In the Provincial Court of Alberta

Citation: Northmont Resort Properties Ltd. v. Reid, 2017 ABPC 249

Date: 20171011
Registry: Edmonton
Action Number: P1490304333

Between:

Northmont Resort Properties Ltd.

Plaintiff (Defendant by Counterclaim)

- and -

James Reid and Diane Reid

Defendants (Plaintiffs by Counterclaim)

Decision of the Honourable Judge L.D. Young

Overview

[1] This is an application by the Plaintiff (also referred to as "Northmont") to obtain judgment against approximately seven-hundred and sixty timeshare owners represented by the same counsel in the Provincial Court of Alberta (the "Defendants"). The Civil Claims filed against the Defendants allege that the time share owners have failed to pay monies owing under a timeshare agreement known as a "vacation interval agreement" ("VIA"). The VIA relates to property in Fairmont Hot Springs, British Columbia, previously known as "Fairmont Vacation Villas" and now known as the Sunchaser Vacation Villas (the "Resort"). The Defendants filed identical Dispute Notes and Counterclaims denying that they breached the VIA and alleging it is the Plaintiff that has breached the VIA and that they are entitled to damages as a result.

[2] There have already been numerous proceedings involving the Plaintiff and timeshare owners of the Resort throughout Alberta and British Columbia, including a trial decision in the British Columbia Supreme Court that was upheld in the British Columbia Court of Appeal. The Plaintiff

argues that judgment should be granted in the Provincial Court of Alberta against the Defendants without a further trial as these proceedings are: *res judicata* (that is, has been previously adjudicated); an abuse of process; and, vexatious.

[3] On the first day this application was heard, the Defendants brought an application, without prior notice, to amend their Dispute Notes to include a new defence. The same lawyers that appeared in this action did the same thing in the British Columbia Supreme Court. In that case, the application of the Plaintiff to strike the amended pleadings of the defendants was successful.

[4] For the reasons that follow, I am satisfied that the Amended Dispute Notes and Counterclaims of the Defendants should be struck for being *res judicata*, an abuse of process and vexatious. Further, I am prepared to grant judgment to the Plaintiff in the amounts claimed in the Amended Civil Claims, subject to the issues of costs, interest, and expiration of civil claims, as I will detail in this decision.

[5] The *Provincial Court Act* (the "*Act*")[1] does not provide a summary form of application for the Plaintiff to obtain judgment based on the grounds relied upon in this application. However, section 8(2) of the *Act* does provide that, "where [the] Act or the regulations do not provide for a specific practice or procedure of the Court that is necessary to ensure an expeditious and inexpensive resolution of a matter before the Court, the Court may . . . apply the *Alberta Rules of Court*" (the "*Rules*").[2] There was no dispute that the *Rules* are appropriate for the resolution of this application.

[6] I heard argument for nearly three days. The filed materials include pleadings, affidavits, written legal briefs and authorities which will be referred to throughout.

Background

[7] This action is one of nearly two thousand brought by the Plaintiff against other defendants in the Provincial Court of Alberta. The named defendants in this action, James Reid and Diane Reid, are only one set of timeshare owners defending this claim. In this particular action, the Civil Claim was filed on August 5, 2014 and the Dispute Note and Counterclaim was filed on September 5, 2014.

[8] This application involves all of those defendants, including the Reids, represented in Alberta by Strathcona Law Group ("SLG"), who have been retained by Geldert Law Corporation of British Columbia ("Geldert"). In the most recent order granted by me, a list was attached of all actions where SLG is counsel of record (the "SLG Actions"). Any reference in this decision to "Defendants" refers to all of the defendants represented by SLG, unless otherwise noted.

[9] Where SLG is not representing the defendants, there are several scenarios: some defendants have not filed dispute notes and the Plaintiff has obtained default judgments; some defendants have filed dispute notes on their own; and, some defendants have filed dispute notes using an agent and some using counsel other than SLG. So far as I am aware, in the actions where dispute notes have been filed, no further proceedings have taken place because of an "unofficial stay" pending the outcome of the JEKE Action (as defined below) and this application.

[10] There is a significant history to the SLG Actions in Alberta and to what one might term "mirror" actions that involve the Plaintiff in the British Columbia Provincial Court and British Columbia Supreme Court. As with the SLG Actions, many of the defendants in the actions in British Columbia are also represented by a law firm that was retained by Geldert. Together, these defendants in Alberta and British Columbia are referred to as the "Geldert Group."

[11] On March 30, 2009, the original developer of the Resort, Fairmont, obtained creditor protection under the *Companies' Creditors Arrangement Act*[3] in the Alberta Court of Queen's Bench. As a result of a series of subsequent court orders and agreements, Northmont ultimately assumed Fairmont's role as lessor and manager, as is further detailed in the JEKE Decision (as defined below).

[12] As a result of significant financial and maintenance issues with the Resort, the Plaintiff sent an invoice to the timeshare owners demanding payment under the VIAs of a "renovation project fee" ("RPF"). The timeshare owners' refusal to pay the RPF has resulted in this litigation.

[13] Significant litigation involving the Plaintiff and the Geldert Group has taken place in the British Columbia Supreme Court and the British Columbia Court of Appeal. Those decisions are as follows:

a. *Philip K. Matkin Professional Corp. v Northmont Resort Properties Ltd.*,[4] the decision of Madam Justice Loo of the British Columbia Supreme Court on November 15, 2013, (the "Loo Decision");

b. *Philip K. Matkin Professional Corp. v Northmont Resort Properties Ltd.,*[5] the decision of the British Columbia Court of Appeal of the Loo Decision on June 13, 2014, (the "Loo Appeal Decision");

c. *JEKE Enterprises Ltd. v Northmont Resort Properties Ltd.,*[6] the decision of Madam Justice Fitzpatrick of the British Columbia Supreme Court on March 8, 2016, (the "JEKE Decision");

d. *JEKE Enterprises Ltd. v Northmont Resort Properties Ltd.,*[7] the decision of Madam Justice Fitzpatrick respecting costs arising from the JEKE Decision, on June 26, 2016, (the "JEKE Costs Decision");

e. *JEKE Enterprises Ltd. v Northmont Resort Properties Ltd.,*[8] the decision of the British Columbia Court of Appeal of the JEKE Decision, on January 25, 2017, (the "JEKE Appeal Decision"); and

f. *Northmont Resort Properties Ltd. v Golberg,*[9] the decision of Mr. Justice Branch of the British Columbia Supreme Court, on September 21, 2017 (the "Golberg Decision").

[14] In the SLG Actions, the Defendants applied on December 10, 2014 for an Order staying all of the actions, consolidating all actions commenced by the Plaintiff, and transferring all actions commenced by the Plaintiff to the Court of Queen's Bench of Alberta. That application was adjourned *sine die* (with no date being assigned for hearing).

The Superconference, *Edwards* and the Loo Decision

[15] A conference was held on January 27, 2015 to find a way forward with all of the actions in the Provincial Court of Alberta, the one action then extant in the Court of Queen's Bench of Alberta, *Edwards v. Resort Villa Management Ltd.*, [10] ("*Edwards*") and all of the actions in both the British Columbia Provincial Court and British Columbia Supreme Court. This conference became known as the "Superconference". Those in attendance included Associate Chief Justice Rooke for the Court of Queen's Bench of Alberta, myself for the Provincial Court of Alberta, Madam Justice Loo for the Supreme Court of British Columbia, Judge Webb for the Provincial Court of British Columbia, and counsel for all parties.

[16] As of the date of the Superconference, the Loo Decision had been released as a "special case" under the British Columbia *Supreme Court Rules*. Justice Loo had found in favour of Northmont but her decision was overturned by the British Columbia Court of Appeal on the basis that a special case was not the proper approach to resolve the issues between the parties and that a trial was necessary to do so.

[17] Prior to the Superconference, an action had been commenced in British Columbia by JEKE Enterprises Ltd. against Northmont (the "JEKE Action"). The JEKE Action would try the issues as ordered by the British Columbia Court of Appeal in the Loo Appeal Decision.

[18] At the Superconference, Mr. Alexander, counsel for JEKE and part of the Geldert Group, stated the following:

[I]n the JEKE proceeding, the vacation interval owner, JEKE Holdings is the plaintiff and Northmont Resort Properties is the defendant. The pleadings are essentially a mirror image of the pleadings in all of the other proceedings in the Supreme Court action where Northmont is the plaintiff and the owners are defendants, and a counterclaim. So the JEKE action raises all of the same issues as about – well, almost 800 other B.C. Supreme Court proceedings . . .

[19] Counsel for the Defendants in the SLG Actions stated the following at the Superconference:

I am the Alberta agent for Mr. Geldert, and myself and Mr. Geldert and Mr. Alexander have worked together, and so effectively the dispute notes and counterclaims that we have filed mirror what has been filed by Mr. Alexander's office in – in British Columbia.

[20] Mr. Alexander added that:

[T]he important point on that in response to what Mr. Virtue said earlier with respect to this misrepresentation claim and what people might have been told when they buy, those do not form a part of the defence or counterclaim in terms of individualized different facts for each of our clients. But I agree with Mr. Virtue that to the extent that there are others out there who defend on the basis of what they were told when they buy, none of us really has control over that, but that defence, that counterclaim, that representation claim, does not form a part of the Geldert group's response to the debt claim.

[21] In response to the specific question from Justice Loo asking, "so . . . no oral misrepresentations?", Mr. Alexander responded "right."

[22] Mr. Alexander also stated the following:

[T]he issues in the JEKE action by design are the same as those in the Alberta and British Columbia Provincial Court actions. The defence and counterclaim that we have filed in all of the actions, and that in JEKE is just a different (indiscernible) because we commenced it instead of waited for a defence and counterclaim, they are all the same . . . So the JEKE action encompasses the same issues . . .

[23] Ultimately, *Edwards* did not proceed to trial as the original counsel for the plaintiffs withdrew from the record. Madam Justice Moreau would not allow for an adjournment of the trial by new counsel, Mr. Alexander. The adjournment application appears to have been made one day before the day the trial was to proceed, it having been scheduled for five days. As set out in the reasons for decision of *Edwards*, the plaintiffs then abandoned all their claims against Northmont

and their defence to Northmont's Counterclaim.[11] Judgment was granted in favor of Northmont against the plaintiffs in *Edwards*.

[24] The Superconference did not result in the hoped for "way forward," and with no trial proceeding in *Edwards*, all involved waited for the outcome of the JEKE Action.

The JEKE Action

[25] Prior to the trial proceeding in the JEKE Action, the Defendants in this action brought another application, this one on September 15, 2015, seeking the same relief as their prior application. The Order granted by me on September 15, 2015 provided for a stay of the SLG Actions until a judgment was issued in the JEKE Action. I adjourned the Defendants' application to consolidate all of the actions commenced by the Plaintiff in the Provincial Court of Alberta and to then transfer those actions to the Court of Queen's Bench of Alberta. The balance of the Defendants' application was dismissed

[26] In the Defendants' Notice of Application, they state the following:

> 22. As of the filing of this application, Northmont has filed at least 578 actions in the B.C. Supreme Court, 188 actions in the B.C. Provincial Court, and at least 1,141 actions in the Province Court of Alberta. These claims raise identical issues and differ only on the quantum of the claim which is based on the type of timeshare interest purchased.
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> 23. In the actions for which the Defendants' counsel acts for the other defendants in Alberta, and in a considerable number of the actions commenced in British Columbia, counterclaims have been filed to the Northmont Actions and those counterclaims raise identical issues to the claim in this action concerning Northmont's breach of contract and a claim for set-off against any amounts due. Northmont has the same claim against the Defendants as has been advanced in the Northmont Actions.
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> 24. The result is that this action and all the Northmont Actions raise the same set of issues.

[27] The "Further Amended Notice of Civil Claim" filed by JEKE on December 14, 2015 stated:

> 28. As of the date of this Notice of Claim, Northmont has filed 299 claims in the Provincial of British Columbia and the Supreme Court of British Columbia (the "Northmont Actions"). As of the date of this amendment, those claims now number in excess of 3,000 claims in the Alberta and B.C. courts. These claims all raise issues in regard to the RPF, set-off of amounts against any maintenance fee, and identification of ports of any fee that are the responsibility of Northmont that are the same but for the quantum of the claims in the Northmont Actions, which may differ based on the type and time interval of the timeshare interest purchased. Nonetheless, the issues in dispute are the same in this action and the other similar claims and will involve the same, evidence, including expert opinion evidence.

[28] The allegations made by JEKE were described in the JEKE Decision at paragraphs 6-7:

JEKE alleges that Northmont is in breach of the VIAs executed by JEKE and Fairmont. Further, JEKE alleges that these breaches are fundamental to the VIAs and constitute a repudiation of them

such that JEKE is relieved from any further obligations under the VIAs. In that event, JEKE claims the remaining value of its interests and amounts which it says Northmont improperly charged to it . . . In the alternative, JEKE seeks orders to clarify Northmont's obligations under the VIAs in respect of payment of certain costs and expenses relating to the Resort, including those relating to the renovation and repairs.

[29] The JEKE Decision also states at paragraphs 9-10 that:

JEKE has had some success in garnering support for its position from a number of other owners. While JEKE is the only plaintiff in this action, and the amounts in issue are relatively small, it describes this as a "test case."

Arising from JEKE and other owners' continuing refusal to pay the annual maintenance fees and contribute to the renovation costs, Northmont has commenced literally thousands of superior and provincial court actions against these owners, both in British Columbia and Alberta. It is my understanding that these other actions have been stayed by agreement or court order pending the outcome of this trial on the basis that the outcome may affect issues arising in those other actions.

[30] The JEKE Decision also states the following at paragraph 169:

Since the transfer, there is no evidence that any time share owner or lessee, including JEKE, has raised any objection to the transfer of the VIAs from Fairmont to Northmont. In addition, no such owner or lessee has taken any steps to appeal or set aside Romaine J.'s Vesting Order for lack of notice or any other reason.

[31] With respect to the allegation made by JEKE that firstly, the original developer and then Northmont failed "to undertake repairs", "to manage" and "to construct", Justice Fitzpatrick said that "there was a complete absence of any evidence to support that . . ." (at paragraph 183). Further, that at no time prior to invoicing of the RPF in late 2012, did any issues arise "in respect of Northmont's actions taken or not taken with respect to the Resort" (at paragraph 191). Justice Fitzpatrick dismissed all of JEKE's claims.

[32] After the JEKE Decision and respecting costs to be awarded, James Albert Belfry, the President of JEKE, swore in an Affidavit on May 9, 2016:

20. Following receipt of the April communication from Resort Villa Management, the core group of five timeshare owners recommended to other timeshare owners we were in contact with to retain Geldert Law as their individual legal counsel. From this time forward it was Michael Geldert, in consultation with the other law firms, who attended the Case Planning Conferences and directed and managed the litigation strategy.

21. In October 2014, JEKE filed a claim against Northmont. The Directors of JEKE discussed that the action would be considered a test case on behalf of approximately 1,100 other timeshare owners who, at that time, had retained Geldert Law as legal counsel (the "Geldert Group") . . .

22. On the basis that it was a test-case for other clients under retainer agreements with Geldert Law, the litigation strategy in the action was not directed by JEKE or by me in my personal capacity,

and JEKE's legal fees were paid for by members of the Geldert Group.

. . .

24. In or about January 2015, Michael Geldert and I attended a case management super conference which included representatives from the Court of Queen's Bench of Alberta, Supreme Court of British Columbia, Provincial Court of Alberta, Provincial Court of British Columbia, Northmont and the Geldert Group ("Super Conference"). It was agreed at the Super Conference that all cases initiated by Northmont against timeshare owners for breach of the Vacation Internal [sic] Agreements would be held in abeyance until the determination of the test-case claim by JEKE ("Test Case").

25. As a result of the Super Conference, Northmont agreed to hold its claim in the Provincial Court of British Columbia against JEKE, Elsie Belfry and me in abeyance along with thousands of other while awaiting the outcome of the Test Case.

26. Upon commencement and throughout the trial, I was a resource person for legal counsel for the Geldert Group but I did not direct which arguments were to be pursued or abandoned.

[33] The fact that the JEKE Action was a test case was confirmed by Michael Geldert, counsel for the Geldert Group, who swore an Affidavit on May 20, 2016 that was filed in the JEKE Action on May 24, 2016, in which he deposes to the following:

2. Beginning in about April 2013, I was contacted by numerous Sunchaser timeshare owners with questions about their contractual obligations under their timeshare agreement(s) in respect of the timeshare Resort located at Fairmont, British Columbia (the "Sunchaser Vacation Villas").

3. Following those discussions, Geldert Law entered into retainer agreements with approximately 500 Sunchaser timeshare owners, including JEKE Enterprises Ltd. ("JEKE") with respect to the intention of Northmont Resort Properties Ltd. ("Northmont") to proceed with a major renovation of the Sunchaser Vacation Villas and their proposal to bill all timeshare owners with a pro-rated share of those costs ("Renovation Proposal").

4. To date, Geldert Law has entered into retainer agreements with over 3,000 Sunchaser timeshare owners who oppose the Renovation Proposal (collectively the "Sunchaser Group").

5. During my dealings on behalf of the Sunchaser Group it became clear that would be very difficult for everyone – Northmont, the individual members of the Sunchaser Group, and the four courts involved – to individually resolve the more than 3,000 disputes between Northmont and the individual members of the Sunchaser Group. The Sunchaser Group agreed to have one of its members become a plaintiff in what would be referred to as the "Test Case."

6. On or about August 1, 2014, I retained the law firm Cox Taylor to act as counsel for the Test Case on behalf of the Sunchaser Group. From that date forward, I took instructions from the Sunchaser Group and directed the litigation strategy pursued by Cox Taylor in the Test Case on their collective behalf.

7. In October 2014, JEKE agreed to be the plaintiff in the Test Case challenging the Renovation Proposal. JEKE was a convenient plaintiff because its President, James Belfry, resided in Victoria, which is where Cox Taylor has its offices and the Test Case litigation was to take place.

8. JEKE's role was to be similar to that of a representative plaintiff in a class action law suit. The purpose of the Test Case was to resolve claims against Northmont that were common to the members of the Sunchaser Group. JEKE's legal fees were paid for my members of the Sunchaser Group on that basis.

[34] In the JEKE Costs Decision, Justice Fitzpatrick stated as follows at paragraphs 65-66:

The only conclusion I can draw is that JEKE intended to throw the kitchen sink at the matter and hope that something stuck. JEKE also simply wanted a reconsideration of the interpretation issue before Loo J., without providing any "new" evidence than what was previously before the court. Such a haphazard and reckless strategy resulted in wasted time and resources on both Northmont's part and that of the Court. At bottom, it appears that JEKE's strategy was to leave Northmont (and the Court) to "figure out" exactly what issues were being advanced and attempt to respond or deal with the allegations.

In my view, such an approach can hardly be endorsed as a proper litigation strategy and a costs award serves a useful function in discouraging such behaviour in the future. I find, in all the circumstances, an award of special costs regarding the issues abandoned by JEKE is appropriate.

[35] On July 20, 2016, following the JEKE Decision, but prior to the JEKE Costs Decision, I granted an Order that the application for summary judgment would be heard on September 14, 2016. The Order provided for timelines for the filing and service of materials.

[36] Following the JEKE Costs Decision, on September 14, 2016, the present application was adjourned to January 11, 2017 pending the release of the JEKE Appeal. The Order further provided that "should the British Columbia Court of Appeal decision not be rendered by January 11, 2017, the parties are to arrange a telephone conference with the Court to discuss a further adjournment." Additionally, the Order once again provided for timelines with respect to the filing of material relevant to the summary judgment application and provided that "cross-examination on the Affidavits filed by the parties shall occur prior to January 11, 2017."

[37] This Order also allowed the Plaintiff to amend its Civil Claims in the SLG Actions solely "to increase the amount claimed against" each defendant and specifically provided that those defendants "are not required to file amended Dispute Notes." At that application, more than two years had already passed since the filing of the Dispute Note and the Defendants did not advise the Court that they were contemplating any amendment.

[38] On December 13, 2016, this application was adjourned to April 7, 2017 pending the outcome of the JEKE Appeal. The Order also allowed, again, for "cross-examination on the Affidavits filed by the parties" and for that to "occur on or before March 30, 2017."

[39] The result of JEKE Appeal Decision was to dismiss JEKE's appeal. JEKE did not seek leave to appeal to the Supreme Court of Canada.

[40] In the JEKE Appeal Decision, Chief Justice Bauman, writing for a unanimous panel, described the dispute between the parties at paragraphs 1–2 as follows:

Before the courts of British Columbia the purchaser, as lessee, of two time share units in a large development in the beautiful Columbia Valley of this province seeks to avoid the effect of relatively clear language in the governing contractual documents with its new lessor. These provisions assign responsibility for all costs incurred in the operation, continuing maintenance and repair of the resort to the purchasers/lessees of the units. The appellant would ignore the plain words of the contract and impose on the lessor a duty to always provide a fit and proper resort and to spend the significant sums to make this so.

No provisions in the applicable documents expressly so provide. No provisions in the applicable documents qualify the clear responsibility on the lessees to pay their way in the enjoyment of their resort community. My reasons for so concluding and finding no reversible error in the trial judge's analysis follow.

[41] Chief Justice Bauman described Justice Fitzpatrick's findings on the issue of the interpretation of the VIAs as follows at paragraphs 16-17:

As it relates to contractual interpretation and the alleged breaches, the trial judge resolved the interpretation issues within the four corners of the contract based on the plain meaning of the words in the context of the VIAs. At trial, both JEKE and Northmont argued that this was the proper interpretive approach because the wording of the JEKE VIAs is clear and unambiguous. The trial judge concluded that costs for delinquent accounts, capital expenses and Northmont's legal fees all fall within the meaning of "Operating Costs" in clause 9. With respect to capital costs, she noted the difficulties associated with JEKE's interpretation, including that there is no reference to "capital costs" in the VIAs. She reasoned that it would defy logic that the parties failed to turn their minds to who would pay for significant maintenance issues. She further concluded that even if she had found ambiguity in the terms of the VIAs such that she could consider extrinsic evidence, that extrinsic evidence supported her interpretation.

The trial judge also found that Northmont did not err in calculating the management fee or its proportionate share of operating expenses. She also rejected JEKE's submissions regarding a number of alleged wrongful acts and omissions committed by Northmont in managing the Resort. On appeal, JEKE does not take issue with these findings and instead focuses on the liability for delinquencies, capital costs and legal fees.

The Amendments

[42] Despite the success of the Plaintiff in the JEKE Appeal Decision, the Defendants opposed the Plaintiff's present application for judgment. On the morning of the application, April 7, 2017, an

application was filed by the Defendants to amend their Dispute Notes to add the following three additional paragraphs:

> 10. All Agreements were standard form contracts. The Owners had no meaningful opportunity to negotiate the terms of the Agreements. The Owners were not provided with an opportunity to review all of the contractual documents prior to signature. The Agreements provided, inter alia, that the Owners would be responsible, in addition to the Management Fee, for their proportionate share of all administrative, maintenance and repair costs (the "Operating Costs") and replacement costs incurred with respect to the Resort (the "Costs Provision").
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> 11. The Owners were not specifically advised of the Costs Provision. The Costs Provision was onerous and exposed the Owners to significant and unlimited liability for expenses beyond their control. The Owners were unaware of the Costs Provision and the extent of the liability that it exposed them to.
>
> . . .

31. The Agreements are standard form agreements containing the Cost Provision which is onerous and oppressive. In the circumstances, the Costs Provision ought to have been specifically brought to the attention of the Owners. As Northmont, or its predecessor did not specifically bring the Cost Provision to the attention of the Owners at the time of signing, the Cost Provision should not be binding on the Owners.

The Plaintiff consented to the amendments and an Order was issued by me permitting the filing of Amended Dispute Notes in all of the SLG Actions in the form attached to the Order (the "Defendants' Amendments"). There was no amendment to the Counterclaim.

[43] Paragraphs 35, 41 and 42 of the Amended Dispute Note state the following:

35. Most or all of the Northmont Actions are the same and a single proceeding will dispose of the issues in all of the actions.

. . .

41. The defendants request a stay of these proceedings until a single proceeding, or single consolidated proceeding is heard either in this court, the B.C. Provincial, or in the B.C. Supreme Court, as appropriate.

42. To proceed with the Northmont Actions in different judicial districts and different courts at different times may result in inconsistent findings and would be a waste of judicial resources. Litigation in slices should be avoided, particularly where the rights and interests of other parties will be affected.

[44] The Plaintiff's application proceeded on April 7, 2017, continued on May 1, 2017, and was concluded on June 28, 2017. There was a voluminous amount of material filed by the parties, the majority of which was filed prior to the issuance of the JEKE Appeal Decision, excepting only two

affidavits and final written legal argument. Despite two Orders from me allowing for cross-examinations on Affidavit, none were conducted.

The Golberg Decision

[45] Following the conclusion of the application before me, the Golberg Decision was issued by Mr. Justice Branch of the British Columbia Supreme Court. The application made by Northmont (the plaintiff in the "Golberg Action") is similar to the application before me in that the Plaintiff was seeking an order striking the defendants' pleadings on the basis of abuse of process and *res judicata*. The same counsel that appeared before me appeared before Justice Branch. The application was heard by Justice Branch commencing on June 23, 2017 and concluding on September 1, 2017, and the Golberg Decision was issued on September 21, 2017.

[46] The Golberg Decision followed an order by a Master in British Columbia consolidating all of the Geldert Group actions in British Columbia for the purposes of the Plaintiff's application. In circumstances nearly identical to those in Alberta, the defendants in the Golberg Action filed amended pleadings on June 22, 2017, the day prior to the Plaintiff's application.

[47] The amendments alleged misrepresentation on the part of Northmont with respect to the terms of the VIA and that the Costs Provision requiring the defendants to pay "all administration, maintenance, repair and replacement costs" is unenforceable. The amendments made by the defendants in the Golberg Action, having been made some two months after the amendments in the action before me, are more numerous and appear broader in scope than the amendments made by the Defendants in this action.

[48] Justice Branch granted the application by concluding "that the liability defences . . . should be struck on abuse of process grounds, and the contractual interpretation defences should also be struck on the grounds of *res judicata*" (paragraph 80). Justice Branch reviewed the circumstances and procedural history of both the action before him and of the JEKE Action, the failure on the part of the defendants to proceed by way of a class proceeding, the late amendment of the defence, and the conduct of the motion before him.

[49] With respect to *res judicata* grounds, Justice Branch stated at paragraph 79:

I do find that:

a) the defendants are privy to JEKE in light of the representations by defendants' counsel reviewed above, their financing of the JEKE Action, the absence of any real opposition to this position during the hearing of the application before me, and the agreement by the defendants at the oral hearing that the Responses would need to remove any defences already decided in the JEKE Action;

b) the same issues were raised in JEKE in relation to all of the contractual interpretation defences;

c) those issues were finally determined through the JEKE Appeal; and

d) a proper exercise of any residual judicial discretion calls for any effort to relitigate these issues to be ceased.

Hence, I do find that *res judicata* applies in relation to any contractual interpretation defences, but not the new misrepresentation and *Tilden* defences.

[50] As to the "new misrepresentation and *Tilden* defences", Justice Branch stated at paragraph 27:

In the extraordinary circumstances of this case as described below, I am prepared to make the order that the liability defences . . . should be struck, leaving quantum to be assessed. This finding is based on the cumulative effect and weight of the following evidence. While perhaps no single element would be sufficient to support this finding, each element of the conduct layered one upon the other has reached a point where this long-running liability battle should come to an end if the "integrity and the coherence of the administration of justice" is to be upheld.

Issues

[51] The following issues were raised by the Plaintiff's application:

a. Should judgment be granted to the Plaintiff against the Defendants based on *res judicata*, abuse of process, and the rule against vexatious proceedings?

b. If the answer is yes, should a determination as to the amount owing by the Defendants to the Plaintiff be made?

Analysis

1) Application to Strike

[52] The Plaintiff argues that the Dispute Notes and Counterclaims should be struck on the basis of *res judicata*, abuse of process and, or in the alternative, vexatious proceedings.

[53] While the Plaintiff initially characterized its application as one for summary judgment under Rule 7.3, the applicable Rule to strike pleadings in the circumstances of the SLG Actions was actually Rule 3.68. Those portions of Rule 3.68 relevant to these proceedings read as follows:

3.68(1) If the circumstances warrant and a condition under subrule (2) applies, the Court may order one or more of the following:

(a) that all or any part of a claim or defence be struck out;

(b) that a commencement document or pleading be amended or set aside;

(c) that judgment or an order be entered;

(d) that an action, an application or a proceeding be stayed.

(2) The conditions for the order are one or more of the following:

. . .

(c) a commencement document or pleading is frivolous, irrelevant or improper;

(d) a commencement document or pleading constitutes an abuse of process;

. . .

[54] I am aware of the evidentiary requirements required for the Plaintiff to succeed under Rule 7.3, but Rule 3.68 does not impose similar evidentiary requirements. The Affidavits before me and

the extensive record of proceedings and decisions, both in this action, and in British Columbia, provide a sufficient basis on which I am able to make a decision in this action.

[55] In conducting these proceedings and making my decision, I am mindful of Rule 1.2 which provides, in part, that "the purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way." I am also mindful of Rule 1.3(2) which provides that "a remedy may be granted by the Court whether or not it is claimed or sought in an action."

[56] I am satisfied that the Provincial Court, although a statutory court, has inherent power to control its own processes. In *Cunningham v Lilles,*[12] Justice Rothstein described the inherent power of a statutory court in the following terms at paragraph 19:

> Likewise in the case of statutory courts, the authority to control the court's process and oversee the conduct of counsel is necessarily implied in the grant of power to function as a court of law. This Court has affirmed that courts can apply a "doctrine of jurisdiction by necessary implication" when determining the powers of a statutory tribunal:
>
> > ... the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime ....
> >
> > (*ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4 (CanLII), [2006] 1 S.C.R. 140 (S.C.C.), at para. 51)
>
> Although Bastarache J. was referring to an administrative tribunal, the same rule of jurisdiction, by necessary implication, would apply to statutory courts.

[57] Prior to setting out my reasons below, I will address two arguments made by the Defendants which I do not accept.

[58] The first argument is that because JEKE was the plaintiff and not the defendant in the JEKE Action, the defence and counterclaim in the SLG Actions have not been adjudicated. This argument contradicts the position taken by Mr. Alexander at the Superconference that "issues in the JEKE Action . . . are the same as those in the Alberta and British Columbia Court actions" with the only difference being that "we commenced it instead of" the action being commenced by Northmont. This argument further contradicts the representations, both orally and written, made throughout all of the proceedings that the JEKE Action is a test case. Finally, as Justice Branch stated in *Golberg:*

[I]n *Erschbamer v Wallster*, 2013 BCCA 76 (CanLII), the court affirmed that a plaintiff in a proceeding can use the doctrine of *res* judicata to negate a defence raised by the defendant, where said defendant acted as the plaintiff in the previous proceedings (paras. 16-19).

[59] The second argument is that there cannot be a finding of *res judicata* as to the VIAs in the SLG Actions because the VIAs are different than the VIA in the JEKE Action. This argument too has no traction. There were innumerable instances where it was represented to the Court that the issues in the JEKE Action are the same as in the SLG Actions, and that the JEKE Action is a test case. I also draw attention once again to the Defendants' Notice of Application seeking a stay of proceedings in Alberta where they refer to both the British Columbia and Alberta actions and acknowledge that the claims and counterclaims "raise identical issues."

[60] Finally, I would remind the Defendants that in their Amended Dispute Note, they agreed that a "single consolidated proceeding" should be heard either in Alberta or British Columbia and that to do otherwise, would "result in inconsistent findings and would be a waste of judicial resources."

[61] The Defendants, as part of the Geldert Group, have had that “single proceeding” and they cannot now resile from that position because they disagree with the result in the JEKE Action.

a) *Res Judicata*

[62] The law applicable to the doctrine of *res judicata* was summarized as follows by Associate Chief Justice Wittmann (as he then was) in *Phillips v Phillips*[13] at paragraphs 52-54:

The rationale behind the doctrine of *res judicata* was articulated by Binnie J. as follows in *Danyluk v. Ainsworth Technologies Inc*., [2001] 2 S.C.R. 460, 2001 SCC 44 (S.C.C.) (CanLII) at para. 18:

> The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. The appellant chose the ESA as her forum. She lost. An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.

In *420093 B.C. Ltd. v. Bank of Montreal*, 1995 CanLII 6246 (AB CA), [1995] A.J. No. 862 (Alta. C.A.), O'Leary J.A. noted at para. 17 that the doctrine of *res judicata* may be divided into two types:

> The two forms of estoppel by res judicata are described in Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, at p. 997. The first is commonly called "issue estoppel" and is defined as follows:
>
> > ... any action or issue which has been litigated and upon which a decision has been rendered cannot be refuted in a subsequent suit between the same parties or their privies. This principle prevents the contradiction of that which was determined in the previous litigation, by prohibiting the relitigation of issues already actually addressed.

The second is "cause of action estoppel":

> > The second principle makes it mandatory that a plaintiff asserting a cause of action must claim all possible relief in respect thereto and prevents any second attempt to invoke the aid of the courts in the same cause. It is sometimes called 'merger' because the plaintiff's cause of action becomes 'merged' in the judgment. The judgment actually operates as a comprehensive declaration of the rights of all parties in respect of the matters in issue. As a result, the rule applies equally to a defendant who must put forward all defences which will defeat the plaintiff's action, and the defendant who does not will be debarred from raising them subsequently. This principle prevents the fragmentation of litigation by prohibiting the litigation of matters that were

> never actually addressed in the previous litigation but which properly belonged to it.

In the same case, O'Leary J.A. enumerated at para. 18 the factors required before *res judicata* can be found:

> A prior judicial decision will not raise an estoppel by *res judicata*, either issue estoppel or cause of action estoppel, unless (i) it was a final decision pronounced by a court of competent jurisdiction over the parties and the subject matter; (ii) the decision was, or involved, a determination of the same issue or cause of action as that sought to be controverted or advanced in the present litigation; and (iii) the parties to the prior judicial proceeding or their privies are the same persons as the parties to the present action or their privies.

[63] During argument, the Defendants conceded the element of *res judicata* in relation to the requirement of privity based on the participation of the Geldert Group in the JEKE Action. They also conceded the element of finality of proceedings in the JEKE Action, except as to the Defendants' Amendments.

[64] I have outlined earlier in this decision the innumerable instances in which the Geldert Group has represented to the courts in British Columbia and Alberta, verbally and in the filed materials, that, prior to the Defendants' Amendments, the issues in the JEKE Action are the same as those in the SLG Actions. One need only highlight paragraph 42 of the Defendants' Amended Dispute Notes where the Defendants agree that "to proceed with the Northmont Actions in different judicial districts and different courts at different times may result in inconsistent findings and would be a waste of judicial resources."

[65] As a result of the foregoing, I am satisfied that the Dispute Notes and Counterclaims, except for the Defendants' Amendments, should be struck in their entirety as the issues in the Dispute Notes and Counterclaims have been decided in the JEKE Action.

[66] With respect to the Defendants' Amendments and despite having been caught unaware that an amendment application would be made on April 7, 2017, the Plaintiff consented to the amendments and pressed on with its application. The essence of the Defendants' Amendments are that the Costs Provision was not brought to the attention of the Defendants and that it is onerous and oppressive and as a result, unenforceable. The Defendants are arguing misrepresentation, relying upon the case of *Tilden Rent-a-Car Co. v. Clendenning*[14] ("*Tilden*").

[67] There was no reasonable explanation provided to the Court as to why the Dispute Note had not previously been amended in the two and a half years prior to the Plaintiff's application. The position of the Defendants also directly contradicts the representation that Mr. Alexander made at the Superconference. He stated that, "what people might have been told when they buy, those do not form a part of the defence or counterclaim in terms of individualized different facts for each of our clients" and further, that "that defence, that counterclaim, that representation claim, does not form a part of the Geldert Group's response to the debt claim." It is telling that the application to amend was filed months after the resolution of the JEKE Action and not until the morning of the Plaintiff's application.

[68] The Defendants argue that they are entitled to raise misrepresentation in the SLG Actions because Mr. Belfry was a sophisticated businessman and he could not have taken the position that he

was unaware of the effect of the Costs Provision. However, in his affidavit Mr. Belfry swears that "it was Michael Geldert, in consultation with other law firms, who attended the Case Planning Conferences and directed and managed the litigation strategy." Mr. Geldert himself in the Affidavit swore that "the Sunchaser Group agreed to have one of its members become a plaintiff in what would be referred to as the "Test Case"" and that "he directed the litigation strategy" including the choice of JEKE as the "representative plaintiff". If JEKE was an inappropriate choice as representative plaintiff, then that is a choice that the Geldert Group cannot now resile from in order to try and raise new defences.

[69] There is authority that the failure to raise issues in an earlier proceeding that could or should have been raised will result in a finding of *res judicata*. In *Hill v Hill,*[15] the Alberta Court of Appeal stated the following at paragraphs 27 to 29:

The doctrine of *res judicata* has developed to maintain respect for the administration of justice. It is a cornerstone of our legal system. The system depends on finality, the guiding principle being: "*interest rei publicae ut finis sit litium*"; it is in the interest of the public that litigation come to an end. Public policy dictates that, once the right of appeal has been exhausted, judicial decisions should be conclusive. The law requires that parties to litigation put forward their entire and best case once. Parties should not be called upon a second time to answer the same claim because legal ingenuity has revealed a new or revised version of the case.

Thus, the grounds for permitting relitigation must be narrow in scope and the discretion to allow it must be exercised only in the most compelling of circumstances, to prevent a substantial miscarriage of justice. This is acknowledged by the long-standing principle that *res judicata* will not apply in "special circumstances", as set out by Vice-Chancellor Wigram in *Henderson v Henderson* (1843), 3 Hare 100 at 114-5 (Eng HCJ):

... where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time [emphasis added].

One special circumstance that can operate as an exception to *res judicata* is where a judgment is obtained through fraud. Another is the discovery of new evidence, not available at trial, that impeaches the result of the case. These are narrow exceptions with very high degrees of proof required to ensure that relitigation will be permitted only in rare circumstances. As noted by LeBel J, relitigation is available only where necessary to enhance the credibility, effectiveness and integrity of the administration of justice: *Toronto (City) v CUPE, Local 79*, at para 52, 2003 SCC 63 (CanLII), [2003] 3 SCR 77.

(see also, *574095 Alberta Ltd. v Hamilton Brothers Exploration Co*.,[16] at paragraph 47).

[70] As set out in *Maynard v Maynard,*[17] the Supreme Court of Canada at paragraph 33 cited the Privy Council in *Hoystead v Commissioner of Taxation*[18]as follows:

Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted.

[71] Having regard to all of the foregoing, I am satisfied that the Defendants' Amendments should also be struck in their entirety on the basis of the application of the doctrine of *res judicata*.

[72] However, if I am in error in applying the doctrine of *res judicata* to strike the Defendants' Amendments, I would find, in any event, that they should be struck as an abuse of process for the reasons set out below.

b) Abuse of Process

[73] The applicable law in relation to abuse of process was summarized by the Court of Appeal in *Reece v Edmonton (City)*[19] as follows at paragraphs 16-20:

> Abuse of process is a compendious principle that the courts use to control misuses of the judicial system. Abuses of process can arise in many different contexts, and there is no universal test or statement of law that encompasses all of the examples.
>
> Both parties discussed *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 (CanLII), [2003] 3 S.C.R. 77 (S.C.C.) in some detail. *Toronto (City) v. C.U.P.E.* is primarily concerned with limits on the ability to re-litigate settled issues. It sets out the tests for the application of the doctrines of issue estoppel and *res judicata*. The most important aspect of *Toronto (City) v. C.U.P.E.*, however, is its confirmation that there is a residual discretion in the courts, using the doctrine of abuse of process, to prevent re-litigation of issues even when the preconditions for issue estoppel and res judicata are not present. The Court (at para. 37) quoted with approval *Canam Enterprises Inc. v. Coles* (2000), 2000 CanLII 8514 (ON CA), 51 O.R. (3d) 481 (Ont. C.A.) at para. 55:

The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute.

Toronto v. CUPE discusses abuse of process in the context of the re-litigation of issues. It is not intended to be an exhaustive exploration of all the circumstances in which an abuse of process can arise. As the Court pointed out at para. 36: "The doctrine of abuse of process is used in a variety of legal contexts."

> The test for abuse of process has been stated in different ways, as the context requires. For example, in *R. v. Scott*, 1990 CanLII 27 (SCC), [1990] 3 S.C.R. 979 (S.C.C.) the Court stated at p. 1007:

. . . abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice....

The issue in Scott was whether it was an abuse of process for the Crown to reactivate a criminal prosecution, after a stay had been entered. The test for abuse of process was stated in terms that were

relevant to that issue.

> It is therefore not appropriate to take any judicial statement of the ambit of the doctrine of abuse of process, and apply it mechanically to different factual settings and issues. Just because a particular proceeding does not fit into a particular authoritative recitation of the test for abuse of process does not mean that no abuse is present. Procedures that can "bring the administration of justice into disrepute" can take many forms.
>
> The cases on abuse of process have tended to fall into a number of categories, such as the re-litigation of settled issues, fairness of trial procedures, delay in proceedings, and so forth. One such category is where proceedings are used to enforce or engage punitive penal statutes, other than by charging the party allegedly responsible with the applicable offence. Such proceedings are generally found to be an abuse of process. Sometimes the court reaches that result by finding that the applicant has no standing to apply for the requested relief.

[74] When taken as a whole, I am satisfied that the Amendments to the Dispute Notes and Counterclaims constitute an abuse of process, having come to this determination for the following reasons:

a. at the Superconference, counsel for the Geldert Group advised the Court that the pleadings in both Alberta and British Columbia are mirror images; that a plea of misrepresentation would not form part of any defence or counterclaim by the Geldert Group; and that, “the issues in the JEKE Action by design are the same as those in the Alberta and British Columbia Provincial Court actions”;

b. throughout, the JEKE Action has been described as a “test case” which would resolve the issues in dispute between Northmont and the Geldert Group;

c. the Defendants sought and obtained court-ordered stays of the SLG Actions on the basis that the JEKE Action would dispose of the issues in the SLG Actions, including the counterclaims;

d. the JEKE Action provided the Geldert Group with a full and fair process to determine all of the issues, including proceeding to the Court of Appeal of British Columbia. No leave was sought to the Supreme Court of Canada;

e. I am in agreement with Justice Branch when he stated in *Golberg* at paragraph 41 that the stakes in the JEKE Action were considerable, there was an adequate incentive to resolve the issues, there is no suggestion that new evidence has been uncovered since that trial, and no suggestion that the original action was conducted in an unfair manner;

f. in response to the argument of the Defendants that it would have been “inappropriate” to have raised the misrepresentation argument in the JEKE Action, I am also in agreement with Justice

Branch in *Golberg* when he stated the following at paragraphs 62 and 63:

> In any event, if there was any suggestion that they were not advancing possible misrepresentation or *Tilden* defences because of JEKE's peculiar situation, defendants' counsel should have at least made it clear to the court that defences were being held in reserve for the balance of the defendants either at the Superconference or during the JEKE Action. They did not do so. Rather, they engaged in litigation misdirection. They themselves proposed that the JEKE Action was a "test case" without reservation, and they themselves suggested at the Superconference that individual misrepresentation claims were not being advanced, without clarifying that they were reserving their right to advance them later. This representation presumably assisted them at the Superconference by allowing them to suggest that everything was under control, and being efficiently managed. Northmont stayed all its actions following the Superconference. The defendants should not be allowed to resile from that misleading representation now.
>
> A further procedural fairness concern created by these late-plead defences is that it will be very difficult for the plaintiff to defend against such allegations of misconduct at the time of execution of each contract, given that they involve individual interactions with a predecessor company occurring up to 25 years ago.

g. the Defendants' Amendments appear to be an attempt to evade the consequences of the JEKE Appeal Decision by raising new issues that are inconsistent with the previously adopted position of the Geldert Group throughout the proceedings in Alberta and British Columbia. This is the case with both of the "new" issues respecting misrepresentation and that the VIA is a standard form contract (see paragraphs 23, 44 and 46 of the JEKE Appeal Decision). Justice Fitzpatrick in the JEKE Costs Decision characterized the conduct during the proceedings before her as abusive and as such, warranted a special costs award. As she stated at paragraph 65:

The only conclusion I can draw is that JEKE intended to throw the kitchen sink at the matter and hope that something stuck. JEKE also simply wanted a reconsideration of the interpretation issue before Loo J., without providing any "new" evidence than what was previously before the court. Such a haphazard and reckless strategy resulted in wasted time and resources on both Northmont's part and that of the Court. At bottom, it appears that JEKE's strategy was to leave Northmont (and the Court) to "figure out" exactly what issues were being advanced and attempt to respond or deal with the allegations.

[75] I am in agreement with and adopt the following statement of Justice Branch in *Golberg,* where he states at paragraph 74 that:

> Although the ability of a court to strike all or part of a claim based on abuse of process is carefully circumscribed as set out above, I find that the plaintiff has met its heavy burden of establishing that the overarching conduct over the course of this dispute has reached the requisite standard. The defendants have taken and are taking too many inconsistent positions over too long a period of time. They had a full opportunity to air out issues in a case they themselves described as a "test case". If they believed aspects needed to be held in reserve, they could and should have said so. Their last ditch effort to save themselves through these late arriving amendments is too little, too late, particularly given the weakness in these new defences. I rely on concerns about relitigation, but my concerns are

broader. This Court has already found the defendants' conduct in these various interrelated matters to be highly problematic, meriting a special costs award. I conclude that we have reached a stage where continued efforts to keep the analysis of the enforceability of the VIAs alive for another round of litigation would indeed bring the administration of justice into disrepute.

[76] In conclusion, the Amended Dispute Notes and Counterclaims are struck in their entirety as an abuse of process.

c) Vexatious Proceedings

[77] Rule 3.68 provides that a pleading may be struck if it is "frivolous, irrelevant or improper", or if it "constitutes an abuse of process." Although the word "vexatious" no longer appears in Rule 3.68, whether or not a pleading is vexatious now tends to fall under the rubric of being improper or an abuse of process.[20] As I have already determined that the Amended Dispute Notes and Counterclaims are an abuse of process, I see no need to conduct an exhaustive review as to whether or not they must also be categorized as "vexatious." As Madam Justice Shelley said in *Kavanagh v Kavanagh*[21] at paragraph 64, "a vexatious proceeding is one that in effect abuses or misuses legal processes." For the reasons previously expressed, I am satisfied that these proceedings are vexatious and that the Amended Dispute Notes and Counterclaims should be struck in their entirety.

2) Determination as to amount owing

[78] The Plaintiff seeks judgment against the Defendants. Rule 7.3 is not to be applied to order judgment as the Amended Dispute Notes and Counterclaims were not struck pursuant to Rule 7.3, but rather Rule 3.68.

[79] In the ordinary course, where the "civil claim includes a claim for a debt or liquidated demand", a plaintiff files a request with the Clerk of the Court to enter a default judgment "for the full amount of the claim."[22] An "assessment of damages" is only required where a plaintiff's claim is for something other than a debt or liquidated demand.[23] There is no definition of "debt" or "liquidated demand" in the *Act*. I note that section 40(1) of the *Act* speaks to a situation where "no dispute note has been filed within the time specified in section 26," which is not the case before me. However, it is the practice of this Court to allow for the entry of a default judgment where a dispute note has been filed and has then been struck and where a plaintiff's claim is for a debt or liquidated demand.

[80] A similar process is set out in Rule 3.36, but it provides that "if a defendant does not file a statement of defence or . . . the defendant's statement of defence is struck out, the plaintiff may, on filing an affidavit of service of the statement of claim . . . enter judgment against the defendant under . . . rule 3.39."[24] It is unclear to me why a plaintiff must file an affidavit of service in order to obtain default judgment if a defence has been filed and struck out. That seems a wasted effort because to file a defence is most likely due to a defendant having been served with a claim, and so likely, that portion of the Rule requiring the filing of an affidavit of service is meant to apply only to those actions where no statement of defence was filed. In the case before me, I am dealing only with the SLG Actions where service of the Civil Claim is a non-issue because dispute notes have been filed for all of the defendants in the SLG Actions.

[81] Rule 3.39 provides that if a "claim includes a claim for a debt or liquidated demand . . . the plaintiff . . . may enter judgment" in a process similar to the one in Provincial Court.[25] The Rule does not define "debt." As set out in *Black's Law Dictionary*, 10th ed., a debt is a "specific sum of money due by agreement." Rule 3.39 does, though, define "liquidated demand" to mean, "a claim

for a specific sum payable under an express or implied contract for the payment of money, including interest, not being in the nature of a penalty or unliquidated damages, where the amount of money claimed can be determined by . . . the terms of the contract . . .”[26]

[82] The Plaintiff’s claim is certainly either a debt or a liquidated demand as defined in Rule 3.39 and as a result, entitles the Plaintiff to judgment. The Plaintiff’s claim is not a damages claim and therefore, it does not require an assessment. As a result, I would, in keeping with the procedure of this Court, allow the Plaintiff to enter judgment for the amount claimed in its Amended Civil Claims, but for interest and costs as discussed below.

[83] However, if I am in error in allowing the Plaintiff to proceed to obtain judgment as set out above, then pursuant to section 8 of the *Act*, I resort to Rule 3.37 which reads as follows:

> 3.37(1) The plaintiff may, without notice to any other party, on proof of the plaintiff’s claim, apply to the Court for judgment in respect of a claim for which default judgment has not been entered if
>
> (a) one or more defendants are noted in default, or
>
> (b) the defendant’s statement of defence is struck out.
>
> (2) In the circumstances described in subrule (1) the plaintiff is entitled to a costs award.
>
> (3) The Court may do one or more of the following:
>
> (a) pronounce judgment;
>
> (b) make any necessary order;
>
> (c) direct a determination of damages;
>
> (d) adjourn the application and order additional evidence to be provided;
>
> (e) dismiss the claim or a part of it;
>
> (f) direct that the claim proceed to trial and that notice be served on every other defendant;
>
> (g) make a costs award in favour of the plaintiff.

[84] As to the “proof” required pursuant to Rule 3.37, which is not a requirement under section 40 of the *Act* or under Rule 3.39, that proof can be found in the Affidavit of Aram Simovonian, filed by the Plaintiff (the “Simovonian Affidavit”). Mr. Simovonian has deposed to having direct knowledge as to the amounts owing by the Defendants to the Plaintiff. He attaches to his Affidavit the statements for the Defendants with each statement detailing the outstanding RPF, annual maintenance fee, interest and “tax” which I assume is the Federal Goods and Services Tax.[27] There was no cross-examination on the Simovonian Affidavit by the Defendants.

[85] In *Edwards*, Justice Moreau states that “the claims of the defendants against each plaintiff had been quantified in the Counterclaim” (at paragraph 91). In this action, the claims of Northmont have been quantified in the Amended Civil Claims supported by the Simovonian Affidavit.

[86] As was also the case in *Edwards,* I do have some concern with respect to the interest and costs as claimed by the Plaintiff because the different versions of the VIAs do not have identical language as to the interest that can be claimed. As to costs in each of the SLG Actions, the

Plaintiff's Amended Civil Claims are for "full costs of this action" and it is unclear to the Court precisely what costs are being claimed by the Plaintiff. Again, the specific wording of the VIAs may govern the costs ultimately awarded to the Plaintiff with respect to each Judgment obtained against the Defendants. In *Edwards*, the Court allowed for the submission of "written argument on the issue of interest and costs" but the parties "were able to agree on the interest." Most of *Edwards* deals with costs but specifically with reference to the wording in the "Edwards VIA."

[87] Given the foregoing, the Plaintiff is entitled to judgment against each Defendant in the SLG Actions for the amount set out in each Amended Civil Claim (the "Judgments"), except as to interest and costs, for which I am prepared to hear argument from the parties if they cannot agree, and also subject to one issue which has been raised by the Defendants. That issue is one of "expired Claims." The Defendants argue that some of the Plaintiff's Civil Claims have expired in the SLG Actions because they were not served within one year from the date of issuance of the Civil Claim. [28] There was no argument on this issue during the application proceedings before the Court. Consequently, this issue must be specifically addressed before me, unless the parties come to agreement on it, and that is to occur when the parties come before me to argue the interest and costs to be payable to the Plaintiff with respect to the Judgments.

Conclusion

[88] For the reasons I have set out above, the application of the Plaintiff to strike the Amended Dispute Notes and Counterclaims is granted. The Plaintiff is entitled to judgment against each of the Defendants in the SLG Actions for the amount claimed in the corresponding Amended Civil Claims, subject to further argument and a determination respecting the issues of interest and costs in each action, and the expiration of certain Civil Claims.

[89] The Plaintiff is entitled to costs of this application and if the parties cannot agree on those costs, then they can be spoken to when the parties appear before me with respect to the other issues. The Clerk of the Court will not be preparing Certificates of Judgment until the outstanding issues have been resolved.

[90] As a housekeeping matter given the number of SLG Actions, the parties are to ensure that prior to their attendance before me, the Amended Civil Claims and Amended Dispute Notes and Counterclaims that were to be filed pursuant to my previous Orders have in fact been filed. Further, I will leave it to counsel to ensure that an accurate list is prepared setting out the action numbers and Defendants in the SLG Actions.

[91] Although counsel has been given leave to attend before me once again to deal with the outstanding issues as listed above, I would urge counsel, given the already extensive use of judicial resources both in Alberta and British Columbia, that they make every reasonable effort to resolve these outstanding issues without the necessity of further judicial intervention. If that does not occur, then counsel are to contact the trial co-ordinator to obtain a date to appear before me. It would be my expectation that this occur as soon as possible, and hopefully, within thirty days after the date this decision is issued.

Heard on April 7th, May 1st and June 28th, 2017.
Final argument filed on August 11th, 2017.
Dated at the City of Edmonton, Alberta, this 11th day of October, 2017.

L.D. Young
A Judge of the Provincial Court of Albert
a

Appearances:

F. Sauvageau, of Sauvageau & Associates
Solicitors for the Plaintiff (Defendant by Counterclaim)

B. King, of Strathcona Law Group
Solicitors for the Defendants (Plaintiffs by Counterclaim)

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[1] RSA 2000, c P-31 as amended
[2] Alberta Regulation, 124/2010 as amended
[3] R.S.C., 1985, c. C-36
[4] 2013 BCSC 2071 (CanLII)
[5] 2014 BCCA 227 (CanLII)
[6] 2016 BCSC 401 (CanLII)
[7] 2016 BCSC 1578 (CanLII)
[8] 2017 BCCA 38 (CanLII)
[9] 2017 BCSC 1680 (CanLII)
[10] Action Number 1303 - 08538
[11] 2015 ABQB 424 (CanLII), at para 1
[12] 2010 SCC 10 (CanLII)
[13] 2007 ABQB 265 (CanLII)
[14] (1978) 1978 CanLII 1446 (ON CA), 83 DLR (3d) 400 (ONCA)
[15] 2016 ABCA 49 (CanLII)
[16] 2003 ABCA 34 (CanLII)
[17] 1950 CanLII 3 (SCC), [1951] SCR 346
[18] [1926] AC 155 at 165
[19] 2011 ABCA 238 (CanLII)
[20] See, *Wong v Leung,* 2011 ABQB 688 (CanLII), 2011 ABQB 688 (Master), at para 33
[21] 2016 ABQB 107 (CanLII)
[22] Section 40(1) of the *Act*
[23] Section 40(2) of the *Act*
[24] Rule 3.36(1)(a)
[25] Rule 3.39(1)(a)
[26] Rule 3.39(1)(2)(a)(i), see also, *Fast Industries v Sparta Engineering*, 2017 ABQB 240 (CanLII), at paras 41-43
[27] As an example, the amount owing by these particular Defendants according to the statement attached to the Affidavit is $14,303.09 plus interest and costs. The amount set out in paragraph 12 of the Amended Civil Claim is

also $14,303.09.

[28] Section 25(5) of the *Act*