Mr. Aujla signed the contracts, he had a couple of phone discussions with Mr. Banwait about the $500,000 penalty clause. Mr. Banwait told him that Mr. Aujla wanted the clause in the contract, and he was fine with it because he and his partners had no intention of backing out of the deal; they were going to “finish the deal”.

[158] Mr. Banwait testified that when he started talking with Mr. Aujla about the sale of the hotel in 2011, Mr. Aujla was “so motivated” and wanted the hotel “sold badly”. When they began negotiating the sale of the hotel with Mr. Badesha, Mr. Aujla told him that they wanted to make sure that the deal went through. On or about June 10 or 11, Mr. Aujla instructed him to include the $500,000 clause because he wanted to make sure that “it will be a firm contract” and that “nobody can step out of the deal”.

[159] Mr. Aujla contradicted the evidence of Mr. Badesha and Mr. Banwait, and testified that he does business and has never seen a clause like this before. He claims that it was Mr. Banwait who suggested that the clause will benefit both parties. He thought that was a good idea and agreed to the $500,000 penalty clause.

[160] Mr. Aujla's evidence on this point was contradicted by the evidence of Herpal Singh Kandola, who is otherwise known as Paul Kandola.

[161] Mr. Kandola is 54 years old and has lived in Williams Lake since July 1986. For over 18 years, he has operated a furniture, appliance, and electronics store just down the street from the hotel. The store's warehouse is kitty-corner to the hotel, and Mr. Kandola went to the hotel's Chinese restaurant three or four times a week because he "loved their food".

[162] Mr. Kandola knew the previous owner of the hotel, Raj Gautam. In July 2011 Mr. Gautam asked him to come over to the hotel the day he was selling the hotel so that he could meet the new owners. He did, and he was introduced to Mr. Aujla and Harry, or Harchet Kaler. Either that day or the next, he also met Tajinder.

[163] Because he was at the restaurant several times a week, he saw Mr. Aujla, Tajinder, and Mr. Kaler for the first month that they were running the hotel. After that, he saw Mr. Aujla and Mr. Kaler whenever they came up to Williams Lake, or sometimes, Mr. Kaler phoned him and told him that they were in town, or coming up to Williams Lake.

[164] Mr. Kandola was at the hotel so frequently that he and the two men would order in pizza, and sit in the hotel lobby eating pizza. Occasionally he even answered the hotel phone. He knew the room rates, and had discussions with Mr. Aujla and Mr. Kaler about the room rates for Williams Inn, and the rates that Howard Johnson set, and the fact that they had to pay Howard Johnson a five percent hotel fee. At one point he learned that the hotel was no longer a Howard Johnson, and that was before Mr. Badesha took over the running of the hotel.

[165] Mr. Kandola testified that by October or November 2011 Mr. Kaler and Mr. Aujla expressed their intention of selling the hotel property. One Friday in October or November 2011 Mr. Kaler asked him to come to the hotel pub because he had a guest coming into town. At the pub he met Mr. Aujla and Mr. Kaler, and was introduced to Jasbir, a realtor who had come to town for the weekend. Jasbir

told him that Mr. Aujla had called him to see if he could find a buyer for the hotel. Jasbir told Mr. Aujla that he wanted to look at the property so he could describe the layout, and list the property.

[166] Mr. Kandola testified that afterwards, in every discussion he had with Mr. Aujla, Mr. Aujla talked about his desire to sell or get rid of the hotel. At one point Mr. Aujla even asked him to take shares in the business so he could keep an eye on things, but he has no interest in the hotel business.

[167] In the week before the July 1, 2012 long weekend, which was also the weekend of the Williams Lake Stampede, Mr. Aujla came over to his retail store just after he had finished having lunch, sometime between 1:00 p.m. and 1:30 p.m. Mr. Aujla sat down on a chesterfield and started talking. He said that he sold the hotel, and one of the men he sold it to was named Badesha. Mr. Aujla asked him if he knew him because he used to live in Williams Lake. He (Mr. Kandola) asked what his name was, and Mr. Aujla replied, Kuldip Badesha. Mr. Kandola said he did not remember that name in the town, but he knew some other Badeshas.

[168] Mr. Kandola testified that they started discussing the sale of the hotel for $3.3 million, and he asked, “how did you sucker these guys in?” Mr. Aujla replied, “I’m a business guy. I know how to wheel and deal”, and told him that they would be taking over the coming long weekend, and he was going to Abbotsford and bringing them back.

[169] Mr. Kandola testified that he asked Mr. Aujla what would happen if they backed out of the deal once they saw the place, the town, and how the business is. Mr. Aujla replied, “They can’t. I put a clause in. If they back out of the deal, or I don’t do things I’m supposed to do: we have a $500,000 penalty clause.”

[170] Mr. Kandola testified that he told Mr. Aujla that he had never heard of this type of deal, and he does real estate deals. They spoke in Punjabi, and the word that Mr. Aujla used was munkhrana, meaning that you cannot back out. Mr. Aujla told him that he had insisted that the realtor put the penalty clause in the contract.

[171] Mr. Kandola testified that during their conversation, he mentioned to Mr. Aujla about the lack of power to the buildings, and Mr. Aujla told him that “we’re supposed to get that up and running” for the new owners.

[172] On cross-examination, Mr. Kandola denied the suggestion that Mr. Aujla never came to his store, and rhetorically asked how he got two cushions. He said that Mr. Aujla came into his store one day, took two cushions and never paid for them.

[173] Mr. Aujla agrees that he met Mr. Kandola at the hotel office in July 2011, but denies ever discussing the penalty clause with Mr. Kandola, denies ever going to Mr. Kandola’s retail store, and denies Mr. Kandola’s evidence that there was a meeting in October or November 2011 where Mr. Banwait was present and he was asking Mr. Banwait to assist him in selling the hotel. Instead Mr. Aujla testified that he left for India in October 23, 2011 and returned December 12, 2011. When asked in direct examination if there was any meeting between himself, Mr. Kandola, and Mr. Banwait prior to October 23, he stated, “absolutely not!”

[174] Mr. Kandola was not aware that he would be testifying at trial until about a week before he testified. He has no axe to grind with Mr. Aujla or Mr. Badesha. His evidence was not shaken on cross-examination. Rather, he became more emphatic and certain about certain matters, and testified that following the fire, a generator was serving building 5 because he walked around the property with Mr. Kaler and they went into building 5 where people had been living and checked on the laundry machines, and made sure the water pipes were not frozen. He also testified that no one was living in building 2.

[175] Despite Mr. Aujla’s protestations, I prefer the evidence of Mr. Kandola to the evidence of Mr. Aujla. Mr. Kandola’s evidence is consistent with Mr. Banwait’s evidence, and Mr. Aujla tends to simply deny or distance himself from any evidence that is not favourable to him.

3. Is the $500,000 damages clause in each of the contracts a penalty clause; if so, ought Mr. Aujla be granted relief from the penalty?

(a) The Plaintiffs' Argument

[176] The overriding principle regarding the $500,000 damages clause is that parties are free to contract with each other as they see fit: *J.G. Collins Insurance Agencies Ltd. v. Elsley Estate*, [1978] 2 S.C.R. 916 (*Elsley Estate*) at 937:

> It is now evident that the power to strike down a penalty clause is a blatant interference with freedom of contract and is designed for the sole purpose of providing relief against oppression for the party having to pay the stipulated sum. It has no place where there is no oppression.

[177] In *Maxam Opportunities Fund Limited Partnership v. Greenscape Capital Group Inc.*, 2013 BCCA 460, the Court of Appeal stated, in *obiter,* at para. 53:

> [53] This court has ruled that the following approach is to be taken to payments that are stipulated to be payable on a breach of contract:
>
> > … where the issue is whether a contractual clause is for liquidated damages or is a penalty:
> >
> > 1. The question of "penalty" or "liquidated damages" is to be answered as at the date of the making of the agreement;
> > 2. If the answer is "liquidated damages", that is the end of the matter, but, if the answer is "penalty"; then,
> > 3. There arises the next question: should relief be granted against the penalty?
> > 4. The answer to that question depends upon whether to enforce the penalty would be unconscionable, and that unconscionability has to be determined at the date of the invocation of the clause.
> > 5. Sec. 21 [now s. 24] of *The Law and Equity Act* only applies if and when stage 3 has been reached.
>
> (*Per* Gow J. in *Lee v. Skalbania* (1987) 47 R.P.R. 162 (B.C.S.C.), *aff'd* (1989) 4 R.P.R. (2d) xxxiii (B.C.C.A.), approved in *Liu v. Coal Harbour Properties Partnership* 2006 BCCA 385 at para. 24. See also *Hinkson Holdings Ltd. v. Silver Sea Developments Limited Partnership* 2007 BCCA 408 at para. 33 and *Maguire v. Revelstoke Mountain Resort Limited Partnership* 2010 BCSC 1618 at para 101; and G.H.L. Fridman, *The Law of Contract in Canada* (5th ed., 2006), at 776.

[178] The clause is a liquidated damages clause and will be upheld where it is considered to be a genuine pre-estimate of damages. The clause is a penalty clause

if the sum is extravagant and unconscionable in comparison to the greatest loss that could conceivably be proved to have followed from the breach: *H.F. Clarke Ltd. v. Thermidaire Corp.*, [1976] 1 S.C.R. 319 at 338 (*Thermidaire*).

[179] In *Thermidaire* the formula for fixing damages for breach of the covenant against competition was based on gross trading profits and resulted in an amount almost three times the amount a court would order in an action for damages. The party in breach was relieved from the consequences of the penalty clause and the issue of damages remitted back to court for a determination of the damages in the ordinary course.

[180] Where the exact damages that may result from a breach is not ascertainable at the time the agreement is made, depending on extrinsic evidence, the damages clause may be upheld where on its fact, the clause is not out of proportion to the probable loss. In *Tkachuk Farms Ltd. v. Le Blanc Auction Service Ltd.*, 2006 SKQB 536 at para. 98, Wilkinson J. observed:

> 98) For those cases where the conceivable losses arising from a breach of covenant are not so readily quantifiable, the seminal decision of the House of Lords in *Dunlop Pneumatic Tyre Co. v. New Garage and Motor Co.* (1915) A.C. 79 (H.L.) enunciates the doctrine in more apt terms, saying:
>
> > ... where the agreement is for an act other than the payment of money and the injury that may result from a breach is not ascertainable with exactness, depending upon extrinsic circumstances, a stipulation for damages, not on the face of the contract out of proportion to the probable loss, may be upheld ...

[181] In *Volvo Truck Finance Canada Ltd. v. Premier Pacific Holdings Inc.*, 2002 BCSC 1137, the petitioner loaned the first named respondent over $2.3 million to purchase five tour buses and a minibus. The vehicles were used as collateral for the loan, and the remaining respondents guaranteed the loan repayment. The first named respondent defaulted, and sought relief under s. 24 of the *Law and Equity Act* from the contractually agreed default interest rate of 18 percent. Sinclair Prowse J. found that the default interest rate was extravagant, unconscionable, and a penalty but declined to grant relief under s. 24. She stated:

> [22] With respect to the second issue (that is, whether I should exercise my power under s. 24 of the *Law and Equity Act*), this power is purely discretionary. "The factors to be considered by the court in the exercise of its discretion are the conduct of the applicant, the gravity of the breaches, and the disparity between the value of the property forfeited and the damage caused by the breach: *Shiloh Spinners Ltd. v. Harding*, [1973] A.C. 69 (H.L.); *Snell's Equity*, 29th ed. (London: Sweet & Maxwell, 1990), at pp. 541-2". See *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.* (1994), 115 D.L.R. (4th) 478 (S.C.C.). Although this comment was *obiter* in *Saskatchewan River Bungalows Ltd.*, *supra*, it has been relied upon as authority for the factors to be considered in exercising this discretion. See *Lieber v. Canadian Group Underwriters Insurance Co.* (2000), 18 C.C.L.I. (3d) 284 (B.C.S.C.).
>
> …
>
> [24] This consideration of oppression is different than the consideration as to whether the default interest rate constituted a penalty because it was extravagant and unconscionable. Specifically, the determination of oppression is done after a consideration of the circumstances as of the time that the agreement was breached and following, whereas the determination of penalty is done after a consideration of the circumstances at the time that the agreement was made.
>
> …
>
> [26] As far as the Respondents' conduct is concerned, prior to May 2000 the Respondents had breached the Agreements from time to time by failing to make all of the payments due. After May 2000, they have consistently breached the Agreements by failing to make any of the payments on the Agreements even though they have retained possession and use of the tour buses and minivan, chattels that the Respondents contend are worth $1.6 million. (There are now 4 rather 5 tour buses as one of the tour buses was reclaimed and sold over 2 years ago).
>
> …
>
> [29] Therefore, as far as the Respondents' conduct is concerned, for a protracted period of time they have consistently breached the Agreements by failing to pay any of the amounts owing on the Agreements and have made no apparent efforts to rectify these breaches by refinancing, even though they have had use of the chattels.
>
> …
>
> [38] Consequently, upon considering the conduct of the Respondents, the gravity of the breaches, and the disparity between the value of the property and that damage caused by the breach, I was not satisfied that the Respondents had demonstrated that the imposition of the default interest rate constituted oppression. Given that conclusion, I decline to exercise my discretion and grant relief under s.24 of the *Law and Equity Act*.

[182] In *MTK Auto West Ltd. v. Allen*, 2003 BCSC 1613 (*MTK Auto West Ltd.*), Kirkpatrick J. (as she then was) stated:

> [20] Where a party seeks relief from a penalty, the factors to be considered by the court include the conduct of the applicant, the gravity of the breach, and the disparity between the value of the property forfeited and the damage caused by the breach: *Shiloh Spinners Ltd. v. Harding*, [1973] A.C. 69 (H.L.).
>
> [21] The assessment of oppression was addressed in *Dimensional Investments Ltd. v. Canada*, [1968] S.C.R. 93, which sets out a broad framework in determining whether a penalty clause is or is not oppressive, or as Ritchie J. asks, whether it would be unconscionable for the party who claims the penalty amount to retain the money. Ritchie J. states at p. 101 that "the question of unconscionability must depend upon the circumstances of each case at the time when the clause is invoked" rather than on the agreement itself, which is the difference between the characterization of the clause as being a penalty in the first place versus its being oppressive.
>
> [22] A court should not strike down a penalty clause as being unconscionable lightly because it is a significant intrusion on freedom of contract. There must be clear evidence of oppression for the court to intrude (see *32262 B.C. Ltd. v. See-Rite Optical Ltd.*, [1998] A.J. No. 312 at ¶ 13 (C.A.) (QL)).
>
> [23] The factors that are relevant to the assessment of oppression in the case at bar include:
>
> (a) Both parties are sophisticated clients (see *Edmonton (City) v. Triple Five Corp.* (1994), 158 A.R. 293 at ¶ 74 (Q.B.)).
>
> …
>
> (d) Ms. Allen knowingly breached the contract and in fact intended to do so before signing the contract (see *Vohra Enterprises Ltd. v. Creative Industrial Corp.* (1988), 23 B.C.L.R. (2d) 394 at ¶ 11-12 (S.C.)).

[183] Although the swap agreement provides that the shares of two companies would be swapped, the real object of the transaction between the parties was the underlying properties: the hotel property and the Young Street property. For the hotel contract, the deposit was $50,000 on a $3 million purchase price, and for the Young Street contract, the total deposit was $100,000 on a $4.8 million purchase price. Both Mr. Badesha and Mr. Aujla told Mr. Banwait that they did not want to put down a larger deposit because all of their equity was in their respective properties.

[184] Since 1995 Mr. Banwait has generally been involved with the sales of farms and commercial buildings ranging in price from $600,000 to as high as $19 million. He testified that deposits on the sale of commercial buildings range in average from 10 to 15 percent, and in this case, the deposit should be calculated with regard to

the purchase price of each property, and not to the difference in price between the two properties.

[185] Based on this evidence, a typical or average deposit on the hotel contract and the Young Street contract would be as follows:

a) hotel purchase price $3,000,000 x 15% = $450,000 deposit

b) Young Street purchase price $4,800,000 x 15% = $720,000 deposit

[186] The damages clause is therefore not penal in nature and the court should not interfere where the clause is clear, unequivocal, and the parties have agreed to it. Alternatively, if the clause is penal in nature, Mr. Aujla must establish on a balance of probabilities that he is entitled to relief.

[187] In *Liu v. Coal Harbour Properties Partnership*, 2006 BCCA 385 (*Coal Harbour*), Mr. and Mrs. Liu appealed an order allowing the vendor to retain a total of $391,000 they had paid in three deposits towards two strata units to be built. The August 2001 agreement provided for the purchase price of the property at $1,955,000, and that the vendor could retain any deposit, unless all payments on account were made. Following a controversy over parking stalls, the Lius refused to complete in May 2003, the vendors accepted their repudiation and claimed the $391,000, or 20 percent of the purchase price. The vendors subsequently sold the property in February 2004 for $2,750,000, or $795,000 more than the original purchase price. The Lius argued that whether or not the clause was a penalty, it would be unconscionable for the vendors to retain deposit. The Court of Appeal stated:

> [8] What must not be lost sight of here is that this is a case involving what is sometimes termed “earnest money”, namely money paid as a deposit to ensure that the land sale transaction is adhered to by the purchaser. …
>
> [13] …The purchaser there had put up a deposit equivalent to 10% of the purchase price of the property. … The judge noted that 10% was half of the usual deposit required in the new construction luxury condominium market. That comment would seem to be consistent with the finding of Wilson J. in the instant case that the 20% deposit was not a penal sum at the time the parties contracted for the sale of the strata lots. …

> [14] … I should think that deposit sums much in excess of 20% of the purchase price of a property would invite particular scrutiny by a court.
>
> [15] In the case of *Workers Trust & Merchants Bank Ltd v. Dojap Investments Ltd*, [1993] A.C. 573, [1993] 2 All E.R. 370 (P.C.), the Privy Council granted relief from forfeiture in the case of a 25% deposit. There was, however, a finding in that case that the sum was not a true deposit because it exceeded the customary deposit in Jamaica of 10% for land transactions. Thus, it is not a case directly on point concerning a true deposit, the circumstance determined to exist in this case by Wilson J.
>
> [16] … of *Dojap* [*Workers Trust & Merchants Bank Ltd. v. Dojap Investments Ltd.*, [1993] A.C. 573, [1993] 2 All E.R. 370 (P.C.)]:
>
> > In general, a contractual provision which requires one party in the event of his breach of the contract to pay or forfeit a sum of money to the other party is unlawful as being a penalty, unless such provision can be justified as being a payment of liquidated damages, being a genuine pre-estimate of the loss which the innocent party will incur by reason of the breach. One exception to this general rule is the provision for the payment of a deposit by the purchaser on a contract for the sale of land. Ancient law has established that the forfeiture of such a deposit (customarily 10% of the contract price) does not fall within the general rule and can be validly forfeited even though the amount of the deposit bears no reference to the anticipated loss to the vendor flowing from the breach of contract. [Emphasis in *Coal Harbour.*]
>
> …
>
> [28] In looking at the issue of unconscionability, the conduct of a vendor must be considered. … It was the purchasers who, for their own reasons, refused to close the transaction. Their conduct was deliberate and considered and they took their decision after access to appropriate professional advice. It is not easy to perceive on what basis they ought to be able to invoke equity as a shield against the forfeiture of the sum paid as a deposit at the inception of the transaction.

[188] In *Hinkson Holdings Ltd. v. Silver Sea Developments Limited Partnership*, 2007 BCCA 408, the parties entered into a real estate transaction for the purchase of a strata lot in a proposed condominium building for $1,255,000. The purchaser paid an initial deposit of $62,750 (5 percent of the purchase price) and was required to pay two additional deposits of $125,500 each (10 percent of the purchase price) by certain dates. The purchase failed to provide the two additional deposits on time, or in the proper amount. The agreement provided that in the event of default, the vendor could retain the deposit as liquidated damages. The vendors terminated the

agreement, and sought to forfeit the $188,250 paid. The Court of Appeal declined to provide relief from forfeiture and stated:

> [37] In any event, I am unable to see anything unconscionable about the deposit being forfeited to the vendor given the conduct of the purchaser throughout. The purchaser was the author of its misfortune. Mr. Hinkson entered into an agreement, assigned to his company, that he was either unable or unwilling to have performed as required. After the initial deposit was made, the purchaser did not make any payment by the date set under the agreement or as extended by the vendor. The purchaser was given repeated opportunities to meet its obligations as the vendor sought to accommodate it, but all was to no avail. For whatever reason, the purchaser failed to make the payments required at every turn over a period of many months.
>
> …
>
> [39] The purchaser sought to preserve the deposit and the agreement for the sale of the strata lot by alleging a collateral agreement that was completely rejected by the judge. The deposit is being forfeited because, in the absence of a collateral agreement to the contrary, the vendor was entitled to cancel the agreement when it did. There is, in my view, nothing unconscionable about that.

[189] Mr. Aujla is not entitled to equitable relief from the $500,000 clause. He was eager, if not desperate to sell the hotel. He misrepresented that the hotel was a Howard Johnson hotel and that there was a Howard Johnson franchise. He insisted that Mr. Banwait include the damages clause on both contracts which were dependent on each other so that Mr. Badesha could not back out without having to pay $500,000 on each contract, or a total of $1 million. He failed to pay the second $50,000 deposit on the Young Street contract, he failed to deliver the Howard Johnson franchise, he failed to repair the damaged rooms, he failed to restore power to the buildings, and he gave scripted and fabricated evidence in court in an attempt to escape liability.

[190] The swap agreement was not unconscionable. *Ekstein v. Jones*, [2005] O.J. No. 3497, deals with what is required in order to establish unconscionability and inequality of bargaining power:

> [55] The caselaw on what must be shown to establish that a transaction is unconscionable is reviewed in *Murray v. TDL Group Ltd.* [2002] O.J. No. 5095 (Fedak J.) at para. 42ff. I shall refer to the principles by reference to that case which lists the authorities.

> [56] It is clear that one must show more than that the transaction was improvident or that the consideration was grossly inadequate: *Murray* at para. 42.
>
> [57] In order to establish unconscionability one must show two things:
>
> > (a) That the terms are very unfair or that the consideration is grossly inadequate.
> >
> > (b) That there was an inequality of bargaining power between the parties and that one of the parties has taken undue advantage of this.
> >
> > *Murray* para. 42; *Black v. Wilcox* (1977) [1976 CanLII 555 (ON CA)], 12 O.R. (2d) 759 (C.A.).
>
> [58] Inequality of bargaining power in this context is not established simply by showing that one party is more sophisticated or more affluent than the other. It must be shown that the weaker party's ability to bargain is impaired to the extent that he or she is "not a free agent and is not equal to protecting himself": *Mundinger v. Mundinger*, [1969] 1 O.R. 606 at p. 609. Another way of putting this is to say that the vulnerable party was not in a position to exercise a "free will and valid consent": *Ontario (Attorney General) v. Barfield Enterprises Ltd.*, op. cit.
>
> [59] The following factors have been identified as showing an inequality of bargaining power:
>
> > (a) distress, recklessness, want of care, intoxication: *Black v. Wilcox*.
> >
> > (b) Ignorance: *Murray*, para. 37.
> >
> > (c) Lack of independent legal advice, infirmity and where a party's bargaining power is "grievously impaired by reason of his own needs and desires": *Murray* at para. 38.
> >
> > (d) Lack of skill in the borrowing of money: *Milani*, para. 24.

[191] In *Harry v Kreutziger*, [1978] B.C.J. No. 1318, McIntyre J.A. considered the principles on which courts in British Columbia will interfere with an agreement on the ground that it is unconscionable:

> 13 The principles upon which a Court will interfere with a concluded transaction and nullify it upon the ground that it is unconscionable have found frequent expression. An early Canadian case is *Waters v. Donnelly* (1884), 9 O.R. 391. The leading pronouncement on the subject in British Columbia is to be found in *Morrison v. Coast Finance Ltd. et al.* (1965), 55 D.L.R. (3d) 710 at p. 713, 54 W.W.R. 257 at p. 259, where Davey, J.A., speaking for himself and Bull, J.A., said:
>
> > The equitable principles relating to undue influence and relief against unconscionable bargains are closely related, but the doctrines are separate and distinct. The finding here against undue influence does not conclude the question whether the

> appellant is entitled to relief against an unconscionable transaction. A plea of undue influence attacks the sufficiency of consent; a plea that a bargain is unconscionable invokes relief against an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker. On such a claim the material ingredients are proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger. On proof of those circumstances, it creates a presumption of fraud which the stronger must repel by proving that the bargain was fair, just and reasonable: *Earl of Aylesford v. Morris* (1873), L.R. 8 Ch. 484, *per* Lord Selborne, L.C., at p. 491; or perhaps by showing that no advantage was taken: see *Harrison v. Guest* (1855), 6 De G. M. & G. 424 at p. 438, 43 E.R. 1298; affirmed (1860), 8 H.L.C. 481 at pp. 492-3, 11 E.R. 517. In *Fry v. Lane* (1888), 40 Ch. D. 312, Kay, J., accurately stated the modern scope and application of the principle, and discussed the earlier authorities upon which it rests. At p. 322 he said:
>
> > "The result of the decisions is that where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, a Court of Equity will set aside the transaction.
> >
> > "This will be done even in the case of property in possession, and *à fortiori* if the interest is reversionary.
> >
> > "The circumstances of poverty and ignorance of the vendor, and absence of independent advice, throw upon the purchaser, when the transaction is impeached, the onus of proving, in Lord Selborne's words, that the purchase was 'fair, just, and reasonable.'"

14 This case has been followed in such cases as *Knupp v. Bell et al.* (1966), 58 D.L.R. (2d) 466 [affd 67 D.L.R. (3d) 256 (Sask. C.A.)], and *Marshall v. Canada Permanent Trust Co.* (1968), 69 D.L.R. (2d) 260, and it was cited with approval by Lord Denning, M.R., in *Lloyd's Bank Ltd. v. Bundy*, [1974] 3 All E.R. 757 at p. 764, which case discusses the applicable principles.

15 From these authorities this rule emerges. Where a claim is made that a bargain is unconscionable, it must be shown for success that there was inequality in the position of the parties due to the ignorance, need or distress of the weaker, which would leave him in the power of the stronger, coupled with proof of substantial unfairness in the bargain. When this has been shown a presumption of fraud is raised and the stronger must show, in order to preserve his bargain, that it was fair and reasonable.

[192] In *Dyck v. Manitoba Snowmobile Association*, [1985] 1 S.C.R. 589, plaintiff appellant was seriously injured in a snowmobile race. He had signed documents releasing the Association from all liability, including negligence. The Supreme Court of Canada upheld the dismissal of his action in negligence and stated at 593 that the relationship between the plaintiff and the Association did not fall within the class of cases, "…where the differences between the bargaining strength of the parties is such that the courts will hold a transaction unconscionable and so unenforceable where the stronger party has taken unfair advantage of the other."

[193] This is not a case where Mr. Badesha is the stronger party who has taken unfair advantage of Mr. Aujla. Rather, Mr. Badesha and Mr. Aujla have similar sophistication in business matters, and they have equal bargaining power. Mr. Aujla saw at least two lawyers, Mr. Buckley and Mr. Singh, but still instructed Mr. Singh to complete the swap agreement. Mr. Aujla sought to include the $500,000 damages clause in both the hotel contract and the Young Street contract, he sought to enforce the damages clause, and he is not entitled to equitable relief.

(b) The Defendant's Argument

[194] The $500,000 clause is not a genuine pre-estimate of damages but a penalty clause. A summary of the applicable law is set out in *MTK Auto West Ltd.* at para. 15:

> [15] The law in this area is well-settled. Lord Dunedin, in *Dunlop Pneumatic Tyre Co. Ltd. v. New Garage and Motor Co. Ltd.*, [1915] A.C. 79 (H.L.), which was accepted in Canada in *H.F. Clarke Ltd. v. Thermidaire Corp. Ltd.*, [1976] 1 S.C.R. 319, states at p. 86-88:
>
> > In view of that fact, and of the number of authorities available, I do not think it advisable to attempt any detailed review of the various cases, but I shall content myself with stating succinctly the various propositions which I think are deducible from the decisions which rank as authoritative:-
> >
> > 1. Though the parties to a contract who use the words "penalty" or "liquidated damages" may prima facie be supposed to mean what they say, yet the expression used is not conclusive. The Court must find out whether the payment stipulated is in truth a penalty or liquidated damages. This doctrine may be said to be found passim in nearly every case.

2. The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage (*Clydebank Engineering and Shipbuilding Co. v. Don Jose Ramos Yzquierdo y Castaneda*, [1905] A.C. 6).

3. The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not as at the time of the breach (*Public Works Commissioner v. Hills*, [1906] A.C. 368, and *Webster v. Bosanquet*, [1912] A.C. 394).

4. To assist this task of construction various tests have been suggested, which if applicable to the case under consideration may prove helpful, or even conclusive. Such are:

(*a*) It will be held to be penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach. (Illustration given by Lord Halsbury in *Clydebank Case*, [1905] A.C. 6).

(*b*) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid (*Kemble v. Farren* 6 Bing. 141). This though one of the most ancient instances is truly a corollary to the last test. Whether it had its historical origin in the doctrine of the common law that when A. promised to pay B. a sum of money on a certain day and did not do so, B. could only recover the sum with, in certain cases, interest, but could never recover further damages for non-timeous payment, or whether it was a survival of the time when equity reformed unconscionable bargains merely because they were unconscionable, - a subject which much exercised Jessel M.R. in *Wallis v. Smith*, 21 Ch. D. 243 – is probably more interesting than material.

(*c*) There is a presumption (but no more) that it is penalty when "a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage" (Lord Watson in *Lord Elphinstone v. Monkland Iron and Coal Co.*, 11 App. Cas. 332).

On the other hand:

(*d*) It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties

> (*Clydebank Case*, Lord Halsbury, [1905] A.C. at p. 11; *Webster v. Bosanquet*, Lord Mersey, [1912] A.C. at p. 398).

[195] In *Lee v. Skalbania*, [1987] B.C.J. No. 2502, 47 R.P.R. 162, aff'd 4 R.P.R. (2d) xxxiii (B.C.C.A.), Gow J. set out the test for determining whether a contractual clause is for liquidated damages or a penalty at p. 175:

> 1. The question "penalty" or "liquidated damages" is to be answered as at the date of the making of the agreement;
>
> 2. If the answer is "liquidated damages", that is the end of the matter, but, if the answer is "penalty"; then,
>
> 3. There arises the next question should relief be granted against the penalty?
>
> 4. The answer to that question depends upon whether to enforce the penalty would be unconscionable, and that unconscionability has to be determined at the date of the invocation of the clause.
>
> 5. Sec. 21(1) [now s. 24] of The Law and Equity Act only applies if and when stage 3 has been reached.

[196] I pause to note that in *Coal Harbour*, Hall J.A. for the Court of Appeal, commenting on the foregoing, stated at para. 24, "….that analysis strikes me as generally correct with perhaps the addition that the question of penalty has to be as well considered as of the time set for performance."

[197] Section 24 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, provides that the court may relieve against all penalties and forfeitures and, in granting the relief, may impose any terms as to costs, expenses, damages, compensations, and all other matters that the court thinks fit.

[198] The Supreme Court of Canada in *Thermidaire* made it clear that there is a presumption that a clause is a penalty when a single lump sum is made payable in compensation on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage. The $500,000 damages clause in the hotel contract and the Young Street contract requires a party to pay $500,000 if it fails to complete any of the terms or conditions of the swap agreement, no matter how serious or trifling, and as such, is presumptively a penalty. It does not matter whose idea it was to insert the $500,000 damages clause. The fact that a

party may have agreed to a penalty clause, and been foolish to do so, does not mean that the court should not exercise its equitable discretion.

[199] *Ashland Scurlock Permian Canada Ltd. v. NESI Energy Marketing Canada Ltd. (Trustee of)* (1998), 226 A.R. 242 (Q.B.) at para. 11 explains that whether or not a provision is oppressive or unconscionable is determined by whether the provision is so extravagant or exorbitant that it has no real relation to any loss which the plaintiffs could have sustained. Forsyth J. states:

> 11 Whether or not a provision is oppressive or unconscionable is determined by whether the provision is so extravagant or exorbitant that it has no real relation to any loss which the plaintiffs could have sustained. Lord Wright in Imperial Tobacco Ltd. v. Parslay, [1936] 2 All E.R. 515, said, at 521:
>
> > If questions of disproportion have to be considered, the relevant disproportion must be not between the price of the article but between the stipulated sum and the possible or probable damage ... the only question can be whether the stipulated sum is so extravagant or exorbitant that it cannot be regarded as having any real relation to any loss which the plaintiffs can possibly sustain. That is what is meant by the expressions which are used from time to time ... [for instance] the word "unconscionable is also used. [This term, in this context] does not bring in at all the idea of an unconscionable bargain.

[200] The issue when determining whether equitable relief should be granted against a penalty clause is whether there is any real relation to any loss which the plaintiffs can possibly sustain. If there is no real relation, the clause is unconscionable and unenforceable. In this case, there is no relation between the $500,000 clause and any loss which the plaintiffs could have possibly sustained. Mr. Banwait testified, despite repeated questioning, that there were no discussions about the size of the deposit in relation to the $500,000 clause. Mr. Banwait, Mr. Badesha, and Mr. Kandola all testified that the purpose of the clause was to ensure that no party could back out of the deal. As there is no relationship between the $500,000 clauses, the value of the deposits or any loss which the plaintiffs could possibly sustain, the enforcement of the penalty clause is clearly unconscionable and cannot be enforced.

4. Conclusion

[201] In *Thermidaire*, the Supreme Court of Canada stated at pp. 338 to 339:

> I regard the exaction of gross trading profits as a penalty in this case because it is, in my opinion, a grossly excessive and punitive response to the problem to which it was addressed; and the fact that the appellant subscribed to it, and may have been foolish to do so, does not mean that it should be left to rue its unwisdom. *Snell's Principles of Equity* (27th ed. 1973), at p. 535 states the applicable doctrine as follows:
>
> > The sum will be held to be a penalty if it is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach.
>
> This proposition comes from a statement by Lord Halsbury in the House of Lords in *Clydebank Engineering and Shipbuilding Co. Ltd. v. Don José Ramos Yzquierdo y Castaneda* [[1905] A.C. 6], at p. 10, and was reiterated by Lord Dunedin in *Dunlop Pneumatic Tyre Co. Ltd. v. New Garage and Motor Co. Ltd.* [[1915] A.C. 79], at p. 87. I do not think that it loses its force in cases where there is difficulty of exact calculation or pre-estimation when the stipulation for liquidated damages, as in this case, is disproportionate and unreasonable when compared with the damages sustained or which would be recoverable through an action in the courts for breach of the covenant in question: see 25 *Corpus Juris Secundum*, s. 108, pp. 1051 ff. The fact that the highest amount put forward by the respondent as its actual loss was $92,017 is plainly indicative of the disproportion that resides in the exaction of gross trading profits of $239,449.05. (emphasis added.)

[202] In *Snell's Equity* (32nd edition, 2010) at p. 405:

> There is a strong similarity between penalty clauses and forfeiture clauses. In each case, one party to a contract bargains for the imposition of a sanction which impermissibly seeks to deter the contractual counter-party from breaking the contract and to encourage performance of his or her obligations. Such a clause may require payment of a sum predominantly designed to deter breach (a penalty) or it may provide for forfeiture of payments which have already been made or forfeiture of rights held by the party in breach (forfeiture). From a very early stage in their history courts of equity have refused to enforce provisions which require a contract breaker to pay a penal sum for a breach of contract. [footnote omitted.]
>
> …
>
> The modern move away from a focus on whether the clause is a pre-estimate of loss, to concentrate upon whether it has a predominant deterrent purpose has further emphasised that a court "should not be astute to descry a 'penalty clause' in every provision of a contract which stipulates a sum to be payable by one party to the other in the event of a breach by the former." [footnote omitted.] A generous approach is therefore taken to finding that clauses are liquidated damages clauses, consistently with a policy of encouraging the use

> of liquidated damages clauses, especially in commercial contracts. [footnote omitted.] Further:
>
> > "where a bargain has been struck by two parties of equal bargaining power, with each party legally represented, a Court should consider long and hard before permitting one of the parties to resile from that agreement." [footnote omitted.]

[203] This is in line with the statement of the Supreme Court of Canada in *Elsley Estate* at p. 937:

> It is now evident that the power to strike down a penalty clause is a blatant interference with freedom of contract and is designed for the sole purpose of providing relief against oppression for the party having to pay the stipulated sum. It has no place where there is no oppression. If the actual loss turns out to exceed the penalty, the normal rules of enforcement of contract should apply to allow recovery of only the agreed sum. The party imposing the penalty should not be able to obtain the benefit of whatever intimidating force the penalty clause may have in inducing performance, and then ignore the clause when it turns out to be to his advantage to do so. A penalty clause should function as a limitation on the damages recoverable, while still being ineffective to increase damages above the actual loss sustained when such loss is less than the stipulated amount.

[204] I have found that it was Mr. Aujla who suggested the clause so that Mr. Badesha could not back out of the deal. Mr. Aujla wanted the clause in both the hotel contract and the Young Street contract in order to deter Mr. Badesha from breaking the contract and ensuring performance of the contract, and he sought to enforce the damages clause against Mr. Badesha.

[205] In *MTK Auto West Ltd.*, Kirkpatrick J. considered as a factor, that "Ms. Allen knowingly breached the contract and in fact intended to do so before signing the contract…". She then stated at para. 24:

> [24] The last factor is the most problematic because granting relief from the application of a penalty clause or from forfeiture is an exercise of the court's equitable jurisdiction and equity makes much of "clean hands". However, the maxims of equity are "not to be taken as positive laws of equity which will be applied literally and relentlessly in their full width but rather as trends or principles" (see John McGhee, ed., *Snells's Equity*, 13th ed. (London: Sweet & Maxwell, 2000) at ¶ 3-01). With respect to the clean hands principle specifically:
>
> > what bars the claim is not a general depravity but one which has an 'immediate and necessary relation to the equity sued for,' and is not balanced by any mitigating factors. [at ¶ 3-15]

> Ms. Allen's "depravity" is related to the clause from which she seeks relief.

[206] In that case, Kirkpatrick J. found that the $10,000 penalty against Ms. Allen was disproportionate to the $2,000 in damages sustained by the plaintiff who sought to enforce the penalty clause.

[207] I do not find that $500,000 is disproportionate to the range of damages that Mr. Badesha might recover for Mr. Aujla's breach of the hotel contract or for the Young Street contract. While those losses were not quantified, I do not find they need be. There is evidence that the hotel property was leased to by Mr. Aujla and Mr. Kaler for $25,000 a month, or $300,000 a year. The June 26, 2013 quote from Mr. Doughty for the electrical installation is $46,555 plus GST, but excluding any BC Hydro, Telus, or cable engineering or connecting and other charges or repairs. The July 27, 2012 quote that Mr. Badesha obtained to repair the damaged rooms is $176,500 plus GST. In other words, if Mr. Badesha were to seek damages for breach of contract, his damages would be in the range of $500,000, if not more. Mr. Badesha also lost the $50,000 deposit he paid on the hotel property transaction, and the personal expense of travelling to Williams Lake and managing the hotel for Mr. Aujla without compensation, between July 1, 2012 and end of February 2013 when negotiations failed and he left the hotel.

[208] *Thermidaire* does not really assist Mr. Aujla because in that case the formula for fixing damages for breach of the covenant against competition was more than double the amount of any actual loss.

[209] Both parties agree that while the swap agreement was structured as a share purchase agreement so that the parties could avoid paying property transfer tax, the real substance of the swap agreement was two property transactions. For the hotel contract, the seller was selling and the buyer was buying the Howard Johnson Hotel in Williams Lake for $3 million. For the Young Street contract, the seller was selling and the buyer was buying the property at 8559 Young Street and 45928 Hocking Road, Chilliwack, for $4.8 million. The form of the hotel contract and the Young Street contract is the BC Real Estate Association and Canadian Bar Association (BC

Branch) standard form contract of purchase and sale of property. The terms for the sale and purchase of company shares are included in the contract of purchase and sale addendum. The real intention of the parties looking at the four corners of the instruments, and not merely the form, is that the $500,000 damage clause in each of the contracts was to ensure performance of the underlying real estate transaction.

[210] Although the $500,000 was not paid as a deposit, but was to be paid in default of completion and is a penalty clause as opposed to a forfeiture, makes little difference. Both Mr. Aujla and Mr. Badesha agreed and understood that the $500,000 penalty clause was to deter the other party from backing away from the contract and ensuring completion of the contract. While there is no evidence that either party put their mind to whether the $500,000 and the deposit was similar to the range of deposits on commercial transactions, it makes little difference, particularly when the payment of $500,000 still falls within the acceptable range of deposits in this Province. (see *Coal Harbour* at para. 14.)

[211] Even if I am wrong, I do not find this to be a case where the court should grant relief under s. 24 of the *Law and Equity Act*. Mr. Aujla entered into a contract for the sale of a Howard Johnson hotel, with a term that the purchaser was required to “assume all the terms and conditions of the contract signed by the seller with Howard Johnson franchise for only 44 rooms”, when he knew that the seller had no franchise with Howard Johnson, the franchise had been terminated, and there was a pending and then actual lawsuit commenced by Howard Johnson against Snowland. Mr. Aujla continued to insist at trial that his lawyer Mr. Deol told him that Howard Johnson had agreed to give him a franchise, when the documentary evidence contradicts him, and he failed to call Mr. Deol to testify. Mr. Aujla asked that the $500,000 damage clause be included in the hotel contract and the Young Street contract so that Mr. Badesha could not back out of the deal or be disinclined from backing out of the deal, and he sought to enforce the $500,000 damage clause against Mr. Badesha. Mr. Aujla created the difficulty that he now finds himself in, and he should not be permitted to resile from the bargains that he made.

[212] With respect to both the hotel contract and the Young Street contract, Mr. Aujla was not oppressed, he was not the weaker party, he is an experienced businessman, no one took advantage of him, and he was encouraged to and obtained the benefit of independent legal advice.

[213] Accordingly I find that the plaintiffs are entitled to the relief sought, and Mr. Aujla is liable to the plaintiffs for damages in the amount of $500,000 for breach of the hotel contract, and damages in the amount of $500,000 for breach of the Young Street contract, for a total of $1 million.

COUNTERCLAIM

[214] The parties are agreed that the following expenses were not paid out of the Snowland account and were not otherwise paid by the plaintiffs while they operated the hotel:

The mortgage: $6,000 per month for 8 months	$48,000.00
Property Tax for 8 months	$32,381.82
Water bill	$3,616.28
Outstanding Telus bill	$4,653.02
Outstanding BC Hydro	$9,196.80
Outstanding Gas bill	$3,600.00
Outstanding Cable bill	$1,500.00
Pattison Sign bill for 8 months: $660 per month	$5,280.00
Total	$108,227.92

[215] However, Mr. Aujla has not satisfied me that he is entitled to judgment on his counterclaim.

[216] Mr. Badesha testified that the money for the mortgage payments was in Snowland's Royal Bank account but he never received a call that the mortgage moneys were not being paid. He also testified that when he took over the running of the hotel in July 2012, there were several unpaid utility and phone bills which he had to pay, and which Mr. Aujla told him to pay, and the amounts would be adjusted on completion. Furthermore, the revenues never covered the expenses, and there is no

evidence that Mr. Aujla personally paid those expenses. Mr. Badesha's uncontradicted evidence is that he worked running what was essentially Mr. Aujla's hotel for eight months for nothing.

[217] The plaintiffs are entitled to judgment in the amount of $1 million. The counterclaim is dismissed.

COSTS

[218] The parties made no submissions on costs, and if they are unable to agree, they may make submissions.

"Loo J."

The Honourable Madam Justice Loo