IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Northmont Resort Properties Ltd. v. Golberg,* 2017 BCSC 1680

Date: 20170921
Docket: S159447
Registry: Vancouver

Between:

Northmont Resort Properties Ltd.

Plaintiff

And

Brian Golberg and Collette Golberg

Defendants

Before: The Honourable Mr. Justice Branch

Reasons for Judgment

Counsel for the Plaintiff:	F. Sauvageau
Counsel for the Defendants:	B. King
Place and Dates of Trial/Hearing:	Vancouver, B.C. June 23, 2017 September 1, 2017
Place and Date of Judgment:	Vancouver, B.C. September 21, 2017

I. INTRODUCTION

[1] This application seeks an order striking the defendants' pleadings in this long-running dispute about time-share expenses, based on the principles of abuse of process or *res judicata*.

II. BACKGROUND

[2] As one might expect in a case alleging abuse of process, this matter has a tortured procedural history.

[3] The underlying dispute centres on the operation of the Sunchaser Vacation Villas time share in Fairmont Hot Springs, British Columbia (the "Resort"). Fairmont Resort Properties Ltd. ("Fairmont") initially constructed, marketed, and developed the Resort.

[4] The defendants are owners of time share interests in the Resort pursuant to vacation interval agreements ("VIAs"). On July 26, 2007, the primary named defendants Brian and Collette Golberg entered into VIAs with Fairmont.

[5] In March 2009, Fairmont became insolvent and sought creditor protection in Alberta pursuant to the *Companies' Creditor Arrangement Act,* R.S.C. 1985, c. C-36 [*CCAA*].

[6] On June 4, 2010, Justice Romaine of the Alberta Court of Queen's Bench issued an order setting out the method of service on the owners, which resulted in notice of an application to approve the sale and vesting of, among other things, the VIAs. The vesting order was issued on June 22, 2010 (the "Vesting Order"). Pursuant to the Vesting Order, the plaintiff Northmont Resort Properties Ltd. ("Northmont") became manager of the Resort on behalf of all owners in accordance with the management provisions of the VIAs.

[7] At the time of the Vesting Order, there were significant financial and maintenance issues relating to the Resort. In late 2012, after investigation and

consideration of the issues, Northmont decided it was necessary to raise funds from the owners to undertake needed renovations and resolve financial deficits.

[8] In April 2013, Northmont distributed a renovation project maintenance fee invoice ("RPF") to all owners. The defendant owners have not paid the RPF or any subsequent notice of assessment. Responsibility for the RPF is the core issue in this and all related litigation.

[9] In October 2013, a proposed special case first considered the legal issues raised by the RPF: *Philip K. Matkin Professional Corp. v. Northmont Resort Properties Ltd.*, 2013 BCSC 2071, (the "Special Case"). The decision on the Special Case was in favour of Northmont. However, it was eventually overturned by the Court of Appeal on June 13, 2014 on the basis that it was not appropriate to decide the issues within such a procedural structure: 2014 BCCA 227 (the "Special Case Appeal").

[10] In August 2014, Northmont began filing notices of claim against the owners who were in default of the RPF. There were eventually around 3,000 claims spread across the B.C. Supreme Court, B.C. Provincial Court, Alberta Court of Queen's Bench and Alberta Provincial Court.

[11] A number of the owners in these actions retained the same counsel to defend them - the firm of Geldert Law and certain other associated firms (the "Geldert Group"). In terms of the present proceeding, all of the defendants before the court retained the Geldert Group. All of the defendants filed the same form of defence and counterclaim to Northmont's actions.

[12] On October 8, 2014, JEKE Enterprises Ltd. ("JEKE"), a company which held two time share interests in the Resort, commenced a proceeding against Northmont (the "JEKE Action") seeking a ruling on the validity and interpretation of the RPF. The JEKE Action was paid for and directed on behalf of the Geldert Group clients, which included the defendants.

[13] On October 23, 2014, JEKE filed a Notice of Application seeking a stay of all other proceedings, on the basis that the JEKE Action was a test case and was thus the most convenient way to proceed, as it raised issues common to all other actions.

[14] On January 27, 2015 a case management conference was held between the four courts: the Alberta Provincial Court; the British Columbia Provincial Court; the Alberta Court of Queen's Bench; and the British Columbia Supreme Court (the "Superconference") for the purpose of discussing the most expedient way to resolve all of the actions relating to the renovation project. Following the representations made at this Superconference, which are discussed further below, Northmont agreed to hold all of its actions in abeyance pending the determination of the issues in the JEKE Action.

[15] From January 4-22, 2016 there was a trial on the merits of the JEKE Action before Madam Justice Fitzpatrick. Comprehensive reasons were issued on March 8, 2016 in favour of Northmont's contractual interpretation: 2016 BCSC 401 ("JEKE Decision"). Costs reasons were issued on August 26, 2016: 2016 BCSC 1578 ("JEKE Costs Decision") and the appeal was dismissed on January 25, 2017: 2017 BCCA 38 ("JEKE Appeal Decision").

[16] On April 7, 2017, Northmont began argument in an application for summary judgment against the Alberta Provincial Court defendants represented by the Geldert Group. That application raised similar arguments to those advanced in this Court. Argument was completed on June 28, 2017, and the matter is under reserve.

[17] On June 1, 2017, Master Tokarek ordered that all of Northmont's B.C. Supreme Court actions against clients represented by the Geldert Group would be consolidated, for the purposes of the present motion to strike.

[18] On June 22, 2017, the named defendants filed an Amended Response to Civil Claim ("ARCC"). The new amendments now seek to raise misrepresentation and *Tilden Rent-A-Car Co. v. Clendenning* (1978), 83 DLR (3d) 400 (Ont. C.A.) defences that had not been expressly pleaded in the JEKE Action.

III. ISSUES

[19] Northmont argues that having advanced and lost a “test-case” within the JEKE Action, the defendants should not now be able to advance any arguments that were or could have been advanced within the JEKE Action, and in particular all those raised in the ARCC. To do so violates the principle of *res judicata,* or alternatively is an abuse of process.

IV. DISCUSSION AND ANALYSIS

[20] Given that the plaintiff’s arguments advanced a wide-ranging attack on the defendants’ conduct, not all of which fit within the precise four corners of the more technical requirements of *res judicata*, I will address this matter through the abuse of process lens first.

A. Abuse of Process

The Legal Principles

[21] Rule 9-5(1) of the Supreme Court Civil Rules provides as follows:

> At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
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> ...
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[22] Regarding the test for abuse of process, McLachlin J. (as she then was) stated in *R. v. Scott*, [1990] 3 S.C.R. 979 at 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.

[23] This Court recently considered this issue in *Alexander v. Alexander*, 2017 BCSC 914 where the Court stated:

> [20] As noted in *Giles*, even where the strict requirements to establish issue estoppel are not met, the court may nonetheless find that relitigation of an issue would be an abuse of process. See para. 62.
>
> [21] In order to establish that the present action should be dismissed as being an abuse of process, the defendant applicant must make out the preconditions described by the *Supreme Court of Canada in Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, 2003 SCC 63. In that case Arbour J. speaking for the majority said at para. 37:
>
> > [37] In the context that interests us here, 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 ... bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, per Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63)). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:
> >
> > > 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. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).
> >
> > > One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined.
>
> [Emphasis in original.]

[24] The Supreme Court of Canada reiterated the test for abuse of process in *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26, stating:

> [39] In *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, Arbour J. wrote for the majority of this Court that the doctrine of abuse of process has its roots in a judge's inherent and residual discretion to prevent abuse of the court's process: para. 35; see also P. M. Perell, "A Survey of Abuse of Process", in T. L. Archibald and R. S. Echlin, eds., *Annual Review of Civil Litigation* 2007 (2007), 243. Abuse of process was described in *R. v. Power*, [1994] 1 S.C.R. 601, at p. 616, as the bringing of proceedings that are "unfair to the point that they are contrary to the interest of justice", and in *R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667, as "oppressive treatment." In addition to proceedings that are oppressive or vexatious and that violate the principles of justice, McLachlin J. (as she then was) said in her dissent in *R.*

> *v. Scott*, [1990] 3 S.C.R. 979, at p. 1007, that the doctrine of abuse of process evokes the "public interest in a fair and just trial process and the proper administration of justice". Arbour J. observed in *C.U.P.E.* that the doctrine is not limited to criminal law, but applies in a variety of legal contexts: para. 36.
>
> [40] The doctrine of abuse of process is characterized by its flexibility. Unlike the concepts of *res judicata* and issue estoppel, abuse of process is unencumbered by specific requirements
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> …
>
> [41] As can be seen from the case law, the administration of justice and fairness are at the heart of the doctrine of abuse of process. In *Canam Enterprises* and in *C.U.P.E.*, the doctrine was used to preclude relitigation of an issue in circumstances in which the requirements for issue estoppel were not met. But it is not limited to preventing relitigation. For example, in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, the Court held that an unreasonable delay that causes serious prejudice could amount to an abuse of process: paras. 101-21.The doctrine of abuse of process is flexible, and it exists to ensure that the administration of justice is not brought into disrepute.

[25] The criteria for assessing vexatious litigation were reviewed by Associate Chief Justice Rooke in *Gauthier v. Starr*, 2016 ABQB 213. In that case, the court provided the following guidance on factors that should be considered in assessing whether litigation conduct is vexatious (at para.44):

> 1. the entire history of a dispute, including activities both inside and outside court, is considered,
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> 2. other litigation and court history is relevant, and
>
> 3. a person is presumed to intend the natural consequences of their acts.

See also *Pearlman v. Insurance Corporation of British Columbia*, 2010 BCCA 362.

[26] Finally, the British Columbia Court of Appeal in *Gonzalez v. Gonzalez*, 2016 BCCA 376 recently outlined the principles applicable to abuse of process as follows:

> [20] The doctrine of abuse of process in Canada responds to a reluctance to import “nonmutual issue estoppel” into Canadian law. Abuse of process provides a sufficiently satisfactory alternative, in that “(1) the application of … estoppel must be sufficiently principled and predictable to promote efficiency and (2) it must contain sufficient flexibility to prevent unfairness”: *Toronto* at para. 29.
>
> [21] The true concerns of abuse of process are “with the integrity and the coherence of the administration of justice”….

[27] In the extraordinary circumstances of this case as described below, I am prepared to make the order that the liability defences in the ARCC 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.

The Special Case

[28] This evidentiary build-up begins with defendants' counsel's participation in the Special Case in 2013. The Special Case was clearly an effort to resolve as many of the issues as possible at one time. The dispute was broadly defined by the Statement of Special Case:

> Some Vacation Interval Owners dispute the legality, validity and enforceability of the Cancellation Fee both under the Vacation Interval Agreements and at law; further dispute the contractual entitlement of Northmont to levy the Renovation Project Fee in whole or in part, pursuant to the Vacation Interval Agreements or otherwise; and further dispute the validity and enforceability of the Vacation Interval Agreements by Northmont against the Vacation Interval Owners.

[29] There were roughly 755 owners represented at the hearing of the Special Case, including owners represented by the defendants' counsel group. The Special Case was brought forward after an order was obtained to ensure that all owners were notified of the proceeding. As Madam Justice Loo described the proceeding:

> [1] …The proposed restructuring and realignment, the petition, and the special case affect the rights, obligations, and liabilities of both the respondent who is the successor in interest to the developer of the resort, as well as approximately 14,500 time share owners who have entered into approximately 18,600 vacation interval agreements.

[30] At the June 25, 2013 case management conference leading up to the hearing of the Special Case "[it] was apparent at the outset that the two main issues related to the renovation project fee and to the cancellation fee. It was generally agreed that the issues had to be determined expeditiously and inexpensively, as both time and

money were running out, and the resort may not be able to continue to operate" (para. 34). Defendants' counsel participated at this case management conference. Their present procedural approach is wholly inconsistent with their desire to resolve the issues "expeditiously and inexpensively" more than four years ago.

[31] I do not place undue weight on the Special Case in light of the procedural irregularities found by the Court of Appeal, and the fact that the Statement of Special Case assumed the VIAs were valid and enforceable. However, the conduct of the Special Case and the Special Case Appeal does provide context for the procedural posture adopted by the defendants and their counsel thereafter. In particular, the Special Case Appeal was brought in the name of "JEKE ENTERPRISES LTD (as representative of approximately 300 owners/leaseholders in Riverside Villas and Riverview Villas in Fairmont Hot Springs)". Counsel for the representative appellant was part of the Geldert Group. As such, from the launching of the Special Case Appeal, it was clear that JEKE was being advanced as a representative of the defendants.

The JEKE Action

[32] The next bundle of relevant evidence flows from the JEKE Action filed on October 8, 2014, after the Special Case Appeal sent the merits issues back to the trial court.

[33] The first point to note is that the choice of JEKE as plaintiff was not forced upon the defendants. They and their counsel selected JEKE to act as their representative and champion. As noted above, the JEKE Action was paid for and directed on behalf of the Geldert Group clients.

[34] Mr. Geldert gave evidence within the JEKE Action that:

> During my dealings on behalf of the Sunchaser Group it became clear that [it] 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 individuals 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".

[35] Notably the path upon which the defendants now seek to have this Court embark would lead to precisely what Mr. Geldert said they were seeking to avoid – the necessity for the trial of more than 3,000 disputes containing individual defences.

[36] The next point of note is that defendants' counsel quickly filed an application for a stay within the JEKE Action: JEKE Costs Decision, para. 19. In this application, defendants' counsel sought a stay of all other Northmont proceedings on the basis the JEKE Action was a "test case". More specifically, Part 2 of this application stated:

> 15. Northmont has filed over 300 claims in the Provincial Court of British Columbia and the Supreme Court of British Columbia. <u>These claims raise identical issues and differ only on the quantum of the claim which is based on the type of timeshare interest purchased.</u>
>
> 16. 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 amount due. Northmont has the same claim against the plaintiff as has been advanced in the Northmont Actions.
>
> 17. <u>The result is that this action and all of the Northmont Actions raise the same set of issues…</u>
>
> 20. This action is the most convenient action to proceed to trial as it raises the issues common to all Northmont Actions. Mr. Belfry, director of the plaintiff company, has acted as a representative party with Respect to the Petition Proceeding and has agreed to proceed to trial with this action to see that the matter is disposed of in the most cost effective and judicially appropriate manner.
>
> [Emphasis added.]

[37] This prior submission that the JEKE Action "and all of the Northmont Actions raise the same set of issues" is difficult to square with the defendants' present representation that these further actions do not in fact present the "same set of issues" as the JEKE Action.

[38] The defendants' conduct thereafter within the JEKE Action also weighs heavily in favour of a finding of abuse of process. First, as noted in the JEKE Decision:

> [8] 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".
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> [9] 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. As such, this decision may have implications for other owners in the Resort and is, most certainly, a significant decision for Northmont in that context.

[39] No one imposed this characterization of the JEKE Action as a "test case" onto JEKE or its supporting defendants; it was a choice they made. They are not in a position to resile from that characterization on this application.

[40] The conduct of the JEKE Action was also highly problematic. Firstly, although the defendants argued at the Special Case Appeal that additional evidence was required as a basis for overturning the Special Case Decision, they did not in fact offer evidence at the JEKE trial that was substantially different than was before the court at the Special Case: JEKE Decision at para. 298.

[41] The defendants had a full and fair process made available to them through the JEKE Action. That action involved a three-week trial that included significant case management, substantial discovery, examinations for discovery, and expert evidence. 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: *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77 at para. 53.

[42] The trial court's decision in favour of Northmont was unsuccessfully appealed to the B.C. Court of Appeal. JEKE's grounds of appeal drifted towards the issues it now seeks to advance in the ARCC. As the Court of Appeal described them:

> [23] JEKE submits that the standard of review for the trial judge's contractual interpretation is correctness due to two extricable errors of law: the trial judge's failure to consider the parties' intentions and the

> circumstances at the time the agreement was made; and the trial judge's reliance on incorrect and irrelevant factors as context for the interpretation of the VIAs.
>
> [Emphasis added.]

[43] In its decision, the Court of Appeal expressly recognized the defendants' procedural posture, noting:

> [9] Northmont has commenced thousands of superior and provincial court actions against owners and lessees who have refused to pay. These actions have been stayed pending the outcome of this action. JEKE has had some success in garnering support for its position from other interest holders and described its case as a "test case" in the court below.

[44] The Court of Appeal summarized its findings as follows:

> [1] 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.
>
> [2] 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.

[45] The Court of Appeal remarked on the "fluidity" of JEKE's positions stating:

> [57] Before us, counsel for JEKE (who was not counsel at trial) went even further. In his submission *none* of the RPF falls to JEKE under the VIA. JEKE's fluid position on this elementary point does not assist it before the court…

[46] The Court of Appeal decision clearly qualifies as a final decision. It was not appealed further.

[47] The JEKE Costs Decision issued on August 26, 2016 also makes several significant findings about the improper conduct of the JEKE Action:

> [46] It was manifestly apparent after the trial that JEKE had no evidence in support of many of its allegations, including that a lack of repairs had cause

> damage to the resort: Reasons at paras. 340-350. Northmont's witnesses certainly did not support such a claim. Mr. Alexander suggests that JEKE's witness, the resort's previous manager, Chris Van der Deen, may have changed his evidence concerning how the resort was run for certain years. Even accepting this to be the case, there was no evidence about any damages that could be said to have resulted from the lack of repairs, including Northmont's witnesses, such as Douglas Frey. It is trite that there is no cause of action from simple negligence alone; damages must be proven.
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> …
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> [49] Many of the claims advanced by JEKE were described by me as "meritless" or having "no merit": see Reasons at paras. 348 and 372. As an overarching comment, I stated in the Reasons:
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> > [188] Unfortunately, the advancement of vague allegations and the lack of any, let alone compelling, evidence in support, coupled at times with an abandonment of certain allegations only after the conclusion of JEKE's argument, was a recurring theme in this trial.
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> …
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> [63] In my view, JEKE's failure to narrow the issues resulted in Northmont wondering, as did I, about what arguments were being advanced at the trial and what evidence was being relied on. The claims that were abandoned were manifestly deficient, something that should have been recognized (or was and was recklessly disregarded) well before trial.
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> …
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> [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.
>
> [66] In my view, such an approach can hardly be endorsed as proper litigation strategy and a costs award serves as a useful function in discouraging such behaviour in the future. I find, in all the circumstances, an award of special costs regarding issues abandoned by JEKE is appropriate.

[48] As such, this Court has already found that the defendants, through JEKE, threw "the kitchen sink at the matter". They now want to fling a bidet as well. This is abusive.

The Superconference

[49] As stated by Madam Justice Fitzpatrick in the JEKE Costs Decision, the purpose of the January 27, 2015 Superconference was to discuss "the most expedient way to resolve all of the Northmont Actions" (para. 22). The defendants' counsel's conduct at the Superconference adds further weight to the court's abuse of process concerns. Counsel admitted that the JEKE Action was a "mirror by design" of the common defence and counterclaim put forward by the other defendants. Defendants' counsel also represented to a justice of this Court that they were not alleging individual misrepresentation:

> MR. ALEXANDER: Correct. And -- and -- and the 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.
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> MADAM JUSTICE LOO: So to summarize, your counterclaims do not allege misrepresentation?
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> MR. ALEXANDER: Not -- not based on individual disclosure statements, individual statements. I failed to state they only raise a common issue about what the documents say Northmont/Fairmont was going to (INDISCERNIBLE) what their roles (INDISCERNIBLE) arising out of the documents.
>
> MADAM JUSTICE LOO: I understand. So it is not -- no oral misrepresentations?
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> MR. ALEXANDER: Right.

[50] If the defendants were reserving their rights to make individual oral misrepresentation and/or *Tilden* defences at some later date, this would have been the proper time to make this known to both the attending justice of this Court, and to Northmont. Arising from the Superconference, Northmont agreed to hold all of its actions in abeyance: JEKE Costs Decision, para. 23.

[51] The defendants suggest that this representation to the court was only intending to convey that they were just planning to advance "common issues" in the

JEKE proceeding, leaving any "individual issues" to be resolved at a later stage. With respect, if that is what was meant, that is what should have been said. Furthermore, the use of what is essentially "class action language" highlights the concerns I have about the defendants' failure to pursue this procedural alternative, which I discuss in the next section.

[52] The defendants also suggested in argument that the representation that no misrepresentation claims would be advanced was actually based on an "incorrect belief". However, no affidavit was filed from counsel who made the representation, nor was there evidence led explaining why counsel's belief was incorrect. At best this "incorrect belief" nonetheless falls at the defendants' feet in any assessment of their litigation conduct. At worst, it is another example of the defendants' intentional "fluidity" in positions that has bedeviled this Court throughout. In either case, it is further evidence of an abusive approach to this litigation.

[53] The defendants note that the plaintiff's own Alberta counsel suggested in another part of this transcript that there may be individual issues that could still arise. However, this excerpt came before the defendants' counsel's assurances above. In any event, I do not find that this earlier comment negates the confusion or reliance created by defendants' counsel. This application is properly focused on the conduct of the defendants. I do not find that the overall conduct reviewed herein was somehow immunized by plaintiff's counsel's earlier comments at the Superconference.

[54] I pause here to note that the defendants were specifically asked at this application whether they objected to the use of counsel's representations at the Superconference. They confirmed they did not, as they themselves were relying on the plaintiff's counsel representations at the same conference.

The Failure to Advance a Class Proceeding

[55] It is obvious, and indeed was conceded by the parties before me, that this entire issue could have been avoided had the matter been brought forward as a proposed class proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

[*CPA*]. In a class proceeding, the court precisely delineates what aspects of the case are common issues that would be resolved at a common issues trial. There would also be a specific and careful review of what individual issues would remain to be resolved at individual trials after any common issues trial was complete. As part of the certification process, the court would carefully consider whether the complexity of any remaining individual issues (such as those contained in the proposed amendments) negated the benefit of trying any common issues together.

[56] Does this failure to pursue clarity fall upon the defendants? In my view, it does. I am advised by the plaintiff that the only B.C. Supreme Court matter in which it was a defendant was the JEKE Action. As such, it did not have the ability to push the matter to a class proceeding under s. 3 of the *CPA*. However, the defendants had every opportunity to pursue this matter as a class proceeding through the mechanism of the JEKE Action. Furthermore, Associate Chief Justice Rooke in Alberta specifically raised the prospect for a class proceeding with defendants' counsel in the Superconference. However, the Geldert Group indicated that they were not inclined to pursue this option. The defendants' knowing failure to pursue a more appropriate process is another factor weighing in favour of a finding of abuse of process.

The Amended Response to Civil Claim

[57] Further evidence of the abusive conduct of this litigation flows from the ARCC. First, the ARCC was only filed after the plaintiff advanced its abuse of process motion. Notably, the defendants now purport to place primary reliance on the proposed amendments in opposition to the motion. Second, the ARCC itself accepts the inefficiency created by multiple proceedings when it states:

> 10. The Defendants seek a consolidation of the Northmont Actions, in the interest of judicial economy.
>
> 11. Most or all of the Northmont Actions are the same and a single proceeding will dispose of the issues in all actions.
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> 12. Consolidating the actions is consistent with the finding of the Court of Appeal wherein it was found that the Northmont Actions should proceed in the most efficient way available.

> 13. The Defendants request a stay of these proceedings until a single proceeding, or single consolidated proceeding is heard either in this court, or in the B.C. Supreme Court, as appropriate.
>
> 14. 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.

[58] The defendants' pleas for efficiency are properly noted. But what is missing is an acknowledgement that the defendants already made an effort at creating the desired efficiency through the sponsored JEKE Action. After the JEKE matter has been lost, they suggest that now is the time when they will finally be serious about avoiding inefficiencies. This is too little, too late.

[59] Other aspects of the ARCC also support the abuse of process claim. Specifically, the defendants have amended to advance misrepresentation defences and a *Tilden* defence on the basis that they did not understand the contract's terms, this was a standard form contract, and inadequate direction was given towards its most significant terms. However, in the JEKE Action, defendants' counsel specifically confirmed that they were not advancing an argument that this was a standard form contract: JEKE Appeal Decision, paras. 23, 44, 46. As stated by the Supreme Court of Canada in *Maynard v. Maynard*, [1951] S.C.R. 346 at 359, quoting *Hoystead v. Commissioner of Taxation*, [1926] A.C. 155 at 165 (J.C.P.C.):

> 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.

[60] The defendants suggest that they could not have made these new arguments through the JEKE Action because JEKE was too sophisticated, and had been provided too much time to review the contract. However, that submission is inconsistent with the affidavit material they themselves put forward on this application, in which James Belfry, the principal of JEKE, states:

> 7. At no time during the April 3, 2004 presentation did the agent for the Lessor indicate that the annual maintenance fees would include the expense of capital improvements or major upgrades to the buildings, facilities, furnishings or equipment or changes to the features or layouts at the Resort. If I had been informed that this was a possibility, I would not have agreed to sign the Lease Documents on behalf of the Lessee.

[61] This suggests that Mr. Belfry in fact believes he is (or was) in a position to advance the arguments now sought to be advanced by his cohort of defendants. In *Behn*, the Supreme Court of Canada found it was an abuse of process to not bring issues forward “at the appropriate time” (para. 37).

[62] 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.

[63] 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.

[64] The plaintiff also argues that, in any event, the defendants are not entitled to advance these new defences given the terms of the Vesting Order. The plaintiff notes that the defendants had notice of the application for the Vesting Order, but

failed to raise any issues with its terms at that time. The plaintiff notes that the language of the Vesting Order is extremely broad. Specifically:

> 7. …
>
> (g) title to all of the LORV Fixed Assets (Carthew) and LOR Fixed Assets (Carthew/Lorwynd) shall vest absolutely in Carthew, as trustee under the LORV Trust Agreement (Amendment and Restatement); in each case free and clear of and from any and all estates , interests, licenses, rights, options, security interests (whether contractual, statutory or otherwise including security interests evidenced by registrations pursuant to the *Personal Property Security Act* of the Province of Alberta or of the Province of British Columbia, or any other personal property registry system), security notices, hypothecs, mortgages, pledges, agreements, statements of claim, certificates of lis pendens, disputes, debts, trusts or deemed trusts (whether contractual, statutory or otherwise), liens whether contractual, statutory or otherwise (including, without limitation, any statutory or builders' liens), taxes and arrears of taxes, executions, levies, and other rights, limitations, restrictions, interests and encumbrances, whatsoever, howsoever and whensoever created or arising, whether absolute or contingent, fixed or floating, whether or not they have attached or have been perfected, registered or filed and whether secured, unsecured or otherwise, whether liquidated, un-liquidated or contingent (collectively the "Claims")…
>
> …
>
> 14. On vesting pursuant to paragraph 7 above, all of the interest of Fairmont, LORV or LOR, as the case may be, in each of the Foreclosed Contracts to which it is a party, including without limitation, each Timeshare Agreement, each Promissory Note, the Fairmont Trust Agreement and the LORV Agreement, as such terms are defined in the Foreclosure Agreement, shall vest absolutely in Northwynd and, upon transfer, in each Northwynd Affiliated LP to which such Foreclosed Contract is transferred pursuant to the applicable Asset Transfer Agreement, as defined in the Foreclosure Agreement ("Asset Transfer Agreement"), and shall be valid and enforceable by Northwynd and such Northwynd Affiliated LP as against any party or counterparty to such Foreclosed Contract notwithstanding any contractual provisions set out therein:
>
> (a) limiting or restricting the assignment or transfer thereof; or
>
> (b) triggering an event of default upon the assignment or transfer thereof or upon the insolvency of any of the Fairmont Group,
>
> and any such party or counterparty is stayed from enforcing any rights of termination or any other rights in relation to any breach of any Foreclosed Contract by reason of the assignment or transfer thereof.

[65] The plaintiff argues that Northmont relied on the finality and certainty created by the *Companies' Creditors Arrangement Act* and the Vesting Order issued

thereunder in deciding to accept the assignment of the VIAs free and clear of liability in a valid and enforceable state. They suggest that if the enforceability of the VIAs was open to attack, Northmont would have never consented to the assignment and it is reasonable to infer other owners would not have as well.

[66] It is correct that the objective of the *CCAA* is toward a timely and inexpensive resolution of claims and distribution to creditors, while also ensuring that the determination of claims is made in a manner that is just and fair to all the stakeholders, including the debtor company, the claimant and other creditors: *Walter Energy Canada Holdings, Inc. (Re),* 2017 BCSC 709 at para 24. In *Canadian Red Cross Society, Re*, 1998 CanLII 14907 (Ont. S.C.J.), the court spoke to the comfort required by a purchaser through the *CCAA* process:

> [42] … In my view, however, the assets either have to be sold free and clear of claims against them – for a reasonable price – or not sold. A purchaser cannot be expected to pay the fair and reasonable purchase price but at the same time leave it open for the assets purchased to be later attacked and, perhaps, taken back.

[67] In terms of the proper approach to the interpretation of this specific Vesting Order, although Madam Justice Loo's order on the Special Case was overturned on the basis that the matter should not have proceeded as a Special Case, I note that her decision provides a helpful analysis of the effect of the Vesting Order. She stated:

> [106] Without deciding the issue, it appears to me that the legal effect of the Vesting Order and the Foreclosure Agreement is to insulate Northmont from any pre-CCAA claims or liabilities of Fairmont. .Several terms of the Vesting Order and of the Foreclosure Agreement, as well as defined terms of the Foreclosure Agreement are relevant.
>
> [107] Paragraph 4 of the Vesting Order approves the transfer and vesting of the "Foreclosed Assets" as that term is defined in the Foreclosure Agreement, to Northwynd. Paragraph 7 of the Vesting Order provides that the Foreclosed Assets vest absolutely in Northwynd, free of all claims.
>
> [108] The Foreclosure Agreement contains several important definitions, the relevant segments of each are set out following:
>
> > a) "Foreclosed Assets" is defined in 1.1(jjjj) of the Foreclosure Agreement as: "Foreclosed Assets": means, collectively, the Fairmont Foreclosed Assets, the LOR V Foreclosed Assets and the LOR Foreclosed Assets;

> b) "Fairmont Foreclosed Assets" is defined in 1.1(pp) of the Foreclosure Agreement as: "Fairmont Foreclosed Assets" means, collectively, ….the Fairmont Foreclosed Assets (Northmont).
>
> c) "Fairmont Foreclosed Assets (Northmont)" is defined in 1.1(rr) of the Foreclosure Agreement as: "Fairmont Foreclosed Assets (Northmont)" means:
>
> (i) to (iv) [omitted]
>
> (v) the Fairmont Timeshare Agreements, ….the Building 7000 Trust Fund, …
>
> (vi) [omitted]
>
> but does not include …Fairmont Retained Liabilities
>
> d) "Fairmont Retained Liabilities" is defined in 1.1 (zzz) of the Foreclosure Agreement as: "Fairmont Retained Liabilities" means each and every obligation, indebtedness (including all of the debt obligations, trade payables and other liabilities related to the ownership or operation of the Fairmont Foreclosed Assets, to Fairmont or to the Fairmont Business) or other liability or accrued liability of Fairmont and whether existing or contingent, in tort or by way of any contract, permit licence or other agreement, any deed or instrument, any judgement order of a court or other authority having jurisdiction, any statute, regulation, order-in-council, bylaw, policy or other decision or act of any Authority, any rule or operation of law or in any other way arising, whether similar to any of the foregoing or otherwise, but *excludes any liabilities expressly assumed by the Creditor pursuant to section 2.3(c)*. [Emphasis added.]
>
> [109] Under s. 2.3 (c) of the Foreclosure Agreement, Northwynd assumes liability for payment of suppliers from the date of the CCAA Order to the Vesting Date.
>
> [110] Clause 2.5 of the Foreclosure Agreement provides: "[f]or greater certainty, [Northwynd] shall not assume any Retained Liabilities of any nature or kind."
>
> [111] <u>It appears to me that Northmont acquired the Foreclosed Assets – including the vacation interval agreements – free and clear of any pre-existing liabilities of Fairmont or any claims that the owners may have had against Fairmont</u>.
>
> [Underline emphasis added.]

[68] Although not binding on me in light of the Special Case Appeal, I find this analysis persuasive.

[69] The plaintiff's position on the effect of the Vesting Order finds additional support in the JEKE Decision, where the trial court stated:

> [176] These very circumstances were expressly addressed in paragraph 14 of the Vesting Order, by which the Alberta court confirmed the validity and enforceability of the VIAs.
>
> …
>
> [226] I find that JEKE, through Mr. Belfry, had notice of, and an opportunity to participate in, the CCAA proceedings in 2010. Mr. Belfry denies having received notice of the application for the Vesting Order. Even if I accepted his evidence, which I do not, there is no explanation why JEKE did not apply before Romaine J. for "clarification" of her Vesting Order if JEKE thought that the Order did not reflect the true intent of the Alberta court.

[70] I also note that this fact pattern does not fit the classic pattern of cases that allow contracting parties to avoid exclusion clauses in standard form consumer contracts. These were investments of large sums where the terms were obviously vital to both sides. Furthermore, the Court of Appeal has already explained the principled basis for the need for the challenged clauses, suggesting that there is little basis to conclude that the relevant terms were "stringent or onerous": JEKE Appeal Decision, paras. 74-78.

[71] Although I do not have to rule on the merits of the new defences on this application, I find that the absence of apparent strength in the defendants' late-arriving defences is a factor that should be weighed in the balance of the abuse of process analysis. Further, concerns about the formation of the original VIA contracts, and whether those concerns could still be raised after the Vesting Order, could have been raised either at the application for the Vesting Order, or through an application for clarification of the Vesting Order once the issue became more pressing through the imposition of the RPFs in April 2013. Failing to pursue these procedural alternatives prior to these late-arriving amendments is another factor in assessing the defendants' abusive conduct.

The Present Motion

[72] Even at the hearing before me, inappropriate conduct continued. First, it was only when the defendants' written argument was delivered that it became clear that the defendants were not actively contesting that they were privy with JEKE.

[73] Further, it was only during oral argument that the defendants acknowledged that at least parts of its Response would indeed have to be struck in light of its concession that the JEKE Decision had already answered many of the defences raised therein.

Conclusion on Abuse of Process

[74] 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.

B. Res *Judicata*

[75] *Res judicata* applies in a more narrow range of situations than abuse of process. In *Alexander*, the court set out the applicable principles as follows:

> [16] The doctrine of res judicata and its application was summarized by Balance J. in *Tylon Steepe Homes Ltd. v. Pont*, 2011 BCSC 385 beginning at para. 52:
>
> > [52] The doctrine of *res judicata* is a time honoured cornerstone of Canadian justice. Where a cause or a fundamental issue has been decided, it is said to be res judicata and, absent special circumstances, is precluded from being adjudged a second time. When res judicata applies, a litigant is stopped by the prior suit, from proceeding in the subsequent action. The maxim has been

> traditionally regarded as an exclusionary rule of evidence. The paramount policy considerations include the avoidance of duplicative litigation, potential inconsistent results and inconclusive proceedings. Finality to litigation is the prime objective. (See generally: *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248 [Angle]; *Grdic v. The Queen*, [1985] 1 S.C.R. 810 [Grdic]; *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460 [Danyluk]).
>
> [53] *Res judicata* takes two distinct forms: issue estoppel and cause of action estoppel, indicating that there can be estoppel with respect to the entire cause or a discrete issue(s). Much of the judicial analyses of the doctrine spring from a scenario where it is a plaintiff who is attempting to relitigate a matter; however, the principles apply, with obvious modifications, to the attempted recycling of a defence.
>
> [54] Generally speaking, the authorities require fastidious adherence to the constituent elements of res judicata in order to permit its application. However, even where the requisite ingredients are present, the court retains a residual discretion to decline to apply it if doing so would cause unfairness in the particular case: *Danyluk* at para. 33; *British Columbia (Minister of Forests) v. Bugbusters Pest Management Inc.* (1998), 159 D.L.R. (4th) 50, 50 B.C.L.R. (3d) 1 (C.A.) [*Bugbusters*, cited to D.L.R.]. As Finch J.A. (now the Chief Justice) emphasized at para. 32 in *Bugbusters*, the doctrine "inevitably calls upon the exercise of a judicial discretion to achieve fairness according to the circumstances of each case".
>
> [55] The threefold requirements which must be established in order to successfully invoke issue estoppel are:
>
> > (1) that the same question has been decided and was fundamental, as opposed to collateral or incidental, to the decision;
> >
> > (2) that the decision in the first proceeding said to create the estoppel was final; and
> >
> > (3) that the parties to the first proceeding or their privies are the same persons as the parties, or their privies, to the subsequent proceeding:
> >
> > (See *Angle*; *Grdic* and *Danyluk*).
>
> [56] The "same question" test is a crucial element and a focal point of both types of estoppel under the *res judicata* umbrella.

[17] With respect to the last of the three requirements, issue estoppel can be established through privity of blood, title or interest: *Genesee Enterprises v. Abou-Rached*, 2001 BCSC 59 at para. 234; *Giles v. Westminster Savings Credit Union*, 2006 BCSC 1600 at para. 45.

[18] The test under Rule 9-5(1)(d) for striking an action on the basis of *res judicata* is whether it is "plain and obvious" that res judicata applies. The burden is on the applicant to establish the applicability of *res judicata*: see *Worldwide Treasure Adventures Inc. v. Trivia Games Inc.* (1996), 17 B.C.L.R (3d) 187 at 195.

[76] There was some suggestion from the defendants that *res judicata* could not be applied to them as defendants given that they were plaintiffs in the prior proceeding. However, in *Erschbamer v. Wallster*, 2013 BCCA 76, 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 proceeding (paras. 16-19).

[77] But the narrower band of evidence relevant to this ground of the application causes me to conclude that the liability defences should not be dismissed in their entirety on pure *res judicata* grounds. In particular, it is not “plain and obvious” that the issues raised by the amendments were or could have been raised squarely by all the defendants within the JEKE Action. Indeed, the plaintiff admits that these issues were not directly resolved.

[78] It is the cumulative effect of surrounding conduct that allowed me to conclude that the defendants’ approach in raising these additional defences at this late date is abusive. However there is little, if any, room to consider surrounding circumstances on the application of the strict *res judicata* test.

[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.

V. CONCLUSION

[80] I conclude that the liability defences raised in the ARCC should be struck on abuse of process grounds, and the contractual interpretation defences should also be struck on the grounds of *res judicata*. These findings apply only to the Geldert Group represented defendants against whom this application has been brought, and no others.

[81] I note that the plaintiff sought judgment in a specific amount at this hearing. However, I conclude that there is insufficient evidence before me to take this matter all the way through to judgment as against all the defendants at a particular quantum level. I will await further submissions on this issue unless the parties are able to come to their own agreement. Failing agreement, the parties may also appear back before me to address the issue of costs. Alternatively, the parties may agree to file written arguments of 10 pages on the costs issue.

"Branch J."

_____

The Honourable Mr. Justice Branch